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Justine Yu

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The United States' Ineffective Response Towards Hong Kong's National Security Law

JUSTINE YU[†]

The city of Hong Kong has undergone a dramatic political shift in recent years. Once known as a safe haven for freedom of speech and expression,¹ HK is now a place where anti-Communist Party views are suppressed under the National Security Law.² The imposition of national security legislation over HK drew wide criticism from Western nations and pro-Democracy activists. This Note will focus specifically on the United States' response and critique its shortcomings in response to the NSL. Because the current U.S. approach fails to achieve its desired outcome of upholding HK autonomy and democracy, this Note will also set forth a recommendation for how the United States should respond moving forward to obtain a more favorable outcome.

[†] J.D. 2022, University of California, Hastings College of the Law; Senior Notes Editor, *Hastings Law Journal*. Thank you to my family for their endless love, support, and constant encouragement as I pursue my passions. I would also like to thank the *HLJ* staff for all their hard work and for providing invaluable feedback on this Note.

1. Jin Wu & Elaine Yu, *What You Can No Longer Say in Hong Kong*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/interactive/2020/09/04/world/asia/hong-kong-speech.html>.

2. *Hong Kong: Beijing Dismantles a Free Society*, HUM. RTS. WATCH (June 25, 2021, 8:00 AM), <https://www.hrw.org/news/2021/06/25/hong-kong-beijing-dismantles-free-society>.

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INTRODUCTION

Under the Sino-British Joint Declaration, the United Kingdom (UK) returned Hong Kong (HK) to the People's Republic of China (PRC) in 1997 on the condition that HK continues to exercise a high degree of autonomy for fifty years.³ Since then, HK has exercised its autonomy by entering into its own international agreements and being recognized in international organizations, such as the World Trade Organization (WTO), as a separate and distinct entity from the PRC.⁴ This view of HK as separate and distinct is known as the concept of “one country, two systems.”⁵ Under this framework that the PRC agreed to in the Sino-British Joint Declaration, HK should theoretically continue to exercise a high degree of autonomy until at least 2047.⁶

Despite HK's promised autonomy, the National People's Congress (NPC) Standing Committee in the PRC abolished one country, two systems by enacting national security legislation over HK on June 30, 2020—one day shy of the city's twenty-third anniversary of the British-Chinese handover.⁷ Since then, many countries have condemned the National Security Law (“the NSL” or “the Law”) and urged the PRC to reconsider its decision to implement such a far-reaching law because it undermines the one country, two systems framework.⁸ The United States, along with other countries, has even changed its foreign policy towards HK in response to the Law's enactment.

After asserting that the NSL suppresses civil liberties and human rights and erodes the PRC's one country, two systems framework for HK, the United States has demonstrated its disapproval in three concrete ways. First, the United States has explicitly condemned the Law by issuing joint statements with its G7 allies and others.⁹ Second, it has implemented sanctions on Chinese officials and HK

3. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, China-U.K., art. 3, Dec. 19, 1984, 1399 U.N.T.S. 62 [hereinafter Sino-British Joint Declaration].

4. Bureau of E. Asian & Pac. Aff., *U.S. Relations With Hong Kong*, U.S. DEP'T OF STATE, <https://www.state.gov/u-s-relations-with-hong-kong> (last updated Aug. 28, 2020); *Hong Kong, China and the WTO*, WORLD TRADE ORG https://www.wto.org/english/thewto_e/countries_e/hong_kong_china_e.htm (last visited Jan. 3, 2022); Horace Yeung & Flora Huang, “One Country Two Systems” as Bedrock of Hong Kong's Continued Success: Fiction or Reality?, 38 B.C. INT'L & COMP. L. REV. 191, 191 (2015).

5. Stanly Johny, *Explained: What is China's One Country Two Systems Policy?*, THE HINDU (Sept. 4, 2019, 1:31 PM), <https://www.thehindu.com/news/international/explained-what-is-chinas-one-country-two-systems-policy/article29279828.ece>.

6. Sino-British Joint Declaration, *supra* note 3.

7. Grace Tsoi & Lam Cho Wai, *Hong Kong Security Law: What is it and is it Worrying?*, BBC NEWS (June 30, 2020), <https://www.bbc.com/news/world-asia-china-52765838>.

8. Media Note, Off. of the Spokesperson, U.S. Dep't of State, G7 Foreign Ministers' Statement on Hong Kong (June 17, 2020), <https://2017-2021.state.gov/g7-foreign-ministers-statement-on-hong-kong/index.html> [hereinafter G7 Foreign Ministers' Statement on H.K.].

9. *Id.*; Media Note, Off. of the Spokesperson, U.S. Dep't of State, Joint Statement on Hong Kong (May 28, 2020), <https://www.state.gov/joint-statement-on-hong-kong> [hereinafter Joint Statement on H.K.]; Media Note, Off. of the Spokesperson, U.S. Dep't of State, Joint Statement on the Erosion of Rights in Hong Kong (Aug. 9, 2020), <https://2017-2021.state.gov/joint-statement-on-the-erosion-of-rights-in-hong-kong/index.html> [hereinafter Joint Statement on the Erosion of Rights in H.K.]; Press Statement, Michael R. Pompeo, U.S. Sec'y

leaders under both the Hong Kong Autonomy Act (HKAA) and Executive Order 13936 (“the Order”).¹⁰ Finally, the United States has eliminated its special treatment towards HK, repudiated its extradition treaty with the city, and ended its military training program under the Order.¹¹

Given how the NSL infringes on what the United States considers to be core human rights, the United States has the responsibility to speak out and take concrete action against the NSL. The United States has ostensibly fulfilled its moral and legal duty by shining a spotlight on HK, both in its words and actions. But instead of upholding one country, two systems, the current U.S. response, though well-intentioned, is likely to make the situation worse for HK residents under the NSL. The current U.S. response further undermines one country, two systems because it inadvertently paves the way for the PRC to have a tighter grasp over HK. However, the United States could still achieve a more positive outcome in attempting to uphold HK’s autonomy and shape the PRC’s implementation of the Law on the margins by working together with its allies to implement a cohesive plan that places international pressure on the PRC to uphold HK autonomy.

Part I of this Note provides an overview of the NSL and discusses Hong Kong’s political scene at the time of the Law’s passage. Part I also addresses the NSL’s controversial aspects and how its passage threatens to erode Hong Kong’s “one country, two systems” framework. Part II explains how the United States critically responded to the NSL’s passage. During Trump’s presidency, Congress enacted the Hong Kong Autonomy Act while Trump issued Executive Order 13936. The Biden administration has since deferred the departure of HK residents currently within the United States. Part III examines the efficacy of the U.S. response in shaping the NSL’s imposition. First, Part III discusses China’s adherence to the principle of non-interference on internal affairs. Second, Part III explains how the U.S. response is unlikely to positively shape the NSL’s implementation based on China’s disdain of foreign interference on internal affairs. Part IV discusses the United States’ duty to act against the NSL despite its initial, unsuccessful attempt to make positive changes. Part V describes how the U.S. response could cause the further deterioration of one country, two systems. Part VI identifies the ways in which the United States should proceed

of State, P.R.C. Proposal To Impose National Security Legislation on Hong Kong (May 22, 2020), <https://2017-2021.state.gov/prc-proposal-to-impose-national-security-legislation-on-hong-kong/index.html> [hereinafter Statement on NSL].

10. Press Statement, Michael R. Pompeo, U.S. Sec’y of State, Designations of National People’s Congress Officials Undermining the Autonomy of Hong Kong (Dec. 7, 2020), <https://2017-2021.state.gov/designations-of-national-peoples-congress-officials-undermining-the-autonomy-of-hong-kong/index.html> [hereinafter Designations of NPC Officials]; Bureau of E. Asian & Pac. Aff., *Identification of Foreign Persons Involved in the Erosion of the Obligations of China Under the Joint Declaration or the Basic Law*, U.S. DEP’T OF STATE (Oct. 14, 2020), <https://www.state.gov/identification-of-foreign-persons-involved-in-the-erosion-of-the-obligations-of-china-under-the-joint-declaration-or-the-basic-law>.

11. Exec. Order No. 13936, 85 Fed. Reg. 43,413, 43,413–14 (July 14, 2020).

to shape the NSL's implementation on the margins. Finally, this Note concludes with a summary.

I. BACKGROUND ON HONG KONG'S NATIONAL SECURITY LAW

Hong Kong experienced political unrest in the year leading up to the NSL's passage. Beginning in June 2019, many HK residents protested a 2019 HK bill that would have allowed HK residents to be extradited to the mainland if they were suspected of certain criminal activity.¹² This proposal caused an uproar among the people of HK because of concerns related to "the possibility of politically motivated persecution and unfair trials on the mainland" if alleged criminals in the city could be extradited to mainland China.¹³ Others have argued that the extradition bill was merely another way for the central government to assert its influence over HK's political scene or compromise the city's high degree of autonomy and the one country, two systems principle.¹⁴

The HK Legislative Council (LegCo) brought some respite to the city after months of protests and unease, but its efforts alone were insufficient to completely halt political unrest in HK. LegCo withdrew the extradition bill to concede to the people of HK.¹⁵ However, the central government was displeased with calls for HK independence and protests in response to the 2019 HK extradition bill.¹⁶ In light of this opposition, the NPC Standing Committee promulgated national security legislation over HK to "maintain the [city's] long-term stability and prosperity"¹⁷ and "change the long-term 'defenseless' status in the field of national security."¹⁸ Although the withdrawal of the 2019 HK extradition bill eased some of the political tension in HK,¹⁹ the NSL's passage sparked another tense moment in HK.

12. *The Hong Kong Protests Explained in 100 and 500 Words*, BBC NEWS (Nov. 28, 2019), <https://www.bbc.com/news/world-asia-china-49317695>.

13. Tony Cheung, *What is Behind Hong Kong's Anti-Extradition Protests?*, S. CHINA MORNING POST (June 13, 2019, 5:00 AM), <https://www.scmp.com/news/hong-kong/politics/article/3014261/what-behind-hong-kongs-anti-extradition-protests>.

14. Grace Shao, *What the Suspension of Hong Kong's Extradition Bill Means for the City and Carrie Lam*, CNBC (June 17, 2019, 11:29 PM), <https://www.cnbc.com/2019/06/17/suspension-of-hong-kongs-china-extradition-bill-and-what-it-means.html>.

15. *See Hong Kong Completes the Process of Withdrawing the Extradition Bill, But Will It Stop the Protests?*, TIME (Oct. 23, 2019, 4:01 AM), <https://time.com/5707831/hong-kong-extradition-bill-withdrawal>.

16. *See* Mingmei, *China Focus: Draft Decision on HK National Security Legislation Submitted to NPC*, XINHUA (May 22, 2020, 11:30 AM), http://www.xinhuanet.com/english/2020-05/22/c_139078396.htm.

17. Liang Caide, Chinese Consulate Gen. in Kota Kinabalu, Ministry of Foreign Aff. of China, *National Security Legislation for Hong Kong is the Cornerstone of Enduring Hong Kong's Stability and Prosperity* (July 27, 2020), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1800976.shtml.

18. Mingmei, *supra* note 16; *see also* SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RESEARCH SERV., R46473, CHINA'S NATIONAL SECURITY LAW FOR HONG KONG: ISSUES FOR CONGRESS 4-6 (2020) (discussing China's rationale for enacting the Hong Kong National Security Law).

19. *See Hong Kong Completes the Process of Withdrawing the Extradition Bill, But Will It Stop the Protests?*, *supra* note 15.

A. OVERVIEW OF HONG KONG'S NATIONAL SECURITY LAW

The NPC's decision to promulgate national security legislation over HK was controversial from the beginning. First, the NPC Standing Committee drafted the NSL in secrecy.²⁰ Second, the text itself was hidden from public view until after its imposition on June 30, 2020.²¹ Not even the leader of HK, Chief Executive Carrie Lam, knew the specific contents of the NSL before its enactment.²² Third, the NSL criminalizes four broad offenses—secession, subversion, terrorism, and collusion with foreign countries²³—and has rather harsh penalties for violators; NSL violations can result in sentences of up to life imprisonment if the offense is of a “grave nature.”²⁴

The NSL is vaguely written and covers a wide array of criminal activity. For example, secession is defined as unlawfully altering HK's legal status,²⁵ while subversion is defined as undermining the PRC.²⁶ The definitions for terrorism and collusion are even more concerning. According to the text, an individual can be found guilty of terrorism if he or she participates in any violent activity that harms people or disrupts public utilities,²⁷ or advocates or incites terrorist activities.²⁸ On the other hand, collusion with foreign countries is defined as participating in any activity that is detrimental to the PRC, such as stealing, spying, or unlawfully obtaining state secrets or intelligence and relaying it to a foreign country or institution.²⁹

The NPC sidestepped the HK legislative process³⁰ when it decided to impose national security legislation over the city without a formal introduction into HK's LegCo or a vote by its members. Nor did the central government offer an alternative method for any HK official to comment or provide meaningful feedback on the Law.³¹ Moreover, the NSL is written in a way that covers a

20. Tsoi & Wai, *supra* note 7.

21. *Id.*

22. *Id.*

23. See *The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, HONG KONG GAZ. (H.K.) (2020), <https://www.gld.gov.hk/egazette/pdf/20202448/egn2020244872.pdf> (promulgated by the Standing Comm. People's Cong., June 30, 2020, effective June 30, 2020).

24. *Id.* at arts. 20, 22, 29.

25. *Id.* at art. 20(2).

26. *Id.* at art. 22(1).

27. *Id.* at art. 24. The Law also criminalizes participating in a terrorist organization and supplying terrorists with weapons, information, or transportation. *Id.* at arts. 25–26.

28. *Id.* at art. 27.

29. *Id.* at art. 29. In addition, the prohibition against collusion covers the following acts: undermining Hong Kong or the PRC's sovereignty, disrupting the implementation of laws, sanctioning Hong Kong or the PRC, or otherwise provoking hatred towards the central government. *Id.*

30. See *Bills*, LEGIS. COUNCIL OF H.K., https://www.legco.gov.hk/general/english/bills/bill_1620.htm (last visited Jan. 3, 2022).

31. Statement, H.K. Bar Ass'n, *The Law of the People's Republic of China (“PRC”) on Safeguarding National Security in the Hong Kong Special Administrative Region (“HKSAR”): Statement of the Hong Kong Bar Association*, 1 (¶ 2–3) (July 1, 2020), <https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20Security%20in%20HKSAR.pdf>.

broad range of criminal activity. Unsurprisingly, this law was controversial from the beginning and generated a plethora of criticism.

B. THE NATIONAL SECURITY LAW'S KEY POINTS OF CONTENTION

The PRC has a duty to safeguard national security and implement such laws that will protect its people from harm.³² However, the PRC can do so only if the imposition of national security measures does not violate its international commitments under the Sino-British Joint Declaration.³³ The central government received a great deal of criticism on its imposition of national security legislation over HK as well as on the specific contents of the Law itself. The criticism, though plentiful, can be summarized into four main points. First, the text's overall ambiguities and vague description hampers free speech.³⁴ Second, Article 38 of the NSL claims extraterritorial jurisdiction over HK residents and non-residents.³⁵ Third, the Law does not provide for the right to a fair trial.³⁶ Finally, perhaps the biggest critique is how the Law appears to seriously undermine the concept of one country, two systems—a framework that has allowed HK to flourish for the past twenty-four years.

First, the NSL is vaguely written with harsh penalties and broadly defined offenses. With up to life imprisonment for offenses of a grave nature,³⁷ the Law is a practical way of chilling anti-Communist Party sentiment. Because any act that the Chinese government perceives as overthrowing the “central power of the [PRC] or the body of power of [HK]” can result in a violation of the NSL,³⁸ the Law can theoretically cover all sorts of behaviors and actions. In addition, Article 22's definition of subversion is concerning because it apparently contravenes the right to assemble and participate in demonstrations as provided

32. See *Six Things You Need to Know about the National Security Legislation for Hong Kong SAR*, MINISTRY OF FOREIGN AFF. OF THE PRC (June 10, 2020), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1787600.shtml.

33. See G7 Foreign Ministers' Statement on H.K., *supra* note 8 (condemning China's decision to promulgate national security legislation over Hong Kong); Javier C. Hernández, *Harsh Penalties, Vaguely Defined Crimes: Hong Kong's Security Law Explained*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html>.

34. Wu & Yu, *supra* note 1; Naomi Xu Elegant, *If You're Reading This, Beijing Says its New Hong Kong Security Law Applies to You*, FORTUNE (July 7, 2020, 3:55 AM), <https://fortune.com/2020/07/07/hong-kong-law-scope-extraterritorial-jurisdiction>.

35. Sarah Cook, *Through Hong Kong, Beijing Channels Its Repression to the World*, THE DIPLOMAT (July 13, 2020), <https://thediplomat.com/2020/07/through-hong-kong-beijing-channels-its-repression-to-the-world>.

36. See *Hong Kong's National Security Law: 10 Things You Need to Know*, AMNESTY INT'L (July 17, 2020, 7:09 PM), <https://www.amnesty.org/en/latest/news/2020/07/hong-kong-national-security-law-10-things-you-need-to-know>.

37. See Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, at arts. 20, 22, 24–25, 29, 24.

38. *Id.* at art. 22(2).

by the HK Basic Law and International Covenant on Civil and Political Rights (ICCPR).³⁹

Article 24 of the NSL provides another problematic example of the Law's vague text. The definition for terrorism contains a "catch-all" that criminalizes "other dangerous activities which seriously jeopardi[z]e public health, safety or security."⁴⁰ This definition could potentially turn many once legal political activities into unlawful acts of terrorism.⁴¹ Article 24's catch-all is especially concerning because it is ambiguous and does not specify the parameters for an activity that could, for example, seriously jeopardize security. Although the Law identifies some other violations in more detail, such as vandalizing government property under subversion⁴² or damaging transportation or public utilities under terrorism,⁴³ it still has many listed offenses that can potentially be used to punish all kinds of activities that are viewed as undermining the central government.

Furthermore, the NSL as written gives authorities broad power to enforce the Law arbitrarily and quash anti-Communist Party sentiment. Because the offenses are vaguely defined, critics have argued that the Law will have a chilling effect on speech.⁴⁴ In fact, the first arrest made under the NSL is a good indicator of its scope: a man was arrested for holding a "Hong Kong Independence" flag during a protest.⁴⁵ Other violations have also made headlines, including one in which eight individuals were arrested for holding blank placards during a silent protest.⁴⁶ If a violation covers a seemingly innocent act, such as holding a flag that calls for HK independence⁴⁷ or even a blank placard during a protest,⁴⁸ then people will need to think twice about what they say or how they express their anti-PRC views, or otherwise risk being arrested for violating the Law.

Second, and perhaps the most controversial article in the Law,⁴⁹ is Article 38 of the NSL. This article provides for extraterritorial jurisdiction and

39. XIANGGANG JIBEN FA art. 27 (H.K.); International Covenant on Civil and Political Rights art. 21, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; LAWRENCE & MARTIN, *supra* note 18, at 10–11.

40. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 24(5).

41. LAWRENCE & MARTIN, *supra* note 18, at 11.

42. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 22(4).

43. *Id.* at art. 24(3).

44. Elegant, *supra* note 34; Wu & Yu, *supra* note 1.

45. Hong Kong Police Force (@hkpoliceforce), TWITTER (June 30, 2020, 10:38 PM), <https://twitter.com/hkpoliceforce/status/1278201222457987073>; see Hernández, *supra* note 33.

46. Tom Grundy, *Security Law: Hong Kong Police Arrest 8 at 'Blank Placard' Silent Protest*, H.K. FREE PRESS (July 6, 2020, 9:57 PM), <https://hongkongfp.com/2020/07/06/security-law-hong-kong-police-arrest-8-at-blank-placard-silent-protest>.

47. See Hong Kong Police Force, *supra* note 45.

48. See Grundy, *supra* note 46.

49. Cook, *supra* note 35.

criminalizes any individual who violates the NSL outside of HK's territory.⁵⁰ While the concept of extraterritorial jurisdiction is not completely foreign in the international community, HK's law deviates from the norm and differs from that of other countries. For example, Article 38 claims that the Law applies to HK residents and non-residents alike, whereas the United States⁵¹ and UK⁵² claim some sort of extraterritorial jurisdiction only over its citizens or residents who are considered as fugitives or have committed certain offenses.⁵³ In practice, the PRC has already issued arrest warrants under the purview of Article 38 for pro-democracy activists outside the city.⁵⁴ One of these arrest warrants was for U.S. citizen Samuel Chu, who manages a group that advocates for HK democracy.⁵⁵

Third, the NSL infringes on the right to a fair trial, at least as understood by Westerners. This right is articulated in Article 14 of the ICCPR, which provides that all people are equal and "presumed innocent until proven guilty" before "a competent, independent and impartial tribunal established by law."⁵⁶ Since the British-Chinese handover, HK has been rather successful in upholding this concept under its legal system. The city's success is due, at least in part, to HK's independent judiciary and common law system by "providing a secure environment for individuals and organi[z]ations and a level playing field for business."⁵⁷ Accordingly, HK has demonstrated an ability to provide fair trials under its common law system.⁵⁸

But the NSL arguably undermines HK's legal system because it gives the PRC broad power and authority to choose when and how to enforce its interpretation of the Law. Although the NSL states that the ICCPR⁵⁹ and HK procedural law will be upheld during judicial proceedings,⁶⁰ that likely will not

50. "This Law shall apply to offen[s]es under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region." Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 38.

51. "The United States exercises extraterritorial jurisdiction for the arrest and removal therefrom to the United States of any citizen or national of the United States who is a fugitive." 18 U.S.C. § 3042.

52. The United Kingdom has also claimed extraterritorial jurisdiction on its own "nationals and residents who commit certain violent and sexual offences outside the UK." *Policy Paper: Extraterritorial Jurisdiction Factsheet*, U.K. GOV'T: HOME OFFICE, <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/extraterritorial-jurisdiction-factsheet> (last updated July 28, 2021).

53. See Elegant, *supra* note 34.

54. Eric Baculinao & Adela Suliman, *Hong Kong Issues Arrest Warrant for U.S. Citizen Under New National Security Law*, NBC NEWS (Aug. 1, 2020, 6:19 AM), <https://www.nbcnews.com/news/world/hong-kong-issues-arrest-warrant-u-s-citizen-under-new-n1235574>.

55. *Id.*

56. ICCPR, *supra* note 39, at 176.

57. *The Rule of Law: The Legal System*, GOVHK, https://www.info.gov.hk/info/sar5/elaw_1.htm (last visited Jan. 3, 2022).

58. See GOV'T OF H.K., HONG KONG: THE FACTS LEGAL SYSTEM 1 (2019), https://www.gov.hk/en/about/aboutk/factsheets/docs/legal_system.pdf.

59. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 4.

60. *Id.* at arts. 5, 41; See also XIANGGANG JIBEN FA art. 39 (H.K.) (upholding the ICCPR and ensuring that its provisions do not contravene Hong Kong laws).

be followed in practice. The body responsible for overseeing the Law's implementation in HK "shall be under the supervision of and accountable to the [central government]."⁶¹ Likewise, President Xi Jinping oversees the central government and is not bound by HK procedural law.⁶² In addition, the Office for Safeguarding National Security is established by the central government and works under the PRC's direction.⁶³ The Office is not subject to HK's jurisdiction, and its employees are immune to HK laws.⁶⁴ Therefore, a criminal suspect could be tried under a PRC court applying Chinese law, rather than HK law, and the HK government would not be able to intervene on the matter.⁶⁵

The Chinese legal system is problematic and results in unfair trials in the PRC. While HK exercises a rule of law that "promote[s] basic principles such as the supremacy of law, legal accountability, judicial independence, and fair treatment," the PRC implements a rule of law that is superseded by the will of the Communist Party.⁶⁶ The alternative "requires that State power must be subordinate and accountable to . . . the law," but the PRC does not uphold such a framework.⁶⁷ Rather, the PRC places the will of the Communist Party as the supreme authority of the land and merely uses its rule of law as a tool to uphold Party sentiment.⁶⁸ For these reasons, Chinese judges are subordinate to the central government⁶⁹ and do not have the authority to make independent decisions apart from the will of the Communist Party.

Unfair trials are bound to occur when Chinese judges fail to pursue procedural fairness throughout the trial process. Part of the problem in the PRC arises when the trial proceeding is manipulated to account for outside factors,

61. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 12 (discussing Committee for Safeguarding National Security).

62. Eleanor Albert, Lindsey Maizland, Beina Xu, *The Chinese Communist Party*, COUNCIL ON FOREIGN RELS. (June 23, 2021, 3:00 PM), <https://www.cfr.org/background/chinese-communist-party>.

63. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 50.

64. *Id.* at art. 60.

65. *Id.* at arts. 55–57.

66. Ronald T. P. Alcala, Eugene (John) Gregory & Shane Reeves, *China and the Rule of Law: A Cautionary Tale for the International Community*, JUST SECURITY (June 28, 2018), <https://www.justsecurity.org/58544/china-rule-law-cautionary-tale-international-community>.

67. *Id.*; cf. *Hong Kong Legal System: The Rule of Law*, CMTY. LEGAL INFO. CTR., <https://www.clic.org.hk/en/topics/hkLegalSystem/theRuleOfLaw> (last visited Jan. 3, 2022) (stating that "the rule of law requires that the courts are independent of the Government Executive bodies" and concluding that "independence is crucial if impartial rulings are to be given in judging the legality of the acts carried out by the Government.").

68. Alcala et al., *supra* note 66. Kate Allen, Amnesty International UK Director, has concluded that Chinese "judges are often under political pressure to . . . enforce[e] the rule of the Party, rather than the rule of law." Press Release, Amnesty Int'l UK, China: Thousands Sentenced to Death After Unfair Trials (Mar. 22, 2004), <https://www.amnesty.org.uk/press-releases/china-thousands-sentenced-death-after-unfair-trials>.

69. Rongjie Lan, *A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law*, 27 UCLA PAC. BASIN L.J. 153, 157 (2010).

such as when judges have been bribed or must appease personal relationships.⁷⁰ Although Chinese judges may occasionally exercise fairness and impartiality during some criminal proceedings, not all judges use such a method every time, especially when they must also uphold the will of the Communist Party. Likewise, case studies on Chinese criminal proceedings have shown that judges use the trial procedure merely as a means to confirm what they have already decided on beforehand.⁷¹ But fair trials, at least by Western standards, require judges to use the trial for fact-finding purposes before arriving at a decision.⁷² Therefore, unfair trials exist with the PRC's subjective framework because the Chinese judicial system favors decisions that further CCP policy regardless of contrary factual or legal bases.⁷³

This problem is further exacerbated because NSL violations can result in the possibility of closed hearings. Article 41 contains a provision that allows violators of the NSL to be tried in closed hearings when it involves “[s]tate secrets or public order.”⁷⁴ The lack of transparency associated with this provision is concerning because it fails to provide an opportunity for judicial review and bars the public from sitting in on the hearings to ensure HK procedural law is followed. While criminal suspects generally have the right to a fair trial in an HK court, the NSL gives the PRC authority to try national security violators in a PRC court where laws can be applied in an arbitrary manner to uphold Communist Party policy.

C. THE LAW SERIOUSLY UNDERMINES THE CONCEPT OF “ONE COUNTRY, TWO SYSTEMS” FOR HONG KONG

The NSL's contentious points undermine the concept of one country, two systems. The HK government has been implementing, overseeing, and applying its own laws over the people of HK under the one country, two systems

70. *See id.* at 161. Kate Allen has stated that “[t]he Chinese criminal justice system is in no condition to offer fair trials, impartiality, or justice” because “political interference is possible at every stage of criminal justice proceedings.” Amnesty Int’l UK, *supra* note 68.

71. Rongjie Lan, Assistant Professor at Zhejiang University Guanghua Law School, has analyzed the Yang Jia murder case, in which Yang Jia was convicted of killing six people in addition to injuring others. Lan, *supra* note 69, at 161. He concluded that this case was manipulated to “ensure efficiency and convenience and turn the trial into a mere formality.” *Id.* Given the high-profile and complex nature of this case, one would expect the hearing to take some time for the factfinder to decide the case, but the hearing lasted only an hour. *Id.* at 169–70.

72. *Id.* at 172.

73. *Hong Kong’s National Security Law: 10 Things You Need to Know*, *supra* note 36 (“Being charged with a national security crime on the mainland can lead to arbitrary or even secret detention As is often the case, detainees held in this way are at great risk of torture and other ill-treatment.”); Amnesty Int’l UK, *supra* note 68; *see* Lan, *supra* note 69, at 182–83 (concluding that judges “blindly accelerate their trials, going straight through the required legal proceedings without addressing any point not mandated by existing laws,” and finding that trials can be manipulated or distorted when Chinese trials lack fairness and transparency).

74. Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 41; LAWRENCE & MARTIN, *supra* note 18, at 15.

framework since the British-Chinese handover.⁷⁵ However, the HK government did not take part in drafting the NSL, nor did it choose to impose the NSL over HK. Rather, the NPC Standing Committee promulgated the NSL over HK without a formal introduction into LegCo. The Law also enables the PRC to oversee and manage its operations within the city.⁷⁶ Article 12 of the NSL states that the body responsible for overseeing the NSL's application is accountable to the central government,⁷⁷ which appears to contravene Article 2 of the HK Basic Law because the HK government does not have "legislative and independent judicial power" over the NSL.⁷⁸

In addition, the NSL restricts freedom of speech and expression in the city. HK has enjoyed free speech for decades under the HK Basic Law,⁷⁹ and the people of HK were allowed to freely express their political or anti-government views before the NSL's enactment. However, the Law's passage effectively ended that freedom overnight,⁸⁰ particularly when HK people can be arrested for holding a flag that calls for HK independence⁸¹ or a blank placard that indirectly demonstrates their dismay of the central government.⁸² The city even saw a significant decrease in its rank in the World Press Freedom Index, which is an index that analyzes the degree of freedom given to journalists in 180 countries, including HK.⁸³ HK's rank dropped from seventy-three in 2019 to eighty in 2020.⁸⁴ The PRC's imposition of national security legislation without a formal introduction into LegCo is an example of how the NSL strips away HK's high degree of autonomy. The NSL also prohibits the people of HK from exercising free speech—a freedom that they once had before the NSL's imposition.

Not only did the Law stir political unrest within HK, but it also received considerable criticism from the international community. Many countries issued statements against the NSL and urged the PRC to reconsider its decision to impose this law over HK.⁸⁵ The NSL has been found to suppress civil liberties

75. See XIANGGANG JIBEN FA art. 2 (H.K.) (Hong Kong shall "exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power").

76. LAWRENCE & MARTIN, *supra* note 18, at 1; Editorial, *The End of One Country, Two Systems in Hong Kong*, FIN. TIMES (July 1, 2020, 7:02 PM), <https://www.ft.com/content/5d3d7d2e-bba8-11ea-a05d-efc604854c3f>; see *infra* Section II.B (discussing no right to fair trial under NSL).

77. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 12 (discussing Committee for Safeguarding National Security).

78. XIANGGANG JIBEN FA art. 2 (H.K.).

79. XIANGGANG JIBEN FA art. 27 (H.K.).

80. Wu & Yu, *supra* note 1.

81. See Hong Kong Police Force, *supra* note 45.

82. See Grundy, *supra* note 46.

83. The Index is based on a questionnaire answered by experts in the field on "abuses and acts of violence against journalists during the period evaluated." *Detailed Methodology*, REPS. WITHOUT BORDERS, <https://rsf.org/en/detailed-methodology> (last visited Jan. 3, 2022).

84. *Hong Kong*, REPS. WITHOUT BORDERS, <https://rsf.org/en/hong-kong> (last visited Jan. 3, 2022). HK's rank has since remained at 80 since 2020. *Id.*

85. G7 Foreign Ministers' Statement on H.K., *supra* note 8.

and human rights for HK residents, especially when the NSL effectively prohibits the exercise of free speech, the right to assemble, or the right to a fair trial.⁸⁶ It can also apply to non-HK residents because the PRC claims extraterritorial jurisdiction under the NSL.⁸⁷ In the end, the Law nearly dismantles HK's one country, two systems framework.

II. THE UNITED STATES' RESPONSE TO HONG KONG'S NATIONAL SECURITY LAW

The United States has played an active role in condemning the NSL since its inception. The United States initially responded to the Law's passage by urging the PRC to reconsider its decision and honor its obligations under the ICCPR, HK Basic Law, and the Sino-British Joint Declaration.⁸⁸ The United States did so by issuing numerous joint statements with its allies on the NSL in an attempt to influence the HK situation and condemn the Law.⁸⁹ The United States also took concrete legislative and executive action against HK. The HKAA and Executive Order 13936 came about under the Trump administration, while the Biden administration has since followed suit with deferring the departure of certain HK residents.

A. CONSEQUENCES UNDER THE HONG KONG AUTONOMY ACT

The HKAA imposes penalties on those who take part in eroding the concept of one country, two systems, while also extending benefits to those targeted by the NSL. Under the HKAA, the United States is permitted to sanction individuals and businesses that contribute to the deterioration of HK autonomy.⁹⁰ These sanctions have been described as the toughest yet, especially as individuals on the receiving end could face property seizures, asset freezes, and a ban on financial transactions associated with U.S. banks.⁹¹ The United States has since sanctioned thirty-four Chinese and HK officials under the HKAA, including HK Chief Executive Carrie Lam.⁹² Despite the Chief

86. Joint Statement on H.K., *supra* note 9; Joint Statement on the Erosion of Rights in H.K., *supra* note 9.

87. Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 38.

88. Joint Statement on H.K., *supra* note 9; Statement on NSL, *supra* note 9; Press Statement, Michael R. Pompeo, U.S. Sec'y of State, Arrest and Detention of Student Democracy Activists in Hong Kong Under the National Security Law (Oct. 29, 2020), <https://2017-2021.state.gov/arrest-and-detention-of-student-democracy-activists-in-hong-kong-under-the-national-security-law/index.html>.

89. G7 Foreign Ministers' Statement on H.K., *supra* note 8; Joint Statement on H.K., *supra* note 9; Joint Statement on the Erosion of Rights in H.K., *supra* note 9.

90. Hong Kong Autonomy Act, Pub. L. No. 116-149, §§ 4(6), 5(a), 134 Stat. 663, 668-69 (2020).

91. Naina Bhardwaj, *Hong Kong's Leader is Being Paid in Cash Due to US Sanctions. Carrie Lam Earns \$56,000 a Month and Says Money is Piling Up at Her House.*, BUS. INSIDER (Nov. 28, 2020, 9:41 AM), <https://www.businessinsider.com/hk-leader-doesnt-have-bank-account-because-of-us-sanctions-2020-11>.

92. Bureau of E. Asian & Pac. Aff., *supra* note 10; Press Statement, Morgan Ortagus, Dep't Spokesperson, U.S. Dep't of State, Release of the Hong Kong Autonomy Act Report (Oct. 14, 2020), <https://2017-2021.state.gov/release-of-the-hong-kong-autonomy-act-report/index.html> [hereinafter Release of the HKAA].

Executive's nonchalant outlook on the imposition of sanctions against her,⁹³ it does not change the seriousness of her predicament. With the interconnectedness of financial institutions, the Chief Executive is left without access to banking services, which is a substantial obstacle because she must bring her monthly income of \$56,000 HKD⁹⁴ in cash home each month. The HKAA also provides for HK residents to obtain lawful entry into the United States if they are found to be persecuted or fear persecution under the Law.⁹⁵

Recent Chinese acts that have arguably eroded HK's high degree of autonomy have prompted the United States to enact the HKAA. The PRC agreed to uphold HK's high degree of autonomy under the Sino-British Joint Declaration and HK Basic Law, yet the United States has found that the NSL compromises HK's autonomy.⁹⁶ Although it was initially agreed upon "that [HK] 'will be vested with executive, legislative and independent judicial power, including that of final adjudication,'" the PRC ultimately overstepped its bounds when the central government took over the NSL's implementation in HK.⁹⁷ The PRC has likewise eroded HK's high degree of autonomy when the central government destroyed the ability of HK people to freely express their views.⁹⁸ Because the NSL's text is vaguely worded and violations may result in up to life imprisonment, people should be concerned about how they express their anti-PRC sentiment. In fact, two prominent political activists and pro-Democracy leaders stepped down or fled HK due to their fear of persecution for violating the NSL.⁹⁹

The United States has a legal duty to play an active role in maintaining one country, two systems under the United States-Hong Kong Policy Act of 1992 and the Hong Kong Human Rights and Democracy Act of 2019 (HKHRDA). Part of this legal duty entails supporting HK's democratic freedoms, human rights, and high degree of autonomy.¹⁰⁰ Because supporting "democratization is a fundamental principle of [U.S.] foreign policy,"¹⁰¹ the United States must

93. Hong Kong International Business Channel, *Exclusive: Carrie Lam Admits Inconvenience of US Sanctions*, FACEBOOK (Nov. 27, 2020), <https://www.facebook.com/hkibnews/videos/484173425894280>.

94. Hong Kong Chief Executive Carrie Lam earns \$672,000 per year. Bhardwaj, *supra* note 91.

95. Hong Kong Autonomy Act § 4(6).

96. Release of the HKAA, *supra* note 92; Hong Kong Autonomy Act § 3.

97. Hong Kong Autonomy Act § 3(8); Sino-British Joint Declaration, *supra* note 3, at art. 3(3); *see* XIANGGANG JIBEN FA arts. 2, 16–18, 19, 22 (H.K.).

98. Hong Kong Autonomy Act § 3(12); Sino-British Joint Declaration, *supra* note 3, at art. 3(3); *see* XIANGGANG JIBEN FA arts. 4, 26–34, 39 (H.K.).

99. Joshua Wong (@joshuawongcf), TWITTER (June 29, 2020, 7:53 PM), <https://twitter.com/joshuawongcf/status/1277797447822172162>; Nathan Law (@nathanlawkc), TWITTER (June 29, 2020, 8:45 PM), <https://twitter.com/nathanlawkc/status/1277810566917218310>; *Hong Kong's National Security Law: 10 Things You Need to Know*, *supra* note 36.

100. United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701, 5711(1) (1992); Hong Kong Human Rights and Democracy Act of 2019, Pub. L. No. 116-76 § 3(1), 133 Stat. 1161, 1162 (2019).

101. United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5701(5).

actively participate in upholding HK autonomy and democracy¹⁰² by enacting legislation or otherwise implementing a foreign policy that is consistent with upholding Hong Kong autonomy. Therefore, the United States has fulfilled its legal duty by enacting the HKAA because it punishes those who contribute to the erosion of HK autonomy while providing an emigration route for HK residents to escape oppression.

B. ELIMINATION OF HONG KONG'S SPECIAL TREATMENT UNDER EXECUTIVE ORDER 13936

Additionally, President Trump issued Executive Order 13936 in response to the NSL's imposition on the same day that the HKAA¹⁰³ was enacted. While exercising his executive power, President Trump determined that HK "is no longer sufficiently autonomous to justify differential treatment in relation to the [PRC]."¹⁰⁴ He cited the PRC's failure to uphold HK's autonomy—a promise that the PRC made to the UK under the Sino-British Joint Declaration—to justify his executive order.¹⁰⁵ The PRC went one step too far in dismantling one country, two systems when it sidestepped HK's legislative process, promulgated national security legislation over the city, and gave itself broad power to implement the NSL as it sees fit. Because HK is no longer sufficiently autonomous as the U.S. originally expected when the United States-Hong Kong Policy Act of 1992 was enacted, the U.S. has found that HK should be treated in the same manner as that of the PRC.¹⁰⁶ As a result, President Trump has eliminated HK's preferential treatment, the U.S.-HK extradition treaty, and military training in the city.¹⁰⁷ Moreover, the new administration under President Biden extended this executive order because the PRC continues to undermine HK's autonomy.¹⁰⁸

Executive Order 13936 has mostly been a symbolic move to date. Some of the Order's short-term impact calls for eliminating preferential treatment towards HK passport holders and trading privileges with the city.¹⁰⁹ Similarly, defense and dual-use technology exports to the territory have been impacted

102. The United States also has a duty to uphold "Hong Kong's confidence and prosperity, Hong Kong's role as an international financial center, and the mutually beneficial ties between" Hong Kong and the United States, which the Hong Kong Autonomy Act also appears to do. *Id.* § 5711(1). The Hong Kong Human Rights and Democracy Act affirms the policies set forth in the United States-Hong Kong Policy Act, particularly as it relates to upholding Hong Kong's autonomy. *See* Hong Kong Human Rights and Democracy Act of 2019 § 3.

103. The Hong Kong Autonomy Act was enacted on July 14, 2020, which is the same day that President Trump issued Executive Order 13936. *See* Exec. Order No. 13936, 85 Fed. Reg. 43,413, 43,413 (July 14, 2020).

104. *Id.* The United States treated Hong Kong differently than mainland China because of the "one country, two systems" framework for Hong Kong. *See* United States-Hong Kong Policy Act of 1992 § 5701.

105. Exec. Order No. 13936, 85 Fed. Reg. at 43,413.

106. *Id.*

107. *Id.* at 43,414.

108. Continuation of the National Emergency with Respect to Hong Kong, 86 Fed. Reg. 36479, 36479 (July 9, 2021).

109. Exec. Order No. 13936, 85 Fed. Reg. at 43,413.

because the United States no longer transports such technology to the region.¹¹⁰ The United States has also imposed sanctions on 14 Chinese officials in charge of implementing the NSL because they have been deemed as contributing to the deterioration of HK's promised autonomy.¹¹¹

However, the executive order has the potential to negatively impact the United States' standing in the international community as well as its relationship with HK. For example, the U.S. Customs and Border Protection (CBP) responded to the Order by issuing a notice requiring imports from HK to be marked with "China" as their origin.¹¹² Perhaps this move is not as drastic as it seems because HK imports accounted for only thirteen percent of total trade between the United States and HK in 2019.¹¹³ In other words, HK does not focus its efforts on providing goods to the United States.¹¹⁴ Nevertheless, the HK government strongly objected to the CBP's notice as a likely violation of WTO rules because the United States has disregarded HK's status as a separate and distinct entity from the PRC.¹¹⁵ HK initiated a complaint against the U.S. shortly after for its origin marking requirements.¹¹⁶ Not only does such a move worsen already tense relations between the United States, HK, and the PRC, but the WTO complaint also draws international attention away from the NSL and shifts it to the United States.

C. PRESIDENT BIDEN'S DIRECTIVE TO DEFER THE DEPARTURE OF HK RESIDENTS

While President Biden has largely supported his predecessor's foreign policy towards HK—namely, providing an update under the HKAA and extending Executive Order 13936 by an additional year—he has since taken it a step further and prepared an avenue for HK residents already in the United States to remain in the country for another eighteen months.¹¹⁷ President Biden has stated that “[t]he [United States] is committed to a foreign policy that unites our democratic values with our foreign policy goals, which is centered on the defense of democracy and the promotion of human rights around the world.”¹¹⁸

110. *Id.*

111. Designations of NPC Officials, *supra* note 10.

112. Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48,551, 48,551 (Aug. 11, 2020).

113. United States exports to Hong Kong totaled \$30.8 billion, whereas Hong Kong imports totaled \$4.7 billion. *Hong Kong*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/china-mongolia-taiwan/hong-kong> (last visited Jan. 3, 2022).

114. Hong Kong mainly provides services to the United States. *See id.*

115. Press Release, Gov't of H.K., HKSARG Strongly Objects to US' New Rule on Origin Marking of Hong Kong Products (Aug. 11, 2020), <https://www.info.gov.hk/gia/general/202008/11/P2020081100732.htm>.

116. *Hong Kong, China Initiates Dispute Complaint Against US Origin Marking Requirements*, WORLD TRADE ORG. (Nov. 3, 2020), https://www.wto.org/english/news_e/news20_e/ds597rfc_03nov20_e.htm.

117. Memorandum on Deferred Enforced Departure for Certain Hong Kong Residents, 2021 DAILY COMP. PRES. DOC. 641 (Aug. 5, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/05/memorandum-on-the-deferred-enforced-departure-for-certain-hong-kong-residents>.

118. *Id.*

The PRC's actions over HK runs counter to U.S. foreign policy. Since the NSL's imposition, the HK government has stifled the voices of over 100 opposition politicians, activists, and protesters by taking them into custody.¹¹⁹ More than 10,000 individuals have also been arrested for participating in anti-government protests.¹²⁰ Because the PRC has significantly eroded the rights and freedoms that the people of HK once enjoyed, President Biden concluded that the deferred departure of HK residents "is in the foreign policy interest of the [United States]."¹²¹

III. THE UNITED STATES' RESPONSE IS UNLIKELY TO POSITIVELY SHAPE CHINA'S IMPLEMENTATION OF HONG KONG'S NATIONAL SECURITY LAW

Although the U.S. has condemned the PRC for failing to uphold HK's high degree of autonomy under the Sino-British Joint Declaration and Basic Law, these largely symbolic gestures will likely prove futile in positively shaping the NSL's implementation. The PRC is likely to characterize the U.S. response as an interference with its sovereignty over HK because the United States has been critical of the NSL¹²² and expressed its criticism by enacting legislation and issuing an executive order against HK.¹²³ Given how the PRC strongly values state sovereignty and the concept of non-interference on internal affairs,¹²⁴ the PRC is unlikely to react positively to the U.S. response.

The PRC frequently emphasizes the importance of non-interference on internal affairs as part of its exercise of state sovereignty. Not only does the PRC cite to non-interference,¹²⁵ but it also demonstrates strict adherence to its exercise of state sovereignty. The PRC has abided by this principle since it initiated the Five Principles of Peaceful Co-Existence in 1954.¹²⁶ The PRC is particularly firm on non-interference, especially when it relates to its "exclusive jurisdiction over a territory and the permanent population therein" and the right

119. *Id.*

120. *Id.*

121. *Id.*

122. G7 Foreign Ministers' Statement on H.K., *supra* note 8; Statement on NSL, *supra* note 9.

123. H.K. Autonomy Act, Pub. L. No. 116-149, §§ 4(6), 5(a), 134 Stat. 663, 668 (2020); Exec. Order No. 13936, 85 Fed. Reg. at 43,413.

124. JUNWU PAN, TOWARD A NEW FRAMEWORK FOR PEACEFUL SETTLEMENT OF CHINA'S TERRITORIAL AND BOUNDARY DISPUTES 80 (2009).

125. *Foreign Minister Tang Jiaxuan at the 54th Session of the UN General Assembly*, XINHUA (Sept. 22, 1999), https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18058.shtml; ALLEN CARLSON, NAT'L COMM. ON U.S.-CHINA RELS., PROTECTING SOVEREIGNTY, ACCEPTING INTERVENTION: THE DILEMMA OF CHINESE FOREIGN RELATIONS IN THE 1990S i-ii (2002), https://www.ncuscr.org/sites/default/files/page_attachments/Protecting-Sovereignty-Accepting-Intervention.pdf; *Chinese FM Stresses Non-Interference in Other Countries' Internal Affairs*, XINHUA (Sept. 2, 2020, 11:26 AM), http://www.xinhuanet.com/english/2020-09/02/c_139336538.htm.

126. The Five Principles of Peaceful Co-Existence include mutual respect for "territorial integrity and sovereignty . . . , mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, . . . and peaceful co-existence." *China's Initiation of the Five Principles of Peaceful Co-Existence*, MINISTRY OF FOREIGN AFF. OF THE PRC, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml (last visited Jan. 3, 2022).

to non-interference on internal affairs.¹²⁷ The PRC does so by disapproving acts that it views as an interference in its internal affairs.¹²⁸

In fact, the central government did exactly that when the United States enacted the HKHRDA. The PRC vigorously condemned this enactment and the United States' overall support for HK democracy and human rights¹²⁹ as a "severe interference in HK affairs, which are [the PRC]'s internal affairs," and went on to characterize U.S. intentions as "malicious and hegemonic."¹³⁰ The central government even threatened to take countermeasures if the United States continued down this path, stating that "[t]he [United States'] attempts are bound to fail."¹³¹ This statement appears to be true today because the PRC proceeded down its path of ignoring U.S. efforts and promulgated the NSL shortly after, arguably to the detriment of HK autonomy, despite calls for the PRC to uphold the city's autonomy.

The central government has similarly condemned the HKAA, Executive Order 13936, and the deferral of HK residents currently in the United States by issuing statements on the U.S. response, and the PRC certainly views the United States as interfering with its sovereignty over HK. The PRC has "expressed strong indignation and protested against" U.S. sanctions,¹³² and has criticized President Biden's decision to extend safe haven to HK residents.¹³³ The PRC also "firmly opposes any attempt by the [United States] to meddle with HK affairs under the pretext of the joint declaration."¹³⁴ But the PRC has not been the only one to condemn the U.S. response. The HK government at one point

127. PAN, *supra* note 124.

128. *Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on November 20, 2019*, MINISTRY OF FOREIGN AFF. OF THE PRC (Nov. 20, 2019), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1717513.shtml (finding the Hong Kong Human Rights and Democracy Act as an interference on China's internal affairs and a "serious violation of international law and basic norms governing international relations").

129. *See* Press Release, The White House, Statement on Signing the Hong Kong Human Rights and Democracy Act of 2019 (Nov. 27, 2019), <https://www.govinfo.gov/content/pkg/DCPD-201900832/pdf/DCPD-201900832.pdf>.

130. *Statement of the Ministry of Foreign Affairs*, MINISTRY OF FOREIGN AFF. OF THE PRC (Nov. 28, 2019), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1719774.shtml [hereinafter *Statement of the Ministry of Foreign Affairs*].

131. *Id.*

132. *Spokesperson of the Commissioner's Office: US Sanctions Will Only be Self-Defeating*, MINISTRY OF FOREIGN AFF. OF CHINA IN H.K. (Aug. 8, 2020), <http://www.fmcoprc.gov.hk/eng/gsxw/t1804993.htm> [hereinafter *US Sanctions Will Only be Self-Defeating*].

133. Remarks, Hua Chunying, Ministry of Foreign Aff. of the PRC, Foreign Ministry Spokesperson Hua Chunying's Remarks on the US President's Signing of the Hong Kong-related Memorandum (Aug. 8, 2021), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1898163.shtml.

134. *The Spokesperson of the Commissioner's Office Strongly Disapproves and Firmly Opposes Groundless Accusations by the US Side Against the National Security Law*, MINISTRY OF FOREIGN AFF. OF CHINA IN H.K. (July 6, 2020), <http://www.fmcoprc.gov.hk/eng/gsxw/t1795630.htm> [hereinafter *Commissioner's Office Disapproves US Accusations*].

characterized the U.S. sanctions as a “blatant and barbaric interference in the internal affairs of the [PRC].”¹³⁵

Not only has the central government condemned the U.S. response, but it has presumably ignored U.S. efforts and taken further steps to erode HK’s autonomy. Nearly one year after the NSL’s imposition, LegCo passed a bill that significantly dilutes the HK electoral process by decreasing the number of seats that the people of HK directly elect while increasing the number of seats that will be selected by the Communist Party.¹³⁶ Doing so, according to Chief Executive Carrie Lam, will “restore peace and prosperity in [HK]”¹³⁷ and plug the loopholes in HK’s electoral system that allowed for “anti-China disruptors . . . to enter [HK]’s power structure in recent years.”¹³⁸ Despite receiving much criticism from the U.S. and others in response to the new bill,¹³⁹ the Chinese government yet again relied on the principle of non-interference on internal affairs to defend the bill.¹⁴⁰

As with the PRC’s approach towards the HKHRDA, the PRC has ignored U.S. actions while continuing to exercise its sovereignty over HK as it sees fit. The central government has stated that all efforts by the United States will prove

135. Press Release, Gov’t of H.K., HKSAR Government Calls So-Called US Sanctions Shameless and Despicable (Aug. 8, 2020), <https://www.info.gov.hk/gia/general/202008/08/P2020080800317.htm> (“the latest US Government measure represents blatant and barbaric interference in the internal affairs of the People’s Republic of China.”).

136. Improving Electoral System (Consolidated Amendments) Bill 2021, H.K. SPECIAL ADMIN. REGION, <https://www.emab.gov.hk/improvement/en/bill/index.html> (last visited Jan. 3, 2022); Iain Marlow & Kari Soo Lindberg, *China Abandons 24-Year Experiment with Open H.K. Elections*, BLOOMBERG (Mar. 5, 2021, 9:23 PM), <https://www.bloomberg.com/news/articles/2021-03-05/china-abandons-24-year-experiment-with-open-hong-kong-elections>.

137. *Hong Kong Legislature Passes Amendments to Electoral Laws*, XINHUA (May 27, 2021, 9:52 PM), http://www.xinhuanet.com/english/2021-05/27/c_139973791.htm.

138. *Id.*; see Press Release, Gov’t of H.K., CE welcomes passage of Improving Electoral System (Consolidated Amendments) Bill 2021 (May 27, 2021, 4:25 PM), <https://www.info.gov.hk/gia/general/202105/27/P2021052700536.htm>.

139. Press Statement, Antony J. Blinken, U.S. Sec’y of State, Denial of Democracy in Hong Kong (May 27, 2021), <https://www.state.gov/denial-of-democracy-in-hong-kong> (denouncing LegCo’s May 27 bill passage which alters the LegCo’s and Election Commission’s composition that “severely constrains people in Hong Kong from meaningfully participating in their own governance and having their voices heard”); Press Statement, Antony J. Blinken, U.S. Sec’y of State, Assault on Democracy in Hong Kong (Mar. 11, 2021), <https://www.state.gov/assault-on-democracy-in-hong-kong> (criticizing the “[NPC]’s decision to unilaterally change HK’s electoral system” and “call[ing] on the PRC to uphold its international obligations and commitments and to act consistently with [HK]’s Basic Law”); Media Note, Office of the Spokesperson, G7 Statement on Hong Kong Electoral Changes (Mar. 12, 2021), <https://www.state.gov/g7-statement-on-hong-kong-electoral-changes> (decrying the HK electoral changes that will stifle dissenting voices in HK and further “undermine[HK]’s high degree of autonomy under the ‘One Country, Two Systems’ principle”). Moreover, the UK declared that the PRC is “in a state of ongoing non-compliance with the Sino-British Joint Declaration.” Dominic Raab, U.K. Foreign Sec’y of State, Radical Changes to Hong Kong’s Electoral System: Foreign Secretary’s Statement (Mar. 13, 2021), <https://www.gov.uk/government/news/foreign-secretary-statement-on-radical-changes-to-hong-kongs-electoral-system>.

140. Zhang Xiaoming, deputy director of the Hong Kong and Macao Affairs Office of the State Council, stated that “Hong Kong affairs are purely China’s internal affairs; no foreign country can make any irresponsible remarks” in response to the bill’s criticism. *Senior Chinese Officials Refute US Condemnation on HK Electoral Reform*, GLOB. TIMES (Mar. 12, 2021, 11:47 AM), <https://www.globaltimes.cn/page/202103/1218182.shtml>.

futile,¹⁴¹ and that has been the case here with the current U.S. approach because the PRC eventually passed Bill 2021 on Improving HK's Electoral System. Based on the PRC's view on state sovereignty, the U.S. response is unlikely to positively shape the PRC's implementation of the NSL.

IV. ALTHOUGH UNLIKELY TO MAKE POSITIVE CHANGES, THE UNITED STATES STILL HAS A DUTY TO SPEAK OUT AND TAKE CONCRETE ACTION AGAINST THE LAW

The United States, a strong proponent of civil liberties and human rights, is generally very outspoken on foreign matters that relate to the erosion of civil liberties and human rights. As part of its National Security Strategy, the Trump administration has emphasized the importance of human rights as a basis for legitimate national sovereignty.¹⁴² President Trump has stated that sovereign nations must allow their people to “take ownership of the future and control their own destiny.”¹⁴³ Therefore, governments have a moral duty to uphold and respect their citizens' interests because it adds to their legitimacy.¹⁴⁴ Likewise, under the current administration, President Biden is dedicated to defending democracy and promoting human rights around the world.¹⁴⁵ To this end, the United States has committed itself to protecting human rights and democracy at home and abroad.¹⁴⁶

As a result, the United States will naturally speak out and take concrete action against human rights abuses. This duty arises particularly when it relates to upholding freedom of speech, assembly, religion, and the right to hold democratic elections.¹⁴⁷ The United States has made it a priority to support and defend these basic rights even in its foreign policy goals.¹⁴⁸ As illustrated by the

141. While referencing the United States' response towards passage of the Hong Kong National Security Law, the spokesperson of the Commissioner's Office of the Ministry of Foreign Affairs in the PRC said, “[a]ny US sanction is futile.” *US Sanctions Will Only be Self-Defeating*, *supra* note 132.

142. *Promoting Human Rights is Essential to an 'America First' Vision*, THE WHITE HOUSE (Mar. 12, 2018), <https://trumpwhitehouse.archives.gov/articles/promoting-human-rights-essential-america-first-vision-2>.

143. *Remarks by President Trump to the 72nd Session of the United Nations General Assembly*, U.S. EMBASSY AND CONSULATES IN BRAZ. (Sept. 19, 2017), <https://br.usembassy.gov/remarks-president-trump-72nd-session-united-nations-general-assembly> [hereinafter *Remarks by President Trump*].

144. *Id.*; see Memorandum on Deferred Enforced Departure for Certain Hong Kong Residents, *supra* note 117.

145. Memorandum on Deferred Enforced Departure for Certain Hong Kong Residents, *supra* note 117.

146. *Remarks by President Trump*, *supra* note 143; Memorandum on Deferred Enforced Departure for Certain Hong Kong Residents, *supra* note 117.

147. *Unalienable Rights and the Securing of Freedom*, Address at the National Constitution Center, U.S. DEP'T OF STATE (July 16, 2020), <https://il.usembassy.gov/unalienable-rights-and-the-securing-of-freedom> [hereinafter *Unalienable Rights and the Securing of Freedom*].

148. *Remarks by President Trump*, *supra* note 143; Michael R. Pompeo, U.S. Sec'y of State, *Remarks on Promoting and Protecting Human Rights: A Re-Dedication to the Universal Declaration of Human Rights*, U.S. DEP'T OF STATE (Sept. 23, 2020), <https://2017-2021.state.gov/promoting-and-protecting-human-rights-a-re-dedication-to-the-universal-declaration-of-human-rights/index.html>; *Unalienable Rights and the Securing of Freedom*, *supra* note 147; Michael R. Pompeo, *Unalienable Rights and U.S. Foreign Policy*, WALL ST. J. (July 7, 2019, 3:07 PM), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>; Memorandum on Deferred Enforced Departure for Certain Hong Kong Residents, *supra* note 117.

U.S. response to the NSL,¹⁴⁹ the United States has made it known that the Law erodes the civil liberties and human rights that the people of HK have embraced for decades.

President Trump's National Security Strategy lays out a general framework to "support the dignity of individuals"¹⁵⁰ and fulfill its moral duty to uphold human rights and civil liberties abroad. First, the United States will issue statements or press releases condemning the violator and the act alleged to violate human rights.¹⁵¹ Second, the United States may decide to act by turning to "diplomacy, sanctions, and other tools to isolate states and leaders . . . whose actions run contrary to [U.S.] values."¹⁵² In practice, the United States has implemented this policy consistently in recent years,¹⁵³ at least with a particular focus towards Xinjiang in China,¹⁵⁴ Iran,¹⁵⁵ Venezuela,¹⁵⁶ and Cuba.¹⁵⁷ Former Secretary of State Mike Pompeo, while citing human rights abuses, frequently criticized all four governments in strong terms.¹⁵⁸ Furthermore, the United States has implemented sanctions against these same countries for their human rights abuses.¹⁵⁹

149. Hong Kong Autonomy Act §§ 4(6), 5(a); Memorandum on Deferred Enforced Departure for Certain Hong Kong Residents, *supra* note 117.

150. DONALD J. TRUMP, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 42 (2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

151. *See id.*

152. *Id.*

153. Michael R. Pompeo, U.S. Sec'y of State, *Remarks on the Release of the 2019 Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE (Mar. 11, 2020), <https://2017-2021.state.gov/secretary-michael-r-pompeo-on-the-release-of-the-2019-country-reports-on-human-rights-practices/index.html> [hereinafter *Remarks on the Release of the 2019 Country Reports on Human Rights Practices*]; *see Remarks by President Trump*, *supra* note 143.

154. Karen Pierce, a U.K. Permanent Representative, delivered a joint statement on behalf of 23 countries, including the United States, to condemn China's human rights abuses in Xinjiang. Karen Pierce, U.K. Permanent Representative, *Joint Statement on Xinjiang at the Third Committee Dialogue of the Committee for the Elimination of Racial Discrimination*, U.S. MISSION TO THE UNITED NATIONS (Oct. 29, 2019), <https://usun.usmission.gov/joint-statement-delivered-by-uk-rep-to-un-on-xinjiang-at-the-third-committee-dialogue-of-the-committee-for-the-elimination-of-racial-discrimination>.

155. Michael R. Pompeo, U.S. Sec'y of State, *Human Rights and the Iranian Regime, Address at the Dean Acheson Auditorium*, U.S. DEP'T OF STATE (Dec. 19, 2019), <https://2017-2021.state.gov/human-rights-and-the-iranian-regime/index.html>.

156. Press Statement, Michael R. Pompeo, U.S. Sec'y of State, *The United States Condemns Maduro's Latest Step to Rig the Next Venezuelan Election* (June 15, 2020), <https://cl.usembassy.gov/the-united-states-condemns-maduros-latest-step-to-rig-the-next-venezuelan-election>.

157. MARK P. SULLIVAN, CONG. RSCH. SERV., IF10045, CUBA: U.S. POLICY OVERVIEW I (Updated Oct. 29, 2021), <https://fas.org/sgp/crs/row/IF10045.pdf>.

158. *Remarks on the Release of the 2019 Country Reports on Human Rights Practices*, *supra* note 153.

159. SULLIVAN, *supra* note 157, at 1–2; Media Note, Off. of the Spokesperson, U.S. Dep't of State, *The United States Sanctions Nicolas Maduro Guerra*, U.S. DEP'T OF STATE (June 28, 2019), <https://uy.usembassy.gov/the-united-states-sanctions-nicolas-maduro-guerra> (sanctioning Nicolas Maduro's son for role in the Maduro regime and condemning regime for oppression of Venezuelans); Press Statement, Michael R. Pompeo, U.S. Sec'y of State, *Major New Human Rights-Related Listings and Accompanying Sanctions on Iran* (Sept. 24, 2020), <https://ir.usembassy.gov/major-new-human-rights-related-listings-and-accompanying-sanctions-on-iran>; Press Statement, Michael R. Pompeo, U.S. Sec'y of State, *The United States Imposes Sanctions and Visa Restrictions in Response to the Ongoing Human Rights Violations and Abuses in Xinjiang*

Unsurprisingly, the United States has responded to the HK situation in a similar manner to that of Xinjiang, Iran, Venezuela, and Cuba. The United States first spoke out and condemned the PRC for implementing national security legislation over HK because its enactment allegedly erodes civil liberties and human rights.¹⁶⁰ The United States also took concrete action by sanctioning Chinese and HK officials¹⁶¹ and eliminating HK's preferential treatment by repealing legislation and bilateral agreements.¹⁶² Therefore, the U.S. response towards HK remains consistent with its foreign policy towards human rights violators.

V. BY SHINING A SPOTLIGHT ON HONG KONG, THE CURRENT UNITED STATES RESPONSE MAY FURTHER DETERIORATE ONE COUNTRY, TWO SYSTEMS UNDER THE NATIONAL SECURITY LAW

Although consistent with its foreign policy goals towards upholding human rights, the current U.S. response fails to prevent the further deterioration of one country, two systems in HK. The United States may inadvertently pave the way for the PRC to step in and take greater reins over HK because it has eliminated HK's special treatment. Additionally, the PRC may decide to respond with a heavy hand on its implementation of the NSL as a statement to the international community that the country will not tolerate "bullies" if the United States continues to place the situation in HK at the forefront of its foreign policy goals and in the news.

A. BY INFLUENCING THE INTERNATIONAL PERCEPTION OF HONG KONG, THE UNITED STATES PAVES THE WAY FOR THE PRC TO HAVE A TIGHTER GRASP OVER THE CITY

The United States has distanced itself from HK by eliminating its special treatment under Executive Order 13936. Under this order, the United States no longer grants HK special trading privileges nor preferential visa treatment for HK residents when compared to the PRC.¹⁶³ The United States and HK had a relatively free flow of trade and ideas due to its special treatment, which has contributed to the city's success as a global financial center.¹⁶⁴ But with the elimination of HK's preferential treatment, the United States no longer treats

(July 9, 2020), <https://2017-2021.state.gov/the-united-states-imposes-sanctions-and-visa-restrictions-in-response-to-the-ongoing-human-rights-violations-and-abuses-in-xinjiang/index.html>.

160. G7 Foreign Ministers' Statement on H.K., *supra* note 8; Statement on NSL, *supra* note 9; Joint Statement on HK, *supra* note 9.

161. Designations of NPC Officials, *supra* note 10; Bureau of E. Asian & Pac. Aff., *supra* note 10.

162. Exec. Order No. 13936, 85 Fed. Reg. at 43,414.

163. *Id.* at 43,413; see Naomi Xu Elegant, *Hong Kong Passport Holders Used to Get Special Perks in the U.S. Not Anymore*, FORTUNE (July 15, 2020, 2:26 AM), <https://fortune.com/2020/07/15/trump-hong-kong-passport>.

164. William Alan Reinsch, Carlota Martinez-Don, Patrick Saumell, *Hong Kong's Special Status: What's Happening and What's Next*, CTR. FOR STRATEGIC & INT'L STUD. (June 15, 2020), <https://www.csis.org/analysis/hong-kongs-special-status-whats-happening-and-whats-next>.

HK differently nor views the city as a separate entity apart from the PRC.¹⁶⁵ Thus, the U.S. response creates distance between itself and HK.

Given the United States' far-reaching influence in the international community, it can ultimately change the international perception of HK as a city that is merely part of the PRC rather than as a separate entity if other countries follow suit. In fact, other countries have already implemented changes to their foreign policy towards HK—just not to the extent that the United States has. For example, Australia,¹⁶⁶ Canada,¹⁶⁷ and the UK¹⁶⁸ have all suspended their extradition treaties with HK and implemented new visa measures for the people of HK to emigrate. Under this more limited approach, Australia, Canada, and the UK have provided the people of HK the opportunity to escape an oppressive regime. As for sanctions, the European Union has indicated a desire to impose sanctions on the PRC because of the HK situation¹⁶⁹ but has yet to implement any substantive measures against the PRC. Nevertheless, responses from Australia, Canada, and the UK have yet to seriously undermine one country, two systems because they are searching for options to support HK and its people, whereas the U.S. response has been more drastic.¹⁷⁰

On the other hand, the U.S. response leads to a fallout that will seriously undermine one country, two systems. Apart from targeted sanctions on Chinese

165. Trevor G. Schmitt, Soo-Mi Rhee & John P. Barker, *The End of Hong Kong's "Preferential Treatment": US Imposes Similar Export Controls as on China and Introduces Sanctions*, ARNOLD & PORTER (Aug. 4, 2020), <https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2020/08/the-end-of-hks-preferential-treatment>; Michelle Toh & Laura He, *The United States is Treating Hong Kong as Mainland China. Business is Starting to do the Same*, CNN BUS. (July 16, 2020, 12:50 AM), <https://www.cnn.com/2020/07/15/business/hong-kong-special-trade-status-us-intl-hnk/index.html>.

166. *Hong Kong Brief*, AUSTL. GOV'T DEP'T OF FOREIGN AFF. & TRADE, <https://www.dfat.gov.au/geo/hong-kong/Pages/hong-kong-brief> (last visited Jan. 3, 2022).

167. Press Release, Immigr., Refugees & Citizenship Can., Canada Announces Immigration Measures Supporting Hong Kong Residents and Canadians in Hong Kong (Nov. 12, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/11/canada-announces-immigration-measures-supporting-hong-kong-residents-and-canadians-in-hong-kong.html>; Statement, François-Philippe Champagne, Fed. Minister of Foreign Aff., Gov't of Can., Canada Takes Action Following Passage of National Security Legislation for Hong Kong (July 3, 2020), <https://www.canada.ca/en/global-affairs/news/2020/07/canada-takes-action-following-passage-of-national-security-legislation-for-hong-kong.html>.

168. Dominic Raab, U.K. Foreign SOS, National Security Legislation in Hong Kong: Foreign Secretary's Statement in Parliament, Speech Before the House of Commons, HC Deb (July 20, 2020) (678) cols. 1831–33 (UK); Stephen Castle, *U.K. Suspends Extradition Treaty with Hong Kong Over Security Law*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/world/asia/extradition-treaty-hong-kong.html>.

169. See Stuart Lau, *European Chief Singles Out China's Moves on Hong Kong, Xinjiang as She Unveils New Sanctions Scheme*, S. CHINA MORNING POST (Sept. 16, 2020, 9:00 AM), <https://www.scmp.com/news/china/diplomacy/article/3101824/european-chief-singles-out-chinas-moves-hong-kong-xinjiang-she>. The European Union (EU) adopted a human rights sanctions regime on December 7, 2020 that gave the EU the ability to impose sanctions on state or non-state actors deemed to commit "serious human rights violations or abuses." See Press Release, Council of the European Union, EU Adopts a Global Human Rights Sanctions Regime (Dec. 7, 2020, 1:00 PM), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:410I:FULL&from=EN> [hereinafter EU Adopts a Global Human Rights Sanctions Regime].

170. Kurt Tong, *Washington's Self-Defeating Hong Kong Strategy*, FOREIGN AFF. (June 2, 2020), <https://www.foreignaffairs.com/articles/china/2020-06-02/washingtons-self-defeating-hong-kong-strategy> (finding that Australia, Canada, and the United Kingdom "are looking for ways to support the city and its people rather than taking steps that will worsen, however unintentionally, the damage Beijing has inflicted").

and HK officials, the everyday people of HK must bear the brunt of the negative effects associated with the current U.S. response.¹⁷¹ For example, Executive Order 13936 prohibits HK passport holders from enjoying special treatment and has ended special trading privileges for all of HK.¹⁷² If other countries decide to follow in the footsteps of the United States, then it could alter the world's view of HK so that it becomes seen as an ordinary Chinese city that is unworthy of special treatment.

The PRC and HK will naturally integrate more quickly if the international community does not recognize HK under one country, two systems. This is so because HK was viewed as a distinct and separate entity before the NSL's enactment. Its separate judicial system, economic freedoms, and autonomy to hold democratic elections made HK distinct from the rest of the PRC.¹⁷³ Countries, including the United States, have placed their trust in the HK system believing that it would continue to enjoy a limited autonomy and be free from PRC intervention. But now that the United States has apparently challenged the status quo by eliminating HK's preferential treatment,¹⁷⁴ other countries may similarly behave in a way that runs contrary to maintaining what is left of the city's one country, two systems due to U.S. influence. When this newfound lack of HK support ensues, the central government will naturally step in to fill the void and have a tighter grasp over the city, thereby further eroding HK's autonomy.¹⁷⁵

B. CHINA MAY ADHERE TO STRICT IMPLEMENTATION OF THE NATIONAL SECURITY LAW TO DISPLAY ITS SOVEREIGNTY OVER HONG KONG

The PRC has maintained its position that the U.S. response to the NSL is an interference in its national sovereignty and has expressed its distaste in strong terms. The PRC claims that the United States has infringed on its right "to formulate and implement national security legislation" over HK.¹⁷⁶ Moreover, the central government views the United States' "[u]nreasonable meddling and shameless threats" as typical "gangster logic and bullying behavior."¹⁷⁷ The

171. The Editorial Board, *Visas for Hong Kong*, WALL ST. J. (May 30, 2020, 9:15 AM), <https://www.wsj.com/articles/visas-for-hong-kong-11590792802>.

172. Exec. Order No. 13936, 85 Fed. Reg. at 43,414.

173. Prableen Bajpai, *Hong Kong vs. Mainland China: What's the Difference?*, INVESTOPEDIA (June 2, 2020), <https://www.investopedia.com/articles/investing/121814/hong-kong-vs-china-understand-differences.asp>.

174. See Tong, *supra* note 170 (calling on the United States to "[d]efend the [s]tatus [q]uo, [n]ot [a]ssist in [i]ts [d]emise").

175. "[F]ormer U.S. diplomat Susan Thornton has argued, the economic fallout from termination of special status could do much to undermine 'one country, two systems,' even speeding Hong Kong's conversion into . . . 'just another Chinese city.'" Joe Renouard, *America's New Hong Kong Human Rights Act May Be Provocative, But It's Not Surprising*, THE DIPLOMAT (Nov. 30, 2019), <https://thediplomat.com/2019/11/americas-new-hong-kong-human-rights-act-may-be-provocative-but-its-not-surprising>.

176. *US Sanctions Will Only Be Self-Defeating*, *supra* note 132.

177. Jessie Pang & Yanni Chow, *China Slams U.S. Response to Hong Kong Security Law as 'Gangster Logic'*, REUTERS (July 15, 2020), <https://www.reuters.com/article/us-hongkong-security-idUSKCN24H065>.

PRC simply does not back down, nor will it back down, when it comes to safeguarding its own national security.¹⁷⁸ Indeed, the PRC views the United States as a bully, and it certainly will not stand idle while the United States meddles in what it perceives as strictly internal affairs.

In fact, the PRC has been very vocal against U.S. interference. When the United States enacted the HKHRDA, the Chinese Ministry of Foreign Affairs issued a statement condemning U.S. interference and accused the United States of “openly back[ing] violent criminals who rampantly smashed facilities, set fire, assaulted innocent civilians, trampled on the rule of law, and jeopardized social order.”¹⁷⁹ The PRC also threatened to take countermeasures against the United States if it continued to interfere in its internal affairs.¹⁸⁰ Evidently, the PRC may have followed through with its threats against the United States, in part, when it promulgated national security legislation over HK.¹⁸¹ *Global Times*, a state-run tabloid associated with the Communist Party, published an article one day before the NSL’s enactment stating that the PRC must “fight some tough battles against U.S. interference in [HK]”¹⁸² It dismissed U.S. efforts as being limited and emphatically stated that the HKHRDA will be overwhelmed when confronted by the NSL.¹⁸³ Therefore, the PRC has played an active role against the United States in an attempt to push back on its interference in HK.

Now that the NSL is in place and the United States has yet again interfered in HK affairs, the PRC is likely to remain active, push back against the United States as it did in response to the HKHRDA, and display its sovereignty in the process. The central government has stated that U.S. sanctions “will only be self-defeating.”¹⁸⁴ Although only time will tell what is meant by this statement, the PRC may ultimately decide to implement the Law with a heavy hand to quash hope that the country can be influenced or bullied by the United States. But even if it does not engage in this way, the PRC is likely to continue doing as it sees fit. Either way, the current U.S. response is futile and appears to hurt the situation in HK under the NSL.

VI. LOOKING AHEAD: A SHIFT IN CURRENT UNITED STATES POLICY COULD MARGINALLY SHAPE IMPLEMENTATION

The United States has been criticized for its response to the HK NSL. One of the biggest critiques is the United States’ double standards on human rights

178. “[T]he Chinese government is rock-firm in safeguarding national sovereignty, security and development interests, in implementing the ‘One Country, Two Systems’ policy, and in opposing any external interference in Hong Kong affairs.” *Id.*; *Commissioner’s Office disapproves US Accusations*, *supra* note 134.

179. *Statement of the Ministry of Foreign Affairs*, *supra* note 130.

180. *Id.*

181. LAWRENCE & MARTIN, *supra* note 18, at 5.

182. Editorial, *National Security Law Will Be New Start for HK*, GLOBAL TIMES (June 29, 2020, 9:03 PM), <https://www.globaltimes.cn/content/1192992.shtml>.

183. *Id.*

184. *US Sanctions Will Only Be Self-Defeating*, *supra* note 132.

abroad when it appears to disregard those rights at home.¹⁸⁵ In an attempt to undermine the United States' assertion that the Law violates human rights norms and civil liberties, the PRC capitalized on U.S. turmoil by criticizing the United States when George Floyd's death sparked unrest and violence.¹⁸⁶ The PRC has good reason to call out the United States for criticizing its alleged human rights abuses in HK because the United States itself has failed to uphold human rights at home.¹⁸⁷ However, doing so does not give the PRC a free pass to disregard criticism against itself because human rights abuses are still abuses,¹⁸⁸ and the Law arguably violates the PRC's international obligations under the Sino-British Joint Declaration, ICCPR,¹⁸⁹ and HK Basic Law.¹⁹⁰

The United States nevertheless has the duty to speak out against human rights abuses and take concrete action to stop the abuses. Although its current response is unlikely to positively change the PRC's implementation of the NSL, the United States could still shape implementation on the margins by taking a more nuanced approach that also takes Chinese criticism into account. The United States could shift the current tide to impact the HK situation more positively by considering working together with its allies to implement a cohesive plan that would uphold one country, two systems. This collective response could also include shining a spotlight on the PRC by seeking an advisory opinion from the International Court of Justice (ICJ) on the NSL.¹⁹¹

The United States is currently proceeding on its own accord in response to the NSL. While part of the U.S. response overlaps with other countries, such as offering a path for the people of HK to emigrate or suspending its extradition

185. Statement, Zhang Jun, Permanent Representative of China, US Attempt to Smear China's Human Rights Record Failed Again, (Oct. 6, 2020), <http://chnun.chinamission.org.cn/eng/hyyfy/t1822154.htm>; *China, on Behalf of 26 Countries, Criticizes U.S., Other Western Countries for Violating Human Rights*, XINHUA (Oct. 6, 2020, 2:10 AM), http://www.xinhuanet.com/english/2020-10/06/c_139420907.htm; Naomi Xu Elegant, *As Protests Roil the U.S., Beijing Seizes the Moment to Call Out 'Hypocrisy'*, FORTUNE (June 3, 2020, 2:20 AM), <https://fortune.com/2020/06/03/george-floyd-protest-us-china-hypocrisy-hong-kong/>; Tamara Cofman Wittes, *Promoting Human Rights Abroad When They're Being Trampled at Home*, BROOKINGS: BLOG (June 3, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/03/promoting-human-rights-abroad-when-theyre-being-trampled-at-home>.

186. Elegant, *supra* note 163.

187. *Id.*

188. Tamara Cofman Wittes, a Senior Fellow at the Brookings Institute, explains how "[t]he moral foundation for American advocacy of human rights does not lie in our status as a paragon of international virtue." Wittes, *supra* note 185. Rather, "[t]he most effective advocacy begins from the acknowledgement that human rights are both universal and inherent, not dependent on one's form of government." *Id.*

189. Although the PRC has not ratified the ICCPR, it is still obligated to abide by its rules under the HK Basic Law. See XIANGGANG JIBEN FA art. § 39 (H.K.).

190. Statement on NSL, *supra* note 9; Joint Statement on NSL, *supra* note 9.

191. Jack Rodgers, *Hong Kong National-Security Law Scrutinized in House Hearing*, COURTHOUSE NEWS SERV. (July 1, 2020), <https://www.courthousenews.com/hong-kong-national-security-law-scrutinized-in-house-hearing/>; *The End of One Country, Two Systems?: Implications of Beijing's National Security Law in Hong Kong: Hearing Before the H. Comm. on Foreign Affairs*, 116th Cong. 2nd Sess., at 01:29:19 (2020), <https://foreignaffairs.house.gov/2020/7/the-end-of-one-country-two-systems-implications-of-beijing-national-security-law-in-hong-kong> (statement of Carole J. Peterson, Professor of Law, William S. Richardson School of Law) [hereinafter *The End of One Country, Two Systems?*].

treaty with HK, it does not appear as though all parties involved are implementing the same plan. For example, the UK,¹⁹² Canada,¹⁹³ and the United States¹⁹⁴ have halted exports of sensitive military equipment and technology to HK, whereas Australia has not committed to such an act. Likewise, no other country has implemented sanctions on HK other than the United States,¹⁹⁵ although the European Union may soon follow suit.¹⁹⁶ Because the United States is working alone in this regard, the PRC is less likely to feel pressured to change. Thus, a more positive outcome on the HK situation could be achieved with international human rights pressure and concerted effort with allies, as demonstrated by the world's response towards Argentina in the late 1970s.

At the time, Argentinian security forces abducted, tortured, and imprisoned anywhere between 3,000 to 30,000 people¹⁹⁷ to eradicate terrorists¹⁹⁸ and societal elements that were considered as subversive.¹⁹⁹ When news broke out about this crisis, the international community heavily criticized the country's gross human rights abuses.²⁰⁰ Because of this collective pressure, the world eventually saw a decline in human rights abuses in Argentina.²⁰¹ Similarly, collective pressure towards the HK NSL is necessary to effect change towards the PRC's deterioration of one country, two systems.

The United States would also benefit by following in the footsteps of like-minded partners in their foreign policy towards the PRC's erosion of one country, two systems. Australia, Canada, and the UK, for example, are "all just as invested as the [United States] in [HK]'s continued autonomy and success,"²⁰² yet their responses are more aligned with supporting the city

192. Raab, *supra* note 168.

193. Champagne, *supra* note 168.

194. Exec. Order No. 13936, 85 Fed. Reg. at 43,414.

195. See Designations of NPC Officials, *supra* note 10; BUREAU OF E. ASIAN & PAC. AFF., *supra* note 10.

196. See EU Adopts a Global Human Rights Sanctions Regime, *supra* note 169.

197. No organization can definitively state the amount of people in Argentina who have disappeared, but the number most frequently cited is about 15,000. AMNESTY INT'L, *Report of an Amnesty International Mission to Argentina 6-15 November 1976*, AI Index: AMR 13/083/1977 (Mar. 1, 1977) <https://www.amnesty.org/en/wp-content/uploads/2021/06/amr130831977eng.pdf>.

198. Cf. Roberta Cohen, *Human Rights Diplomacy: The Carter Administration and the Southern Cone*, 4 HUM. RTS. Q. 212, 213 (1982) (concluding that many of these individuals were not actually affiliated with terrorists and were targeted based only on suspicions).

199. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 239 (1980).

200. European nations, the United States, the U.N. Educational Scientific, and Cultural Organization, the World Inter-parliamentary Union, as well as other international organizations "mobilized around a broad international solidarity movement" to condemn Argentina for its human rights abuses. SONIA CARDENAS, CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE, 42-43 (2007).

201. *Id.* at 52, 63. The director of the Washington Office on Latin America also stated that "[a]lmost every major improvement in the human rights situation in Argentina can be traced to some form of international pressure." Cohen, *supra* note 198.

202. Tong, *supra* note 170.

because they do not adversely impact the people targeted by the NSL.²⁰³ On the other hand, the U.S. response arguably contributes to the demise of one country, two systems and has the potential to adversely impact people already targeted by the NSL because the United States has paved the way for the PRC to have a tighter grasp over the city under Executive Order 13936. Rather than distancing itself from the city under the Order, the United States could exercise a more limited approach that upholds HK autonomy and targets only Chinese and HK leaders who contribute to the erosion of one country, two systems.

Moreover, a coordinated response with allies could entail taking the HK matter to the ICJ. The United States and its allies in the United Nations (U.N.) could do so by getting help from the General Assembly in seeking an advisory opinion.²⁰⁴ Nearly two-thirds of the advisory opinions issued by the ICJ have been requested by the U.N. General Assembly.²⁰⁵ The U.N. Charter provides a mechanism for the General Assembly to request an advisory opinion from the ICJ²⁰⁶ so long as there is a two-thirds majority vote in favor of the measure.²⁰⁷ These opinions are nonbinding and issued by the ICJ when an international organization submits a request.²⁰⁸ Despite being nonbinding, advisory opinions may still be useful because they “carry great legal weight and moral authority . . . [and] are often an instrument of preventive diplomacy.”²⁰⁹

But obtaining a majority vote in the General Assembly to seek an advisory opinion may be difficult to achieve. At present, thirty-nine countries, including the U.S., issued a joint statement against the PRC for its human rights abuses in HK.²¹⁰ On the other hand, fifty-five countries led by Pakistan echoed support for the PRC’s sovereignty over HK and encouraged non-interference on internal affairs.²¹¹ Based on these numbers alone, the PRC appears to be supported by a

203. Australia, Canada, and the UK have suspended their extradition treaties with HK and implemented new visa measures for the people of Hong Kong to emigrate. *Hong Kong Brief*, *supra* note 166; Immigr., Refugees & Citizenship Can., *supra* note 167; Champagne, *supra* note 167; Raab, *supra* note 168.

204. Carole Peterson, a legal scholar specializing in Hong Kong constitutional law and human rights, suggested seeking an advisory opinion from the ICJ on the Hong Kong matter at a House Committee hearing on the Hong Kong National Security Law. *The End of One Country, Two Systems?*, *supra* note 191.

205. The U.N. General Assembly has requested seventeen of the twenty-eight total advisory opinions from the ICJ. *What is an Advisory Opinion of the International Court of Justice (ICJ)?*, U.N. DAG HAMMARSKJÖLD LIBR.: ASK DAG, <https://ask.un.org/faq/208207> (May 20, 2021); see *Judgments, Advisory Opinions and Orders From 1946 to 2020*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/decisions/advisory-opinion/1946/2020/desc> (last visited Jan. 3, 2022).

206. U.N. Charter art. 96, ¶ 1.

207. U.N. Charter art. 18, ¶ 3.

208. *Advisory Jurisdiction*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/advisory-jurisdiction> (last visited Jan. 3, 2022).

209. *Id.*

210. Christoph Heusgen, Joint Statement on the Human Rights Situation in Xinjiang and the Recent Developments in Hong Kong, Delivered by Germany on Behalf of 39 Countries, Address Before the United Nations (Oct. 6, 2020), <https://new-york-un.diplo.de/un-en/news-corner/201006-heusgen-china/2402648>.

211. Press Release, Pandemic Pushing Those Least Able to Adapt into Positions of Greater Risk, General Assembly President Tells Third Committee, amid Calls for Greater Protections, U.N. Press Release GA/SHC/4287 (Oct. 6, 2020), <https://www.un.org/press/en/2020/gashc4287.doc.htm>.

greater number of countries. If the United States and its allies want to secure a majority vote on the possibility of having the U.N. General Assembly seek an ICJ advisory opinion, they must campaign for such an outcome.

Although securing a majority vote might be difficult, bringing the matter to the General Assembly itself will still shine a spotlight on the NSL. The process of campaigning and seeking an advisory opinion could place the HK situation at the forefront of international criticism yet again. Similarly, campaigning for an ICJ advisory opinion could exert pressure on the central government to be more cautious in its implementation of the Law.²¹² However, others have argued that public pressure and opinions do not meaningfully affect the central government.²¹³ But even if attempting to seek an ICJ opinion has minimal impact on the government, it would still be better than no effect at all.

The United States will likewise benefit if the HK matter is brought before the ICJ. The PRC may presumably ignore the advisory opinion, just as it has done in the past on other ICJ matters,²¹⁴ but the PRC's probable loss would still be embarrassing for itself nonetheless because the country would be blamed.²¹⁵ The ICJ would be a formal avenue to uphold the concept of one country, two systems. The United States would also increase its legitimacy towards the HK situation by having a neutral third-party in the ICJ provide an objective opinion over the situation instead of the current tit-for-tat approach by the United States.

While these options by no means offer a perfect solution for combating the deterioration of HK autonomy, it should at least shape the PRC's implementation of the NSL on the margins by preventing the PRC from proceeding in a heavy-handed manner when it comes to managing HK. The PRC would face collective pressure if the United States worked as a team with its allies to uphold the concept of one country, two systems. Likewise, the United States could add to its legitimacy by working with its allies to seek an ICJ advisory opinion over the NSL because the PRC has arguably violated its international obligations. Overall, international pressure on the HK situation would, at the very least, force the PRC to be more cautious and less strict on its implementation of the NSL.

212. *The End of One Country, Two Systems?*, *supra* note 191.

213. Tong, *supra* note 170.

214. China referred to a U.N. arbitral tribunal ruling on the South China Sea matter as “‘a piece of paper’ that is destined to come to naught” and disregarded the tribunal’s ruling. Opinion, *Inherently Biased and Unjust ‘Piece of Paper,’* CHINA DAILY (July 13, 2016, 7:47 AM), http://www.chinadaily.com.cn/opinion/2016-07/13/content_26065667.htm.

215. Tong, *supra* note 170. There is good reason to believe that Beijing would be at fault, especially when the U.N. Human Rights Office performed an initial analysis on the Hong Kong NSL and found it in violation of the ICCPR. Press Briefing, Rupert Colville, Spokesperson, U.N. High Comm’r for Human Rights, Note on China / Hong Kong SAR (July 3, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26033&LangID=E>.

CONCLUSION

The PRC's enactment of national security legislation over HK created uproar not only within HK but also throughout the international community. Although HK was guaranteed a high degree of autonomy for fifty years under the Sino-British Joint Declaration, the PRC nearly dismantled the concept of one country, two systems when it implemented national security legislation over HK. The NSL arguably erodes civil liberties and human rights that the people of HK have enjoyed for decades. Accordingly, the United States, while remaining consistent with its foreign policy towards human rights violators, condemned the NSL, issued sanctions under the HKAA and Executive Order 13936, and suspended its preferential treatment of HK under the same executive order, and provided for HK residents to remain within the United States for a limited amount of time.

Despite fulfilling both its moral and legal duty to speak out and take concrete action against the Law, the current U.S. response is unlikely to positively shape the PRC's implementation of the NSL. The PRC is unlikely to relent to U.S. interference and may adhere to strict implementation of the Law because the PRC values state sovereignty and has a sovereign duty to protect national security. The current U.S. response likely also contributes to the deterioration of HK autonomy. But the United States may still influence the NSL's implementation on the margins by shifting its current foreign policy to a more nuanced approach. To do so, the United States should consider working with its allies to implement a cohesive plan that would prevent the further deterioration of HK's autonomy. Part of this plan should entail seeking an ICJ advisory opinion over the PRC's enactment of HK's NSL.