



The Surrender of Fugitive Offenders between Mainland China and Hong Kong: European Arrest Warrant Model or US Interstate Rendition Model?

RESEARCH ARTICLE

YANHONG YIN

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ABSTRACT

Under the ‘one country, two systems’ policy, the surrender of fugitive offenders between Mainland China and Hong Kong has been debated. This article will frame the debate on the application of traditional extradition rules in Mainland China and Hong Kong by exploring the more recent ‘European Arrest Warrant’ system and the long-standing US interstate rendition system. It thus aims to find a suitable model for Mainland China and Hong Kong. The US interstate rendition system is one domestic system, which seems most appropriate for application to Mainland China and Hong Kong as two regions of the same country. However, this article finds that the US interstate rendition system is too direct and inflexible to be enacted by Mainland China and Hong Kong where the legal situation is more complicated and human rights protection differs. This article argues that the European Arrest Warrant can better address the ‘one country, two systems’ situation of Mainland China and Hong Kong. Mainland China and Hong Kong can learn from the European Arrest Warrant to apply the ‘mutual recognition principle’ and other concrete extradition principles to their own surrender system.

CORRESPONDING AUTHOR:

Yanhong Yin

PhD Researcher, Faculty of Law and Criminology, VUBrussels, Belgium

yinyanhong01@gmail.com

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1. INTRODUCTION

Extradition was originally carried out between different sovereign countries for the purpose of handing over fugitive offenders to the requesting countries to face trial or punishment.¹ Now traditional extradition has evolved into diverse relations: bilateral, multilateral, regional, international and even domestic, and its name also varies from 'extradition' to 'surrender' and 'rendition'.² This article will use 'surrender' to define the cross-border hand over of fugitive offenders between Mainland China and Hong Kong. On the one hand, both the Hong Kong Fugitive Offenders Ordinance³ and the concrete agreements concluded between Hong Kong and other countries have used the word 'surrender'. On the other hand, the earliest research study on the Mainland and Hong Kong topic also used the word 'surrender'.⁴ However, there is a chance that both extradition and rendition are applied.⁵ For the purpose of consistency as well as distinguishing from traditional extradition, this article will use surrender to define the transfer of fugitive offenders between Mainland China and Hong Kong. Additionally, the definition of fugitive offenders also follows the tradition of the Hong Kong Fugitive Offenders Ordinance, meaning both the suspect and the convicted offenders.⁶

On July 1st, 1997, Hong Kong was returned to the People's Republic of China, and since then, the 'one country, two systems' policy has been implemented in this special administrative region.⁷ Following the 'one country, two systems' policy, Hong Kong exercises a high degree of autonomy and enjoys executive, legislative and independent judicial power in accordance with the provisions of the Basic Law of Hong Kong Special Administrative Region.⁸ With regard to judicial cooperation between Mainland China and Hong Kong, the Basic Law provides a legal basis allowing the Hong Kong Special Administrative Region to carry out judicial cooperation with other regions of China through negotiation and in accordance with the law.⁹ The judicial cooperation in civil matters between Mainland China and Hong Kong has been fruitful. It has mainly concerned the enforcement of arbitral awards, the recognition of civil judgments, and the taking of evidence in civil and commercial matters.¹⁰ The legal assistance in criminal matters, however, is underdeveloped, with the lack of a concrete legal basis for the surrender of fugitive offenders being only one of the deficiencies.¹¹ Mainland China has signed more than 50 extradition treaties with the foreign countries,¹² including France, Belgium, Italy, Spain, and Portugal. Hong Kong has also signed twenty surrender agreements.¹³ However, no surrender agreement or arrangement has been concluded between Mainland China and Hong Kong.¹⁴

Regarding the construction of the surrender agreements between Mainland China and Hong Kong,

there has been ongoing consideration and debate on the basic principles and rules.¹⁵ While Mainland China and Hong Kong belong to one sovereign country, they share distinct legal systems; the central government implements overall governance power, but Hong Kong enjoys a high degree of autonomy.¹⁶ Consequently, neither international extradition, where all the traditional extradition principles between different sovereign countries apply, nor the police cooperation mechanism between mainland provinces, where the procedure generally does not face the problems of divergent legal systems within unitary countries, can be implemented between Mainland and Hong Kong. There is great need for an appropriate model for the surrender mechanism between Mainland China and Hong Kong.¹⁷ Against this background, the European Arrest Warrant (EAW), one of the most developed regional extradition mechanisms, and the US interstate rendition, one of the closest domestic rendition mechanisms, both break the extradition traditions and offer the possibility to be used as a source of inspiration for Mainland and Hong Kong. This article will explore which mechanisms (EAW or US interstate rendition) can be better used by Mainland China and Hong Kong and in which ways.

Firstly, this article revisits the surrender issue between Mainland China and Hong Kong, examines the essence of surrender under the 'one country, two systems' policy and evaluates what kind of surrender system between Mainland China and Hong Kong is required. Secondly, this article introduces the US interstate rendition mechanism with the aim of offering an overview of the US interstate rendition mechanism. Thirdly, this article examines the EAW in comparison to the US interstate rendition mechanism, and it offers the basis for further discussion on whether it can be of inspiration for Mainland China and Hong Kong. Lastly, the article will analyse which external mechanisms can be implemented by Mainland China and Hong Kong, and how it can be implemented.

2. THE SURRENDER OF FUGITIVE OFFENDERS BETWEEN MAINLAND CHINA AND HONG KONG

2.1 PRESENT VACANCY OF SURRENDER ARRANGEMENT

In 2019, the Hong Kong Government proposed to amend the Hong Kong Fugitive Offenders Ordinance¹⁸ to open the door for surrender cooperation between Hong Kong and other regions with which Hong Kong has not established formal surrender relations.¹⁹ This would have also introduced a surrender mechanism between Hong Kong and Mainland China.²⁰ Yet, after months of protests in Hong Kong, the Amendment Bill was withdrawn on September 4th, 2019.²¹ On June 30th, 2020, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative

Region was enacted. This law established four offences, including secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security.²² It determined that in special circumstances, suspects can be transferred from Hong Kong to Mainland China for investigation, prosecution, court trial and execution of the sentence.²³ However, in essence, this law still is not a surrender arrangement between Mainland China and Hong Kong. It is a direct implementation of governance power from the central government to Hong Kong on just four categories of offences relating to the national security issue.²⁴ The surrender of fugitive offenders between Mainland China and Hong Kong naturally concerns more offences than those four,²⁵ and it should address a bigger group of cross-border offences. The transfer of the suspects will be done bilaterally rather than unilaterally from Hong Kong to Mainland China as regulated in this national security law. Despite continued efforts, there remains a real need for a surrender arrangement.

Since the return of Hong Kong to the People's Republic of China in 1997, the cross-border communications and movement of people between Mainland China and Hong Kong are increasing daily. This goes hand in hand with the increasing movement of criminals.²⁶ It is reported that over 300 fugitives from other parts of China are currently enjoying a safe haven in Hong Kong, including at least one alleged murderer, as well as businessmen already convicted of corruption and money laundering. While the Mainland has transferred 248 suspects to Hong Kong to face justice since 2006, Hong Kong has surrendered none in return.²⁷ In fact, currently there is a one-way administrative arrangement through which the Mainland police return Hong Kong residents to Hong Kong for investigation or trial.²⁸ However, Hong Kong has not returned anyone to the Mainland China because such an action 'cannot be done in the absence of a formal arrangement which is supported by legislation'.²⁹ The lack of a surrender agreement may lead to more fugitives as well as illegal or questionable cross-border law enforcement. A series of cases have demonstrated this. The first case is the *Zhang Ziqiang* case,³⁰ which caused a heated debate on the conflict of criminal jurisdiction between Mainland China and Hong Kong. The second is the *Causeway Bay Bookstore* case,³¹ in which Mainland police officers crossed the Hong Kong border, arrested several booksellers and took them to the Mainland China without formal legal proceedings. And the latest can be the *Chan Tong-kai* case, which motivated the Amendment of Hong Kong Fugitive Offenders Ordinance.³² These cases all show that the surrender arrangement between Hong Kong and Mainland China is highly necessary. The top priority relating to the construction of a system for the surrender of fugitive offenders between Mainland China and Hong Kong is to identify where it departs from traditional extradition. This distinction will directly affect

the application of concrete surrender principles and procedures.

2.2 THE ROLE OF ONE COUNTRY

Traditional extradition is meant to cater to or limit the political interests of the different sovereign states.³³ However, the surrender between Mainland China and Hong Kong occurs within one sovereign country, namely the People's Republic of China (China). Hong Kong and Mainland China share a common political interest,³⁴ and a common legal obligation,³⁵ under the umbrella of one country. Against this background, it is debatable whether some of the traditional extradition principles can be applied.³⁶ For instance, the non-extradition of political offenders in the traditional extradition process is a double-edged sword: while it is intended to protect individual rights and personal freedom, it imposes national standards and values on other states.³⁷ It also causes turmoil between States, allowing them to avoid prosecuting offences regardless of their existing duty to do so.³⁸ However, under the one-country policy, Hong Kong must accept the political and legal responsibilities to maintain the territorial unity of China and to uphold the leadership and governance of the central government.³⁹ Hong Kong also has the legal obligation to tackle secession, subversion, espionage and other traditional political offences which hamper the national security and integrity of a State.⁴⁰ In addition, after the enactment of the Hong Kong Safeguarding National Security Law in July 2020, which combats secession, subversion, terrorism and collusion with foreign forces, the Hong Kong Government is legally obligated to enforce it.⁴¹ Hong Kong is also responsible for safeguarding the sovereignty and the unification and territorial unity of the People's Republic of China.⁴² With these at heart, it is doubtful whether Hong Kong can implement the traditional non-extradition for political offences to refuse a surrender request from Mainland China in the future.⁴³ Moreover, the non-extradition of nationals is also a traditional extradition principle, which aims to fulfil the country's obligation to protect its own nationals.⁴⁴ However, in the case of Mainland China and Hong Kong after the return of Hong Kong to China in 1997, the residents of Hong Kong, whether Chinese or not, are classified as either permanent residents or non-permanent residents. Regardless, all of them are subject to the Basic Law of Hong Kong Special Administrative Region. Therefore, whether and how the traditional non-extradition of nationals principle can be applied is in question.⁴⁵ Additionally, in the traditional extradition system, both the judicial organization and the executive authorities will be involved in the extradition procedure for the sake of sovereignty and national interest, with the executive authority generally having the final say in refusing the extradition.⁴⁶ However, in terms of the surrender of fugitive offenders between Mainland China

and Hong Kong, the fact that the two regions belong to one country and the Hong Kong Government is directly subordinate to the central government will challenge the role of executive authorities as well as the judicial organizations in this surrender procedure.⁴⁷ It is difficult to see how the Hong Kong government can reject surrender requests from Mainland China while complying with the present Hong Kong Fugitive Offenders Ordinance and the withdrawn 2019 extradition bill.⁴⁸ In summary, the one country two systems situation will deeply influence the application of the traditional extradition principles between Mainland China and Hong Kong.

2.3 THE ROLE OF TWO SYSTEMS

The surrender of fugitive offenders between Mainland China and Hong Kong is not only a 'one country' issue but is also limited by the 'two systems' situation. According to the Basic Law, Hong Kong enjoys a high degree of autonomy, practices the common law system and the Hong Kong Final Appeal Court has supreme jurisdiction.⁴⁹ In terms of the surrender issue between the two, Mainland China and Hong Kong should respect each other's different legal systems. Accordingly, the direct and simple interprovincial arrest cooperation which has been practised within the provinces of Mainland China cannot be directly applied to the surrender of fugitive offenders between Mainland China and Hong Kong.⁵⁰ The traditional extradition principles still have a role to play. For instance, the offences and penalties in Mainland China and Hong Kong are quite different. To name just a few, the crime of incest committed by a man will be a felony in Hong Kong punishable by imprisonment for 14 years⁵¹ but is not a crime in Mainland China; the illegal use of farm land can be punishable by 5 years imprisonment in Mainland China⁵² but is not criminalized in Hong Kong; and abortion is legal in Mainland China but is punishable by 7 years' imprisonment in Hong Kong.⁵³ Furthermore, Hong Kong has abolished the death penalty, but Mainland China keeps it in both law and in practice. In short, the double criminality check, which is meant to allow compliance with the legality principle and human rights protection, cannot be neglected. From the perspective of respecting each other's different legal systems and given the international tendency to abolish the death penalty, refusing surrender on the ground of the death penalty can be justified. In a nutshell, the 'two systems' situation determines that the surrender between Mainland China and Hong Kong should follow some traditional extradition principles, despite the fact that the degree of compliance may have to be balanced by the 'one country' reality.

2.4 THE ROLE OF HUMAN RIGHTS PROTECTION

Whether it concerns traditional extradition between sovereign countries or domestic surrender between Mainland China and Hong Kong, one common element

no modern society can ignore is human rights protection. Since the Second World War, international and regional conventions on human rights have provided individuals with certain substantive and procedural rights.⁵⁴ Human rights protection can be a primary reason to refuse or suspend an extradition treaty. It can also be the main ground to refuse an extradition request under the applicable extradition treaty. In fact, the handling of human rights issues in extradition is greatly affected by the requested and requesting parties' familiarity with each other's political and legal systems as well as the mutual trust that the degree of human rights protection between the two parties can be assumed with the minimum protection in place.⁵⁵ In the traditional extradition, most bilateral or multilateral treaties will take the human rights clause as mandatory grounds to refuse the extradition.⁵⁶ Under the 'one country, two systems' policy, Mainland China and Hong Kong should find a more suitable way to protect the human rights of the requested person in the surrender procedure while maintaining the trust and respect between the two regions. The 'human rights check' in the surrender mechanism can also be used to help promote human rights protection in the whole of China. It is clear that the surrender between Mainland China and Hong Kong has a background of increasing political, economic, societal and cultural integration, which generally does not occur in traditional extradition.⁵⁷ However, the divergence between the two regions on human rights protection cannot be overlooked. For instance, Mainland China still has not ratified the International Convention on Civil and Political Rights. In practice, there are also cases relating to torture, long time detention before trial and limited access to lawyers.⁵⁸ The abortion of the Amendment of the Hong Kong Fugitive Offenders Bill can be partially attributed to the public's concern over the human rights situation in Mainland China.⁵⁹ However, it should be noted that the Chinese criminal justice system and judicial standards have been improving in recent years.⁶⁰ Practically speaking, human rights protection should be adaptable to its real context.⁶¹ That is to say, the human rights protection should comply with international standards as well as reflect the practical requirement. In surrenders between Mainland China and Hong Kong, the application of the human rights check should simultaneously benefit the requested offenders, protect the national interest and even help to promote human rights protection in the whole country.

In summary, in the construction of the surrender system between Mainland China and Hong Kong, the traditional extradition may be referred to as the starting point for the two regions to initiate negotiations, but it cannot offer sufficient theoretical inspiration or practical support for the two regions to finalize their surrender mechanism. As analysed above, the surrender system between Mainland China and Hong Kong must both exist

under the framework of one country as well as respond to the two divergent legal systems. At the same time, it must provide basic human rights protection. All these three requirements should be taken into consideration in the construction of this surrender system. The following chapters will provide an introduction and analysis of two mechanisms, namely the US interstate rendition and European Arrest Warrant system, and offer a roadmap through to the conclusion that the EAW could be a good option for Mainland China and Hong Kong.

3. THE US INTERSTATE RENDITION

3.1 GENERAL INTRODUCTION: PROCEDURE AND LEGAL BASIS

The US interstate rendition system is a domestic surrender system established in one federal country between the different constituent states, with the characteristics of being direct, simple, and executive-dominated.⁶² In the general procedure, when the suspect or the criminal is located in the asylum (requested) state, first the prosecutors in the demanding (requesting) state will prepare a petition for requisition and forward it to the demanding state governor. Then, after evaluation by the governor's counsel, the governor will sign that requisition and send it to the asylum state. Next, after the asylum state governor has received the requisition and an evaluation by that governor's counsel has been made, an arrest warrant will be issued to the appropriate state or local law enforcement. Consequently, the fugitive will be arrested, a governor hearing may be given (as it is not obligatory) and a habeas corpus hearing can be requested. If relief is denied, the fugitive will be taken back to the demanding state.⁶³

Regarding the legal basis, the transfer of fugitives is governed by the extradition clause of the US Constitution,⁶⁴ the Federal Statute on Fugitives from State or Territory to State, District, or Territory,⁶⁵ and the state extradition law.⁶⁶ Extradition guidelines are also found in the Uniform Criminal Extradition Act which was drafted and recommended by the Interstate Commission on Crime and the National Conference of Commissioners on Uniform State Laws and has been enacted in all the US states.⁶⁷ The extradition clause in the US Constitution stipulates: 'A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.'⁶⁸ This clause has been the most important legal basis for the interstate rendition, which not only imposes the constitutional rendition obligation upon each state but also recognizes that the scope of the rendition offences can be limitless.⁶⁹ Additionally, the interstate rendition is based on the full faith and credit of each state, with the Constitution specifying: 'Full faith

and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state'.⁷⁰

3.2 MAIN CHARACTERISTICS

The US interstate rendition is distinct from the international extradition as the cooperation is based on the common interest of each state as well as the whole country. It is one domestic extradition system mainly based on one sovereignty fact and excludes the traditional principles which have been applied to sovereign countries. As provided by the court:

*'In respect to the return of fugitives from justice, the various states are not to be regarded from the standpoint of international law as separate and independent sovereignties with selfish and jealous purposes to serve, but as governmental organizations having mutual interest, duties and relations and pledged to mutual support, each one acting as an instrumentality for the suppression of crime and the advancement of justice in the other. Such being the true attitude of the states toward each other, the constitution loses all semblance of a treaty between sovereigns and becomes a supreme law of the land for the promotion of the general welfare. The specification in the constitution of treason, felony and other crimes leaves no ground for distinction between political and other offenses, and no ground for the application of the rules and principles which govern in the case of limited treaty concessions hedged about by conditions and restrictions, express and implied.'*⁷¹

The first primary characteristic of the US interstate rendition is that it is guided by the governors of the requesting and requested states, which is executive dominated. As provided in the Federal Statute on Fugitives from State or Territory to State, District or Territory:

*'Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.'*⁷²

Also, the governor of the asylum state not only has the duty to cooperate with the demanding state but also can be compelled to do so by the federal court. In 1861, in *Kentucky v Dennison*,⁷³ the Court held that the rendition was merely declaratory of a moral duty and the federal courts have no power to order a governor to fulfil the state's obligation under the extradition clause to deliver up fugitives from justice. However, *Dennison* was finally formally overruled in the 1987 case of *Puerto Rico v Branstad*,⁷⁴ in which the federal power was certified to supervise the state duty to surrender. Therefore, the obligation for the governor to surrender an offender requested by a sister state is generally binding.

Is that virtually none of the traditional extradition principles can be applied to refuse the surrender request of a sister state. A fugitive may be extradited for any offence made punishable by the law of the demanding state, including misdemeanours, regardless of whether the offence is also against the law of the asylum state.⁷⁵ That is to say, there is no double criminal requirement in the US interstate rendition and there is no threshold on the charges (either minimum or maximum penalties) for which the rendition can be requested. Although some of the states have kept the death penalty, under the US interstate rendition system, it cannot be grounds to refuse the rendition, and no guarantees regarding the imposition or execution of the death penalty can be asked for by the requested states.⁷⁶ The political offence ground is also excluded from the US interstate rendition, and non-extradition of nationals cannot be found in the US interstate rendition either.

The case law also shows that a third characteristic of the US interstate rendition system, which is that it gives priority to the law of the demanding state and requests the executing state to fully respect the rendition request from the sister state.⁷⁷ A fugitive rendered to stand trial for an offence listed in the rendition request could be tried upon return to the demanding state for all crimes committed within its jurisdiction and not limited to the traditional specialty rule.⁷⁸ The requested state has a very limited role to play in the probable cause check.⁷⁹ Once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that there is probable cause, no further inquiry may be made on that issue in the asylum state.⁸⁰ In terms of the possible human rights breach in the demanding state, under the US interstate rendition system, it should be tested by the fugitive in the demanding state courts rather than in the asylum state, since the federal system presupposes confidence that a demanding state will not exploit the action of an asylum state via illegal conduct to a returned fugitive from justice.⁸¹ After the governor of the asylum state issues the rendition order, the fugitive offenders can apply for *habeas corpus*. However, there are only four possible grounds for refusing to extradite a person when the court

considers release on *habeas corpus*: (a) the extradition documents are not in order; (b) the person has not been charged with a crime in the requesting state; (c) the person is not the person named in the extradition documents; and (d) the person is not a fugitive (whether the demanded person has 'fled from any state to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding').⁸² The court essentially checks for formality rather than for substance.

3.3 GROUNDS ANALYSIS

Legislation and practice have shown that the US interstate rendition is simple, direct, and almost impossible to refuse.⁸³ Several reasons which are typical of US federalism can account for this. Firstly, irrespective of whether it is a federal legal system or the 50 states' domestic legal system, they all belong to the common law system developed by judges through legal opinions and share the main characteristics of the US common law system. Although the 50 states each have their own legal system, the differences among those systems may still be smaller than the differences between common law systems and civil law systems. Secondly, the US Federal Constitution set up the criminal procedural safeguards which are applied equally to all the states. The US Federal Constitution, including the US Bill of Rights and subsequent amendments, contains provisions regarding criminal procedure due to the incorporation of the Bill of Rights. All these provisions apply equally to criminal proceedings in state courts.⁸⁴ Since the 1970s and the new judicial federalism, state courts rely on the State Bill of Rights to provide greater protection than was available under the federal Bill of Rights.⁸⁵ In addition to the similar and high-level criminal procedure safeguards in the states, the substantive criminal law in the states also have much in common. The Model Penal Code created by the American Law Institute is the equivalent for criminal law. Many states have wholly or largely adopted the Code, and there are many similarities among the 52 American criminal codes in large part due to the influence of the Model Penal Code.⁸⁶ Even in jurisdictions where it has not been adopted, the Code has great influence as courts regularly rely upon it to fashion the law that the state's code fails to provide.⁸⁷ However, the sentencing, treatment and correction portions of the Code saw little acceptance and were soon left behind.⁸⁸ Thirdly, the US Federal Courts deal with cases that relate to the constitutionality of a law, disputes between two or more states, and *habeas corpus* issues. When issuing decisions, all courts must follow binding precedent – that is, their decisions must follow any rulings made by courts above them. On questions of the interpretation of the US Constitution and statutes passed by Congress, the US Supreme Court has the final say; all other courts, both

federal and state, must follow any precedent set by the Supreme Court.⁸⁹ Fourthly, some institutions are also established to promote the harmonious and cooperative relationship between the federal and state judiciaries, including the National Center for State Courts and the State Justice Institute, which have the greatest effect on the quality of justice in state courts and on coordination between state and federal courts.⁹⁰ All of this contributes to building mutual trust as well as the actual conditions between the states to allow the direct and simple rendition feasible under the US domestic system.

4. THE EUROPEAN ARREST WARRANT MECHANISM

4.1 GENERAL INTRODUCTION: WHAT THE EAW IS AND HOW IT CAME TO EXISTENCE

When it comes to the EAW mechanism, there is a different picture that shows more elements of traditional extradition while maintaining the efficiency required by the closely related region with more frequent movement of persons as well as criminals. Unlike the US interstate rendition system, the EAW system is applied in one regime, within which the Member States are independent sovereign countries with a more intensive correlation than confederation, however, a looser one than federalism.⁹¹ This distinction with the US also offers the basis that the EAW system differs from the US interstate rendition mechanisms. The EAW system mirrors the international extraditions to some degree and, at the same time, embodies some characteristics specific to the EU region. Under the EAW mechanism, the surrender is for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or where a sentence has been passed or a detention order has been made for sentences of at least 4 months.⁹² The judicial authorities in the requesting Member State will generally issue the EAW directly to the executing judicial authorities in the requested Member State. After the latter has received the arrest warrant, the requested person will be apprehended and given a hearing. If the grounds to refuse the surrender are not satisfied, which will be examined in the following section, a surrender decision will be made by the executing judicial authority, and the requested person will be surrendered within 10 days after that decision is made.⁹³

As analysed above, the US interstate rendition system, implemented by the state directly through the state extradition act, is built on the US Constitutional rendition obligation and the credit clause imposed upon the states.⁹⁴ By contrast, the EAW, which has also been implemented into the domestic law of each EU Member State, is built on the principle of mutual recognition which

is regarded as the cornerstone of EU judicial cooperation in criminal matters.⁹⁵

The establishment of the mutual recognition principle was the product of strong and joint political willingness. For the past twenty years, the European Council has been determined to develop the Union as an area of freedom, security and justice by full use of the possibilities offered by the Treaty of Amsterdam. With this as one aim, the UK Government put forward the idea of applying the mutual recognition principle in the field of criminal law during its EU Presidency in 1998, leading to the recognition by the European Council at Cardiff of 'the need to enhance the ability of national legal systems to work closely together' and a request to the Council 'to identify the scope for greater mutual recognition of decisions of each other's courts'.⁹⁶ Then, in the European Council Tampere Conclusions 1999, the Council endorsed the principle of mutual recognition as the cornerstone of judicial cooperation in both civil and criminal matters within the Union, and declared that the principle should apply both to judgments and to other decisions of judicial authorities.⁹⁷ The EU Commission stated:

*'...borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extra-national implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there.'*⁹⁸

With respect to extradition, the European Council has urged Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition and has considered that the formal extradition procedure should be abolished among the Member States in respect of persons fleeing from justice after having been sentenced and replaced by a simple transfer of such persons.⁹⁹ This can be regarded as one initial influence of the principle of mutual recognition on the Europe extradition system, with deeper influence coming from the terrorist attacks in the US on September 11th, 2001. In 2002, the Framework Decision on European arrest warrant and surrender procedures between EU Member States ('EAW Framework Decision') was enacted, and since then, the EAW has replaced the traditional Extradition Conventions in Europe¹⁰⁰ and has been applied in the 27 Member States of the EU through domestic legal transformation.¹⁰¹

4.2 MAIN HIGHLIGHT

The EAW introduced an advanced surrender procedure. Extradition is a procedure in which both the judicial organizations and the executive authorities have important roles to play; however, the EAW was conceived as a surrender system purely dominated by judicial authorities.¹⁰² The average surrender procedure has been shortened from 1 year to 48 days.¹⁰³ Besides the active role of the judicial authorities in the Member States, the Court of Justice of the European Union (CJEU) also makes preliminary rulings on the relevant disputes in the implementation and interpretation of the EAW, and such rulings are binding upon the Member States.¹⁰⁴ Another innovative feature is that the human rights clause cannot be used as a mandatory or optional ground to refuse the surrender¹⁰⁵ because, as analysed above, the EAW is based on the mutual recognition principle, and the mutual trust in the rule of law and human rights protection between Member States is especially required.¹⁰⁶ However, the EAW mechanism also gives due consideration to the respect of fundamental rights by requiring the respect of the EU Treaties and the Charter.¹⁰⁷ In some exceptional situations, human rights concerns can still be used to postpone the surrender pending further information from the requesting Member State, before a final decision is made.¹⁰⁸ The CJEU in the *Aranyosi and Caladararu* case required that the Member States should verify whether there is a real risk of inhuman or degrading treatment of the requested persons before agreeing to a surrender in order to further recognize whether there are substantial grounds to believe that such a real risk of inhuman or degrading treatment exists in the particular circumstances of the case for the requested person.¹⁰⁹ If a concrete risk can be discounted by the supplementary documents or the guarantees offered by the requesting Member States, it must decide on the execution of the EAW; if not, the surrender may be suspended.¹¹⁰

The EAW has also innovated the main principles of surrender mechanism. Differing from traditional extradition where the non-extradition of political offenders applied, the EAW does not exclude surrender for political offences. The EAW allows for the surrender of political offences because this removes the dispute on the definition of political offences between Member States. It is also because the judicial authority plays the decisive role in the surrender procedure. Under the leading role of judicial authorities, even without the political offence exception, it is still expected that the requested person can also enjoy objective and impartial judicial protections. This in turn contributes to the enhancement of mutual trust which has also been guaranteed since the application of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.¹¹¹ While the EAW mechanism does not abolish the double criminality check completely like the US interstate rendition, it still has made considerable progress

compared to the traditional extradition by waiving the double criminal check for 32 categories of serious offences of which the minimum maximum punishable sentence is above 3 years.¹¹² With regard to the traditional non-surrender of nationals, since the EAW is based on the idea of citizenship of the EU, the exception provided for a country's nationals which existed under traditional extradition arrangements should not apply within the Common Area of Freedom, Security and Justice. A citizen of the Union should face being prosecuted and sentenced wherever they have committed an offence within the territory of the Union irrespective of their nationality.¹¹³ In principle, nationality cannot be used as ground to refuse surrender for trial under the EAW mechanism, but surrender can be accorded on the guarantee that after conviction the offender will be sent back to their home country to serve the sentence for a better rehabilitation and reintegration.¹¹⁴

4.3 GROUNDS ANALYSIS

Several reasons may account for the innovations of the EAW which combine both heavy EU regional characteristics and traditional extradition heritage. The most basic reason may be the fact all EU Member States are party to the European Convention on Human rights and the EU Charter on Fundamental Rights of the European Union, which offers the common basis of mutual trust in the respect of the rule of law in the Member States. More concrete reasons may be that the relationship between mutual recognition and the necessary approximation is emphasized and the actions have been taken.¹¹⁵ The Lisbon Treaty specifies that minimum rules should be established to facilitate the mutual recognition in judicial cooperation in criminal matters.¹¹⁶ Since then, several directives have been enacted to ensure the minimum procedural safeguards, including the Interpretation and Translation Directive,¹¹⁷ the Directive on Information in Criminal Proceedings,¹¹⁸ the Directive on Access to a lawyer,¹¹⁹ and the Directive on Legal Aid.¹²⁰ Besides the harmonization of the important EU criminal procedural safeguards, there has been harmonization of EU serious crimes within a cross-border dimension. As the Lisbon Treaty stipulates, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.¹²¹ Such directives mainly include the Directive on prevention and combating trafficking in human beings and protecting its victims,¹²² the Directive on combating the sexual abuse and sexual exploitation of children and child pornography,¹²³ the Cybercrime Directive,¹²⁴ the Directive on the protection of the euro

against counterfeiting,¹²⁵ the Directive on terrorism,¹²⁶ the drugs Directive,¹²⁷ the criminal anti-money laundering Directive,¹²⁸ and the non-cash counterfeiting Directive.¹²⁹ These harmonization measures taken by the EU contribute to narrowing the divergence of substantive and procedural criminal law between EU Member States and helping the implementation of the mutual recognition principle in judicial cooperation in criminal matters. All these factors have contributed to the simplicity and efficiency of the EAW mechanism.

4.4 THE PROBLEMS AND DEVELOPMENTS

However, as stated above, the harmonization of the substantive and procedural criminal law is partial, and the divergence between the Member States on human rights protection is still evident.¹³⁰ Mutual trust is assumed to some degree, yet further enhancement of that trust is still required.¹³¹ This may also account for why the EAW retains some traditional extradition principles and is less direct than the US interstate rendition system. While the prevailing view is that the EAW is successful,¹³² the surrender system is far from perfect, and it is still developing through legislation and case law. The EAW itself has evolved in terms of the legislation as well as in practice. After the EAW Framework Directive of 2002, in order to deal with the issue of trial *in absentia*, a specific Framework Decision on the decisions rendered in the absence of the person concerned at the trial was enacted in 2009, which aims to enhance the procedural rights of requested persons.¹³³ Moreover, although the proportionality principle is not written into the legislation (which has raised several concerns),¹³⁴ there have been guidelines offered by the EU Commission emphasizing that the proportionality check should be done by the issuing Member State before issuing the EAW in order to avoid harming the liberty of individuals by taking the severity of the offences, the situation of the victims and other relevant elements into serious consideration.¹³⁵ The CJEU has also contributed to balance the efficiency of EAW execution and the human rights protection in practice. On the one hand, it confirms the validity of the EAW Framework Directive and emphasizes the obligation to execute the EAW on the principle of mutual recognition, but on the other hand, it guarantees the rights to an independent tribunal and a fair trial as well as other fundamental rights.¹³⁶

To summarize, the EAW is developing and updating through ongoing cases and supplementary legislative documents. Comparatively, the US interstate rendition mechanism, as a much older surrender mechanism, has been steady, with fewer disputes.¹³⁷ How, then, can the two distinct extradition systems aid in the construction of surrender mechanisms between Mainland China and Hong Kong? Which experiences can be offered? The following paragraphs provide some answers.

5. EUROPEAN ARREST WARRANT: ONE ROAD AHEAD FOR MAINLAND CHINA AND HONG KONG

As analysed above, the surrender of fugitive offenders between Mainland China and Hong Kong occurs within one country, and the essence of surrender between Mainland China and Hong Kong is more similar to the US interstate rendition than the EAW mechanism. However, this paper still finds that before 2047, when the ‘one country, two systems’ policy may end as specified in the Basic Law,¹³⁸ the EAW mechanism remains a more relevant source of inspiration for the construction of the surrender system between Mainland China and Hong Kong.¹³⁹

5.1 LEGAL DIVERGENCE ECHOES WELL

First, the legal and practical situation in the EU more accurately resembles that of Mainland China and Hong Kong. From the above comparative study between the EAW and the US interstate rendition mechanisms, it is clear that the internal divergence of the legal systems in the EU is much bigger than in the US.¹⁴⁰ The EAW has to deal with a high degree of diversity between the different national criminal law systems and traditions, most notably between the common law system adopted by Ireland, the mixed legal system practiced in Cyprus and Malta, and the continental civil law system.¹⁴¹ This diversity more closely mimics the evident distinctions between Mainland China’s socialist legal system and Hong Kong’s common law system, and therefore offers a more familiar and common platform for Mainland China and Hong Kong to discuss their internal surrender mechanism. Besides the resemblance in the diversity of legal systems, human rights protection also varies between EU Member States. Mainland China and Hong Kong face the problem of unequal human rights protection. The European Court of Human Rights (ECtHR) has a serious backlog and a high number of repetitive cases, which can signal that Member States often do not comply with its rulings.¹⁴² As noted by Professor John Spencer, ‘In practice, there are still Member States of which the criminal procedure, particularly during the investigative phase, puts possibly innocent suspects at grave risk. Points of particular concern include poor or non-existent legal advice and legal representation, incompetent interpreters and oppressive police practices when dealing with suspects and witnesses.’¹⁴³ These human rights concerns in practice are also present in the surrender mechanism between Mainland China and Hong Kong, and accordingly, the EAW mechanism has important traits to offer by keeping some traditional extradition principles and applying the human rights check when necessary.

5.2 MUTUAL RECOGNITION RESPONDS WELL

Second, the mutual recognition principle, which underpins the EAW as one basic principle, can also be more suitable to the Mainland China and Hong Kong situation. The EAW is based on the principle of mutual recognition, which calls for mutual trust while maintaining the differences rather than demanding the unification of the different legal systems in 27 Member States. Mutual recognition is often regarded as an alternative to harmonizing laws, particularly as it is respectful of national diversity since it does not require changing national law.¹⁴⁴ This practice can suit the actual position in Mainland China and Hong Kong very well. Under the ‘one country, two systems’ policy, Hong Kong has been able to keep its common law system without changing it for 50 years despite the handover to China in 1997. In contrast, Mainland China will continue to develop its socialist legal system with the typical characteristic of civil law.¹⁴⁵ The application of the mutual recognition principle will strengthen the judicial cooperation between the two regions while not putting the independence and uniqueness of the Hong Kong legal system at risk.

This paper finds that there has already been some social and legal basis for the application of the mutual recognition principle to Mainland China and Hong Kong’s surrender system. The development of the mutual recognition principle from the internal market to the judicial system in the EU still can be a good reference. In Europe, the mutual recognition principle is firstly applied in the EU internal market field to achieve the free movement of goods, capital, services and persons.¹⁴⁶ After 20 years’ practice, it is well developed and has helped realize free movement while respecting diversity and some national regulatory autonomy;¹⁴⁷ at the end of the 20th century it was introduced in the context of judicial cooperation in criminal matters.¹⁴⁸ This development roadmap has proved to be well-grounded and efficient. Mainland China and Hong Kong are in a similar position; a similar mutual recognition principle is expanding from China’s internal market field to legal assistance in civil matters since Hong Kong’s handover. In 2003, the Closer Economic Partnership Agreement between Mainland China and Hong Kong was signed, and a series of supplementary agreements followed in which the mutual recognition of professions was set out. In 2004, Mainland China signed the Memorandum on the Diploma Mutual Recognition with Hong Kong.¹⁴⁹ In 2015, the Agreement on the Service Trade between Mainland China and Hong Kong was signed, and the service market was opened further to each other.¹⁵⁰ In terms of judicial cooperation in civil matters, the mutual recognition principle has also been practiced for years. In 1999, the Supreme People’s Court reached the Arrangement between Mainland China and Hong Kong on the Mutual Enforcement of Arbitral Decision, and in 2006, the Supreme People’s Court concluded the Arrangement between Mainland China

and Hong Kong on Mutual Recognition and Enforcement of Civil and Commercial Judgments under the Agreeing Jurisdiction by the Parties Involved.¹⁵¹ All these suggest that there are good prospects for the expansion of the mutual recognition principle to criminal matters, including the surrender of fugitive offenders, despite the clear distinction between criminal law and civil law.

Continuing the mutual recognition topic, it is also necessary to expand specifically to the mutual trust issue between Mainland China and Hong Kong. Regarding the establishment and application of the mutual trust principle, the European Arrest Warrant can offer some insight. This paper finds that the surrender of fugitive offenders between Mainland China and Hong Kong could and should be based on mutual trust. It is generally accepted that trust is established in all systems by common goals, common norms/values, and personal contacts.¹⁵² In the surrender of fugitive offenders between Mainland China and Hong Kong, it can be said, firstly, to be based on the common goal of combating crimes and achieving justice, and, secondly, on the common value that human rights should be protected in this procedure. Moreover, a key aspect of the trust relationship is interest-based: that is to say A trusts B because A presumes it is in B’s interest to act in a way that is respectful of that trust.¹⁵³ In the Mainland China and Hong Kong surrender cooperation, it is not difficult to conclude that Mainland China’s respect of human rights protection values will help to obtain the interest of combating crimes through successful surrender cooperation; it is the same with Hong Kong. Hence, in theory, the mutual trust can be relied on between the two regions. In practice, trust is inherently a matter of knowledge or belief, and knowledge of each other’s behaviour is thus essential.¹⁵⁴ Therefore, trust is the result of a history of cooperation and the road to trust is a learning process.¹⁵⁵ Despite that, there still remains insufficient mutual trust between Mainland China and Hong Kong. In practice, the mutual trust can be established through legal training, regular communication, personal contacts and judicial cooperation. Under the surrender of fugitive offenders between Mainland China and Hong Kong, mutual trust is more a goal than a prerequisite, which calls for sincere cooperation between the two regions and which would also lead to a sincere cooperation between the two regions.

On the other side, mutual trust is constantly evolving rather than static and absolute.¹⁵⁶ Under the European Arrest Warrant system, the mutual trust has gone through a ‘blind trust’ stage to ‘introduce limits to trust’ stage to ‘individual assessment’ stage.¹⁵⁷ However, these developments should not be seen as the ‘death’ of mutual trust but as examples of challenges to a pragmatic, dynamic trust that will need to be earned.¹⁵⁸ Mutual trust is founded on a presumption of compliance with fundamental rights obligations, however, the

presumption is not conclusive, as mutual trust is formative and dynamic, constantly fed by the state of compliance of human rights.¹⁵⁹ Under the principle of mutual trust, in the surrender of fugitive offenders between Mainland China and Hong Kong, human rights can still be applied as a ground to refuse the surrender in exceptional cases where there is concrete and objective evidence of a human rights risk. The other principles may also be applied as discussed following.

Lastly, the EAW is not only offers the basic idea of 'mutual recognition' to Mainland China and Hong Kong, but it also provides more detailed and technical experiences than the US interstate rendition system.

5.3 DETAILED PRINCIPLES SUIT WELL

5.3.1 On the procedure issue

In terms of the surrender procedure, the EAW gives the leading role to the judicial authorities and empowers the courts to do human rights checks when necessary, and Mainland China and Hong Kong should consider this. The 2019 social unrest which occurred in Hong Kong arising from the amendment of the extradition bill proves that one surrender system where the state governors play the deciding role like the US interstate rendition would not be acceptable to the Hong Kong public. A more important role of the judicial authorities is called for to guarantee fair trials and judicial independence.¹⁶⁰ Especially considering that the Hong Kong government is appointed by and constitutionally subordinate to the central government in Beijing, it is difficult to see how the Hong Kong government can reject the surrender request from Beijing.¹⁶¹ At the political level, the power imbalance between Mainland China and Hong Kong would make it difficult for the Hong Kong courts to refuse a request for rendition that comes from the Mainland.¹⁶² Comparatively, the judicial authorities can win more local public trust as well as mutual trust between the regions for their independence and impartiality. The EAW provides an example of a model whereby the surrender order between Mainland China and Hong Kong would be a totally judicial decision issued by the judges or prosecutors in the two regions.

Human rights protection is also an important element in the surrender procedure. Analysing the experience and lessons from the European arrest warrant, this paper suggests applying the proportionality check before issuing the surrender request and using the alternative measures considering the seriousness of the cases.¹⁶³ Within a one country two systems frame, this article does not suggest applying human rights as a mandatory ground to refuse surrender, but it still holds that the human rights check should be given an important role to play. Like the EAW, the human rights clause should still be used in some special cases to demand the requesting party offers more certain guarantees to protect the fair trial of the requested person. In such cases, the two

evaluation steps could also be introduced to Mainland China and Hong Kong before the final surrender decision is made, which means that the requested court should examine both the general and concrete situations relating to the specific case into consideration by asking for supplementary information from the requesting court and evaluating the assurance given by that court; only when the concerns can be discounted, the surrender can continue.¹⁶⁴

5.3.2 On the substantive principles

In terms of other substantive surrender principles, the EAW experience is additionally applicable to Mainland China and Hong Kong.

First, admittedly, sending Hong Kong residents back to Hong Kong to serve their sentence will help the reintegration and rehabilitation of the offenders, as occurs in the EAW.¹⁶⁵ However, a Hong Kong resident's identity may not be a refusal ground for the purpose of trial both for the sake of justice and for the mutual respect between Mainland China and Hong Kong.¹⁶⁶ This has been practiced under the EAW as well.¹⁶⁷ In fact, the EAW Framework Decision only refers to the 'requested person' without distinguishing their nationality and it follows that, for the purposes of the EAW, the nationality of a requested person is not important.¹⁶⁸ In Mainland China and Hong Kong, where 'Common Chinese identity' is emphasized, this paper proposes the same logic in the EAW which emphasizes that 'European citizenship' can also be studied.

Second, completely abolishing the double criminality requirement will not resolve the huge gap between Mainland China and Hong Kong in terms of the offence definition and penalties. However, fully complying with the traditional double criminal check not only hampers the surrender efficiency, but it also harms the mutual respect between the regions as two closely related parts of the same country. Therefore, partially abolishing the double criminal check on a list of serious crimes could be introduced to the surrender system between Mainland China and Hong Kong as already occurs in the EAW system.¹⁶⁹

Third, regarding the surrender of fugitives for political offences, neither the US interstate rendition nor the EAW set obstacles on this, but the human rights grounds can still be used to postpone or cancel the surrender in some exceptional situations or after a series of evaluations under the EAW mechanism.¹⁷⁰ This paper also finds that the exception for political offences may not be applied to the surrender cooperation between Mainland China and Hong Kong. The Standing Committee of National People's Congress has legislated on subversion, secession, collusion with foreign forces and terrorism crimes, and these four 'political offences' have been implemented directly in Hong Kong.¹⁷¹ Under article 23 of the Basic Law, the Hong Kong Government still has an obligation to

legislate on the other four political offences to safeguard the national security of China.¹⁷² Therefore, it can be presupposed that the criminal laws on national security will show a tendency of unification between Mainland China and Hong Kong through these legislations.¹⁷³ These legislations have confirmed and will further confirm that the protection of national security and interest is the common obligation of the Mainland and Hong Kong. Hence, the exception of political offences will be meaningless in such a situation. Moreover, the function of the exception of political offences on human rights protection is greatly limited, and extra human rights checks after the abolishment of the exception of political offences could be applied to protect the rights of those surrendered.¹⁷⁴

Fourth, despite the practice in the EAW and US interstate rendition systems,¹⁷⁵ this paper suggests that the death penalty should be a ground to refuse the surrender between Mainland China and Hong Kong. On the one hand, the non-surrender in cases where the requested person could be subject to death penalty has been formally practised in international extraditions. On the other hand, while other countries have tended to abolish the death penalty, China has been implementing the policy of 'apply death penalty limitedly, reduce the death penalty gradually' for many years.¹⁷⁶ Refusal to surrender in such circumstances may push Mainland China to abolish the death penalty completely and sooner than planned.

6. CONCLUSION

The surrender between Mainland China and Hong Kong is one internal extradition issue under the 'one country, two systems' framework. Having applicable principles different from the traditional international extradition system should be recognized and justified. Although both the US interstate rendition system and the EAW mechanism distinguish themselves from the traditional extradition because of their simplicity and efficiency, this paper finds the EAW mechanism could be a more appropriate model upon which Mainland China and Hong Kong's can construct their surrender system.

Compared to the EAW system, the US interstate rendition system is swifter, more efficient, and more executive-driven. None of the traditional extradition principles apply to the rendition procedure. It is not only a necessity under the US federal regime but also a product of the similar legal systems and human rights protection standards in the US states. However, none of the conditions exist in Mainland China and Hong Kong to facilitate the two regions opting for a US interstate rendition model for their own surrender of fugitive offenders' system.

Comparatively, the EAW system can better respond to the surrender requirement under the 'one country, two systems' model and the gap in human rights protections between Mainland China and Hong Kong. The EAW system has encountered more divergence between different legal systems and creatively offered solutions to this issue. The application of the mutual recognition principle and depoliticizing the surrender procedure can offer inspiration to Mainland China and Hong Kong. In the latter surrender system, the mutual trust between the central authorities and Hong Kong residents needs to be enhanced, and conflict between the socialist legal system and the capitalist legal system needs to be mitigated. The EAW's creative design on the double criminality principle, surrender of nationals, and sophisticated evaluations on human rights are also relevant to Mainland China and Hong Kong. The importance of the EAW as a model for Mainland China and Hong Kong to construct their surrender system under the 'one country, two systems' policy should be taken into serious consideration.

NOTES

¹ 'Extradition' is defined as 'the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of, a crime, by the state in whose territory he happens for the time being to be'. John P Grant and J Craig Barker (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009) 41.

² "Extradition" is generally used between sovereign countries, "surrender" has been formally used in the European Arrest Warrant to distinguish it from traditional extradition, "rendition" is typically used in the US interstate rendition mechanism as will be introduced in this paper. For a more detailed definition of the three nouns, see Miguel João Costa, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond* (Brill Nijhoff 2019) 26–27.

³ It is the Hong Kong domestic extradition law, the legal basis for Hong Kong to conclude agreements on the surrender of fugitive offenders with other countries. Regarding the documents, see <<https://www.elegislation.gov.hk/hk/cap503>> accessed 26 September 2021.

⁴ See Chau Pak-kwan and Stephen Lam, 'Research Study on the Agreement between Hong Kong and Mainland concerning Surrender of Fugitive Offenders', (Research and Library Services Division and Legal Service Division Hong Kong Legislative Council Secretariat, March 2001) <<https://www.legco.gov.hk/yr00-01/english/library/erp05.pdf>> accessed 6 May 2021.

⁵ See Richard Cullen, *Hong Kong Constitutionalism: the British Legacy and the Chinese Future* (Routledge 2020) 138. In this book, both rendition and extradition are used interchangeably. Also see Wayne Walsh SC, *Cross-Border Crime in Hong Kong: Extratition, Mutual Assistance, Financial Sanctions* (Lexis Nexis 2020) 235. In this book rendition is used.

⁶ See Hong Kong Fugitive Offenders Ordinance, preliminary 2(6). For the full text see <https://www.elegislation.gov.hk/hk/cap503?xpid=ID_1438403283205_001> accessed 8 May 2021.

⁷ Basic Law of Hong Kong Special Administrative Region ('Basic Law'), Preamble.

⁸ Basic Law, art 2.

⁹ Basic Law, art 95.

¹⁰ These agreements concretely include the Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong, Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, Arrangement on Reciprocal Recognition

and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region, Arrangement on Reciprocal Recognition and Enforcement of Civil judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region, Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Court of Mainland and of Hong Kong Special Administrative Region and Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of Mainland and of the Hong Kong Special Administrative Region. Regarding the documents, see <<https://www.doj.gov.hk/eng/topical/mainlandlaw.html#mutual>> accessed 23 July 2020.

¹¹ On 14 December 2017, the Arrangement on the Reciprocal Notification Mechanism between the Mainland and the Hong Kong Special Administrative Region Relating to Situations Including the Imposition of Criminal Compulsory Measures or the Institution of Criminal Prosecution was signed to replace the old one concluded in 2001. Besides this arrangement, there is no longer any other arrangement or agreement on judicial cooperation in criminal matters between the two regions; Government of Hong Kong (Gov HK), 'HKSAR and Mainland Sign New Arrangements on Notification Mechanism' (14 December 2017) Press Release <<https://www.info.gov.hk/gia/general/201712/14/P2017121400516.htm>> accessed 24 July 2020.

¹² Global Times, 'China Expected to Ratify Extradition Treaties with Sri Lanka, Vietnam' *Global Times* (Beijing, 22 August 2019) <<https://www.globaltimes.cn/content/1162327.shtml>> accessed 25 July 2020.

¹³ Department of Justice of the Government of Hong Kong Special Administrative Region, 'List of Surrender of Fugitive Offenders Agreements (Legislative References)' <<https://www.doj.gov.hk/eng/laws/table4ti.html>> accessed 25 July 2020.

¹⁴ The Hong Kong Fugitive Offenders Ordinance, as the legal basis for the surrender cooperation between Hong Kong and any other legal territories, excludes other parts of the People's Republic of China from the possible cooperation scope.

¹⁵ The debate is mainly focused on the application of the traditional extradition principles, including the double criminality check, national (citizen) protection, exception for political offences and death penalty offenders, and the authority which can be in charge of the surrender.

¹⁶ Regarding the "one country, two systems" and autonomy issue, see the analysis mainly in the surrender between Mainland China and Hong Kong part, the way access to the two mechanisms part, additionally in the European Arrest Warrant mechanism and the US interstate rendition part some analyses are also given.

¹⁷ For the past 20 years, a possible agreement between Hong Kong and Mainland China has been explored and possible models have been examined, cf Pak-kwan and Lam (n 4).

¹⁸ It is the legal basis for the Hong Kong government to conclude a surrender agreement with only foreign countries, excluding the other territory of the People's Republic of China, about its application territory. See Hong Kong Fugitive Offenders Ordinance, preliminary 2(1)(a).

¹⁹ Government of Hong Kong, 'Statement Given by Secretary of HK Security Bureau on the Amendment of Hong Kong Fugitive Offender Ordinance' (30 May 2019) <<https://www.info.gov.hk/gia/general/201905/30/P2019053000811.htm>> accessed 6 May 2021. The text of the amendment is available at <<https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>> accessed 6 May 2021.

²⁰ Albert H Y Chen, 'A Perfect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders' (2019)49 (2) Hong Kong Law Journal 423.

²¹ SCMP Reporters, 'Hong Kong Leader Carrie Lam Announces Formal Withdrawal of the Extradition Bill and Sets Up a Platform to Look into Key Causes of Protest Crisis' *South China Morning Post* (Hong Kong, 4 September 2019) <<https://www.scmp.com/news/hong-kong/politics/article/3025641/hong-kong-leader-carrie-lam-announce-formal-withdrawal>> accessed 2 September 2020.

²² The full text of the Law is available at <<https://www.chinadaily.com.cn/a/202007/01/WS5efbd6f5a310834817256495.html>> accessed 6 May 2021. (Hong Kong Safeguarding National Security Law).

²³ Hong Kong Safeguarding National Security Law, art 55.

²⁴ Just as the enactment of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region itself is the embodiment of central government implementing power to a local region (Hong Kong), the enjoyment of criminal jurisdiction in specific situations in national security cases is also one representation of this central power.

²⁵ Although the transfer of suspects relating to the four national security offences cannot be regarded as a surrender, this regulation will have some influence on the future design of exceptions for political offences between Mainland China and Hong Kong as discussed in the final section of this paper.

²⁶ Sonny Shiu-Hing Lo, *The Politics of Cross-border Crime in Greater China: Case studies of Mainland China, Hong Kong and Macau* (Routledge 2009) 3.

²⁷ Grenville Cross, 'Fugitive Surrender: Rights and Responsibilities' *China Daily* (Hong Kong, 12 June 2019) <<https://www.chinadailyhk.com/articles/186/73/64/1560307116859.html>> accessed 27 July 2020.

²⁸ Marsha Wellknown Yee, 'Hong Kong's Legal Obligation to Require Fair Trial for Rendition' (2002)102 *Columbia Law Review* 1375.

²⁹ Arrangements with the Mainland on Surrender of Fugitive Offenders, Security Bureau paper prepared for LegCo Panel on Security meeting (23 November 1998) <https://www.legco.gov.hk/yr98-99/english/panels/se/papers/se0312_3.htm> accessed 1 September 2021.

³⁰ In the 1990s, Zhang Ziqiang, a Hong Kong permanent resident, kidnapped several HK tycoons and also committed crimes of kidnapping and smuggling of weapons and ammunition in Mainland China. He was finally executed in Guang Dong Province, China. In this case, the main argument was that Zhang was a Hong Kong citizen and had also committed crimes in Hong Kong and should be extradited back to Hong Kong for the trial. This argument was rejected by the Hong Kong government and central government. About the case, see Conor O'clery, 'Big Spender gang could the pay ultimate price' *The Irish Times* (Dublin, 9 November 1998) <<https://www.irishtimes.com/news/big-spender-gang-could-the-pay-ultimate-price-1.212470>> accessed 8 May 2021.

³¹ In 2005, five Hong Kong booksellers in the Causeway Bay Bookstore were brought to Mainland China and taken into custody in Guang Dong Province, China. Their detention aroused public concern. About the case, see Phila Siu, Ng Kang-chung and Owen Fung, 'Bookseller Lam Wing-kee reveals explosive details of his mainland China detention, claims Lee Po told him he was "taken away from Hong Kong"' *South China Morning Post* (Hong Kong, 16 June 2016) <<https://www.scmp.com/news/hong-kong/politics/article/1976489/bookseller-lam-wing-kee-reveals-explosive-details-his>> accessed 8 May 2021.

³² In this case, the Hong Kong resident Chan Tong-kai was charged by the Taiwanese Government for murdering his girlfriend in Taiwan. Hong Kong refused to surrender him since the Hong Kong Fugitive Offenders Ordinance excludes surrender with other parts of China, including the Taiwan Region. About the story, see Daniel Victor and Tiffany May, 'The Murder Case that Lit the Fuse in Hong Kong' *The New York Times* (New York, 15 June 2019) <<https://www.nytimes.com/2019/06/15/world/asia/hong-kong-murder-taiwan-extradition.html>> accessed 8 May 2021.

³³ See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, Oxford University Press 2014) 2-3.

³⁴ The establishment of Hong Kong Special Administrative Region aims to uphold national unity and territorial integrity and maintain the prosperity and stability of Hong Kong: Basic Law, Preamble. After the handover of Hong Kong, the land and natural resources within Hong Kong are state property, and at the same time, the revenues and other relevant profits are exclusively at the disposal of the government of the Region: Basic Law, articles 7,106,116. Moreover, the fundamental rights of Hong Kong residents are also protected after the return: Basic Law, arts 24-42.

³⁵ Hong Kong is one inalienable part of the People's Republic of China, and the Hong Kong region has the obligation to safeguard national security and territorial integrity: Basic Law, arts 1, 23 as well as the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region 2020.

³⁶ See kwan and Lam (n 4); also see Guoqiang Zhao, "The Discussion on the Surrender of Fugitive Offenders Mechanism under 'One Country, Two Systems,'" (2007) 20(78) *The Journal of Administration* 1050.

³⁷ See Bassiouni (n 33) 672, also see Costa (n 2) 501.

³⁸ See M. Cherif Bassiouni, *Crimes and Justice* (Houghton Mifflin Co 1969) 234.

³⁹ Hong Kong, as one Special Administrative Region enjoying a high degree of autonomy, is still one local region and is under the Central People's Government: Basic Law, art 12. And this high degree of autonomy is not automatic or naturally inherent; it is laid down by the National People's Congress: Basic Law, art 2.

⁴⁰ Basic Law, art 23.

⁴¹ See Hong Kong Safeguarding National Security Law, art 1.

⁴² See Hong Kong Safeguarding National Security Law, art 6.

⁴³ Yanhong Yin and Irene Wieczorek, 'What model for extradition between Hong Kong and mainland China? A comparison between the 2019(withdrawn)amendment to Hong Kong extradition law and the European Arrest Warrant' (2020) 11(4) *New Journal of European Criminal Law* 517.

⁴⁴ William Anthony Schabas, 'Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition' (1991) 62 *International Review of Penal Law* 260.

⁴⁵ See Yin and Wieczorek (n 43) 519.

⁴⁶ For instance, in the UK, the extradition can be rejected by the Secretary of State, Extradition Act 2003 Section 93–102; in Canada, it can be rejected by the Minister of Justice, Extradition Act Arts 7, 40; in the US, the Secretary of State has the final say, 18 U.S.C. § 3184; in Hong Kong, the Chief Executive is empowered to make a final decision on surrender, Hong Kong Fugitive Offenders Ordinance Sections 3–5; and in China, the extradition requires the approval of the State Council, China Extradition Law art 28.

⁴⁷ In fact, the role of the Chief Executive and the Hong Kong courts has been questioned by the Hong Kong public in amending the Hong Kong Fugitive Offenders Ordinance in 2019. The Chief Executive is expected to cooperate with the central government and courts are concerned about being in a disadvantageous position and cannot refuse the surrender.

⁴⁸ See Chen (n 20) 426.

⁴⁹ Basic Law, arts 2 and 8.

⁵⁰ China Criminal Procedure Law, art 81 governs inter-province arrests in China.

⁵¹ Hong Kong Crimes Ordinance, s 47 pt. 5.

⁵² China Criminal Law, art 342.

⁵³ Offences against the Person Ordinance, art 46(a).

⁵⁴ See Bassiouni (n 33) 3.

⁵⁵ In the following EAW case, one finds that, as long as the minimum human rights level is achieved, the trust to carry out efficient surrender cooperation will be assumed.

⁵⁶ E.g. the UN Model Treaty on Extradition specifies that extradition shall not be granted if there are grounds to believe that the request has been made to prosecute or punish a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that the person's position may be prejudiced for any of these reasons or if the person would be subjected to torture or cruel, inhuman treatment or degrading punishment or if that person has not or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights: Model Treaty on Extradition, art 3(b)(f).

⁵⁷ Hong Kong has been returned to China for 24 years, and so the integration with Mainland China in politics, economy and culture should be assumed, although, in practice, the degree varies.

⁵⁸ See Liling Yue and Shuo Guo, *Human Rights and Criminal Justice in China* (Law Press 2017) 32, 46, 145.

⁵⁹ See Guest Contributor, 'HKFP Voices: Hong Kong's extradition law plan is a threat to human rights, say over 70 NGOs in open letter', (*Hong Kong Free Press* (Hong Kong, 7 June 2019) <<https://hongkongfp.com/2019/06/07/hkfp-voices-hong-kongs-extradition-law-plan-threat-human-rights-say-70-ngos-open-letter/>> accessed 8 May 2021).

⁶⁰ See Cross (n 27), also see Albert HY Chen, *The Changing Legal Orders in Hong Kong and Mainland China: Essays on "One Country, Two Systems"* (City University of Hong Kong Press, 2021) 256–258; and see Guangzhong Chen, *China Modern Judicial System* (Peking University Press 2020) 164–253.

⁶¹ John Vervaele, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU: ECJ Judgment (Grand Chamber) C-399/11 of 26 February 2013' (2013) 2 *Review of European Administrative Law* 37.

⁶² The Yale Law Journal, 'Interstate Rendition: Executive Practices and the Effects of Discretion' (1956) 66 *Yale Law Journal* 97.

⁶³ Pennsylvania Office of General Council, 'Extradition Process Chart' <<https://www.ogc.pa.gov/Extradition/Documents/Extradition%20Process%20Chart.pdf>> accessed 27 July 2020.

⁶⁴ US Constitution, art IV, §2, cl 2.

⁶⁵ 18 USC §3182 (2000).

⁶⁶ US States have enacted state extradition law following the guidance of Uniform Criminal Extradition Act (UCEA) which was proposed to reduce confusion and uncertainty about what was required by the various states.

⁶⁷ Douglas S Feinberg and others, *California Criminal Law Procedure and Practice* (Continuing Education of the Bar 2017) 1661.

⁶⁸ US Constitution, art IV, §2.

⁶⁹ The criminal extradition process cannot be used for a private purpose or to aid in the collection of a debt. Applications and demands for minor misdemeanours are not encouraged but can be processed in appropriate circumstances.

⁷⁰ US Constitution, art IV, §1.

⁷¹ *In re Flack*, 88 Kan. 616 (1913).

⁷² See 18 USC (n 65).

⁷³ *Kentucky v Dennison* 65 US 66, 71 (1861).

⁷⁴ *Puerto Rico v Branstad* 483 US 219, 228 (1987).

⁷⁵ *California v Superior Court of California* 482 US 400 (1987), 107 S.Ct. 2433; *Kentucky v Dennison* 65 US 24 How 66 (1861).

⁷⁶ Currently, besides the US federal government, there are other states applying the death penalty. Death Penalty is not set as a ground to refuse the rendition.

⁷⁷ *Drew v Thaw* 235 US 432 (1914); also *Ex Parte Shirley Chapman* 435 S.W.2d 529 (1968).

⁷⁸ *Lascelles v Georgia* 148 US 537 (1893).

⁷⁹ Probable cause check means that the competent legal evidence should be presented in order to warrant the reasonable conclusion that the relator committed the offence for which he or she is sought. However, the requesting state does not need to adduce evidence sufficient to justify a conviction. See Bassiouni (n 33) 893–898.

⁸⁰ *Michigan v Doran* 439 US 282 (1978).

⁸¹ *Sweeney, Sheriff v Woodall and others* 344 US 916 (1953).

⁸² *California v Superior Court* 482 US 400(1987); *State of Alabama Governor and Attorney General v Phillip Chance, Movant Appellee*, 85 F.3d 1205 (6th Cir. 1996); regarding the definition of a fugitive, see 18 USC §921.

⁸³ See Auke Willems, 'Extradition on the Two Sides of the Atlantic: the US Model as Blueprint for the European Arrest Warrant?' 2016(27) *Criminal Law Forum* 454–457; also see Calos Gómez-Jara Díez, *European Federal Criminal Law: the Federal Dimension of EU Criminal Law* (Intersentia 2015) 147–149.

⁸⁴ This has been an important factor justifying the near-automatic nature of extradition, as a fugitive is not being rendered for 'trial to an alien jurisdiction, with laws which our standards might condemn', but is simply being returned to be tried under the protection of the US Constitution: *In the matter of Strauss*, 197 US 324 (1905).

⁸⁵ On the development of the new judicial federalism and its impact, See G Alan Tarr, 'The New Judicial Federalism in Perspective' (1997) 72 *Notre Dame Law Review* 1097.

⁸⁶ Paul H Robinson and Markus D Dubber, 'The American Model Penal Code: A Brief Overview' (2007) 10 *New Criminal Law Review* 320.

⁸⁷ *ibid* 319.

⁸⁸ *ibid* 326. The other criticisms on the influence of Model Penal Code can also be found, e.g., Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008) 1.

⁸⁹ G Alan Tarr, 'Judicial Federalism in the United States: Structure, Jurisdiction and Operation' (2015) 2 *Journal of Constitutional Research* 7 <<https://revistas.ufpr.br/rinc/article/view/44526/27212>> accessed 24 July 2020.

⁹⁰ National Center for State Courts, 'State Justice Institute (SJI)' <<https://www.ncsc.org/services-and-experts/government-relations/appropriations/state-justice-institute>> accessed 24 July 2020.

⁹¹ Thomas Schmitz, 'Observing the UPOs: The Conception of the European Union as a Supranational Federal Polity' (*Europarechtliches Seminar, Georg-August Universität Göttingen* 2004) 14, 15. <http://www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Csaba_Abel_European_Union_as_federal_polity.pdf> accessed 22 March 2022.

⁹² EAW Framework Decision, art 2(1).

⁹³ Commission Notice, *Handbook on How to Issue and Execute a European Arrest Warrant* [2017] OJ C335/07. (Handbook).

⁹⁴ See US Constitution (n 68) and US Constitution (n 70).

⁹⁵ EAW Framework Decision, Preamble para 6.

⁹⁶ Cardiff European Council, 15 and 16 June 1998 Presidency Conclusions, para 39 <<https://www.consilium.europa.eu/media/21103/54315.pdf>> accessed 26 July 2020.

⁹⁷ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, para 33, <https://www.europarl.europa.eu/summits/tam_en.htm> accessed 26 July 2020. At that time, the UK was still an EU Member State. (Tampere Conclusions).

⁹⁸ Commission, 'Mutual Recognition of Final Decisions in Criminal Matters' (Communication) COM (2000) 495 final.

⁹⁹ See Tampere Conclusion (n 97).

¹⁰⁰ Those replaced include the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977; the extradition-related clause in the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union; and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union: EAW Framework Decision, Preamble paras 3 and 4.

¹⁰¹ Following the UK's departure in 2019, the EU now has 27 Member States.

¹⁰² Regarding the meaning of judicial organizations, see Handbook (n 93).

¹⁰³ Commission, 'Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' COM (2011) 175 final.

¹⁰⁴ The European Court of Justice (ECJ) has issued a series of preliminary rulings on several topics which relate to the implementation of the EAW, including the 'EU citizenship' 'double criminality' 'fundamental rights' 'judicial authority' 'judicial decision', etc: EUROJUST, 'Case Law by the Court of Justice of the European Union on the European Arrest Warrant' (14 May 2020) <<https://op.europa.eu/en/publication-detail/-/publication/f5fcc052-9655-11ea-aac4-01aa75ed71a1/language-en/format-PDF/source-search>> accessed 27 July 2020.

¹⁰⁵ Regarding the grounds for mandatory and optional non-execution of the EAW, see European Arrest Warrant Framework Decision, arts 3 and 4. The human rights ground is not a ground for mandatory or optional refusal, but there is also a provision that confirms that the Framework Decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union: European Arrest Warrant Framework Decision, Preamble para 12.

¹⁰⁶ EAW Framework Decision, Preamble point 10.

¹⁰⁷ *ibid*, Preamble point 12.

¹⁰⁸ Directly declining surrender because of the concerns of human rights protection is not permitted; more communication and information is required by the executing Member State before making the final decision, so suspension under special situations is the normal way rather than direct declination.

¹⁰⁹ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Cldraru*, Judgment of 5 April 2016, paras 89-100.

¹¹⁰ *ibid* paras 100-104; see also, Commission Notice (n93).

¹¹¹ In 2017, after the Catalonia independence event, the former president of Catalonia, Puigdemont, was accused of misuse of public funds and rebellion (in 2019, this charge was changed to sedition). Both rebellion and sedition are typical political offences. Since the EAW Framework Directive abolished the exception for political offences, the German court refused the surrender for the charge of rebellion on the ground that it failed to satisfy the double criminal requirement in German law.

¹¹² EAW Framework Decision, art 2(2). The 32 offences include participation in a criminal organization; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud; laundering of the proceeds of crime; counterfeiting currency; computer-related crime; environmental crime including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorized entry and residence; murder; grievous bodily injury; illicit trade in human organs and tissues; kidnapping; racism and xenophobia; organized or armed robbery; illicit trafficking in cultural goods; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft/ships; and sabotage.

¹¹³ Commission, 'Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States' COM (2001) 522 final.

¹¹⁴ EAW Framework Decision, arts 4(6) and 5(3).

¹¹⁵ See Tampere Conclusion (n 97).

¹¹⁶ Lisbon Treaty 2007, art 82(2).

¹¹⁷ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings [2010] OJ L 280/1.

¹¹⁸ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings [2012] OJ L 142/1.

¹¹⁹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October on the Right of Access to a Lawyer in Criminal Proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1.

¹²⁰ Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on Legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1.

¹²¹ Lisbon Treaty 2007, art 83(1).

¹²² Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

¹²³ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1.

¹²⁴ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [2013] OJ L 218/8.

¹²⁵ Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA [2014] OJ L 151/1.

¹²⁶ Directive 2017/541/EU of the European Parliament and of the

Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6.

¹²⁷ Directive 2017/2103/EU of the European Parliament and the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA [2017] OJ L305/12.

¹²⁸ Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2018] OJ L284/22.

¹²⁹ Directive 2019/713/EU of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA [2019] OJ L123/18.

¹³⁰ According to the EAW case law, as well as the cases decided by the European Court of Human Rights, Poland, Greece, Romania, Hungary and other Eastern European countries generally have a lower level of human rights protection.

¹³¹ Asif Efrat, 'Assessing Mutual Trust among EU members: Evidence from the European Arrest Warrant' (2019) 26 (5) *Journal of European Public Policy* 656.

¹³² Ermioni Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment' (2015) 6 *New Journal of European Criminal Law* 32.

¹³³ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L 81/24.

¹³⁴ Massimo Fichera and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) 19(4) *European Public Law*; see also Xanthopoulou (n 132).

¹³⁵ See Handbook (n 93) 14.

¹³⁶ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR-3672; Case C-268/17, AY, Judgment of 25 July 2018; Case C-220/18, ML, Judgment of 25 July 2018; Case C-396/11 Radu, Judgment of 29 January 2013; Case C-399/11 Melloni, Judgment of 26 February 2013.

¹³⁷ See Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021) 286.

¹³⁸ Basic Law, art 5.

¹³⁹ What kind of surrender system between Mainland China and Hong Kong should be applied after 2047 is mainly up to what kind of amendment will be made to the "one country, two systems" policy. At present, no official decision has been made yet.

¹⁴⁰ See Willems (n 83) 443.

¹⁴¹ See Julia Sievers, 'Too Different to Trust? First Experiences with the Application of the European Arrest Warrant' in Elspeth Guild and Florian Geyer (eds), *Security Versus Justice? Police and Judicial Cooperation* (Ashgate 2008) 114, 115, 116.

¹⁴² See Willems (n 137) 111.

¹⁴³ John Spencer, 'Fair Trials and the European Arrest Warrant' (2010) The Cambridge Law Journal 226. Similar concerns on human rights of the EU Member States can also be found in Asif Efrat, "Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant" (2019) 26(5) *Journal of European Public Policy* 6, 9.

¹⁴⁴ Julia Sievers, 'Too Different to Trust? First Experiences with the Application of the European Arrest Warrant' in Elspeth Guild and Florian Geyer (eds), *Security Versus Justice? Police and Judicial Cooperation* (Ashgate 2008) 113.

¹⁴⁵ Relating to the meaning of socialist legal system with the typical characteristic of civil law, see Chen (n 59) 260.

¹⁴⁶ The mutual recognition principle in the single market area was introduced through the case law. The famous ECJ case of *Cassis de Dijon* first introduced the principle of mutual recognition into the area of free movement of goods: C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*, Judgment on 20 February 1979.

¹⁴⁷ Jacques Pelkmans, 'Mutual Recognition in Goods on Promises and Disillusions' (2007) 14 (5) *Journal of European Public Policy* 699.

¹⁴⁸ See *Puerto Rico v Branstad* (n 74).

¹⁴⁹ Department of Justice of the Government of the Hong Kong Special Administrative Region, 'Arrangements with the Mainland and the Macau SAR' <<https://www.doj.gov.hk/eng/mainland/intracountry.html>> accessed 23 July 2020.

¹⁵⁰ Department of Justice of the Government of the Hong Kong Special Administrative Region, 'Mainland and Hong Kong Closer Economic Partnership Arrangement' <<https://www.doj.gov.hk/eng/topical/wto.html>> accessed 23 July 2020.

¹⁵¹ Department of Justice of the Hong Kong Special Administrative Region, 'Enforcement of Civil and Commercial Judgment between Hong Kong and the Mainland' <<https://www.doj.gov.hk/eng/public/enforcement.html>> accessed 23 July 2020.

¹⁵² Saskia Hufnagel, 'Police Cooperation in Europe, China and Australia: Does Trust Depend on the Political System' in Saskia Hufnagel and Carole McCartney (eds), *Trust in International Police and Justice Cooperation* (Bloomsbury 2017) 36.

¹⁵³ See Willems (n 137) 51.

¹⁵⁴ Russell Hardin, 'Conceptions and Explanations of Trust' in Karen S Cook (ed), *Trust in Society* (Russell Sage Foundation 2001) 7.

¹⁵⁵ See Willems (n 137) 72.

¹⁵⁶ See Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice-A Role for Proportionality?* (Hart 2020) 43-45.

¹⁵⁷ ibid, 30-35.

¹⁵⁸ ibid, 45.

¹⁵⁹ ibid, 43.

¹⁶⁰ RTHK, 'HK courts must have a bigger say on extraditions' (RTHK, 5 June 2019) <<https://news.rthk.hk/rthk/en/component/k2/1461063-20190605.htm?share=twitter>> accessed 23 July 2020.

¹⁶¹ See Johannes Chan, 'Ten Days that Shocked the World: the Rendition Proposal in Hong Kong' (2019) 49(2) *Hong Kong Law Journal* 431.

¹⁶² See Cora Chan, 'Demise of One Country, Two Systems: Reflections on the Hong Kong Rendition Saga' (2019) 49(2) *Hong Kong Law Journal* 447.

¹⁶³ See Handbook (n 93) 14.

¹⁶⁴ See Joined cases (n 109).

¹⁶⁵ See Schmitz (n 91).

¹⁶⁶ See Yin and Wieczorek (n 43) 519.

¹⁶⁷ See Libor Klimek, *European Arrest Warrant* (Springer 2015) 316

¹⁶⁸ ibid, 53.

¹⁶⁹ See EAW FD, art 2.

¹⁷⁰ See EAW FD, preamble (n79). Re the two-step examination on human rights protection, Case C-220/18 PPU *Generalstaatsanwaltschaft ECLI:EU:C:2018:589*; also Valsamis Mitsilegas, 'Joined Cases C-404/15 and C-659/15 PPU-Pál Aranyosi and Robert Calderaru v Generalstaatsanwaltschaft Bremen: Resetting the Parameters of Mutual Trust: From Aranyosi to LM' in Valsamis Mitsilegas, Alberto Di Martino and Leandro Mancano (eds), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (Hart 2019) 429.

¹⁷¹ Law of People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, Part .

¹⁷² Government of Hong Kong (Gov HK) 'LCQ6: Legislation on Article 23 of Basic Law' (27 May 2020) Press Release <<https://www.info.gov.hk/gia/general/202005/27/P2020052700520.htm>> accessed 23 July 2020.

¹⁷³ See Simon NM Young, 'Guide to Basic Law Article 23: Hong Kong's Unresolved National Security Issue' (HKU Legal Scholar Blog, 15 March 2015) <<http://researchblog.law.hku.hk/2015/03/guide-to-basic-law-article-23-hong.html>> accessed 24 July 2020.

¹⁷⁴ The application of the exception of political offences to protect human rights has been in doubt for a long time: Christine Van den Wyngaert, *The Political Offence Exception of Extradition* (Springer 1980) 80; M.C Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Code and*

Draft Statute for an International Criminal Tribunal (Brill Nijhoff 1987) 16; Julia Jansson, *Terrorism Criminal Law and Politics: the Decline of the Political Offence Exception to Extradition* (Routledge 2020) 60.

¹⁷⁵ The US interstate rendition does not refuse rendition on the ground of the death penalty; the whole EU region has abolished the death penalty, so it is not an obstacle under the EAW system.

¹⁷⁶ Liping Chen, 'The Amendment (9) of Criminal Law Abolished another 9 Offences, Expert: The Death Penalty for the Non-violent Offences Should Be Abolished Gradually' *People's Daily* (Hong Kong, 14 September 2015) <<http://npc.people.com.cn/n/2015/0914/c14576-27580702.html>> accessed 23 July 2020.

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The author has no competing interests to declare.

AUTHOR INFORMATIONS

The author's main research is on EU criminal law and China criminal law, specifically on regional extradition and judicial cooperation in criminal matters.

AUTHOR AFFILIATION

Yanhong Yin  orcid.org/0000-0001-6898-3339
PhD Researcher, Faculty of Law and Criminology, VUBrussels, Belgium

REFERENCES

BOOKS AND ARTICLES

Bassiouni C M, *Crimes and Justice* (Houghton Mifflin Co 1969)

Bassiouni C M, *A Draft International Criminal Code and Draft Statute for an International Criminal Code and Draft Statute for an International Criminal Tribunal* (Brill Nijhoff 1987)

Bassiouni C M, *International Extradition: United States Law and Practice* (6th edn, Oxford University Press 2014)

Chan C, 'Demise of One Country, Two Systems: Reflections on the Hong Kong Rendition Saga' (2019) 49(2) *Hong Kong Law Journal* 447.

Chan J, 'Ten Days that Shocked the World: the Rendition Proposal in Hong Kong' (2019) 49(2) *Hong Kong Law Journal* 431

Chen G Z, *China Modern Judicial System* (Peking University Press 2020)

Chen H Y A, 'A Perfect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders' (2019) 49 (2) *Hong Kong Law Journal* 423. DOI: <https://doi.org/10.2139/ssrn.3469366>

Chen H Y A, *The Changing Legal Orders in Hong Kong and Mainland China: Essays on "One Country, Two Systems"* (City University of Hong Kong Press, 2021)

Costa J M, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond* (Brill Nijhoff 2019)

Cullen R, *Hong Kong Constitutionalism: the British Legacy and the Chinese Future* (Routledge 2020). DOI: <https://doi.org/10.4324/9780429453502>

Díez C, *European Federal Criminal Law: the Federal Dimension of EU Criminal Law* (Intersentia 2015)

Efrat A, "Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant" (2019) 26(5) *Journal of European Public Policy* 656. DOI: <https://doi.org/10.1080/13501763.2018.1478877>

Feinberg S D and others, *California Criminal Law Procedure And Practice* (Continuing Education of the Bar 2017)

Fichera M and Herlin-Karnell E, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) 19(4) *European Public Law* 759. DOI: <https://doi.org/10.54648/EURO2013045>

Grant P J and Barker C J (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009). DOI: <https://doi.org/10.1093/acref/9780195389777.001.0001>

Hardin R, 'Conceptions and Explanations of Trust' in Karen S Cook (ed), *Trust in Society* (Russell Sage Foundation 2001)

Husak D, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008). DOI: <https://doi.org/10.1093/acprof:oso/9780195328714.001.0001>

Hufnagel S, 'Police Cooperation in Europe, China and Australia: Does Trust Depend on the Political System' in Saskia Hufnagel and Carole McCartney (eds), *Trust in International Police and Justice Cooperation* (Bloomsbury 2017)

'Interstate Rendition: Executive Practices and the Effects of Discretion' (1956) 66 *Yale Law Journal* 97. DOI: <https://doi.org/10.2307/794088>

Jansson J, *Terrorism Criminal Law and Politics: the Decline of the Political Offence Exception to Extradition* (Routledge 2020)

Klimek L, *European Arrest Warrant* (Springer 2015). DOI: <https://doi.org/10.1007/978-3-319-07338-5>

Lo S, *The Politics of Cross-border Crime in Greater China: Case studies of Mainland China, Hong Kong and Macau* (Routledge 2009)

Mitsilegas V, 'Joined Cases C-404/15 and C-659/15 PPU-Pál Aranyosi and Robert Calderaru v Generalstaatsanwaltschaft Bremen: Resetting the Parameters of Mutual Trust: From Aranyosi to LM' in Valsamis Mitsilegas, Alberto Di Martino and Leandro Mancano (eds), *The Court of Justice and European Criminal*

Law: Leading Cases in a Contextual Analysis (Hart 2019). DOI: <https://doi.org/10.5040/9781509911196.ch-015>

Pak-kwan C and Lam S, 'Research Study on the Agreement between Hong Kong and Mainland concerning Surrender of Fugitive Offenders', (Research and Library Services Division and Legal Service Division Hong Kong Legislative Council Secretariat, March 2001) <<https://www.legco.gov.hk/yr00-01/english/library/erp05.pdf>> accessed 6 May 2021.

Pelkmans J, 'Mutual Recognition in Goods on Promises and Disillusions' (2007) 14 (5) Journal of European Public Policy 699. DOI: <https://doi.org/10.1080/13501760701427888>

Robinson H P and Dubber D M, 'The American Model Penal Code: A Brief Overview' (2007) 10 New Criminal Law Review 320. DOI: <https://doi.org/10.1525/nclr.2007.10.3.319>

Schabas A W, 'Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition' (1991) 62 International Review of Penal Law 260

Schmitz T, 'Observing the UPOs: The Conception of the European Union as Supranational Federal Polity' (Europarechtliches Seminar, Georg-August Universität Göttingen 2004) <http://www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Csaba_Abel_European_Union_as_federal_polity.pdf> accessed 22 March 2022.

Sievers J, 'Too Different to Trust? First Experiences with the Application of the European Arrest Warrant' in Elspeth Guild and Florian Geyer (eds), *Security Versus Justice? Police and Judicial Cooperation* (Ashgate 2008)

Spencer J, 'Fair Trials and the European Arrest Warrant' (2010) The Cambridge Law Journal 226. DOI: <https://doi.org/10.1017/S0008197310000358>

Tarr A G, 'The New Judicial Federalism in Perspective' (1997) 72 Notre Dame Law Review 1097

Tarr A G, 'Judicial Federalism in the United States: Structure, Jurisdiction and Operation' (2015) 2 Journal of Constitutional Research 7 <<https://revistas.ufpr.br/rinc/article/view/44526/27212>> accessed 24 July 2020. DOI: <https://doi.org/10.5380/rinc.v2i3.44526>

Vervaele J, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU:ECJ Judgment (Grand Chamber) C-399/11 of 26 February 2013' (2013) 2 Review of European Administrative Law 37

Walsh W, *Cross-Border Crime in Hong Kong: Extradition, Mutual Assistance, Financial Sanctions* (Lexis Nexis 2020)

Willems A, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021). DOI: <https://doi.org/10.5040/9781509924578>

Willems A, 'Extradition on the Two Sides of the Atlantic: the US Model as Blueprint for the European Arrest Warrant?' 2016 (27) Criminal Law Forum 454. DOI: <https://doi.org/10.1007/s10609-016-9290-7>

Wyngaert C, *The Political Offence Exception of Extradition* (Springer 1980)

Xanthopoulou E, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment' (2015) 6 New Journal of European Criminal Law 32. DOI: <https://doi.org/10.1177/203228441500600104>

Xanthopoulou E., *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice-A Role for Proportionality?* (Hart 2020). DOI: <https://doi.org/10.5040/9781509922284>

Yee W M, 'Hong Kong's Legal Obligation to Require Fair Trial for Rendition' (2002) 102 Columbia Law Review 1375. DOI: <https://doi.org/10.2307/1123675>

Yue L L and Guo S, *Human Rights and Criminal Justice in China* (Law Press 2017)

Yin Y H and Wieczorek I, 'What model for extradition between Hong Kong and mainland China? A comparison between the 2019 (withdrawn) amendment to Hong Kong extradition law and the European Arrest Warrant' (2020) 11 (4) New Journal of European Criminal Law 517. DOI: <https://doi.org/10.1177/2032284420972190>

Young S, 'Guide to Basic Law Article 23: Hong Kong's Unresolved National Security Issue' (HKU Legal Scholarship Blog, 15 March 2015) <<http://researchblog.law.hku.hk/2015/03/guide-to-basic-law-article-23-hong.html>> accessed 24 July 2020

Zhao G Q, "The Discussion on the Surrender of Fugitive Offenders Mechanism under 'One Country, Two Systems," (2007) 20 (78) The Journal of Administration 1050

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