

# EXTRADITING CITIZENS AND PERMANENT RESIDENTS TO CHINA: A NEW ZEALAND CASE STUDY

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## ABSTRACT

The New Zealand case of *Minister of Justice v. Kyung Yup Kim* is extraordinary for three reasons. First, it is the world's first test case for the extradition of a non-Chinese citizen to China. Prior to this case, there was no precedent where a domestic court of last resort had ruled that one of its own citizens or permanent residents could be extradited in accordance with a request by China. Second, this is the first time New Zealand has relied on ad hoc diplomatic assurances for protection against torture and ensuring fair trial rights. Finally, this case presents important issues of pre-trial detention. A permanent resident of New Zealand was detained without charge or trial for eight years in New Zealand. This included five years and three months in prison—the longest a person has remained in a New Zealand prison without being charged with a crime.

This Article summarizes the legal history and findings of *Minister of Justice v. Kyung Yup Kim*, raises concerns about the use of diplomatic assurances to protect human rights, and highlights the need for reform of New Zealand extradition law. It concludes that this precedent-setting case in New Zealand is very likely to influence the governments and judicial bodies of other jurisdictions in their review of similar extradition requests from China and thus should be closely followed.

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## INTRODUCTION

On June 4, 2021, after a decade of litigation, the New Zealand Supreme Court (“the Court”) tentatively ruled that the New Zealand government could extradite a New Zealand permanent resident accused of homicide to the People’s Republic of China (“China”) in *Minister of Justice v. Kyung Yup Kim*.<sup>1</sup> More broadly, the Court’s landmark decision stood for the novel ruling that any New Zealand citizen or permanent resident could be extradited to face trial and possible conviction and imprisonment for alleged crimes committed in China.<sup>2</sup> Extradition is permissible so long as the Chinese government provided diplomatic assurances to the New Zealand government that a suspect would (1) not be tortured; (2) receive a fair trial; and (3) these assurances were, among other things, credible, reliable, sufficiently detailed and comprehensive.<sup>3</sup>

China has previously requested extradition of its nationals and foreign nationals from various countries,<sup>4</sup> including New Zealand,<sup>5</sup> on charges of serious crimes. However, this case was extraordinary, as there is no precedent where a domestic court of last resort has ruled that one of its *own* citizens or permanent residents could be extradited in accordance with a formal request by China.<sup>6</sup> While Professor Donald Clarke, an expert on

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1. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57.

2. *Id.*

3. *Id.* at [121, 128, 465].

4. *See, e.g.*, Claudia Garcia-Salas, Wong Ho Wing v. Peru, 40 LOY. L.A. INT’L & COMP. L. REV. 1231, 1231 (2017) (discussing the extradition of a Chinese business person from Peru due to his purported crimes of money laundering, bribery, and tax evasion).

5. Previous extradition requests have included Chinese nationals from New Zealand to Hong Kong under the 1998 Extradition Agreement with Hong Kong and the People’s Republic of China. However, in response to the National Security Law passed on June 20, 2020, New Zealand (along with several other countries), suspended its extradition agreement with China. *See Rachel Pannett, New Zealand Suspends Extradition Treaty with Hong Kong over New Security Law*, WALL ST. J. (July 28, 2020), <https://www.wsj.com/articles/new-zealand-suspends-extradition-treaty-with-hong-kong-over-new-security-law-11595924633> (last visited Feb. 25, 2022).

6. China has previously requested and received the extradition of foreign nationals from a third country. *See, e.g.*, *China Sentences Canadian Activist to Life in Prison*, N.Y. TIMES (Apr. 9, 2007), <https://www.nytimes.com/2007/04/19/world/asia/19iht-activist.1.5350420.html> [<https://perma.cc/L287-JV4D>] (describing the case of Huseyin Can Celil, a Canadian national extradited in 2006 from Uzbekistan to China); *Hundreds of Taiwanese Extradited to China, Says Report*, BBC (Dec. 1, 2021), <https://www.bbc.com/news/world-asia-59486286> [<https://perma.cc/NYN2-FGMZ>] (reporting that more than 600 Taiwanese arrested overseas have been extradited to China instead of Taiwan); *Cambodia to Extradite Taiwanese to China*, RADIO FREE ASIA (May 22, 2012), <https://www.refworld.org/docid/4fc8ad6123.html> [<https://perma.cc/K4RE-GDP6>] (reporting that 49 Taiwanese individuals suspected of involvement in an Internet

Chinese law at George Washington University Law School,<sup>7</sup> and other academics have criticized the Court decision for not adequately addressing human rights concerns of the Chinese criminal justice system,<sup>8</sup> the ruling is nevertheless precedential for New Zealand. Undoubtedly, the Court's decision will also inform government ministers and courts in other jurisdictions making or reviewing similar decisions about extradition to China.

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extortion ring would be deported to China, including some who were acquitted, because of the lack of diplomatic relations between Cambodia and Taiwan); Steven Jiang, 94 *Taiwanese Criminal Suspects Extradited from Spain to Beijing*, CNN (June 7, 2019), <https://www.cnn.com/2019/06/07/asia/taiwan-extradition-beijing-intl/index.html> [<https://perma.cc/Z92M-Y2RK>] (agreeing to China's request of extradition of Taiwanese citizens from Spain to China, in order to face charges of telephone and online fraud). China is not the only country that requests third countries to extradite foreign nationals. For example, Meng Wanzhou, a Chinese national and CFO of Huawei, was arrested in Vancouver, Canada by the Canadian government at the request of the United States. The following three years entailed a legal battle to see if she could be extradited to the United States. In May 2020, the British Columbia Supreme Court found she could be extradited. However, before the appeals process ended, U.S. prosecution reached a deferred prosecution agreement with Ms. Meng, which allowed for her return to China. Tracy Sherlock & Dan Bilefsky, *Extradition of Huawei Executive Clears a Major Legal Hurdle in Canada*, N.Y. TIMES (Sept. 25, 2021), <https://www.nytimes.com/2020/05/27/world/canada/huawei-extradition-meng-wanzhou.html> [<https://perma.cc/7UB3-8NYG>] ("A Vancouver court ruled that fraud charges against Meng Wanzhou in the United States would constitute a crime in Canada, opening the way for her extradition."); Clare Duffy & Evan Perez, *Huawei CFO Meng Wanzhou Reaches Agreement with US to Resolve Fraud Charges*, CNN (Sept. 25, 2021), <https://www.cnn.com/2021/09/24/tech/meng-wanzhou-huawei-us-plea-deal/index.html> [<https://perma.cc/ZD49-C4SY>] ("Huawei CFO Meng Wanzhou and the US Department of Justice . . . entered an agreement to defer prosecution of US charges against her until late 2022, after which point the charges could be dropped.").

7. Donald Clarke, *New Zealand's Troubling Precedent for China*, LAWFARE (June 15, 2021), <https://www.lawfareblog.com/new-zealands-troubling-precedent-china-extradition> [<https://perma.cc/HTK8-PRSV>].

8. See *id.* ("In a number of cases, [China] has clearly abused the legal process for political purposes . . . . Fear of reputational damages has constrained the government in these cases. China indeed wants . . . international cooperation in criminal matters. But it does not yet seem willing to pay for it in the coin of due process."); see also Anna High & Andrew Geddis, *Diplomatic Assurances as a Basis for Extradition to the People's Republic of China*, 7 N.Z. L.J. 1 (2021), <https://papers.ssrn.com/abstract=3911494> (discussing the relative strength of the assurances and concluding that the Court downplays how China has actually behaves in practice); Jerome A. Cohen, *Should Murder Go Unpunished? China and Extradition, Part 1*, THE DIPLOMAT (June 23, 2021), <https://thediplomat.com/2021/06/should-murder-go-unpunished-china-and-extradition-part-1/> [<https://perma.cc/8AX9-GSM5>] (noting that the Court's judgment is relying on the assumption that China is likely to honor its assurances of a fair trial, despite ample evidence showing a severe lack of judicial independence).

The purpose of this Article is to summarize the complex history of this ongoing case, which is the subject of several hundred pages of judicial rulings over the past decade. The Article focuses on the most recent New Zealand Supreme Court judgment, which canvasses the international law framework and cases that protect against torture and provide for fair trial during extradition proceedings. It ends with three brief observations about the broader implications of this individual case, the use of diplomatic assurances to prevent torture and ensure fair trial rights, and extradition law reform in New Zealand.

### I. The Underlying Accusation: The Alleged Murder of a Young Woman in Shanghai

The individual at the center of this lawsuit is Mr. Kyung Yup Kim, a 46-year-old citizen of South Korea who has been a permanent resident of New Zealand since the age of fourteen. His father, brother, and two adult daughters are New Zealand citizens, while his mother is also a South Korean citizen and New Zealand Permanent Resident. He considers New Zealand his home.<sup>9</sup>

In 2009, while visiting China on a tourist visa, the then-34-year-old Mr. Kim allegedly murdered a Chinese woman in Shanghai.<sup>10</sup> Ms. Peiyun Chen, 20-years-old, was last seen alive on December 10, 2009. Her body was found on December 31, 2009 in a remote location outside of Shanghai, wrapped in a large black cloth bound by tape with pieces of a colored quilt surrounding her head and torso.<sup>11</sup> Chinese police circulated pictures of the quilt, which was later identified by Mr. Kim's then-girlfriend, who had seen a similar quilt in the Shanghai apartment Mr. Kim rented from August 22 to December 14, 2009.<sup>12</sup> Police went to Mr. Kim's apartment and extracted blood samples, which they said matched Ms. Chen's DNA.<sup>13</sup> Police also examined Mr. Kim's phone records and alleged that he had contacted another South Korean man soon after Ms. Chen was last seen alive. Police reported that Mr. Kim told the South Korean man that he may have beaten a prostitute to death. Authorities stated there was additional evidence that suggested Ms. Chen engaged in prostitution.<sup>14</sup> None of the DNA evidence or allegations against Ms. Chen or Mr. Kim have been tried in court.

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9. *Kyung Yup Kim v. Minister of Justice* [2016] NZHC 1491 at [4–5].

10. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [1].

11. *Id.* at [13].

12. *Id.* at [12–13].

13. *Id.* at [15].

14. *Id.*

Mr. Kim departed China before police could question him. He traveled to South Korea and then to Auckland, New Zealand. On May 25, 2011, New Zealand received a formal request from China seeking to extradite Mr. Kim on one count of intentional homicide.<sup>15</sup> On June 10, 2011, New Zealand police arrested Mr. Kim in Auckland. He denied being involved in the alleged crime and was detained at Auckland's Mount Eden Corrections Facility pending the extradition process. Judges repeatedly denied his request for bail. In total Mr. Kim spent five years and three months in detention, which is believed to be the longest a person has remained in a New Zealand prison without being charged.<sup>16</sup> On September 20, 2016, he was granted bail to an Auckland address under 24-hour curfew and strict electronic monitoring.<sup>17</sup> In releasing Mr. Kim, a High Court Judge<sup>18</sup> stressed that he had the right not to be arbitrarily detained, and any police concern about flight risk could be managed administratively.<sup>19</sup> Nearly three years later, on July 17, 2019, the same High Court Judge relaxed the strict bail conditions, noting that Mr. Kim had been detained, in custody or in 24-hour home detention, for over eight years on unproven allegations.<sup>20</sup>

Separately, more than twelve years after her death, Ms. Chen's family continue to seek answers for their daughter and sister.<sup>21</sup>

## II. Procedural History

This was China's first-ever extradition request of a New Zealand citizen or permanent resident.<sup>22</sup> New Zealand and China do not have an

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15. *Id.* at [1].

16. Charlotte Graham-McLay, *New Zealand Court, Blocking Extradition, Is Latest to Rebuke China's Judiciary*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/world/asia/new-zealand-china-extradition.html> [<https://perma.cc/L3N2-T9WN>].

17. *Kyung Yup Kim v. Attorney General* [2016] NZHC 2235 at [41].

18. The High Court of New Zealand is the superior court of the country and has general jurisdiction. See *Our New Zealand Court System: Overview of the Appeal Process*, N.Z. MINISTRY OF JUST., <https://www.justice.govt.nz/assets/Documents/Publications/our-nz-court-system.pdf> (on file with *Columbia Human Rights Law Review Online*).

19. *Kyung Yup Kim v. Attorney General* [2016] NZHC 2235 at [25–26, 41].

20. *Id.* at [5].

21. See Caley Callahan, *Family of Young Woman Killed in Shanghai Want NZ Murder-Accused Extradited*, NEWSHUB (Apr. 6, 2021), <https://www.newshub.co.nz/home/new-zealand/2021/06/family-of-young-woman-killed-in-shanghai-want-nz-murder-accused-extradited.html> [<https://perma.cc/9DSL-HSMJ>].

22. There has been "mutual assistance" between New Zealand and China and voluntary cooperation by a suspect, such as in *Yan v. Commissioner of Police*, resulting in the recovery of alleged financial proceeds of crime from a New Zealand citizen accused of serious fraud in China and money laundering in New Zealand. [2015] NZHC 2544. There are also "currently nine New Zealand citizens detained in Chinese prisons or detention

extradition treaty. The then-Minister of Justice, Simon Power, decided that the extradition request would be dealt with under New Zealand's Extradition Act of 1999.<sup>23</sup> The applicable process is two-fold: a District Court Judge determines whether an individual is eligible for surrender, and if so, the Minister of Justice then determines whether the person should be surrendered to the requesting country.<sup>24</sup>

On November 9, 2013, a District Court Judge determined that Mr. Kim was eligible for surrender.<sup>25</sup> On November 30, 2015, after receiving assurances<sup>26</sup> from the Chinese government that Mr. Kim would receive a fair trial and not be tortured—despite evidence that torture was still used in China<sup>27</sup>—then-Minister of Justice Amy Adams determined that Mr. Kim should be surrendered to China.<sup>28</sup> Given China's reforms of their criminal justice system by their Criminal Procedure Laws of 1996 and 2012, the aforementioned assurance that China would abide by the International Covenant on Civil and Political Rights ("ICCPR"), and their relevant domestic laws, the Minister believed that Mr. Kim would receive a fair trial "to a reasonable extent."<sup>29</sup> She believed that China would not impose the death penalty on Mr. Kim, particularly because China had honored a previous

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facilities" who were arrested inside China. See *Kyung Yup Kim v. Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [220]. New Zealand has never extradited anyone to China, nor has it previously sought formal assurances on torture or fair trial rights from any country. *Id.* at [233].

23. Extradition Act 1999, S 60 (N.Z.).

24. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [3]; see also ALBERTO COSTI, *Jurisdiction*, in PUBLIC INTERNATIONAL LAW: A NEW ZEALAND PERSPECTIVE 414–26, 438–47 (2020) (providing an extensive analysis on the theory and practice of extradition law in New Zealand).

25. *Re Kim DC Auckland* [2013] CRI-2011-004-11056.

26. See the discussion and language of the assurances *infra* Part III.D.

27. Notwithstanding China's efforts to address the practice of torture and related problems in the criminal justice system, the UN Committee Against Torture in 2008 remained "deeply concerned about the continued allegations, corroborated by numerous Chinese legal sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings." Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: China, U.N. Doc. CAT/C/CHN/CO/4, at ¶ 11 (Dec. 12, 2008); see also Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of China, U.N. Doc. CAT/C/CHN/CO/5, at ¶¶ 6–10, 16, 20–23 (Feb. 3, 2016) (noting that China had failed to implement the recommendations identified in the 2008 report, which includes legal safeguards to prevent torture).

28. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [5, 19].

29. *Id.* at [20]; see also *id.* at [339–40] (noting that Mr. Kim would likely face trial in Shanghai, a more developed area with less political interference and a "greater respect for the law").

assurance not to impose the death penalty where a Chinese national had killed a taxi driver in New Zealand but was later tried in China under extraterritorial jurisdiction.<sup>30</sup>

Mr. Kim successfully challenged the Minister's decision on judicial review before a High Court Judge.<sup>31</sup> The High Court was satisfied that, in the absence of assurances, there were substantial grounds to believe Mr. Kim risked torture if extradited, concluding his risk was higher than assessed by the Minister.<sup>32</sup> The High Court was concerned that China's assurances did not appear to permit New Zealand representatives to disclose information about Mr. Kim's treatment to third parties.<sup>33</sup> The Judge also held that the Minister had not specifically addressed whether the assurances sufficiently protected Mr. Kim from ill-treatment and guaranteed his right to silence during pre-trial interrogations.<sup>34</sup>

After reconsideration and receiving further diplomatic assurances, the Minister again decided on September 19, 2016 that Mr. Kim should be surrendered.<sup>35</sup> The Minister concluded that: (1) Mr. Kim's treatment would be proactively monitored; (2) New Zealand would be able to disclose information about Mr. Kim's treatment to third parties in appropriate circumstances; (3) Mr. Kim's rights would be sufficiently protected despite the absence of a lawyer during pre-trial interrogations; and (4) there would be no legal consequence under Chinese law if Mr. Kim refused to answer questions during pre-trial interrogations.<sup>36</sup>

Mr. Kim applied for judicial review of this decision but was unsuccessful in the High Court.<sup>37</sup> He then appealed to the Court of Appeal, New Zealand's penultimate civil and criminal appeal court. On June 11, 2019, in a notable and influential decision,<sup>38</sup> a three-judge bench of the Court of Appeal ruled 3-0 to quash the extradition and ordered reconsideration of the

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30. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [21].

31. *Id.* at [6].

32. *Id.* at [25].

33. *Id.*

34. *Id.* at [26].

35. *Id.* at [7]; *Kyung Yup Kim v. Minister of Justice* [2019] NZCA 209 at [39]. The High Court had asked the Minister to reconsider her decision in light of the Court's February 2016 decision, the first judicial review of Mr. Kim's case. *Kyung Yup Kim v. Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [262].

36. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [29].

37. *Id.* at [8].

38. Charlotte Graham-McLay, *New Zealand Court, Blocking Extradition, Is Latest to Rebuke China's Judiciary*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/world/asia/new-zealand-china-extradition.html> [<https://perma.cc/KZ4D-DDEA>].



Minister's decision in light of "wide-ranging" human rights concerns.<sup>39</sup> These concerns included the effectiveness of assurances to address the risk of torture and issues related to the risk of Mr. Kim not receiving a fair trial. The Government appealed to the Supreme Court.

### III. The Supreme Court's Decision

On June 4, 2021, the New Zealand Supreme Court's five-judge bench<sup>40</sup> significantly narrowed the list of issues that the Court of Appeal had said required clearer assurances from the government of China. The Court concluded 5–0 that, assuming the issues it raised in its ruling were resolved, there is no real risk that Mr. Kim would be subject to an act of torture if surrendered, nor would there be a real risk of an unfair trial.<sup>41</sup>

In its decision, the Court addressed: (1) the proper standard of review; (2) whether the Minister was obliged to make a preliminary assessment of the general human rights situation in China before seeking assurances; (3) the circumstances in which it is possible to rely on assurances related to torture; (4) whether the assurances relating to torture were sufficient; (5) the proper test to assess whether Mr. Kim will receive a fair trial; (6) whether China's assurances on fair trial are adequate; and (7) whether the Minister should have received an assurance in regard to the time Mr. Kim already served in pre-trial detention.<sup>42</sup>

#### A. Standard of Review

As neither party challenged the lower court's determination regarding the appropriate standard of review, the Court accepted that the case would be analyzed under heightened scrutiny.<sup>43</sup> The New Zealand Human Rights Commission as intervenors, however, argued for a standard a

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39. *Kyung Yup Kim v. Minister of Justice* [2019] NZCA 209 at [274].

40. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [1]. The bench comprised of Justice Glazebrook (author of the decision), Justice Mark O'Regan, Justice Ellen France, and, for this case alone, Justice Terence Arnold, a retired acting judge, and Justice Christine French, a Court of Appeal judge. Two of the three judges of the Court of Appeal decision, Justice Helen Winkelmann (author of the decision) and Justice Joe Williams, were elevated to the Court in March and May 2019 respectively, the former as Chief Justice. Both were recused at the Court hearings in February and July 2020. High & Geddis, *supra* note 8. Looking at the Court composition for future cases, two of the current Court's six judges (Justices Young and O'Regan) reach mandatory retirement age in early 2022, and early 2023, respectively. All judges in New Zealand must retire at the age of seventy. Seniors Courts Act of 2016, s 133 (N.Z.).

41. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [471].

42. *Id.* at [38].

43. *Id.* at [40–46].

correctness<sup>44</sup>—a standard, the Court noted, that may affect the factual determinations but be difficult to apply in practice.<sup>45</sup> Recognizing these constraints, the Court concluded that the standard of review may ultimately have little influence on the outcome of this particular case.<sup>46</sup>

B. Whether the Minister Was Obligated to Make a Preliminary  
Assessment of the General Human Rights Situation in  
China Before Seeking Assurances

Reversing the Court of Appeal, the Court stated that it is not necessary for the Minister to make a preliminary assessment as to whether the human rights situation in China allowed for New Zealand to rely on China's assurances.<sup>47</sup> The Court found that as long as the New Zealand decisionmaker properly takes into account the general human rights situation in China, it is unnecessary to conduct a separate preliminary consideration.<sup>48</sup>

C. Circumstances in Which It Is Possible to Rely on Assurances  
Related to Torture

To address this broad question, the Court evaluated three sub-questions. First, whether allowing extradition to a country that practices torture would breach the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").

The Court stated that it would be a violation of UNCAT to send someone to a jurisdiction where there are substantial grounds to believe they would be in danger of being subjected to torture.<sup>49</sup> However, the Court

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44. *Id.* at [42–44].

45. *Id.* at [49].

46. *Id.* at [50]. The Court also noted that both parties accepted that Mr. Kim cannot be surrendered if there are substantial grounds to believe he would be in danger of an act of torture in China. *Id.* at [47]. They further noted that though there is disagreement on the test to determine whether there will be a fair trial, there is agreement that Mr. Kim cannot be surrendered if he would not receive a fair trial in China. *Id.* at [48]. They concluded that in both cases, the decision "can be seen as largely factual." *Id.*

47. *Id.* at [64]. The Court noted that in the extreme instances where the body giving assurances has no control over the territory, it may be pointless for the Court to rely on such assurances. However, the Court asserts that the existence of such extreme situations does not necessitate preliminary assessments of whether to seek assurances in every case. *Id.* at [57].

48. *Id.* at [57].

49. *Id.* at [110] (outlining the obligation of non-refoulement as set out in Article 3(1) of the Convention); see Convention Against Torture and Other Cruel, Inhuman or

also endorsed one comment by the European Court of Human Rights in *Othman v. United Kingdom*:<sup>50</sup> that is not for the court to “rule upon the propriety of seeking assurances, or to assess the long-term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.”<sup>51</sup>

Second, the Court addressed whether assurances can be sought where—absent assurances—there would be substantial grounds to believe the person to be extradited would be in danger of being subjected to torture or, in other words, at a real risk of torture. The Court agreed with the submission of Canada, Denmark, the United Kingdom, and the United States<sup>52</sup> for the Committee Against Torture’s General Comment No. 4<sup>53</sup> that

[T]he essential question in evaluating any particular use of diplomatic assurances is whether, taking into account the content of the assurances, their credibility and reliability, and the totality of other relevant factors relating to the individual and the government in question, there are substantial grounds for believing that the individual would be in danger of being tortured in the country to which he or she is being transferred.<sup>54</sup>

Lastly, the Court considered whether assurances could be sought from a state where torture is systemic. The Court emphasized that New Zealand’s “statutory framework is predicated on the ability to seek undertakings or assurances” related to the danger of torture.<sup>55</sup> Moreover, the

Degrading Treatment or Punishment art. 3(1), *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, (entered into force June 26, 1987).

50. *Othman (Abu Qatada) v. United Kingdom*, App. No. 8139/09, ¶ 186 (Eur. Ct. H.R. Jan. 17, 2012).

51. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [111].

52. Joint Observations of Canada, Denmark, the United Kingdom and the United States of America on Paragraphs 19–20 of the Committee Against Torture’s Draft General Comment No. 1 (2017) on Implementation of Article 3 in the Context of Article 22 (Mar. 31, 2017), <https://www.ohchr.org/Documents/HRBodies/CAT/GCArticle3/JointSubmission.pdf> [<https://perma.cc/LLA9-KHKS>] (discussing their general support for diplomatic assurances as an effective tool in ensuring compliance to Article 3’s non-refoulement obligations, and noting that while such assurances are not appropriate in all circumstances, they can be relevant considerations when asking whether an individual faces the risk of torture)

53. See also U.N. Committee Against Torture (CAT), *General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22*, ¶ 20, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018), [https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4\\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf) [<https://perma.cc/DY7S-8DXQ>] (noting that while such assurances are not appropriate in all circumstances, they can be relevant considerations when asking whether an individual faces the risk of torture).

54. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [121].

55. *Id.* at [115].

Court observed UNCAT does not prohibit assurances from states with systemic torture.<sup>56</sup> The Court accepted the position of United Nations Special Rapporteurs and other commentators that torture may be more difficult to detect in countries where it is systemic, and accordingly, closer monitoring and more extensive diplomatic assurances will be required in states with systemic torture.<sup>57</sup> However the Court did not rule out the possibility that assurances could mitigate the danger of torture in these states.<sup>58</sup>

In answering all three questions, the Court reasoned that not accepting assurances presented a “Catch-22.”<sup>59</sup> Seeking assurances because of a country’s systemic pattern of torture, but then rejecting these assurances because they should have been asked in the first instance is an unresolvable paradox, amounting to an “absolute prohibition” on assurances.<sup>60</sup> To move past this, the Court stated the question for the Minister is “whether there is a real risk of a person being subjected to torture.”<sup>61</sup> Assurances must be weighed in this consideration and can be accepted “in relation to a person at high risk of torture and a state where torture is systemic, provided the assurances are sufficiently comprehensive, there is adequate monitoring and there is a sufficient basis for concluding that the assurances will be complied with.”<sup>62</sup>

#### D. Whether the Assurances Relating to Torture Are Sufficient

As a baseline, the Court adopted the approach in *Othman*, which outlined an intertwined three-step inquiry.<sup>63</sup>

What is the risk to the individual, when considered in light of the particular characteristics and situation of the individual, and the general human rights situation in the country where the person would be sent?<sup>64</sup>

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56. *Id.* at [124].

57. *Id.* at [126].

58. *Id.*

59. *Id.* at [127].

60. *Id.*

61. *Id.*

62. *Id.* at [128].

63. *Id.* at [132].

64. *Id.*

What is the quality of assurances given, and would they, if honored, adequately mitigate the risk the individual would otherwise face?<sup>65</sup>

Can the assurances be relied upon in light of the situation in the receiving state and any other relevant factors (such as the strength of the bilateral relationship between the receiving and sending states)?<sup>66</sup>

As part of this inquiry, the Court first considered whether the Minister erred in assessing the individual risk to Mr. Kim in light of the general human rights situation in China.<sup>67</sup> It noted the Minister did not consider the relevance of a report by the non-governmental organization Human Rights Watch, which deemed murder suspects to be at high risk of torture.<sup>68</sup> While the Minister was allowed to prefer evidence from one expert over another, the Court deemed that she had underestimated Mr. Kim's relative risk of torture as a murder suspect.<sup>69</sup> The Court emphasized that this alone did not invalidate the Minister's decision, but it does require the Minister to emphasize the second and third prongs of the above-mentioned inquiry.<sup>70</sup>

The Court then assessed the quality of the assurances provided by China related to torture.

First Assurance:<sup>71</sup>

As a State Party to the [UNCAT], ... [China] will comply with the Convention to ensure [Mr. Kim] will not be subject to torture or other cruel, inhuman and degrading treatment or punishment. The PRC side will honour the above assurances.<sup>72</sup>

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65. *Id.*

66. *Id.*

67. *Id.* at [197-256].

68. *Id.* at [208-09].

69. *Id.* at [210]. The Court also noted that other factors diminished his risk: he was not a member of a minority group, he was not a political prisoner, and he would be held in an urban area. Moreover, the Court added the strength of the *prima facie* case against him, and the advanced stage of the investigation.

70. *Id.* at [211].

71. Please note that this Article only discusses the assurances that the court analyzed during this three-step inquiry. The other assurances were omitted by the Court and are thus correspondingly omitted here.

72. *Id.* at [213].

The Court noted that this statement, if it stood alone, would be too general,<sup>73</sup> and that torture persists in China despite it being a party to UNCAT and despite domestic reforms.<sup>74</sup>

Second Assurance:

After surrender to the PRC from New Zealand, [Mr. Kim] will be brought to trial without undue delay, pursuant to the Criminal Procedure Law of the [PRC].<sup>75</sup>

The Court deemed this assurance to be relevant and sufficient,<sup>76</sup> as torture is more likely to occur during the investigation phase.<sup>77</sup>

Third Assurance:

During all periods of Mr. Kim's detention . . . New Zealand [government] representatives will be informed in a timely manner of where [he] is detained and of any changes to the place of his detention.<sup>78</sup>

The Court deemed this assurance to be incomplete, as there was no guarantee that Mr. Kim would be detained in Shanghai, which was the presumption underlying most of the Minister's analysis.<sup>79</sup> New Zealand's ability to monitor Mr. Kim's situation is predicated on his detention in Shanghai, where the New Zealand Consulate-General is located.<sup>80</sup> The Court determined that there should have been an explicit assurance that Mr. Kim would be tried and detained in Shanghai.<sup>81</sup>

Fourth Assurance:

During all periods of Mr. Kim's detention . . . he will be able to contact New Zealand [government] representatives at all reasonable times, [and] such contact . . . will not be censored or edited in any way. Any such contact with New Zealand [government] representatives under this paragraph will be used for the sole purpose of obtaining

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73. *Id.* at [214].

74. *Id.*

75. *Id.* at [218].

76. *Id.* at [219].

77. *Id.* at [220].

78. *Id.* at [221].

79. *Id.* at [223].

80. *Id.*

81. *Id.*

information on the treatment of [Mr. Kim] and will not otherwise be disclosed to third parties.<sup>82</sup>

The Court accepted the advice the Justice Minister received from the New Zealand Foreign Ministry that information from Ministry visits could be provided to other countries should any problems arise, thus upholding the effectiveness of the assurance.<sup>83</sup>

Fifth Assurance:

During all periods of Mr. Kim's detention . . . New Zealand [government] representatives, [accompanied by a Chinese interpreter, medical and/or legal professional of New Zealand's choosing], may visit him at his place of detention . . . on a regular basis and permitted once every fifteen days . . .<sup>84</sup>

The Court concluded this assurance should explicitly allow for visits every forty-eight hours (not every fifteen days) during the investigation stage.<sup>85</sup> Moreover, a fifteen-day timeline, with prior notice required to authorities, diminished the quality of the assurance.<sup>86</sup>

Sixth Assurance:

There will be no reprisal against persons who supply information regarding [Mr. Kim's] treatment to New Zealand [Government] representatives, if the information is provided in good faith.<sup>87</sup>

The Court noted this did not add greatly to the efficacy of the monitoring regime.<sup>88</sup>

Seventh Assurance:

[Mr. Kim] will be entitled to retain a lawyer licensed to practise law in the PRC to defend him . . . [He] shall be entitled to meet with his lawyer in private without being monitored. In addition, he has the right to receive legal aid according to Chinese law.<sup>89</sup>

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82. *Id.* at [129].

83. *Id.* at [227-28].

84. *Id.* at [129].

85. *Id.* at [234].

86. *Id.* at [235-36].

87. *Id.* at [129].

88. *Id.* at [248].

89. *Id.* at [288].

Despite the fact that a lawyer was not entitled to be present during Mr. Kim's interrogation, the Court did not consider this a fatal flaw and noted the monitoring arrangements and recording requirements in other assurances were adequate.<sup>90</sup>

Tenth Assurance:

The PRC will, on request, provide New Zealand . . . with full and unedited recordings of all:

(i) pre-trial interrogations of [Mr. Kim]

(ii) court proceedings relating to [Mr. Kim], including recordings during any period when the hearing is closed.

Any recording provided under this paragraph to New Zealand . . . will be used for the sole purpose of obtaining information on the treatment of [Mr. Kim] and in respect of paragraph 11, and will not otherwise be disclosed to third parties.<sup>91</sup>

The Court believed the Minister was entitled to put weight on this assurance as an added safeguard.<sup>92</sup> They also considered and agreed with the High Court's view that this assurance was "strengthened by including a promise that there will be no unrecorded interrogations."<sup>93</sup>

Twelfth Assurance:

In the event of any issue arising in relation to [these assurances] or . . . to the treatment of [Mr. Kim], the PRC and New Zealand will immediately enter into consultations in order to resolve the issue in a manner satisfactory to both sides . . .<sup>94</sup>

The Court viewed this assurance, which provided for a clear mechanism to address poor treatment, to be of sufficient quality.<sup>95</sup> They noted that "any poor treatment by local authorities could be brought to the

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90. *Id.* at [249].

91. *Id.* at [129, 251]. The eleventh assurance is that "the PRC will comply with applicable international legal obligations and domestic requirements requiring a fair trial." *Id.* at [129, note 160]; *see also id.* at [380] (noting that being allowed to have an unmonitored meeting with his lawyer within 48 hours of any request falls under the eleventh assurance).

92. *Id.* at [255].

93. *Id.* at [251].

94. *Id.* at [129].

95. *Id.* at [256].



attention of the central government,” and that this assurance is strengthened by “the long-standing and strong bilateral relationship” between New Zealand and China.<sup>96</sup>

Finally, the Court evaluated the likelihood that the assurances, not formally binding under international law, would be honored.<sup>97</sup> The Court considered the seniority and authority of Chinese officials who made these assurances, finding that both were indicative of China’s commitment to upholding assurances.<sup>98</sup> It also found that the frequent monitoring outlined in the assurances also contributed to the likelihood that the assurances would be upheld.<sup>99</sup>

The Court concluded by stating this case was not an instance where there could be no extradition even with assurances.<sup>100</sup> Instead, it emphasized the areas where further assurances could be obtained. If received, the assurances would provide a sufficient basis for the Minister to conclude there are no substantial grounds to believe Mr. Kim would be in danger of being subjected to torture were he surrendered.<sup>101</sup>

#### E. The Proper Test for Assessing Whether There Will Be a Fair Trial<sup>102</sup>

Instead of formulating an alternative test, the Court chose to use the longstanding test for considering fair trial issues as outlined in the 2012 European Court of Human Rights case *Othman v. United Kingdom*, which asks “whether there is a real risk of a flagrant denial of justice.”<sup>103</sup> In examining this question, courts must consider whether the trial would be inadequate under the fair trial requirements in Article 14 of the ICCPR.<sup>104</sup> Whether a trial falls below minimum international standards is judged holistically and not in relation to individual requirements of Article 14 of the ICCPR. However, the absence of one of the individual requirements, such as language

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96. *Id.* at [256, note 298].

97. *Id.* at [257–62].

98. *Id.* at [258].

99. *Id.* at [262].

100. *Id.* at [264].

101. *Id.*

102. *Id.* at [266–421].

103. *Id.* at [277–78]. This test originated in *Soerig v. United Kingdom*, App. No. 14038/88, at ¶ 113 (Eur. Ct. H.R. July 7, 1989).

104. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [278]; *see also* Hum. Rts. Comm., General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007), (examining the fair trial requirements required by Article 14 of the ICCPR, including the issue of language between the accused and the courts).

interpretation, may mean there could not be a fair trial.<sup>105</sup> The Court explicitly rejected a position in a Ministerial briefing, prepared by Crown Law and endorsed by the Justice and Foreign Ministries, that had advised the Minister that the standard in extradition cases should be compliance with fair trial standards “to a reasonable extent.”<sup>106</sup> The Court rightly emphasized that

[a] trial is either fair or it is not. A somewhat fair trial would not suffice. We also note that we do not accept that there should be a balancing of the right to a fair trial and the public interest in extradition. There can be no public interest in extradition to an unfair trial.<sup>107</sup>

#### F. Whether the Assurances Relating to Fair Trial Issues Are Sufficient

China provided six fair trial assurances and the Court evaluated the five that were of concern to the Court of Appeal: (1) judicial independence; (2) the right to silence; (3) the right to legal assistance; (4) disclosure; and (5) the right to examine witnesses.<sup>108</sup>

##### 1. Judicial Independence

The Court extensively canvassed the role of Chinese courts, judicial committees, and political influence on the courts relying on new information not available to lower courts.<sup>109</sup> The Court of Appeal had considered the lack of independence of the judiciary to be both structural and systemic.<sup>110</sup> However, the Supreme Court did not consider the high conviction rates (reportedly 98–99%), or the aim of exerting social stability and crime control to be indicative of judicial dependence.<sup>111</sup> It affirmed the Minister’s finding that the likelihood of political interference was low since Mr. Kim’s alleged offending was only “ordinary criminal offending and not ‘political’ offending.”<sup>112</sup>

As for judicial committees, the Court could not come to any definitive conclusions as to whether a referral to judicial committees would breach Mr.

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105. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [279].

106. *Id.* at [276].

107. *Id.* at [281].

108. *Id.* at [290].

109. *Id.* at [334, 346–54].

110. *Kyung Yup Kim v. Minister of Justice* [2019] NZCA 209 at [217].

111. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [337].

112. *Id.* at [339].

Kim's fair trial rights.<sup>113</sup> The Court concluded the Minister should make further enquiries and consider whether the judicial committee system, as it may operate in Mr. Kim's case, would meet minimum international standards for independence and impartiality.<sup>114</sup>

## 2. Right to Silence

The Court determined that the Minister was correct in finding that Mr. Kim will effectively have the right to silence as there will be no consequences if he fails to answer any questions posed to him.<sup>115</sup> Further, as long as Mr. Kim cannot be compelled to testify or confess guilt, the fact that a lawyer would not be present during interrogations does not mean his trial would not fall below minimum international standards for a fair trial.<sup>116</sup>

## 3. Right to Legal Assistance

The Court found that there are enough safeguards to ensure that his counsel would be able to defend him accordingly.<sup>117</sup>

## 4. Disclosure

On the issue of disclosure, the Court disagreed with the Court of Appeal that a specific assurance was required.<sup>118</sup> It found that Mr. Kim had been provided with details of his charge and access to information about the case against him, satisfying the requirement in Article 14(3) of the ICCPR.<sup>119</sup> Further, the Court found that access to Mr. Kim's file was "adequate time for

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113. *Id.* at [355]; *see id.* at [342] ("A very common criticism of the judicial committee system has been that it 'leads to a separation between the trial process and the actual decision-making.'"). The Chinese judicial system includes "judicial committees," sometimes referred to as "adjudication committees," that review major cases by lower judges, and can overturn lower court decisions that can thus not be appealed. *See Judicial Independence in the PRC*, CONG.-EXEC. COMM'N ON CHINA (2021), <https://www.cecc.gov/judicial-independence-in-the-prc> [<https://perma.cc/XH38-RMYM>] (reporting that the Chinese judicial system does not have adequate controls to ensure independent decision-making); Polly Botsford, *China's Judicial Reforms Are No Revolution*, INT'L BAR ASS'N, <https://www.ibanet.org/article/846c87e8-a4aa-4a88-a7fc-e6fc136c2fca> [<https://perma.cc/MPY5-SSWB>] (noting that despite recent reforms to the Chinese judicial system, the changes are unlikely to challenge the underlying system and thus fail to address frequent criticisms by scholars and practitioners).

114. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [355].

115. *Id.* at [362–63].

116. *Id.* at [367].

117. *Id.* at [379–83].

118. *Id.* at [404].

119. *Id.* at [402–03].

trial preparation” and was consistent with international minimum fair trial standards.<sup>120</sup>

### 5. Right to Examine Witnesses

The Court noted the lower court’s concerns that the Chinese inquisitorial legal system lacks cross-examination and seldom requires witnesses to appear in person.<sup>121</sup> Nevertheless, the Court ruled that an inability to cross-examine witnesses does not mean a trial risks being unfair.<sup>122</sup> Further, the Court ruled it was sufficient that the Chinese legal system allows witnesses with contested evidence to appear in court and be cross-examined if required.<sup>123</sup>

In conclusion, the Court noted that when assessing the above factors, there is no real risk of Mr. Kim not receiving a fair trial that overall meets minimum international standards.<sup>124</sup> The Court asserted that “subject to certain additional assurances being obtained and certain inquiries satisfactorily resolved, domestic Chinese law, if followed, would accord Mr. Kim a fair trial.”<sup>125</sup> Moreover, it found that the Minister was correct in relying on the assurances provided.<sup>126</sup>

### G. Whether the Minister Should Have Received an Assurance with Regard to Remand Time

The final issue the Court analyzed was whether an assurance should have been sought that Mr. Kim’s time in detention in New Zealand would count toward his final sentence, should a finite one be imposed.<sup>127</sup> The Court ruled that a finite sentence that did not take into account time served in New Zealand would not breach Article 7 of the ICCPR.<sup>128</sup> While the Court of Appeal found the Minister should have sought an assurance, the Court here only held that the Minister could have required an assurance, but the absence of one does not prevent a surrender.<sup>129</sup>

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120. *Id.* at [404].

121. *Id.* at [409–21].

122. *Id.* at [420].

123. *Id.* at [410].

124. *Id.* at [422–23].

125. *Id.* at [423].

126. *Id.*

127. *Id.* at [424–33].

128. *Id.* at [427]. The Court also ruled it does not breach Section 9 of the 1990 New Zealand Bill of Rights Act, which establishes “the right not to be subject to torture or to cruel, degrading, or disproportionate severe treatment or punishment.” *Id.*

129. *Id.* at [433].

#### IV. What Happens Next in this Case?

Despite the Court's unanimous opinion clarifying broader issues, it did not clearly rule for or against extradition in this particular case. Instead, in a convoluted 3–2 decision, the majority adjourned the matter, asking the Government to submit any further assurances received from China, and for the Government and Mr. Kim to jointly indicate to the Court any points of disagreement and whether another hearing is sought.<sup>130</sup> On this procedural point, the two dissenting judges would have upheld the Court of Appeal's finding to quash the decision of the previous Minister<sup>131</sup> to surrender Mr. Kim. They would have further ordered that the Minister reconsider the decision in light of the five years that had passed since the previous Minister made her decision on September 19, 2016.<sup>132</sup> Any new decision would be subject to a new, and likely lengthy, judicial review process. The majority left the option of a new decision to the discretion of the Minister.<sup>133</sup> They noted that the Minister would be "entitled to depart from the previous Minister's decision" and "recognise[d] that there may also be relevant changes in the circumstances [that had been] considered by the previous Minister."<sup>134</sup>

Mr. Kim's lawyer has indicated that, once all available domestic judicial remedies are exhausted, Mr. Kim intends to file an individual communication with the United Nations Human Rights Committee alleging

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130. *Id.* at [474]. On February 4, 2022, the Court held a contested hearing to consider assurances received from the Government of China. While the Court reserved its decision for later in 2022, the final surrender decision will remain with the Justice Minister. *Supreme Court to Weigh Assurances from China in Extradition Case of Murder-Accused*, RADIO N.Z. (Feb. 4, 2022), <https://www.rnz.co.nz/news/national/460867/supreme-court-to-weigh-assurances-from-china-in-extradition-case-of-murder-accused> [<https://perma.cc/XQV9-RBM9>].

131. The Honorable Amy Adams, of the center-right National Party, was Minister of Justice from October 8, 2014, until October 26, 2017 (in the Fifth National Government, which was in power from November 19, 2008 to October 26, 2017). *Hon. Amy Adams*, N.Z. PARLIAMENT (Oct. 19, 2020), <https://www.parliament.nz/en/mps-and-electors/former-members-of-parliament/adams-amy/> (last visited Feb. 25, 2022). The Honorable Kris Faafoi of the center-left Labour Party has been Minister of Justice since November 2, 2020, as part of the Sixth Labour Government which has been in power since October 26, 2017. *Ministerial List for Announcement on Monday, 2 November 2020*, DEP'T OF THE PRIME MINISTER AND CABINET, [https://cdn.theconversation.com/static\\_files/files/1309/482507295-Ministerial-List.pdf?1604279064](https://cdn.theconversation.com/static_files/files/1309/482507295-Ministerial-List.pdf?1604279064) [<https://perma.cc/3RND-VGA3>].

132. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [481].

133. *Id.* at [473].

134. *Id.*

violations of the ICCPR.<sup>135</sup> New Zealand, through the First Optional Protocol to this Covenant, has accepted this Committee's competence to review such complaints.<sup>136</sup> Mr. Kim would also be entitled to request the application of interim measures,<sup>137</sup> which, if accepted by the Committee, would place a good faith requirement on New Zealand not to extradite Mr. Kim while his case is under the Committee's consideration.<sup>138</sup> The extradition process for Mr. Kim therefore remains ongoing and unlikely to resolve quickly.

## V. Observations

While the ambit of this Article is to summarize the long, complex history of this ongoing case, this Section highlights three broader observations. First, this case is a world-leading test case for the extradition of non-Chinese citizens to China. This is the first time China has formally requested the extradition of a foreign national and the domestic court of last resort has ruled that one of its own citizens or permanent residents could be extradited.<sup>139</sup>

In advancing a case involving an alleged violent crime, the Chinese government chose a sympathetic fact pattern to make a strong argument for extradition.<sup>140</sup> Indeed, given the serious allegations against Mr. Kim, and the

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135. RNZ, *Man Accused of Murder Fights Extradition to China*, NEWSHUB (May 6, 2021), <https://www.newshub.co.nz/home/new-zealand/2021/06/man-accused-of-murder-fights-extradition-to-china.html> [https://perma.cc/S52E-464C].

136. *International Covenant on Civil & Political Rights*, N.Z. MINISTRY OF JUST., <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/international-covenant-on-civil-and-political-rights/> ("The Government of New Zealand . . . recognises the competence of the Human Rights Committee to receive and consider communications from another State Party which has similarly declared under article 41 its recognition of the Committee's competence . . .") (last visited Feb. 25, 2022).

137. Hum. Rts. Comm., Rules of Procedure of the Human Rights Committee, Rule 94(1), U.N. Doc. CCPR/C/3/Rev.12 (Jan. 4, 2021) ("[T]he Committee may request that the State party concerned take on an urgent basis such interim measures as the Committee considers necessary to avoid possible actions which could have irreparable consequences for the rights invoked by the [individual concerned].").

138. While not binding, the Optional Protocol of the ICCPR asserts that "failure to implement such measures is incompatible with the obligation to respect in good faith the procedure of individual communications." Hum. Rts. Comm., General Comment No. 33, ¶ 19, U.N. Doc. CCPR/C/GC/33 (June 25, 2009).

139. As noted earlier, China has previously requested and succeeded in extraditing foreign nationals from a third country. See *supra* notes 5–6 and accompanying text; *Minister of Justice v. Kyung Yup Kim* [2016] NZHC 1490, [2016] 3 NZLR 425 at [254] (noting that this is the first time New Zealand has extradited a citizen or permanent resident to China).

140. Clarke, *supra* note 7.

strength of the alleged evidence against him, some may question the Court's focus on the protection of his rights. Yet, a rebuttal to this emphasis on adherence to international human rights agreements is that the Court understands this case will set a precedent that will very likely have legal and political implications beyond New Zealand's borders.<sup>141</sup>

The Court's ruling is a powerful reminder that while extradition is an important international legal tool to fight impunity for serious crimes, so too is the international law framework protecting both citizens and foreigners against torture and guaranteeing the right to a fair trial. In response to this ruling, China may seek to increase the success and speed of extradition requests by improving their human rights standards and their practice of such standards within their criminal justice system.<sup>142</sup> In the interim, while there is not yet an agreed set of criteria for assessing the risk of torture and unfair trial in extradition cases to China, New Zealand's highest court has provided invaluable guidance. At the same time, the Court's ruling has also been criticized for not fully addressing human rights concerns about the Chinese criminal justice system.<sup>143</sup> In contrast, the earlier Court of Appeal decision ensured safeguards more robustly; for example, by insisting on an explicit assurance that time served in detention in New Zealand for the alleged crime would count towards any finite sentence received in China.<sup>144</sup> Unfortunately, the Supreme Court also avoided directly deciding some substantive questions. For example, despite its extensive analysis of China's "judicial committee system," the Court concluded it would be for the Minister

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141. High & Geddis, *supra* note 8.

142. See, e.g., *New Progress in the Legal Protection of Human Rights in China*, STATE COUNCIL INFO. OFF. PEOPLE'S REPUBLIC OF CHINA (Dec. 15, 2017), <http://www.scio.gov.cn/zfbps/ndhf/36088/Document/1613605/1613605.htm> [<https://perma.cc/QA4U-XGLC>] (affirming the national commitment to human rights and citing recent reforms decreasing the number of crimes punishable by the death penalty, stricter rules excluding illegally obtained evidence, requiring interrogations to be recorded under certain circumstances, and more). *But see* AMNESTY INT'L, CHINA 2020 (2021), <https://www.amnesty.org/en/location/asia-and-the-pacific/east-asia/china/report-china/> [<https://perma.cc/FK33-4AKD>] (asserting that China continues its persecution of human rights defenders, restricted human rights organizations from access to regions such as Tibet and Xinjiang where violations are allegedly occurring and continues to challenge established human rights mechanisms); HUM. RTS. WATCH, WORLD REPORT 2021: CHINA, <https://www.hrw.org/world-report/2021/country-chapters/china-and-tibet> [<https://perma.cc/XG3W-X424>] (reporting continued violations of international human rights obligations and norms, such as the Hong Kong National Security Law; abuses against the domestic Muslim population; and its resolution on "mutually beneficial cooperation" at the Human Rights Council, which ignores states' responsibility to protect human rights).

143. See *supra* notes 7–8 and accompanying text.

144. *Kyung Yup Kim v. Minister of Justice* [2019] NZCA 209 at [267].

to make further enquiries and to consider whether the system as it may operate in Mr. Kim's case would meet minimum international fair trial standards.<sup>145</sup>

This case is also a first-ever test case for New Zealand on the use of diplomatic assurances for torture and fair trial rights. New Zealand has never previously sought formal assurances regarding torture or fair trial rights from any country.<sup>146</sup> This raises two key concerns. First, the use of diplomatic assurances in a case between two governments with an unequal power dynamic means that the merits of individual extradition decisions may be, or perceived to be, tainted by political or trade considerations.<sup>147</sup> Second, the excessive emphasis on diplomatic assurances as a tool to prevent torture and ensure fair trial rights in individual extradition cases has negative consequences on the international law framework protecting these same rights. This concern is best articulated by the former war crimes prosecutor, former Canadian Supreme Court Justice, and former United Nations High Commissioner for Human Rights, Louise Arbour:

There are many reasons to be skeptical about the value of assurances. . . . even if some post-return monitoring were functioning, the fact that some Governments conclude legally non-binding agreements with other Governments on a matter that is at the core of several legally-binding UN instruments threatens to empty international human rights law of its content. Diplomatic assurances basically create a two-class system among detainees, attempting to provide for a special bilateral protection and monitoring regime for a selected few and ignoring the systematic torture of other detainees, even though all are entitled to the equal protection of existing UN instruments. Rather than extending this protection of convenience to a few, efforts should be directed at eliminating the risk of torture faced by many. Instead of attempting to monitor an individual case, with limited chances of effectiveness, efforts should be directed at creating a genuine system for monitoring all detainees in all places of detention. The tools to do this already exist, including the Optional Protocol to the UN Convention against Torture, which foresees the creation of

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145. *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 at [355].

146. *Id.* at [233].

147. High & Geddis, *supra* note 8, at 2; see also Sam Sachdeva, *NZ Exports to China Hit New Record Amidst Diversification Talk*, NEWSROOM (Sept. 24, 2021), <https://www.newsroom.co.nz/nz-exports-to-china-hit-new-record-amidst-diversification-talk> [<https://perma.cc/8MSG-79KW>] (reporting that 31% of New Zealand's goods exports went to China during the first half of 2021, a national record).



mechanisms to access places of detention and interview detainees.<sup>148</sup>

Finally, this case affirms the urgent need for legal, policy, and procedural reform of the New Zealand extradition process. A permanent resident of New Zealand was detained without charge or trial for eight years.<sup>149</sup> Answers for the family of an alleged victim in China have been delayed twelve years and counting. Diplomatic relations between New Zealand and China may be affected. And, despite extensive time and resources, the New Zealand courts and Ministers have still not been able to resolve one extradition case.

Dr. Anna High and Professor Andrew Geddis of New Zealand's Otago University argue that "if nothing else, [the] case demonstrates why the underlying statutory framework needs amending in line with recommendations from the [New Zealand] Law Commission."<sup>150</sup> In 2016, the New Zealand Law Commission published a 281-page report recommending new legislation to replace the Extradition Act 1999 and the Mutual

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148. *Human Rights Day 2005—Statement by UN High Commissioner for Human Rights Louise Arbour*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER (Dec. 7, 2005), <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E> [<https://perma.cc/D477-Z4N4>]. Earlier in her statement, Louise Arbour also argues "if there is no risk of torture, . . . [assurances] are unnecessary and redundant. If there is a risk, how effective are these assurances likely to be? . . . Short of very intrusive and sophisticated monitoring measures, . . . there is little oversight that could that guarantee the risk of torture will be obliterated." *Id.* These concerns have also been raised by the Special Rapporteur against torture and other cruel, inhuman or degrading treatment. *Report of the Special Rapporteur Against Torture and Other Cruel, Inhuman or Degrading Treatment*, ¶¶ 47–50, A/HRC/37/50 (Feb. 26, 2018) (expressing grave alarm at the implicit complacency and acquiescence expressed by the use of diplomatic assurances for selective compliance with the prohibition of torture and ill-treatment and the inadequacy of diplomatic assurances in protecting human rights).

149. If Chinese courts were to find Mr. Kim guilty, they are unlikely to consider Mr. Kim's pre-trial detention in New Zealand when sentencing. This would be a human rights violation in and of itself but is not addressed in the New Zealand Supreme Court's decision.

150. High & Geddis, *supra* note 8, at 2. Others have argued that a conclusion from this case demonstrates why an extradition treaty with China is necessary. See Joseph Griffiths, *The Need for a Structured Approach to Extradition Between China and New Zealand* (2019) (Master of Laws, Victoria University of Wellington) (on file with *Columbia Human Rights Law Review Online*) (examining the failings of New Zealand's current ad hoc extradition system in protecting human rights with its reliance on diplomatic assurances for individuals extradited to China and 2016 Law Commission report's approach to reform); Jack Wong, *Trickle-Down Assurances: Could the Central Authority, Treaty, or Judiciary Alleviate Extradition Issues Amongst Non-traditional Treaty Partners* (2018) (Master of Laws, Victoria University of Wellington) (on file with *Columbia Human Rights Law Review Online*) (analyzing the problems that extradition agreements create and the interplay between international agreement and domestic courts).

Assistance in Criminal Matters Act 1992,<sup>151</sup> and the creation of a central authority under the Attorney-General. The many responsibilities of a central authority would include making an initial assessment of the merits of an individual case and the justice system in the receiving country,<sup>152</sup> ensuring any action conforms to New Zealand values “within the wider context of [New Zealand’s] international obligations,” and recommending whether an extradition proceeding can commence.<sup>153</sup> The Commission also recommended that the judiciary has a responsibility to decide the grounds for refusing extradition, with only a few grounds reserved for the Justice Minister’s sole consideration.<sup>154</sup>

Many of the Commission’s ideas have merit, but they also have significant shortcomings.<sup>155</sup> To take just two examples, despite discussing how to improve human rights protections through ad hoc assurances, the Commission failed to consider the “intrinsic problems arising from reliance on diplomatic assurances.”<sup>156</sup> Furthermore, while it may be more

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151. N.Z. L. COMM’N, MODERNISING NEW ZEALAND’S EXTRADITION AND MUTUAL ASSISTANCE LAWS (NZLC R137, Wellington, 2016) <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R137.pdf> [https://perma.cc/6CDN-JV4S]. In July 2016, the Government responded with a press release, noting that while it agreed with the Law Commission’s conclusion that the Extradition Act 1999 and the Mutual Assistance in Criminal Matters Act 1992 should be replaced, the issues were complex and further work was needed to finalize details of new legislation. Press Release, *Government Response to Law Commission Report on Modernising New Zealand’s Extradition and Mutual Assistance Laws* (July 29, 2016), <https://www.lawcom.govt.nz/sites/default/files/governmentResponseAttachments/Govt-response-lc-report-modernising-extradition-mutual-assistance%20R137.pdf> [https://perma.cc/R7ML-YLEB].

152. MODERNISING NEW ZEALAND’S EXTRADITION AND MUTUAL ASSISTANCE LAWS, *supra* note 151, at ¶ 2.9.

153. *Id.* at ¶¶ 2.1–2.15.

154. *Id.* at ¶ 13(b)(ii); *see also id.* at ¶¶ 5.11–5.14. A Justice Minister “must or may” refuse extradition are related to the death penalty and bilateral extradition treaties. *Id.* at ¶ 13(b)(ii), note 14.

155. *See generally* Griffiths, *supra* note 150 (arguing that the Law Commission’s 2016 report “fails to comprehend the essential role bilateral treaties are likely to play in terms of New Zealand’s extradition relationships with countries such as China,” and noting there needs to be “a legally binding treaty with China that provides for specific human rights guarantees and a monitoring regime”); Wong, *supra* note 150 (arguing that in addition to the necessity of an extradition treaty with China, courts need to be more involved in the extradition process and be able to assess assurance-related evidence if absolutely necessary).

156. *See* Griffiths, *supra* note 150, at 3–4. The thesis also noted that the Law Commission’s approach “fails to comprehend the essential role bilateral extradition treaties are likely to play in terms of New Zealand’s extradition relationships . . . [and] [d]omestic extradition law coupled with an ever-increasing reliance on diplomatic assurances to circumvent breaches of international human rights law will never be an

appropriate in some ways for the Attorney-General to be responsible for extradition matters, there is still a conflict of interest because the Attorney is a Cabinet Minister in the same party leading the Government.<sup>157</sup> While there can be agreement on the urgent need for reform, the exact structure of reform is still unclear and should be carefully pursued.

#### CONCLUSION

*Minister v. Kyung Yup Kim* case raises important questions at the intersection of domestic and international law. The next step in the ongoing litigation—a ruling by the same five-judge bench of the Court, which is expected later in 2022—will likely be limited to clarifying the utility of the latest assurances received from the government of China. Thus, the Court's 2021 ruling will remain the new precedent for New Zealand, pending any domestic reforms. The outcome of this internationally notable test case may influence the Chinese government's behavior regarding its extradition requests. However, the case and the New Zealand Court's thorough examination of Chinese law and practice against international human rights standards is even more likely to influence the governments and judicial bodies of other jurisdictions in their review of similar extradition requests from China. It is left to be seen just how far-reaching the impact of this case will be.

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adequate substitute for the binding structures that constitute bilateral extradition treaties." *Id.* at 113.

157. Wong, *supra* note 150, at 56–60.