

# HIDE AND SEEK

## China's Extradition Problem

A MANUAL ON COUNTERING  
EXTRADITION TO CHINA



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## About Safeguard Defenders

**Safeguard Defenders** is a human rights NGO founded in late 2016. It undertakes and supports local field activities that contribute to the protection of basic rights, promote the rule of law and enhance the ability of local civil society and human rights defenders in some of the most hostile environments in Asia.

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# HOW TO USE THE MANUAL

This document is the most comprehensive review of extraditions to the People's Republic of China (PRC) to date. It is intended for legal practitioners, lawmakers, journalists and academics engaged in extradition and related extraterritorial procedures related to China. The chapters are divided as follows:

## Chapter 1

outlines the international legal framework on extraditions and international human rights law.

## Chapter 2

places formal extraditions within the broader context of China's extraterritorial and extrajudicial pursuit of fugitives abroad and provides detailed information on the history, substance and procedures of China's extradition process.

## Chapter 3

the most relevant for practitioners, explains in detail how China acts in breach of international norms on extraditions. It also focuses on the reasons why extradition to China can and should be rejected, namely on the grounds of the lack of fair trial rights, prevalence of torture, and China's regular violation of promises and assurances given.

## Chapter 4

looks specifically at the problem of extraditions to China within Council of Europe countries, based on provisions in the European Convention on Human Rights (ECHR), and includes emblematic case studies from the region.

## Chapter 5

is a global snapshot of extradition cases in other regions of the world.

The **Annexes** provides a variety of information, including links to relevant reports and more (all of which is already referenced and linked inside the main report).

# INTRODUCTION

China is increasingly exerting extraterritorial jurisdiction, both through judicial and law enforcement agreements and through extrajudicial means, to pursue fugitives abroad. Fugitives have included suspected violent criminals, perpetrators of economic crimes, or other more accepted ‘criminal’ categories, but China has also used international mechanisms to pursue political opponents and human rights defenders who have fled persecution in China for residence abroad. This has often included transnational repression and the perpetration of human rights abuses abroad, while also forcing countries to ignore their own international human rights obligations not to return someone to a country where they are at risk of persecution.

**Domestic rule of law conditions in China requires a more sophisticated approach to extraterritorial law enforcement cooperation and extradition agreements with China.**

As this report argues, the denial of the right to a fair trial and the prevalence of torture **call for a total moratorium on law enforcement cooperation and extradition of fugitives to China**, and the emptiness of consular and diplomatic assurances removes any opening for ad hoc exceptions. To put it another way, **regardless of the veracity of criminal allegations, the risk of human rights abuse upon return to China is so great that international extradition norms and human rights law implores countries not to extradite to China.**

**China’s abuse of international law enforcement cooperation and related mechanisms is not a new phenomenon and extraditions do not exist in a vacuum outside of various extrajudicial and abusive mechanisms for transnational repression.** China’s expanding extradition regime is part of this interconnected international system and is directly linked to rampant human rights abuses back home. China’s transnational repression, of which its use of formal extradition agreements is just one part, is not new but unless serious legislative and policy changes are implemented it will continue to threaten the international norms-based system.

This report aims to expose China’s extradition problem. It is as much a report as a practitioners’ guide for legislators and policy-makers, extradition defense attorneys, journalists, or other practitioners working to defend against, counter, or report on China and international extraditions.

Since the 1990s and following a period of economic liberalization and growth that also gave rise to rising corruption, China has been engaged in the pursuit of economic fugitives and corrupt officials abroad. At the heart of has been China’s expansion of extradition agreements and a focus on pursuing extradition agreements with developed nations—often the most frequent destinations for those fleeing China. It is worth noting many of the most popular destination countries are also those that score high on civil and political rights indexes and publicly endorse the rule of law and human rights.

China began to negotiate and ratify extradition agreements with several countries in the late 1990s, although the first wave of countries entering into formal extradition agreements with China were not liberal democracies. The first formal bilateral extradition agreements China concluded during this time were with Russia and Bulgaria in 1997 and Belarus in 1998. By the end of the 1990s, China had concluded 10 formal bilateral extradition agreements. In 2000, China also enacted its own domestic Extradition Law, which on paper reflects international norms on extradition law. However, implementation is another matter.

In the following decade, China concluded an additional 16 agreements, and more in the next ten-year period, 2011-2021. To date, China has ratified 43 extradition agreements, with another 14 signed and awaiting ratification. This includes extradition agreements with a number of democratic, rule of law-abiding countries such as Spain (ratified in 2007) and Belgium (ratified in 2020).

While the text of these extradition agreements has often varied from closely adhering to international norms and model agreements to providing only very basic procedural safeguards, implementation may be another matter. While many bilateral agreements and China's own Extradition Law include mandatory grounds for rejection of extradition, for example, if the case concerns a political offence or where there are significant concerns over persecution and religious or ethnic discrimination, they have seldom been an effective protection against abuse with China pursuing both political opponents and ethnic minority targets through these mechanisms.

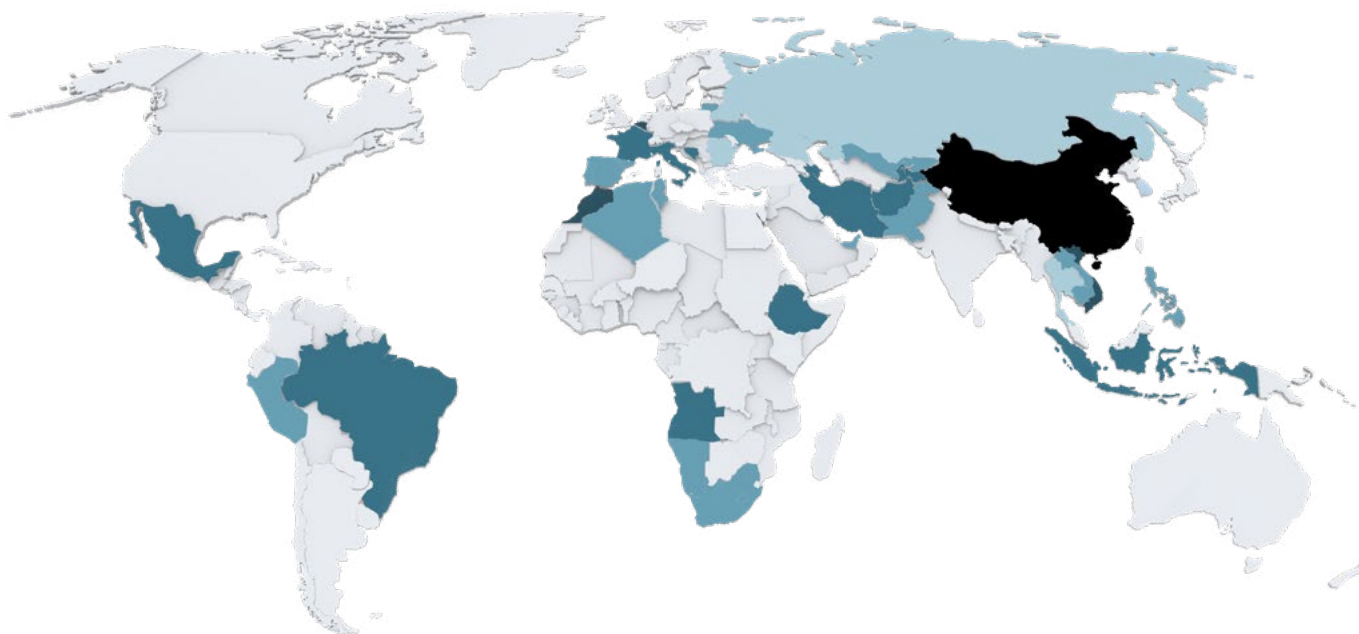
*Non-refoulement* is a norm established by international customary law that applies to all countries regardless of treaty ratification. This prohibits returning someone to a country where they are at risk of facing persecution and being denied their basic human rights. An extradition is the process of returning someone to another country to stand trial for an alleged criminal offense. In China, there is no right to a fair trial and torture and forced confessions are common. These are basic human rights. Sending someone to China, should be seen prima-facia as a violation of *non-refoulement* obligations.

A State may request the country seeking extradition to give diplomatic assurances as part of extradition norms. However, such assurances mean little when there is a clear pattern of consistent abuse or failure to comply with prior diplomatic assurances. China has a long record of failing to adhere to consular and diplomatic assurances and related obligations, a clear red flag for State reviewing an application for extradition from Beijing.

Arguably, until systematic and structural changes to address criminal justice sector reform in China, independent investigations and proof of significant improvements on torture and forced confessions, and other rule of law improvements, have been put in place, an extradition to China should be seen as a violation of any State's obligations under the principle of *non-refoulement*.

This report lays out the evidence for a blanket refusal of extradition requests from China and also serves as a resource for stakeholders engaged with countering or documenting China's use of extraditions to pursue fugitives abroad.

## Extradition treaties with the PRC

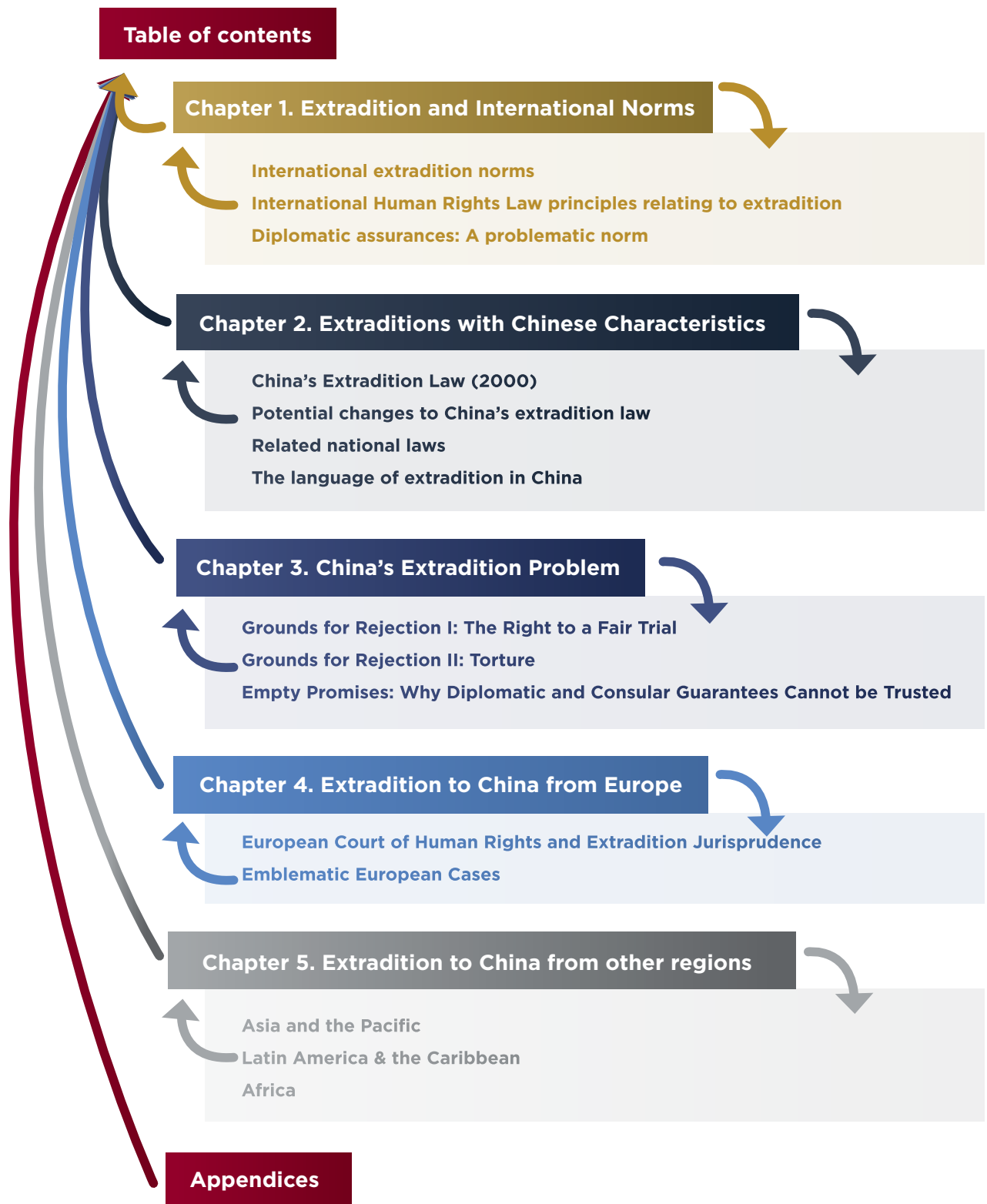


### Ratification / in effect

- 1990s
- 2000s
- 2010s
- 2020s



# “SITEMAP” FOR NAVIGATION



**Chapter 1** explains extradition and international norms. The first section draws from model extradition laws and standards to introduce best practices and key concepts. This is followed by an explanation of key human rights law and the fundamental rights to a fair trial and the prohibition against torture. The Chapter concludes with a detailed treatment of diplomatic assurances, explaining why they are a weak point in extradition practice and arguing that China's systematic failure to keep its diplomatic assurances should render all future assurances void.

China's extradition law is laid out in **Chapter 2**, and compared with other extraterritorial law enforcement mechanisms including extrajudicial mechanisms for transnational repression. Extradition is placed within the China's *Operation Fox Hunt* and *Sky Net* and past abuse of INTERPOL Red Notices, and illustrated with a number of emblematic case studies. This chapter concludes with an introduction to the National Supervision Commission, the Party organ responsible for overseeing much of China's international fugitive repatriation work, both formal and extrajudicial.

**Chapter 3** covers China's extradition problem in depth. It begins with an examination of international human rights norms concerning the right to a fair trial before moving on to unpack the denial of the right to a fair trial in China. The right to a fair trial requires independent and impartial courts; access to legal representation of one's own choosing; the right to be presumed innocent until proven guilty; and to be free of coercion to testify against yourself. This is followed by a review of international human rights norms on the prohibition against torture and then moves on to outlining China's record of systematic use of torture. The final section touches on China's unkept consular and diplomatic assurances, illustrated with a number of emblematic case studies.

**Chapter 4** looks specifically at China's extradition attempts in Europe. It begins with a deep dive into the European Court of Human Rights jurisdiction on extradition and human rights issues in general. While the Court itself has not been involved with extradition cases to China, its jurisprudence is a guide to European countries for decisions on fair trial, torture, death penalty, and diplomatic assurances. The next section unpacks important cases in Sweden, the Czech Republic, Poland, and Turkey involving extradition to China.

Finally, **Chapter 5** offers a number of regional snapshots from Asia and the Pacific, Latin America, and Africa.

# ABBREVIATIONS

<b>CCDI</b>	Central Commission for Discipline Inspection
<b>CCP</b>	Chinese Communist Party
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>MOFA</b>	Ministry of Foreign Affairs
<b>MPS</b>	Ministry of Public Security
<b>MSS</b>	Ministry of State Security
<b>NSC</b>	National Supervision Commission
<b>NSL</b>	National Supervision Law
<b>HK-NSL</b>	National Security Law (Hong Kong)
<b>UNODC</b>	United Nations Office of Drugs and Crime
<b>PRC</b>	People's Republic of China
<b>PSB</b>	Public Security Bureau (police)
<b>RSDL</b>	Residential Surveillance at a Designated Location
<b>SCB</b>	State Security Bureau (security police)
<b>SPC</b>	Supreme People's Court
<b>SPP</b>	Supreme People's Procuratorate
<b>UDHR</b>	Universal Declaration of Human Rights



# CHAPTER 1. EXTRADITION AND INTERNATIONAL NORMS

## **International extradition norms**

- Specialty
- Double jeopardy
- In absentia judgement
- Dual criminality
- Political offence exception
- Humanitarian grounds on age of health exception

## **International Human Rights Law Principles relating to extradition**

- Non-discrimination on race, religion, ethnic, nationality, political opinion
- Fundamental prohibition against torture
- Death Penalty
- Non-Refoulement

## **Diplomatic assurances: a problematic norm**

# INTERNATIONAL EXTRADITION NORMS

## EXTRADITION

The formal legal process of transferring an individual from one State to the requesting State for the purposes of criminal prosecution or punishment. The individual may be a suspect or may already have been convicted in a court of law.

There is no legal obligation under international law that requires any State to extradite someone.<sup>1</sup> Extraditions are usually determined through bilateral or multilateral agreements. These could be standing extradition agreements between States or agreements that are established on a case-by-case basis. Even after the bilateral extradition agreement has been ratified, both sides must also usually pass national legislation to implement it before it can be considered to formally be in effect. It is sometimes the case that the extradition agreement is effective immediately if, for example, the wording of the extradition agreement or the national legal systems of the parties involved empowers this.

Common law and civil law jurisdictions handle extraditions differently. Common law countries or mixed systems influenced by common law, such as the United Kingdom, United States, Australia, or India for example, tend to consult both bilateral treaties and their specific, relevant domestic legislation to regulate extradition procedures. In other words, common law countries generally require a treaty and domestic law in order to extradite someone. At the same time, some Common law countries, such as the United States and Canada, have been accused of allowing “disguised extraditions,” that is forcibly transferring an individual outside the formal extradition process over a matter like an immigration infraction, to countries with whom they do not have bilateral extradition agreements.

On the other hand, Civil law countries, such as most European and Asian nations, tend to rely on bilateral treaties and domestic legislation as the legal basis for extraditing someone. However, a bilateral treaty is not absolutely necessary.

The biggest difference between common law and civil law traditions is that civil law countries permit extradition even where there is no bilateral extradition treaty, in the spirit of reciprocity.<sup>2</sup>

<sup>1</sup> Matthew Bloom, “A Comparative Analysis of the United State’s Response to Extradition Requests from China,” *Yale Journal of International Law*, vol. 33, no.1, Winter 2008, p. 177-214., p 190.

<sup>2</sup> NOAH E. LIPKOWITZ, ‘Why Countries Diverge over Extradition Treaties with China: The Executive Power to Extradite in Common and Civil Law Countries,’ 2019, *Virginia Journal of International Law*, p. 474.- 479.

In theory, entering into an extradition treaty or agreeing to perform an extradition on the basis of reciprocity should not differ in terms of the expectation of compliance and adherence to fundamental international norms and human rights law.

The primary purpose of extradition agreements is to facilitate the transfer of a fugitive from one jurisdiction to another, and therefore it can have far-reaching and serious human rights consequences, based on the rule of law conditions in both jurisdictions. International norms hold that States should only permit an extradition if:

- the alleged offence is a criminal act in both States;
- the target individual has not already been tried for the offence in another jurisdiction; and,
- the offence is not political in nature (in order to protect the targeting of political opponents in exile).

The UN Office on Drugs & Crime (UNODC) has produced a Model Treaty on Extradition, which forms the foundational guideline for many of these principles. The following overview of international extradition principles is drawn from the UNODC Model Treaty, and other sources.

## **SPECIALITY**

The individual sought for extradition may only be tried for the specific offense listed in the extradition request, and not for any other crimes once returned, unless the State surrendering the individual or the individual being requested consents to waive this protection. However, any such waiver should be strictly scrutinized, especially in cases where the requesting State has a history of intimidation. While each case is different, and it is not possible to predict the exact outcome of an extradition ahead of time, the principle of speciality can be assessed by examining past extraditions. Has the requesting State made a habit of trying extradited individuals for different or additional charges than those specified in the request? *The principle of speciality is stated in China's Extradition law (Article 14(1)).*

## **DOUBLE JEOPARDY (NON BIS IN IDEM)**

This fundamental principle states that an individual may only be tried once for the same offence. It is also considered to be part of international customary law, thus binding on all States.

## **IN ABSENTIA JUDGEMENT**

Should the requested individual have been judged in absentia ahead of the requested extradition, and therefore been denied the right to a fair trial, the extradition request should automatically be refused.

## DUAL CRIMINALITY

The criminal offence for which the individual is sought for extradition must be a crime in both the host and receiving States. The principle of dual criminality is part of international customary law and considered a “deeply ingrained principle of extradition law.”<sup>3</sup> *It is also noted in China’s Extradition Law (Article 7(1)).*

## POLITICAL OFFENCE EXCEPTION

The political offence exception requires the automatic rejection of extradition if the individual is being sought on accusations that are overtly political. Scholars have noted the complexity of interpreting the political offence exception and pointed to differences between jurisdictions.<sup>4</sup> While there is no standard definition of what constitutes a political offence, assessment of past cases can easily check whether there is a trend of political persecution. *China prohibits extradition for political offences in its Extradition Law (Article 8(3)), but has made a habit of requesting extraditions for political purposes.*

## HUMANITARIAN GROUNDS ON AGE OR HEALTH EXCEPTION:

An extradition may be refused on the ground of ill health (both physically and mentally) or elderly. *China’s Extradition Law also notes such an exception (Article 9(2)).*

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<sup>3</sup> U. N. Office on Drugs & Crime, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, at 10 (2002), [https://www.unodc.org/pdf/model\\_treaty\\_extradition\\_revised\\_manual.pdf](https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf)

<sup>4</sup> See: Geoff Gilbert, Undesirable but Unreturnable: Extradition and Other Forms of Rendition, 15 J. INT’L CRIM. JUST. 55 (2017).

# INTERNATIONAL HUMAN RIGHTS LAW PRINCIPLES RELATING TO EXTRADITION

## NON-DISCRIMINATION ON RACE, RELIGION, ETHNICITY, NATIONALITY, POLITICAL OPINION

A fundamental tenet of international customary law and introduced in Article 2 of the Universal Declaration of Human Rights (UNHDR), is the non-discrimination prohibition and is commonly used to reject extradition requests. *China includes a prohibition against extradition should it violate non-discrimination principles (Article 8(4)), however it has a trend of seeking extradition of ethnic and religious minorities, such as Uyghurs, Tibetans, and Falun Gong practitioners, who are objectively at risk of discrimination.*

The Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR), has said that the prohibition against discrimination covers citizens and non-citizens, “all persons in their territory and all persons under their control.” It adds that States should not “extradite, deport, expel or otherwise remove a person from their territory” where there are grounds for concern that they will be subjected to harm, especially relating to the right to life (Article 6) and the prohibition against torture (Article 7). This applies to both the destination country or to any third party, intermediary country.<sup>5</sup>

## FUNDAMENTAL PROHIBITION AGAINST TORTURE

Under international law, torture is prohibited under any circumstances at any time. It is considered *jus cogens* (it can never be overridden), and binding on all States regardless of treaty ratification. It is enshrined in the UNHDR (Article 5), the ICCPR (Article 7), among others. In its General Comment on Article 7 of the ICCPR, the Human Rights Committee specifically addresses the prohibition of torture within extradition agreements. “State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”<sup>6</sup> The Committee also calls on ICCPR members to clearly indicate what measures they have taken to comply with this prohibition.

<sup>5</sup> General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 1326 May 2004, para. 12.

<sup>6</sup> United Nations Human Rights Committee (HRC), General Comment No. 20: Article 7 (*Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*), 10 March 1992, para. 9.



This fundamental prohibition against torture is part of customary international law and thus binding on all States irrespective of whether or not they have ratified The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). China is both a State-Party to the CAT and prohibits extraditions should the individual be at risk of torture (Article 8(7)), on the other hand practice of torture in China being widespread. Article 3 of the CAT explicitly notes that “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>7</sup>

The Committee Against Torture has said in reference to Article 3 that if an extradition treaty came into effect before the two sides had joined the CAT or where the treaty may leave open provisions that do not comply with the Convention, that the “principle of non-refoulement” should ALWAYS apply.<sup>8</sup> In situations where the two are in conflict, the Committee requests that the State party concerned should:

inform the Committee about any possible conflict between its obligations under the Convention and those under an extradition treaty from the beginning of the individual complaint procedure in which the State party is involved so that the Committee may try to give priority to the consideration of that communication before the time limit for the obligatory extradition is reached.<sup>9</sup>

## DEATH PENALTY

Although there is no universal consensus on the death penalty, at least 89 States are party to the Second Optional Protocol to the ICCPR, which aims to abolish the death penalty.<sup>10</sup> Many extradition agreements include optional clauses that allow the host State to reject an extradition request if the individual sought is believed to be at risk of execution if returned. In such cases, the requesting State may issue an assurance that it will not seek the death penalty. In China, the number of executions is considered a State secret, but it is widely believed to have the highest rate of capital punishment in the world.<sup>11</sup>

<sup>7</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>8</sup> Committee Against Torture, ‘General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, CAT/C/GC/4,’ Office of the High Commissioner for Human Rights, 4 September 2018, available at: [https://www.ohchr.org/documents/hrbodies/cat/cat-c-gc-4\\_en.pdf](https://www.ohchr.org/documents/hrbodies/cat/cat-c-gc-4_en.pdf), para. 23.

<sup>9</sup> CAT, General Comment No. 4, para. 24.

<sup>10</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, <https://www.ohchr.org/en/professionalinterest/pages/2ndopccpr.aspx>

<sup>11</sup> Amnesty International, ‘Death penalty in 2020: Facts and figures,’ 21 April 2021, <https://www.amnesty.org/en/latest/news/2021/04/death-penalty-in-2020-facts-and-figures/>

## NON-REFOULEMENT

This fundamental principle prohibits, under all circumstances, the transfer or removal of an individual from one State to another where there are “substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.”<sup>12</sup> It forms part of international refugee, humanitarian, human rights, and customary law. It does not endorse impunity should an individual be legitimately wanted for certain international crimes, including crimes against humanity or genocide. In such cases, the individual is transferred to a third party where a fair trial is possible.<sup>13</sup>

Non-refoulement becomes an issue when there are “substantial grounds” for believing someone is at risk of abuse, including torture, either as an *individual* or as a *member of a group*.<sup>14</sup> According to the CAT, evidence for “substantial grounds” for concern of abuse, include: “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”<sup>15</sup>

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<sup>12</sup> “The principle of non-refoulement under international human rights law,” <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

<sup>13</sup> Geoff Gilbert, *Undesirable but Unreturnable: Extradition and Other Forms of Rendition*, 15 J. INT’L CRIM. JUST. 55 (2017).

<sup>14</sup> CAT, General Comment No. 4, para. 11.

<sup>15</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

## States should consider, among other issues:

- i. “Whether the person concerned had previously been arrested arbitrarily” and/or denied fundamental procedural safeguards, including: notification of the reasons for arrest; access to family members, legal representatives, or medical practitioners, and access to a “competent and independent judicial institution that is empowered to judge the person’s claims for the treatment in detention within the time frame set by law or within a reasonable time frame”;<sup>16</sup>
- ii. “Whether the person has been the victim of brutality or excessive use of force by public officials”;<sup>17</sup>
- iii. “Whether the person has been judged in the State of origin or would be judged in the State to which the person is being deported in a judicial system that does not guarantee the right to a fair trial.”<sup>18</sup>
- iv. “Whether the person concerned has previously been detained or imprisoned in the State of origin or would be detained or imprisoned, if deported to a State, in conditions amounting to torture or cruel, inhuman or degrading treatment or punishment”;<sup>19</sup>
- v. “Whether the person concerned would be deported to a State where the inherent right to life is denied, including the exposure of the person to extrajudicial killings or enforced disappearance, or where the death penalty is in force.” This may include States where the death penalty has not been abolished, where the death penalty would be imposed for crimes not considered most serious crimes, or where the death penalty is carried out for crimes committed by people below the age of 18, pregnant women or people with mental disability;<sup>20</sup>
- vi. “Whether the person concerned would be deported to a State where reprisals amounting to torture have been or would be committed against the person, members of the person’s family or witnesses of the person’s arrest and detention, such as violent and terrorist acts against them, the disappearance of those family members or witnesses, their killings or their torture”;<sup>21</sup>
- vii. “Whether the person concerned would be deported to a State where the person was subjected to or would run the risk of being subjected to slavery and forced labor or trafficking in human beings.”<sup>22</sup>

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<sup>16</sup> CAT, General Comment No. 4, para. 29a(i-vi).

<sup>17</sup> CAT, General Comment No. 4, para. 29b.

<sup>18</sup> CAT, General Comment No. 4, para. 29d.

<sup>19</sup> CAT, General Comment No. 4, para. 29e.

<sup>20</sup> CAT, General Comment No. 4, para. 29k (i-iii).

<sup>21</sup> CAT, General Comment No. 4, para. 29m.

<sup>22</sup> CAT, General Comment No. 4, para. 29n.

The Committee Against Torture considers Article 3 restrictions absolute. “Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.”<sup>23</sup>

In other words, there is an absolute prohibition against returning anyone to a State where there is a consistent pattern of gross violations of human rights, and this applies to any accused offences for extradition from national security crimes to high-level corruption.

The Refugee Convention (Article 33) also requires that no State shall expel or return a refugee to any territory where their life or freedom would be threatened on account of “race, religion, nationality, membership of a particular social group or political opinion.”<sup>24</sup>

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<sup>23</sup> *Gorki Ernesto Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April 1997, 14.5

<sup>24</sup> Convention relating to the Status of Refugees, available at: <https://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf>

# DIPLOMATIC ASSURANCES: A PROBLEMATIC NORM

## DIPLOMATIC ASSURANCE

A guarantee from the requesting State to the host State that the target of extradition will be treated in accordance with conditions agreed by both parties, usually in reference to upholding their fundamental human rights.<sup>25</sup>

Diplomatic assurances, sometimes called diplomatic notes, are most common in death penalty cases, or concerns of torture and ill-treatment, or the fairness of judicial proceedings (see Article 14 of the ICCPR). Because diplomatic assurances are a common feature of extradition cases involving China, it is important to discuss them in greater detail.

Diplomatic assurances may convince the host State to comply with an extradition request, even if the requesting State has a record of non-compliance with international human rights norms. The requesting State's diplomatic assurance is usually a guarantee that in this specific case the individual facing extradition will receive certain protections. The problem is that diplomatic assurances are mostly only ever sought in cases where there are already serious grounds for concern of abuse. As the Commissioner for Human Rights of the Council of Europe noted in 2004, "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment."<sup>26</sup>

Even more concerning is that diplomatic assurances are **not legally binding**. There are **no effective mechanisms** for holding governments accountable for violating assurances. They also do not mean that the host State can ignore its obligations under international law, especially as regards the principle of *non-refoulement*.<sup>27</sup> Limitations governing the use of diplomatic assurances has often failed to prevent abuses.

<sup>25</sup> See: UNHCR Note on Diplomatic Assurances and International Refugee Protection, <https://www.refworld.org/pdfid/44dc81164.pdf>

<sup>26</sup> Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21-23, 2004. Council of Europe, CommDH (2004)13, July 8, 2004.

<sup>27</sup> UNHCR Note on Diplomatic Assurances and International Refugee Protection, <https://www.refworld.org/pdfid/44dc81164.pdf>, para. 19.

## Assessing diplomatic assurances

The European Court of Human Rights rules that only when there has been “a long history of respect for democracy, human rights and the rule of law” should a host State give a requesting State’s diplomatic assurance the presumption of good faith.<sup>28</sup> *This is clearly not the case with China that has had no history of respect for democracy, human rights and the rule of law.* International norms provide a basic, two-part test for assessing whether diplomatic assurances can be considered credible or not. As such, diplomatic assurances may only be relied upon if, at a minimum, they are:

- i. “A *suitable* means to eliminate the danger to the individual concerned, and
- ii. If the sending State may, in good faith, consider them *reliable*.”<sup>29</sup>

The host State should consider the extent and nature of concerns that the individual will face human rights abuses if extradited, the source of these concerns, and whether there are grounds to believe the assurance will be effectively and sincerely implemented. It is also crucial to assess the authority issuing the diplomatic assurance and whether it has the legal power to make such assurances. ***For example, China’s Ministry of Foreign Affairs is often the body conducting extradition negotiations and issuing diplomatic assurances but it is only the People’s Supreme Court that can make such assurances.***

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<sup>28</sup> See: FOURTH SECTION PARTIAL DECISION AS TO THE ADMISSIBILITY OF Application nos. 24027/07, 11949/08 and 36742/08 by *Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan and Mustafa Kamal Mustafa (Abu Hamza) v. the United Kingdom*, para 105; *Rapo v Albania* Application no. 58555/10

<sup>29</sup> UNHCR Note on Diplomatic Assurances and International Refugee Protection, <https://www.refworld.org/pdfid/44dc81164.pdf>, para. 20.

European Court of Human Rights case law, summarized in *Othman (Abu Qatada) v. The United Kingdom* (2012),<sup>30</sup> outlines the following factors for evaluating diplomatic assurances:

- i. “Whether the terms of the assurances have been disclosed to the court;”<sup>31</sup>
- ii. “Whether the assurances are specific or are general and vague;”<sup>32</sup>
- iii. “Who has given the assurances and whether that person can bind the receiving State;”<sup>33</sup>
- iv. “If the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;”<sup>34</sup>
- v. “Whether the assurances concern treatment which is legal or illegal in the receiving State;”<sup>35</sup>
- vi. “Whether they have been given by a Contracting State;”<sup>36</sup>
- vii. “The length and strength of bilateral relations between the sending and receiving States, including the receiving State’s record in abiding by similar assurances;”<sup>37</sup>
- viii. “Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant’s lawyers;”<sup>38</sup>
- ix. “Whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;”<sup>39</sup>
- x. “Whether the applicant has previously been ill-treated in the receiving State;”<sup>40</sup>
- xi. “Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.”<sup>41</sup>

<sup>30</sup> *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012, available at: <https://www.refworld.org/cases/ECHR.4f169dc62.html>

<sup>31</sup> Citing: ECHR, *Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 119, and *Muminov v. Russia*, No. 42502/06. Judgment of December 11, 2008, para. 97.

<sup>32</sup> Citing: ECHR, *Saadi v. Italy* [GS], No. 37201/06. Judgment of February 28, 2008, para. 147; *Klein v. Russia*, No. 24268/08. Judgment of April 1, 2010, para. 55, and *Khaydarov v. Russia*, No. 21055/09. Judgment of May 20, 2010, para. 111.

<sup>33</sup> Citing: ECHR, *Shamayev and Others v. Georgia and Russia*, No. 36378/02. Judgment of April 12, 2005, para. 344; *Kordian v. Turkey*, No. 6575/06. Decision of July 4, 2006; *Abu Salem v. Portugal*, No. 26844/04. Decision of May 9, 2006, and, to the contrary, *Ben Khemais v. Italy*, No. 246/07. Judgment of February 24, 2009, para. 59; *Garayev v. Azerbaijan*, No. 53688/08. Judgment of June 10, 2010, para. 74; *Baysakov and Others v. Ukraine*, No. 54131/08. Judgment of February 18, 2010, para. 51, and *Soldatenko v. Ukraine*, No. 2440/07. Judgment of October 23, 2008, para. 73.

<sup>34</sup> Citing: ECHR, Case of *Chahal v. The United Kingdom* [GS], No. 22414/93. Judgment of November 15, 1996, paras. 105 to 107

<sup>35</sup> Citing: ECHR, *Cipriani v. Italy*, No. 221142/07. Decision of March 30, 2010; *Saudi v. Spain*, No. 22871/06, Decision of September 18, 2006; *Ismaili v. Germany*, No. 58128/00, Decision of March 15, 2001; *Nivette v. France*, No. 44190/98. Decision of July 3, 2001, and *Einhorn v. France* No. 71555/01. Decision of October 16, 2001.

<sup>36</sup> Citing: ECHR, *Chentiev and Ibragimov v. Slovakia*, Nos. 21022/08 and 51946/08. Decision of September 14, 2010, and *Gasayev v. Spain*, No. 48514/06. Decision of February 17, 2009.

<sup>37</sup> See: ECHR, *Babar Ahmad and Others v. The United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09. Judgment of April 10, 2012, paras. 107 and 108; *Al Moayad v. Germany*, No. 35865/03. Decision of February 20, 2007, para. 68.

<sup>38</sup> Citing: ECHR, *Chentiev and Ibragimov v. Slovakia*, Nos. 21022/08 and 51946/08. Decision of September 14, 2010, and *Gasayev v. Spain*, No. 48514/06. Decision of February 17, 2009, and, to the contrary, *Ben Khemais v. Italy*, No. 246/07. Judgment of February 24, 2009, para. 61; *Ryabikin v. Russia*, No. 8320/04. Judgment of June 19, 2008, para. 119, and *Kolesnik v. Russia*, No. 26876/08, Judgment of June 17, 2010, para. 73.

<sup>39</sup> Citing: ECHR, *Ben Khemais v. Italy*, No. 246/07. Judgment of February 24, 2009, paras. 59 and 60; *Soldatenko v. Ukraine*, No. 2440/07. Judgment of October 23, 2008, para. 73, and *Koktysh v. Ukraine*, No. 43707/07. Judgment of December 10, 2009, para. 63.

<sup>40</sup> Citing: ECHR, Case of *Koktysh v. Ukraine*, No. 43707/07. Judgment of December 10, 2009, para. 64.

<sup>41</sup> Citing: ECHR, Case of *Gasayev v. Spain*, No.48514/06. Decision of February 17, 2009; *Babar Ahmad and Others v. The United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09. Judgment of April 10, 2012, para. 106, and *Al Moayad v. Germany*, No. 35865/03. Decision of February 20, 2007, paras. 66 to 69.

## The problem with diplomatic assurances

There are many examples where diplomatic assurances have not been kept and individuals extradited have not been protected from abuse. This has long been noted by The Committee Against Torture who recommended in 2006 that diplomatic assurances should not be accepted from States who “systematically violate the [Convention Against Torture].”<sup>42</sup>

UN Special Rapporteurs on Torture have called into question the practice and said they have failed protect against the fundamental prohibition against torture.<sup>43</sup>

Former Special Rapporteur Against Torture Theo van Boven, in 2004, noted that diplomatic assurances are increasingly undermining the principle of non-refoulement. Referring to those where diplomatic assurances were not been respected, asked “whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement which, it must not be forgotten, is absolute and non-derogable.”<sup>44</sup>

Another former Special Rapporteur, Manfred Nowak, has also raised concerns in 2005. “In the situation that there’s a country where there’s a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law, so in any case the government would deny that torture is actually systematic in that country, and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with.”<sup>45</sup>

In 2010, a further former Special Rapporteur on Torture, Juan Mendez, also expressed his concerns over the credibility of diplomatic assurances. “The practice of seeking diplomatic assurances from the receiving State does not relieve the sending State of its obligations, particularly when it is clearly used as ‘an attempt to circumvent the absolute prohibition of torture and non-refoulement’,” he said.<sup>46</sup>

In 2017, the Committee Against Torture said: “The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.”<sup>47</sup>

<sup>42</sup> ‘CAT/C/USA/CO/2, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Conclusions and recommendations of the Committee against Torture United States of America, 25 July 2006., para. 21.

<sup>43</sup> See also: “DANGEROUS DEALS EUROPE’S RELIANCE ON ‘DIPLOMATIC ASSURANCES’ AGAINST TORTURE,” Amnesty International, 2010, <https://www.amnesty.org/download/Documents/36000/eur010122010en.pdf>

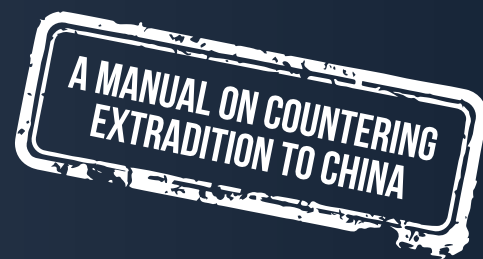
<sup>44</sup> Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, August 23, 2004, A/59/324. Para. 30-31.

<sup>45</sup> Human Rights Watch, ‘Still at Risk: Diplomatic Assurances No Safeguard Against Torture,’ April 2005, <https://www.hrw.org/reports/2005/eca0405/>

<sup>46</sup> See: Statement by Mr. Juan E Méndez SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 7 March 2010, [https://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE\\_March2011.pdf](https://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53/Add.4, 12 March 2013, <https://undocs.org/pdf?symbol=en/A/HRC/22/53/Add.4>

<sup>47</sup> General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (CAT/C/GC/4), 4 September 2018, [https://www.ohchr.org/documents/hrbodies/cat/cat-c-gc-4\\_en.pdf](https://www.ohchr.org/documents/hrbodies/cat/cat-c-gc-4_en.pdf)





# CHAPTER 2. EXTRADITIONS WITH CHINESE CHARACTERISTICS

## China's Extradition Law (2000)

- International standards included in China's extradition law:
  - grounds for extradition
- Grounds for automatic rejection
- Grounds for discretionary rejection
- Process of issuing extradition requests
- Process for Securing Diplomatic Assurances

## Potential changes to China's extradition law

### Related national laws

### The language of extradition in China

- Operation Fox Hunt
  - Zhang Jianping
- Operation Sky Net
- INTERPOL and the abuse red notices
  - Dolkun Isa and China's Abusive Red Notices
  - Ren Biao: One of China's "Most Wanted"
- National Supervision Commission
- International Cooperation against Corruption
  - Chi Daqiang: China's 'Irregular Measures'

# CHINA'S EXTRADITION LAW (2000)<sup>48</sup>

China's drive to create a formal extradition process began in earnest in the 1990s, with the emphasis on corruption suspects. Although it has often been used as an excuse to pursue CCP critics,<sup>49</sup> corruption also poses a real harm in China and around the world. According to China's Ministry of Commerce, around 4,000 corrupt officials fled the country between 1978 and 2003, taking with them an estimated 50 billion USD.<sup>50</sup> This spiked in the 1990s,<sup>51</sup> which coincided with China's first bilateral extradition agreements.

The first deal was signed with Thailand in 1993, with another 10 treaties agreed with countries in Asia from Kazakhstan (1996) to Cambodia (1999) and parts of Eastern Europe, such as Russia (1995) and the Ukraine (1998).

In 1994, a year after its first extradition treaty was signed, the Ministry of Foreign Affairs began working on a draft extradition law. On 21 August 2000, Hu Kangsheng (胡康生), then Vice-Chairman of the Legislative Affairs Committee, presented a draft extradition law for adoption by the Standing Committee of the Ninth National People's Congress.<sup>52</sup>

Hypocritically, Hu stressed the importance that the draft law should comply with international norms. He highlighted the conditions for refusing extradition requests, including grounds for believing the person would be at risk of prosecution or punishment due to race, religion, nationality, gender, or identity, and if the person would be at risk of torture or other cruel, inhuman or degrading treatment.

He outlined the Ministry of Foreign Affairs should be the contact agency for extradition, and that once treaty provisions are accepted, request and supporting documents should be submitted to the Supreme People's Court to review whether China should to comply with the extradition request. Hu noted that since extraditions involve national sovereignty, national interests, and diplomatic relations, the final decision should rest with the government. Therefore, in China, the State Council decides whether to extradite once the Supreme People's Court has approved the case.

Hu also explained that China may be required to issue diplomatic assurances in seeking the extradition of an individual from a foreign country back to China. He urged that such assurances should not "harm the sovereignty, national interest, or public interest of the People's Republic of China," and that "the judiciary should be bound by the promise made."

<sup>48</sup> See Appendix 1

<sup>49</sup> "Xi Jinping's Anti-Corruption Campaign: The Hidden Motives of a Modern-Day Mao," *Foreign Policy Research Institute*, 17 August 2018, <https://www.fpri.org/article/2018/08/xi-jinpings-anti-corruption-campaign-the-hidden-motives-of-a-modern-day-mao/>

<sup>50</sup> "Govt wants a better view of 'naked officials,'" *China Daily*, 24 February 2010, [http://www.chinadaily.com.cn/china/2010-02/24/content\\_9492278.htm](http://www.chinadaily.com.cn/china/2010-02/24/content_9492278.htm)

<sup>51</sup> "Capital Flight: Capture of Corrupt Officials A Long Drive," *China Daily*, 13 August 2003, [www.china.org.cn/english/China/72319.htm](http://www.china.org.cn/english/China/72319.htm)

<sup>52</sup> 关于《中华人民共和国引渡法（草案）》的说明, [http://www.npc.gov.cn/wxzl/gongbao/2001-03/05/content\\_5131090.htm](http://www.npc.gov.cn/wxzl/gongbao/2001-03/05/content_5131090.htm)

<sup>53</sup> Why countries diverge, p 446.

For the most part, China's extradition law complies with international standards set out in the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters. In general, countries have not objected to the actual text of China's extradition law<sup>53</sup>, what they have objected to is the widespread and systematic human rights violations perpetrated inside the country that are then grounds for automatic rejection of China's extradition requests, no matter how compliant the wording of its extradition law.

## International standards included in China's extradition law: grounds for extradition



### Double criminality

**Article 7** *Request for extradition made by a foreign state to the People's Republic of China may be granted only when it meets the following conditions:*

*(1) the conduct indicated in the request for extradition constitutes an offence according to the laws of both the People's Republic of China and the Requesting State;*

### Speciality

**Article 14** *The Requesting State shall make the following assurances when requesting extradition:*

*(1) no criminal responsibility shall be investigated against the person in respect of the offences committed before his surrender except for which extradition is granted, nor shall that person be re extradited to a third state, unless consented by the People's Republic of China, or unless that person has not left the Requesting State within 30 days from the date the proceedings in respect of the offence for which extradition is requested are terminated, or the person completes his sentence or is released before the sentence expires, or after leaving the country the person has returned of his own free will.*

### Reciprocity

**Article 3:** *The People's Republic of China cooperates with foreign states in extradition on the basis of equality and reciprocity.*

**Article 15:** *Where there is no extradition treaty to go by, the Requesting State shall make an assurance of reciprocity.*

**Article 8** *The request for extradition made by a foreign state to the People's Republic of China shall be rejected if:*

### Nationality

*(1) the person sought is a national of the People's Republic of China under the laws of the People's Republic of China;*

Some 20 years ago, China did not request the extradition of a foreign national to stand trial in China,<sup>54</sup> but that has now changed. China has also increasingly demanded Taiwanese nationals to be extradited or deported from third countries to China, and not Taiwan, to stand trial.

First, it has sought the extradition former Chinese nationals who have become naturalized citizens of other countries (see the case of Huseyin Celil,<sup>55</sup> a Uyghur and naturalized Canadian citizen on page XX). China generally refuses to accept the renouncement of Chinese nationality. (See the issue of dual nationality in Chapter 3) The most famous example is the enforced disappearance from Thailand and lengthy arbitrary imprisonment of naturalized Swedish citizen Gui Minhai.<sup>56</sup>

Second, China has detained foreign nationals for political purposes, through so-called “hostage diplomacy” and has requested the extradition of foreign nationals suspected of committing criminal offences inside its territory. China has been seeking the extradition of South Korean national and permanent New Zealand resident Kyung Yup Kim since 2011.<sup>57</sup>

China fiercely rejects the idea of extraditing one of its own citizens to face trial in another country. Meanwhile, it has sought to extradite, abduct and secretly imprison, foreign nationals.

## EXTRADITING ONE'S OWN NATIONALS, A COMMON LAW/CIVIL LAW DIVIDE

Common law countries allow for the extradition of their own nationals accused of committing criminal offenses in other countries because they view criminal jurisdiction as linked to territorial jurisdiction. This means that they will often only prosecute individuals suspected of crimes that took place in their territory and they tend not to prosecute their nationals for suspected crimes committed in other territories. On the other hand, civil law countries or mixed systems influenced by the civil law tradition tend to allow courts to prosecute individuals even if the suspected crime was committed abroad. This means that civil law countries tend to have provisions within their extradition agreements that **do not permit** the extradition of their own nationals. Of course, these are not hard rules and both common law and civil law countries may have varying positions regarding reciprocity and the extradition of their own nationals.

<sup>54</sup> Fu Hualing, “One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?” Hong Kong Lawyer, January 1999. <https://hub.hku.hk/bitstream/10722/44889/1/46551.pdf>

<sup>55</sup> “Free Huseyin Celil,” *Amnesty International*, <https://www.amnesty.ca/our-work/individuals-at-risk/huseyin-celil>

<sup>56</sup> “No room for negotiation from the Chinese side about imprisoned Swedish-Chinese Gui Minhai,” ScandAsia, 11 January 2021, <https://scandasia.com/no-room-for-negotiation-from-the-chinese-side-about-imprisoned-swedish-chinese-gui-minhai/>

<sup>57</sup> “New Zealand supreme court opens door for murder suspect's extradition to China,” The Guardian, 4 June 2021, <https://www.theguardian.com/world/2021/jun/04/new-zealand-supreme-court-opens-door-for-suspects-extradition-to-china>

## Political and military offenses

**Article 8** also addresses the grounds for rejection for political and military offenses:

*(3) the request for extradition is made for a political offence, or the People's Republic of China has granted asylum to the person sought;*

*(5) the offence indicated in the request for extradition is a purely military offence under the laws of the People's Republic of China or the laws of the Requesting State;*

China law professor Fu Hualing notes that China amended its Criminal Law in 1997 to change “counter-revolutionary” crimes to crimes of endangering national security, in part to make it easier for China to integrate with the international community, including extraditions.<sup>58</sup> However, crimes of endangering national security (Articles 102 to 113 of China's Criminal Law) are routinely used against civil society and human rights defenders and should therefore still be seen as political crimes.

## Non-discrimination principle

*(4) the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings;*

Although the Extradition Law includes the important non-discrimination principle, ethnic and religious-based persecution, especially of Uyghurs and Tibetans, is widespread and systematic in China. Such persecution has been described as both meeting the criteria for crimes against humanity *and* genocide.<sup>59</sup> China's requests for extradition of Uyghur or Tibetans abroad, therefore, are not only a violation of international norms but also a violation of China's own domestic law.

## Statute of limitation or pardon

*(6) the person sought is, under the laws of the People's Republic of China or the laws of the Requesting State, immune from criminal responsibility because, at the time the request is received, the limitation period for prosecuting the offence expires or the person is pardoned, or for other reasons;*

<sup>58</sup> Fu Hualing, “One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?” Hong Kong Lawyer, January 1999. <https://hub.hku.hk/bitstream/10722/44889/1/46551.pdf>

<sup>59</sup> Human Rights Watch, ‘Break Their Lineage, Break Their Roots’ China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims,’ 19 April 2021, available at: <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>; ‘Uyghur tribunal rules that China ‘committed genocide’ against the Uyghurs and other ethnic minorities,’ CNN, 10 December 2021, available at: <https://edition.cnn.com/2021/12/09/china/uyghur-tribunal-judgment-intl/index.html>; Tibet Action, ‘VAST COLONIAL BOARDING SCHOOL SYSTEM UNCOVERED IN TIBET,’ 7 December 2021, available at: <https://tibetaction.net/2021/12/07/vast-colonial-boarding-school-system-uncovered-in-tibet/>

## Prohibition of torture principle

*(7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State;*

While this provision complies with international law prohibiting torture, China has failed to properly define torture in domestic statutes and does not prosecute violators. Furthermore, torture of suspects in police detention is widespread, as will be argued in Chapter 3.

## Fair trial and trial in absentia

*(8) the request for extradition is made by the Requesting State on the basis of a judgement rendered by default, unless the Requesting State undertakes that the person sought has the opportunity to have the case retried under conditions of his presence.*

China's Criminal Law (Articles 8 to 12) outlines provisions against double jeopardy, however, as highlighted in a recent report by the Australian Government:

Chinese citizens convicted and punished for offences abroad may face punishment for the same offence on return to China. Authorities are less likely to pursue those who have committed offences overseas carrying a sentence in China of three years or less. Those convicted of offences that are more serious are more likely to be re-sentenced on return, depending on the offence and the severity of punishment served overseas: more severe punishment overseas would likely attract a lesser punishment on return. Authorities have also pursued individuals for crimes for which they were acquitted abroad.<sup>60</sup>

## Grounds for discretionary rejection



**Article 9** *The request for extradition made by a foreign state to the People's Republic of China may be rejected if:*

*(1) the People's Republic of China has criminal jurisprudence over the offence indicated in the request and criminal proceedings are being instituted against the person or preparations are being made for such proceedings; or*

*(2) extradition is incompatible with humanitarian considerations in view of the age, health or other conditions of the person sought.*

<sup>60</sup> 'DFAT Country Information Report People's Republic of China,' Australia Department of Foreign Affairs and Trade, 3 October 2019, available at: <https://www.dfat.gov.au/sites/default/files/country-information-report-china.pdf>, p. 72.

**Article 47** of China's Extradition Law explains the process for China to make extradition requests. Requests can come from multiple administrative levels, such as municipal or provincial level public security bureaus (PSB) or state security bureaus (SCB) or other bodies. In all cases, before the request is made to the target country, the requesting body in China must submit detailed written material to the (a) Supreme People's Court; (b) Supreme People's Procuratorate; (c) Ministry of Public Security; (d) Ministry of State Security; and (e) Ministry of Justice.

Once **all** these bodies have reviewed and approved the request, then the Ministry of Foreign Affairs (MOFA) takes over and submits the extradition request. It is then "the communicating authority for extraditions" (Article 4). However, MOFA may be replaced by another body if a particular bilateral extradition treaty provides for this (Article 4). "Where in an extradition treaty there are special provisions to govern the communicating authority, [those] provisions there shall prevail."

Under "urgent circumstances," **Article 48** allows China to request the foreign State to detain the target individual before a formal extradition request is issued. Such requests should be made by MOFA through diplomatic channels. The Extradition Law does not explicitly define what constitutes an "urgent circumstance", neither does it provide a timeframe within which China can request compulsory measures against an individual before issuing a formal extradition request. This would need to be clarified either through the bilateral extradition agreement or through negotiations via diplomatic channels.

The Extradition Law does not give any more details about the specific process, required instruments, documents, and other materials for requesting an extradition, or compulsory measures. However, **Article 49** says that these details must be established either in bilateral extradition agreements or agreed on an ad hoc basis between China and the target country.

**China has demonstrated a blatant disregard for its own diplomatic and consular agreements.**

**Article 50** outlines the process for issuing diplomatic assurances in extradition cases. MOFA is the body responsible for making assurances, “on condition that the sovereignty, national interests and public interests of the People’s Republic of China are not impaired.” Article 50 establishes that it is the Supreme People’s Procuratorate and the Supreme People’s Court that have the legal authority to determine and monitor assurances. It is therefore crucial that any State that is considering a diplomatic assurance from China as part of an extradition request, should, at the bare minimum, ensure the assurance has been approved by China’s Procuratorate and Supreme Court and not simply accept the word of MOFA. Specifically:

- (i) diplomatic assurances regarding **limitations on prosecution** are under the direct authority of the Supreme People’s Procuratorate;
- (ii) diplomatic assurances regarding **penalty** are subject to the decision of the Supreme People’s Court.

In noting at Article 50 that “the judicial organ shall be bound by the assurance made,” China’s Extradition Law establishes a legal obligation to comply with any diplomatic assurances thus issued. China refusing to comply with its own diplomatic assurances is both a breach of its own law and international standards.

International norms require diplomatic assurances to be effective and enforceable to be accepted. There must be a degree of monitoring and expectation of transparency in both the negotiation and implementation of such assurances.

A number of extradition requests from China have been rejected explicitly by States’ Supreme Courts because the diplomatic assurances were deemed unenforceable and untrustworthy. See chapter 4.

## BASIC QUESTIONS FOR STATES ON CHINA’S DIPLOMATIC ASSURANCES

- Who is issuing the assurance? (Is it an embassy/foreign ministry official or judicial organ empowered under the law with the authority to make the assurance)
- If the extradition offence is an economic crime, or the person is a former party member or state functionary, or manager within public institutions or companies, is there a stated role for the CCDI or the NSC in the extradition request?
- Are there exceptions in the law that may apply to the charges, which risk putting the individual at risk of human rights abuses, for example Article 73 of the CPL?<sup>61</sup>
- Are other suspects or cases related to the sought individual mentioned? Has any court documentation been provided? Do they exist in the Supreme Court’s database on verdicts 2013-to-present? Are Chinese authorities willing to make them available?
- Are there other crimes the person might be held liable for upon return, that are not crimes in resident/target country or are clearly of a political nature?

<sup>61</sup> For example, the Criminal Procedure Law establishes a number of exceptions to key procedural safeguards on length of detention, incommunicado detention, and other safeguards that raise the risk of torture.



# POTENTIAL CHANGES TO CHINA'S EXTRADITION LAW

Since it took effect in 2000, no amendments or revisions have been made to China's Extradition Law, although there have been several calls by Chinese scholars to make changes. In that time, China has signed at least another 35 bilateral extradition treaties with overseas governments.

In 2020, in an article titled *Several Problems in the Amendments of Extradition Law of China* for the Jilin University Journal of Social Sciences, authors Huang Feng (黄风) and Tao Linlin (陶琳琳) outline several of proposed changes.<sup>62</sup> Huang is a law professor at Beijing Normal University and member of the G20 Anti-corruption cooperation on Persons Sought for Corruption and Asset Recovery Research Center (G20反腐败追逃追赃研究中心), set up in September 2016. It operates with support from the CCDI, NSC, and MOFA.<sup>63</sup> Due to the Center's role in shaping policy and its links with these agencies, the recommendations in the paper are worth closer scrutiny as an indication of possible future amendments in law and practice.

One of their recommendations was for China to adopt a "simplified extradition procedure." A simplified extradition procedure is one in which the host State extradites the process by skipping the normal extradition review stage. This would only work in situations where the sought individual has voluntarily agreed to be extradited to China. The authors point out that China has already signed bilateral treaties allowing for simplified extraditions, such as with Peru, Namibia, and Mexico. Since this potentially would mean that the host State would not assess whether there was any risk of mistreatment upon return or other violations of international norms, this is very concerning.

In effect, simplified extraditions could become the same as "persuade to return" mechanisms used by China (see page 36), a practice that is open to such abuses as intimidating the target abroad or their family in China into forcing them into "agreeing" to return. Simplified extraditions are attractive to Beijing because they allow extraditions to go ahead without the host State's review of the risk of abuse or mistreatment upon return.

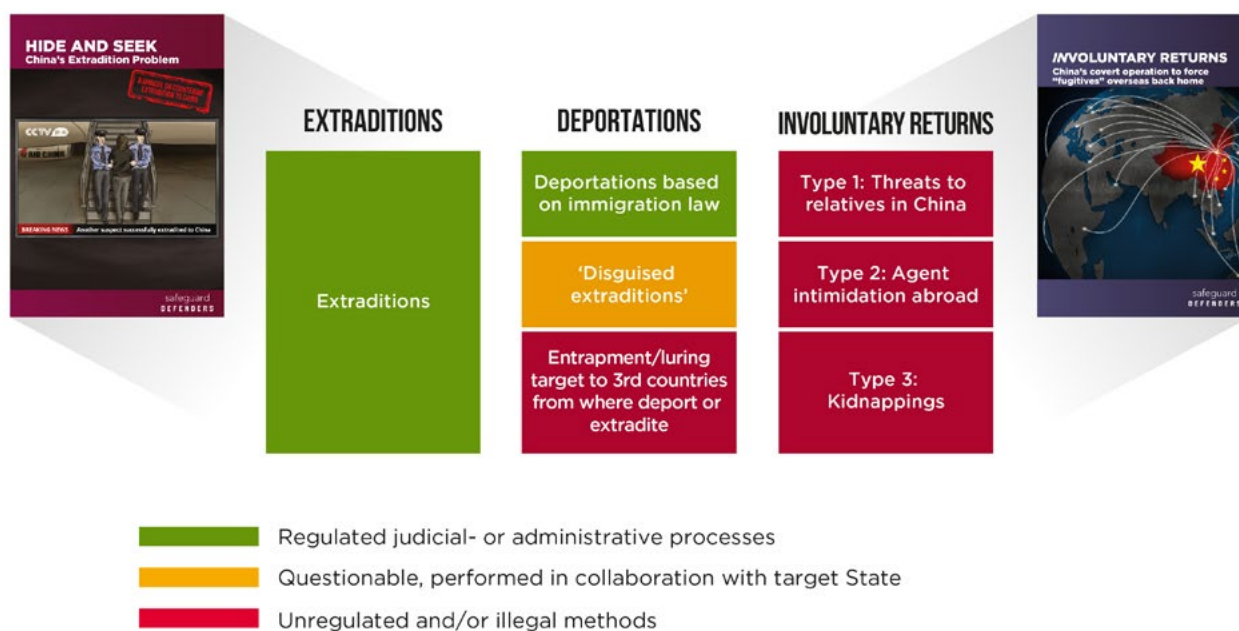
Another of their proposals is to NSC as the competent authority for extradition cooperation. As the authors point out, and as is explored throughout this report, since its establishment in 2018 under the National Supervision Law, the NSC has indeed de facto handled a number of extradition cases, despite not being legally empowered to do so under the current Chinese Extradition Law.

<sup>62</sup> (关于《中华人民共和国引渡法》修订的几个主要问题),

<https://scjg.cnki.net/kcms/detail/detail.aspx?filename=JLDB202004002&dbcode=CJFQ&dbname=DKFX2020&v=>

<sup>63</sup> G20反腐败追逃追赃研究中心在北京师范大学设立, Sohu, 23 September 2016, [https://www.sohu.com/a/114981041\\_391342](https://www.sohu.com/a/114981041_391342); 北师大将设G20反腐败追逃追赃研究中心, Xinhua, 7 September 2016, [http://www.xinhuanet.com/politics/2016-09/07/c\\_129272100.htm](http://www.xinhuanet.com/politics/2016-09/07/c_129272100.htm)

# EXTRADITIONS AND OTHER FORMS OF FORCED RETURNS



For example, the Commission has been increasingly active in pursuing fugitives abroad through Operation Sky Net (see Safeguard Defenders report 'Involuntary Returns').<sup>64</sup> It has also been responsible for filing extradition requests, as in the cases of Qiao Jianjun (乔建军)<sup>65</sup> in Sweden and Yao Jinqi (姚锦旗)<sup>66</sup> in Bulgaria.



## RELATED NATIONAL LAWS

It is beyond the scope of this report to analyze all of the laws listed below as they relate to extradition. However, the list is included as they are relevant to understand how the criminal justice and larger legal-political system and administrative hierarchies in China operate. Those that relate to fair trial and torture issues will be discussed in Chapter Three.

<sup>64</sup> Safeguard Defenders report, Involuntary Returns, 2022, available at: <https://safeguarddefenders.com/en/blog/involuntary-returns-report-exposes-massive-illegal-policing-operations-china>

<sup>65</sup> "Ex-Chinese official Qiao Jianjun extradited to US from Sweden on money-laundering and fraud charges," South China Morning Post, 2 June 2020, <https://www.scmp.com/news/china/diplomacy/article/3087064/ex-chinese-official-qiao-jianjun-extradited-us-money>; "Sweden rejects China's request to extradite former official," Reuters, 9 July 2019, <https://www.reuters.com/article/us-sweden-extradition-china-idUSKCN1U40RI>; "Swedish court rules out extradition of Qiao Jianjun to China," ScandAsia, 15 July 2019, <https://scandasia.com/swedish-court-rules-out-extradition-of-feng-li-to-china/>

<sup>66</sup> "China extradites duty crime suspect from Bulgaria," Xinhua, 30 September 2018, [www.xinhuanet.com/english/2018-11/30/c\\_137641663.htm](http://www.xinhuanet.com/english/2018-11/30/c_137641663.htm); "Former official gets six-year prison term," China Daily, 28 August 2020, <https://www.chinadaily.com.cn/a/202008/28/WS5f48412aa310675eafc555fbf.html>; "Corrupt civil servant extradited from Bulgaria jailed for 6 years," China Daily, 27 August 2020, <https://www.chinadaily.com.cn/a/202008/27/WS5f4766f1a310675eafc55e82.html>

- a) **Nationality Law (1980)<sup>67</sup>**
- b) **Regulations of the People’s Republic of China Concerning Consular Privileges and Immunities (1990)<sup>68</sup>**
- c) **Passport Law (2007)<sup>69</sup>**
- d) **Law on Diplomatic Personnel Stationed Abroad (2009)<sup>70</sup>**
- e) **Legislation Law (2015)<sup>71</sup>**
- f) **Police Law (2016)<sup>72</sup>**
- g) **Criminal Law (2017)<sup>73</sup>**
- h) **Provisions on Several Issues Regarding the Strict Exclusion of Illegal Evidence in Handling Criminal Cases (2017)<sup>74</sup>**
- i) **Criminal Procedure Law (2018)<sup>75</sup>**
- j) **National Supervision Law (2018)<sup>76</sup>**
- k) **Organic Law of the People’s Courts (2018)<sup>77</sup>**
- l) **Organic Law of the People’s Procuratorate (2018)<sup>78</sup>**
- m) **Constitution (2019)<sup>79</sup>**
- n) **Procurators Law (2019)<sup>80</sup>**
- o) **Judges Law (2019)<sup>81</sup>**
- p) **Interpretation on the Application of the Criminal Procedure law of the People’s Republic of China (2021)<sup>82</sup>**
- q) **Law on Supervision Officials (Draft)<sup>83</sup>**

<sup>67</sup> ‘Nationality Law of the People’s Republic of China,’ Ministry of Commerce Website People’s Republic of China, 22 November 1985, available at: <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050315.html>

<sup>68</sup> ‘Regulations of the People’s Republic of China Concerning Consular Privileges and Immunities,’ National People’s Congress website, available at: [www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383903.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383903.htm)

<sup>69</sup> ‘The Passport Law,’ Asian Legal Information Institute, available at: [www.asianlii.org/cn/legis/cen/laws/tpplotproc436/](http://www.asianlii.org/cn/legis/cen/laws/tpplotproc436/)

<sup>70</sup> ‘Law of the People’s Republic of China on Diplomatic Personnel Stationed Abroad,’ National People’s Congress website, available at: [www.npc.gov.cn/zgrdw/englishnpc/Law/2011-02/16/content\\_1620759.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2011-02/16/content_1620759.htm)

<sup>71</sup> ‘Legislation Law (2015 Revised Edition),’ China Law Translate, 16 March 2015, available at: <https://www.chinalawtranslate.com/en/2015lawlaw/>

<sup>72</sup> ‘People’s Police Law of the People’s Republic of China,’ National People’s Congress website, available at: [www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383708.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383708.htm)

<sup>73</sup> ‘Criminal Law of the People’s Republic of China (2017 Amendment PKULAW Version),’ Law Info China, available at: <https://www.lawinfochina.com/display.aspx?id=28346&lib=law&SearchKeyword=&SearchCKeyword=&EncodingName=big5>

<sup>74</sup> ‘最高人民法院、最高人民检察院、公安部等印发《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》的通知 [现行有效],’ ‘Notice of the Supreme People’s Court, the Supreme People’s Procuratorates, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice on Issuing the Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Sentence Cases and the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases,’ China Law translate, available at: [www.lawinfochina.com/display.aspx?lib=law&id=8205&CGid=](http://www.lawinfochina.com/display.aspx?lib=law&id=8205&CGid=)

<sup>75</sup> ‘Criminal Procedure Law (2018),’ China Law Translate, available at: <https://www.chinalawtranslate.com/en/criminal-procedure-law-2018/>

<sup>76</sup> ‘Supervision Law of the People’s Republic of China,’ Legal Tools database International Criminal Court, available at: <https://www.legal-tools.org/doc/ef4c4d/pdf/>

<sup>77</sup> ‘Organic Law of the People’s Courts of the P.R.C. (2018 Revision),’ China Law Translate, available at: <https://www.chinalawtranslate.com/en/organic-law-of-the-peoples-courts-of-the-p-r-c-2018-revision/>

<sup>78</sup> ‘Organic Law of the People’s Procuratorate of the PRC (2018),’ China Law Translate, available at: <https://www.chinalawtranslate.com/en/organic-law-of-the-peoples-procuratorate-of-the-prc-2018/>

<sup>79</sup> ‘Amendment to the Constitution of the People’s Republic of China,’ National People’s Congress website, available at: [www.npc.gov.cn/englishnpc/constitution2019/201911/36a2566d029c4b39966bd942f82a4305.shtml](http://www.npc.gov.cn/englishnpc/constitution2019/201911/36a2566d029c4b39966bd942f82a4305.shtml)

<sup>80</sup> ‘Procurators Law of PRC (2019),’ China Law Translate, available at: <https://www.chinalawtranslate.com/en/procurator-law-of-the-prc/>

<sup>81</sup> ‘Judges Law of the People’s Republic of China,’ National People’s Congress website, available at: [www.npc.gov.cn/englishnpc/c23934/202012/9c82d5dbefbc4ffa98f3dd815af62dfb.shtml](http://www.npc.gov.cn/englishnpc/c23934/202012/9c82d5dbefbc4ffa98f3dd815af62dfb.shtml)

<sup>82</sup> ‘Interpretation on the Application of the “Criminal Procedure Law of the PRC”,’ China Law Translate, available at: <https://www.chinalawtranslate.com/en/spccplinterp2021/>

<sup>83</sup> ‘PRC Law on Supervision Officials (Draft) (Second Deliberation Draft),’ China Law Translate, 30 April 2021, available at: <https://www.chinalawtranslate.com/en/supervisors2/>

# THE LANGUAGE OF EXTRADITION IN CHINA

China uses a variety of terms to describe the return of individuals from overseas back to China. Understanding what these terms mean and how they relate to each other sheds light on the issue of China's legal and extralegal behavior.

**EXTRADITION (引渡)** is the formal legal process of transferring an individual from one State to the requesting State for the purposes of criminal prosecution or punishment. The People's Republic of China (2000) provides an important legal basis for how Chinese domestic authorities deal with extradition issues between China and foreign countries. While this law covers the internationally accepted meaning of extradition, China has also sought alternatives to extradition: repatriation, persuading to return, and remote prosecution.

**REPATRIATION (遣返)** applies to prisoners of war, refugees and other displaced persons, and criminal suspects either as a right to return to their place of origin or as a law enforcement mechanism to return suspects to their country of origin. It is dealt with under different international law regimes from Humanitarian Law to Human Rights Law. It also covers the deportation of an individual who is in a country illegally to their country of legal residence. When China is seeking to extradite an individual in a country with which it does not have a formal bilateral extradition agreement or when the case does not reach the formal definition of an extradition case, China will seek to use repatriation by negotiating with the host State. However, there are example where China has used this mechanism as part of its involuntary returns.<sup>84</sup>

**PERSUADE TO RETURN (劝返)**, although not a formal legal measure, is a system whereby China pursues the return of an individual overseas by securing their agreement to "volunteer" to go back and hand themselves in. Sometimes, this is achieved by cooperating with the host country's judicial and law enforcement agencies. In practice, the means of "persuasion" include intimidation, abuse, and coercion, including threats to family in China.<sup>85</sup>

**"A fugitive is like a flying kite. Even though he is abroad, the string is grounded in China. He can always be found through his family."**

**- Li Gongjing (李公敬) captain of the economic crimes division Shanghai Public Security Bureau.**

<sup>84</sup> For more on involuntary returns outside of more formal extradition channels see Safeguard Defenders report, Involuntary Returns, 2022, available at: <https://safeguarddefenders.com/en/blog/involuntary-returns-report-exposes-massive-illegal-policing-operations-china>.

<sup>85</sup> 'PRC Law on Supervision Officials (Draft) (Second Deliberation Draft),' China Law Translate, 30 April 2021, available at: <https://www.chinalawtranslate.com/en/supervisors2/>

<sup>86</sup> "Obama Administration Warns Beijing About Covert Agents Operating in U.S.," New York Times, 16 April 2015, <https://www.nytimes.com/2015/08/17/us/politics/obama-administration-warns-beijing-about-agents-operating-in-us.html>.

**REMOTE PROSECUTION (异地追诉)** describes the process of the requesting State providing evidence to the host State to assist in prosecuting the suspect under the laws of that country. Normally, the individual would serve the sentence in the host State if found guilty, however in some countries, serious crimes could lead to the individual also losing their right to stay in the host country if found guilty. This would mean that they would be deported to China once their sentence has been served, or even sometimes before.

In addition to the above four, China also pursues fugitives through arrest (with the cooperation of the police in the host country); capture and return at the border; and capture inside China (when the fugitive is in China under cover). In the last decade, China has launched two key operations focused on locating and securing the return of fugitives overseas: Sky Net and Fox Hunt.



Since it was first launched in 2014, Operation Fox Hunt and its subsequent Operation Sky Net have reportedly caught and returned to China some 8,000 international fugitives. Very few of these have been formal extraditions, the majority have been the result of long-term surveillance, intimidation, and forced return operations, often in breach of local laws and international norms.

In 2020, former US Assistant Attorney General for National Security John Demers announced charges against eight individuals<sup>87</sup> “acting as agents of the People’s Republic of China while taking part in an illegal Chinese law enforcement operation known as Fox Hunt here in the United States.” He noted:

<sup>87</sup> ‘FBI arrests five in alleged ‘Operation Fox Hunt’ plot to stalk and pressure citizens to return to China,’ CNBC, 28 October 2020, available at: <https://www.cnbc.com/2020/10/28/fbi-arrests-5-in-alleged-operation-fox-hunt-plot-to-pressure-citizens-to-return-to-china.html>

China describes Fox Hunt as an international anti-corruption campaign in which it seeks to locate legitimate fugitives around the world and bring them to China to face genuine criminal charges. But this is certainly not the whole story, and often times, it simply isn't true.

Some of the individuals may well be wanted on traditional criminal charges and they may even be guilty of what they are charged with. But in many instances the hunted are opponents of Communist Party Chairman Xi — political rivals, dissidents, and critics. And in either event, the operation is a clear violation of the rule of law and international norms.<sup>88</sup>

Scholars have pointed out that although China has been on a crusade against corrupt officials since the 1990s, under Xi Jinping, efforts have been seriously stepped up. There are also serious concerns that the “anti-corruption” presentation is just as much a cover for political targets. In addition to launching Sky Net and Fox Hunt, a critical part of Xi's trademark efforts to hunt down fugitives abroad has been to seek to conclude extradition treaties around the world, especially with developed countries such as the US, Canada, the UK and Australia, all high on the list of destinations for those fleeing China.<sup>89</sup>

“Operation Fox Hunt is just one of many ways in which China disregards the rule of law.”<sup>90</sup>

Fox Hunt, a global program to track down and arrest economic suspects who have fled abroad, was launched as a special operation by the MPS on 22 July 2014.

Fox Hunt works closely with a range of bilateral law enforcement and security cooperation mechanisms with countries around the world and coordinated with multilateral bodies such as INTERPOL.<sup>91</sup> In China, in addition to the MPS, the SPP and courts are responsible for issuing legal orders and notices, and working closely with the CCDI.

Hunters, responsible for the targeting and tracking of suspects, are hired from around China, with priority given to men in their 30s, many recruited from the MPS' Arrest and Investigation Team of Economic Investigation Bureau. In total, there are around 20 members. Hunters are required to be skilled in investigation, law, and foreign languages; have a high EQ, IQ and the ability to deal with emergencies and risky situations. They are generally well educated, most with masters' degrees and a multidisciplinary background in finance, economics, foreign languages, law, computers, business management, or criminal investigation.<sup>92</sup>

Fox Hunt also relies coordinated information campaigning, such as efforts to mobilize public opinion through media and to encourage people to come forward with information, sometimes with the promise of a reward.

However, Fox Hunt is also associated with state-sanctioned kidnappings. Elsewhere, Fox Hunt teams have relied on “pressure, leverage, threats against family, they use proxies,” according to Deputy Assistant Director Bradley Benavides, chief of the China branch of the US's Federal Bureau of Investigations counterintelligence division.<sup>93</sup>

<sup>88</sup> ‘Assistant Attorney General John C. Demers Delivers Remarks Announcing People's Republic of China Related Arrests Washington,’ United States Department of Justice, October 28, 2020, available at: <https://www.justice.gov/opa/speech/assistant-attorney-general-john-c-demers-delivers-remarks-announcing-peoples-republic>

<sup>89</sup> ‘Why countries diverge,’ p442.

<sup>90</sup> ‘Assistant Attorney General John C. Demers Delivers Remarks Announcing People's Republic of China Related Arrests Washington,’ United States Department of Justice, October 28, 2020, available at: <https://www.justice.gov/opa/speech/assistant-attorney-general-john-c-demers-delivers-remarks-announcing-peoples-republic>

<sup>91</sup> ‘NO ROOM TO RUN China's expanded mis(use) of INTERPOL since the rise of Xi Jinping,’ 2021, available at: <https://safeguarddefenders.com/sites/default/files/pdf/No%20Room%20to%20Run.pdf>

<sup>92</sup> [http://www.xinhuanet.com/politics/2015-06/20/c\\_127934526\\_2.htm](http://www.xinhuanet.com/politics/2015-06/20/c_127934526_2.htm)

<sup>93</sup> ‘Operation Fox Hunt: How China Exports Repression Using a Network of Spies Hidden in Plain Sight,’ Propublica, 22 July 2021, available at: <https://www.propublica.org/article/operation-fox-hunt-how-china-exports-repression-using-a-network-of-spies-hidden-in-plain-sight>

## ZHANG JIANPING AND MAINTAINING APPEARANCES



**Credit: Shanghai PSB**

Zhang Jianping's (张建平) case is emblematic of the political significance Xi Jinping has placed on Operation Fox Hunt and sending a signal to fugitives abroad.

Zhang was detained in March 2015 at the Shanghai Pudong International Airport on his return to China from Australia. His initial detention was widely hailed on Chinese media as highlighting technological advances under Xi and the success of the Fox Hunt operation. Zhang had reportedly been identified trying to enter China through

facial recognition cameras at the airport. While the news of his arrest was widely covered by domestic media, little attention was given to his trial. He was sentenced to life in prison for using a fake identity to obtain Australian citizenship and of defrauding investors of tens of millions of dollars.<sup>94</sup>

China claims that Zhang's real name is Xie Renliang (谢仁良), one of their Fox Hunt targets, who had reportedly spent 18 years on the run. During the trial, Chinese authorities claimed to have verified his identity with a DNA test that was cross-referenced with Xie Yun, Xie Renliang's son. Zhang's fantastic defence was: "I've forgotten everything before 2006. I don't know who Xie Renliang is. I am Zhang Jianping."<sup>95</sup>

According to court documents, Zhang fled China for Australia in 2002, but aside from obtaining Australian citizenship it appears that he had actually been living in China for most of the next 13 years. Xie Renliang's case was reopened after it was included in Operation Fox Hunt. Police then began surveillance of Xie Yun. They discovered that the son often called a woman, later identified as Zhang's ex-wife in Sydney and one particular number on the Chinese island of Hainan. Police tracked the number and discovered it belonged to their target. But rather than arresting him at his farm in Hainan, it seems they bided their time waiting for the more politically important spectacle of a successful arrest under Operation Fox Hunt. They wanted the propaganda value of apprehending an overseas target using advanced surveillance technology.

<sup>94</sup> 'Man with two names: first Australian conviction for China's Fox Hunt?', 17 June 2016, available at: <https://www.smh.com.au/world/man-with-two-names-first-australian-conviction-for-chinas-fox-hunt-20160617-gpm20i.html>

<sup>95</sup> 'Untold story: China's Operation Fox Hunt and the capture of Zhang Jianping,' 18 June 2016, available at: <https://www.afr.com/world/untold-story-chinas-operation-fox-hunt-and-the-capture-of-zhang-jianping-20160616-gpk1i9>

According to official figures, from mid-2014 until November 2021, 9,946 overseas targets were returned from over 120 countries around the world and under operation Sky Net, and this number would have surpassed 10,000 by Christmas 2021. In 2018, for which the Chinese government released slightly more detailed data, only 1% of that year's 1,335 people were returned via extradition. Of the reported cases, some 2,212 were Communist Party members and government employees, 357 had been issued with INTERPOL Red Notices, while 60 of them were on the 100 most-wanted Red Notice list.<sup>96</sup>

Sky Net was launched in April 2015, with a new round relaunched each year. The official purpose of the program is “to capture corrupt officials, crack down on fake passports, bust underground banks, recover assets involved in criminal cases and persuade fugitive suspects to return home.”<sup>97</sup> This includes hunting down corruption suspects who have fled abroad and recovering their assets, cracking down on money transfers and the use of offshore companies, underground banking, and fake passports. It is led by the Central Organization Department, the Supreme People's Procuratorate, the MPS, the People's Bank of China, and the Central Anti-Corruption Coordination Group (中央反腐败协调小组). With each passing year, different State and Party organs have been responsible for Sky Net operations.

**April 2016:** Sky Net 2016 was launched, with a special mission operation to crack down on fake passports. It was led by the MPS, Central Organization Department, MOFA and CCDI.<sup>98</sup>

**March 2017:** Sky Net 2017 was launched, tasked with continuing the operations of 2015 and 2016. The SPC and SPP had published Provisions in January 2017 to give legal basis for the confiscation of illegal assets of accused corrupt officials who had fled abroad.<sup>99</sup>

**April 2018:** Sky Net 2018 was launched under the NSC instead of the SPP as in years past.<sup>100</sup>

**January 2019:** Sky Net 2019 was launched, and was again led by NSC. The focus of the operations remained the same as the previous years except the recovery of ill-gotten gains would be led only by the SPC (previously led by the SPC, SPP and MPS). According to state media, “The first 11 months of 2019 saw 1,841 fugitives repatriated to China from abroad under the ‘Sky Net 2019’ operation, with more than 4 billion RMB (US\$560 million) of illicit money recovered.”<sup>103</sup>

**March 2020:** Sky Net was 2020 launched,<sup>104</sup> again under the NSC.<sup>105</sup> The recovery of ill-gotten gains was again led just by the SPC. Efforts to crack down on fake passports and those responsible for their production were headed by the MPS and Central Organization

<sup>96</sup> Safeguard Defenders report, Involuntary Returns, 2022, available at: <https://safeguarddefenders.com/en/blog/involuntary-returns-report-exposes-massive-illegal-policing-operations-china>. “8,363 overseas fugitives repatriated to China during six-year ‘Sky Net’ campaign,” Global Times, 14 December 2020, <https://www.globaltimes.cn/page/202012/1209897.shtml>.

<sup>97</sup> ‘Sky Net’ cast over corrupt officials abroad,’ Global Times, 27 March 2015, <https://web.archive.org/web/20150704151341/http://www.globaltimes.cn/content/914227.shtml>

<sup>98</sup> “天网2016”行动启动 反腐败国际追逃追赃一刻不放松,’ 22 April 2016, available at: <http://fanfu.people.com.cn/n1/2016/0422/c64371-28295664.html>

<sup>99</sup> Provisions of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of the Confiscation Procedures for Illegal Income in a Case Where a Criminal Suspect or Defendant Escapes or Dies,’ 4 January 2017, available at: <http://lawinfochina.com/display.aspx?id=23157&lib=law>

<sup>100</sup> ‘国家监委成立后的新“天网”，有啥新武器？,’ 25 April 2018, available at: <http://news.sina.com.cn/c/2018-04-25/doc-ifyuwafa4881336.shtml>

<sup>101</sup> ‘“天网2019”行动正式启动,’ 29 January 2019, available at: <http://dangjian.people.com.cn/n1/2019/0129/c117092-30595504.html>

<sup>102</sup> ‘China launches “Sky Net 2019” to capture fugitive officials,’ 28 January 2019, available at: [http://www.xinhuanet.com/english/2019-01/28/c\\_137781988.htm](http://www.xinhuanet.com/english/2019-01/28/c_137781988.htm)

<sup>103</sup> ‘China launches “Sky Net 2020” to capture fugitive graft suspects,’ 20 March 2020, available at: <https://www.shine.cn/news/nation/2003305365/>

<sup>104</sup> “天网2020”行动正式启动 一体推进追逃防逃追赃,’ 30 March 2020, available at: <http://politics.people.com.cn/n1/2020/0330/c1001-31654482.html>

<sup>105</sup> ‘China launches “Sky Net 2020” to capture fugitive graft suspects,’ 20 March 2020, available at: <https://www.shine.cn/news/nation/2003305365/>



Department. The MPS and People's Bank of China were responsible for preventing the transfer of ill-gotten gains through offshore banking and underground banks.

Chinese official media reported that through Sky Net 2020 a total of 1,421 fugitives were apprehended, and an estimated 2.95 billion RMB (458 million USD) in assets were recovered. 2020, reportedly saw the second highest number of returned individuals since the Fugitive Repatriation and Asset Recovery Office of the Central Anti-Corruption Coordination Group was established in 2014.<sup>106</sup>

February 2021: Sky Net 2021 was launched with the objective of intensifying previous years' efforts. "Keep intensifying efforts on tracking down corrupt fugitives from state-owned enterprises, and in the financial, political, legal and livelihood sectors, and recovering their illegal gains... Highlights will be cast on cases involving officials of county division levels and above who fled in recent years and cases involving large amounts of money which had gained strong public reactions."<sup>107</sup>

## INTERPOL and the abuse of Red Notices



On 22 April 2015, China published a list of the Top 100 targets under Sky Net.<sup>108</sup> The list was released in the form of Red Notices<sup>109</sup> via the INTERPOL National Central Bureau (NCB), which goes by the name INTERPOL Beijing and is part of the International Cooperation Department of the MPS. The list included suspects around the world wanted by China for various corruption-related offenses. The goal of the list was to coordinate with INTERPOL and other multilateral law enforcement bodies to track down and return those suspected of committing crimes in China.

China is a world leader in engaging with INTERPOL and issuing Red Notices.<sup>110</sup> Along with several other countries, it abuses the Red Notice system.<sup>111</sup> The deep-seated lack of transparency within INTERPOL's Red Notice system makes this situation even worse. A systematic overhaul of INTERPOL is a necessary first step in addressing its misuse by authoritarian governments.

**RED NOTICE** An alert for law enforcement cooperation that does not carry a requirement to arrest or repatriate the named individual. A Red Notice is not an international arrest warrant but it will usually reference some criminal activity, arrest warrant, or judicial decision at the national level of the country that issues it.

<sup>106</sup> 'China launches 'Sky Net 2021' to capture fugitive graft suspects,' 24 February 2021, available at: <https://news.cgtn.com/news/2021-02-24/China-launches-Sky-Net-2021-to-capture-fugitive-graft-suspects-Y8Uogs80YU/index.html>

<sup>107</sup> 'Sky Net' campaign launched to intensify efforts on corruption,' 24 February 2021, available at: <https://www.globaltimes.cn/page/202102/1216438.shtml>

<sup>108</sup> '我国发布红色通缉令缉拿百名外逃人员 (表),' People, 22 April 2015, <http://world.people.com.cn/n/2015/0423/c1002-26892788.html>; "China's graft-busters release list of 100 wanted fugitives in Operation Sky Net," South China Morning Post, 23 April 2015, <https://www.scmp.com/news/china/policies-politics/article/1773872/chinas-graft-busters-release-list-100-wanted-fugitives>

<sup>109</sup> Red Notices are published by INTERPOL at the request of a member country. They are not international arrest warrants, despite how they are sometimes portrayed. Red Notices are requests to law enforcement around the world to locate and apprehend a target individual wanted for extradition, surrender, or other legal action. A Red Notice contains two types of information: "Information to identify the wanted person, such as their name, date of birth, nationality, hair and eye color, photographs and fingerprints if available. Information related to the crime they are wanted for, which can typically be murder, rape, child abuse or armed robbery." For more, see "Red Notices" available at: <https://www.INTERPOL.int/en/How-we-work/Notices/Red-Notices>

<sup>110</sup> 'Interpol Is Helping Enforce China's Political Purges,' Foreign Policy, 21 April 2017, available at: <https://foreignpolicy.com/2017/04/21/interpol-is-helping-enforce-chinas-political-purges/>

<sup>111</sup> 'Strengthening INTERPOL, an update,' Fair Trials, <https://www.fairtrials.org/wp-content/uploads/2017/05/Strengthening-INTERPOL-update.pdf>

## China & Red Notices

**STEP ONE:** The INTERPOL National Central Bureau of China will file a request to the INTERPOL International Secretariat in Lyon, France, who is responsible for reviewing and approving it for circulation to police worldwide.

**STEP TWO:** The Secretariat reviews the Red Notices for compliance with INTERPOL's legal framework.

**STEP THREE:** If approved, the Red Notice is published and distributed through all INTERPOL member countries, if they believe the request does not violate any rules or requirements.<sup>112</sup>

The problem is, despite these checks, China has repeatedly been able to abuse the system and issued politically-motivated Red Notices seeking the arrest and extradition of individuals including dissidents.<sup>113</sup> Some jurisdictions have adopted additional procedural safeguards to prevent this abuse, for example the US.

In the United States, national law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone. If the subject for a Red Notice is found within the United States, the Criminal Division will make a determination if a valid extradition treaty exists between the United States and the requesting country for the specified crime or crimes. If the subject can be extradited, and after a diplomatic request for provisional arrest is received from the requesting country, the facts are communicated to the U.S. Attorney's Office with jurisdiction which will file a complaint and obtain an arrest warrant requesting extradition.<sup>114</sup>

China's efforts to influence INTERPOL have included infiltrating the highest echelons of leadership. In 2016, INTERPOL selected Meng Hongwei (孟宏伟) as its new president, who served in this position until 2018 when he was forcibly disappeared by Chinese agents and later delivered a likely forced confession and resigned from his position. In January 2020, Meng was sentenced to 13 years in prison on bribery charges. His wife claimed the charges were purely political.<sup>115</sup> In November 2021, INTERPOL shockingly elected Hu Binchen (胡斌晨) to a four-year term on its executive committee.<sup>116</sup>

Some have even speculated that Meng was removed because he had failed to secure more Red Notices for China and because he had not succeeded in blocking the cancellation of a Red Notice against a leading member of the international Uyghur activist community (see below).<sup>117</sup>

<sup>112</sup> '什么是红通？国际刑警组织干什么？', 3 May 2017, available at: <https://www.voachinese.com/a/red-notice-20170502/3835058.html>

<sup>113</sup> 'Lawyers say China using INTERPOL to seek dissident's return,' AP, 30 July 2021, available at: <https://apnews.com/article/china-immigration-migration-6463bf3d26c5a4ed3b799e83116edc45>; 'INTERPOL: Address China's 'Red Notice' Abuses,' Human Rights Watch, 25 September 2017, available at: <https://www.hrw.org/news/2017/09/25/INTERPOL-address-chinas-red-notice-abuses>

<sup>114</sup> 'PROVISIONAL ARRESTS AND INTERNATIONAL EXTRADITION REQUESTS—RED, BLUE, OR GREEN NOTICES,' United States Department of Justice, <https://www.justice.gov/jm/organization-and-functions-manual-3-provisional-arrests-and-international-extradition-requests>

<sup>115</sup> 'Ex-President of INTERPOL Is Sent to Prison for Bribery in China,' New York Times, 21 January 2020, available at: <https://www.nytimes.com/2020/01/21/world/asia/interpol-china-meng-hongwei.html>

<sup>116</sup> 'Interpol elects Chinese cop in charge of pursuing overseas fugitives to senior role,' Radio Free Asia, 26 November 2021, available at: <https://www.rfa.org/english/news/china/interpol-election-11262021104543.html>

<sup>117</sup> 'China upset as INTERPOL removes wanted alert for exiled Uyghur leader,' Reuters, 24 February 2018, available at: <https://www.reuters.com/article/us-china-xinjiang/china-upset-as-INTERPOL-removes-wanted-alert-for-exiled-uyghur-leader-idUSKCN1G80FK>

## DOLKUN ISA AND CHINA'S ABUSIVE RED NOTICES



Dolkun Isa is the President of the World Uyghur Congress, a global advocacy organization that China calls a terrorist actor. After fleeing China in 1996, he was granted political asylum in Germany. China has pursued him around the world, intimidating States and actively working to interfere with his peaceful human rights advocacy. His story is an emblematic case of China's abuse of the Red Notice system.

In 1997, at China's behest, INTERPOL issued a Red Notice against Isa, but it wasn't until 1999 that German police informed him of the notice's existence. The fact that he had been granted asylum in Germany should have been enough for INTERPOL to deny the Red Notice much earlier. Despite its clear political origin and abusive nature, it took nearly 20 years for the notice to be withdrawn.

Throughout this time, it served as a fearful choke hold against the international travel and advocacy efforts of a leading Uyghur rights defender, even though Isa has been a German citizen since 2006. In 2006, he reported problems entering the US. From 2008, Turkey banned him from entering, a country which is home to a large Uyghur population. In 2009, Isa was prohibited from travelling to Taiwan and also briefly detained in South Korea, preventing him from attending the World Forum for Democratization in Asia. In 2016, his visa application to India was rejected, which prevented him from attending the Interethnic Interfaith Leadership Conference in Dharamsala. And in 2017, he was again briefly detained in Italy despite a speaking engagement before the Italian Senate on official invitation.

Finally, in February 2018, INTERPOL cancelled Isa's Red Notice. Fair Trials,<sup>118</sup> a UK-based human rights organization that campaigns against abusive Red Notices noted: "For years Dolkun Isa suffered as a result of China's attempts to stop him campaigning from exile for the Uyghur people. We are delighted that INTERPOL's improved complaints mechanism has worked as it should and said 'no' to China's abuse of the Red Notice system."<sup>119</sup>

Isa is far from the only Uyghur target of abusive Red Notices. Others include Abduljelil Karakash, director of the Uyghur Information Centre in Munich, and Abdulhamit Tursu,<sup>120</sup> and more recently in 2021 with Idris Hasan.<sup>121</sup>

<sup>118</sup> See also: 'Dismantling the Tools of Oppression: Ending the Misuse of INTERPOL,' Fair Trials report 2018, available at: [https://www.fairtrials.org/sites/default/files/publication\\_pdf/Dismantling%20the%20tools%20of%20oppression.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/Dismantling%20the%20tools%20of%20oppression.pdf); 'Joint observations on the human rights implications of Hong Kong's Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019,' Fair Trials, 14 June 2019, available at: <https://www.fairtrials.org/publication/joint-observations-human-rights-implications-hong-kongs-fugitive-offenders-and-mutual>

<sup>119</sup> 'PRESS RELEASE: AFTER 20 YEARS WUC PRESIDENT DOLKUN ISA HAS INTERPOL RED NOTICE REMOVED,' World Uyghur Congress, 25 February 2018, available at: <https://www.uyghurcongress.org/en/after-20-years-wuc-president-dolkun-isa-has-INTERPOL-red-notice-removed/>

<sup>120</sup> 'WUC DEEPLY CONCERNED ABOUT ELECTION OF MENG HONGWEI AS INTERPOL PRESIDENT,' World Uyghur Congress, 11 November 2016, available at: <https://www.uyghurcongress.org/en/wuc-is-deeply-concerned-about-election-of-meng-hongwei-as-INTERPOL-president/>

<sup>121</sup> Safeguard Defenders, 'UN Committee Against Torture requests Morocco halt extradition of Idris Hasan,' 21 December 2021, available at: <https://safeguarddefenders.com/en/blog/un-committee-against-torture-requests-morocco-halt-extradition-idris-hasan>

**STEP FOUR:** A Red Notice puts police in INTERPOL member states around the world on the lookout for the suspect, who may then be detained and returned to China.

Individual countries and their law enforcement have an obligation under international law to ensure they are not violating non-refoulement principles in returning someone at risk of human rights abuses. General practice is still that the host country has the authority to decide how to respond to a Red Notice. This has been crucial in protecting individuals targeted by abusive Red Notices from China, as was the case for Isa (see above) and many others who are being pursued for politically-motivated reasons.<sup>123</sup>

In March 2017, China's Top 100 list was removed from the INTERPOL website. One source told media that the China wanted to normalize anti-corruption efforts and the Red Notice list should no longer be published.<sup>124</sup>

Looking at the 2017 list of China's Top 100 "most wanted" fugitives, 40 were in the US, 26 in Canada, and 11 in New Zealand,<sup>125</sup> which is no doubt why establishing formal extradition agreements with these countries has been a priority for Beijing.

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<sup>123</sup> 'China says INTERPOL "red notice" issued for tycoon Guo Wengui,' Reuters, 19 August 2017, available at: <https://www.reuters.com/article/us-china-corruption/china-says-INTERPOL-red-notice-issued-for-tycoon-guo-wengui-idUSKBN17L12O> ; 'China Disappeared INTERPOL's Chief. The World Can't Pretend It's Business as Usual,' Human Rights Watch, 9 October 2018, available at: <https://www.hrw.org/news/2018/10/09/china-disappeared-INTERPOLs-chief-world-cant-pretend-its-business-usual>

<sup>124</sup> "'百名红通人员"从国际刑警组织网站上消失,' 25 March 2017, available at: <https://www.voachinese.com/a/red-notice-20170324/3781005.html>

<sup>125</sup> 'China's Overseas Anticorruption Operation Bags Another Suspect,' 27 September 2017, available at: <https://thediplomat.com/2017/09/chinas-overseas-anticorruption-operation-bags-another-suspect/>

## REN BIAO (任标): ONE OF CHINA'S 'MOST WANTED'



Credit: CGTN

Ren Biao (任标) was named as one of the original Top 100 most wanted in 2015. He fled China in 2014 after allegedly abusing his corporate positions to embezzle more than 100 million USD. He became a citizen of Saint Kitts and Nevis in 2013 under the nation's Citizenship by investment Program.<sup>126</sup>

Saint Kitts and Nevis does not have an extradition treaty or mutual legal assistance agreement with China and Beijing was critical of the Caribbean nation for not acting on the INTERPOL Red Notice. It is worth noting

also that Saint Kitts and Nevis remains one of the few countries in the world to maintain diplomatic relations with Taiwan and not China.

In July 2017, he returned to China. The CCDI said the news was “a warning for fugitives and proves there is no safe haven overseas.”<sup>127</sup> His lawyer stated that, “[Ren Biao] has made this decision on his own, he wants to go back to face his accusers,”<sup>128</sup> however facts at the time also point to Ren being coerced into returning.

Shortly before his “voluntary” return in 2017, according to some reports, Ren claimed that his 70-year old father had been arbitrarily detained in China. The police may have been trying to intimidate Ren and drive him out of hiding, a case of “persuaded return.”<sup>129</sup>

Ren's lawyer said that his client agreed to return to China but only on his Saint Kitts and Nevis passport and the protections he thought it afforded.

<sup>126</sup> “China confirms that ‘most wanted’ Ren Biao is back in country,” WIC News, 31 July 2017, <https://wicnews.com/world/china-confirms-that-most-wanted-ren-baio-is-back-in-country-st-kitts-and-nevis-08554111/>

<sup>127</sup> “‘Red Notice’ graft fugitive returns to China,” China Daily, 29 July 2017, [https://www.chinadaily.com.cn/china/2017-07/29/content\\_30290460.htm](https://www.chinadaily.com.cn/china/2017-07/29/content_30290460.htm)

<sup>128</sup> “Chinese-Kittitian fugitive Ren Biao willing to return to China, but ‘not in handcuffs,’” Investment Migration Insider, 9 July 2017, <https://www.imidaily.com/china/chinese-kittitian-fugitive-ren-biao-willing-to-return-to-china-but-not-in-handcuffs/>

<sup>129</sup> “Chinese fugitive hiding on tiny Caribbean island willing to return to face US\$100 million fraud accusations – but only as ‘free man,’” South China Morning Post, 9 July 2017, <https://www.scmp.com/news/hong-kong/politics/article/2101887/chinese-fugitive-hiding-tiny-caribbean-island-willing-return>



China adopted the National Supervision Law (中华人民共和国监察法) in March 2018, which established the NSC. One of its main tasks was to oversee international cooperation on anti-corruption. Xi had been calling for reforms on anti-corruption work as early as 2014 through the *Implementation Plan for the Reform of the Party Discipline Inspection System*, which supported changes to the 2003 Administrative Supervision Law.<sup>130</sup>

The NSC sits at the same level as the State Council (the executive branch of the government) and the Supreme Court. It is nominally supervised by the National People's Congress, China's rubberstamp parliament. It is important to understand that the NSC is a **Party organization** that is controlled by the Politburo Standing Committee, and is not part of the judiciary.

*Despite the now critical role played by the NSC in pursuing extraditions around the world, under the 2000 Extradition Law the NSC has no legal authority to be involved in the extradition process.*

## THE NSC VS CCDI

China often employs a dual structure in governance, with one body representing the Party, and another the State, even though they are in reality one and the same. This is the case with the NSC (a State body) and the CCDI (a Party body).

For a long time, Party members were not only subject to investigation, detention and punishment by the legal system, but also by an internal Party-run enforcement unit – the CCDI -- which aimed to counter corruption, instill political morale, and ensure loyalty. For many, this Party-run internal police force was far more fearful than any part of China's judicial system. They ran the *shuanggui* (双规) system, which facilitated serious human rights violations, including torture and other ill-treatment.<sup>131</sup> Being placed under *shuanggui* meant ending up in 'the worst place in the world', according to the wife of one of its victims.<sup>132</sup> Only after CCDI agents have finished with a suspect, are they then handed over to the police and prosecutor, for criminal proceedings.

In March 2018, the CCDI was merged and expanded with the creation of the NSC. The NSC inherited CCDI's staff, offices, computers, secret detention facilities, among other things. The key difference between the NSC and the CCDI is that the NSC was designated a State body. Effectively, its creation has expanded CCDI work to non-Party members. Any State worker, including those performing public duties of any sort such as doctors, teachers, State-owned enterprise employees and contractors working for them, can be targeted by the NSC.<sup>133</sup> The NSC also investigates and disciplines the judicial system, such as the police, prosecutor's offices and courts.<sup>134</sup>

All NSC data is released by the CCDI.

<sup>130</sup> 'Sapio, Flora, "The National Supervision Commission: A History of Power Limitations and Untapped Possibilities (April 27, 2019).

<sup>131</sup> 'Special Measures: Detention and Torture in the Chinese Communist Party's Shuanggui System.' Human Rights Watch, 6 December 2016, available at: <https://www.hrw.org/report/2016/12/06/special-measures/detention-and-torture-chinese-communist-partys-shuanggui-system>

<sup>132</sup> 'Shuanggui: The harsh, hidden side of China's war on graft, and how one man disappeared into it,' Globe and Mail, 24 March 2017, available at: <https://www.theglobeandmail.com/news/world/shuanggui-and-wilson-wang-in-china/article34400855/>

<sup>133</sup> 'Follow-up Submission to select UN Special Procedures on China's National Supervision Commission and its detention tool liuzhi – Cooperation with UNODC,' Safeguard Defenders, available at: <https://safeguarddefenders.com/sites/default/files/pdf/Submission%20to%20UN%20Special%20Procedures%20on%20NSC%20and%20UNODC%20cooperation.pdf>

<sup>134</sup> Ibid

Chapter VI International Cooperation Against Corruption is the most relevant section in the National Supervision Law for understanding the NSC's role in extraditions.

## International Cooperation against Corruption



**ARTICLE 50** The National Supervisory Commission<sup>135</sup> shall make overall planning and coordinate international anti-corruption communication and cooperation with other nations, regions and international organizations, and organize the implementation of international anti-corruption treaties.

**ARTICLE 51** The National Supervisory Commission shall organize and coordinate with relevant parties to strengthen cooperation with relevant countries, regions and international organizations in such fields as anti-corruption law enforcement, extradition, judicial assistance, custody transfer of sentenced persons, asset recovery, and information exchange.

**ARTICLE 52** The National Supervisory Commission shall strengthen the organization and coordination of anti-corruption efforts such as international pursuit of stolen assets and fleeing persons and prevention of escape, and urge relevant entities to effectively conduct relevant work.

(1) Cooperating with foreign parties to search and arrest the escaped person, if the person under investigation has escaped outside the country (territory) and concrete evidence has been obtained in a case of any major duty-related crime, such as corruption, bribery, neglect of duty, and malfeasance in office.

(2) Requesting the country where stolen assets or goods are located to make inquiries about, freeze, impound, confiscate, recover or return the assets involved in the case.

(3) Making inquiries about and monitoring the entry and exit from the country (territory) of public officials suspected of any duty-related crime and related persons and the cross-border flow of funds, and setting up procedures for preventing escape in the course of case investigation.<sup>136</sup>

The CCDI has issued an interpretation of the Supervision Law, which sheds a light on China's conviction in its right to pursue suspects abroad by all available means, including extrajudicial mechanisms, in addition to extradition.<sup>137</sup>

The official interpretation of Article 52 acknowledges extradition as the formal, legal channel for "fugitive repatriation" and the "ideal way to acquire international criminal judicial assistance to carry out overseas fugitive repatriation." The interpretation outlines five distinct categories, of which the fifth category is the most concerning in explicitly outlining kidnapping (see below).

<sup>135</sup> The NSC is sometimes translated as National Supervisory Commission

<sup>136</sup> National Supervision Law of the People's Republic of China, available at: <https://www.legal-tools.org/doc/ef4c4d/pdf/>

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**THE FIRST CATEGORY IS FORMAL EXTRADITION (一是引渡)**, carried out under “bilateral or multilateral treaties or reciprocity, requesting the country where the overseas suspects are located, and transferring the suspected criminals back for prosecution and punishment. Extradition has strict criteria. The current main principles include the principle of non-extradition of political prisoners, the principle of non-extradition of death row prisoners, the principle of non-extradition of national citizens, and the principle of double criminality.”

**THE SECOND CATEGORY IS REPATRIATION (二是遣返)**, carried out under immigration laws and working within legal systems and based on identity fraud, such as forged passports or related immigration law infractions, such as visa overstays. In some countries, the forced removal of an individual based on immigration law infractions and not a formal agreement might also rise to the level of a disguised extradition.

**THE THIRD CATEGORY IS REMOTE PROSECUTION (三是异地起诉)**, carried out through coordination with the criminal justice system of a third country and where, following conviction and sentencing, the Chinese fugitive would normally face compulsory repatriation to China.

**THE FOURTH CATEGORY IS PERSUADING TO RETURN (四是劝返)**. The CCDI explicitly notes that this category is considered “ideological and political work.” The official interpretation however does not reveal that this method is the one where family members in China are often threatened or harassed as part of the intimidation process to persuade the fugitive to return.

<sup>137</sup> 《中华人民共和国监察法》释义:第六章反腐败国际合作第五十二条, 4 July 2018, [https://www.ccdi.gov.cn/djfg/fgsy/201807/t20180704\\_175037.html](https://www.ccdi.gov.cn/djfg/fgsy/201807/t20180704_175037.html)



## The fifth category includes state-sanctioned kidnapping

### THE FIFTH CATEGORY IS “IRREGULAR MEASURES (五是非常规措施).

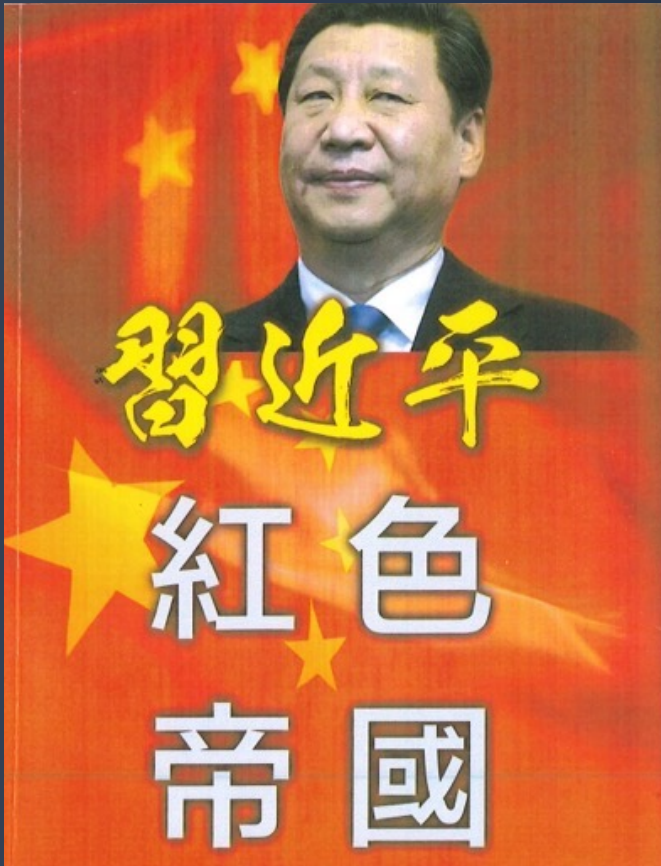
There are two irregular measures under the interpretation:

(1) kidnapping the fugitive from the host country and bringing them back to China (绑架，采用绑架的手段将在逃人员缉捕回国);

(2) “trapping and capturing,” which means luring suspects to a third country or territory, the high seas, international airspace, or otherwise territory that has a formal extradition treaty with China or is a known ally of China’s, where the forced return or formal extradition is possible. The CCDI makes no attempt to hide the fact that “irregular measures” are extrajudicial in nature, only noting that such methods “could break the law in host countries and lead to the crime of illegal detention or kidnapping because the investigation activities are not approved by a sovereign state. They could also cause diplomatic disputes. Therefore, in practice, kidnapping or trapping and capturing are rarely used.” (诱捕，将犯罪嫌疑人引诱到诱骗国境内、国际公海、国际空域或有引渡条约的第三国，然后进行逮捕或引渡。由于未经主权国家的批准擅自开展调查活动，会触犯所在地国家刑事法律，构成非法拘禁罪或绑架罪，引发外交纠纷，因此，实践中，绑架或诱捕手段很少使用)。

For example, this second category could ensure a suspect in the US, who could not be extradited to China from the US, is instead extradited to Thailand, where he is then much easier to extradite onwards to China (Below). **That the use of such “irregular measures,” including state-sanctioned kidnapping or overt manipulation of extradition agreements is sanctioned by the state, this should raise serious red flags about China’s entire detention, repatriation, and extradition regime.**

## CHI DAQIANG: CHINA'S 'IRREGULAR MEASURES'



The case of book entrepreneur and publisher Chi Daqiang<sup>138</sup> (迟大强) is emblematic of China's anything goes approach to fugitive repatriation including the use of intermediary countries and INTERPOL Red Notices.

In 2015, Chi published a book, 习近平红色帝国 (Xi Jinping's Red Empire) that was critical of Xi Jinping and the Communist Party of China. Chinese police detained and tortured him. He later fled the country for the US, traveling on his Marshall Islands passport.

Soon after his arrival in the US, China issued a Red Notice for him, accusing him of economic crimes. Initially, US Immigration and Customs Enforcement (ICE) agents in Washington State detained Chi, however his legal defense secured the removal of the Red Notice based on Convention Against Torture protections. They argued that he faced substantive grounds for fearing he was at risk of torture if he was

returned to China. Around the same time, Thailand also issued a Red Notice for Chi, also accusing him of economic crimes.

The Thai Red Notice alleges that Chi had defrauded Kok Yeow Chew, a Singaporean-Canadian citizen of 700,000 Thai Baht (about 20,700 USD). They claimed that the two men had met in Thailand in May 2016 during which Chi had convinced Chew to enter into a fraudulent real estate deal in the US.

There were several discrepancies in the Thai Red Notice including the fact that Chi was not in Thailand at the time of that alleged meeting. While this may have been a clerical error, it points to the fact that the abusive Red Notice has likely been rushed through.

The amount of the alleged fraud is also irregular, as this is an extremely low figure to warrant the issuance of an international Red Notice and also ground for a formal extradition request.

Despite these concerns, ICE detained Chi again, placing him in an immigration detention facility in Washington State to await trial on whether he could be sent to Thailand based on the Red Notice. A big part of the problem here was the failure to acknowledge the Thai Red Notice as not only a questionable document in terms of its allegations but more importantly as an obvious example of a friendly third party acting on behalf of a request from China.

There is no doubt that had Chi been extradited to Thailand, then upon landing in the Southeast Asian country he would have swiftly been formally extradited to China, or returned via other means. We should therefore see this case as an example of China's fifth category: "trapping and capturing".

In the end, the judge in Chi's case ruled in October 2021 to reject Thailand's request on the grounds that the US should not send someone who is neither a citizen nor resident of the country issuing the Red Notice (in this case Thailand) to that country without following a formal extradition process.

<sup>138</sup> For full disclosure, Safeguard Defenders provided expert testimony in Chi Daqiang's case.

## Other laws that govern NSC's role in extraditions

In addition to the National Supervision Law, there are several other laws that are relevant to understanding the role played by the NSC in China's international judicial and law enforcement activities.

The Law on International Criminal Judicial Assistance (国际刑事司法协助法), adopted in October 2018, further empowered the NSC to work on international criminal judicial assistance. The SPC and SPP issued judicial interpretations of the confiscation of illegal income (违法所得没收程序司法解释), urging local authorities to recover stolen money from fugitives. As part of this process the CCDI and the NSC drafted Regulations for Disciplinary Inspection and Supervisory Organs Handling Foreign-related Anti-corruption Cases Such as Chasing Fugitives and Recovering Stolen Money (Trial)" (纪检监察机关办理反腐败追逃追赃等涉外案件规定 (试行)).<sup>139</sup> This regulation covers the procedures for sending people overseas to "persuade to return" or investigate and collect evidence.

Despite documented human rights concerns with the NSC, and the pause these should have on international cooperation with the NSC, in October 2019 the UN Office of Drugs and Crime signed a Memorandum of Understanding with the NSC on cooperating in combatting corruption. However, the ODC has not made the details of this MOU publicly available, despite numerous attempts by Safeguard Defenders and others. This raises additional concerns over not only the international involvement of Chinese actors with a record of human rights abuse but also of the lack of transparency by otherwise rule of law respecting international institutions. Without greater transparency, it is impossible to understand the extent of potential abuses introduced by the NSC involvement in international anti-corruption work.<sup>140</sup>

China has also signed memorandums of understanding on anti-corruption enforcement cooperation with the judicial and law enforcement agencies in nine countries, including Belarus, Laos, Vietnam, Argentina, Australia, Denmark, Thailand, the Philippines, and Kazakhstan.

The main problem with the NSC's role in extraditions -- in addition to the legal challenges noted below, namely that it is not authorized to do so under the Extradition Law -- are the widespread and serious human rights abuses carried out under its custodial system, known as *Liuzhi* (留置).

*Liuzhi* is essentially shuanggui renamed. The shadowy Shuanggui system of enforced disappearances of suspect Party members was responsible for grave human rights violations, including torture. As shuanggui had no legal basis, it clearly did not fit with Xi Jinping's rhetoric of rule of law.

*Liuzhi* was launched in 2016 with the rollout of pilot programs in Beijing, Shanxi and Zhejiang provinces, which were then expanded in 2017. In Beijing alone, according to official statistics, the number of officials put under supervision under the *liuzhi* system went from around 200,000 to nearly one million. While these figures do not refer to people in actual detention, they are a clear indication of how that the pilot and later legal mechanism expanded the target demographic of potential secret detentions massively to include all staff of Party organs, legislatures, courts, judges, political advisory bodies, managerial staff at state-owned enterprises and public institutions such as hospitals or universities, and others.

<sup>139</sup> 纪检监察机关办理反腐败追逃追赃等涉外案件规定 (试行), 21 August 2019, available at: <http://fanfu.people.com.cn/n1/2019/0821/c64371-31307519.html>

<sup>140</sup> Safeguard Defenders, 'Call on UNODC to end partnership with China's NSC,' 3 November 2020, available at: <https://safeguarddefenders.com/en/blog/call-unodc-end-partnership-chinas-nsc>

When the National People's Congress convened in March 2018, *liuzhi* went from being a pilot program to becoming law with the passing of the National Supervision Law. The stated purpose was to unify previously disjointed supervisory functions. However, the main reason was to take a highly abusive system for coercive custody that previously existed outside legislative authority and legitimize it to make it more palatable to international judicial and law enforcement cooperation.

Under *liuzhi* the suspect can be held in custody at a secret location, at the discretion of the investigating authority, for up to six months, during which time the victim is often kept in solitary confinement and held incommunicado without access to family members or a lawyer, at risk of torture and ill-treatment. Although, the National Supervision Law states that the family or work units of an individual held under *liuzhi* should be notified within 24 hours of their detention, it also provides an exception for those cases where this might impede the investigation. This statutory exception to fundamental procedural safeguards meant to prevent enforced disappearances and torture has in practice been normalized.

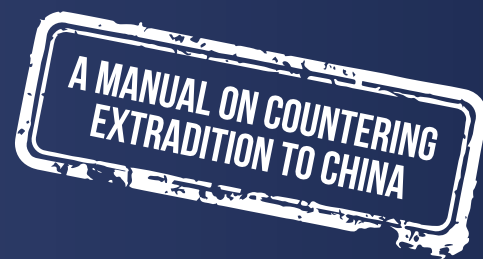
Under *liuzhi*, the victim is held in solitary confinement, the only company being the guards and interrogators. This violates international norms, including the Istanbul Statement on the Use and Effect of Solitary Confinement and the Special Rapporteur on Torture (2011), which hold that prolonged isolation, defined as longer than 15 days, fundamentally violates the absolute prohibition on torture and other cruel, inhuman, or degrading treatment. Solitary confinement is only to be used in exceptional cases and as a last resort for as short a time as possible. *Liuzhi* is legalized for six months.

Speaking on the need to expand international cooperation, and influence in extradition work in a 2018 article for China Discipline Inspection, a CCDI-affiliated publication, La Yifan, Director of the CCDI International Cooperation Bureau, wrote:

We must strengthen international cooperation in anti-corruption comprehensive law enforcement, and continue to weave an international network to hunt down fugitives. We must strengthen political leadership, firmly hold the key of signing extradition treaties, promote relevant departments to speed up negotiation of new extradition treaties, and strive to negotiate and sign more bilateral extradition treaties. Give full play to the role of existing bilateral extradition treaties and explore cooperation on extradition based on the United Nations Convention against Corruption. Promote the conclusion of more criminal judicial assistance treaties and arrangements, and continue to expand the "friend's circle." Deepen anti-corruption law enforcement exchanges and cooperation, improve the anti-corruption law enforcement cooperation mechanism between China and the US, and explore the establishment of joint persuasive procedures. Promote the establishment of a comprehensive anti-corruption law enforcement cooperation mechanism with Canada, Australia, New Zealand and other countries, as well as Hong Kong and Macau. Strengthen cooperation in asset recovery, and organize training workshops on asset recovery through APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET).<sup>143</sup>

We will turn in the next chapter to explore China's domestic criminal justice system and rampant human rights abuses, as they particularly pertain to the issue of diplomatic assurances and whether China should be trusted to regarding any guarantees of fair treatment for repatriated individuals. In short, we will see that even though China's extradition law itself may comport with international standards, domestically China is entirely in conflict with international human rights norms.

<sup>139</sup> '以永远在路上的执着不断推动国际追逃追赃,' 2018, available at: [http://zgjjc.ccdi.gov.cn/bqml/bqxx/201802/t20180211\\_163860.html](http://zgjjc.ccdi.gov.cn/bqml/bqxx/201802/t20180211_163860.html).



# CHAPTER 3. CHINA'S EXTRADITION PROBLEM

## **Grounds for Rejection I: The Right to a Fair Trial**

- International standards on the Right to a Fair Trial
- The denial of the right to a fair trial in China
  - The right to be tried before an independent and impartial court
  - Access to legal representation and legal aid of one's own choosing
  - The right to be presumed innocent until proven guilty and to be free of coercion to testify against yourself

## **Grounds for Rejection II: Torture**

- International norms on torture
- Widespread and Systematic use of torture in China

## **Empty Promises: Why Diplomatic and Consular Guarantees Cannot be Trusted**

- Executed Despite Assurances
- Denial of Consular Access
  - Michael Spavor and Michael Kovrig (Canada)
  - Huseyin Celil (Canada)
  - Yang Hengjun (Australia)
  - Stern Hu (Australia)
  - Gui Minhai (Sweden)
- China & Hong Kong: Broken assurances



In September 2021, the British Foreign, Commonwealth & Development Office (FCDO) contacted a number of UK citizens, including members of parliament, to warn them about travelling to a third country with an extradition treaty with China or Hong Kong SAR. The persons, all of whom are critics of the Chinese Communist Party, were told that they could be extradited to China to face charges for breaking Hong Kong's new national security law, even if their actions had taken place outside China and Hong Kong.<sup>144</sup>

# GOODS FOR REJECTION I: THE RIGHT TO A FAIR TRIAL

## “International standards on the right to a fair trial”

The benchmarks of a fair trial are the right to be present in court, or not to be subjected to trial in absentia; to be allowed to have a lawyer of one's choosing; not to have one's trial delayed; to be tried in public before an independent and impartial court; to be presumed innocent until proven guilty; and to be free of coercion to testify against yourself. The last, obviously, includes the prohibition of forced confessions, often the result of torture.<sup>145</sup>

This right extends equally to foreign nationals, migrants and stateless persons.

At the same time, the right to a fair trial is about more than just the procedural safeguards. It relates to the rule of law in general and the entire legal-political system. In other words, it relates to the independence of lawyers, prosecutors and judges and whether they are free of political pressure, intimidation or control.<sup>146</sup>

<sup>144</sup> 'Hong Kong Critics Warned by U.K. to Avoid Extradition Locations,' Bloomberg, 22 September 2021, available at: <https://www.bloomberg.com/news/articles/2021-09-22/hong-kong-critics-warned-by-u-k-to-avoid-extradition-locations-due-to-china>; 'Britain warns MP, activists against travel to 50 countries over China risk,' Sydney Morning Herald, 24 September 2021, available at: <https://www.smh.com.au/world/europe/britain-warns-mp-activists-against-travel-to-50-countries-over-china-risk-20210924-p58udf.html>

<sup>145</sup> See also, 'Amnesty International fair trial manual, second edition,' Amnesty International, 2014, available at: <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>; Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Office of the High Commissioner for Human Rights, available at: <https://www.ohchr.org/Documents/Publications/training9chapter6en.pdf>

<sup>146</sup> 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 10, Article 10: Right to a Fair Trial,' Office of the High Commissioner for Human Rights, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23898&LangID=E>

These protection principles are established under international and regional human rights instruments, as follows:

**“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>147</sup>**

**- The Universal Declaration of Human Rights (Article 10)**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

<sup>147</sup> Universal Declaration of Human Rights, Article 10, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.<sup>148</sup>

**- International Covenant on Civil and Political Rights (Article 14)**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>149</sup>

**International Covenant on Civil and Political Rights (Article 26)**

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.<sup>150</sup>

**General Comment No. 32 on Article 14:  
Right to equality before courts and tribunals and to a fair trial,**

<sup>148</sup> ICCPR, Article 14.

<sup>149</sup> ICCPR, Article 26.

<sup>150</sup> Human Rights Committee General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, available at: [https://www.un.org/ga/search/view\\_doc.asp?symbol=CCPR/C/GC/32](https://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/GC/32)



The UN Human Rights Committee explains that the right to equality before the law does not apply only to courts and tribunals but “must **also be respected whenever domestic law entrusts a judicial body with a judicial task.**”<sup>151</sup>

The right to a fair trial is not limited to citizens. It must **apply to all individuals** “regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.”<sup>152</sup>

The requirement of a fair and public hearing before a competent, independent, and impartial judiciary is “an **absolute right** that is not subject to any exception,” according to the Committee.

States should take specific measures to guarantee **the independence of the judiciary**, including through constitutional or other legislative frameworks establishing protocols for independence. “A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”<sup>153</sup>

**Public hearings** are also a crucial safeguard for ensuring transparency and independence, and as such the Human Rights Committee has furthermore noted that while courts may exclude the public from parts of hearings on grounds of personal privacy or national security, this is only permissible in cases that do not arbitrarily violate the principles of the ICCPR. The expectation of public hearings as a fundamental component of the right to a fair trial is an international customary norm and should therefore be extended even to countries that are not parties to the ICCPR, such as China.

Apart from limited circumstances, “hearings must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, **the judgment**, including the essential findings, evidence and legal reasoning **must be made public.**”<sup>154</sup>

The Human Rights Committee concludes that the provisions of Article 14 bear an interconnected relationship with other substantive human rights guaranteed within the ICCPR. These include the **freedom from arbitrary detention** and the fundamental **prohibition against torture**, for example. This is of particular concern in cases where the accused faces lengthy imprisonment or the death penalty, or in cases where the rights to equality before the law and a fair trial have been denied. In such situations, the resulting sentencing would only compound these violations and give birth to new and more serious deprivations of rights.

There are also a number of non-treaty-based standards relating to the right to a fair trial.

The **Basic Principles on the Independence of the Judiciary**<sup>155</sup> recognizes the right to be tried before an independent and impartial court is a fundamental requirement of the right to a fair trial.

On ensuring the independence of judges, it says the “independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country,”<sup>156</sup> and that the

<sup>151</sup> HRC, General Comment No. 32., para 7.

<sup>152</sup> HRC, General Comment No. 32., para 9.

<sup>153</sup> HRC, General Comment No. 32., para 19.

<sup>154</sup> HRC, General Comment No. 32., para 29.

<sup>155</sup> ‘Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,’ Office of the High Commissioner on Human Rights, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

<sup>156</sup> Basic Principles on the Independence of the Judiciary, Principle 1.

judiciary shall decide matters impartially, “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”<sup>157</sup> In addition, “there shall not be any inappropriate or unwarranted interference with the judicial process,”<sup>158</sup> and that “the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”<sup>159</sup>

The **Bangalore Principles of Judicial Conduct** says that “judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.”

A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason... A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.<sup>60</sup>

**Bangalore Principles, Values 1.1 & 1.3**

Impartiality applies not only to the judicial decisions themselves but also to the process by which decisions are made. An independent and impartial judiciary shall perform all their duties “without favour, bias or prejudice.”<sup>161</sup>

**“The Communist Party of China’s absolute leadership over political and legal systems must be upheld, Xi Jinping, general secretary of the CPC Central Committee, said in an instruction” and the “legal system should uphold the Party’s absolute leadership.”**

**– Xi Jinping in 2018<sup>162</sup>**

Just as a fair trial requires an independent judiciary, it also calls for States to respect the role and independence of **lawyers**.

**Basic Principles on the Role of Lawyers<sup>163</sup>** reaffirms that “all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”<sup>164</sup> Governments “shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction.”<sup>165</sup>

<sup>157</sup> Basic Principles on the Independence of the Judiciary, Principle 2.

<sup>158</sup> Basic Principles on the Independence of the Judiciary, Principle 4.

<sup>159</sup> Basic Principles on the Independence of the Judiciary, Principle 6.

<sup>160</sup> ‘THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 2002,’ UN Office of Drugs and Crime, available at: [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf), Values 1.1 and 1.3.

<sup>161</sup> Bangalore Principles, Value 2.1.

<sup>162</sup> “CPC must lead in political, legal area, Xi says,” China Daily, 23 January 2018, [www.chinadaily.com.cn/a/201801/23/WS5a66757da3106e7dcc135d74.html](http://www.chinadaily.com.cn/a/201801/23/WS5a66757da3106e7dcc135d74.html)

<sup>163</sup> ‘Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990,’ Office of the High Commissioner for Human Rights, available at: <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>

<sup>164</sup> Basic Principles on the Role of Lawyers, Principle 1.

<sup>165</sup> Basic Principles on the Role of Lawyers, Principle 2.

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

#### Basic Principles on the Role of Lawyers, Principle 7

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

#### Basic Principles on the Role of Lawyers, Principle 8

**Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**<sup>166</sup> introduces a series of principles on ensuring equal access to **legal aid** as an “essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is the foundation for the enjoyment of other rights, including the right to a fair trial.”<sup>167</sup> Here legal aid includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses. The principles call upon States to “guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution,”<sup>168</sup> and that States “should **not interfere with the organization of the defence** of the beneficiary of legal aid or with the **independence of his or her legal aid provider**.”<sup>169</sup> The right to legal aid should apply promptly and at all stages of the criminal justice process, and without discrimination.

**Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**<sup>170</sup> lays out basic principles on how detainees and prisoners should be treated, which includes a right to be free from torture and other ill-treatment and to be promptly informed of the reason for their detention and to be able to challenge their detention before an independent and impartial court.

**The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)**<sup>171</sup> go into more detail on the fundamental prohibition on torture and ill-treatment, including the prohibition on **prolonged solitary confinement**. Among its provisions that are of particular importance to China are the requirements for file management to be transparent and precise. This should include details on the identity of the detainee, reasons for detention and records of any mistreatment, so that their fate and whereabouts can be known by lawyers and family members.<sup>172</sup> It also says that prisoners shall be allowed to communicate with their family and friends, a safeguard against **secret and incommunicado detention**.

<sup>166</sup> ‘United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,’ United Nations Office of Drugs and Crime, available at: [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

<sup>167</sup> Principles on Legal Aid, page 2.

<sup>168</sup> Principles on Legal Aid, Principle 1, para 14.

<sup>169</sup> Principles on Legal Aid, Principle 2, para 16.

<sup>170</sup> ‘Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988,’ Office of the High Commissioner for Human Rights, available at: <https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf>

<sup>171</sup> ‘United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/Res/70/175, available at: <https://undocs.org/A/RES/70/175>; see also, ‘THE NELSON MANDELA RULES,’ UN Office of Drugs and Crime, available at: <https://www.unodc.org/unodc/en/justice-and-prison-reform/NMRules.html>

<sup>172</sup> For the full list of Prisoner file management rules see Rule 6-10, (the Nelson Mandela Rules), A/Res/70/175, available at: <https://undocs.org/A/RES/70/175>

Safeguard Defenders has documented at length the manipulation of file management in China's criminal justice system, and in particular to hold detainees under false names.<sup>173</sup>

## The denial of the right to a fair trial in China



### **“In China, the criminal justice system is a method of control.”**

– Dr. Grace (Yu) Mou author of *The Construction of Guilt in China: An Empirical Account of Routine Chinese Injustice*, 2021<sup>174</sup>

In 2016, the UN Committee Against Torture<sup>175</sup> addressed minimum fair trial standards in China, noting:

- There is no legal right to access a lawyer immediately, only after 48 hours, and after first initial interrogation (Criminal Procedure Law (CPL) article 34).
- In certain cases, the right to legal counsel is denied entirely (lawyers need State permission, which is rarely given).
- Access to legal counsel is mandated only for those facing life imprisonment or death penalty (CPL article 35), many others go through process without.
- Access to legal counsel can be denied to those facing national security charges, terrorism, or large-scale bribery (CPL article 39).
- The judicial system *“Overly relies on confessions as the basis for convictions”*
- *“It expresses concern that the majority of allegations of torture and ill-treatment take place during pre-trial and extra-legal detention, and involve police officers”, and who is “without effective control by procuratorate and the judiciary”. “This overarching power is reportedly further intensified by the public security’s joint responsibilities over the investigation and the administration of detention centre” and which “creates an incentive for the investigators to use detention as a means to compel detainees to confess”.*
- *“The Committee continues to be concerned that the dual functions of procuratorates, namely, prosecution and pre-indictment review of the police investigation, creates a conflict of interest that could taint the impartiality of its actions, even if carried out by different departments. It takes note, furthermore, of the State party’s position that the Chinese Communist Party Politics and Law Committees coordinate the work of judicial bodies without directly taking part in investigations or suggesting lines of action to judges. The Committee is concerned, however, at the necessity of keeping a political body to coordinate the proceedings, with a potential to interfere in judicial affairs, particularly in cases of political relevance.”*
- China needs to, the Committee concludes, take step to ensure that: *“Chinese Communist Party Politics and Law Committees are prevented from undertaking inappropriate or unwarranted interference with the judicial process”*

<sup>173</sup> See Access Denied series of reports, in particular ‘China’s Vanishing Suspects,’ 2020, available at: [https://safeguarddefenders.com/sites/default/files/pdf/ACCESS\\_DENIED\\_%231\\_SGL\\_EN.pdf](https://safeguarddefenders.com/sites/default/files/pdf/ACCESS_DENIED_%231_SGL_EN.pdf)

<sup>174</sup> Grace (Yu) Mou talk at the US-Asia Law Institute, 6 October 2021, available at: <https://usali.org/event-recordings>

<sup>175</sup> ‘Concluding observations on the fifth periodic report of China, CAT/C/CHN/CO/5, Committee Against Torture, 3 February 2016, available at: <https://undocs.org/CAT/C/CHN/CO/5>

## The right to be tried before an independent and impartial court

China's Constitution claims that: "The people's courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual."<sup>176</sup> However, no entities have been given the task of enforcing the Constitution and courts are not empowered to conduct judicial reviews to assess Constitutionality of laws or practices.<sup>177</sup>

In reality, the judiciary is subordinate to the Chinese Communist Party, with judges regularly receiving "political guidance on pending cases, including instructions on how to rule, from both the government and the CCP, particularly in politically sensitive cases."<sup>178</sup>

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**"The separation of powers only takes place in terms of organizational structure but not in terms of functions since the legislative process also remains under the control of the Communist Party of China."**

**- Bridging the EU-China's gap on the Rule of Law<sup>179</sup>**

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Arguably any case arising from lengthy diplomatic negotiations and extradition should be considered a politically-sensitive case.

A CCP organ known as the *Political and Legal Affairs Commission* (中共中央政法委员会) oversees the courts, prosecutors' offices and police. Although the Commission's outward focus is primarily ideological, "they can influence the outcome of cases, particularly when the case is sensitive or important. Judicial surveys suggest that direct Party interference is less common than local government interference, but this distinction is clouded in practice, as most key government officials are also Party members."<sup>180</sup>

The Political and Legal Affairs Commission is directly under the control of the Party's Central Committee, the CCP's highest organ. There are commissions at every level of jurisdiction. The chairman of the commission is traditionally also a member of the MPS. It offers guidance on how to handle precedent-setting cases and ensuring the Party's leadership over, and guidance of, law enforcement in general.

The role of these commissions is established in internal Chinese Communist Party rules,<sup>181</sup> not in law as expected according to international standards.

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<sup>176</sup> CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, available at: [www.npc.gov.cn/zgrdw/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm)

<sup>177</sup> 'DFAT Country Information Report People's Republic of China,' Australia Department of Foreign Affairs and Trade, 3 October 2019, available at: <https://www.dfat.gov.au/sites/default/files/country-information-report-china.pdf>, p. 65.

<sup>178</sup> '2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet),' United States Department of State, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/china/>

<sup>179</sup> Matthieu Burnay, Joëlle Hivonnet, Kolja Raube, *Bridging the EU-China's gap on the Rule of Law?*, Springer, 2015, [https://www.researchgate.net/publication/283004808\\_Bridging\\_the\\_EU-China's\\_gap\\_on\\_the\\_Rule\\_of\\_Law](https://www.researchgate.net/publication/283004808_Bridging_the_EU-China's_gap_on_the_Rule_of_Law)

<sup>180</sup> 'Judicial Independence in the PRC,' Congressional Executive Commission on China, available at: <https://www.cecc.gov/judicial-independence-in-the-prc>

<sup>181</sup> <http://news.12371.cn/dzybmbdj/>

China's legal system cannot be characterised as a fully-fledged rule of law system against Western standards, due to the lack of separation of powers, supremacy of law, legal certainty and judicial independence.

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**“China's legal system cannot be characterised as a full-fledged rule of law system against Western standards, due to the lack of separation of powers, supremacy of law, legal certainty and judicial independence.”**

**- Bridging the EU-China's gap on the Rule of Law<sup>182</sup>**

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Appointments, promotions, demotions, etc. within the judicial system are largely made by the CCP's Organization Department (a body that oversees the career of Party members). Judges who fail to rule in the way they are “instructed” will face adverse impacts on their career prospects. It is therefore functionally impossible to guarantee independence and impartiality of the judiciary.

The prosecutors' appraisal system puts further pressure on prosecutors not have their cases acquitted. Acquittal can have a negative influence on career progression. This influences the prosecutors' selection of cases, noted below, but also forces prosecutors to work closely with police, especially in cases where the evidence is weak, and rather than relying on evidence to privilege confessions.<sup>183</sup>

Even the discussion of judicial independence is considered a sensitive topic and is tightly controlled in universities and media. Since at least the 2013 internal Party memo known as Document Number 9,<sup>184</sup> China has associated judicial independence with “promoting Western Constitutional Democracy: An attempt to undermine the current leadership and the socialism with Chinese characteristics system of governance.”<sup>185</sup>

The fact that judicial independence conflicts with the Party's ideology and, as such, is seen as an inherent threat, should be a clear indication that China does not intend to improve its criminal justice system to follow international norms on equality before the law and the right to a fair trial. By extension, therefore, any diplomatic assurance from China regarding a fair trial, can never be credible.

International standards, as described above, hold that hearings should be conducted in public or under limited circumstances they may be closed but only for periods as short as possible. However, closed or secret trials, especially for politically-sensitive cases, are now the norm rather than the exception.<sup>186</sup> This includes for foreign nationals, even when binding bilateral consular agreements demand public hearings. This is explored in greater detail below.

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<sup>182</sup> Matthieu Burnay, Joëlle Hivonnet, Kolja Raube, Bridging the EU-China's gap on the Rule of Law?, Springer, 2015, [https://www.researchgate.net/publication/283004808\\_Bridging\\_the\\_EU-China's\\_gap\\_on\\_the\\_Rule\\_of\\_Law](https://www.researchgate.net/publication/283004808_Bridging_the_EU-China's_gap_on_the_Rule_of_Law).

<sup>183</sup> For a detailed discussion of the lack of prosecutorial independence see The Construction of Guilt in China An Empirical Account of Routine Chinese Injustice, Grace (Yu) Mou, Bloomsbury Publishing 2020.

<sup>184</sup> ‘China Takes Aim at Western Ideas,’ New York Times, 19 August 2013, available at: <https://www.nytimes.com/2013/08/20/world/asia/chinas-new-leadership-takes-hard-line-in-secret-memo.html>.

<sup>185</sup> ‘Document 9: A ChinaFile Translation,’ China File, 8 November 2013, available at: <https://www.chinafile.com/document-9-chinafile-translation>.

<sup>186</sup> ‘China holds a secret trial for a rights lawyer after 3 years in detention. It backfired,’ Washington Post, 27 December 2018, available at: [https://www.washingtonpost.com/world/china-holds-a-secret-trial-for-a-rights-lawyer-after-3-years-in-detention-it-backfired/2018/12/27/884d8b6a-09a9-11e9-892d-3373d7422f60\\_story.html](https://www.washingtonpost.com/world/china-holds-a-secret-trial-for-a-rights-lawyer-after-3-years-in-detention-it-backfired/2018/12/27/884d8b6a-09a9-11e9-892d-3373d7422f60_story.html); ‘Trials in China Kept Secret by Silencing Lawyers,’ Human Rights Watch, 22 January 2019, available at: <https://www.hrw.org/news/2019/01/22/trials-china-kept-secret-silencing-lawyers>; ‘China stepping up use of secret detention without trial, report warns,’ The Guardian, 22 June 2021, available at: <https://www.theguardian.com/world/2021/jun/22/china-stepping-up-use-secret-detention-without-trial-report-warns>.

## Access to legal representation and legal aid of one's own choosing

As Safeguard Defenders has documented in *Access Denied 3: China's Legal Blockade*, China routinely denies access to legal counsel during the investigation phase by claiming vague and overbroad exceptions to the law based on national security. These exceptions are not in line with international norms and constitute an arbitrary denial of the right to legal counsel.

Secondly, following lengthy periods of incommunicado detention, there is a documented trend of Chinese authorities forcing rights defenders to fire their chosen lawyers or of the police or other authorities producing fraudulent papers claiming the detainees have chosen to fire their lawyers. In a number of cases, such as with human rights lawyer Yu Wensheng, the detainee had actually made a recorded testimony before arrest that if he ever “fired his chosen lawyer,” it would only have been as a result of suffering torture to do so.<sup>187</sup> We see a trend of China intimidating or torturing detainees, made all the more possible through lengthy incommunicado detention, to renounce their chosen lawyers.

At the same time, China has arbitrarily disbarred rights lawyers and others who have taken on sensitive cases, arguably in a move meant to intimidate other legal representatives from refusing to take politically sensitive cases in the future, and therefore also interfering with human right defenders' right to access to legal counsel of their choosing.<sup>188</sup>

Defense attorneys are almost never permitted to cross-examine in court, a moot point in that by some accounts only 5 percent of witnesses even appear in court. In China, the majority of evidence in criminal cases is written records, which defense attorneys are not only often refused from full access but Chinese law is used to threaten defense attorneys against challenging the state's evidence. Article 306 of the Criminal law penalizes perjury with up to three years imprisonment, and according to legal scholars, Chinese prosecutors have used the threat of imprisonment of perjury to intimidate defense attorneys against uncovering contradicting evidence or refuting evidence collected by the state.<sup>189</sup>

In China, lawyers are required to be members of the CCP-controlled All China Lawyers Association (中华全国律师协会). Since 2012, the Ministry of Justice has also required lawyers to pledge their loyalty to the CCP when registering or during the annual renewal of their lawyers' licenses. The oath includes: “I promise to faithfully fulfill the sacred mission of socialism with Chinese characteristics ... loyalty to the motherland, its people, and uphold the leadership of the Communist Party of China.”<sup>190</sup> At the same time, law firms with more than three employees must form Party units within the law firm.<sup>191</sup>

Human rights lawyers in China have increasingly been targeted by campaigns of harassment, intimidation, arbitrary detention and imprisonment. In 2015, hundreds of human rights lawyers and legal aid practitioners were arrested and imprisoned in what came to be known as the “709 Crackdown”. Many of them have since been unable to renew their license to practice law following release.<sup>192</sup> This has further decreased the number of human rights lawyers willing to take on more sensitive cases.

As noted above, defense attorneys in all criminal cases, not only politicized trials of human rights

<sup>187</sup> ‘Detained Chinese Rights Lawyer ‘Fires’ Defense Team Under Suspected Duress,’ Radio Free Asia, 23 April 2021, available at: <https://www.rfa.org/english/news/china/yuwensheng-duress-04232018130813.html>

<sup>188</sup> Safeguard Defenders, ‘Access Denied 3: China's Legal Blockade,’ 2021, available at: <https://safeguarddefenders.com/sites/default/files/pdf/ACCESS%20DENIED%203%20EN.pdf>

<sup>189</sup> *The Construction of Guilt in China An Empirical Account of Routine Chinese Injustice*, Grace (Yu) Mou, Bloomsbury Publishing 2020.

<sup>190</sup> ‘China orders lawyers to pledge allegiance to Communist Party,’ Reuters, 21 March 2012, available at: <https://www.reuters.com/article/us-china-lawyers-idUSBRE82KOG320120321>

<sup>191</sup> ‘2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet),’ United States Department of State, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/china/>

<sup>192</sup> ‘China: Free Rights Lawyers, Reinstate Law Licenses,’ Human Rights Watch, 5 July 2018, available at: <https://www.hrw.org/news/2018/07/05/china-free-rights-lawyers-reinstate-law-licenses>; ‘Disbarred Chinese Rights Lawyers ‘Have No Regrets’ After Losing Licenses,’ Radio Free Asia, 15 February 2021, available at: <https://www.rfa.org/english/news/china/lawyers-licenses-02152021101423.html>; ‘China's 709 Crackdown Is Still Going On,’ The Diplomat, 9 July 2021, available at: <https://thediplomat.com/2021/07/chinas-709-crackdown-is-still-going-on/>

defenders, are often forced to choose between actually challenging flawed evidence presented by the state prosecutors and the risk of being arbitrarily charged with perjury.

Widespread breaches of other procedural safeguards has also negatively impacted the right to legal representation. For example, the Committee Against Torture has noted that China has consistently failed to implement the systematic registration of all detainees and to keep records of all periods of detention,<sup>193</sup> as called for in a number of international norms listed above.

In China, as documented by Safeguard Defenders, police have also forced victims to take fake names during pre-trial detention, making it impossible for their family or lawyers to locate them, and prolonging their period of incommunicado detention.<sup>194</sup>

Police custodial powers are not subject to judicial oversight, and in China the detention and imprisonment periods up to, and following trial, can be lengthy. The investigation phase starts at the moment the suspect is detained, continues past official arrest and until the case is sent to the prosecutor for review. With a maximum of 37 days detention allowed before official arrest, plus a further maximum of seven months under pre-trial investigation, this allows for the investigation phase to last more than eight months. If additional custodial mechanisms are used, such as Residential Surveillance at a Designated Location, this period can extend to a maximum of 13 months.

Meanwhile, “The total time required to hear a case and issue a verdict in standard cases ranges from twenty months to an indefinite period. Security agencies can hold individuals for years while they progress through the charge, arrest, investigation, court hearing and sentencing processes.”<sup>195</sup>

As well as being a fundamental component of the right to a fair trial, access to one’s choice of legal counsel is also crucial in preventing other human rights abuses such as torture and enforced disappearances.

## **The right to be presumed innocent until proven guilty and to be free of coercion to testify against yourself**

The nearly 100 percent conviction rate in China raises concerns about bias toward the presumption of guilt. The table below shows that between 2017 and 2020, the conviction rate in China has hovered between over 99.95 and over 99.96 percent.<sup>196</sup>

<sup>194</sup> ‘Access Denied: China’s Vanishing Suspects,’ Safeguard Defenders, <https://safeguarddefenders.com/en/access-denied-chinas-vanishing-suspects>

<sup>195</sup> ‘DFAT Country Information Report People’s Republic of China,’ Australia Department of Foreign Affairs and Trade, 3 October 2019, available at: <https://www.dfat.gov.au/sites/default/files/country-information-report-china.pdf>, p. 62.

<sup>196</sup> Safeguard Defenders, ‘Presumed Guilty report and trials of Michaels Spavor and Kovrig,’ 8 March 2021, available at: <https://safeguarddefenders.com/en/blog/presumed-guilty-report-and-trials-michaels-spavor-and-kovrig>.



Year	Judgements	Not guilty	Conviction rate
2020	1,527,000	656	99.95706%
2019	1,660,000	637	99.96164%
2018	1,429,000	517	99.96383%
2017	1,297,000	573	99.95511%
2016	1,220,000	656	99.94626%
2015	1,232,000	667	99.94589%
2014	1,184,000	518	99.95627%
2013	1,158,000	529	99.95434%

The high rate of conviction is also partly to do with the selection of cases. Prosecutors, as noted above, are under intense pressure to ensure convictions, which requires cooperation with the police ahead of case selection. Following the police investigation phase, there is also the prosecutorial review, which often involves rounds of prosecutorial interrogation. The purpose of this phase, especially in cases with weak evidence or of a political nature, is for the prosecutor to earn a guilty plea from the defendant.

The presumption of innocence is also threatened by the fact that many decisions are not made the presiding judge but by a judicial committee, which doesn't even hear the case. As observers have noted, there is a "separation between the trial process and the actual decision-making. Judges who are involved in the trial do not deliver the final judgement and members of the judicial committee who do not hear a case make the final decision for the judges."<sup>197</sup> The lack of an independent judiciary, noted above, combined with the process of decision-making by non-trial observing judges compounds the violation of the right to the presumption of innocence until proven guilty.

Forced confessions also represent a serious violation of fair trial rights in China, and are often the result of torture.<sup>198</sup> There is a lot of pressure on police to extract confessions from suspects because they need to ensure they maintain the high rate of near-guaranteed convictions at trial. A search of the Supreme Court's database which stores verdicts issued (except those concerning national security or State secrets) reveals that confessions are used as the main source of evidence used in trials. Other forms of evidence, such as forensic evidence, is rarely produced. Confessions are easy to secure, cheap, and effective. The police's primary goal after an arrest is approved is to secure a confession before handing the case over to the procuratorate for prosecution and trial.

<sup>197</sup> Yuwen Li "Judicial Independence: Applying International Minimum Standards to Chinese Law and Practice" (2001) in IN THE SUPREME COURT OF NEW ZEALAND I TE KŌTI MANA NUI SC 57/2019 [2021] NZSC 57

<sup>198</sup> Scripted and Staged, Behind the scenes of China's forced TV confessions, Safeguard Defenders, available at: <https://safeguarddefenders.com/sites/default/files/pdf/SCRIPTED%20AND%20STAGED%20-%20Behind%20the%20scenes%20of%20China%27s%20forced%20televised%20confessions.pdf>; '2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet)', United States Department of State, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/china/>

In its own reporting to the Committee Against Torture, China admitted that between 2008 and the middle of 2015,<sup>199</sup> 279 people were convicted based on extracted confessions through torture.<sup>200</sup>

In practice in China, courts place the burden of proof on defense attorneys to prove torture has taken place, rather than requiring the prosecution to prove torture did not take place following an allegation from a client or attorney. Placing the burden on the defense, following denial of access and other lack of transparency renders meaningless any such mechanisms for investigation torture or holding perpetrators accountable. Lawyers have very limited access to their clients before trial, and no access to evidence such as police surveillance cameras, nor can they request a medical examination of their client to prove torture. This failure effectively means the police can act with impunity in using torture to extract confessions in China.

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Safeguard Defenders conducted interviews from 2019-2020 with more than 50 practicing defense attorneys who have represented clients most at risk of torture. Not a single one of them was able to get evidence excluded on the basis that torture was used to secure it. And not one had heard of any other case where evidence had been excluded on these grounds.

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<sup>200</sup> CAT/C/CHN/Q/5/Add.1, China's reply to CAT list of issues 2015, <https://www.refworld.org/docid/564ed6854.html>, para 22.

# GROUNDS FOR REJECTION II: TORTURE

In 2018, a group of UN Human Rights Special Procedures noted that “[those extradited to China] may be exposed to the risk of torture, other ill-treatment, or the death penalty.”<sup>201</sup>

## International norms on torture



The prohibition against torture is considered a *jus cogens* (or peremptory norm) meaning it is a fundamental principle of international law from which no derogation is permitted under any circumstances.

The **UDHR** (Article 5) says: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>202</sup> The **ICCPR** (Article 7) states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>203</sup>

The prohibition against torture is further enshrined and expanded in numerous international instruments, as outlined below.

Torture is defined in the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>204</sup>

In its **General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)**,<sup>205</sup> the UN Human Rights Committee states that there are no justifications or extenuating circumstances, including a public emergency, that allow for a violation of the prohibition against torture. The Committee notes that while there is not an exhaustive list of actions or treatment that rise to the level of torture, prolonged solitary confinement may amount to acts prohibited under the Covenant.

<sup>201</sup> OHCHR, ‘UN human rights experts urge Spain to halt extraditions to China fearing risk of torture or death penalty,’ Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions; Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Felipe González Morales, Special Rapporteur on the human rights of migrants; Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23105&LangID=E>.

<sup>202</sup> Universal Declaration of Human Rights, Article 5, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>203</sup> International Covenant on Civil and Political Rights, Article 7, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>204</sup> ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1),’ Office of the High Commissioner of Human Rights, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

<sup>205</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, available at: <https://www.refworld.org/docid/453883fb0.html>

The Committee also notes that to lower the risk of torture, States should take steps to address the conditions that give rise to torture and other ill-treatment. In particular, the Committee holds that States “must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”<sup>206</sup>

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.<sup>207</sup>

**General Comment No. 20, UNHRC**

CAT (Article 3) states that “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>208</sup>

In addition to human rights law, the **Rome Statute of the International Court**, defines torture as a crime under international criminal law. The Statute (Article 7), which covers Crimes Against Humanity, includes torture if it is part of a “widespread or systematic attack directed against any civilian population.”

The **Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)**, provides detailed guidance on investigating torture for human rights lawyers and medical practitioners.<sup>209</sup>

## The widespread and systematic use of torture in China



The UN Committee Against Torture,<sup>210</sup> addressing minimum fair trial standards in China, noted its 2016 Concluding observations on the fifth periodic report of China:<sup>211</sup>

- **Despite some statutory safeguards, the Committee “remains seriously concerned over consistent reports that the practice of torture and ill-treatment is still deeply entrenched in the criminal justice system”**
- **“The Committee remains concerned over allegations of death in custody as a result of torture or resulting from lack of prompt medical care and treatment during detention”**
- **“The Committee regrets that, despite its requests to the State party’s delegation to provide statistical data on the number of deaths in custody during the period under review, no information has been received on this subject, or on any investigations into such deaths”**
- **“the Committee remains concerned that their [procuratorates] dual function as prosecutors and supervisors [of detention facilities] compromises the independence of their functions”**

<sup>206</sup> HRC, General Comment No. 20, para 12.

<sup>207</sup> HRC, General Comment No. 20, para 9.

<sup>208</sup> CAT, Article 3, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

<sup>209</sup> PROFESSIONAL TRAINING SERIES No. 8/Rev.1 UNITED NATIONS New York and Geneva, 2004 Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Office of the High Commissioner for Human Rights, available at: <https://www.ohchr.org/documents/publications/training8rev1en.pdf>

<sup>210</sup> ‘Concluding observations on the fifth periodic report of China, CAT/C/CHN/CO/5, Committee Against Torture, 3 February 2016, available at: <https://undocs.org/CAT/C/CHN/CO/5>

<sup>211</sup> China has entered a reservation against CAT Article 20, denying the authority of the Committee Against Torture, in a clear sign of disregard for independent monitoring of its compliance under the Convention.

While China is a State-Party to the CAT,<sup>212</sup> it has failed to meet its obligations under the Convention. In particular, it has failed to define, and effectively prohibit and prosecute, torture in domestic law. It has not effectively banned the exclusion of evidence obtained through torture as explicitly required under the Convention (Article 15).<sup>213</sup> There is no effective legal mechanism for challenging confessions or evidence obtained through torture or remedy for victims of torture (Article 14; Basic Principles on Right to Remedy).<sup>214</sup>

China has not joined the Optional Protocol to the CAT,<sup>215</sup> permitting independent monitoring, nor has it lifted its reservation to Article 20 that grants authority to the Committee Against Torture to undertake independent monitoring. China has also rejected calls to ratify the Second Optional Protocol to the ICCPR, aimed at abolishing the death penalty.<sup>216</sup>

The risk of torture and abuse is highest during pre-trial detention but continues during post-trial sentencing. UN and Government human rights agencies have reported China's denial of protections and failure to adhere to significant parts of guiding United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).<sup>217</sup>

*Of particular relevance to extradition requests and diplomatic assurances from China, there are many cases where foreign nationals have also been subjected to torture in China, including German,<sup>218</sup> Swedish<sup>219</sup> and UK,<sup>220</sup> US,<sup>221</sup> and Canadian<sup>222</sup> citizens.*



<sup>212</sup> China ratified the CAT on 8 October 1988.

<sup>213</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

<sup>214</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>

<sup>215</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx>

<sup>216</sup> Second Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, <https://www.ohchr.org/en/professionalinterest/pages/2ndopcpr.aspx>

<sup>217</sup> A/RES/70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 8 January 2016, <https://undocs.org/A/RES/70/175>

<sup>218</sup> "Forced Labor and Torture in a Chinese Jail," Der Spiegel, 7 March 2019, <https://www.spiegel.de/international/world/ex-german-prisoner-exposes-life-in-a-chinese-prison-a-1256413.html>

<sup>219</sup> "The Strange and Sad Case of Gui Minhai," The Diplomat, 31 January 2018, <https://thediplomat.com/2018/02/the-strange-and-sad-case-of-gui-minhai/>

<sup>220</sup> Written Statement of Lam Wing-kee May 3, 2017 My Testimony regarding the "Causeway Bay Books" event, <https://www.cecc.gov/sites/chinacommission.house.gov/files/CECC%20Hearing%20-%203May17%20-%20Hong%20Kong%20-%20Lam%20Wing%20Kee.pdf> ; <https://www.ft.com/content/db8b9e36-1119-11e8-940e-08320fc2a277>

<sup>221</sup> "How inmates in Chinese prisons are forced to make the world's Christmas decorations," The Independent, 21 December 2019, [https://www.independent.co.uk/news/long\\_reads/china-prisons-christmas-decorations-supply-chain-forced-labour-torture-a8692776.html](https://www.independent.co.uk/news/long_reads/china-prisons-christmas-decorations-supply-chain-forced-labour-torture-a8692776.html); "China instability rising," Politico, 27 June 2012, <https://www.politico.com/story/2012/06/china-instability-rising-with-fungible-rule-of-law-077915>; "Inside a Chinese Prison: An American's Perspective," Prison Legal News, 22 June 2014, <https://www.prisonlegalnews.org/news/2014/jun/22/inside-chinese-prison-americans-perspective/>

<sup>222</sup> See Julia and Kevin Garratt

# COUNTRY REPORTS ON TORTURE IN CHINA

## UK

The Conservative Party Human Rights Commission wrote in a 2021 report on human rights in China 2016-2020 that: “the use of torture in China’s detention systems continues to be pervasive, widespread, systematic and egregious. From the evidence received by the Conservative Party Human Rights Commission, it is beyond doubt that the authorities in China use torture – both physical and psychological – as a matter of course.”<sup>223</sup>

## US

In its 2020 annual report on China, the US Congress concluded that torture and abuse of detainees continues.<sup>224</sup> “Numerous former prisoners and detainees reported they were beaten, raped, subjected to electric shock, forced to sit on stools for hours on end, hung by the wrists, deprived of sleep, force fed, forced to take medication against their will, and otherwise subjected to physical and psychological abuse. Although prison authorities abused ordinary prisoners, they reportedly singled out political and religious dissidents for particularly harsh treatment.”<sup>225</sup>

## SWEDEN

A 2019 country report on China found that besides torture, cases of inmates being used to attack others inmates is also practiced in addition to direct torture perpetrated by police and interrogators. It also notes the lack of access to medical treatment, medicine, and healthy food for detainees and the lack of independent investigations into allegation of torture.<sup>226</sup>

## AUSTRALIA

The Department of Foreign Affairs and Trade 2019 country report on China concluded that: “allegations of torture, particularly those detailed in cases deemed politically sensitive, to be credible.”<sup>227</sup>

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<sup>223</sup> “The Darkness Deepens, the crackdown on human rights in China 2016-2020,” The Conservative Party Human Rights Commission, <https://conservativepartyhumanrightscommission.co.uk/wp-content/uploads/2021/01/CPHRC-China-Report.pdf>

<sup>224</sup> “Congressional-Executive Commission on China 2020 ANNUAL REPORT,” CECC, [https://www.cecc.gov/publications/annual-reports/2020-annual-report\\_page\\_91](https://www.cecc.gov/publications/annual-reports/2020-annual-report_page_91).

<sup>225</sup> “2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet),” US Department of State, <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/china/>

<sup>226</sup> “Kina – Mänskliga rättigheter, demokrati och rättsstatens principer: situationen per den 31 december 2018,” <https://www.regeringen.se/4a7346/contentassets/f8f0525faeaf4673affbb62159c57189/kina---manskliga-rattigheter-demokrati-och-rattsstatens-principer-2019.pdf>

<sup>227</sup> ‘DFAT Country Information Report People’s Republic of China,’ Australia Department of Foreign Affairs and Trade, 3 October 2019, available at: [https://www.dfat.gov.au/sites/default/files/country-information-report-china.pdf\\_p.61\\_](https://www.dfat.gov.au/sites/default/files/country-information-report-china.pdf_p.61_)

# EMPTY PROMISES: WHY DIPLOMATIC AND CONSULAR GUARANTEES CANNOT BE TRUSTED

In light of the above gross human rights concerns, the host State of an extradition request from China will often ask for diplomatic assurances to the effect the target of extradition will not be subjected to any of the above rights abuses. However, in order to placate concerns of mistreatment it must be accepted in good faith. However, China routinely violates its diplomatic and consular agreements, a fact that should invalidate any future diplomatic assurances.

## EXECUTED DESPITE ASSURANCES

The UK Parliament called it a “politically motivated execution” in a February 2003 motion.<sup>228</sup> While the European Union reiterated concerns at the “conditions under which the trial was conducted and the lack of certainty as to whether due process and other safeguards for a fair trial were respected, and considers this a serious violation...”<sup>229</sup>

There are other cases where suspects from East and Southeast Asia have been executed following extradition to China despite the issuance of diplomatic assurances that they would not be subjected to the death penalty.<sup>230</sup>

The same year that China enacted its Extradition Law (2000), China and Canada were negotiating the extradition of **Yang Fong**. The 35-year-old Chinese citizen, who had fled to Canada, was wanted over a 10-year-old computer fraud case involving 130,000 USD. Canada, which had abolished the death penalty in 1999, was apprehensive to comply with the extradition request over concerns for Yang’s treatment and especially over the risk of capital punishment he faced on return to China.

In January 2000, China finally agreed to provide Canada with a diplomatic assurance that Yang would receive a sentence of less than ten years. However, following his extradition, China promptly and without explanation executed Yang.<sup>231</sup>

In 1995, China executed **Wang Jianye** (王建业) following his extradition from Thailand in 1993, despite Guangdong provincial Prosecutor having offered Thai authorities diplomatic assurances that he would not be given the death penalty.<sup>232</sup> Wang was accused of taking bribes of around 2 million USD. According to Police Major Tawee Sadsong, two Chinese officials had told Wang and the police officer that he would not face execution but only imprisonment. The assurance, was reportedly not made in writing. Speaking in 1995, after the sentence was announced, a representative from the Thailand Ministry of Foreign Affairs noted: “It’s not our responsibility to ask the Chinese authorities to keep the promise,” calling it China’s “own problem. We just helped them by sending back a criminal.”<sup>233</sup>

<sup>228</sup> “CHINESE EXECUTION OF LOBSANG DHONDUP AND FURTHER PERSECUTION OF TIBETANS,” UK Parliament Early Day Motions, EDM 670, tabled 5 February 2003, <https://edm.parliament.uk/early-day-motion/23370/chinese-execution-of-lobsang-dhondup-and-further-persecution-of-tibetans>

<sup>229</sup> “EU expresses “deep regret” at the execution of Lobsang Dhondup,” available at: <https://tibet.net/eu-expresses-deep-regret-at-the-execution-of-lobsang-dhondup/>

<sup>230</sup> See: Matthew Bloom, “A Comparative Analysis of the United State’s Response to Extradition Requests from China,” Yale Journal of International Law, vol. 33, no.1, Winter 2008, p. 177-214.; Fu Hualing, “One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?” Hong Kong Lawyer, January 1999. <https://hub.hku.hk/bitstream/10722/44889/1/46551.pdf>

<sup>231</sup> “Canada’s Haven: For Notorious Fugitives, Too?,” New York Times, 29 December 2000, <https://www.nytimes.com/2000/12/29/world/canada-s-haven-for-notorious-fugitives-too.html>

<sup>232</sup> See: AI Index: ASA 17/59/95, <https://www.amnesty.org/download/Documents/172000/asa170591995en.pdf>

<sup>233</sup> “Extradition vow ‘violated’,” South China Morning Post, 26 April 1995, <https://www.scmp.com/article/115502/extradition-vow-violated>

Only the Supreme People's Procuratorate and the Supreme People's Court have the legal authority to issue diplomatic assurances, even though they may be delivered by the Ministry of Foreign Affairs. The lack of legal authority of the body issuing the assurance should be seen as an **additional reason** to reject it. China has a record of consistently failing to uphold diplomatic and consular agreements and that should be more than sufficient grounds for rejecting diplomatic assurances given in any extradition case by China.

Violations of these obligations should be treated in the same way as violations of other bilateral treaties and should also influence any "in good faith" negotiations for future bilateral agreements or shape an understanding on relevant fair trial and treatment of foreign nationals in detention, in addition to influencing extradition decisions.

Similar to extradition agreements, China maintains bilateral consular agreements with several countries. In situations where there is no such agreement, it must negotiate on an ad hoc basis. In these cases, the foundation for establishing consular relations is the 1963 Vienna Convention on Consular Relations.<sup>234</sup> Before turning to specific cases, it is worthwhile examining what the Vienna Convention has to say about the consular access of criminal suspects.

## The Vienna Convention on Consular Relations

**Article 36** rules that consular officers should be free to communicate with their nationals and to have access to them.

This means that China must notify consular officers of the sending State "without delay," if a national is arrested or held in custody pending trial or otherwise detained. Any communications from the detained foreign national to their consular officials are to be forwarded without delay. Consular officers of foreign nationals have the right to visit a national of their State who is imprisoned, or otherwise detained, and to arrange for their legal representation.

The Vienna Convention acknowledges that such rights of communication and access by consular officials are to be exercised in conformity with all national laws and regulations, but goes on to clarify that national laws must not be used as a workaround to deny consular access.

The Vienna Convention does not address issues of **dual nationality** and consular access. Internationally, countries diverge on whether they recognize dual nationality or not and may adopt different practices on foreign consular services accordingly. At the same time, it is generally accepted that when someone is residing as a dual national in one of their countries of nationality, then that person owes greater allegiance to the host country at present. Furthermore, that host country can theoretically assert itself over the individual without interference from the other country of nationality.<sup>235</sup> In addition, this is often addressed by bilateral agreements.

However, China does not recognize dual nationality. An individual may obtain a second nationality, for example in the US, which does recognize dual nationality but this will not be recognized by China. It is not uncommon in extradition cases, as seen throughout this report, for individuals to have fled China on passports of other nations, for China then to pursue them overseas as Chinese nationals.

However, China's own law establishes that the mere act of obtaining another nationality will automatically result in the forfeit of one's Chinese nationality.

<sup>234</sup> Vienna Convention on Consular Relations 1963, available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf)

<sup>235</sup> 'DUAL NATIONALITY,' United States Department of State, Foreign Affairs Manual, available at: <https://fam.state.gov/fam/07fam/07fam0080.html>



Any Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality.<sup>236</sup>

### China's Nationality Law (Article 9)

In other words, as soon as a Chinese national naturalizes in another country they automatically cease to be Chinese nationals. The law doesn't require any additional steps other than merely obtaining the nationality of the other country. Article 14 of the Nationality Law notes that anyone "who wishes to acquire, renounce or restore Chinese nationality, with the exception of the cases provided for in Article 9, shall go through the formalities of application."<sup>237</sup> China is thus required by its own domestic law to treat former Chinese nationals as citizens of their new countries of nationality.<sup>238</sup>

Not only does China refuse to acknowledge dual nationality, in case after case, China has refused to accept the foreign naturalization process of Chinese citizens despite the fact China's own domestic law requires the automatic revocation of Chinese nationality the moment that happens. This is important for because it influences how China responds to its consular obligations and is relevant to assessing diplomatic assurances.

Several of the following case studies involve individuals who were born Chinese nationals but have since obtained foreign nationality. In violation of its own laws, China has routinely refused to acknowledge their foreign nationality and instead detained them as Chinese nationals. By China's own domestic legal standards and those of international norms, China has arbitrarily denied foreign nationals their citizenship and subjected them to custodial and criminal penalty as though they were Chinese citizens. This is an alarming trend that should trigger a complete reset in international cooperation with China involving former Chinese nationals.

These case studies illustrate not only China's disregard of consular and diplomatic agreements as a sign of bad faith for diplomatic assurances but also point to this China's trend of exerting extraterritorial jurisdiction at odds with international norms.

<sup>236</sup> 'Nationality Law of the People's Republic of China,' Embassy of the People's Republic of China in the United States of America, available at: [www.china-embassy.org/eng/ywzn/lsyw/vpna/fag/t710012.htm](http://www.china-embassy.org/eng/ywzn/lsyw/vpna/fag/t710012.htm)

<sup>237</sup> Ibid.

<sup>238</sup> It is interesting to note that a January 2021 article in the Chinese Journal of the Armed Police Academy (武警学院学报) calls for an amendment to Article 9 because it is inefficient and difficult to monitor and implement. See: '西方主要国家退籍制度研究' 西方主要国家退籍制度研究, January 2021, Vol 37, no. 1

## Denial of Consular Access

### MICHAEL SPAVOR & MICHAEL KOVRIG (CANADA)



China detained Michael Spavor and Michael Kovrig in December 2018 on suspicions of endangering state security. Their cases attracted considerable international attention as emblematic of China's hostage diplomacy,<sup>239</sup> with their arrests directly linked to Beijing's anger over the US' extradition request for Meng Wanzhou (孟晚舟), the chief financial officer of Huawei, to answer for alleged financial crimes. We will not get into the details of the hostage diplomacy aspect of their cases, but instead focus on how the two Michaels were treated and how this relates to China's breach of its consular agreement with Canada.<sup>240</sup>

In detention, the two Michaels were subjected to torture, including sleep deprivation and prolonged solitary confinement. China only permitted sporadic consular access, often with lengthy gaps between visits. For example, in 2020, Canadian officials were denied any contact with the two Canadian citizens from January to October.<sup>241</sup> The Chinese authorities claimed this was a Coronavirus precaution, despite there being no provisions within the consular agreement for such postponement.

In March 2021, Michael Spavor's trial opened in the northern Chinese city of Dandong along the border with North Korea. It lasted just two hours.<sup>242</sup> The following week, in Beijing, Michael Kovrig's trial also opened.<sup>243</sup> China denied Canadian consular access to both trials, saying diplomats could not attend because the trials involved issues of national security. Canada said the lack of transparency was "completely unacceptable."<sup>244</sup>

<sup>239</sup> "Opinion: China is holding two Canadians as hostages. It's not even denying it," Washington Post, 18 Dec 2018, <https://www.washingtonpost.com/opinions/2018/12/17/china-is-holding-two-canadians-hostages-its-not-even-denying-it/>.

<sup>240</sup> See also: 'Your rights under the Vienna Convention on Consular Relations and the Consular Agreement Between the Government of Canada and the Government of the People's Republic of China,' in An Overview of the Criminal Law System in China, Government of Canada, available at: <https://travel.gc.ca/travelling/advisories/china/criminal-law-system#rights>.

<sup>241</sup> "China grants Canadian officials consular access to Michael Kovrig, but not to Michael Spavor," CBC, 22 January 2021, <https://www.cbc.ca/news/politics/michael-kovrig-spavor-consular-access-1.5883882>; "Canada given 'virtual' consular access to Spavor and Kovrig detained in China," South China Morning Post, 11 October 2020, <https://www.scmp.com/news/world/united-states-canada/article/3105008/canada-given-consular-access-two-citizens-held>

<sup>242</sup> "Michael Spavor: Canadian spy trial in China ends without verdict," BBC, 19 March 2021, <https://www.bbc.com/news/world-asia-china-56452981>

<sup>243</sup> "Michael Kovrig: China begins espionage trial behind closed doors," BBC, 22 March 2021, <https://www.bbc.com/news/world-asia-china-56480219>

<sup>244</sup> "Trial of Michael Kovrig concludes with verdict to come later, Chinese court says," CBC, 21 March 2021, <https://www.cbc.ca/news/world/trial-michael-kovrig-china-1.5958648>

The prolonged periods where China denied consular access to the two men in detention, blocked diplomatic attendance to the trials, and its failure to provide clear information regarding the charges are beyond unacceptable. They amount to flagrant violations of China's diplomatic and consular obligations established through bilateral, legally binding treaties with Canada. They are also governed by the Vienna Convention and the China – Canada consular agreement.

The Consular Agreement Between the Government of Canada and the Government of the People's Republic of China, in force since March 1999, clarifies the consular relationship between China and Canada. Article 8 outlines rights and obligations concerning detention, arrest, and visitation.<sup>245</sup> If a Canadian citizen is detained, arrested, or deprived of their freedom in China, Article 8 stipulates that the Chinese authorities must notify a Canadian consular representative “without delay” or “as soon as possible.” The failure of the consular agreement to provide an explicit timeframe is noted. The detaining authorities must also inform the consular representative of the reasons for detention.

A consular representative is entitled to meet with their national, a visit that “shall take place as soon as possible, but at the latest, shall not be refused after two days” once the consular representative is notified of the detention, according to Article 8(2). Consular access is to take place on a recurring basis and “no longer than one month shall be allowed to pass between visits requested by a consular officer.”

In the event of a trial, Article 8(5) requires China to provide the Canadian consular representative all relevant information on the charges and that “a consular officer shall be permitted to attend the trial or other legal proceedings.”

The agreement recognizes the importance of adhering to national laws but is quite explicit that local laws may not be cited to deny the rights and procedural safeguards laid out in the treaty obligation between China and Canada. Article 8(7) reads: “The application of the law of the receiving State shall not restrict the implementation of the rights provided for in this Article.”<sup>246</sup>

China's treatment of Kovrig and Spavor was in clear breach of its obligations under the China – Canada consular agreement, an agreement that has the force of an international treaty. This was not an exception: China has a long record of violating consular agreements. This fact alone should mean that diplomatic assurances from China cannot be seen as credible in extradition cases.

On 24 September 2021, after more than 1,000 days of arbitrary detention, Kovrig and Spavor were released and flown home just hours after Beijing and Washington agreed on a deal for the release of Meng.<sup>247</sup>

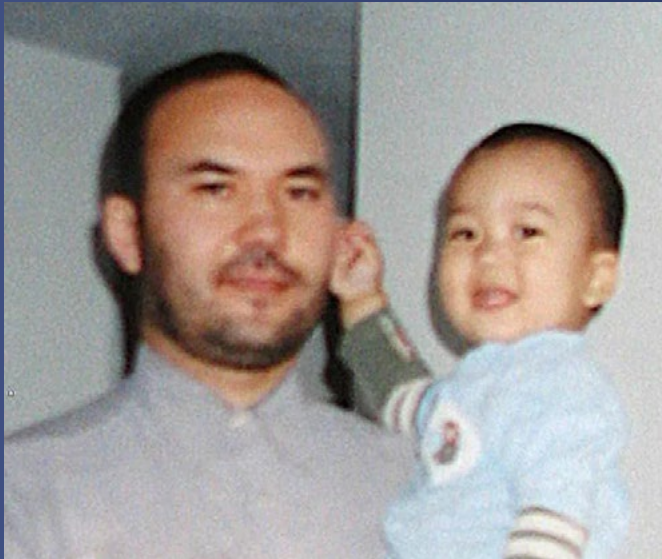
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<sup>245</sup> ‘Consular Agreement Between the Government of CANADA and the Government of the PEOPLE'S REPUBLIC OF CHINA’, available at: <https://travel.gc.ca/assistance/emergency-info/consular/framework/china>.

<sup>246</sup> Ibid.

<sup>247</sup> ‘China frees Canadians Michael Spavor and Michael Kovrig after Huawei boss released,’ BBC 25 September, available at: <https://www.bbc.com/news/world-us-canada-58687071>

## HUSEYIN CELIL (CANADA)



Huseyin Celil is a Uyghur human rights defender who fled China as a political refugee in 2001 following a period of arbitrary detention in reprisal for his religious and political rights advocacy for Uyghurs. He was a teacher of the Uyghur language, religion, and culture. As a political refugee in Uzbekistan, Huseyin met and married his wife Kamila Telendibaeva, who is Uzbek. The family was later accepted for resettlement in Canada and became Canadian citizens in November 2005.<sup>248</sup>

In March 2006, when the family were visiting relatives in Uzbekistan,<sup>249</sup> Celil, who was travelling on his Canadian passport, stepped out to run an errand and disappeared. 26 March 2006, Uzbek

police placed him under arrest after Chinese authorities requested his extradition on vague terrorism charges. In 2007, he was extradited to China.

China refused to recognize Celil as a Canadian citizen. In fact, it took months for China to inform the Canadian government where he was being detained.<sup>250</sup> He was denied all consular access. He was not allowed to have a lawyer of his choice at his secret trial in April 2007, at which he was made to deliver a forced confession. Celil was sentenced to life imprisonment.<sup>251</sup>

Before 2017, Celil's family members still in China were allowed to visit him about twice a year, but Chinese authorities continued to refuse to grant him access to Canadian consular representatives or diplomats. Outrageously, Canada's Ambassador to China, Dominic Barton, said stated in 2020 that he could not meet with Celil in prison because he was not a Canadian citizen.<sup>252</sup> This gaffe only fuels China's false narrative that he is not a Canadian citizen and has only harmed his case. According to Canada's former ambassador to China, Guy Saint-Jacques, China rejected every request from the Canadian government to free Celil, including a request from the office of the Prime Minister.<sup>253</sup>

From 2017, Celil has been held entirely incommunicado at an undisclosed location in China,<sup>254</sup> making his fate or whereabouts impossible to determine, this is equivalent to an enforced disappearance under international law.

**In summary:** China pressured Uzbekistan to extradite a Canadian citizen to China, where he was tried in secret, has never been given consular access, and has for the past five years been the victim of an enforced disappearance, a crime under international law.

<sup>248</sup> "Free Huseyin Celil," Amnesty International, <https://www.amnesty.ca/our-work/individuals-at-risk/huseyin-celil>

<sup>249</sup> "Wife of Canadian citizen jailed 13 years in China fears he's been 'forgotten' amid Huawei crisis," Global News, 24 January 2019, <https://globalnews.ca/news/4874245/canadian-detained-china-huseyin-celil/>

<sup>250</sup> "10 Years Later, Family of Canadian in Chinese Prison Still Looking for Answers," Uyghur World Congress, 18 March 2016, <https://www.uyghurcongress.org/en/10-years-later-family-of-canadian-in-chinese-prison-still-looking-for-answers/>

<sup>251</sup> "Free Huseyin Celil," Amnesty International, <https://www.amnesty.ca/our-work/individuals-at-risk/huseyin-celil>

<sup>252</sup> "Huseyin Celil is the forgotten Canadian detained in China," Toronto Star, 15 March 2021, <https://www.thestar.com/opinion/contributors/2021/03/15/huseyin-celil-is-the-forgotten-canadian-detained-in-china.html>

<sup>253</sup> "Wife of Canadian citizen jailed 13 years in China fears he's been 'forgotten' amid Huawei crisis," Global News, 24 January 2019, <https://globalnews.ca/news/4874245/canadian-detained-china-huseyin-celil/>

<sup>254</sup> "Huseyin Celil is the forgotten Canadian detained in China," Toronto Star, 15 March 2021, <https://www.thestar.com/opinion/contributors/2021/03/15/huseyin-celil-is-the-forgotten-canadian-detained-in-china.html>

## YANG HENGJUN (AUSTRALIA)



In January 2019, writer and blogger Yang Hengjun (杨恒均), a Chinese-born Australian citizen, was detained by Chinese authorities and initially held under RSDL for six months before he was transferred to a detention facility in Beijing. In a message later sent from detention, Yang wrote: “The first six months, when I was in RSDL, was a really bad period. They tortured me.” He was not permitted consular access with Australia until after he was transferred from RSDL. On 7 October 2020, Yang was formally charged, accused of espionage, although Chinese officials haven’t said for what country. On 27 May 2021, his trial opened at the Beijing No. 2 Intermediate People’s Court. Australia’s Ambassador to China, Graham Fletcher, among other diplomats, were refused entry.

Fletcher told media: “The reason given was because of the pandemic situation but the foreign ministry has also told us it is because it is a national security case therefore we are not permitted to attend it.”<sup>256</sup>

Denial of consular access at trial is a fundamental violation of Article 11 of the China-Australia Consular Agreement<sup>257</sup>, which entered into force on 15 September 2000. The Agreement builds upon the Vienna Convention in several important ways and should guide all bilateral consular relations between the two countries, especially concerning the detention and trial of foreign nationals.

That the Ambassador was denied access on the grounds that the case involved Chinese national security furthermore flaunts China’s obligations to the Agreement, which is explicit that there can be no justification under Chinese national law that interferes with the “full effect” of the Agreement, especially concerning consular access at trial (Article 11(2)).

While the Vienna Convention provides only for the undefined notification of arrest or granting of consular access for detainees “without delay,” Article 11(1e) of the Agreement clarifies that if an Australian national is arrested or detained in any way, including pending trial, that Chinese authorities are to notify Australian consular officers within **three** days and that access to the detained national shall be guaranteed within **two** days of the notification and granted at least **once per month** thereafter; Article 11(1h). China did not honor this with Yang Hengjun.

Australian consular officials in Beijing and Canberra maintained that China has failed to provide “any explanation or evidence for the charges” against Yang other than that he is alleged of committing espionage.<sup>258</sup>

While China provided Australia with the reason for Yang’s initial arrest, as required under the Agreement (Article 11(1e)), its ongoing failure to provide information on the specific charges constitutes a flagrant violation of its obligations under the Agreement. During trial or other legal proceedings against an Australian national, Article 11(1f), requires that China must provide information on the charges and that a consular officer must be permitted to attend the trial or any other legal proceedings.

<sup>256</sup> “Australia’s ambassador to China denied entry to trial of Yang Hengjun,” The Guardian, 27 May 2021, <https://www.theguardian.com/world/2021/may/27/australias-ambassador-to-china-denied-entry-to-trial-of-yang-hengjun>

<sup>257</sup> Agreement on Consular Relations between Australia and the People’s Republic of China, available at: <http://www.austlii.edu.au/au/other/dfat/treaties/2000/26.html>

<sup>258</sup> “Ambassador denied entry as Australian writer faces China espionage trial,” CNN, 27 May 2021, <https://edition.cnn.com/2021/05/26/china/china-australia-yang-hengjun-trial-intl-hnk/index.html>

The Australian National Interest Analysis of the [Consular] Agreement stresses, “The Australian Government regards consular access to its citizens arrested or detained overseas as vital to the discharge of its consular rights and duties.”<sup>259</sup> The Analysis continues, “The Australian Government has encountered particular difficulties in securing consular access to arrested or detained Australian citizens who also possess Chinese citizenship. This is because China’s nationality law does not recognise dual (or plural) nationality. The Agreement reaffirms that an Australian citizen who enters China on an Australian passport is entitled to consular access and assistance from Australian consular posts.”

This statement is strong grounds against entering into bilateral agreements with China because as Qin clearly said, from China’s point of view, Beijing will ultimately pursue whatever course it chooses regardless of the agreement’s wording. If China can simply disregard bilateral treaty obligations under the cover of sovereign supremacy, what is the value in signing such a treaty? And, also what then is the purpose of seeking diplomatic assurances, which have even less standing?

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<sup>259</sup> Agreement on Consular Relations between Australia and the People’s Republic of China, done at Canberra on 8 September 1999, available at: <http://www.austlii.edu.au/au/other/dfat/nia/1999/25.html>

## STERN HU (AUSTRALIA)



A decade before Yang Hengjun's trial, another Australian citizen was facing similarly concerning circumstances. Chinese-born Australian citizen, and former Rio Tinto executive, Stern Hu (胡士泰) was arrested in July 2009, although it took several days for news of his arrest to be reported.

His arrest and later imprisonment were likely connected with a massive trade negotiation gone wrong and it was speculated that they were part of an arbitrary reprisal against his employer. Through early 2009, Rio Tinto was in negotiations with China's state-owned Aluminum Corporation (Chinalco) over increasing their share in the Australian firm. However, as global markets shifted, the Rio Tinto board reversed its support for

Chinalco's share acquisition and instead announced a joint venture with BHP, another Australian mining company in June. A month later, on 5 July 2009, four Rio Tinto employees were detained in Shanghai.<sup>260</sup> Hu, as the company's Chief Representative in Shanghai, was among those detained.<sup>261</sup> He was accused of accepting bribes and of stealing trade secrets.

On 29 March 2010, in a secret trial, Hu was found guilty and sentenced to 10 years in prison. The Australian Consulate General at the time, Tom Connor, was only permitted limited access during the trial. He was barred from entering during the espionage sessions, the most important in light of the charges.<sup>262</sup> However, not only was the denial of trial access a breach of the China - Australia consular agreement, keeping the trial secret on industrial espionage grounds appears to violate national law in China as well -- commercial secrets are not a protected class of information permitting a closed trial under the Chinese Criminal Procedure Law (Article 152).<sup>263</sup>

As with Yang's case a decade later, Chinese authorities failed to provide clear evidence regarding the charge of industrial espionage, according to Australia's Foreign Minister Stephen Smith, at the time.<sup>264</sup> Again, there are no justifications within the China-Australia consular agreement permitting this selective access of consular officials during trial. Not only does this violate the bilateral agreement, because of poor consular access and the lack of transparency, there was no way to assess whether the trial was fair or impartial.<sup>265</sup>

Neither Hu nor the Australian government appealed the verdict. Reportedly, Chinese authorities had promised Hu that if he accepted the guilty plea he would be granted immediate deportation to Australia.<sup>266</sup> This did not happen. Hu was imprisoned in China until his release from prison in July 2018.

<sup>260</sup> "Rio Tinto Says China Has Detained Four Workers," Wall Street Journal, 8 July 2009, <https://www.wsj.com/articles/SB124698828902306991>

<sup>261</sup> "Stern Hu, Rio Tinto and China," The Australia-China Story, <https://aus.thechinastory.org/archive/stern-hu-rio-tinto-and-china/>

<sup>262</sup> "Stern Hu release: Here's why the former mining executive was convicted in China," ABC News, 4 July 2018, <https://www.abc.net.au/news/2018-07-04/stern-hu-explainer-why-china-jailed-the-former-mining-executive/9936578>

<sup>263</sup> "The closing of the Stern Hu trial: a legal analysis," Chinese Law Prof Blog (archived), 21 March 2010, <https://perma.cc/7LSS-ZZKD>

<sup>264</sup> "Stern Hu release: Here's why the former mining executive was convicted in China," ABC News, 4 July 2018, <https://www.abc.net.au/news/2018-07-04/stern-hu-explainer-why-china-jailed-the-former-mining-executive/9936578>

<sup>265</sup> "The Chinese legal system and the Stern Hu case," East Asia Forum, 28 March 2010, <https://www.eastasiaforum.org/2010/03/28/the-chinese-legal-system-and-the-stern-hu-case/>

<sup>266</sup> "Stern Hu, Rio Tinto and China," The Australia-China Story, <https://aus.thechinastory.org/archive/stern-hu-rio-tinto-and-china/>

When asked for a clarification on the breach of their agreement in denying Australian consular access to the trial, Qin Gang, spokesperson for the Chinese Ministry of Foreign Affairs responded:

Please don't mix up the relationship between a country's sovereignty, particularly its judicial sovereignty, and the Chinese-Australian Agreement on Consular Relations. The Chinese-Australian Agreement on Consular Relations must be premised on respect for China's sovereignty and judicial sovereignty.<sup>267</sup>

This statement is strong grounds against entering into bilateral agreements with China because as Qin clearly said, from China's point of view, Beijing will ultimately pursue whatever course it chooses regardless of the agreement's wording. If China can simply disregard bilateral treaty obligations under the cover of sovereign supremacy, what is the value in signing such a treaty? And, also what then is the purpose of seeking diplomatic assurances, which have even less standing?

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<sup>267</sup> "The closing of the Stern Hu trial: a legal analysis," Chinese Law Prof Blog (archived), 21 March 2010, <https://perma.cc/7LSS-ZZKD>



## GUI MINHAI (SWEDEN)



At the time he was disappeared, publisher Gui Minhai (桂民海), was a Chinese-born Swedish citizen and resident of Hong Kong. On 17 October 2015, Gui was subjected to an enforced disappearance and extraordinary rendition from his home in Pattaya, Thailand. Chinese men are seen in a video clip escorting Gui into a van outside his condo in Thailand. Nothing was heard from him for another three months until he resurfaced in China. On 17 January 2016, Gui appeared on Chinese television to deliver a forced confession. A day after the TV broadcast, Swedish police said that Thai immigration claimed to have no record of Gui ever leaving Thailand.<sup>268</sup> Following his first forced confession, Gui spent the next two years first in RSDL and then detention.

On 22 November 2016, the European Parliament concluded a resolution on Gui in which it explicitly acknowledged, that: “Swedish authorities have asked for the Chinese authorities’ full support in protecting the rights of their citizen as well as the other ‘disappeared’ individuals; whereas neither the family of Gui Minhai nor the Swedish government has been informed of any formal charges against him, nor the formal place of his detention.”<sup>269</sup> Although formally released from detention in October 2017, Gui remained under strict police surveillance.

In late January 2018, Gui was travelling to Beijing accompanied by Sweden’s consul general Lisette Lindahl, and another Swedish diplomat, but when the train pulled into a station in Jinan, Shandong province, a group of Chinese plainclothes security agents came into the train car and pulled Gui in front of his consular representatives.<sup>270</sup>

In February 2020, Gui was tried and sentenced to ten years imprisonment for “illegally providing intelligence overseas.” In delivering its verdict, the court claimed that Gui’s Chinese citizenship had been reinstated in 2018.<sup>271</sup> In doing so, China had effectively stripped Gui of his Swedish citizenship, as China does not recognize dual citizenship. However, such an action clearly raises serious questions, not least of all for violating China’s own Nationalities Law.<sup>272</sup> Swedish diplomats were denied access to his trial, which was also held in secret.

After his trial, a spokesperson for the European Union said: “There are serious questions to be answered about this case. His rights, including inter alia to consular access and due process, have not been respected.” With that, the EU made it clear it still considered Gui a Swedish citizen, regardless of the denaturalization tricks China had tried. The EU also urged the Chinese authorities to “cooperate fully with their Swedish counterparts, in full transparency.”<sup>273</sup>

<sup>268</sup> “Gui Minhai’s last days in Thailand,” Safeguard Defenders, 16 December 2020, <https://safeguarddefenders.com/en/blog/gui-minhai-s-last-days-thailand>

<sup>269</sup> European Parliament resolution of 24 November 2016 on the case of Gui Minhai, jailed publisher in China (2016/2990(RSP)), available at: [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0444\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0444_EN.html)

<sup>270</sup> “‘A very scary movie’: how China snatched Gui Minhai on the 11.10 train to Beijing,” The Guardian, 22 February 2022, <https://www.theguardian.com/world/2018/feb/22/how-china-snatched-gui-minhai-train-beijing-bookseller-hong-kong>; “Chinese Police Seize Publisher From Train in Front of Diplomats,” The New York Times, 22 January, <https://www.nytimes.com/2018/01/22/world/asia/china-police-bookseller-train-gui-minhai.html>

<sup>271</sup> “Gui Minhai: Hong Kong Bookseller gets 10 years jail,” The BBC, 25 February 2020, <https://www.bbc.com/news/world-asia-china-51624433>

<sup>272</sup> “Jailed bookseller: With Gui Minhai citizenship ploy, Beijing infringes int’l law and its own rules,” Hong Kong Free Press, 29 February 2020, <https://hongkongfp.com/2020/02/29/jailed-bookseller-gui-minhai-citizenship-ploy-beijing-infringes-intl-law-rules/>

<sup>273</sup> “EU critical of China on Swedish dissident publisher,” EU Observer, 26 February 2020, <https://euobserver.com/foreign/147559>

Unlike Canada and Australia, Sweden does not maintain a bilateral consular agreement with China. This means, the guiding principles on consular relations are governed by the Vienna Convention, and in particular, Article 36 provisions on consular access and communication.

China's treatment of Gui and its refusals to grant consular rights to a Swedish citizen is a strong indictment of China's systemic failure to that Convention and diplomatic and consular norms. That China went so far as to arbitrarily unilaterally remove Gui's Swedish citizenship and reimpose his Chinese citizenship is a stark example of the wanton disregard for basic international diplomatic and consular principles and should speak loudly in assessing any diplomatic assurances from China.

In a similar move, in early 2021 Hong Kong announced it was barring Hong Kongers with dual nationality from seeking and obtaining consular support from consular representatives of their other nationalities.<sup>274</sup>

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<sup>274</sup> 'Hong Kong bars its dual nationals from foreign consular help,' the Guardian, 10 Feb 2021, available at: <https://www.theguardian.com/world/2021/feb/10/hong-kong-bars-its-dual-nationals-from-foreign-consular-help>.



On the 20th anniversary of Hong Kong's handover to China on 1 July 2017, Lu Kang (陆慷), spokesperson for China's Ministry of Foreign Affairs, declared:

Now that Hong Kong has returned to the embrace of the motherland for 20 years, the Sino-British Joint Declaration, as a historical document, has no practical significance and does not have any binding force on the management of the Hong Kong Special Administrative Region by the Chinese Central Government. The British side has no sovereignty, no governance power, and no supervision power over Hong Kong after the return. I hope the above-mentioned people will recognize the reality.<sup>275</sup>

Lu's statement on the 1984 Sino-British Joint Declaration on Hong Kong highlights China's unliteral rejection of treaty obligations, which had been negotiated in good faith to establish a legally binding bilateral agreement. It echoes China's MOFA spokesperson comment in 2010 that China was not bound by its consular agreement with Australia over Stern Hu's treatment.

According to the UK, the Sino-British Joint Declaration is still "a legally binding treaty, registered with the UN and continues to be in force."<sup>276</sup> And indeed, it has been registered as a bilateral treaty with the United Nations Treaty Depository since 12 June 1985.<sup>277</sup>

The Joint Declaration is very much a legally binding bilateral treaty, despite China's unilateral claim that it is now only an "historical document," with "no practical significance and does not have any binding force." Article 8 of the Joint Declaration clearly states, "This Joint Declaration and its annexes shall be equally binding."<sup>278</sup>

The Joint Declaration does not include specific provisions for monitoring compliance nor does it establish a statutory dispute mechanism within the text of the Declaration itself, although as an international treaty there are other mechanisms for arbitration. In this sense, the Joint Declaration is relevant to understanding China's fulfillment of international agreements in general but especially in regarding extradition agreements and diplomatic assurances issued as part of specific extradition cases.

Signed in 1984 by then Chinese Premier Zhao Ziyang and British Prime Minister Margaret Thatcher, the Sino-British Joint Declaration laid out the details of how the UK would return Hong Kong and neighboring territories to China in 1997. The legally binding declaration also established a guaranteed

<sup>275</sup> 2017年6月30日外交部发言人陆慷主持例行记者会, Ministry of Foreign Affairs of the People's Republic of China, 30 June 2017, [https://www.fmprc.gov.cn/web/fyrbt\\_673021/t1474476.shtml](https://www.fmprc.gov.cn/web/fyrbt_673021/t1474476.shtml)

<sup>276</sup> "Sino-British Joint Declaration on Hong Kong 'no longer has any realistic meaning', Chinese Foreign Ministry says," South China Morning Post, 30 June 2017, <https://www.scmp.com/news/hong-kong/politics/article/2100779/sino-british-joint-declaration-hong-kong-no-longer-has-any>

<sup>277</sup> Registration page of the Sino-British Joint Declaration on Hong Kong with the United Nations Treaty Depository, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d4d6e>

<sup>278</sup> United Nations Treaty Series, treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Volume 1399, Nos. 23389 - 23396, 1985, <https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf>

minimum standard of civil and political rights for Hong Kong. This was further enumerated in the Hong Kong Basic Law, effectively the city's mini-constitution, to ensure this high degree of civil and political rights for at least 50 years, or until 2047.<sup>279</sup>

**When China declared in 2017 that it no longer considered itself bound by the legally binding Joint Declaration, not only was Beijing making a unilateral decision to free itself of accountability under international law but it was also foreshadowing greater denial of civil and political rights in Hong Kong.**

This is where the National Security Law comes into play, both as another legal instrument expanding human rights abuses and as a case study in China's breach of assurances of a significant legal or political merit. China's disregard of promises concerning the NSL are worth briefly exploring, as they shed light on how China treats international treaty obligations more broadly. This relates to Extraditions and diplomatic assurances.

On 30 June 2020, China imposed the National Security Law in Hong Kong, circumventing the city's legislative body, in contravention of Article 23 of Hong Kong's Basic Law, which holds:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.<sup>280</sup>

On 3 July 2020, a spokesperson for the UN Office of the High Commissioner for Human Rights expressed explicit concern with the law's offence of "collusion with a foreign country or with external elements to endanger national security." It argued it risked criminalizing freedom of expression, association and peaceful assembly.<sup>281</sup> In September 2020, in a joint comment on legislation and policy, seven Special Procedures elaborated that Hong Kong's new National Security Law was particularly troubling for the risks it posed to fundamental rights.<sup>282</sup>

Mainland Chinese and Hong Kong authorities sought to address these concerns with a series of promises on how the National Security Law would be implemented, the most important of which is that it would not be applied retroactively.<sup>283</sup>

Deng Zhonghua (邓中华), deputy director of the Hong Kong and Macau Affairs Office, issued an assurance regarding the non-retroactive application of the law the week before it took effect.<sup>284</sup> Also, during the week of its imposition, Hong Kong's Chief Executive Carrie Lam also told the United Nations that the law would not be applied retroactively. She said the law will only target an "extremely small minority of people," and that the basic civil and political rights of the "overwhelming majority of Hong Kong residents" will be protected.<sup>285</sup>

<sup>279</sup> For more, see: Jeffrey Wasserstrom, *Vigil: Hong Kong on the Brink*, Columbia Global Reports, 2020.; Human Rights Watch Reports and Press Releases on Hong Kong 1997.

<sup>280</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 Promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990 Effective as of 1 July 1997, <https://www.basiclaw.gov.hk/en/basiclaw/index.html>

<sup>281</sup> "Press briefing note on China / Hong Kong SAR," Spokesperson for the UN High Commissioner for Human Rights, 3 July 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26033&LangID=E>

<sup>282</sup> Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues, Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25487>

<sup>283</sup> "National security law for Hong Kong 'not retroactive', but can it be compatible with mainland Chinese legislation?," South China Morning Post, 15 June 2020, <https://www.scmp.com/news/hong-kong/politics/article/3089166/national-security-law-hong-kong-not-retroactive-can-it-be>

<sup>284</sup> "Hong Kong security law will not be retroactive: Chinese official," Reuters, 15 June 2020, <https://www.reuters.com/article/us-hongkong-protests-security-idUSKBN23MOQE>

<sup>285</sup> "Law won't be retroactive, Carrie Lam tells the UN," RTHK, 30 June 2020, <https://news.rthk.hk/rthk/en/component/k2/1534945-20200630.htm>

Despite these assurances that the law would not be applied retroactively, it did not take long for the authorities to arrest leading pro-democracy activists, lawmakers, and to target independent media over violations that were alleged to have taken place before the law was enacted.<sup>286</sup>

China's behaviour in this regard is not only about disregarding assurances made to placate diplomatic concerns, it is also itself an alarming violation of international norms.<sup>287</sup>

The ICCPR specifically addresses the issue of retroactive criminality.

15(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

15(2). Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

**ICCPR, Article 15**

Although the ICCPR does permit for limited derogation of some civil and political rights during public emergencies—only when they are proscribed by law, in pursuit of a legitimate aim, necessary and proportionate, and the least restrictive measure available—there are some rights that may never be derogated even in emergencies or in the name of national security.

Article 4 of the ICCPR lists the Article 15 prohibition on retroactive criminality as among those which may never be curtailed, even in the name of national security.

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**“The record shows that China is willing to violate its international commitments in criminal justice matters when it finds it convenient, and granting extradition in this case risks opening the door to future extraditions on the basis of unreliable guarantees.”**

**– Donald Clarke, George Washington University Law School, on the extradition trial in New Zealand of South Korean Kyung Yup Kim in June 2021.**<sup>288</sup>

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<sup>286</sup> “HONG KONG: IN THE NAME OF NATIONAL SECURITY HUMAN RIGHTS VIOLATIONS RELATED TO THE IMPLEMENTATION OF THE HONG KONG NATIONAL SECURITY LAW,” Amnesty International, 30 June 2021, <https://www.amnesty.org/download/Documents/ASA1741972021ENGLISH.PDF>

<sup>287</sup> ICCPR, Article 4 and 15(1).

<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>288</sup> “New Zealand’s Troubling Precedent for China Extradition,” Lawfare, 15 June 2021, <https://www.lawfareblog.com/new-zealands-troubling-precedent-china-extradition>

# PREJUDICIAL AND HIGH-RISK CASES

There are a number of demographics who should be protected against extradition to China under any circumstances, regardless of the nature of the alleged crime, because of substantive grounds for fear that they would be at risk of persecution.

The most well-known **high-risk groups** are ethnic minorities being targeted for political reasons. The two biggest are Tibetans and Uyghurs who have faced unprecedented persecution, leading to these groups often being given automatic asylum and protections against being returned, such as the moratorium on deporting any Uyghur to China from Sweden. Other groups, including religious minorities such as Falun Gong, have similar protections. Recent escalation against so-called Christian ‘house churches’ may also qualify (unregulated underground church groups). Well-known political dissidents is another obvious high-risk group.

However, there are also other **prejudicial situations**.

As outlined in Safeguard Defenders’ report *Involuntary Returns*,<sup>289</sup> many of those targeted for extradition may have been targeted before via involuntary return, such as having family members back in China threatened or been approached by agents abroad and operating in violation of the judicial sovereignty of the host state.

There may have also been public campaigns against them, where State- or Party media, or official proclamations have used threatening language against them, such as encouraging them to return “before other measures are taken”.

The media coverage may also indicate that they are wanted for reasons other than what is stated in the extradition request, and that they may face additional charges, or harsher penalties. A number of new crimes, such as *spreading rumours* and *slandering heroes and martyrs*, loosely defined in law, may also be used to target fugitives.

Finally, resisting an extradition request may itself place the person in greater danger. A prolonged or extradition difficult process, which exposes flaws in the Chinese government or judiciary, especially if it receives media or diplomatic attention, may be seen as defiance against the Party-State, and if the extradition request fails, a serious embarrassment to the organ who requested it. If the individual finds themselves returned to China in the future, they will likely face much harsher treatment in retribution for this embarrassment.

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<sup>289</sup> Safeguard Defenders report, *Involuntary Returns*, 2022, available at: <https://safeguarddefenders.com/en/blog/involuntary-returns-report-exposes-massive-illegal-policing-operations-china>.



# CHAPTER 4. EXTRADITION TO CHINA FROM EUROPE



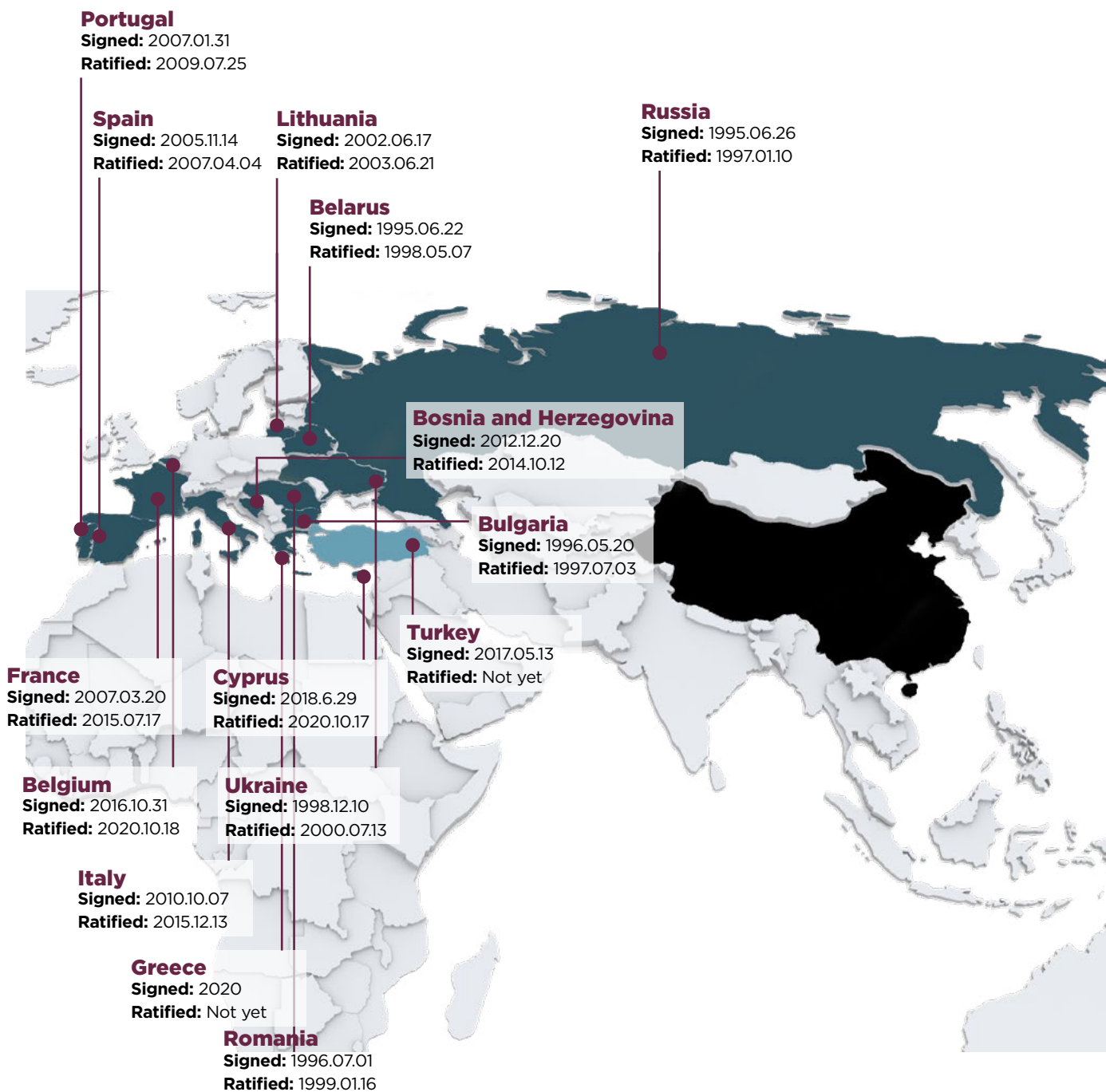
- Ratified (in effect)
- Signed (not in effect)

## European Court of Human Rights and Extradition Jurisprudence

- Fair trial
- Torture
- Death Penalty
- Diplomatic Assurances

## Emblematic European Cases

- Sweden (2019)
- Czech Republic (2020)
- Poland (2021)
- Turkey (2021)



Fifteen countries across Europe have signed bilateral extradition agreements with China, 12 of which at the time of writing this report, are in effect. These include 13 Council of Europe (COE) countries, plus Belarus whose COE ‘Special Guest’ status was suspended due to its lack of respect for human rights and democratic principles.

China has also sought extraditions with European countries that do not have bilateral extradition laws, as noted below.



The human rights situation in China has reached such an unacceptable level as to constitute not just a general but also a widespread and systematic problem that rises to a level as to necessitate the automatic refusal of any extradition request from the country under the European Convention on Human Rights.

Recently, several Council of Europe countries have ruled against extraditions of individuals to China, there has not been any need to take the case as far up as the ECtHR in extradition cases to China. However, there have still been cases of individuals being extradited to China from COE countries, such as Spain.

The following section focuses on the **four primary concerns** relevant to extradition to China: (1) the denial of the right to a fair trial; (2) the prevalence and risk of torture and other ill-treatment; (3) the risk of the death penalty; and (4) the lack of good faith diplomatic assurances.

## Fair trial <<

### **Article 6 of the European Convention on Human Rights (ECHR) establishes the right to a fair trial:**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Freedom from arbitrary detention is crucial for the right to a fair trial and for protecting against torture and other ill-treatment. The right to liberty and security is upheld by **Article 5**:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

**Article 7** further establishes the freedom from punishment that is not clearly listed by law, a crucial feature of the right to a fair trial. This is because the lack of legal precision or outright codification of laws makes it otherwise impossible for an average person to regulate their behavior and raises the risk of arbitrary or retroactive penalty.

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

The ECtHR has assessed extraditions over the right to a fair trial.

The precedent-setting *Soering v the United Kingdom*<sup>290</sup> 1989 established the standard of evaluating Article 6 violations on the grounds of a “flagrant denial of justice,” i.e. the denial of fair trial rights. This is addressed in a number of cases,<sup>291</sup> but it wasn’t until *Othman v the United Kingdom*, in 2012, that the Court ruled for the first time in an extradition case that sending someone to a country where they are at risk of denial of fair trial rights at the receiving end would be a breach of Article 6 fair trial rights, as there would be a real risk that evidence obtained through torture of Othman’s co-defendants would be used against him during his retrial. This underlined that the “flagrant denial of justice” check is a stringent test of unfairness.

ECtHR case law lays out a set of standards for assessing when to suspect the “flagrant denial of justice” in extradition cases:

- a. Detention, and especially incommunicado detention, and the denial of habeas corpus rights, i.e. the absence of an independent and impartial judiciary with which to challenge the legality of one’s detention;<sup>292</sup>
- b. The “deliberate and systematic refusal of access to a lawyer,” again in particular incommunicado detention, including for nationals detained in a foreign country;<sup>293</sup>
- c. A trial that is summary by nature and disregards the rights of the defence, especially the denial of the defence’s ability to present oral evidence, other evidence or to challenge the prosecution’s evidences. This includes the ability of the accused to question a prosecution witness, either when the witness is making their statement or at a later stage, and includes charges made before the extradition when the accused was in another country;<sup>294</sup>
- d. The use of statements or other evidence obtained through other Convention violations and in particular the Article 3 prohibition against torture, such as forced confessions but arguably also including other forms of intimidation or coercion against witnesses and family members;<sup>295</sup>

<sup>290</sup> *Soering v United Kingdom*, application no. 14038/88 (1989), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-57619%22>;

<sup>291</sup> For example see also *Mamatkulov and Askarov v Turkey*, application no 46827/99 and 46951/99 (2005), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-68183%22>; *Al-Saadoon and Mufdhi v the United Kingdom*, application no 61498/08 (2010), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-97575%22>; *Ahorugeze v Sweden*, application no 37075/09 (2011), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-107183%22>; and *Othman (Abu Qatada) v the United Kingdom*, application no 8139/09 (2012), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-108629%22>;

<sup>292</sup> See *Al-Moayad v Germany*, application no 35865/03 (2007), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-79710%22>}, para. 101.

<sup>293</sup> See also *Al-Moayad v Germany*, para. 101, 102.

<sup>294</sup> See *Bader and Kanbor v Sweden*, application no 13284/04 (2005), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-70841%22>}, para. 47; *A.M. v Italy*, application no. 3701/97, available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-58379%22>} paras. 25-26.

<sup>295</sup> See *Othman (Abu Qatada) v the United Kingdom*, application no 8139/09 (2012), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-108629%22>}, para. 267; *El Haski v Belgium*, application 649/08 (2012), available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-113445%22>};





**Article 2** establishes the right to life:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

**Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty** holds that "the death penalty shall be abolished. No one shall be condemned to such penalty or executed," (**Article 1**) with no derogation (**Article 3**) or reservations (**Article 4**). The abolition of the death penalty is now a key feature and requirement of membership in the COE.

There have been a handful of ECtHR cases examining death penalty concerns in extradition cases. Again, the precedent is set in *Soering v United Kingdom* in 1989,<sup>307</sup> which dealt with an extradition case involving the death penalty upon conviction and where it was held that the death row phenomenon, caused by inmates waiting for long periods on death row before being executed, constituted a breach of Article 3.

Soering also argued that an assurance given by the Commonwealth Attorney of Bedford County to the effect that should Soering be convicted of murder, a representation would be made 'in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out' was an ineffective measure to protect his Convention rights.

Following Soering success in rejecting the extradition at the European Court of Human Rights, assurances were given by the United States' government that Soering would not be executed if found guilty. After he was extradited to the United States he was found guilty of double murder and given a double life sentence.

China has also issued assurances that the extradited individual will not face the death penalty. However, unlike in the US example, the individuals were promptly upon return to China.

Since Soering, ECtHR jurisprudence, namely in *Al Nashiri v Poland*<sup>308</sup> and *F.G. v Sweden*,<sup>309</sup> has established a general prohibition against the extradition or deportation to a receiving State where the individual faces a real risk of the death penalty. This means that Article 3 may provide a robust defence against extraditions to China they involve the death penalty.

<sup>307</sup> *Soering v United Kingdom*, application no. 14038/88 (1989), available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57619%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57619%22]})

<sup>308</sup> *Al Nashiri v Poland*, application no. 28761/11 (2014), available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-146044%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-146044%22]})

<sup>309</sup> *F.G. v Sweden*, application no. 43611/11 (2016), available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-161829%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161829%22]})

**We argue that these examples, along with China's numerous breaches of international agreements to which it is party, such as the Sino-British Joint Declaration, mean that assurances from China are not credible and they assuage the risk of a breach of Article 3 by the use of the death penalty.**

A detailed breakdown of the problematic norm and key factors in evaluating diplomatic assurances as established under ECtHR caselaw is already presented above in Chapter 1's Diplomatic assurances: A problematic norm.

Diplomatic assurances carry the presumption of good faith. This has been acknowledged in numerous ECtHR cases. For example, in Babar *Ahmed and others v The United Kingdom*, the Court considered that in regard to the presumption of good faith "in extradition cases, it is appropriate that that presumption be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States."<sup>310</sup>

Applying this statement in principle, any domestic Court (and the ECtHR when supervising decisions) should not accept diplomatic assurances from States without such democratic and human rights-abiding behaviour. Assurances from such states should not be treated in good faith and should be rejected outright. There are a number of cases where the Court has rejected diplomatic assurances because they were deemed unreliable.<sup>311</sup> We believe that a blanket rejection of all diplomatic assurances from China should be applied given their brazen breaches of international law and lack of accountability mechanisms to enforce any assurances China may breach.

Article 4 and 13 may also be relevant to Chinese extradition cases.

**Article 4 Prohibition of slavery and forced labor** (of particular concern regarding the prevalence of forced labor in China and most recently that subjected to Uyghurs):

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labor.

### **Article 13 Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

<sup>310</sup> Babar Ahmed and others v The United Kingdom, application no. 24027/07 et al (2010), available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-99876%22%5D%7D>, para. 101.

<sup>311</sup> See: Azimov v Russia, application no. 67474/11 (2013), available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-118605%22%5D%7D>; Kasymakhunov v Russia, application no. 29604/12 (2013), available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-128055%22%5D%7D>; Baysakov and others v Ukrain, application no. 54131/08 (2010), available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-97437%22%5D%7D>; Klein v Russia, application no. 24268/08 (2010), available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-98010%22%5D%7D>.

## Sweden (2019)

The **Swedish Supreme Court** ruled that Sweden could not extradite Chinese national Qiao Jianjun (乔建军) because doing so would violate Sweden's extradition law on the grounds that there was a risk of likely persecution upon his return. It also ruled that the extradition would violate Articles 2, 3 and 6 of the ECHR. In addition, the Court considered the diplomatic assurance offered by China in this case was not legally valid because the Chinese embassy never presented a guarantee from China's Supreme Court of China, even though it had said it had been issued.

The Court's verdict ran: "Altogether, the Supreme Court makes the judgement that there is a high likelihood to believe that QJ, even if the use of death penalty can be discounted, would be at real risk of being treated in violation of ECHR Article 3."<sup>313</sup> It also noted that "**any trial of [would] significantly deviate from a standard that is acceptable**"<sup>314</sup> and thus be in violation of Article 6. The court pointed out China's reservation of Article 20 of the CAT (allowing the Committee to carry out an inquiry into a state's purported use of torture), and said that: "The practical ability to, in the way the prosecutor states, control and monitor that an assurance given by China is adhered to is **very** limited."<sup>315</sup> Because of this, the Swedish Supreme Court found that "any assurances given by China concerning these points would not have a deciding impact on concluding whether extradition would be in violation of the ECHR."<sup>316</sup>

The Supreme Court decision also notes the establishment of the National Supervision Commission, its *Liuzhi* system (and its predecessor shuanggui), and notes that people under its mandate are subject to extralegal detention and punishments within it. It also notes that the system is under the practical control of the Chinese Communist Party, and that it is not part of the judicial system. It notes that the system "includes a very high risk of violation of the principle of legal certainty, and for arbitrary application. It also notes the use of broadcasting TV confessions by those detained."<sup>317</sup>

<sup>313</sup> Official verdict (in Swedish): <https://safeguarddefenders.com/sites/default/files/wp-rsdl/uploads/2019/07/2019-07-09-%C3%96-2479-19-Beslut.pdf>, Official brief on verdict (English): <https://www.domstol.se/nyheter/2019/07/extradition-to-china-is-refused/>, Analysis of verdict (English): <https://safeguarddefenders.com/en/analysis-verdict-sweden-concerning-extradition-china>

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.



## Czech Republic (2020) <<

The **Czech Supreme Court** rejected the extradition of eight Taiwanese nationals wanted by China in April 2020 by citing the Czech Charter of Fundamental Rights and Freedoms, the ECHR, and Czech Extradition Law. The Constitutional Court (effectively the Supreme Court for these matters), found that a lower court's earlier approval of the extradition request had not taken into account the likelihood the eight individuals would suffer from torture and other inhumane treatment if they were sent to China. It deemed the diplomatic assurances provided by China unreliable and insufficient to eliminate the real risk of torture.<sup>318</sup>

The Court found that “Chinese law prohibiting torture was not itself sufficient to rule that it would not be used, because of evidence presented that torture is widespread in China.”<sup>319</sup> Extradition would therefore violate Article 3 of the ECHR and Article 7(2) of the Charter of Fundamental Rights and Freedoms.

In addition, similar to the Swedish Supreme Court case above, the court noted its lack of confidence that Czech consular staff in China would be given access to the group of Taiwanese nationals once they were returned to China because such right of access is not guaranteed under Chinese law. It also did not believe that visits, even if included in diplomatic assurances, would be carried out in a way that would ensure freedom from torture and other ill-treatment. Finally, it did not believe that a promise to grant access would necessarily be honored by the Chinese authorities.<sup>320</sup>

<sup>318</sup> ‘Czech court rules against extraditing Taiwanese to China,’ Safeguard Defenders, 12 April 2020, available at: <https://safeguarddefenders.com/en/blog/czech-court-rules-against-extraditing-taiwanese-china>

<sup>319</sup> Analysis of the Constitutional Court decision in English is available here: <https://safeguarddefenders.com/en/blog/czech-court-rules-against-extraditing-taiwanese-china>. The full verdict, in Czech, is available here: <https://safeguarddefenders.com/sites/default/files/Czech%20TW%20verdict%20CZ.pdf>. The court's brief overview, in English, is available here: <https://safeguarddefenders.com/sites/default/files/Czech%20TW%20press%20release%20EN.pdf>

<sup>320</sup> Ibid.

## Poland (2021) <<

The Warsaw Appeals Court denied the extradition of Li Zhihui (李志惠),<sup>321</sup> a Chinese-born Swedish citizen and Falun Gong practitioner,<sup>322</sup> citing both Polish law and the ECHR.

Li was initially detained in Poland in 2019 based on an INTERPOL Red Notice. A lower court first approved Li's extradition, but as an appeal court was holding a hearing on the case, the prosecutor, in dramatic fashion, switched to opposing the extradition on grounds there was a "justified fear" and "high degree of probability" that releasing the defendant to China would not allow their rights and freedoms to be protected. The prosecutor also emphasized that Poland would require China's "goodwill to cooperate" because there was no effective enforcement mechanism for accountability or failure to comply with diplomatic assurances.

However, after China issued diplomatic assurances, the prosecutor again switched sides. (The assurances, given as answers to 11 questions given to the Chinese Embassy, were analysed by Safeguard Defenders).<sup>323</sup>

In the end, the Warsaw Appeals Court rejected the extradition, ruling that the extradition would violate Article 19 of the EU's Charter of Fundamental Rights of the European Union, which applies to all EU citizens.<sup>324</sup> It also argued the diplomatic assurances were not legal in accordance with Chinese law and so could not be accepted. The court assessed China's record on following international human rights law and cooperating with international human rights organization and it found it lacking. It also ruled that China did not effectively prosecute violators of fundamental rights, thus protections against torture were also lacking.

It deemed that Li was also at risk of ill-treatment if returned to China, and in particular it was concerned he might be punished for belonging to Falun Gong. Further, the court was not able to confidently rule out that Li would be sentenced to death or life imprisonment.

The Polish Ombudsman raised concerns about the lack of objective knowledge about the situation inside China's penitentiary system, and the inability of international organizations/institutions to gain such knowledge/investigate. It also pointed out that it was against Polish law to extradite to someone to a country with life imprisonment where there was no system for reduction of punishment. In its view, China's system is unpredictable and under control of the executing organ. The court expressed concern whether there was an effective way for conditional release or reduction in sentence.

Extradition would thus be in violation of Polish law, as well as Article 2 and 3 of the ECHR, and the extradition was denied.<sup>325</sup>

<sup>321</sup> For full disclosure, Safeguard Defenders provided expert testimony in Li Zhihui's case

<sup>322</sup> For background on human rights abuses against Falun Gong practitioners see: 'China: UN human rights experts alarmed by 'organ harvesting' allegations,' Office of the High Commissioner for Human Rights, 14 June 2021, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27167&LangID=E>; 'Falun Gong: Religious Freedom in China,' Freedom House, 2017, available at: <https://freedomhouse.org/report/2017/battle-china-spirit-falun-gong-religious-freedom>.

<sup>323</sup> <https://safeguarddefenders.com/en/blog/poland-blocks-extradition-china>

<sup>324</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

<sup>325</sup> Information about the verdict, in English, available here: <https://safeguarddefenders.com/en/blog/poland-blocks-extradition-china>. The full verdict, in Polish, is available here: <https://safeguarddefenders.com/sites/default/files/Verdict%20Li%20Zhihui%20Polish.pdf>. For additional information, in English, about the case, see <https://safeguarddefenders.com/en/blog/last-bid-help-block-extradition-china-sweden-s-foreign-ministry-falls-short>

## Turkey (2021) <<

In April 2021, the Istanbul Çağlayan Justice Palace rejected an extradition request from China for Abduqadir Yapchan, a Uyghur religious scholar. Yapchan had been granted refugee status by the United Nations High Commissioner for Refugees and had been residing in Turkey for 18 years. However, following the 2016 extradition request from China, he had been held under house arrest. The Turkish court rejected the extradition request in a closed-door hearing claiming the Chinese side had failed to provide adequate evidence in support of the terrorism charge.<sup>326</sup>

At a press conference in Beijing following the decision, China's Spokesperson for the Ministry of Foreign Affairs, Zhao Lijian, slammed the decision and doubled down on the unsubstantiated terrorism charges claiming "the evidence is irrefutable," and urged Turkey to reverse its verdict, "lest the case should have a severe negative impact on China-Turkey relations."<sup>327</sup>

<sup>326</sup> 'Turkish Court Rejects China's Request to Extradite Uyghur Religious Teacher,' Radio Free Asia, 9 April 2021, available at: <https://www.rfa.org/english/news/uyghur/turkey-dismiss-04092021192932.html>

<sup>327</sup> 'Foreign Ministry Spokesman's Remarks,' Embassy of China in Cambodia, 13 April 2021, available at: [http://kh.china-embassy.org/eng/fyrth\\_3/t1868644.htm](http://kh.china-embassy.org/eng/fyrth_3/t1868644.htm)





## Cambodia

Cambodia was one of the first countries in Asia Pacific to ratify an extradition agreement with China. This, and how the Southeast Asian country has been conducting extraditions and forced transfers to China by the pro-Beijing Hun Sen regime, make it a great case study for looking at how extraditions involve international human rights law violations.

The Cambodia - China Extradition Agreement,<sup>328</sup> (Article 3) covers grounds for mandatory refusal: for political or military offenses; cases involving discrimination based on race, religion, nationality, or political opinion; when the charges are related to a crime whose statute of

<sup>328</sup> Treaty Between the Kingdom of Cambodia and the People's Republic of China on Extradition, available at: <https://www.mfaic.gov.kh/wp-content/uploads/2018/02/Treaty-on-Extradition-Cambodia-China.pdf>

limitations has expired; in cases of double jeopardy; or if a judgment has been rendered in absentia. However, the provisions fall short of international norms because, for example, it does not include fair trial or torture concerns.

The Cambodia agreement does establish grounds for discretionary refusal (Article 4) if the host State also has jurisdiction over the crime for which the individual is sought for extradition. It allows the host State to try the case instead of extraditing the individual or if they are already in the process of proceedings against the individual for the same offence. The host State may also refuse if there are humanitarian concerns or if the person requested has been, or is at risk of being, sentenced in an “extraordinary or ad hoc court or tribunal”.

This failure to include fundamental international norms in the extradition agreement is concerning, especially in light of Cambodia’s obligations under international human rights instruments. Cambodia’s own poor record on human rights this is not surprising. Since the ratification of the extradition agreement, Cambodia has been involved in several highly problematic extradition and disguised extradition cases to China.

In December 2009, Cambodia deported, or otherwise extradited, a group of 22 Uyghurs (17 men, one woman and two children) back to China. This undoubtedly constituted a violation of Cambodia’s obligations under the principle of *non-refoulement* to prevent deportation or extradition where there is a risk of arbitrary detention, torture or disappearance but also a breach of the Cambodia – China Extradition Agreement in that the Uyghurs were at real risk of discrimination on ethnic and religious grounds (Article 3(2)).

This group had fled China after July 2009 protests and violent crackdown in Urumqi, the capital of the Xinjiang Uyghur Autonomous Region and had already been granted “Person of Concern” status by the United Nations High Commissioner for Refugees (UNHCR).<sup>329</sup> This disregard of UNHCR protection added a further breach of international norms to Cambodia’s decision to comply with China’s request. It was clear that economic leverage from China played a part when two days after the group of Uyghurs were returned, China signed nearly one billion dollars’ worth of investment deals with Cambodia’s government.<sup>330</sup>

Two of the Uyghurs forcibly returned from Cambodia were sentenced to life imprisonment in 2012, another was given 17 years, while the sentences for the rest of the group are unknown because their trials in China were held in secret.<sup>331</sup>

Cambodia has also extradited Taiwanese nationals to China on several occasions, despite objections from Taipei. These extraditions were conducted in waves in 2011 (two batches involving around 200 Taiwanese) and 2012 (one group of 49 individuals). The Taiwanese citizens were accompanied by Chinese citizens and were allegedly involved in a telecommunications scam.<sup>332</sup>

The Department of International and Cross-Strait Legal Affairs of Taiwan’s Ministry of Justice called for an investigation in June 2016 into a separate incident when Cambodia extradited a group of 25 Taiwanese to China. The individuals had been arrested in a joint operation between

<sup>329</sup> ‘China: Forcibly Returned Uighur Asylum Seekers At Risk,’ Human Rights Watch, 22 December 2009, available at: <https://www.hrw.org/news/2009/12/22/china-forcibly-returned-uighur-asylum-seekers-risk>; ‘Cambodia to deport Uighurs despite persecution fears,’ Reuters, 19 December 2009, available at: <https://www.reuters.com/article/us-cambodia-china-uighurs/cambodia-to-deport-uighurs-despite-persecution-fears-idUSTRE5BI0TX20091219>

<sup>330</sup> ‘After Expelling Uighurs, Cambodia Approves Chinese Investments,’ New York Times, 21 December 2009, available at: <https://www.nytimes.com/2009/12/22/world/asia/22cambodia.html>

<sup>331</sup> ‘Two Uighurs deported from Cambodia to China get life,’ Reuters, 26 January 2012, available at: <https://www.reuters.com/article/us-china-uighurs/two-uighurs-deported-from-cambodia-to-china-get-life-idUSTRE80Q0AW20120127>; ‘Life in Prison for Asylum Seekers,’ Radio Free Asia, 26 January, available at: <https://www.rfa.org/english/news/uyghur/life-in-prison-01262012205722.html>

<sup>332</sup> ‘Cambodia to Extradite Taiwanese to China,’ Radio Free Asia, 22 May 2012, available at: <https://www.rfa.org/english/news/cambodia/taiwan-05222012154740.html>

China's MPS and the Cambodian police over their alleged involvement in telecommunications fraud.<sup>333</sup>

In 2017, Cambodia extradited another seven Taiwanese nationals again for allegedly being involved in telecommunications fraud. Taiwan called on Cambodia to “truly guarantee our nationals’ judicial rights and interests and access to assistance,” and expressed “solemn concerns and deep regrets about its Taiwan nationals being sent to China.”<sup>334</sup>

On several occasions, Taiwan’s Ministry of Justice has unsuccessfully attempted to negotiate with the Chinese Ministry of Public Security and Cambodian officials in efforts to prevent the extradition of their nationals from Cambodia to China. Taiwan does not have formal diplomatic relations with Cambodia and the Cambodia – China Extradition Agreement has been used by China to also cover the apprehension and extradition of Taiwanese nationals, often without any consultation or prior notification to Taiwanese ministries.

## Latin America & the Caribbean



<sup>333</sup> 'Taiwan calls for joint investigation in regard to the deportation of Taiwanese suspects from Cambodia to Mainland China.,' Press Release of the Ministry of Justice, Department of International and Cross-Strait Legal Affairs, 24 June 2016, available at: <https://www.thip.moj.gov.tw/media/67997/691015455973.pdf?mediaDL=true>

<sup>334</sup> 'Taiwan protests against Cambodia sending Taiwanese fraud suspects to China,' Reuters, 26 July 2017, available at: <https://www.reuters.com/article/us-cambodia-china-taiwan/taiwan-protests-against-cambodia-sending-taiwanese-fraud-suspects-to-china-idUSKBN1ACOD1>

The bilateral extradition agreement between Peru and China, which came into effect in 2003,<sup>335</sup> is incompatible with a number of international standards. Article 3 outlines several grounds for the mandatory rejection of an extradition request: *inter alia*, if the offence is political in nature and if the requested individual is at risk of persecution based on race, gender, religion, nationality, or political opinion. However, it does not list fear of torture or other forms of mistreatment as grounds for mandatory rejection. Article 4 outlines two grounds for the discretionary rejection of extradition requests, including on humanitarian grounds. Article 15 also notes that the target of extradition shall not be charged with additional offences following extradition.

Peru is one of the countries with whom China maintains an extradition agreement that includes a mechanism for “simplified extradition.” Article 13 defines a simplified extradition as one in which the targeted individual for extradition agrees to be transferred to the requesting State, thus allowing the host State to extradite that person as soon as possible within the scope of law but without the need for any other procedural steps. In other words, if China wants someone in Peru and the Peruvian authorities claim that the individual agrees to the extradition request then Peru does not need to investigate any claims or concerns of the risk of abuse upon return to China. Simplified extradition combined with State coercion raises the risk of serious abuse of human rights.

In 2016, China completed its first extradition of a criminal target from Latin America. Huang Haiyong (黄海勇), also known as Wong Ho Wing was extradited from Peru<sup>336</sup> after China accused him in 2001 of being involved in a crude soybean oil smuggling case involving around 100 million USD worth of tax evasion. He and two associates had reportedly fled to the United States in 1998, when an INTERPOL Red Notice was issued for him. Huang was arrested on his arrival in Peru in October 2008 and negotiations began over his extradition. At a public hearing in December 2008, Huang said he would be at risk of torture and the death penalty if he was sent back. He requested his trial be held in Peru.<sup>337</sup>

In 2009, the Inter-American Commission granted “precautionary measures” asking the Peruvian authorities not to extradite Huang until the Inter-American Court of Human Rights (IACHR) had decided on his petition for protection. Over the ensuing years, a number of habeas corpus petitions were filed regarding Huang’s ongoing detention in Peru awaiting extradition while Chinese and Peruvian officials negotiated the domestic annulment of the death penalty for the smuggling crime for which he was sought for extradition.<sup>338</sup> In May 2011, China removed the death penalty for this crime. In 2014, Huang’s prolonged detention was determined “unreasonable” and he was released into house arrest under his brother’s supervision. In 2016, at the end of a contentious eight-year legal fight, Huang was extradited to China, and subsequently sentenced to 15 years in prison. His case is considered one of the most complicated extradition cases involving China.<sup>339</sup>

<sup>335</sup> 中华人民共和国和秘鲁共和国引渡条约 (CN), Extradition Treaty between the People’s Republic of China and the Republic of Peru, [www.npc.gov.cn/wxzl/gongbao/2002-12/03/content\\_5303267.htm](http://www.npc.gov.cn/wxzl/gongbao/2002-12/03/content_5303267.htm)

<sup>336</sup> “China extradites first fugitive from Latin America,” Reuters, 18 July 2016, <https://www.reuters.com/article/us-china-corruption-idUSKCNQZY00Z>

<sup>337</sup> “URGENT ACTION CHINESE NATIONAL FACING EXTRADITION,” Amnesty International, 47/10 Index: AMR 46/003/2010, 4 March 2009, <https://www.amnesty.org/download/Documents/36000/amr460032010en.pdf>; ‘PERU: Extradition of Chinese Citizen at Risk of Death Penalty Halted,’ Inter Press Service, 31 May 2010, available at: [www.ipsnews.net/2010/05/peru-extradition-of-chinese-citizen-at-risk-of-death-penalty-halted/](http://www.ipsnews.net/2010/05/peru-extradition-of-chinese-citizen-at-risk-of-death-penalty-halted/)

<sup>338</sup> ‘Wong Ho Wing v Peru,’ Inter American Commission on Human Rights, available at: [https://iachr.ils.edu/sites/default/files/iachr/Cases/garcia-salas\\_wong\\_ho\\_wing\\_v\\_peru.pdf](https://iachr.ils.edu/sites/default/files/iachr/Cases/garcia-salas_wong_ho_wing_v_peru.pdf)

<sup>339</sup> ‘《焦点访谈》：“红通”顽抗被顶格重判释放强烈信号,’ Sina, 26 August 2019, available at: <https://news.sina.com.cn/c/2019-08-27/doc-ihytcern3769312.shtml>



Ratified in 2014, the China – Brazil Extradition Agreement includes a more detailed list of mandatory rejections of an extradition request in Article 3. These include mandatory grounds to refuse an extradition for political and military crimes; where there are sufficient grounds to believe there are risks of discrimination based on race, gender, religion, nationality or political opinion; if the individual sought for extradition has already been tried; or if the statute of limitations has expired. It also includes that the request for extradition be rejected if there are concerns the individual is at risk of an ad hoc tribunal, grounds for believing fair trial rights will be denied or if the penalties the requesting State may impose are in conflict with the basic principles of the sending State's law.<sup>340</sup>

Article 15 lays out the rights of the extradition target: they should enjoy all the rights guaranteed by the law of the host State, including the right of defense and any necessary translation assistance. It also holds that any time spent in detention awaiting extradition shall be counted toward any future sentence.<sup>341</sup>

Brazil extradited the first Chinese suspect in 2019, just a few years after the agreement was ratified. Huang<sup>342</sup> was wanted in connection with organized crime in Fujian province. He had fled China in 2010, incurring a Red Notice and was arrested in Brazil in 2018. The Brazilian Supreme Court approved his extradition in June 2019.<sup>343</sup>

However, the same court has also rejected several recent extradition requests in illustrative verdicts.

In 2019, it rejected the extradition of a Chinese couple, Mi Xu and Ming Yao,<sup>344</sup> who China claimed were wanted for serious financial crimes. The court rejected the request on concerns the possible penalties (life imprisonment or death sentence) were disproportionate under Brazilian law. The refusal came the provisions of the extradition agreement for mandatory rejection when the individual is at risk of criminal punishment in conflict with the fundamental principles of the other party's legal system.<sup>345</sup>

In this case, Amnesty International's reports in China's death penalty were raised as persuasive evidence, along with Brazil's own Foreign Ministry's Report on China that reiterated the serious human rights abuses that were taking place in the country, highlighting the arrests of human rights lawyers. As outgoing Justice Celso de Mello stressed, the High Court must not grant extradition, "if the legal system of the requesting State is not capable of ensuring the defendants, in criminal court, the full guarantee of an impartial trial, fair, regular and independent."<sup>346</sup>

Again, in August 2021, the Supreme Court rejected another extradition request for China for Miao Hongjiang,<sup>347</sup> also wanted for alleged financial crimes. The key argument was also the risk of

<sup>340</sup> 中华人民共和国和巴西联邦共和国引渡条约, National People's Congress, available at: [www.npc.gov.cn/wxzl/wxzl/2006-05/24/content\\_350143.htm](http://www.npc.gov.cn/wxzl/wxzl/2006-05/24/content_350143.htm)

<sup>341</sup>

<sup>342</sup> Huang's full name in Chinese characters is unavailable in public records search of Brazil high court documents and Chinese official documents do not provide information on this case.

<sup>343</sup> 'Suspect extradited to China from Brazil for the first time,' China Daily, 18 August 2019, available at: [www.chinadaily.com.cn/a/201908/18/WS5d5897aba310cf3e355665a8.html](http://www.chinadaily.com.cn/a/201908/18/WS5d5897aba310cf3e355665a8.html); 'Gang crime suspect extradited to China from Brazil,' Xinhua, 18 August 2019, available at: [www.xinhuanet.com/english/2019-08/18/c\\_138316927.htm](http://www.xinhuanet.com/english/2019-08/18/c_138316927.htm)

<sup>344</sup> Mi Xu and Ming Yao's full name in Chinese characters is unavailable in public records search of Brazil high court documents and Chinese official documents do not provide information on this case.

<sup>345</sup> 'Negada extradição de casal chinês que poderia receber pena de prisão perpétua ou de morte,' Supreme Court of Brazil website, available at: <https://stf.jusbrasil.com.br/noticias/705370167/negada-extradicao-de-casal-chines-que-poderia-receber-pena-de-prisao-perpetua-ou-de-morte>

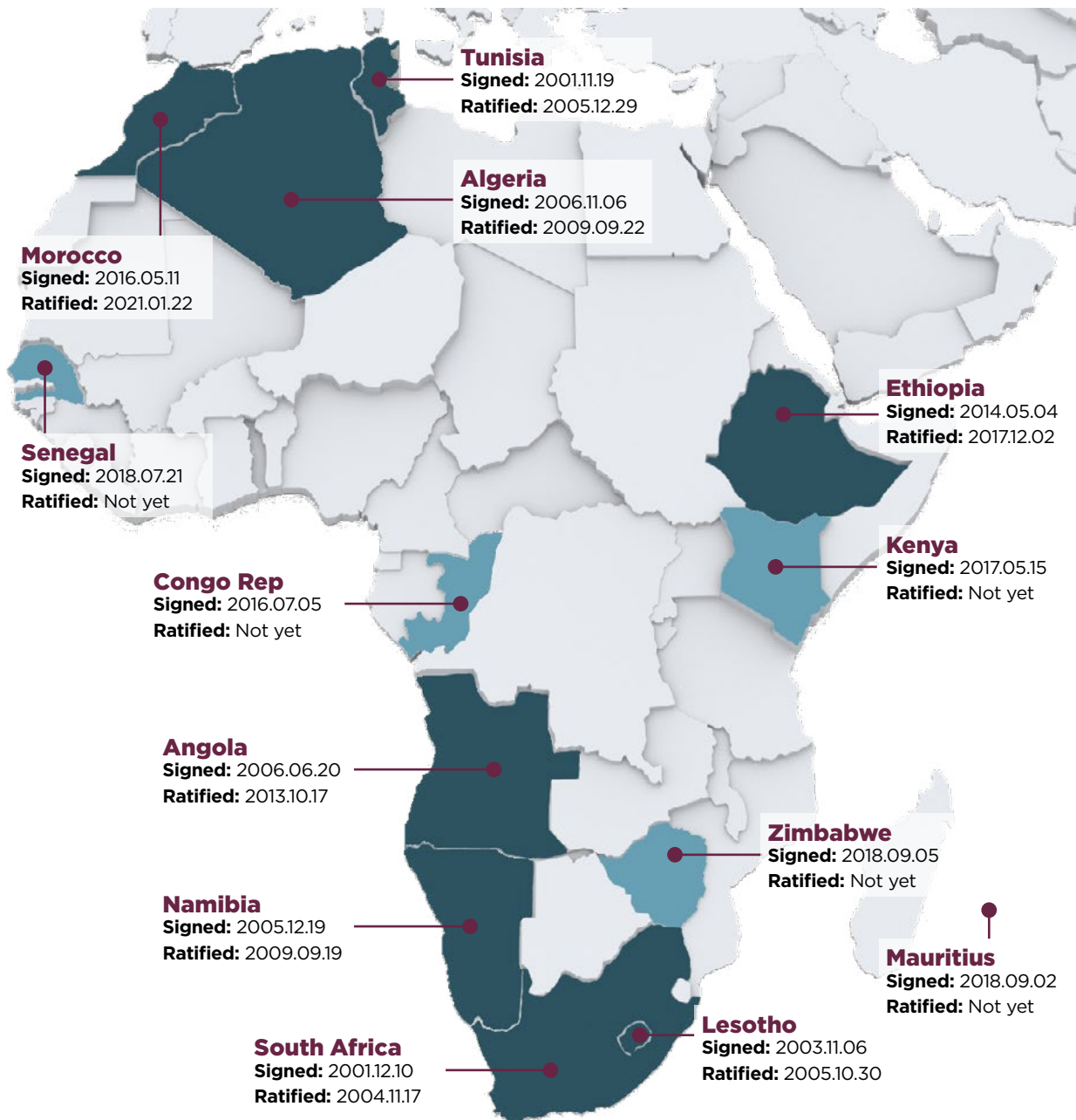
<sup>346</sup> Ibid.

<sup>347</sup> 'Advogado questiona no STF extradição de cidadão chinês,' Consultor Jurídico, 7 May 2021, available at: <https://www.conjur.com.br/2021-mai-07/advogado-questiona-extradicao-cidadao-chines-stf>

disproportionate sentencing under Chinese law, at odds with what is permitted under Brazilian law. The court was also convinced by arguments that Miao was at risk of disproportionate sentencing in China.<sup>348</sup>

The court also concluded that the lack of separation of powers and independence between State and party organs in China meant that the victim would not receive a fair trial and was at risk of mistreatment. Because of the Brazilian Embassy in China's challenges in monitoring the treatment of prisoners even diplomatic assurances could not assuage their concerns.<sup>349</sup>

## Africa



<sup>348</sup> Here the Supreme Court noted the 2018 country reports on human rights in China by the US State Department, along with Amnesty International's annual reports for 2017-2019, and the Human Rights Watch country report for China 2019.

<sup>349</sup> 'Supremo Tribunal Federal STF - EMB.DECL.NOS EMB.DECL.NOS EMB.DECL.NA EXTRADICAO: Ext 0001274-51.2016.1.00.000 DF 0001274-51.2016.1.00.000,' Supreme Court of Brazil, available at: <https://stf.jusbrasil.com.br/jurisprudencia/1262991668/embdecl-nos-embdecl-nos-embdecl-na-extradicao-ext-1443-df-0001274-5120161000000/inteiro-teor-1262991675>

## Kenya <<

Beginning in 2015, China began to pressure Kenya over a mixed group of around 76 Chinese and Taiwanese nationals wanted for alleged telecommunications fraud. Kenya's Attorney General, Githu Muigui, sought to allay concerns at the time in regard to their extradition stating that any agreement on their return would have to satisfy Kenya's legal provisions but he still spoke of China as a "friendly government" without acknowledging any fair trial or torture concerns.<sup>350</sup> Then, in 2016, even after being acquitted by local courts, Kenya agreed to send a group to China, including some 45 Taiwanese nationals. The court had earlier granted them three weeks to leave the country but when they went to the police station to collect their passports, they were detained and sent to China.<sup>351</sup> At least two of the Taiwanese nationals were later shown delivering televised forced confessions in China.<sup>352</sup>

Kenya's decision to deport the Taiwanese nationals was doubly concerning in light of accusations from Taiwan's Ministry of Foreign Affairs that Chinese diplomats had been actively seeking to subvert a court order blocking the deportation of the Taiwanese nationals from Kenya.<sup>353</sup> Instead, Taiwan was denied a chance to contest Kenya's decision to send their nationals to China, a flagrant disregard of Taiwan's jurisdiction over its own nationals.<sup>354</sup>

Highlighting the problem of Taiwanese national's precarious situation within China's expanded extradition regime, a spokesperson for Kenya's Ministry of Interior, Mwenda Njoka, told CNN at the time, "We followed international law and released them back to the court in which they came from... We don't have a relationship with Taiwan as a country, but we have a relationship with China."<sup>355</sup>

This Kenya incident demonstrates the overtly politicized nature of how China pursues deportations and extraditions around the world.



Taiwanese suspects deported from Kenya to China, 2016

<sup>350</sup> 'Kenya weighs Chinese request for extradition of 76 held for cyber crime,' Reuters, 22 January 2015, available at: <https://www.reuters.com/article/us-kenya-china/kenya-weighs-chinese-request-for-extradition-of-76-held-for-cyber-crime-idUSKBNOKV1IR20150122>

<sup>351</sup> 'Kenya defends forcing 45 Taiwanese onto a plane to China,' CNN, 14 April 2016, available at: <https://edition.cnn.com/2016/04/13/asia/taiwan-kenya-china-abducted/index.html>

<sup>352</sup> 'Chinese state TV airs confessions by Taiwan fraud suspects,' Reuters, 15 April 2016, available at: <https://www.reuters.com/article/us-china-taiwan-kenya-idUSKCN0XC1QL>

<sup>353</sup> '8 Taiwanese Are Deported to China After Trial in Kenya,' New York Times, 11 April 2016, available at: <https://www.nytimes.com/2016/04/12/world/asia/kenya-deport-taiwan-china.html>; 'Kenyan Extraditions Raise Questions on Stability of China-Taiwan Relations,' the Global Observatory, 19 April 2016, available at: <https://theglobalobservatory.org/2016/04/china-taiwan-kenya-abduction/>

<sup>354</sup> 'Dispatches: Ending Extra-legal Deportations to China,' Human Rights Watch, 24 April 2016, available at: <https://www.hrw.org/news/2016/04/24/dispatches-ending-extra-legal-deportations-china>

<sup>355</sup> 'Kenya defends forcing 45 Taiwanese onto a plane to China,' CNN, 14 April 2016, available at: <https://edition.cnn.com/2016/04/13/asia/taiwan-kenya-china-abducted/index.html>

## Morocco <<

On 19 July 2021, Uyghur activist and computer designer Yidiresi Aishan (also known as Idris Hasan), was arrested in Casablanca by Moroccan authorities after flying into the country from Turkey.<sup>356</sup> The arrest came at the request of China and an abusive Red Notice, which claims without evidence that he is wanted on terrorism charges. His forcible transfer to China would place him at extreme risk of torture and other inhuman and degrading treatment, in violation of Morocco's obligations under international law.

Idris Hasan had been living in Turkey, where he has permanent residency, since 2012, along with his wife and three children. His residency in Turkey was granted on humanitarian grounds.

Following his arrest, on 20 July the King's Prosecutor at the Casablanca Criminal Court of First Instance recommended his extradition to China pending a decision by the Rabat Court of



<sup>356</sup> 'Morocco: Authorities must not deport detained Uyghur to China,' 27 July 2021, available at: <https://www.amnesty.org/en/latest/news/2021/07/morocco-authorities-must-not-deport-detained-uyghur-to-china/>

Cassation, despite Idris Hasan's express fear of facing a death sentence and torture. Idris Hasan was not granted access to legal representation until 29 July, meaning his earlier communication with the Moroccan prosecutor stood in place without legal aid in contravention of international norms.

On 11 August 2021, Interpol canceled the standing Red Notice for Idris Hasan on the grounds that the original Red Notice request was not in compliance with Article 1(1) and 3 of Interpol's Constitution. These provisions enjoin Interpol to promote mutual assistance between countries but only in the spirit of the Universal Declaration of Human Rights (Article 2(1)) and that "it is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character."<sup>357</sup>

As such, four UN Special Procedures of the Human Rights Council wrote to the Moroccan authorities expressing their concerns of Idris Hasan being persecuted on the basis of his work to defend the human rights of Uyghurs and stating: "Although we do not wish to prejudge the accuracy of the allegations above, we express our deep concern about the potential extradition of Mr. Aishan to China, where he is at risk of torture and other mistreatment, both for belonging to an ethnic and religious minority and for his accusation of being affiliated with a terrorist organization."<sup>358</sup>

Despite the reversal from Interpol and communications from the UN Special Procedures, on 15 December 2021 the Moroccan Court issued a favorable opinion on the extradition request.<sup>359</sup>

As the written sentence provided only in January shows, the judge clearly disregarded the arguments made by the defense and human rights community concerning "foreseeable, real and personal" risks of torture in China. Moreover, a non-paper dated December 16, circulated by Moroccan authorities to the numerous Members of Parliament around the world who had raised concerns over Idris Hasan's possible extradition continued to ignore such arguments and their corresponding obligations under international law, both with regard to the Convention Against Torture and the Convention for the Protection of Refugees.

In response to the verdict and in light of these concerns, four Special Procedures of the UN Human Rights Council, on 16 December again publicly called on the government of Morocco to immediately halt its decision to extradite Idris Hasan to China, "where he risks serious human rights violations including arbitrary detention, enforced disappearance, or torture and other cruel, inhuman or degrading treatment or punishment."<sup>360</sup>

The independent experts reiterated that:

No State has the right to expel, return or otherwise remove any individual from its territory whenever there are "substantial grounds" for believing that the person would be in danger of being subjected to torture in the State of destination, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>361</sup>

<sup>357</sup> See Interpol Constitution and related legal documents, available at: <https://www.interpol.int/en/Who-we-are/Legal-framework/Legal-documents>

<sup>358</sup> JA MAR 7/2021, Joint Communication available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26609>

<sup>359</sup> 'Moroccan court rules in China's favor to extradite Uyghur accused of 'terrorism', 16 December 2021, available at: <https://www.rfa.org/english/news/uyghur/idris-hasan-12162021175312.html>

<sup>360</sup> 'Morocco: UN experts say extradition of Uyghur asylum seeker to China violates principle of non-refoulement,' 16 December 2021, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27974&LangID=E>

<sup>361</sup> Ibid.

<sup>362</sup> 'UN Committee Against Torture requests Morocco halt extradition of Idris Hasan,' 21 December 2021, available at: <https://safeguarddefenders.com/en/blog/un-committee-against-torture-requests-morocco-halt-extradition-idris-hasan>

On 20 December, following an urgent request by Safeguard Defenders and Mena Rights Group, the UN Committee Against Torture further issued a request for interim measures to halt the extradition in order to prevent irreparable harm.<sup>362</sup>

While, at the time of writing, Morocco has yet to make a final decision concerning Idris Hasan's fate, it is clear from the expert opinion of the UN Special Procedures that Morocco, and indeed no State, should extradite anyone to China, and especially not Uyghurs, due to gross human rights concerns.

# APPENDIX I: CHINA EXTRADITION LAW

## Extradition Law of the People's Republic of China

Order of the President of the People's Republic of China

No. 42

The Extradition Law of the People's Republic of China, adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on December 28, 2000, is hereby promulgated and shall go into effect as of the date of Promulgation.

Jiang Zemin

President of the People's Republic of China

December 28, 2000

## Extradition Law of the People's Republic of China

(Adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on December 28, 2000)

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## *Chapter I*

### **General Provisions**

**Article 1** This Law is enacted for the purpose of ensuring normal extradition, strengthening international cooperation in punishing crimes, protecting the lawful rights and interests of individuals and organizations, safeguarding national interests and maintaining public order.

**Article 2** This Law is applicable to extradition conducted between the People's Republic of China and foreign states.

**Article 3** The People's Republic of China cooperates with foreign states in extradition on the basis of equality and reciprocity.

No cooperation in extradition may impair the sovereignty, security or public interests of the People's Republic of China.

**Article 4** The People's Republic of China and foreign states shall communicate with each other through diplomatic channels for extradition. The Ministry of Foreign Affairs of the People's Republic of China is designated as the communicating authority for extradition.

Where in an extradition treaty there are special provisions to govern the communicating authority, the provisions there shall prevail.

**Article 5** In handling cases of extradition, compulsory measures including detention, arrest and residential surveillance may, depending on the circumstances, be taken against the person sought.

**Article 6** The terms used in this Law are defined as follows:

- (1) "the person sought" refers to the person for whom a request for grant of extradition is made by a requesting state;
- (2) "the person extradited" refers to the person extradited from the requested state to the requesting state;
- (3) "extradition treaty" refers to a treaty on extradition, which is concluded between the People's Republic of China and a foreign state or to which both the People's Republic of China and a foreign state are parties, or any other treaty which contains provisions in respect of extradition.

## *Chapter II*

### **Request Made to the People's Republic of China for Extradition**

#### *Section 1*

#### **Conditions for Extradition**

**Article 7** Request for extradition made by a foreign state to the People's Republic of China may be granted only when it meets the following conditions:

- (1) the conduct indicated in the request for extradition constitutes an offence according to the laws of both the People's Republic of China and the Requesting State; and
- (2) where the request for extradition is made for the purpose of instituting criminal proceedings, the offence indicated in the request for extradition is, under the laws of both the People's



Republic of China and the Requesting State, punishable by a fixed term of imprisonment for one year or more or by any other heavier criminal penalty; where the request for extradition is made for the purpose of executing a criminal penalty, the period of sentence that remains to be served by the person sought is at least six months at the time when the request is made.

If the request for extradition concerns miscellaneous offences which conform to the provisions of Subparagraph (1) of the preceding paragraph, as long as one of the offences conforms to the provisions of Subparagraph (2) of the preceding paragraph, extradition may be granted for all of those offences.

**Article 8** The request for extradition made by a foreign state to the People's Republic of China shall be rejected if:

(1) the person sought is a national of the People's Republic of China under the laws of the People's Republic of China;

(2) at the time the request is received, the judicial organ of the People's Republic of China has rendered an effective judgement or terminated the criminal proceedings in respect of the offence indicated in the request for extradition;

(3) the request for extradition is made for a political offence, or the People's Republic of China has granted asylum to the person sought;

(4) the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings;

(5) the offence indicated in the request for extradition is a purely military offence under the laws of the People's Republic of China or the laws of the Requesting State;

(6) the person sought is, under the laws of the People's Republic of China or the laws of the Requesting State, immune from criminal responsibility because, at the time the request is received, the limitation period for prosecuting the offence expires or the person is pardoned, or for other reasons;

(7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State;

(8) the request for extradition is made by the Requesting State on the basis of a judgement rendered by default, unless the Requesting State undertakes that the person sought has the opportunity to have the case retried under conditions of his presence.

**Article 9** The request for extradition made by a foreign state to the People's Republic of China may be rejected if:

(1) the People's Republic of China has criminal jurisdiction over the offence indicated in the request and criminal proceedings are being instituted against the person or preparations are being made for such proceedings; or

(2) extradition is incompatible with humanitarian considerations in view of the age, health or other conditions of the person sought.

## *Section II*

### **Submission of the Request for Extradition**

**Article 10** The request for extradition made by the Requesting State shall be submitted to the Ministry of Foreign Affairs of the People's Republic of China.

**Article 11** The Requesting State shall present a letter of request for extradition which shall specify:

- (1) the name of the requesting authority;
- (2) the name, sex, age, nationality, category and number of identification documents, occupation, characteristics of appearance, domicile and residence of the person sought and other information that may help to identify and search for the person;
- (3) facts of the offence, including the time, place, conduct and outcome of the offence; and (4) legal provisions on adjudgement, measurement of penalty and prescription for prosecution.

**Article 12** A letter of request for extradition submitted by the Requesting State shall be accompanied by:

- (1) where extradition is requested for the purpose of instituting criminal proceedings, a copy of the warrant of arrest or other document with the same effect; where extradition is requested for the purpose of executing criminal punishment, a copy of legally effective written judgment or verdict, and where part of punishment has already been executed, a statement to such an effect; and
- (2) the necessary evidence of the offence or evidentiary material.

The Requesting State shall provide the photographs and fingerprints of the person sought and other material in its control which may help to identify that person.

**Article 13** The letter of request for extradition and other relevant documents submitted by the Requesting State in accordance with the provisions of this Section shall be officially signed or sealed by the competent authority of the Requesting State and be accompanied by translations in Chinese or other languages agreed to by the Ministry of Foreign Affairs of the People's Republic of China.

**Article 14** The Requesting State shall make the following assurances when requesting extradition:

- (1) no criminal responsibility shall be investigated against the person in respect of the offences committed before his surrender except for which extradition is granted, nor shall that person be re extradited to a third state, unless consented by the People's Republic of China, or unless that person has not left the Requesting State within 30 days from the date the proceedings in respect of the offence for which extradition is requested are terminated, or the person completes his sentence or is released before the sentence expires, or after leaving the country the person has returned of his own free will; and
- (2) where after submitting the request for extradition, the Requesting State withdraws or waives it, or it is a mistake for the Requesting State to submit such a request, the Requesting State shall bear the responsibility for the harm thus done to the person.

**Article 15** Where there is no extradition treaty to go by, the Requesting State shall make a reciprocity assurance.

## Section 3

### Examination of the Request for Extradition

**Article 16** Upon receiving the request for extradition from the Requesting State, the Ministry of Foreign Affairs shall examine whether the letter of request for extradition and the accompanying documents and material conform to the provisions of Section 2 in Chapter II of this Law and the provisions of extradition treaties.

The Higher People's Court designated by the Supreme People's Court shall examine whether the request for extradition made by the Requesting State conforms to the provisions of this Law and of extradition treaties regarding conditions for extradition and render a decision on it. The decision made by the Higher People's Court is subject to review by the Supreme People's Court.

**Article 17** Where two or more states request extradition of the same person for the same or different conducts, the order of priority of the request for extradition shall be determined upon considering the factors such as the time when those requests for extradition are received by the People's Republic of China and the fact whether there are extradition treaties between the People's Republic of China and the Requesting States to go by.

**Article 18** Where the Ministry of Foreign Affairs, after examination, believes that the request for extradition submitted by the Requesting State does not conform to the provisions of Section 2 in Chapter II of this Law or the provisions of extradition treaties, it may ask the Requesting State to furnish supplementary material within 30 days. The time limit may be extended for 15 days at the request of the Requesting State.

If the Requesting State fails to provide supplementary material within the time limit mentioned above, the Ministry of Foreign Affairs shall terminate the extradition case. The Requesting State may make a fresh request for extradition of the person for the same offence.

**Article 19** Where the Ministry of Foreign Affairs, after examination, believes that the request for extradition submitted by the Requesting State conforms to the provisions of Section 2 in Chapter II of this Law and the provisions of extradition treaties, it shall transmit the letter of request for extradition and the accompanying documents and material to the Supreme People's Court and the Supreme People's Procuratorate.

**Article 20** Where the person sought is detained for extradition before a foreign state makes a formal request for extradition, the Supreme People's Court shall, without delay, transmit the letter of request for extradition and the accompanying documents and material it has received to the Higher People's Court concerned for examination.

Where the said person is not detained for extradition before a foreign state makes a formal request for extradition, the Supreme People's Court shall, after receiving the letter of request for extradition and the accompanying documents and material, notify the Ministry of Public Security to search for the person. Once finding the person, the public security organ shall, in light of the circumstances, subject that person to detention or residential surveillance for extradition and the Ministry of Public Security shall notify the Supreme People's Court of the fact. Upon receiving the notification of the Ministry of Public Security, the Supreme People's Court shall, without delay, transmit the letter of request for extradition and the accompanying documents and material to the Higher People's Court concerned for examination.

Where, after searching, the public security organ is certain that the person sought is not in the territory of the People's Republic of China or it cannot find the person, the Ministry of Public Security shall, without delay, notify the Supreme People's Court of the fact. The latter shall,

immediately after receiving the notification of the Ministry of Public Security, notify the Ministry of Foreign Affairs of the results of the search, and the Ministry of Foreign Affairs shall notify the Requesting State of the same.

**Article 21** Where the Supreme People's Procuratorate, after examination, believes that the offence indicated in the request for extradition or other offences committed by the person sought are subject to prosecution by a Chinese Judicial organ, although criminal proceedings have not yet been instituted, it shall, within one month from the date the letter of request for extradition and the accompanying documents and material are received, notify the Supreme People's Court the Ministry of Foreign Affairs respectively of its opinions to institute criminal proceedings.

**Article 22** The Higher People's Court shall, in accordance with the relevant provisions of this Law and of extradition treaties regarding conditions for extradition, examine the request for extradition made by the Requesting State, which shall be conducted by a collegial panel composed of three judges.

**Article 23** When examining an extradition case, the Higher People's Court shall hear the pleadings of the person sought and the opinions of the Chinese lawyers entrusted by the person. The Higher People's Court shall, within 10 days from the date it receives the letter of request for extradition transmitted by the Supreme People's Court, serve a copy of the letter to the person. The person shall submit his opinions within 30 days from the date he receives the copy.

**Article 24** After examination, the Higher Peoples' Court shall:

(1) where the request for extradition made by the Requesting State is regarded as being in conformity with the provisions of this Law and of extradition treaties, render a decision that the request meets the conditions for extradition. Where the person whose extradition requested falls under the category for postponed extradition according to Article 42 of this Law, it shall be so specified in the decision; or

(2) where the request for extradition made by the Requesting State is regarded not as being in conformity with the provisions of this Law and of extradition treaties, render a decision that no extradition shall be granted.

Upon request by the Requesting State, the Higher People's Court may, on condition that other proceedings being conducted in the territory of the People's Republic of China are not hindered and the lawful rights and interests of any third party in the territory of the People's Republic of China are not impaired, decided to transfer the property related to the case, while rendering the decision that the request meets he conditions for extradition.

**Article 25** After making the decision that the request meets the conditions for extradition or the decision that no extradition shall be granted, the Higher People's Court shall have it read to the person sought and, within seven days from the date it makes the decision, submit the decision and the relevant material to the Supreme People's Court for review.

Where the person sought refuses to accept the decision made by the Higher People's Court that the request meets the conditions for extradition, he and the Chinese lawyers entrusted by him may, within 10 days from the date the People's Court has the decision read to the person, submit their opinions to the Supreme People's Court.

**Article 26** The Supreme People's Court shall review the decision made by the Higher People's Court and shall do the following respectively:

(1) where it believes that the decision made by the Higher People's Court conforms to the

provisions of this Law and of extradition treaties, it shall approve it; and

(2) where it believes that the decision made by the Higher People's Court does not conform to the provisions of this Law and of extradition treaties, it may quash it and send the case back to the People's Court which has originally reviewed it for fresh review, or modify the decision directly.

**Article 27** In the course of examination, the People's Court may, when necessary, request through the Ministry of Foreign Affairs that the Requesting State provide supplementary material within 30 days.

**Article 28** After making the decision of approval or modification, the Supreme People's Court shall, within seven days from the date it makes the decision, transmit the letter of decision to the Ministry of Foreign Affairs and, at the same time, serve it on the person sought.

After approving the decision or making the decision that no extradition shall be granted, the Supreme People's Court shall immediately notify the public security organ to terminate the compulsory measures against the person sought.

**Article 29** After receiving the decision made by the Supreme People's Court that no extradition shall be granted, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same.

Upon receiving the decision made by the Supreme People's Court that the request meets the conditions for extradition, the Ministry of Foreign Affairs shall submit the decision to the State Council for which to decide whether to grant extradition.

Where the State Council decides not to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. The People's Court shall immediately notify the public security organ to terminate the compulsory measures against the person sought.

## *Section IV*

### **Compulsory Measures for Extradition**

**Article 30** Where before making a formal request for extradition, a foreign state applies, under urgent circumstances, for keeping in custody the person sought, the public security organ may detain the said person for extradition upon request by the foreign state.

The request mentioned in the preceding paragraph shall be submitted through diplomatic channels or to the Ministry of Public Security in written form and shall contain the following:

- (1) the contents provided for in Articles 11 and 14 of this Law;
- (2) statement of availability of the material provided for in Subparagraph (1), Article 12 of this Law; and
- (3) statement that a formal request for extradition is to be made soon.

If the request is submitted through diplomatic channels, the Ministry of Foreign Affairs shall, without delay, transmit it to the Ministry of Public Security. If the request is submitted to the Ministry of Public Security, the Ministry of Public Security shall impart to the Ministry of Foreign Affairs information about the request.

**Article 31** When the public security organ, in accordance with the provisions of Article 30 of this Law, takes measures to detain the person for extradition, as requested, if the request is submitted to the Ministry of Public Security, the Ministry of Public Security shall, without delay,

notify the Requesting State of the fact; if the request is submitted through diplomatic channels, the Ministry of Public Security shall notify the Ministry of Foreign Affairs of the fact and the latter shall, without delay, notify the Requesting State of the same. When doing the notification through the above-mentioned channels, the time limit for submitting a formal request for extradition shall be informed at the same time if the person has been detained for extradition as requested.

If, within 30 days after the public security organ takes the measure of detention for extradition, the Ministry of Foreign Affairs receives no formal request for extradition from the foreign state, the public security organ shall terminate the detention for extradition. At the request of the foreign state, the time limit may be extended for 15 days.

Where the detention for extradition is terminated in accordance with the provisions in the second paragraph of this Article, the Requesting State may make a formal request for extradition of that person for the same offence afterwards.

**Article 32** After receiving the letter of request for extradition and the accompanying documents and material, the Higher People's Court shall, without delay, make a decision to arrest the person for extradition, where normal extradition may be impeded if such a measure is not taken. Where the measure of arrest for extradition is not taken against the person sought, a decision for residential surveillance shall be made without delay.

**Article 33** Detention for extradition, arrest for extradition and residential surveillance for extradition shall be executed by the public security organs.

**Article 34** The organ that takes a compulsory measure for extradition shall, within 24 hours after measure is taken, interrogate the person against whom the compulsory measure for extradition is taken.

The person against whom a compulsory measure for extradition is taken may, beginning from the date the compulsory measure is taken, employ Chinese lawyers for legal assistance. When executing the compulsory measure for extradition, the public security organ shall inform that person of the above mentioned right he is entitled to.

**Article 35** Where the person sought, who should otherwise be arrested for extradition, is seriously ill or is a woman who is pregnant or is breast-feeding her own baby, residential surveillance may be taken against him or her.

**Article 36** After making the decision to grant the extradition, the State Council shall, without delay, notify the Supreme People's Court of the decision. If the person sought is not arrested for extradition, the People's Court shall immediately make a decision to arrest that person for extradition.

**Article 37** If the foreign state withdraws or waives the request for extradition, the compulsory measure taken against the person sought shall be terminated immediately.

## *Section V*

### **Execution of Extradition**

**Article 38** Extradition shall be executed by the public security organs. Where the State Council decides to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Ministry of Public Security of the decision, and notify the Requesting State to consult with

the Ministry of Public Security for arrangements with regard to the time, place, manners for surrender of the person sought and other matters related to execution of the extradition.

**Article 39** Where extradition is to be executed in accordance with the provisions of Article 38 of this Law, the public security organ shall, in accordance with the decision of the People's Court, transfer the property related to the case to the Requesting State.

When extradition cannot be executed for reasons of death or escape of the person sought or for other reasons, the property mentioned above may, all the same, be transferred to the Requesting State.

**Article 40** Where, within 15 days from the date agreed on for surrender, the Requesting State does not take over the person sought, it shall be regarded as waiving the request for extradition of its own accord. The public security organ shall immediately release the person, and the Ministry of Foreign Affairs may refuse to accept any fresh request by the Requesting State for extradition of the person for the same offence.

Where, for reasons beyond its control, the Requesting State fails to take over the person sought within the above-mentioned time limit, it may request an extension of the time limit for not more than 30 days, or seek to negotiate for fresh arrangements for surrender in accordance with the provisions of Article 38 of this Law.

**Article 41** Where the person under extradition escapes back to the People's Republic of China before criminal proceedings are terminated or his sentence is served in the Requesting State, that person may be re-extradited upon a fresh request for extradition made the Requesting State in respect of the same offence and the Requesting State need not submit the documents and material provided for in Section 2 of this Chapter.

## *Section VI*

### **Postponed and Temporary Extradition**

**Article 42** Where the judicial organ of the People's Republic of China is, for other reasons, conducting criminal proceedings or executing criminal punishment against the person sought, the State Council may decide to postpone the extradition while approving it.

**Article 43** If postponed extradition may seriously impede the criminal proceedings in the Requesting State, the person sought may be extradited temporarily upon the request of the Requesting State on condition that the criminal proceedings being conducted in the territory of the People's Republic of China are not hindered and the Requesting State undertakes to send back that person unconditionally and immediately after concluding the relevant proceedings.

The decision on temporary extradition shall be made by the State Council after obtaining consent of the Supreme People's Court or the Supreme People's Procuratorate, as the case may be.

## *Section VII*

### **Transit for Extradition**

**Article 44** Where extradition between foreign states involves transit through the territory of the People's Republic of China, the foreign states shall, in accordance with the relevant provisions of Article 4 and Section 2 of this Chapter of this Law, make a request for such transit.

The preceding paragraph is not applicable where air transport is used for transit and no landing in the territory of the People's Republic of China is scheduled. In the event of an unscheduled landing, a request for transit shall be submitted in accordance with the provisions of the preceding paragraph.

**Article 45** The Ministry of Foreign Affairs shall, in accordance with the relevant provisions of this Law, examine the request for transit made by a foreign state, and make a decision on whether to permit it or not.

The decision to permit transit or to refuse transit shall be notified to the Requesting State by the Ministry of Foreign Affairs through the same channels as the ones through which the request is received.

After making the decision to permit transit, the Ministry of Foreign Affairs shall, without delay, notify the Ministry of Public Security of the same. The Ministry of Public Security shall decide on such matters as the time, place and manners for the transit.

**Article 46** The public security organ in the place of transit shall supervise or assist in the execution of transit for extradition.

The public security organ may provide a temporary place for custody upon the request of the Requesting State.

### *Chapter 3*

#### **Request Made to Foreign States for Extradition**

**Article 47** When requesting a foreign state to grant extradition or transit for extradition, the adjudicative organ, procuratorate organ, public security organ, state security organ or prison administration organ responsible for handling the case concerned in a province, autonomous region and municipality directly under the Central Government shall submit its written opinions accompanied by relevant documents and material with certified correct translation respectively to the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice. After the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice have, respectively in conjunction with the Ministry of Foreign Affairs, reviewed the opinions and approved to make the request, the request shall be submitted to the foreign state through the Ministry of Foreign Affairs.

**Article 48** Under urgent circumstances, before a formal request for extradition is made, the request to take compulsory measures against the person concerned may be submitted to the foreign state through diplomatic channels or other channels consented by the Requested State.

**Article 49** The instruments, documents and material required for request for extradition, for transit for extradition, or for taking compulsory measures shall be submitted in accordance with the provisions of extradition treaties, or where there are no such treaties or no such provisions in such treaties to go by,

the provisions of Sections 2, 4 and 7 of this Chapter may be applied mutatis mutandis, or where the Requested State raises specific requirements, those requirements may be complied with on condition that the basic principles contained in the laws of the People's Republic of China are not violated.

**Article 50** Where the Requested State grants extradition with strings attached, the Ministry



of Foreign Affairs may, on behalf of the Government of the People's Republic of China, make assurance on condition that the sovereignty, national interests and public interests of the People's Republic of China are not impaired. The assurance with regard to restriction on prosecution shall be subject to decision by the Supreme People's Procuratorate; the assurance with regard to measurement of penalty shall be subject to decision by the Supreme People's Court.

In investigating criminal responsibility of the person extradited, the judicial organ shall be bound by the assurance made.

**Article 51** The public security organ shall be responsible for taking over the person whose extradition is granted by the foreign state as well as the property related to the case.

Where the request for extradition is made by other organs, the public security organ shall, after taking over the person extradited and the property related to the case, transfer them to the said organs without delay, or take over the said person and related property in conjunction with the organs concerned.

## *Chapter IV*

### **Supplementary Provisions**

**Article 52** Where, in accordance with the provisions of this Law, whether to grant extradition is subject to decision by the State Council, the State Council may, when necessary, authorize relevant departments to make the decision.

**Article 53** Where the person sought suffers any harm because the Requesting State, after submitting the request for extradition, withdraws or waives the request, or makes a mistake in requesting for extradition and the person presents a claim for compensation, such claim shall be presented to the Requesting State.

**Article 54** The expenses arising from the handling of a case of extradition shall be defrayed in accordance with extradition treaties or agreements which both the Requesting State and the Requested State have acceded to or signed.

**Article 55** This Law shall go into effect as of the date of promulgation.

# APPENDIX II: EXTRADITION CHECKLIST

- (1)** Is the client in a prejudicial situation or are they are at high risk?
  - Has China previously pursued them through non-extradition means, such as forced “voluntary” return (by threatening them and/or threatening their family back in China)?
  - Are they part of a politically persecuted demographic in China (for example independent publishers, writers, or lawyers or other human rights defenders)
  - Are they part of an ethnic or religious group being persecuted in China (for example Uyghurs, Tibetans, Inner Mongolians, Falun Gong, Christian ‘house churches’)?
  - Have they publicly voiced criticism of the Party or State (for example, on social media including media banned in China)?
- (2)** Is the client at risk of being processed outside the normal judicial system\*?
  - Are they at risk of being held in Residential Surveillance at a Designated Location (RSDL)?
  - Are they at risk of being held under Liuzhi? (In other words, have they ever been a Party member or worked for the State)
- (3)** Has Party/State media ever accused them? Do these accusations exactly match that in the extradition request? Have there been other allegations against them? Researching this in Chinese is important. Defence attorneys should ensure they consult with additional counsel or expert input fluent in Chinese.
- (4)** Does the client have any prior convictions? If so, is the available in China’s Supreme Court public database\*\*? (A red flag if it is not, as it indicates the case may have been political in nature. Checking this database is important.
- (5)** Look at the source of any diplomatic assurance, and whether it is permitted to make such assurances.
- (6)** Are they practically enforceable in such a way as to actually provide required protections\*\*\*?
- (7)** Is the client a citizen of another State, and if so, are there bi- or multilateral treaties that would make consular access possible upon the client’s return?
- (8)** Has media reported on the extradition case or has the case received diplomatic attention to make extradition more difficult or led to publication of views critical of China? Would this cause Beijing embarrassment and thus place the client at risk of retaliation if returned?

\*For extensive background and details on China’s custodial systems, especially RSDL and Liuzhi it is advised to consult Safeguard Defenders’ website and additional reports.

\*\* Chinese Supreme Court database records all legal proceedings, except those involving National Security or State Secrets. Searchable in Chinese: <https://wenshu.court.gov.cn/>

\*\*\* While it Safeguard Defenders’ contention that no diplomatic assurances from China should be accepted on their face, for a trend of failure to adhere to assurances, this argument is likely insufficient on its own to convince an extradition judge. Therefore, you need to assess the authority making the assurance and whether there Chinese law empowers them to make the assurance or if there is even any chance of it being followed through. Is there any kind of monitoring of enforcement mechanism? Likely the answer to these questions will all be no.

# APPENDIX III: ADDITIONAL RESOURCES FOR BUILDING CASE AGAINST EXTRADITION TO CHINA

In extradition cases, whether preparing an expert's report or a full legal defense, certain supplementary information and sources are weighed higher than others by the court.

Jurisprudence is of course crucial, either drawing from previous decisions by the same high court hearing the case at bar or from relevant cases before regional human rights courts. It is advisable to look up such decisions for relevant inclusion in expert reports.

Additional sources with the most weight are usually country reports produced by relevant government ministries. These are followed by UN reports, joint communications, or the resolutions and statements of other multilateral bodies such as European Parliamentary committees. Finally, non-governmental human rights organizations' reports can be consulted to add additional evidence against extradition cases. While the NGO reports may often have the most detailed or relevant information to prevent an extradition to China, they should be presented alongside government and UN reports for maximum effect.

Examples of such additional resources are presented below but this is only a partial list for reference of the type of material useful in preparing to counter an extradition to China.

## Government country reports on China

- Australia, Department of Foreign Affairs and Trade, Country Information Report <sup>363</sup>
- Sweden, Ministry of Foreign Affairs, Country Report <sup>364</sup>
- The Netherlands, Ministry of Foreign Affairs, Country of Origin Report <sup>365</sup>
- United Kingdom, Foreign Commonwealth and Development Office, Country Report <sup>366</sup>
- United Kingdom, Visa and Immigration, Country Policy and Information notes (used for decisions in asylum and human rights applications.) <sup>367</sup>
- United States, Department of State, Country Reports on Human Rights Practices <sup>368</sup>
- United States, Congressional-Executive Committee on China, Annual Report <sup>369</sup>

<sup>363</sup> 'DFAT COUNTRY INFORMATION REPORT PEOPLE'S REPUBLIC OF CHINA,' (October 2019), available at: <https://www.dfat.gov.au/sites/default/files/country-information-report-china.pdf>

<sup>364</sup> 'Kina - Mänskliga rättigheter, demokrati och rättsstatens principer: situationen per den 31 december 2018,' available at: <https://www.regeringen.se/4a7346/contentassets/f8f0525faeaf4673affbb62159c57189/kina---manskliga-rattigheter-demokrati-och-rattsstatens-principer-2019.pdf>

<sup>365</sup> 'Country of origin information report China (July 2020),' available at: <https://www.government.nl/documents/reports/2020/07/01/country-of-origin-information-report-china-july-2020>

<sup>366</sup> 'Human Rights & Democracy The 2020 Foreign, Commonwealth & Development Office Report,' available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/999607/Human\\_Rights\\_and\\_Democracy\\_the\\_2020\\_Foreign\\_Commonwealth\\_Development\\_Office\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999607/Human_Rights_and_Democracy_the_2020_Foreign_Commonwealth_Development_Office_report.pdf)

<sup>367</sup> 'China: country policy and information notes', available at: <https://www.gov.uk/government/publications/china-country-policy-and-information-notes>

<sup>368</sup> '2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet),' available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/china/>

## UN reports on China/China's judiciary and human rights situation

- Special Procedures of the Human Rights Council, joint communication on Residential Surveillance at a Designated Location (2018)<sup>370</sup>
- Committee Against Torture, Concluding observations on the fifth periodic report of China with respect to Hong Kong, China (2016)<sup>371</sup>
- Committee Against Torture, Concluding observations on the fifth periodic report of Macao, China, (2016)<sup>372</sup>
- Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (2013)<sup>373</sup>
- Universal Periodic Review of China before the Human Rights Council (2009, 2013, 2018)<sup>374</sup>
- Communications of the Special Procedures of the Human Rights Council database<sup>375</sup>
- Office of the High Commissioner for Human Rights China Country Page<sup>376</sup>

<sup>369</sup> 'Congressional-Executive Commission on China 2020 ANNUAL REPORT,' available at: <https://www.cecc.gov/publications/annual-reports/2020-annual-report>

<sup>370</sup> 'OL CHN 15/2018, joint communication, 24 August 2018,' available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=23997>

<sup>371</sup> 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China,' 3 February 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/017/38/PDF/G1601738.pdf?OpenElement>

<sup>372</sup> 'Concluding observations on the fifth periodic report of Macao, China,' 3 January 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/017/32/PDF/G1601732.pdf?OpenElement>

<sup>373</sup> 'Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013),' 29 April 2013, available at: [https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr2bAznTlrkyo4FU\\_NHETCQOY7P%2fow040gd8LZ9d1NQukCEhx4dNtgXsWJSk7fStTBMEzKOWsqHv9SIKqzjoKxAYOvEuYSz7bBCEBkn48xMzfM8%2brBXHTfUbyYz%2btX3U9w%3d%3d](https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr2bAznTlrkyo4FU_NHETCQOY7P%2fow040gd8LZ9d1NQukCEhx4dNtgXsWJSk7fStTBMEzKOWsqHv9SIKqzjoKxAYOvEuYSz7bBCEBkn48xMzfM8%2brBXHTfUbyYz%2btX3U9w%3d%3d)

<sup>374</sup> 'Universal Periodic Review - China,' available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CNindex.aspx>

<sup>375</sup> OHCHR Communications database, available at: <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>

<sup>376</sup> OHCHR China page, available at: <https://www.ohchr.org/en/countries/asiaregion/pages/cnindex.aspx>

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