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HONG KONG'S FAILURE TO EXTRADITE EDWARD SNOWDEN: MORE THAN JUST A TECHNICAL DEFECT

By: Mark D. Kielsingard and Ken Gee-Kin Ip

As the Edward Snowden case takes legs and exhibits all the earmarks of official misconduct and scandal, the U.S. government continues efforts aimed at extraditing this "whistleblower," characterizing him as a traitor and doing damage control in the NSA. Part of this strategy includes intimidating those sovereign states that refuse to cooperate in returning Snowden to face trial. Yet, the legal basis for these U.S. efforts is highly contentious. If Snowden had stayed in Hong Kong and fought extradition, in all likelihood he would have prevailed. Thus, the U.S. is left with not credible basis for complaint, and its retaliatory diplomatic measures against other states are without merit. This essay reviews Snowden's defenses under the double criminality principle and the political offense exception according to Hong Kong law, applying the British "incidence" standard, and casts light on a self-defeating U.S. Policy.

On June 14, 2013, a criminal complaint was lodged by the United States against Edward Snowden for theft of government property and espionage (unauthorised communication of national defense information and wilful communication of classified intelligence to an unauthorised person).¹ Snowden had fled to Hong Kong S.A.R. The U.S. government requested Snowden's extradition,² but Hong Kong allowed him to leave for Russia.³ The Hong Kong government justified its actions on several grounds, including technical defects in the legal

¹ Criminal Complaint, United States v. Snowden, No. 1:13 CR 265, (E.D. Va. June 14, 2013), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-074.pdf>; each count carries a maximum of ten years imprisonment upon conviction, 18 U.S.C. §§ 641 (Chapter 31 – Embezzlement and Theft), 793(d), and 798(a)(3) (Chapter 37 – Espionage and Censorship) (2006).

² Lana Lam & Tony Cheung, *US Files Espionage Charges Against Snowden, Calls for His Arrest in Hong Kong*, SOUTH CHINA MORNING POST, June 22, 2013, <http://www.scmp.com/news/world/article/1266483/us-charges-snowden-espionage-stealing-government-property?page=all>.

³ *Edward Snowden Leaves Hong Kong on Moscow Flight*, BBC NEWS CHINA, June 23, 2013, <http://www.bbc.co.uk/news/world-asia-china-23019414>.

requirements under the applicable extradition treaty and the Fugitive Offenders Ordinance.⁴ There was confusion concerning Snowden's middle name,⁵ the request failed to provide Snowden's passport number, and Hong Kong apparently only received the request for the provisional arrest, not for his surrender.⁶ Additionally, Hong Kong alleged that the U.S. had not replied to Hong Kong's inquiry as to whether the offenses in the request were listed in the applicable treaty and the evidence it intended to rely on to charge Snowden.⁷

The Snowden case has had significant international impact. Though President Obama claimed that he was not going to give Snowden undue attention,⁸ it has resulted in substantial national debate in the U.S.⁹ and changes to the U.S. National Security Administration's data collection process.¹⁰ It has also had significant impact on U.S. relations with Russia, which eventually granted Snowden asylum for one year.¹¹ In response to what has been described as "an insult" to the U.S.,¹² a high-level summit scheduled with Russian Premier Putin was cancelled¹³ and relations between the two States have chilled. Indeed, condemnation of Russia's decision to refuse extradition even

⁴ Patsy Moy, *US Failure to Clarify Snowden Papers Tied HK's Hands, Says Justice Chief*, SOUTH CHINA MORNING POST, June 26, 2013, <http://www.scmp.com/news/hong-kong/article/1268958/us-failure-clarify-snowden-papers-tied-hks-hands-says-justice-chief?page=all>.

⁵ The name obtained by the Hong Kong Immigration is "Joseph" while the documents furnished by the US referred to "James" and the relevant court document had "J" written on it.

⁶ Moy, *supra* note 4.

⁷ *See id.*

⁸ Shaun Waterman & Dave Boyer, *Obama Hasn't Spoken with Chinese or Russian Leaders about Snowden*, THE WASH. TIMES, June 27, 2013, <http://p.washingtontimes.com/news/2013/jun/27/obama-hasnt-spoken-with-chinese-or-russian-leaders/>.

⁹ Editorial Board, *The Real Debate on Surveillance*, THE N.Y. TIMES, June 10, 2013, http://www.nytimes.com/2013/06/11/opinion/a-real-debate-on-surveillance.html?_r=0.

¹⁰ *Barack Obama Pledges Changes to Restore Trust in NSA Surveillance Programs*, ABC RADIO AUSTR., Aug. 10, 2013, <http://www.radioaustralia.net.au/international/2013-08-10/barack-obama-pledges-changes-to-restore-trust-in-nsa-surveillance-programs/1173928>.

¹¹ *Edward Snowden Leaves Airport, Granted Temporary Asylum in Russia: Lawyer*, ABC NEWS, Aug. 1, 2013, <http://www.abc.net.au/news/2013-08-01/edward-snowden-granted-asylum-for-one-year-in-russia3a-lawyer/4860072>.

¹² *NSA Spy Leaks: Edward Snowden Leaves Moscow Airport*, BBC NEWS EUROPE, Aug. 1, 2013, <http://www.bbc.co.uk/news/world-europe-23535524>.

¹³ *Obama Cancels Moscow Summit with Putin in Rare Snub*, CBC NEWS POL., Aug. 7, 2013, <http://www.cbc.ca/news/politics/story/2013/08/07/world-obama-cancel-russia-meeting.html>.

seems to enjoy bi-partisan support in an otherwise polarized American political landscape.¹⁴ Thus far, Hong Kong (and the People's Republic of China) has managed to avoid the ire of the U.S., but what would have happened if Snowden had remained and fought extradition in a local court? Is the U.S. really entitled to have Snowden extradited to face the charges, and, if not, is their international posturing without merit? Indeed, if Hong Kong had no duty to extradite, what complaint can the U.S. now make of the action taken by Russia?

This essay will consider the legal implications of Snowden's presence in Hong Kong and explore his defenses against U.S. extradition efforts. It will consider the legal authority of Hong Kong to act under the Basic Law and review its extradition treaty with the U.S. in context with customary practice. It will then consider Hong Kong's duty to extradite and the validity of Snowden's defenses under the double criminality principle and the political offense exception according to Hong Kong law.

POLITICAL RAMIFICATION

Extradition can be broadly defined as "the delivery by one government to another of persons accused or convicted of crimes committed (and justiciable) in one state or territory who have fled to another."¹⁵ Before 1997, Hong Kong derived its extradition powers from the United Kingdom.¹⁶ "Prior to 25 April 1997, when the Fugitive Offenders Ordinance (FOO)¹⁷ came into force, the statutory basis for extradition between Hong Kong and the United States was a United Kingdom Order in Council."¹⁸ "The change in the exercise of sover-

¹⁴ *Condoleezza Rice: Russian Asylum for Snowden Is a "Slap in the Face" to U.S.*, CBS NEWS, Aug. 9, 2013, [http://www.cbsnews.com/8301-505263_162-57597737/condoleezza-ricerussian-asylum-for-snowden-is-a-slap-in-the-face-to-u.s./](http://www.cbsnews.com/8301-505263_162-57597737/condoleezza-ricerussian-asylum-for-snowden-is-a-slap-in-the-face-to-u.s/).

¹⁵ See *Cherk Ching v. Superintendent of Lai Chi Kok Reception Centre*, [2005] 4 H.K.L.R.D. 105, 109G (C.F.I.).

¹⁶ The legal regime governing extradition between Hong Kong and non-Commonwealth countries was created under the 1870 Extradition Act. The 1989 Extradition Act, which entered into force on September 27, 1989, has repealed the 1870 Act.

¹⁷ Fugitive Offenders Ordinance, (1997) Cap. 503 (H.K.).

¹⁸ *Chong Bing Keung, Peter v. The Government of the United States of America*, [2000] 2 H.K.L.R.D. 571 (C.A.). The position is summarized in the judgment of Hartmann J in *Chen Chong Gui v. Senior Superintendent of Lai Chi Kok Reception Centre*, [1997] H.K.L.R.D. 1305, 1311C (C.F.I.). The judgment stated, "[o]n 8 June 1972 a treaty was concluded between the Government of the United Kingdom and the Government of the United States of America for the reciprocal extradition of offenders. On 21 October 1976 the treaty was ratified and by Order in Council of that same year was brought into operation [United States of America (Extradition) Order 1976]. Article 11(a) of the treaty stated that it should apply

eighty on 1 July 1997 meant that international arrangements previously extended in their operation to Hong Kong would . . . lapse by that date and, further, that UK legislation could not . . . any longer have effect within Hong Kong.¹⁹ Since then, Hong Kong has been acting under authority to negotiate and conclude agreements with third countries in relation to the rendition of fugitive offenders under the Basic Law.²⁰ In addition, the FOO provides a unified extradition regime with all foreign countries reserving Hong Kong's power and authority for the implementation of any agreements concluded.²¹ On the other hand, China was given a special role in the process as well. The Chief Executive (CE) must give notice to the Central People's Government (CPG) in relation to surrender requests.²² The CPG can direct the CE to take action if the matter significantly affects China's defense and/or foreign affairs interests.²³ The rationale is that the CPG is the sovereign power responsible for all matters affecting foreign affairs and defense.²⁴ However, Hong Kong has traditionally exercised its authority without interference from the Central Government.²⁵ The Central Government only intervenes in extradition matters sparingly. There is no credible evidence suggesting that the CPG has ever di-

not only to the United Kingdom and the United States but to those of the United Kingdom's overseas territories in respect of whose international relations it still bore responsibility. Such a territory was Hong Kong and the Order in Council itself (No 2144 of 1976) extended the treaty to this jurisdiction."

¹⁹ *Tiongco v. The Government of the Republic of the Philippines and Another*, [1998] 2 H.K.L.R.D. 282 (C.F.I.).

²⁰ Xianggang Ji Ben Fa (The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China) Arts. 13, 96, 151 & 153; on April 4, 1990, the National People's Congress of the P.R.C. adopted the Basic Law of the H.K.S.A.R. as the Region's constitution. The Basic Law created the Hong Kong Special Administrative Region (the "H.K.S.A.R."), governed by the principle of "one country, two systems"; see the Preamble of Xianggang Jiben Fa (recognizing Hong Kong is an "inalienable part" of the P.R.C., but that its capitalist system is to be "unchanged for 50 years [from July 1, 1997]."); Xianggang Jiben Fa arts. 1, 5 (H.K.).

²¹ See Fugitive Offenders Ordinance, (1997) Cap. 503 (H.K.).

²² See *id.* § 24(1).

²³ See *id.* § 24(3).

²⁴ Xianggang Jiben Fa arts. 13, 14 (H.K.); Fugitive Offenders (Notification Procedures) Regulation, (1997) Cap. 503L (H.K.).

²⁵ Article 59 of the Basic Law establishes an executive authority and enumerates its powers and functions, among them, "to conduct relevant external affairs on its own" subject to the ultimate authority of the central government of the P.R.C. See Xianggang Jiben Fa arts. 13, 62(3) (H.K.). The Basic Law authorizes the H.K.S.A.R. government to "make appropriate arrangements with foreign states for reciprocal judicial assistance" subject to the approval of the central government of the P.R.C.. See Xianggang Jiben Fa art. 96 (H.K.).

rectly overridden the Hong Kong Courts on extradition issues in the past. Moreover, there is little reason to expect that Beijing would choose now to circumvent Hong Kong's extradition powers under the Basic Law.²⁶ This is primarily because it might cause the Hong Kong court to lose face and because the U.S. has a history of refusing to extradite individuals into China.²⁷ Politically, it would be prudent for Beijing to avoid this issue, especially since Beijing can sidestep it by citing Hong Kong autonomy. Thus, it appears that an extradition decision in the Snowden case would be based on the law of Hong Kong alone, and a further review of political motivations is of little value.

UNITED STATES – HONG KONG AGREEMENT

Since there is no extradition treaty between the United States and China,²⁸ to avoid a gap in law enforcement, the United States required a treaty to continue an extradition relationship with Hong Kong after the Handover in 1997. The two governments created the *Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders* (the "1996 Treaty").²⁹ The Chief Executive Fugitive Offenders Order incorporated this treaty into the domestic law (United States of America) in 1998.³⁰ Similar to other extradition treaties, there are four essential safeguards in the Agreement: (i) the double criminality principle,³¹ which stipulates that "in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties . . . it is enough if the particular variety was criminal in both jurisdictions;"³² (ii) the specialty rule,³³ which re-

²⁶ See Xianggang Jiben Fa arts. 13, 59, 62(3), & 96 (H.K.).

²⁷ See, e.g., HUMAN RIGHTS WATCH, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, at 11 (Mar. 25, 2003), http://www.hrw.org/sites/default/files/reports/counter-terrorism-bck_0.pdf (stating that the United States is holding as many as thirty Uighur nationals at Guantánamo Bay, Cuba and has refused all Chinese requests for extradition); *Sect Leader's Arrest Warrant Rejected*, BBC NEWS, July 30, 1999, <http://news.bbc.co.uk/1/hi/world/asia-pacific/407599.stm> (describing U.S. dismissal of China's request for the arrest and extradition of Li Hongzhi, the leader of the Falun Gong religious movement).

²⁸ Agreement between the Government of the United States of America and the Government of Hong Kong For the Surrender of Fugitive Offenders, U.S.-H.K., art. III, Dec. 20, 1996, S. TREATY DOC. NO. 105-3 (1997) [hereinafter U.S.-H.K. Agreement] (noting the absence of an extradition treaty between the United States and the People's Republic of China).

²⁹ Signed at Hong Kong on Dec. 20, 1996.

³⁰ Chong Bing Keung v. Gov't of the U.S., [2000] 2 H.K.L.R.D. 571 (C.A.).

³¹ U.S.-H.K. Agreement, *supra* note 28, art. 2.

³² Wright v. Henkel, 190 U.S. 40, 58, 60-61 (1903).

³³ U.S.-H.K. Agreement, *supra* note 28, art. 16.

quires that a requesting state try a surrendered fugitive only for the offense in respect of which it has ordered his return;³⁴ (iii) the prima facie case requirement,³⁵ which provides that “[a] fugitive offender shall be surrendered only if the evidence is found sufficient according to the law of the requested Party;”³⁶ and (iv) the political offense exception,³⁷ which states that “[a] fugitive offender shall not be surrendered if the offense of which that person is accused or was convicted is an offense of a political character.”³⁸ These provisions are mirrored in the United Nations Model Treaty on Extradition (“UN Model Treaty”).³⁹

WOULD HONG KONG BE LEGALLY OBLIGED TO EXTRADITE?

If Snowden had remained in Hong Kong, he would have been surrendered into local custody and subject to long and complicated legal extradition proceedings. Extradition is a competence that fits squarely within the sovereign rights of states⁴⁰ and, in determining whether Hong Kong would be legally obliged to extradite Snowden, the contentious issues would focus on the double criminality principle and the political offense exception.

DOUBLE CRIMINALITY PRINCIPLE

The double criminality principle is defined in article 2 of the 1996 Treaty as:

“any other offense which is *punishable under the laws of both Parties* by imprisonment or other form of detention for more than one year, or by a more severe penalty, un-

³⁴ See *id.*, art. 16(1)(a)

³⁵ *Id.*, art. 13.

³⁶ *Id.*

³⁷ *Id.*, art. 6.

³⁸ U.S.-H.K. Agreement, *supra* note 28, art. 6(1).

³⁹ United Nations Model Treaty on Extradition, G.A. Res. 45/116, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49 (Dec. 14, 1990). The double criminality principle is provided in Article 2 § 1; the specialty rule is provided in Article 14 § 1; the prima facie case requirement is provided in Article 5 § 2 and the political offense exception to extradition is provided in Article 3(a).

⁴⁰ See *Murphy v. United States*, 199 F.3d 599, 601-02 (2d Cir. 1999) (quoting *Wacker v. Bisson*, 348 F.2d 602, 605 (5th Cir. 1965) (“the question of the wisdom of extradition remains for the executive branch to decide.”)); *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996) (explaining that the Secretary of State is under no legal duty to extradite a certified fugitive); *United States v. Lui Kin-Hong*, 110 F.3d 103, 109-10 (1st Cir. 1997) (discussing the scope of the Secretary of State’s prerogative).

less surrender for such offense is prohibited by the laws of the requested Party.”⁴¹ (emphasis added)

The article further stipulates that, in determining whether an act is an offense under the law of the requested Party, the conduct of the person shall be examined by reference to the totality of the underlying criminal conduct, without reference to the elements of the offense prescribed by the law of the requested Party.⁴² Also, the article specifies that “[a]n offense shall fall within the description . . . whether or not the laws of the Parties place the offense within the same category of offenses or describe the offense by the same terminology.”⁴³ Thus, this militates “against the possibility of an excessively formalistic application of the treaty based upon the semantic description of an offense (which will obviously differ depending on the legal systems and languages concerned) rather than its practical nature.”⁴⁴

Of the two charges Snowden faced, the offense of theft of government property⁴⁵ would not cause great difficulty because article 2(1)(x) of the 1996 Treaty provides that surrender of fugitive offenders shall be granted for obtaining property by theft or similar offenses.⁴⁶ In addition, the Hong Kong counterpart of theft as provided in section 2(1) of the Theft Ordinance (Cap 210) states that a person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.⁴⁷ The U.S. would easily make out a *prima facie* case for the double criminal nature of the theft charge.

On the other hand, the espionage charges would spark greater controversy, as Hong Kong effectively has no foreign policy competence (reserved for the CG), yet maintains a semi-autonomous state as a Special Administrative Region. Moreover, although national security provisions are referenced in the Basic Law (under article 23)⁴⁸ no im-

⁴¹ U.S.-H.K. Agreement, *supra* note 28, art. 2 § 1(xxxvi).

⁴² *Id.*, art. 2 §3. Also, it is noted that Hong Kong courts have followed the England jurisprudence in replacing a stringent “double criminality test” in favor of a more relaxed “conduct test”; see Lawrence Louis Levy (alias John William Dearman) v. Attorney General, [1987] H.K.L.R. 777, 779 (C.A.). In that case the applicable test is whether the conduct of the accused would have constituted a crime falling within one or more of the descriptions included in the list of extraditable offenses.

⁴³ U.S.-H.K. Agreement, *supra* note 28, art. 2 § 4(a).

⁴⁴ U.N. Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, ¶ 20 (2002).

⁴⁵ 18 U.S.C. § 641 (2011).

⁴⁶ U.S.-H.K. Agreement, *supra* note 28, art. 2 § 1(x).

⁴⁷ Theft Ordinance, (1997) Cap. 210 § 1 (H.K.).

⁴⁸ Article 23 of the Hong Kong Basic Law provides that “[t]he Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason,

plementing legislation has been passed.⁴⁹ Arguably, there is no Hong Kong equivalent charge to the U.S. Espionage Act. However, the U.S. could propose that Hong Kong's colonial era Official Secrets Ordinance (OSO) is the equivalent of the U.S. Espionage Act, whether authorized under the Basic Law or not.⁵⁰ The offense of damaging disclosure of defense information is dealt with in section 15 of the OSO⁵¹ and the disclosure of security and intelligence information is prohibited under section 13 of the OSO.⁵² Nevertheless, Snowden could maintain that the OSO, being holdover legislation from British rule and largely pro-

secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

⁴⁹ DANNY GITTINGS, *INTRODUCTION TO THE BASIC LAW 106* (Hong Kong Univ. Press 2013) provides the following account: "[a]n extreme example of this came during more than 180 hours of scrutiny by the Legislative Council of the National Security (Legislative Provisions) Bill in early 2003. This controversial bill primarily sought to implement the requirement in Article 23 of the Hong Kong Basic Law for Hong Kong to enact comprehensive laws protecting national security. But it aroused so much opposition during the legislative process that the government was forced to table three revised versions of the bill and 51 amendments, some making major changes to its original proposals. However, all these changes failed to appease the bill's critics. Instead, the highly publicized process of legislative scrutiny arguably only intensified public opposition. As a result, after a massive street protest by more than half a million people on 1 July 2003, legislators who had previously promised to support the bill change their minds. Lacking enough support in the Legislative Council to secure its enactment, the executive was left with no choice but to withdraw the bill just days before it was due to be put to a vote."

⁵⁰ By articles 8 and 18 of the Hong Kong Basic Law, it preserved in force in the H.K.S.A.R., inter alia the laws previously in force in Hong Kong, including ordinances and subsidiary legislation, subject to amendment by the H.K.S.A.R. legislature.

⁵¹ Defence Information, (1998) Cap. 521, § 1 (H.K.). This Ordinance provides that "[a] person who is or has been a public servant or government contractor commits an offense if without lawful authority he makes a damaging disclosure of any information, document or other article relating to defence that is or has been in his possession by virtue of his position as such."

⁵² Security and Intelligence Information-Members of Services and Persons Notified, Cap. 521, § 13 (H.K.) This section provides that (1) A person who is or has been (a) a member of the security and intelligence services; or (b) a person notified that he is subject to the provisions of this subsection, commits an offense if without lawful authority he discloses any information, document or other article relating to security or intelligence that is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.

tecting British interests, is no longer applicable,⁵³ or that the logical equivalent portion of the law would be section 16 of the OSO. Section 16 of the OSO is clearly obsolete as it protects against “disclosures [which] endanger the interests of the United Kingdom”⁵⁴ and defense competence is now within the ambit of the CG, not the Hong Kong government (or the UK). Failure to pass implementing legislation to article 23 of the Basic Law is thus key in the determination of this case.⁵⁵ Snowden can maintain that this lacuna in Hong Kong law would be fatal to the U.S. claim. Alternatively, he could assert that, as a whistle-blower, he was not disclosing damaging information—an essential element of the offense under the OSO—but safeguarding public interests by reporting on illegal U.S. government conduct.⁵⁶ However, he would be unlikely to prevail because the OSO legislation is generally considered valid law post-Handover,⁵⁷ and the U.S. could make out a *prima facie* case that the information provided was damaging, as it maintains Snowden was not a whistle-blower, did not reveal any

⁵³ See Johannes Chan, *National Security and the Unauthorized and Damaging Disclosure of Protected Information*, in NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY (Hualing Fu, Carole Petersen & Simon Young eds., Hong Kong Univ. Press 2005) (“[t]he . . . Official Secrets Act 1911 and its subsequent amendments were extended to Hong Kong by Order in Council and formed part of Hong Kong law until 1992, when the Official Secrets Act 1989 was extended to Hong Kong by the Official Secrets Act (Hong Kong) Order 1992. The English provisions were repealed by section 27 of the Official Secrets Ordinance, which was enacted in 1997 and modelled on the Official Secrets Act 1989.”)

⁵⁴ Official Secrets Ordinance, (1997) Cap. 521, 8-9, § 16(2)(a) (H.K.).

⁵⁵ See National Security (Legislative Provisions) Bill, C149 § 10 (H.K.) (failed bill which sought to Amend the Crimes Ordinance, Official Secrets Ordinance and the Societies Ordinance pursuant to Article 23 of the Basic Law, making it an offense for a public servant or government contractor to make, without lawful authority, a damaging disclosure of any information, document or other article that relates to the affairs concerning the H.K.S.A.R. that are the responsibility of the Central Authorities; and that have come into their possession by virtue of his position), available at <http://www.basiclaw23.gov.hk/english/download/s3200307077>.

⁵⁶ See Barton Gellman, *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, WASH. POST, Aug. 15, 2013, http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.htm (identifying 2,776 NSA violations between April 2011 and March 2012); Charlie Savage, *N.S.A. Often Broke Rules on Privacy, Audit Shows*, N.Y. TIMES, Aug. 16, 2013, <http://www.nytimes.com/2013/08/16/us/nsa-often-broke-rules-on-privacy-audit-shows.html>; Ken Dilanian, *National Security Agency Broke Privacy Rules, Documents Show*, L.A. TIMES (Aug. 16, 2013), <http://www.latimes.com/nation/la-na-nsa-privacy-2013-0817,0,4332110.story>.

⁵⁷ See Johannes Chan, *supra* note 53, at 254.

wrongdoing by NSA, and that information, particularly dealing with European allies,⁵⁸ was damaging to U.S. foreign interests.

Even if Snowden could establish that the OSO was invalid after the 1997 Handover, he would still face the theft charge and could be extradited under the double criminality principle. If this scenario played out, he could only be subsequently prosecuted on the theft charge, as inclusion of the espionage offenses would be prohibited under the specialty principle.⁵⁹ Thus, Snowden would probably face extradition to the U.S. on at least the theft charge, unless he could establish that the theft he committed was of a political nature.

POLITICAL OFFENSE EXCEPTION

The political offense exception has a history dating back to the 19th century⁶⁰ and has been justified on several grounds. First, it is premised on the belief that individuals have a “right to resort to political activism to foster political change.”⁶¹ Secondly, the exception manifests the requirement of fairness that individuals (e.g., unsuccessful rebels) should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions.⁶² Thirdly, the exception shows respect for the right of self-determination, and foreign governments should not intervene in the internal political struggles of other nations.⁶³ This exception is commonly included in extradition treaties and is provided in the UN

⁵⁸ Chris Bucktin, *Edward Snowden: European Union Furious at Claims America Bugged its Offices and Computers*, MIRROR NEWS (Jul. 1, 2013), <http://www.mirror.co.uk/news/world-news/edward-snowden-european-union-furious-2014009> (noting that European Union President, Martin Schulz, stated that if America had indeed bugged their offices it would have a “severe impact” on relations between the EU and the US.).

⁵⁹ See U.S.-H.K. Agreement, *supra* note 28, at art. XVI § 2 (agreeing to the specialty rule where the US would be obliged to forego prosecution on the espionage count if Snowden was only extradited on the theft charge).

⁶⁰ Lloyd W. Grooms & Jane M. Samson, *The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005, 1009 (1984).

⁶¹ See Cindy V. Schlaefler, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U. J. INT’L L. & POL. 617, 622 (1981); *In re Doherty*, 599 F. Supp. 270, 275 (S.D.N.Y. 1984).

⁶² CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 425 (1974); CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION 100 (1980); *Garcia-Guillern v. U.S.*, 450 F.2d 1189, 1225, 1238 (5th Cir. 1971).

⁶³ VAN DEN WIJNGAERT, *supra* note 62, at 158, 204; Schlaefler, *supra* note 61, at 622.

Model Treaty at article 3(a).⁶⁴ It is also contained in article 6(1) of the 1996 Treaty which states: "A fugitive offender shall not be surrendered if the offense of which that person is accused or was convicted is an offense of a political character."

According to international practice there are two distinct categories of political offenses: "pure political offenses" and "relative political offenses."⁶⁵ "Pure political offenses" are acts aimed directly at the government and are distinguishable from ordinary crimes. These offenses include treason, sedition, and espionage and do not violate the private rights of individuals.⁶⁶ In *Quinn v. Robinson*, the Court explained, because these offenses are often specifically excluded from the list of extraditable crimes (in extradition treaties), courts seldom deal with these offenses and it is generally agreed that they are not extraditable.⁶⁷

Pure Political Offense

The two espionage charges filed against Snowden would fall within this category. Any uncertainty concerning the applicability of the political offense exception to the espionage charges, such as it is, lies in recent changes of practice. As noted, "pure political offenses" such as espionage are rarely extraditable because, *inter alia*, the practical reason that they are not named in the treaties made under the so-called "list" system.⁶⁸ However, "pure political offenses" have arguably been brought within the ambit of UK extradition law with their adoption of the "no list" system whereby extradition is determined by the gravity of the offense, not inclusion on the list.⁶⁹ Yet, the UK's departure from the "list" system which occurred after the Handover of 1997,⁷⁰ is not binding on Hong Kong. Additionally, Hong Kong has not

⁶⁴ United Nations Model Treaty on Extradition, *supra* note 39.

⁶⁵ See *Quinn v. Robinson*, 783 F.2d 776, 793 (9th Cir. 1986) (citing *Karadzole v. Artukovic*, 247 F.2d 198, 203 (9th Cir. 1957)); Manuel Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230 (1962); Grooms & Samson, *supra* note 60, at 1009.

⁶⁶ *Quinn*, 783 F.2d at 793.

⁶⁷ *Id.* at 793-94.

⁶⁸ Extradition law was treated as inapplicable in the case of a convicted spy in *R v. Governor of Brixton Prison, ex parte Soblen*, [1963] 2 Q.B. 243; Also acts of international espionage were not considered to be political offenses in *R v. Governor of Pentonville Prison, ex parte Rebott*, [1978] L.S. Gaz. R. 43 (C.A.).

⁶⁹ IVOR STANBROOK & CLIVE STANBROOK QC, *EXTRADITION: LAW AND PRACTICE* 4.10 (2d ed. 2000).

⁷⁰ The double criminality standard in the 2003 Extradition Treaty (Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., Mar. 31, 2003, S. TREATY DOC. NO. 108-23 (2003)) differs from the 1972 Extradition Treaty (Extradition Treaty be-

abandoned the list system and Hong Kong continues to maintain lists of offenses in its treaties. Moreover, there is no provision for “pure political offenses” in its list of extraditable charges in the 1996 Treaty.⁷¹ It strains credulity to conclude that the local court would constructively imply the inclusion of espionage to the 1996 Treaty, as all other political offenses are specifically excluded. Moreover, constructive inclusion of espionage would render the political offense exception (article 6 (1)) of the 1996 Treaty meaningless.⁷² Espionage has long been considered a pure political offense.⁷³

Furthermore, relying on the pure political offense exception, Snowden can advance a claim that the political nature of his offense would preclude a fair trial. The alleged effects of his conduct “are likely to give rise to a heat of public passion making an orderly and just trial at best a remote possibility.”⁷⁴ This is further exacerbated by “the observation . . . that these offenses are regarded as such only by the society against which they are directed.”⁷⁵ The espionage charges in question “lack the essential elements of ordinary crime, as, for instance, malice in the technical criminal law sense of this term”⁷⁶ and, on a pragmatic note, Snowden as a political offender poses less danger to the security of Hong Kong (if provided asylum) than those accused

tween the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., art. X, June 8, 1972, 28 U.S.T. 227), which used an enumerative method that listed specific extraditable offenses in an Annex to the treaty. Under the 2003 Extradition Treaty extraditable offenses are not enumerated in and limited to a specific list, but rather are expanded to any crime that is recognized in both nations as punishable by a predetermined penalty.

⁷¹ U.S.-H.K. Agreement, *supra* note 28, at art. 2.

⁷² An account is provided in CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW VOLUME II- MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 356 (3d ed. 2008) (“[U]nder the enumerative approach, the extradition treaty and the relevant extradition legislation list all offenses for which surrender must be granted, subject to limitations and exceptions. If the offense is not listed, there will be no extraditable offense and the fugitive will not be surrendered.”).

⁷³ *Quinn v. Robinson*, 783 F.2d 776, 793 (9th Cir. 1986); Garcia-Mora, *supra* note 65, at 1234; Steven Lubet & Morris Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 200 (1980).

⁷⁴ Manuel Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses under the Law of Extradition*, 26 U. PITT. L. REV. 65, 85 (1964).

⁷⁵ *See id.*

⁷⁶ *See id.*; see Reuben Clark, Frederic Coudert & Julian Mack, *The Nature and Definition of Political Offense in International Extradition*, 3 AM. SOC'Y OF INT'L L. PROC. 95, 97 (1909).

of ordinary crimes.⁷⁷ Thus, Snowden would not be subject to extradition to the U.S. for the espionage charges pursuant to article 6(1) under a "pure political offense" exception.

Relative Political Offense

The remaining charge, theft of government property, may be a relative political offense and exclude extradition despite the double criminality principle discussed above. Relative political offenses include "otherwise common crimes committed in connection with a political act" or "common crimes . . . committed for political motives or in a political context."⁷⁸ In Hong Kong, no statutory definition is provided in either the FOO or the 1996 Treaty, and few states have attempted to define it in their extradition law.⁷⁹ The U.K. has no statutory or generally accepted judicial definition.⁸⁰ Nevertheless, broadly defined, a relative political offense is one that requires a nexus between the offense and the political motivation behind its perpetration.⁸¹ Additionally, "in UK law, the offender's political motivation alone is not decisive. The crime must have [been] directed against a particular government and not against government in general."⁸² Specifically, "the crime must have been directed against the government of the request-

⁷⁷ Garcia-Mora, *supra* note 65, at 85; see Cass., sez. un., 5 mar. 1949, n. 3, 101 Giur. it. 1975, 281 (It.).

⁷⁸ Quinn v. Robinson, 783 F.2d 776, 794 (9th Cir. 1986).

⁷⁹ Roda Mushkat, *Jurisdictional Issues in a "Highly Autonomous Region"—The Case of Hong Kong*, 42(1) INT'L & COMP. L.Q. 11, 33 (1993).

⁸⁰ STANBROOK & STANBROOK, *supra* note 69, at 4.09; see Schtraks v. Government of Israel, [1964] A.C. 556 (H.L.) 589 (U.K.); Cherif Bassiouni, *The Political Offense Exception in Law and Practice*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 408 (Cherif Bassiouni ed., 1975).

⁸¹ The judicial approaches could be categorised into three distinct groups: (i) the French "objective" test; (ii) the Swiss "proportionality" or "predominance" test; and (iii) the Anglo-American "incidence" test. The early French test considered an offense non-extraditable only if it directly injured the rights of the state and the motives of the accused had been considered irrelevant. The test essentially protects only pure political offenses and is not useful in defining whether an otherwise common crime should not be extraditable because it is connected with a political motive. On the contrary, the Swiss test examines the political motivation of the offender, the circumstances surrounding the commission of the crime and applies either the proportionality between the means and the political ends standard or a predominance of the political elements over the common crime elements. See Garcia-Mora, *supra* note 65, at 1249-54; The Anglo-American "incidence" test will be addressed in subsequent passages.

⁸² STANBROOK & STANBROOK, *supra* note 69, at 4.10(5); Re Meunier, [1894] 2 Q.B. 415 (The offense was said to have been committed for anarchistic reasons.).

ing State as the dominant motive.”⁸³ Lord Diplock held that the idea of a political offense should be “confined to the object of overthrowing or changing the government of a State or inducing it to change its policy, or escaping from its territory the better to do so; [and the object should be] sufficiently immediate to justify the epithet ‘political.’”⁸⁴

Clearly, Snowden’s objective was to induce the U.S. government to change domestic policy. However, courts are wary of attempts to enlarge the scope of the political offense exception. In the *Budlong* case⁸⁵ for example, the fugitives (charged in the U.S. with burglary) had entered a government building in order to gather information from official files which might be of value to the Church of Scientology in its campaign for more favorable tax treatment.⁸⁶ It was argued that this was a political offense since it was committed with the object of inducing the government to change its policy. Judge Griffiths held that “the offense was not committed within the framework of a struggle for power within the State. The applicants did not order these burglaries to take place in order to challenge the political control or government of the United States but simply to advance the interests of the Church of Scientology.”⁸⁷ It was “ridiculous to regard the applicants as political refugees seeking asylum in this country.”⁸⁸ The *Budlong* case is one with a profit motive parading as political activism.

Distinguishing Snowden, he does not possess a profit motive, he did not engage in the offending behavior for personal gain or the gain of others, but to stop what he regarded as illegal government behavior and invasion of privacy interests in the U.S. Snowden’s motive was “to rid his people of an intolerable oppression or, at any rate, to change a given political situation which he honestly regards as unjust and arbitrary.”⁸⁹ Snowden “committed his acts because of his political beliefs and convictions.”⁹⁰ Hence, the type of intent which is necessary to these crimes may be regarded by the extradition law of Hong Kong as “only incidental to an overriding political motive.”⁹¹ Moreover, the subjects of the charges are “directed against the political and social organization of the State, without in any way affecting the private

⁸³ STANBROOK & STANBROOK, *supra* note 69, at 4.10(5); *Cheng v. Governor of Pentonville Prison*, [1973] A.C. 931 (H.L.); *see also* *R v. Governor of Belmarsh Prison, ex parte Dunlayici*, THE TIMES, 2 August 1996.

⁸⁴ *Cheng v. Governor of Pentonville Prison*, [1973] A.C. 931 (H.L.) 945.

⁸⁵ *R v. Pentonville Prison Governor, ex parte Budlong*, [1980] 1 W.L.R. 1110 (Q.B.).

⁸⁶ STANBROOK & STANBROOK, *supra* note 69, at 4.35.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1124.

⁸⁹ *Garcia-Mora, supra* note 74, at 87.

⁹⁰ *Id.* at 88.

⁹¹ *Id.* at 87.

rights of individuals.”⁹² His actions were directed against the requesting state, namely the U.S. Thus, he would predictably satisfy the political nexus requirement.

In addition to prohibiting extradition for offenses of a political character, article 6(2) of the 1996 Treaty expressly excludes from the reach of the exception an offense for which both parties are obliged pursuant to a multilateral international agreement to extradite the person sought.⁹³ The article likewise excludes murder or other willful crimes against the Head of State of the United States, China, or a member of the Head of State's immediate family. Snowden's charges do not fall within either of these categories.

Under the Anglo-American “incidence” test, Snowden would face the preliminary and essential hurdle of the existence of a political disturbance.⁹⁴ Political disturbance relates to the measure of politically motivated unrest which exists in the requesting state at the time of the operative behaviour. This varies according to jurisdiction and requirements may range from mere fractious dissent⁹⁵ to a shooting war.⁹⁶ Under the traditional Anglo-American test, extradition will only be denied if the acts are “committed during the progress of actual hostilities between contending forces” and are “closely identified” with the uprising “in an unsuccessful effort to suppress it.”⁹⁷ The “incidence” test has two components—the uprising requirement and the nexus requirement. The uprising component “makes the exception applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objec-

⁹² *Id.*; *In re Giovanni Gatti*, Cour d'appel [CA] [regional court of appeal] Grenoble, Jan. 13, 1947, Ann. Dig. 1951, 145, 70 (Fr.).

⁹³ See, e.g., aircraft hijacking pursuant to The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; aircraft sabotage pursuant to the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; crimes against internationally protected persons, including diplomats, under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; and hostage taking, pursuant to the International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205.

⁹⁴ *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986) (the Court of Appeals agreed to the extradition of Quinn for murder because it found there was no uprising in mainland Britain); see also Mary Landergan et al., *Report Recommending the Reform of the Law of International Extradition*, by the Committee on Immigration and Nationality Law, 1986 REC. A.B.A.C.N.Y. 587, 592-93.

⁹⁵ See *R v. Governor of Brixton Prison, Ex parte Koczynski* [1955] 1 Q.B. 540 (Eng.).

⁹⁶ See *In re Castioni*, [1891] 1 Q.B. 149.

⁹⁷ *In re Ezeta*, 62 F. 972, 997, 1002 (N.D.Cal. 1894).

tive.”⁹⁸ The nexus component means the offense must occur in the context of an uprising and be limited by the geographic confines of the uprising, contemporaneous with the uprising and causally or ideologically related to the uprising.⁹⁹ This is a fairly high standard, which Snowden would be unable to meet. There is no ongoing uprising taking place in the U.S., only disparate political rhetoric, so Snowden would fail to meet the first prong of the Anglo-American “incidence” test. Having failed the first prong under the Anglo-American standard, the second prong would be moot.

The U.K. law, however, incorporates a more lenient interpretation of relative political offenses and moderates the requirement of the existence of a political disturbance. Although the English law shared the common origin in *In re Castioni*,¹⁰⁰ the rigid “two-party struggle” requirement of the British incidence test has not survived.¹⁰¹ In the 1950s, British courts considered other factors, where “political offenses . . . [had to] be considered according to the circumstances existing at the time.”¹⁰² Instead of a distinct uprising, the new British “incidence” test requires some “political opposition . . . between the fugitive and the requesting State”¹⁰³ and “incorporates an examination of the motives of the accused and the requesting country in those situations in which the offense is not part of an uprising.”¹⁰⁴ Based on that, “the United States’ interpretation of the exemption is, in some ways, the strictest, for the fugitive has no prospect of success unless a political disturbance is proven.”¹⁰⁵ Under U.K. law, Snowden is likely to prevail, as his motives and opposition to certain government policy have never been contested and there is a direct nexus between the conduct complained of and Snowden’s intent to change government policy. Dispensing with the political disturbance requirement obviates the only barrier for use of the relative political offense exception for the theft charges.

Thus, the Hong Kong judiciary is confronted with two opposing doctrines: a rigid application of the traditional Anglo-American test of “incidental to and forming part of a political disturbance,” and the British “incidence” test of a broader perception of political crimes as

⁹⁸ *Quinn*, 783 F.2d at 807.

⁹⁹ *Id.* at 809.

¹⁰⁰ *In re Castioni*, [1891] 1 Q.B. 149.

¹⁰¹ *Quinn*, 783 F.2d at 796.

¹⁰² *Id.*; *Regina v. Governor of Brixton Prison, Ex parte Kolczynski* [1955] 1 Q.B. 540 at 549 (Eng.).

¹⁰³ *Schtraks v. Government of Israel and Others*, [1964] A.C. 556, 591 (H.L.).

¹⁰⁴ *Quinn*, 783 F.2d at 796.

¹⁰⁵ GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* 228 (1998).

those committed in association with a political object.¹⁰⁶ The question, therefore, turns on which precedent Hong Kong would resort to for guidance. Article 8 of the Hong Kong Basic Law provides that law as it existed in Hong Kong on 1 July 1997, including the common law, shall be maintained. The “common law” in article 8 includes any relevant pre-1997 English precedents. Hence, “while not binding unless they had been expressly adopted by Hong Kong courts already, [precedents] would remain indirectly authoritative, arguably to a degree more than mere persuasiveness, as a statement of English law that had not been superseded by Hong Kong law nor deemed to be in contravention of the Basic Law.”¹⁰⁷ Therefore, as the British “incidence” test was established before 1997, it presumptively prevails over the traditional Anglo-American test and is the applicable standard in the Snowden case. Accordingly, the non-existence of a political disturbance in the United States would not bar Snowden’s claim of protection for the theft charge under the relative political offense exception of the 1996 Treaty.

CONCLUSION

Snowden would have a colorable case for avoiding extradition on the double criminality principle for the espionage charges. He also has a strong case for both sets of charges under the political offense exception—the espionage charge as a pure political offense and the theft charges as relative political offenses. Due to his sincere desire to influence political change (by calling for the U.S. government to live up to constitutional obligations to ensure privacy interests), rather than a motivation for profit or an intent to incite violence, if this case does not fall within the political offense exception, what case would?

As the new century advances, political-strategic paradigms continue to shift and presumed U.S. omnipotence wanes. The U.S.’s international initiative relative to the Snowden case is self-defeating, as it fails to occupy high moral ground and lacks legal legitimacy. Despite sabre rattling and efforts at intimidation, extradition is a matter of state sovereignty and will be decided as an issue of domestic law and practice. The law of Hong Kong, inextricably linked with English law for more than 100 years, favors a less rigid approach to the political offense exception than the U.S. The Edward Snowden case presents a classic example of the divergence of these two great common law systems and exposes the flaws in the current geopolitical U.S. strategy concerning this singular case. Indeed, once the legal bases have been

¹⁰⁶ Mushkat, *supra* note 79.

¹⁰⁷ Anne Scully-Hill, *Radmacher in Hong Kong: Choosing between Autonomy and Equal Sharing*, 41 H.K.L.J. 785 (2011); see *A Solicitor (24/07) v Law Society of Hong Kong*, [2008] 2 H.K.L.R.D. 576 (C.F.A.).

exhausted, the only rationale left for extradition is an uneasy resort to extra-judicial political justifications, an untenable posture for a nation priding itself on rule of law.