

***Research Study on the Agreement between
Hong Kong and the Mainland concerning
Surrender of Fugitive Offenders***

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Prepared by

**Mr CHAU Pak-kwan
Mr Stephen LAM**

**Research and Library Services Division and
Legal Service Division
Legislative Council Secretariat**

5th Floor, Citibank Tower, 3 Garden Road, Central, Hong Kong

Telephone : (852) 2869 7735

Facsimile : (852) 2525 0990

Website : <http://www.legco.gov.hk>

E-mail : library@legco.gov.hk

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EXECUTIVE SUMMARY

Principles and Approaches in Extradition Treaties Signed by China with Foreign Countries

1. The first extradition treaty signed by China with a foreign country was the one signed with Thailand in 1993. By March 2000, the Standing Committee of the National People's Congress had ratified 10 bilateral extradition treaties with other countries. These countries are Thailand, Belarus, Russia, Bulgaria, Kazakhstan, Romania, Mongolia, Kirghizstan, Ukraine and Cambodia.
2. The extradition treaties signed between China and other countries generally follow the extradition principles which are recognized internationally, including the principle of double criminality, the principle of specialty, the principle of non-extradition for political offences, the principle of non-extradition for nationals and the principle of either extradition or prosecution.
3. The contents and structure of the ten extradition treaties signed between China and foreign countries are very similar and mainly cover the following aspects, including the obligation to extradite, extraditable offences, the circumstances under which extradition should be refused, the circumstances under which extradition may be refused, the principle of specialty, the applicable law to deal with extradition requests and the dispute resolution.
4. The concept of "political offences" is very often not directly mentioned in the bilateral extradition treaties signed between China and other countries. Instead, the granting of political asylum is used as a reason for the refusal of extradition. In some of its bilateral extradition treaties, political asylum is in fact employed to substitute for non-extradition for political offences.
5. When China signs bilateral extradition treaties with other countries, it tries to avoid directly incorporating the principle of "non-extradition for death penalty" in a treaty. Nevertheless, according to the current judicial extradition practice in China, the norm of "non-extradition for death penalty" is accepted to a certain extent.

Arrangements for the Surrender of Fugitive Offenders between Hong Kong and Foreign Countries

6. The law governing the surrender of fugitive offenders in Hong Kong is the *Fugitive Offenders Ordinance* (Cap. 503). The existing *Fugitive Offenders Ordinance* does not apply to the Mainland. After its reunification with China, the Hong Kong Special Administrative Region (HKSAR), under the *Basic Law*, has been authorized by the Central Government to negotiate and conclude agreements on the surrender of fugitive offenders with foreign countries. Hong Kong has so far entered into such agreements with more than 10 countries. In the form of subsidiary legislation, such agreements become part of the Hong Kong laws. The *Fugitive Offenders Ordinance* provides guidance on principles and procedures of the surrender of fugitive offenders.

7. Section 5 of the *Fugitive Offenders Ordinance* provides for grounds of refusing the surrender of persons to prescribed places, including: where the offence in question is political in nature; where the request for surrender appears to be made for the purpose of punishing the person on account of his race, religion, nationality or political opinions, or that the person might be prejudiced at his trial on these grounds; where the person was convicted in his absence; where if the offence had occurred in Hong Kong, the law of Hong Kong relating to previous acquittal or conviction would preclude the prosecution, or the imposition or enforcement of a sentence, in respect of that offence; where there is no guarantee that the person would not be tried for a crime other than that for which his surrender was granted; or where there is no guarantee that the person would not be re-surrendered to a third jurisdiction.

Inter-regional Arrangements for the Surrender of Fugitive Offenders in Other Places

8. Arrangements for the surrender of fugitive offenders between states in the United States are primarily governed by the *United States Constitution*, federal laws and state legislation. Section 2(2) of Article IV of the *United States Constitution* provides that “[A] person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.”
9. The approach adopted by the United States to resolve the conflicts of state laws is by establishing “model laws”. Under this approach, some official, quasi-official or non-governmental organizations will initiate the drafting of sets of “model laws”, which will then be adopted as state laws by the legislatures of individual states for the purpose of achieving uniformity of state laws. In 1926, the National Conference of Commissioners on Uniform State Laws drafted the *Uniform Criminal Extradition Act*. This Act provides that it is the duty of the Governor of a state to deliver over to the Executive Authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.
10. In contrast to the surrender of fugitive offenders between countries, the arrangements for interstate extradition in the United States are not subject to the general principles of international extradition. For example, the “principle of double criminality”, “principle of non-extradition for death penalty” and “principle of non-extradition of political offenders” are not applicable. Nevertheless, it should be noted in particular that the establishment of an interstate extradition system in the United States is subject to the provisions of the Constitution and is not permitted to violate the constitutional protection of the citizens’ rights.

11. The cross-strait mutual surrender of criminal offenders between the Mainland and Taiwan was initially arranged through third parties. On 12 September 1990, the Committees of Red Cross from the two sides negotiated in Jinmen an agreement on the mutual surrender of illegal immigrants, criminal suspects and convicted criminals on the sea, referred to as the *Jinmen Agreement*. The *Jinmen Agreement* remains the only basis for the surrender of criminal offenders between the two sides of the Straits.
12. As interactions between people from both sides of the Straits have been increasing since the late 1980's, there is a wide range of crimes which necessitates joint actions from both sides, especially the crime of hijacking aircraft. Although the two sides have not been able to reach an agreement on the surrender of aircraft hijackers, a draft agreement is available. In the draft agreement, they have established several principles of surrender, which can be regarded as the basis for the promotion of future cross-strait mutual assistance in criminal matters. The principles include: the rule against double jeopardy, non-surrender of nationals, public order exceptions and humanitarianism.

Division of Criminal Jurisdiction between the Mainland and Hong Kong

13. Criminal jurisdiction generally refers to the right of a sovereign state to prosecute, try and punish crimes occurring within its sovereignty. There are basically four elements in defining the scope of criminal jurisdiction. They are the place where a crime takes place, the nature of the person who commits the crime, the nature of the victim of the crime and the nature of the crime. Different principles of criminal jurisdiction are derived from these elements, which are the territorial principle, the nationality principle, the passive personality principle, the protective principle and the universality principle.
14. The spatial effect of the *Chinese Criminal Law* adopts the principle of eclecticism, which is based upon the territorial principle, supplemented by the personality and protective principles, and incorporating the universality principle. Hong Kong courts adopt the model of territorial jurisdiction over criminal offences according to the common law, and adjudicate criminal cases occurring within Hong Kong. Some Hong Kong ordinances have modified the territorial principle to enable the courts to exercise extraterritorial jurisdiction.

15. The trial of Cheung Tze-keung in the Mainland provoked a debate over the exercise of jurisdiction between courts in the Mainland and HKSAR for cases involving cross-border crime. Some members of Hong Kong's legal community were concerned that jurisdiction of the HKSAR would be infringed if Mainland courts exercised jurisdiction over criminal activities committed within Hong Kong by Hong Kong residents. They were also concerned about whether the accused could receive fair trials. The criminal jurisdiction controversies arising from the Cheung Tze-keung case involve different interpretations of Article 6 of the *Criminal Procedure Law of the People's Republic of China* and Article 24 of the *Criminal Law of the People's Republic of China*. Meanwhile, the criminal jurisdiction controversies arising from the Li Yuhui case involve different interpretations of Article 7 of the *Criminal Law of the People's Republic of China*.
16. While Hong Kong applies the strict territorial principle in exercising criminal jurisdiction, and extra-territorial jurisdiction is an exception provided by law; the Mainland takes an eclectic approach where the territorial principle is the rule, with personality and protective principles as supplements. There are views that as Hong Kong is a Special Administrative Region of China, neither the Mainland nor Hong Kong can use its own extra-territorial principles in dividing criminal jurisdiction between the Mainland and Hong Kong. Otherwise, an asymmetry would occur where the criminal jurisdiction of the Mainland greatly exceeds that of Hong Kong.
17. There are other views that the conflict of criminal jurisdiction between Mainland China and Hong Kong should be resolved on the basis of the territorial principle and supplemented by the principles of "actual control" and "first control". The codification of these principles of criminal jurisdiction mentioned above into detailed rules to be incorporated in Hong Kong's criminal law, will be a very difficult task that needs considerations of jurisprudence and matters outside jurisprudence.

Regulatory Model for the Agreement on the Surrender of Fugitive Offenders between the Mainland and Hong Kong

18. Two main arrangements on judicial assistance between the Mainland and Hong Kong after the reunification are implemented through the promulgation of judicial interpretation by the judicial organ in the Mainland and through the amendment of local legislation in Hong Kong. There are views that regional criminal mutual assistance in China can take the form of a central, unified legislation model, a model law model or a regional agreement model.
19. The Secretary for Security assured Members of the Legislative Council that the Administration would consult the public on the rendition arrangement with the Mainland upon the completion of the discussions with the Mainland. Views from Members of the Legislative Council would be sought when the legislation on the statutory framework for the rendition arrangement was introduced.

20. In drafting the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong, one important issue to be considered is whether or not this agreement should adopt internationally recognized principles and standards. Regarding whether “the principle of double criminality” should be adopted, there are views that “the principle of double criminality” is an international convention of extradition judicial practice between countries and therefore should not be adopted in the regional judicial assistance between the Mainland and Hong Kong. The reasons include the provisions on criminal offences in the Mainland and Hong Kong being different and fugitive offenders being surrendered to the judicial organ where the offences were committed according to the principle of territorial jurisdiction. Other views are that the extradition judicial practice in both the Mainland and Hong Kong follows the principle of double criminality, thus the continual adoption of this principle in the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong should not be too difficult. In addition, they propose to adopt the method of elimination in the implementation of the principle, whereas the method of listing should be used for some sensitive offences.
21. As regards the issue of death penalty in the surrender of fugitive offenders, Hong Kong abolished death penalty in 1993, and has expressly implemented the principle of non-extradition for death penalty in its extradition judicial system. Although the scope of application of death penalty in Chinese law is very broad, the principle of non-extradition for death penalty is, to a certain extent, considered to be acceptable in its extradition judicial practice. Since the *Basic Law* provides that the *International Covenant on Civil and Political Rights* shall remain in force in Hong Kong, the future agreement on fugitive offenders between the Mainland and Hong Kong is bound to take into consideration of Articles 6 and 7 of the Covenant on the issue of death penalty.
22. Regarding the issue of political offences, there are views that the primary objective of the principle of "non-extradition for political offences" is to maintain the sovereignty and political system of one country. Since Hong Kong and the Mainland belong to the same country, the principle should not be applicable. However, there are other views that as Hong Kong and the Mainland have different political systems and different protection of citizen's political rights, and Hong Kong will have its own legislation on crimes of treason, sedition and the like, the application of the principle of “non-extradition for political offences” in the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong shall enhance the implementation of the guarantee of Hong Kong’s original system and living style unchanged under the *Basic Law*.

23. It is believed that whether or not the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong should take into account their difference in the protection of fair trial in criminal trials is a very controversial issue. There are views that both sides should follow the principle of mutual respect and should not interfere with each other's criminal trial procedure. There are other views that the protection of these rights under the *Basic Law* should be the bottom line for the negotiation on the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong.
24. Regarding the implementation of the principle of "double jeopardy" in the future arrangement on the surrender of fugitive offenders between the Mainland and Hong Kong, there are views that although the relationship between the two sides is not international in nature, the principle of "double jeopardy" should be adopted. For cases over which both sides have jurisdiction, it is noteworthy of how to avoid a situation that either side may easily refuse extradition on the grounds that the case has proceeded into the criminal litigation stage.
25. At present, the Mainland and Hong Kong have their respective mechanism for reviewing extradition requests. Whether or not the arrangements under these two sets of mechanism should be incorporated into the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong is an issue which needs to be examined in details. The Mainland's extradition request review mechanism is similar to that of countries adopting the continental legal system. It is mainly a formality type of review and no substantive review is carried out on the subject case of the extradition request.
26. Meanwhile, Hong Kong conducts, to a certain extent, a substantive review of the offence indicated by the extradition request. There are views that the dual review mechanism under the *Fugitive Offenders Ordinance* is conducive to the protection of individuals' fundamental rights. There are other views that the future judicial co-operation on the surrender of fugitive offenders between the Mainland and Hong Kong should be based on the principles of simplicity and high efficiency. Accordingly, it is worthy of consideration that the review of the evidence concerning the merits of the case should be waived and only formality review of the relevant request should be conducted.

Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders

Introduction

Background

i) At the special meeting of the Legislative Council (LegCo) Panel on Security held on 13 April 2000, Members asked the Research and Library Services Division (RLSD) to conduct a research study on the agreement between the Mainland and Hong Kong concerning the surrender of fugitive offenders.

Scope of Study

ii) An outline of the research study was subsequently submitted to the Panel on Security by RLSD and the Legal Services Division (LSD), setting out the scope of the study as follows:

- a) Principles and approaches in extradition treaties signed by China with foreign countries;
- b) Principles and approaches of agreements between Hong Kong and foreign countries concerning the surrender of fugitive offenders;
- c) Inter-regional arrangements for the surrender of fugitive offenders adopted in other places;
- d) Division of criminal jurisdiction between the Mainland and Hong Kong;
- e) Regulating the surrender of fugitive offenders between the Mainland and Hong Kong;
- f) Possible scope and content of an agreement between the Mainland and Hong Kong concerning the surrender of fugitive offenders;
- g) Special topics: political offences, death penalty cases, military offences and double criminality principle.

iii) This research report consists of the following five chapters: Chapter 1: “Principles and Approaches in Extradition Treaties signed by China with Foreign Countries”; Chapter 2: “Arrangements for the Surrender of Fugitive Offenders between Hong Kong and Foreign Countries”; Chapter 3: “Inter-regional Arrangements for the Surrender of Fugitive Offenders in Other Places”; Chapter 4: “Division of Criminal Jurisdiction between the Mainland and Hong Kong”; and Chapter 5: “Regulatory Model for the Agreement on the Surrender of Fugitive Offenders between the Mainland and Hong Kong”.

iv) The research study was jointly conducted by RLSD and LSD. LSD was responsible for preparing Chapter 2 of the report, while the remaining chapters were drafted by RLSD and reviewed by LSD.

CHAPTER 1 – PRINCIPLES AND APPROACHES IN EXTRADITION TREATIES SIGNED BY CHINA WITH FOREIGN COUNTRIES

1.1 In this chapter, we first discuss the legal basis of China's extradition system and then examine the basic principles and contents of bilateral extradition treaties signed between China and other countries. There are special sections on how issues concerning political offences and death penalty are dealt with under these bilateral extradition treaties.

Legal Basis of China's Extradition System

China's Domestic Legal Norms

Specific Law

1.2 Prior to 28 December 2000, China did not have any laws directly relating to the extradition system¹. The previous regulatory framework on the extradition system was primarily based on internal regulations and international treaties.

1.3 In 1992, the Ministry of Foreign Affairs, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice jointly issued the *Provisions on Several Issues concerning the Handling of Extradition Cases*, which laid down a set of norms for extradition activities in Mainland China.

General Criminal Law

1.4 Article 17 of the *Criminal Procedural Law of the People's Republic of China*, which was amended in March 1996, provides that "[I]n accordance with the international treaties which the People's Republic of China has concluded or acceded to or on the principle of reciprocity, the judicial organs of China and that of other countries may request judicial assistance from each other in criminal affairs". There is an opinion that "judicial assistance in criminal affairs" in Article 17 should mean judicial assistance in its broad sense, and should be applicable to international judicial cooperative activities in criminal affairs, such as extradition, transfer of criminal litigation between jurisdictions and reciprocal enforcement of criminal judgments.²

¹ At the final stage of preparing this research report, the Standing Committee of the National People's Congress formally adopted on 28 December 2000 the *Law of the People's Republic of China on Extradition*. This new law will be discussed in the last chapter of this report. The adoption of this law has no bearing on the content of this chapter.

² Huang Feng, *Zhongguo Yindu Zhidu Yanjiu (A Study of China's Extradition System)*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1997, pp. 9-12. Extradition is also incorporated into the

1.5 Article 16 of the *Criminal Procedural Law of the People's Republic of China* provides that “[P]rovisions of this Law shall apply to foreigners who commit crimes for which criminal responsibility should be investigated”. Hence, the application of any compulsory measures such as detention and arrest to foreigners should follow the relevant provisions of the criminal procedural law. However, for foreign-related cases, there is a separate set of internal and external reporting systems and visiting arrangements with regard to the specific operational procedure.³

International Legal Norms

Bilateral Extradition Treaties

1.6 The first extradition treaty signed by China with foreign countries was the one signed with Thailand in 1993.⁴ By March 2000⁵, the Standing Committee of the National People's Congress (“NPCSC”) had ratified 10 bilateral extradition treaties with other countries. These countries are Thailand, Belarus, Russia, Bulgaria, Kazakhstan, Romania, Mongolia, Kirghizstan, Ukraine and Cambodia. (see Table 1)

scope of criminal judicial assistance by some judicial interpretation documents relating to criminal procedural law. See Article 441 of the *Rules of the Supreme People's Procuratorate on Criminal Litigation of the People's Procuratorate*, promulgated on 18 January 1999 and Article 341 of the *Procedural Provisions of the Ministry of Public Security on the Handling of Criminal Cases by the Public Security Organ*, promulgated on 4 May 1998. These two judicial interpretation documents are included in *Zuigao Renmin Fayuan – Zuixin Xingshi Falu Sifa Jieshi Huibian (the Supreme People's Court – the Collection of the Latest Judicial Interpretation on Criminal Law)*, compiled by Zuigao Renmin Fayuan Yanjiushi (the Research Department of the Supreme People's Court), Beijing: Jingguan Jiaoyue Chubanshe, 1999, revised edition.

³ See the *Provisions on Several Issues concerning the Handling of Foreign-related Cases* issued on 20 June 1995 jointly by the Ministry of Foreign Affairs, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice.

⁴ For a detailed analysis of the treaty, please refer to Huang Feng, “Xi zhongtai yindu tiaoyue jian lun jianli zhongguo yindu zhidu de ruogan wenti (Analysis of the extradition treaty between China and Thailand and several issues relating to the establishment of an extradition system in China),” in Sifabu Sifa Xiehuju (the Bureau of Judicial Assistance under the Ministry of Justice) ed., *Sifa Xiezhu Yanjiu (Study of Judicial Assistance)*, Beijing: Falu Chubanshe, June 1996, pp. 148-164.

⁵ In the course of preparing this research report, the Standing Committee of the National People's Congress ratified on 8 July 2000 the *Extradition Treaty between the People's Republic of China and the Republic of Uzbekistan*, which was signed on 8 November 1999. China and South Korea also signed the *Extradition Treaty between the People's Republic of China and the Republic of Korea* in October 2000.

Table 1 – The List of Bilateral Treaties Signed between China and Foreign Countries

Name of the Country	Date of Signature	Date of Ratification*	Effective Date
Thailand	26/08/1993	05/03/1994	07/03/1999
Belarus	22/06/1995	01/03/1996	07/05/1998
Russia	26/06/1995	01/03/1996	10/01/1997
Bulgaria	20/05/1996	23/02/1997	04/07/1997
Kazakhstan	05/07/1996	23/02/1997	10/02/1999
Romania	01/07/1996	23/02/1997	16/01/1999
Mongolia	19/08/1997	26/06/1998	10/01/1999
Kirghizstan	27/04/1998	04/11/1998	-
Ukraine	10/12/1998	28/06/1999	-
Cambodia	09/02/1999	01/03/2000	-

* the date on which the NPCSC ratified the bilateral treaty.⁶

1.7 All the countries which have signed bilateral extradition treaties with China belong to the continental civil law system. With the exception of Thailand, these countries were formerly belonged to the socialist camp. China has not signed extradition treaties with any major western countries.

1.8 Meanwhile, China has also signed mutual judicial assistance treaties in criminal affairs with some countries, including Cuba, Russia, Greece, Egypt, Canada and the United States.

⁶ Article 67(14) of the *Constitution of the People's Republic of China* provides that the Standing Committee of the National People's Congress has the authority to "decide on the ratification or abrogation of treaties and important agreements concluded with foreign states". The *Law of the People's Republic of China on the Procedure of the Conclusion of Treaties*, adopted in December 1990, stipulates in great detail that for a treaty on judicial assistance, extradition or related matters, the Ministry of Foreign Affairs or the State Council in conjunction with the Ministry of Foreign Affairs shall submit it to the State Council for examination and verification. After being examined and verified by the State Council, the treaty shall be submitted by the State Council in the form of a bill to the Standing Committee of the National People's Congress for decision on ratification. The President of the People's Republic of China shall ratify the treaty according to the decision of the Standing Committee of the National People's Congress.

1.9 Although these judicial assistance treaties in criminal affairs do not directly contain any provisions on extradition, the matters regulated by these treaties, such as the delivery of criminal litigation documents, investigation and collection of evidence, and transfer of written evidence and material evidence, directly promote the combat against international crimes and enable domestic judicial organs to perform more efficiently their criminal judicial functions. This report will not discuss the judicial assistance treaties in criminal affairs signed between China and other countries.⁷

International Treaties

1.10 In addition to the bilateral extradition treaties mentioned above, China has also acceded to some international treaties, of which several provisions require joint undertaking of international obligations on judicial assistance and extradition. These international treaties include:

1. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*
2. *Vienna Convention on Consular Relations*
3. *Convention on the Prevention and Punishment of the Crime of Genocide*
4. *International Convention on the Suppression and Punishment of the Crime of Apartheid*
5. *Convention on Offences and Certain Other Acts Committed on Board Aircraft*
6. *Convention for the Suppression of Unlawful Seizure of Aircraft*
7. *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*
8. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*
9. *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*
10. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
11. *Single Convention on Narcotic Drugs, 1961, as amended by the Protocol Amending the 1961 Single Convention on Narcotic Drugs*
12. *The 1971 Convention on Psychotropic Substances*

⁷ See Zhao Yong & Ma Xinmin, "Wuoguo duiwai dijie de sifa xiezhu tiaoyue (Judicial assistance treaties signed by China with other countries)", in *Zhongguo Guojifa Niankan (The Chinese Yearbook of International Law)*, 1996, pp. 130-171, and Huang Feng, "Guoji xingshi sifa xiezhu jiqi jiben guize (International criminal judicial assistance and its basic rules)", in *Zhongguo Guojifa Niankan (The Chinese Yearbook of International Law)*, 1997, pp. 265-286.

13. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*
14. *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*
15. *The Protocol on the Prevention of Illegal Acts Endangering the Safety of Fixed Platform on Continental Shelf*
16. *International Convention against the Taking of Hostages*
17. *United Nations Convention on the Law of Seas*

1.11 In addition, China has also sent delegates to participate in the drafting of model law on international judicial co-operation in criminal affairs, including the *Model Convention on Extradition*, *Model Convention on Mutual Assistance in Criminal Affairs*, and the *Transfer of Criminal Litigation*. These model conventions have become the reference documents when China negotiates and signs bilateral treaties with other countries.

Relationship between International Law and Domestic Law

1.12 The Chinese Constitution has no specific provisions on the relationship between international law and domestic law.⁸ In respect of the jurisdiction over the crimes regulated by international treaties, China has adopted the approach of incorporating the relevant provisions of the international treaties into domestic law. In June 1987, the NPCSC adopted the *Decision of the Standing Committee of the National People's Congress on Exercising Criminal Jurisdiction over the Crimes Prescribed in the International Treaties to Which the People's Republic of China Is a Party or Has Acceded*, which provides clearly that “*the People's Republic of China shall, within the scope of its treaty obligations, exercise criminal jurisdiction over crimes prescribed in the international treaties to which the People's Republic of China is a party or has acceded*”.

⁸ Some scholars hold different views on the relationship between international and domestic law in China. See Zhu Qiwu, *Zhongguo Guojifayue Lilun Yu Shijian (The Theory and Practice of International Law in China)*, Beijing: Falu Chubanshe, pp. 416-417. See also Li Zhaojie, “The effect of treaties in the municipal law of the People's Republic of China: practice and problems,” in Ko Swan Sik, *et al*, *Asian Yearbook of International Law*, Vol. 4, Kluwer Law International, 1995, pp. 185-223.

1.13 Meanwhile, when conflict exists between domestic law and a provision of an international treaty, the provision in the international treaty shall prevail. The ground generally cited to support this approach is Article 238 of the *Civil Procedural Law of the People's Republic of China*, which provides that “[I]f an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except those on which China has made reservations.”⁹ The principle regarding the provisions in international treaties shall prevail has also been clearly written into the *Provisions on Several Issues concerning the Handling of Extradition Cases*¹⁰ and the *Provisions on Several Issues concerning the Handling of Foreign-related Cases*¹¹.

⁹ As a matter of fact, this provision may not invariably apply to criminal proceedings. See Huang Feng, *Zhongguo Yindu Zhidu Yanjiu (A Study of China's Extradition System)*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1997, p. 12.

¹⁰ See paragraph 1.3 of this research report.

¹¹ See note 3 above, Article 1(3).

Basic Principles and Contents of Sino-Foreign Bilateral Extradition Treaties

Basic Principles

1.14 The extradition treaties signed between China and other countries generally follow some internationally recognized extradition principles which are listed below:

- (i) The Principle of Double Criminality – it states that the act of the person requested to be extradited constitutes an offence according to either the national laws of both the requesting state and requested state or the provisions of an international treaty of which both the requesting state and the requested state are member states.
- (ii) The Principle of Specialty – it states that the country which makes the request for extradition must guarantee at the time it makes the request that the extradited offender shall only be tried and imposed criminal responsibility for the offence specifically indicated in the extradition request. The requesting state shall not conduct trial of or impose penalty on the person extradited for any other offence not specifically mentioned in the reasons of extradition request.
- (iii) The Principle of Non-extradition for Political Offences – it states that the person requested to be extradited shall not be extradited if he is regarded by the requesting state as a criminal of a political offence or a criminal relating to politics.
- (iv) The Principle of Non-extradition of Nationals – it states that no state shall extradite its own nationals to other countries.
- (v) The Principle of either Extradition or Prosecution – it states that with regard to an internationally recognized crime, the requested state shall either extradite the offender to the requesting state, or prosecute the offender according to its own national laws if it decides not to extradite the offender.

Basic Contents

1.15 The contents and structure of the 10 extradition treaties signed between China and foreign countries are very similar and mainly cover the following aspects¹²:

1. Obligation to extradite;
2. Extraditable offences;
3. Circumstances under which extradition should be refused;
4. Circumstances under which extradition may be refused;
5. The obligation to conduct criminal litigation within the requested state (the consequence for non-extradition of nationals);
6. Means of communication;
7. Language;
8. Extradition request and attached documents;
9. Materials which should be attached to an extradition request;
10. Supplementary materials;
11. Arrest for extradition;
12. Custody before receiving extradition request;
13. The surrender of the person to be extradited;
14. Delay of surrender and temporary surrender;
15. Renewed extradition;
16. Extradition requests made by several countries;
17. Principle of specialty;
18. Surrender of goods relating to the crime;
19. Transit;
20. Giving notice of consequences;
21. Applicable law to deal with extradition request;
22. Expenditure relating to extradition;
23. Dispute resolution; and
24. Relationship with multilateral international conventions.

¹² To facilitate readers to understand the structure and contents of such extradition treaties, the text of the *Extradition Treaty between the People's Republic of China and Romania* is attached in Appendix I. The texts of the extradition treaties that the People's Republic of China has signed respectively with the Kingdom of Thailand, the Republic of Belarus, the Federation of Russia, the Republic of Bulgaria, the Republic of Kazakhstan are reproduced in *Zhongwai Sifa Xiezhu Yu Yindu Tiaoyue Ji (A Collection of Sino-foreign Treaties on Mutual Legal Assistance and Extradition)*, compiled by Zuigao Renmin Jianchayuan Xingshi Jianchating (Procuratorial Office for Criminal Cases of the Supreme People's Procuratorate), Beijing: Zhongguo Renmin Gong'an Daxue Chubanshe, 1997. For the text of the *Extradition Treaty between the People's Republic of China and the People's Republic of Mongolia*, please see the *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 1998, Issue No. 3, pp. 288-294; for the text of the *Extradition Treaty between the People's Republic of China and the Republic of Kirghizstan*, see the *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 1998, Issue No. 5, pp. 539-544; for the text of the *Extradition Treaty between the People's Republic of China and Ukraine*, see the *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 1999, Issue No. 4, pp. 351-357; for the text of the *Extradition Treaty between the People's Republic of China and the Kingdom of Cambodia*, see the *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, 2000, Issue No. 1, pp. 17-23.

1.16 Since each treaty covers many different aspects, this report chooses three main aspects for discussion, which are (i) extraditable offences, (ii) circumstances under which extradition should be refused, and (iii) circumstances under which extradition may be refused.¹³ In addition, since there are special public concerns over the issue of political offences and death penalty, this report will also discuss these issues in separate sections.

Extraditable Offences

1.17 All extradition treaties signed between China and other countries adhere to the principle of double criminality. The general expression provides that an extraditable offence refers to an act which constitutes an offence according to the laws of both parties. Similar provisions can be found in the extradition treaties signed between China and other countries.

1.18 This principle does not require that the identification of both the category and type of offence is exactly the same in both the requesting and requested states. The common practice is to require the requested state to decide whether or not the relevant act constitutes an offence according to its domestic law. All treaties signed between China and other countries incorporate a provision similar to the following: “[I]n making a decision on extradition and deciding whether or not an act has constituted an offence under the laws of both contracting parties, both parties shall not be influenced by whether or not the laws of both parties have classified the act as the same kind of offence or have used the same name of offence for the act”.¹⁴

1.19 In addition to satisfying the requirement of the standard of double criminality, an extraditable offence also needs to satisfy the requirement of a certain period of imprisonment. The 1992 *Provisions on the Several Issues concerning the Handling of Extradition Cases*¹⁵ provides that, for an extraditable offence, “the maximum statutory penalty under the laws of both the requesting state and China for the offence upon which the request for extradition is raised must be at least two years of fixed term imprisonment.” However, in the extradition treaties signed between China and other countries, the standard minimum term of imprisonment is usually one year.

¹³ For a more comprehensive analysis, refer to Huang Feng, *Zhongguo Yindu Zhidu Yanjiu (A Study of Chinese Extradition System)*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1997, and Zhang Zhihui, “Yindu wenti yanjiu (A study of the issue of extradition),” in Gao Mingxuan & Zhao Bingzhi ed., *Xingfa Luncong (Criminal Law Review)*, Vol. 2, Beijing: Falu Chubanshe, 1999, pp. 437-483.

¹⁴ Article 2(3) of the *Extradition Treaty between China and Belarus*.

¹⁵ See paragraph 1.3 of this report.

1.20 There are two ways to define the scope of extraditable offences. “The method of listing” lists clearly extraditable offences; while “the method of exclusion”, restricts the extraditable offences through the restriction of criminal penalties which may be imposed.

1.21 When China signs an extradition treaty with another country, it always adopts the method of exclusion, through either one of two ways of expressions. The first way is to prescribe that the offence is punishable with the imposition of at least one year imprisonment according to the laws of both countries. For example, Article 2(1) of the *Extradition Treaty between China and Thailand* provides that “*as far as this treaty is concerned, an extraditable offence refers to an offence which is punishable with the imposition of at least one year imprisonment or other kinds of detention or any other more serious offences according to the laws of both parties to the Treaty.*” A similar provision is included in the extradition treaties signed between China and Belarus, Russia, Bulgaria, Romania, Mongolia, and Cambodia respectively.

1.22 The second way is to make reference to the respective penalty provisions on offence in each of the treaty states. For example, in the *Extradition Treaty between China and Belarus*, it is separately stated that “*(i) according to the laws of the People’s Republic of China, it is an offence which is punishable with at least one year fixed term imprisonment or a more serious offence; (ii) according to the laws of Belarus, it is an offence which is punishable with at least one year deprivation of freedom or other more serious penalties.*” A similar provision is adopted in the extradition treaties signed between China and Russian, Kazakhstan, Kirghizstan and Ukraine respectively.

1.23 Some of the extradition treaties signed between China and other countries have also incorporated provisions on the extradition for enforcement of a sentence. These treaties generally have a minimum requirement of six months for remaining sentence to be served. The method of expression is similar to that adopted for Article 2(2) of the *Extradition Treaty between China and Cambodia*, which provides that “*[I]f the extradition request is concerned with a person on whom the court of the requested state has imposed a penalty of imprisonment or other form of detention for committing any extraditable offence, the extradition shall only be agreed to under the condition that the remaining sentence to be served has at least six months.*”

Circumstances under which extradition should be refused

1.24 The 1992 *Provisions on Several Issues concerning the Handling of Extradition Cases*¹⁶ provides the following seven circumstances under which extradition should be refused:

1. The extradition is concerned with a political offence;
2. The extradition request aims at pursuing criminal liability or enforcing criminal penalty against the person to be extradited by reason of his race, religion, nationality, or political opinions;
3. The extradition is concerned with military offence;
4. The extradition is concerned with the nationals of the requested state;
5. The person to be extradited enjoys immunity from criminal jurisdiction according to either Chinese law or international law;
6. A final judgment has already been delivered in China against the person to be extradited for the same offence, or a judicial proceeding is in process; and
7. The requesting state does not have jurisdiction over the offence committed by the person to be extradited.

1.25 The issue of non-extradition of a person committing a political offence will be discussed in detail in the next part of this report. The focus of this part is on two issues, namely non-extradition for military offences and non-extradition of nationals.

Non-extradition for Military Offences

1.26 All bilateral extradition treaties signed between China and other countries exclude military offences from extraditable offences.

¹⁶ See paragraph 1.3 of this report.

1.27 There are several approaches to express the principle of non-extradition for military offences in these extradition treaties. The first approach is to provide clearly that extradition should be refused if “*the offence is only an offence as provided for by the military laws and regulations of the requesting state but does not constitute an offence under the ordinary criminal law of the requesting state*”.¹⁷ This approach is adopted in treaties signed by China with Thailand and Belarus respectively. The *Extradition Treaty between China and Belarus* further defines the scope of military offences, which may include offences committed by persons in military service in addition to the offences provided for by military laws and regulations.¹⁸ The major reason for the inclusion of the term “offences committed by persons in military service” is that Belarus does not have a separate military criminal law.

1.28 The second approach uses the expression of “offences of military nature”. The *Extradition Treaty between China and Romania* prescribes clearly that extradition should be refused if “*the offence referred to in the extradition request is only an offence of military nature and does not constitute an offence under ordinary criminal law*”.

1.29 The third approach uses the expression of “pure military offences” and does not include the requirement that it does not constitute an offence under ordinary criminal law. This approach is adopted in the treaties signed by China with Bulgaria, Kazakhstan, Mongolia and Cambodia respectively.

1.30 The fourth approach is not to directly include any provision on non-extradition for military offences in the extradition treaty. For example, Article 3(6) of the *Extradition between China and Russia* provides that “*extradition may be refused according to the statutory provisions of the requested state*”. Under such circumstances, the requested state may rely on this provision to refuse extradition for military offences.

Non-extradition of Nationals

1.31 All bilateral extradition treaties signed between China and other countries include a provision on the non-extradition of their own nationals. There are two ways of expression, namely the methods of absolute refusal and relative refusal.

¹⁷ See Article 3(3) of the *Extradition Treaty between China and Thailand*.

¹⁸ The whole provision reads as follows: “[T]he crime referred to in the extradition request is purely a crime committed by a person in military service or a crime prescribed in the military law and regulations of the contracting party which makes the request, which does not constitute a crime under the ordinary criminal law of the requesting party”. See Article 3(4).

1.32 The extradition treaties signed by China with Russia, Belarus, Bulgaria, Kazakhstan, Romania, Mongolia, Kirghizstan and Ukraine respectively adopt the method of absolute refusal of extradition of nationals. These treaties incorporate the provisions on the extradition of nationals under the part on “circumstances under which extradition should be refused”.

1.33 The extradition treaties signed by China with Thailand and Cambodia respectively adopt the method of relative refusal of extradition. The provisions on the refusal to extradite nationals are separately provided under the section on “extradition of nationals”. The method of expression is “*both parties to the treaty have the right to refuse the extradition of their own nationals*”. Under such circumstances, the requested state may decide on its own whether or not to extradite its own nationals.

Circumstances under which extradition may be refused

1.34 The bilateral extradition treaties signed between China and other countries generally stipulate the following circumstances under which extradition may be refused:

1. The requested state has jurisdiction over the offence and shall bring prosecution against that offence;
2. Extradition is not consistent with humanitarian spirit by reason of the age or health of the person to be extradited or any other factors;
3. Extradition is contradictory to some basic legal principles of the requested state;¹⁹
4. The criminal cases are those for which a court will only accept for trial if the victim brings a lawsuit.²⁰

¹⁹ See Article 4(3) of the *Extradition Treaty between China and Romania*.

²⁰ Such cases are usually very minor criminal cases. See Article 4(4) of the *Extradition Treaty between China and Kirghizstan*. Under the *Extradition Treaty between China and Russia*, a similar provision is listed under Article 3 which is entitled “Circumstances under which extradition should be refused”.

Principle of Non-extradition for Political Offences

1.35 “Non-extradition for political offences” is an extradition principle generally accepted by the international community. Its purposes are to protect fundamental human rights, and to prevent political oppression and unfair adjudication against persons holding different political opinions. The international community does not have a commonly accepted definition on “political offences”.²¹ Every country could, according to its legal system and in the exercise of its discretion, make its own judgment of the nature of relevant “political offences” in order to decide whether or not to extradite.

1.36 Article 7(1) of the *Provisions on Several Issues concerning the Handling of Extradition Cases*, issued in 1992 jointly by the Ministry of Foreign Affairs, the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security and the Ministry of Justice, provides that extradition should be refused if “*the offence referred to in the extradition request of the requesting state is an offence for political reasons*”.

1.37 The term of “for political reasons” in the aforementioned Provisions comes from Article 32(2) of the *Constitution of the People’s Republic of China*, which states that: “[T]he People’s Republic of China may grant asylum to foreigners who request it for political reasons.”

1.38 The concept of “political offences” is very often not mentioned directly in the bilateral extradition treaties signed between China and other countries. Instead, the granting of political asylum is used as the reason for the refusal of extradition. The approach of substituting non-extradition for political offences with asylum is adopted in the extradition treaties signed by China with Russia, Belarus, Bulgaria, Kazakhstan, Kirghizstan and Ukraine respectively. (see Table 2)

1.39 The reason why China and the countries mentioned above use asylum as the ground for refusing extradition is that it is more consistent with their own legal tradition. For example, the Constitutions of both China and Bulgaria contain provisions which provide for the granting of asylum to foreigners.

²¹ For detailed discussion on the principle of “non-extradition for political offences”, refer to Geoff Gilbert, *Transnational Fugitive Offenders in International Law*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1998, Chapter 6, and Huang Feng, *Yindu Zhidu (Extradition System)*, expanded edition, Beijing: Falu Chubanshe, 1997, Chapter 10. Readers may also refer to a paper provided by the Government to the Legislative Council entitled “The Political Offence Exception”, LegCo Paper No. CB(2)799/98-99(01).

1.40 The right to receive asylum embodies the right of not being repatriated or extradited. However, political asylum is not a criminal protection system targeted specifically on extradition. Instead, it is a political protection system widely applicable to foreigners.²²

1.41 When China signed its first extradition treaty with Thailand in 1994, the concept of “political offences” was clearly incorporated in the treaty. Article 3(1) of the *Extradition Treaty between China and Thailand* provides that extradition should not be carried out if “*the requested party is of the view that the offence referred to in the extradition request of the requesting party is a political offence*”. However, “*a political offence does not include murdering or attempt to murder the head of state, the head of the government or their family members*”. When China signed its extradition agreement with Cambodia in 1999, it adopted the same expression of the principle of “non-extradition for political offences” as that contained in its agreement with Thailand.

1.42 In the extradition treaty signed between China and Romania in 1996, a different approach was used to express “political offences”. Article 3(2) of the *Extradition Treaty between China and Romania* provides that extradition should be refused if “*the requested party is of the view that the offence referred to in the extradition request of the requesting party is an offence of a political character*”. This way of expression is the same as the expression of the relevant provisions of the *Model Treaty on Extradition* of the United Nations.

1.43 In addition, with the exception of Russia, Kirghizstan and Ukraine, the extradition treaties signed by China with Thailand, Bulgaria, Kazakhstan, Romania, Mongolia, and Cambodia respectively contain a provision that no extradition shall be executed if “*the requested party has sufficient reasons to believe that the extradition request made by the requesting party aims to bring criminal litigation or to enforce penalty against the requested person by reason of his race, religion, nationality, or **political belief**, or the position of the requested person in judicial proceedings may be prejudiced for the above-mentioned reasons*”.²³ This provision is a supplement to the provision on non-extradition for political offences. (see Table 2)

1.44 The focus of this supplementary provision is not on the political character of the offence, but on the political character of the litigation proceedings and extradition. Its purpose is to prevent the occurrence of political oppression of a person who has committed an ordinary offence after his extradition.

²² In many Western countries, extradition is primarily a matter within the jurisdiction of judiciary while asylum is a matter within the jurisdiction of the administration. See M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 3rd ed., New York: Oceana Publications Inc., 1996, pp. 156-60.

²³ This is the expression of Article 3(2) of the *Extradition Treaty between China and Thailand*. The term used in the extradition treaty between China and Belarus is “political belief” rather than “political opinions”.

1.45 According to various international conventions acceded to by China, some offences of political character are excluded from the scope of application of the principle of “non-extradition for political offences”. They are:

1. war crimes and crimes endangering human beings;²⁴
2. crimes against internationally protected persons, including diplomatic agents;²⁵
3. crimes of genocide and apartheid;²⁶
4. crimes in violation of humanitarian spirit;²⁷ and
5. crimes of unlawful seizure of aircraft and unlawful acts against the safety of civil aviation.²⁸

²⁴ See the Resolution of the General Assembly of the United Nations (XXVIII) on the *International Cooperation Principles concerning Investigation, Arrest, Extradition and Punishment of War Criminals and Criminals Endangering Human Beings*.

²⁵ See the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*.

²⁶ See the *Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid*.

²⁷ See the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

²⁸ See the *Convention on Offences and Certain Other Acts Committed on Board Aircraft, the Convention for the Suppression of Unlawful Seizure of Aircraft, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*.

Table 2 – Provisions relating to the Principle of Non-extradition for Political Offences in Sino-foreign Bilateral Treaties

Country	Provisions relating to the Principle of Non-extradition for Political Offences
Thailand	<p>(i) <i>[T]he requested party is of the view that the offence referred to in the extradition request of the requesting party is a political offence. But a political offence does not include murdering or attempt to murder the head of state, the head of the government or their family members; (Article 3(1)) and</i></p> <p>(ii) <i>the requested party has sufficient reasons to believe that the extradition request made by the requesting party aims to bring criminal litigation or to enforce penalty against the requested person by reason of his race, religion, nationality, or political belief, or the position of the requested person in the judicial proceedings may be prejudiced for the above-mentioned reasons. (Article 3(2))</i></p>
Belarus	<p>(i) <i>[T]he contracting party which has been requested has granted asylum to the requested person according to its own law; (Article 3(2)) and</i></p> <p>(ii) <i>the requested party has sufficient reasons to believe that the extradition request made by the requesting party aims to bring criminal litigation or to enforce penalty against the requested person by reason of his race, religion, nationality, or political belief, or the position of the requested person in the judicial proceedings may be prejudiced for any of the above-mentioned reasons. (Article 3(3))</i></p>
Russia	<p>(i) <i>[T]he contracting party which has been requested has granted asylum to the requested person according to its own law. (Article 3(2))</i></p>
Bulgaria	<p>(i) <i>[T]he requested party has granted the right to receive asylum to the requested person according to its own law; (Article 3(2)) and</i></p> <p>(ii) <i>the requested party has sufficient reasons to believe that the extradition request made by the requesting party aims to bring criminal litigation or to enforce penalty against the requested person by reason of his race, religion, nationality, or political belief, or the position of the requested person in the judicial proceedings may be prejudiced for any of the above-mentioned reasons. (Article 3(3))</i></p>

Note : The terms are bolded for the purpose of this research. The numbers in () are the numbers of the provisions in the bilateral extradition treaties signed by China with the relevant countries.

Country	Provisions relating to the principle of non-extradition for political offences
Kazakhstan	<p>(i) <i>[T]he contracting party which has been requested has granted the right to receive asylum to the requested person according to its own law; (Article 3(2)) and</i></p> <p>(ii) <i>the requested party has sufficient reasons to believe that the extradition request made by the requesting party aims to bring criminal litigation or to enforce penalty against the requested person by reason of his race, religion, nationality, or political belief, or the position of the requested person in the judicial proceedings may be prejudiced for the above-mentioned reasons. (Article 3(3))</i></p>
Romania	<p>(i) <i>[T]he requested party is of the view that the crime referred to in the extradition request of the requesting party is an offence of a political character; (Article 3(2)) and</i></p> <p>(ii) <i>the requested party has sufficient reasons to believe that the extradition request of the requesting party aims to bring criminal litigation or to enforce criminal penalty against the requested person by reason of his race, religion, nationality, or political belief, or the position of the requested person in the judicial proceedings may be prejudiced for the above-mentioned reasons. (Article 3(3))</i></p>
Mongolia	<p>(i) <i>[T]he requested party has granted the right to receive asylum to the requested person according to its own law; (Article 3(2)) and</i></p> <p>(ii) <i>the requested party has sufficient reasons to believe that the extradition request made by the requesting party aims to bring criminal litigation or to enforce penalty against the requested person by reason of his race, religion, nationality, or political belief, or the position of the requested person in the judicial proceedings may be prejudiced for any of the above-mentioned reasons. (Article 3(3))</i></p>
Kirghizstan	<p>(i) <i>[T]he requested party has granted the right to receive asylum to the requested person according to its own law. (Article 3(2))</i></p>
Ukraine	<p>(i) <i>[T]he requested party has granted the right to receive asylum to the requested person according to its own law. (Article 3(2))</i></p>

Country	Provisions relating to the Principle of Non-extradition for Political Offences
Cambodia	<p>(i) <i>[T]he requested party is of the view that the crime referred to in the extradition request of the requesting party is a political offence. But a political offence does not include murdering or attempt to murder or wound the head of state, the head of the government or their family members; (Article 3(1)) and</i></p> <p>(ii) <i>the requested party has sufficient reasons to believe that the extradition request made by the requesting party aims to bring criminal litigation or to enforce penalty against the requested person by reason of his race, religion, nationality, or political belief, or the position of the requested person in the judicial proceedings may be prejudiced for any of the above-mentioned reasons. (Article 3(2))</i></p>

Principle of Non-extradition for Death Penalty

1.46 The principle of non-extradition for death penalty means that extradition will not be granted if the requested state believes that the person to be extradited may be sentenced to death after his extradition. In recent years, increasing importance has been attached to this principle in international judicial cooperation.²⁹

1.47 The scope of application of death penalty under Chinese law is very wide. According to the existing Chinese criminal law, there are 70 crimes to which death penalty applies, including (1) treason, (2) crime of splitting the state, (3) crime of hijacking, (4) crime of rape, (5) crime of embezzlement and (6) crime of bribery.³⁰

1.48 Among the 10 countries which have signed bilateral extradition treaties with China, seven still retain death penalty. Romania and Cambodia had abolished death penalty before they signed extradition treaties with China while Bulgaria abolished death penalty after it had signed extradition treaty with China. (see Table 3)

Table 3 – Abolition and Retention of Death Penalty in Countries which have Signed Extradition Treaties with China

Country	Death Penalty**
Thailand	Retained.
Belarus	Retained.
Russia	Retained.
Bulgaria	The last execution of death penalty was in 1989. Abolished in 1998.
Kazakhstan	Retained.
Romania	The last execution of death penalty was in 1989. Abolished in 1989.
Mongolia	Retained.
Kirghizstan	Retained.
Ukraine	Retained.
Cambodia	Abolished in 1989.

** Source: Office of the United Nations High Commissioner for Human Rights, "Question of the Death Penalty – Report of the Secretary-General submitted pursuant to Commission Resolution 1998/8", January 1999, at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/dc357b9da6390bf980256723003c3dad?Opendocument>

²⁹ See Ved P. Nanda, "Bases for refusing international extradition requests—capital punishment and torture," *Fordam International Law Journal*, June 2000; John Dugard and Christine Vanden Wyngaert, "Reconciling extradition with human rights," *American Journal of International Law*, Vol. 92, No. 2, April 1998, pp. 187-212, and Zhang Xu, "Sixing yu yindu: yuanzi renquan baohu de sikao (Death penalty and extradition—thoughts from the perspective of human rights protection)," *Falu yu Shehui Fazhan*, 1999(2), pp. 39-43.

³⁰ See Zhang Guoxuan, "Lun sixing de juti shiyong: jianhui xinjiu xingfa zhong de sixing shiyong zuoyi bijiao (Review of the specific application of death penalty—also a comparison of the application of death penalty under the former and new criminal law)," *Zhongguo Xingshi Fa Zazhi*, 1999(1), pp. 34-40; and Hu Yunteng, *Cun yu Fei: Sixing Jiben Lilun Yanjiu (Retention or Abolition—A Study of the Basic Theory of Death Penalty)*, Beijing: Zhongguo Jiancha Chubanshe, 2000.

1.49 There is no indispensable relationship between whether a country retains death penalty and that country upholds or admits the principle of “non-extradition for death penalty”. When China negotiated extradition treaties with other countries about the conclusion of extradition treaties, some countries which retained death penalty, such as Russia, Belarus and Bulgaria, still demanded the inclusion of this principle into their respective bilateral extradition treaties.

1.50 When China signs bilateral extradition treaties with other countries, its attitude towards “non-extradition for death penalty” is to avoid as far as possible the direct expression of the principle in a treaty provision. According to the analysis of Huang Feng³¹, there are four ways to deal with this issue in these treaties, as follows:

- (1) to try its best to persuade the other side not to include a provision in the treaty on the principle of “non-extradition for death penalty”. The treaties signed with Thailand and Kazakhstan are such examples;
- (2) to use more general phrases in order to avoid direct expression. Article 3(6) of the *Extradition Treaty between China and Russia* provides that “*extradition may not be granted according to the legal provisions of the requested state*”;
- (3) to set the issue aside in the formal provisions of the treaty but to make explanations in the minutes of the meetings between the parties to the treaty. For example, the minutes of the meetings signed between China and Belarus after their negotiation state that it will be up to the two parties to discuss the conditions for extradition when an extradition case may be related to death penalty; and
- (4) to make a general stipulation in the formal provisions of the treaty, as well as a supplementary explanation in the minutes of meetings. When China negotiated the extradition treaty with Romania, Romania had already abolished death penalty and insisted on the incorporation of an express provision of the principle of “non-extradition for death penalty” in the treaty. Finally, Article 4(3) of the official text of the treaty provides that the circumstances under which extradition should be refused include “*being contradictory to the fundamental principles of the laws of the requested state*”. In the minutes of the meetings, the relevant provisions are directly linked with the issue of extradition for death penalty.³² The negotiation between China and Bulgaria on extradition treaty also adopted the same approach to resolve the issue of “non-extradition for death penalty”.

³¹ Huang Feng, “Guanyu sixing buyindu wenti de tantao (Discussion of the issue of non-extradition for death penalty),” in Gao Mingxuan & Zhao Bingzhi ed., *Xingfa Luncong (Criminal Law Review)*, Vol. 1, 1998, pp. 447-58.

³² The minutes of the meetings state that when the issue of extradition for death penalty arises, both parties should take into account the characteristics of their own law respectively. *Ibid.*, p. 454.

1.51 No provision for implementing the principle of “non-extradition for death penalty” is made in the extradition treaties signed by China with Mongolia, Kirghizstan, Ukraine and Cambodia respectively.

1.52 Overall, judging from the current judicial practice in China, it appears to accept and comply with the norm of “non-extradition for death penalty” to a certain extent.

CHAPTER 2 – ARRANGEMENTS FOR THE SURRENDER OF FUGITIVE OFFENDERS BETWEEN HONG KONG AND FOREIGN COUNTRIES

2.1 In this chapter, we focus on the primary legislation governing the arrangements for the surrender of fugitive offenders between Hong Kong and foreign countries, namely the *Fugitive Offenders Ordinance* (the FOO)(Cap. 503). To date, Hong Kong has entered into bilateral extradition agreements with more than 10 countries³³. In the form of subsidiary legislation, such agreements become part of the Hong Kong laws³⁴.

Fugitive Offenders Ordinance

Surrender of Fugitive Offenders

2.2 Surrender of fugitive offenders concerns the return by one jurisdiction to another of fugitives who are accused or convicted of serious criminal offences in the jurisdiction which requests the surrender.

2.3 The *Fugitive Offenders (Hong Kong) Order 1967* (S.I. 1967 No. 1911) extended the *Fugitive Offenders Act 1967* of the United Kingdom to Hong Kong. The Act concerned the return of offenders from Hong Kong to the United Kingdom, the Commonwealth countries, the United Kingdom dependencies and the Republic of Ireland. An Order in Council of 20 March 1877 extended the *Extradition Act 1870* of the United Kingdom to Hong Kong. The *Extradition Act 1870* concerned the extradition of offenders to foreign states, which meant states other than Commonwealth countries, United Kingdom dependencies or the Republic of Ireland. The *Extradition Act 1989* of the United Kingdom repealed the *Extradition Act 1870* but preserved the Order in Council made under the Act as far as Hong Kong was concerned. Schedule 1 to the *Extradition Act 1989* was the legislative substitute for the Order in Council which extended the *Extradition Act 1870* to Hong Kong.

³³ These countries include Australia, Canada, India, Indonesia, Malaysia, the Netherlands, New Zealand, the Philippines, Singapore, Sri Lanka, the United Kingdom and the United States.

³⁴ In September 1999, a District Court of the United States ruled that a request for the surrender of a fugitive offender to Hong Kong be refused on the ground that, under the laws of the United States, fugitive offenders shall only be surrendered to countries with which the United States has extradition treaties, whereas Hong Kong is not a sovereign state. On 24 May 2000, the Court of Appeal of the United States overturned this ruling and affirmed the validity of the extradition agreement between Hong Kong and the United States. See *John Cheung v. United States of America*, 213 F. 3d82 (2nd Cir. 2000).

2.4 The fugitive offenders legislation as applied to Hong Kong and the arrangements for the surrender of fugitive offenders basing on bilateral and multilateral treaties which the United Kingdom had extended to Hong Kong have lapsed on the hand over of the sovereignty in 1997. Further, the Hong Kong Government, with the agreement of the Chinese side in the Joint Liaison Group, also proceeded to negotiate a network of bilateral agreements for the surrender of fugitive offenders which would remain in force after 1997. Those new bilateral agreements are similar to the then existing United Kingdom-based arrangements which applied to Hong Kong. Against this background, the FOO was enacted in April 1997 to-

- (a) provide a mechanism for implementing the new agreements and the fugitive offenders provisions in multilateral agreements which will continue to apply to Hong Kong; and
- (b) set out the conditions and procedures under which Hong Kong will surrender fugitives under those agreements, and the treatment which will be accorded to returned fugitives.

Persons Liable to be Surrendered

2.5 Section 4 of the FOO provides that a person in Hong Kong who is wanted in a prescribed place for prosecution, or for the imposition or enforcement of a sentence, in respect of a relevant offence against the law of that place may be arrested and surrendered to that place in accordance with the provisions of the FOO.

2.6 The term “prescribed place” is defined under section 2(1) to mean a place outside Hong Kong to or from which a person may be surrendered to prescribed arrangements.

2.7 The term “arrangements for the surrender of fugitive offenders” is defined under section 2(1) of the FOO to mean arrangements-

- (a) which are applicable to-
 - (i) the Government and the government of a place outside Hong Kong (other than the Central People’s Government or the government of any part of the People’s Republic of China); or
 - (ii) Hong Kong and a place outside Hong Kong (other than any other part of the People’s Republic of China); and
- (b) for the purposes of the surrender of a person or persons wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of an offence against the law of Hong Kong or that place.

Relevant Offences

2.8 Section 2(2) of and Schedule 1 to the FOO specify the offences against the law of a prescribed place which are relevant offences for the purposes of the FOO. Basically, the offence must be punishable for more than 12 months imprisonment.

General Restrictions on Surrender

2.9 Section 5 of the FOO provides for grounds of refusing the surrender of persons to prescribed places including:

- a. where the offence in question is political in nature;
- b. where it appears that the request for surrender has been made for the purpose of punishing the person on account of his race, religion, nationality or political opinions, or that he might be prejudiced at his trial on these grounds;
- c. where the person was convicted in his absence;
- d. where if the offence had occurred in Hong Kong the law of Hong Kong relating to previous acquittal or conviction would have precluded the prosecution, or the imposition or enforcement of a sentence, in respect of that offence;
- e. where there is no guarantee that the person would not be tried for a crime other than that for which his surrender was granted; or
- f. where there is no guarantee that the person would not be re-surrendered to a third jurisdiction.

Procedural Safeguards

2.10 Part II of the FOO sets out the procedure for the surrender of persons from Hong Kong to places outside Hong Kong pursuant to prescribed arrangements. A magistrate may issue a warrant for the arrest of a person on the receipt of an authority to proceed issued by the Chief Executive of the Hong Kong Special Administrative Region (CE). A person arrested shall be brought as soon as practicable before a magistrate. The court of committal shall hear the case and may remand or release the person in custody or on bail. Where the court of committal refuses to make an order of committal in respect of a person, the prescribed place seeking that person's surrender may apply to the court to state a case for the opinion of the Court of First Instance on the question of law involved. If the Court of First Instance dismisses the appeal, the prescribed place may appeal to the Court of Appeal and may further appeal to the Court of Final Appeal. A person in relation to whom an order of committal has been made shall not be surrendered if an application for habeas corpus is made in his case, so long as proceedings on that application are pending.

2.11 CE has a general discretion to make no order for surrender where a person has been committed pursuant to an order of committal. CE may decide to make no order for surrender in the case of a person committed in consequence of a request for surrender if-

- (a) another request for surrender has been made in respect of the person; and
- (b) it appears to CE, having regard to all the circumstances of the case and in particular the prescribed arrangements pursuant to which either request is made, that preference should be given to that other request.

CE may decide to make no order for surrender in the case of a person who is a national of the People's Republic of China.

2.12 Where —

- (a) a person is wanted in a prescribed place for prosecution, or for the imposition or enforcement of a sentence, in respect of a relevant offence against the law of that place; and
- (b) that offence is punishable with death, then an order for surrender may only be made in the case of that person if that place gives an assurance which satisfies CE that that punishment will not be imposed on that person or, if so imposed, not carried out.

Treatment of Persons Surrendered from Prescribed Places

2.13 Part III of the FOO deals with persons surrendered to Hong Kong from prescribed places. Where any person is surrendered to Hong Kong by a prescribed place pursuant to prescribed arrangements, he shall not, subject to certain exceptions, be tried for an offence other than that for which his surrender was granted or be re-surrendered under the Ordinance to any other prescribed place for an offence committed before such surrender. Such a person may be sent back free of charge to the place from which he was surrendered if proceedings against him are not instituted within six months from his arrival in Hong Kong, or on his trial of an offence, he is acquitted or discharged.

Transit

2.14 Where a prescribed place wishes to transport in custody through Hong Kong a person who is being surrendered to that place by another place outside Hong Kong (and whether or not that other place is a prescribed place) that person may be transported in custody through Hong Kong for the purposes of being so surrendered.

Mutual Legal Assistance in Criminal Matters

2.15 The law of and procedure for mutual legal assistance in criminal matters in Hong Kong are contained in the *Mutual Legal Assistance in Criminal Matters Ordinance* (Cap. 525) (the MLAO). However, the MLAO does not prohibit Hong Kong from rendering assistance to jurisdictions with which Hong Kong has no mutual legal assistance agreements. A request for assistance may however be refused on the ground that there are no mutual legal assistance agreements between Hong Kong and the requesting jurisdiction. At present, Hong Kong also provides limited assistance to other jurisdictions pursuant to the *Evidence Ordinance* (Cap. 8) and the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap. 405) in the absence of such agreements. Details of Hong Kong legislation relating to mutual legal assistance in criminal matters are in Appendix II.

CHAPTER 3 - INTER-REGIONAL ARRANGEMENTS FOR THE SURRENDER OF FUGITIVE OFFENDERS IN OTHER PLACES

3.1 This chapter deals with the arrangements for the surrender of fugitive offenders between states in the United States (US) and those between Mainland China and Taiwan. Although the relationship between the Mainland and Hong Kong is not entirely the same as that between states in the US and that between Mainland China and Taiwan, this chapter mainly reviews if the extradition arrangements adopted by these places can serve as useful references for formulating the future arrangements for the surrender of fugitive offenders between the Mainland and Hong Kong.

Arrangements for the Surrender of Fugitive Offenders between States in the United States

3.2 Arrangements for the surrender of fugitive offenders between states in the US are primarily governed by the *US Constitution*, federal laws and state legislation, and, as a matter of course, also by precedents established by the Federal Supreme Court and State Supreme Courts³⁵.

Constitution

3.3 Section 1 of Article IV of the *US Constitution* provides that “[F]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

3.4 Section 2(2) of Article IV of the US Constitution provides that “[A] person charged in any state with treason, felony³⁶, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.”

³⁵ For a detailed discussion, please refer to John Bassett Moore, *A Treatise on Extradition and Interstate Rendition*, Littleton, Colorado: Fred B Rothman & Co., Vol. 2 (Originally published by Boston Book Co., 1891), 1997, Joseph F. Zimmerman, *Interstate Relations: The Neglected Dimension of Federalism*, Westport, Connecticut: Praeger, 1996, Chapter 6, and Charles E. Toria, *Wharton’s Criminal Procedure*, 13th ed., Vol. 1, West Group, 1989, Chapter 6.

³⁶ In line with the British common law system, the US classifies offences into three categories, namely treason, felony and misdemeanor, according to the seriousness of penalty. Currently, an offence punishable by imprisonment for a term exceeding one year is classified as felony.

3.5 Much controversy arose in the early days over the meaning of the term “other crime” in the constitutional provision in paragraph 3.4. The controversy lasted until 1860 when the US Federal Supreme Court decided in the case of *Kentucky v. Dennison*³⁷ that “other crime” means “punishable as a crime by the laws of the state making demand”, even if the crime does not constitute an offence under either the common law or the laws of other states (including the demanded state), the fugitive should still be surrendered for trial³⁸.

Federal Laws

3.6 Since the US Constitution did not clearly define matters such as the form or the method of surrender of fugitive offenders, each state adopted different procedures and arrangements in the past, which had caused a lot of controversy and confusion. In order to avoid constant conflicts and thus disharmony among states, the Federal Government and every state, at the beginning of the founding of the US, intended to draft a set of legislation on the surrender of fugitives applicable throughout the country, in order to standardize the procedure. In 1793, the US Congress adopted the *Rendition Act of 1793*, which was later incorporated into the Revised Statutes³⁹. The Revised Statutes have provided a uniform procedure for the interstate surrender of fugitive offenders.

3.7 The legislation primarily provides that when the executive authority of a state or territory demands for the rendition of a fugitive from justice and produces a certified authentic copy of an indictment to the demanded state, the demanded state should cause the fugitive to be arrested, notify at the same time the executive authority of the demanding state, and deliver the fugitive to the agent appointed by the demanding state.

³⁷ 65 U.S. (24 How.) 66 (1860).

³⁸ See John Bassett Moore, pp. 828-831.

³⁹ “Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.”, 18 USCS§ 3182.

3.8 However, the enactment of federal legislation failed to end the controversy over the arrangements for the interstate surrender of fugitive offenders, especially when the Governor of a state had wide discretionary power⁴⁰. There were cases where the surrender demands were refused by the Governors of the demanded states on the ground of protecting the human rights and freedom of the fugitives or even preventing them from being treated unfairly after their surrender. This had given rise to disputes between states. The Governor of the state whose demand for surrender had been refused might, for the sake of revenge, take the same action to refuse demands for surrender by other states⁴¹.

State Laws

3.9 In 1926, the National Conference of Commissioners on Uniform State Laws drafted the *Uniform Criminal Extradition Act*, which was revised in 1935. Except for the states of Mississippi and South Carolina, all states have adopted the Act as their laws⁴². This Act provides that it is the duty of the Governor of a state to arrest and deliver up to the Executive Authority of any other state of the US any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

3.10 This Act sets out in detail the form of making a demand and demand documents, arrest and detention, bail, habeas corpus proceedings and related matters.

3.11 The *Uniform Criminal Extradition Act* also permits the Governor of a state to surrender to the demanding state a fugitive from justice charged with committing an act intentionally resulting in a crime in the demanding state, even if the fugitive was not in the demanded state at the time of committing the crime.⁴³

3.12 In 1931, the National Conference of Commissioners on Uniform State Laws also drafted the *Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*. All states except Alabama have adopted it as their laws⁴⁴. The law requires the demanded state to deliver a witness to the relevant officials of the demanding state upon receiving a certificate issued by a judge of the demanding state to require the witness to attend and testify in a criminal prosecution or a grand jury investigation.

⁴⁰ According to the court opinion on *Kentucky v. Dennison*, the duty of the Governor to surrender the fugitive is declaratory of the moral duty but not mandatory and compulsory.

⁴¹ John J. Murphy, "Revising domestic extradition law", *University of Pennsylvania Law Review*, Vol. 131, No. 5, April 1983, pp. 1062-1109 at pp. 1074-1077.

⁴² See *California Penal Code*, sections 1548-1556.2. <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=01001-02000&file=1547-1558>.

⁴³ "The Governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in the other state with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand", section 13 of the *Uniform Criminal Extradition Act*.

⁴⁴ For example, California adopted this Act in 1933, see *California Penal Code*, section 1334.

3.13 Each state of the US has also enacted the *Uniform Close Pursuit Act*⁴⁵. This Act provides that any police officer of a state, who has entered another state in close pursuit of a fugitive or a criminal, shall have the authority to arrest such person in another state. This dispenses with the need for the law enforcement authorities to go through the surrender of fugitive procedure after making the arrest.

3.14 Each state of the US has also enacted the *Interstate Compact for Out-of-State Parolee or Probationer Supervision*⁴⁶. This Compact primarily permits a parolee or probationer of a state to reside in another state which is also a party to this Compact and be placed under the proper supervision of the latter state. The parolee or probationer may, if necessary, be sent back to the state where he was convicted and the legal procedure for the transfer shall be waived.

3.15 Each state of the US has also enacted the *Interstate Agreement on Detainers*⁴⁷. This Agreement allows a criminal serving his sentence in one state to be temporarily detained in another state so as to facilitate another trial of the criminal. After the completion of the trial, the criminal shall be sent back to the state where he is serving his sentence, regardless of the result of the trial.

Habeas Corpus

3.16 Interstate rendition in the US is intended to be a summary and mandatory executive proceeding⁴⁸. The demanded state does not need to conduct detailed inquiry and such proceedings are subject to judicial review only under very limited circumstances (see paragraph 3.17). Once the Governor of the demanding state has, upon receiving an authentic copy of indictment provided by the demanding state, decided to make an interstate rendition, such a decision shall be *prima facie* evidence of compliance with the requirements of the Constitution and relevant laws.

3.17 If the person demanded to be surrendered does not want to be surrendered, he may apply to the court for habeas corpus. In the case of *Michigan v Doran*, the US Supreme Court held that courts may only consider the following four issues in dealing with the application for habeas corpus in rendition proceedings:

- (1) whether the extradition documents on their face are in order;
- (2) whether the petitioner has been charged with a crime in the demanding state;

⁴⁵ See *California Penal Code*, sections 852-852.4.

⁴⁶ See *California Penal Code*, sections 11175-11179.

⁴⁷ See, for example, sections 580.10-520.20 of the *New York Criminal Procedure Law*.

⁴⁸ “*Interstate extradition was intended to be a summary and mandatory executive proceeding ... the [Extradition] clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial*” *Michigan v Doran*, 439 U.S. 282 (1978).

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- (3) whether the petitioner is the person named in the request for extradition; and
 - (4) whether the petitioner is a fugitive⁴⁹.

3.18 Hence, in deciding whether to surrender a person, it is only necessary to consider whether or not the prescribed procedure has been complied with, and the guilt or innocence of the person concerned is not a point that needs to be considered⁵⁰.

Issue of Death Penalty

3.19 Thirty-eight states in the US currently retain death penalty while the remaining 12 states have abolished death penalty altogether. The crimes for which death penalty may be imposed in each state are different, and usually include murder, death of the victim caused by kidnapping, hijacking, and treason.⁵¹ As aforementioned, in considering whether or not to surrender a fugitive, the demanded state only focuses its attention on whether the procedures comply with the legal requirements. If a demanded state which does not have death penalty needs to surrender a fugitive who is charged with first degree murder to another state which has death penalty, it will not refuse the rendition demand simply because the fugitive may be sentenced to death in the demanding state.

Issue of Political Offenders

3.20 In considering a demand for interstate rendition, the demanded state will not refuse the demand simply on the ground that the fugitive is a political offender. The US Constitution clearly stipulates that a fugitive charged with the offence of treason should be surrendered. Arguments have all along been put before the courts for non-rendition on the ground that the fugitive offender may face political oppression or may not receive a fair trial if he is surrendered. However, this argument of “fugitive rights doctrine” has not received wide support from the judicial community.⁵²

⁴⁹ Whether the demanded person has committed an offence in the demanding state and is currently in the demanded state.

⁵⁰ “The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime”, section 20 of the *Uniform Criminal Extradition Act*.

⁵¹ Hugo Adam Bedau ed., *The Death Penalty in America: Current Controversies*, New York: Oxford University Press, 1997, Chapter 2.

⁵² See *New Mexico ex rel. Ortiz v. Reed*, 534 U.S. 151 (1998) and Julie Ann Karkosak, “Feeling injustice: examining the interstate extradition clause as applied to political refugees,” *University of Cincinnati Law Review*, Fall 1999.

Establishment of an Interstate Rendition System

3.21 The interstate extradition system in the US is based on the Constitution and federal legislation, and state laws are only of a supplementary nature. Nevertheless, the differences among states in their judicial systems and protection of human rights in the past had caused much controversy over the issue of interstate extradition of fugitives. Such differences have gradually been reduced since the 1960s.

3.22 The approach adopted by the US to resolve the conflicts of state laws is by way of establishing “model laws”. Under this approach, some official, quasi-official or non-governmental organizations will initiate the drafting of a set of “model laws”, which will then be adopted as state laws by the legislature of individual states for the purpose of achieving uniformity of state laws.⁵³

3.23 The *Uniform Criminal Extradition Act* aforementioned was drafted by the National Conference of Commissioners on Uniform State Laws. This organization has, since 1892, worked for the uniformity of state laws. Its work primarily involves drafting “uniform” or “model” laws and promoting them to all states with a view to enacting them as state laws.⁵⁴

3.24 In 1983, the same organization also drafted a new *Uniform Extradition and Rendition Act*⁵⁵ to further improve the previous *Uniform Criminal Extradition Act*⁵⁶. However, so far, only North Dakota has adopted it as its law.

3.25 In contrast with the surrender of fugitive offenders between countries, the arrangements for interstate extradition in the US are not subject to the general principles of international extradition. For example, none of the “principle of double criminality”, “principle of non-extradition for death penalty” and “principle of non-extradition of political offenders” is applicable. Nevertheless, it should be noted in particular that the establishment of the interstate extradition system in the US is, to a large extent, based on the fact that the legislative and judicial systems of all states are subject to the provisions of the Constitution and are not permitted to violate the constitutional protection of the citizens’ rights.⁵⁷

⁵³ Zhao Xianglin & Liu Yinghong, “Meiguo zhouji falu chongtu lifa yu shijian jiqi dui woguo de qishi (Legislation and practice to resolve conflicts of state laws in America - implications for China),” in Zhongguo Guoji Sifa Xuehui ed., *Zhongguo Guoji Sifa yu Bijiaofa Niankan (Yearbook of Chinese Private International Law and Comparative Law)*, Beijing: Falu Chubanshe, 1999(2), pp. 270-280.

⁵⁴ For information on this organization, please refer to <http://www.nccusl.org/>.

⁵⁵ See North Dakota’s *Criminal Judicial Procedural Act*, Chapters 29-30.2, available at <http://ranch.state.nd.us/LR/cencode/CCT29.pdf>.

⁵⁶ John J. Murphy, “Revising domestic extradition law”, *University of Pennsylvania Law Review*, 131(5), April 1983, pp. 1062-1109.

⁵⁷ For example, the *US Constitution* guarantees that citizens enjoy the rights of due legal process, open trial, assistance of lawyers and no imposition of torture. The Constitution also ensures that every state shall adopt the republic form of government, and that no state may adopt legislation which either deprives citizens of their rights or has retrospective effect.

Arrangements for the Surrender of Fugitive Offenders between Mainland China and Taiwan

3.26 The cross-strait mutual surrender of criminal offenders was initially arranged through third parties. In April 1989, the Mainland police handed a Taiwanese murderer, Yang Mingzong, to the Taiwan police via Singapore; and the Taiwan police also requested, through the International Criminal Police Organization, the Mainland side to detain fugitive offenders, Fan Wenxin and others, who had smuggled firearms to Taiwan, and to hand them over to Taiwan.

3.27 On 12 September 1990, the Committees of Red Cross from the two sides negotiated in Jinmen an agreement on the mutual surrender of illegal immigrants, criminal suspects and convicted criminals on the sea, referred to as the *Jinmen Agreement*.

3.28 An intermediary organization, the Straits Exchange Foundation (SEF), was established in Taiwan in 1991, with official authorizations, to co-ordinate and handle matters relating to mutual visits by people from Taiwan and the Mainland. An intermediary organization, the Association for Relations Across the Taiwan Straits (ARATS), was also created in Mainland China in the same year, with similar official authorizations.

3.29 Since their establishment, the SEF and the ARATS have engaged in negotiations of mutual assistance in cross-strait criminal justice matters.⁵⁸ They agreed in April 1993 to enter into negotiations on the following matters: The Surrender of Persons who Entered the Region of the Other Side in Violation of the Relevant Rules and Other Related Matters, Joint Action against Smuggling, Robbery and Other Crimes Committed on the Sea, Mutual Consultation and Handling Cross-strait Fishing Disputes, Cross-strait Protection of Intellectual Property, and Cross-strait Mutual Legal Assistance of Judiciary Organs.⁵⁹ To date, however, the SEF and the ARATS have not been able to reach any concrete agreement on mutual assistance in criminal matters.

3.30 The agreements reached by the SEF and the ARATS touching upon mutual assistance in criminal matters include: (1) *Agreement on Use and Verification of Certificates of Authentication Across the Taiwan Straits* concluded in April 1993, under which, both parties agree to transmit to the other side duplicates of certificates of authentication concerning inheritance, marriage, trust and property rights; and (2) four mutual understandings reached by the SEF and the ARATS in October 1998, with the third of these mutual understandings specifying that “*the SEF and the ARATS will strengthen case assistance and entrust each other in handling matters concerning the safety of life and property of compatriots on both sides of the Straits*”.

⁵⁸ For a description of the cross-strait meetings, see the Schedule of Meetings between the SEF and the Mainland, available at <http://www.sef.org.tw/www/html/discuss1.htm>.

⁵⁹ Agreement of the Gu-Wang Talks, April 1993.

3.31 Mainland China has not enacted any legislation governing mutual assistance in criminal matters between the Mainland and Taiwan.⁶⁰ Taiwan has enacted the *Regulation on the Relations between Residents of the Taiwan Region and the Mainland Region*⁶¹ in 1992. This Regulation has six chapters, namely General Principles, Administrative Matters (32 articles), Civil Matters (34 articles), Criminal Matters (four articles), Penalties (16 articles) and Supplementary, totaling 96 articles. It forms the primary basis for Taiwan in resolving the cross-strait conflicts of law issues. Relevant authorities in Taiwan have also promulgated a series of detailed measures to implement the above Regulation.

Jinmen Agreement Model

3.32 The *Jinmen Agreement* was signed in 1990. It remains the only basis for the surrender of criminal offenders between the two sides of the Straits.

3.33 The main contents of the *Jinmen Agreement* are:⁶²

- (1) Principles of surrender: ensuring that the operation of surrender is consistent with humanitarianism and the principles of safety and convenience.
- (2) The person to be surrendered:
 - i). residents who entered the region of the other side in violation of the relevant rules;
 - ii). criminal suspects or convicted criminals.
- (3) Place of surrender: both sides decided Mawei-Mazu (Mazu-Mawei) as the designated places, and also agreed Xiamen-Jinmen (Jinmen-Xiamen) as the alternative if necessary after considering the residence of the people being surrendered, the weather, conditions at sea and other factors.

⁶⁰ The highest judicial organs in the Mainland made a number of related judicial interpretations. For example, the Supreme People's Court and the Supreme People's Procuratorate promulgated the *Notice on Suspending the Prosecution of Crimes Committed by People who Went to Taiwan before the Establishment of the People's Republic of China*, the *Notice on Suspending Prosecution of Crimes Committed by People who Went to Taiwan after the Establishment of the People's Republic of China but before the Establishment of a Local People's Government*, and *Executive Minutes of the Seminar on Handling Criminal Review and Civil Cases Involving Taiwan*.

⁶¹ The text of the Regulation is available at <http://www.gio.gov.tw/info/mainland/law1.html>.

⁶² See Appendix III for the text of the *Jinmen Agreement*.

- (4) Procedures of surrender:
- i). both parties shall notify the other party of the information relating to the persons to be surrendered, and the requested party shall verify the information, reply to the requesting party within 20 days, and execute the surrender according to the agreed time and place. Where the requested party has questions in verifying the persons to be surrendered, it shall notify the requesting party for double checking;
 - ii). both parties shall use the Red Cross flag during the hand-over process;
 - iii). during the hand-over process, two representatives whose appointments have been confirmed by both parties shall sign the hand-over documents; and
 - iv). personnel from the Committees of Red Cross on both sides shall witness the whole surrender procedure to safeguard humanitarianism and to maintain safety.

3.34 The *Jinmen Agreement* not only set the precedent for direct cross-strait mutual assistance in criminal matters, but also created the model for the surrender of criminal offenders through non-governmental organizations from both sides of the Straits.

3.35 Because of the creation of intermediary organizations with official authorizations on both sides of the Straits, the Committees of Red Cross on both sides have since August 1992 transferred the responsibility for matters relating to surrenders to the SEF and the ARATS respectively. Despite this change, no corresponding changes were made to the *Jinmen Agreement*.

3.36 Since 1990, Taiwan has surrendered more than 30 000 persons from the Mainland region who entered Taiwan illegally. Through *Jinmen Agreement*, Taiwan has requested Mainland China to assist in detaining and surrendering 340 persons, of whom only ten were successfully detained and surrendered to Taiwan. See Table 1 for details (attached as Appendix IV).

Issues Relating to the Surrender of Aircraft Hijackers

3.37 As interactions between people from both sides of the Straits have been increasing since the late 1980's, there is a wide range of crimes which necessitates joint actions from both sides, especially the crime of hijacking aircraft. In 1993, there were 10 hijacking offences occurred where aircraft from Mainland China were hijacked to Taiwan. The two sides have discussed the matter relating to the surrender of aircraft hijackers on numerous occasions.⁶³ Although they have not been able to sign the final agreement on the surrender of aircraft hijackers, a draft agreement is available.

3.38 Since Mainland China acceded to the *Tokyo Convention*, the *Hague Convention* and the *Montreal Convention* between 1978 and 1980,⁶⁴ it has assumed the scope of obligations prescribed in these treaties. These international treaties also form the legal basis for Mainland China to punish the act of aircraft hijacking. In addition, Article 6 of the current Mainland Criminal Law stipulates that: "[T]his Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the People's Republic of China, except as otherwise specifically provided by law. This Law shall also be applicable to anyone who commits a crime on board a ship or aircraft of the People's Republic of China.....".⁶⁵

⁶³ For detailed discussions, see Zhao Bingzhi, *Waixiangxing Xingfa Wenti Yanjiu (Studies on Externally Oriented Criminal Law Issues)*, Vol. 1, Beijing: Zhongguo Fazhi Chubanshe, 1997, Chapters 19-20; Zheng Zhengzhong, *Jieji Fanzui zhi Yanjiu (Studies on the Crime of Aircraft Hijacking)*, Vol. 1 & 2, Taiwan: Wunan Tushu Chuban Gongsi, 1996; Xu Liyi, "Liangan jieji fanqianfan tanpan: shuangfang xiangdui diwei yu zhonggong tanpan xingwei moshi zhipouxu (Cross-strait negotiations on the surrender of aircraft hijackers: examinations on the positions of both parties and the behavioural mode of the Chinese Communist Party in negotiation)," *Gongdang Wenti Yanjiu*, 22(2), pp. 26-35; Wang Taiquan & Chen Jianyu, "Dalu jieji fanqianfan shou haixia liangan erdu shenpan zhi guojifa yu requan wenti (Issues of international law and human rights concerning the cross-strait double trials of mainland aircraft hijackers)," *Yuedan Faxue Zazhi*, 1998 (35), pp. 85-95, and Zhang Zengliang, "Dalu jieji fanqianfan shourong yu qianfan wenti zhi yanjiu (Studies on the detention and surrender of mainland aircraft hijackers)," *Jingxue Congkan*, 2000(7), pp. 275-300.

⁶⁴ The three international Conventions provide criminal jurisdiction, extradition and punishment of crimes committed in aircraft.

⁶⁵ This article is the same as Article 3 of the original Criminal Law 1979.

3.39 Taiwan signed the *Tokyo Convention*, the *Hague Convention*, and the *Montreal Convention* between 1969 and 1972. The Criminal Law of Taiwan also has provisions on jurisdiction over aircraft similar to those in the Mainland Criminal Law. Article 3 of the *Taiwan Criminal Law* stipulates that: “[T]his Law applies to anyone who commits a crime within the territory and territorial waters and space of the Republic of China; any crime committed within the vessels or aircraft of the Republic of China which are outside the territory and territorial waters and space of the Republic of China is deemed to have been committed within the territory and territorial waters and space of the Republic of China.” In addition, Article 75 of the *Regulation on the Relations between Residents of the Taiwan Region and the Mainland Region* also provides that: “[A]ny person who commits a crime in the Mainland Region or in a Mainland vessel or aircraft shall be dealt with according to law, even though he has been punished for the same offence by competent authorities in the Mainland Region. But he should be exempted from further punishment fully or partially.”

3.40 According to the above international treaties and the criminal law provisions of both sides, aircraft hijacking is both an international and domestic crime, and the two sides can exercise criminal jurisdiction over the act. However, the two sides of the Straits disagree on who should exercise the jurisdiction.

3.41 The SEF and the ARATS have discussed matters relating the surrender of hijackers of aircraft on numerous occasions since the end of 1993. The Mainland Affairs Council of the Executive Yuan of Taiwan promulgated the *Position of the Government in Handling the Incidents of Aircraft Hijacking* in July 1994.⁶⁶ It insisted upon the principle of separating hijackers from aircraft, so that the aircraft, passengers and crews could continue the voyage as soon as possible, and the hijackers would be detained for prosecution according to the law. The *Position* paper maintained that the *Jinmen Agreement* could not be used to handle the crime of hijacking aircraft as both sides are entitled to exercise jurisdiction over the crime. It further pointed out that in surrendering hijackers of aircraft, consideration should be given to exceptional circumstances, such as the non-surrender of one’s own nationals and political offenders, as well as the application of a strict decision-making process.

⁶⁶ See Zheng Zhengzhong, *Jieji Fanzui zhi Yanjiu (Studies on the Crime of Aircraft Hijacking)*, Vol. 2, Taiwan: Wunan Tushu Chuban Gongsì, 1996, Appendix V.

3.42 Between 22 and 28 January 1995 when the third “Chiao-Tang Meeting” was held in Beijing,⁶⁷ the SEF and the ARATS had reached a common understanding on the draft *Agreement of the Two Sides on the Surrender of Hijackers of Aircraft and other Related Matters*⁶⁸ and were prepared to sign.⁶⁹ However, as Taiwan insisted on concluding the agreement on aircraft hijackers and the agreement on illegal immigrants together with the agreement on fishing disputes, and as the two sides disagreed on the jurisdiction over fishing disputes, they were not able to conclude the agreement on aircraft hijackers.

3.43 Although the two sides were not able to reach an agreement on the surrender of aircraft hijackers, they have established several principles of surrender, which can be regarded as the basis for the implementation of future cross-strait mutual assistance in criminal matters.⁷⁰ These principles include:

(1) Rule against Double Jeopardy

Section 3(3)(1) of the draft agreement states that as to “*a criminal on whom a surrender request is made, the requested party shall conduct the necessary investigation and make the surrender.*” This process is required to avoid the possibility that a criminal is tried by both sides for the same offence; it can also be seen as the trust and respect that each side has regarding the other's legal system.⁷¹

(2) Non-Surrender of Nationals

Section 3(2) of the draft agreement provides that “*where a person on whom a surrender request is made is the personnel of the requested party, the requested party shall be in charge of handling the case.*” The implication is that where a person wanted for surrender is a resident of the requested party, the requested party will not surrender the person to the other party.

⁶⁷ Chiao Jenho and Tang Shubei are Vice-Chairman of the SEF and Executive Vice-Chairmen of the ARATS respectively.

⁶⁸ The text of the draft *Agreement of the Two Sides on the Surrender of Hijackers of Aircraft and other Related Matters* is attached as Appendix V.

⁶⁹ The two sides had also reached an understanding on the draft agreement on the surrender of illegal immigrants, see *China Times*, 25 January 1995, page 2.

⁷⁰ Zhao Bingzhi, *Waixiangxing Xingfa Wenti Yanjiu (Studies on Externally Oriented Criminal Law Issues)*, Vol. 1, Beijing: Zhongguo Fazhi Chubanshe, 1997, pp. 578-584. Some scholars are of the opinion that these principles may be extended to the arrangement between the Mainland and Hong Kong on the surrender of fugitive offenders. See Fu Hualing, “One Country and Two Systems: Will Hong Kong and the Mainland reach an agreement on rendition?”, *Hong Kong Lawyer*, January 1999, pp. 54-5.

⁷¹ The issue of whether or not to recognize the jurisdiction of the other party was a very contentious matter during the cross-strait negotiation.

(3) Public Order Exceptions ⁷²

Section 3(3)(1) of the draft agreement provides that “*in the special circumstances where the requested party is of the opinion that it has closer relations to the case or its rights and interests are damaged more severely, it has the right to consider the circumstances and decide to surrender or not.*” The provisions of the agreement do not expressly state the meaning of the expression “*...has closer relations to the case or its rights and interests are damaged more severely*”. This can be regarded as the agreement providing due flexibility for both sides to co-operate with each other while safeguarding their own interests.

(4) Humanitarianism

Section 3(4) of the draft agreement simply states that “*the surrender of hijackers of aircraft and others shall be consistent with humanitarian spirits.*”

3.44 In April 1997, Mainland China surrendered a Taiwanese hijacker of aircraft, Liu Shanzhong, to Taiwan after investigation. In July 1997, Taiwan surrendered hijackers of aircraft, Huang Shugang and Han Fengying, to Mainland China after serving their sentences in Taiwan. Additionally, in February 1999, Taiwan planned to surrender nine aircraft hijackers who served their sentences in Taiwan to Mainland China, but during the course of transfer, some of the hijackers committed the offence of assault. As a result, only five were surrendered. The two sides hold different views on these surrender cases. Mainland China pointed out that they were in accordance with the *Jinmen Agreement*, while Taiwan argued that they were by special arrangement.

Arrangement for the Surrender of Fugitive Offenders between the Two Sides

3.45 While contacts between the two sides have been growing since the late 1980's, a variety of criminal activities have also occurred. Authorities from both sides have on numerous occasions discussed issues relating to mutual assistance in criminal matters. However, political considerations have been added into the discussions and as a result, the scope of co-operation in criminal justice has been very limited to date.

3.46 The substance of the 1990 *Jinmen Agreement* is mostly concerned with the matter of principles, and it deals primarily with the surrender of persons from the Mainland who entered Taiwan illegally.

⁷² Public order exception is a principle in international judicial mutual assistance, providing that where a matter concerns the domestic legal procedures of a country, requirement of public order, economic interest or other important public interests, that country may reject a request from other countries for judicial assistance.

3.47 Due to the seriousness of the problem of cross-strait aircraft hijacking, there has been substantive progress on the surrender of aircraft hijackers, with a draft agreement being available. However, since the agreement on the surrender of aircraft hijackers between the two sides has remained unsigned, there is a lack of a unified model and operational mechanism in executing the surrender of aircraft hijackers between the two sides. In addition, some aircraft hijackers have been subjected to two trials for the same offence,⁷³ which has been criticized by some scholars as a gross violation of basic human rights.⁷⁴

3.48 Although the arrangement for the surrender of fugitive offenders between the two sides is different from international extradition, there is a need to draw references on international conventions and principles, given the apparent differences between the two sides in political, economic and judicial systems. There is, however, no agreement on which international conventions should or should not be adopted.

3.49 A Taiwan scholar, Professor Cai Dunming, commissioned by the Mainland Affairs Council of the Executive Yuan, completed his research report entitled *Studies on Mechanisms Handling Cross-strait Criminal Cases*⁷⁵ in 1993. The report proposed a *Draft Regulation on Handling Criminal Cases Entrusted by the Mainland Region*,⁷⁶ which included the gathering of evidence, interrogation of criminal suspects, the surrender of criminals and handling of co-defendants. There were discussions and comments among scholars from both sides on the report.

⁷³ Mainland aircraft hijackers were tried again after being surrendered to Mainland China despite the fact that they had been sentenced and had served their sentences in Taiwan.

⁷⁴ Wang Taiquan & Chen Jianyu, "Dalu jiejifan shou haixia liangan erdu shenpan zhi guojifa yu requan wenti (Issues of international law and human rights concerning the cross-strait double trials of mainland aircraft hijackers)," *Yuedan Faxue Zazhi*, 1998 (35), pp. 85-95.

⁷⁵ Cai Dunming, *Sheji Liangan Xingshi Anjian Chuli Fangshi Yanjiu (Studies on Mechanisms Handling Cross-strait Criminal Cases)*, Taiwan: Xingzhengyuan Dalu Weiyuanhui Weituo Yanjiu Baogao (Research report commissioned by The Mainland Affairs Council of the Executive Yuan), October, 1993.

⁷⁶ The text of the draft is attached as Appendix V.

CHAPTER 4 - DIVISION OF CRIMINAL JURISDICTION BETWEEN THE MAINLAND AND HONG KONG

4.1 This chapter begins with a definition of criminal jurisdiction, followed by an introduction to some general principles of criminal jurisdiction and then an analysis of the respective jurisdictions of criminal laws of the Mainland China and Hong Kong. This chapter also discusses the criminal jurisdiction controversies between the Mainland and Hong Kong arising from the cases of Cheung Tze-keung and Li Yuhui, and concludes with a summary of principles proposed by some scholars regarding the division of criminal jurisdiction between the Mainland and Hong Kong.

Criminal Jurisdiction

Criminal Jurisdiction/Spatial Effect of Criminal Law

4.2 Criminal jurisdiction generally refers to as the right of a sovereign state to prosecute, try and punish crimes occurring within its sovereignty.⁷⁷

4.3 In addition to the above definition, criminal jurisdiction also refers to the territory in which the criminal law of a state applies and the legal scope of the sovereignty. In this sense, criminal jurisdiction can be seen as the spatial effect of criminal law. The spatial effect of criminal law, as discussed by scholars in the Mainland, refers to the territorial and personal effect of criminal law.⁷⁸ The spatial effect of criminal law is consistent with the jurisdiction of criminal law. When the criminal law of a state provides its spatial scope of application, it declares the criminal jurisdiction of the state.

4.4 Although the spatial effect of criminal law is commensurate with criminal jurisdiction in scope, they are two different concepts. Criminal jurisdiction is part of state sovereignty, coming into being with the establishment of a state, but the spatial effect of criminal law is the scope of application provided by the criminal law on certain crimes.

⁷⁷ Gao Mingxuan, *Xingfaxue Yuanli (Principles of Criminal Law)*, Vol. 1, Beijing: Zhongguo Renmin Daxue Chubanshe, 1993, p. 276.

⁷⁸ Zhao Bingzhi ed., *Xinxingfa Jiaocheng (Textbook of the New Criminal Law)*, Beijing: Zhongguo Renmin Daxue Chubanshe, 1997, p. 67.

4.5 The spatial effect of criminal law bears some differences with criminal jurisdiction.⁷⁹ As stated above, the spatial effect of criminal law defines the scope of criminal jurisdiction, while criminal jurisdiction refers to the types of cases over which judicial institutions can claim jurisdiction. Although the criminal law may provide its application to a particular crime, it does not mean the criminal law will actually be applied when that crime occurs, because it depends on whether a state is capable of exercising jurisdiction over the criminal activity. For example, where a person in one country commits an offence of endangering the state security of another country, judicial institutions of the latter country may not be able to exercise jurisdiction because the offender is outside the country.

Principles of Criminal Jurisdiction

4.6 There are basically four factors in defining the scope of criminal jurisdiction, which are the place where a crime takes place, the nature of the person who commits the crime, the nature of the victim of the crime and the nature of the crime. Different principles of criminal jurisdiction are derived from these factors.⁸⁰

Territorial Principle

4.7 Under the territorial principle, the criminal law of a country applies to any person, no matter whether he or she is a national or a foreigner, who commits an offence within the territory of that country. In practice, this principle can be divided into subjective and objective applications. Subjective application allows a state to exercise jurisdiction over a crime which is started in the country but not completed there. Objective application, which is more commonly accepted in the international community, refers to the exercise of jurisdiction over a crime which is completed in the country, although it is not started there.

⁷⁹ The Law Commission, *Report on the Territorial and Extraterritorial Extent of the Criminal Law*, London: Her Majesty's Stationery Office, 1978, p. 4 and Law Reform Commission of Canada, *Extraterritorial Jurisdiction*, Working Paper 37, 1984, pp. 3-4.

⁸⁰ Michael Akehurst, "Jurisdiction in international law," in W. Michael Reisman ed., *Jurisdiction in International Law*, Aldershot, Hants: Ashgate/Dartmouth, 1999, pp. 145-235; Ian Brownlie, *Principles of Public International Law*, 5th ed., Oxford: Clarendon Press, 1998, Chapter 15, and Zhang Zhihui, *Guoji Xingfa Tonglun (Treatise on International Criminal Law)*, enlarged ed., Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1999, Chapter 3.

Nationality Principle

4.8 The nationality principle refers to the application of the criminal law of a state to the crime committed by its nationals, regardless of whether the crime occurs within or outside the territory. Since a state cannot exercise its criminal jurisdiction outside its territory, it must await the national to return to the country before exercising its jurisdiction. Many countries restrict the application of the nationality principle in their criminal laws to the more serious criminal activities.⁸¹

Passive Personality Principle

4.9 The passive personality principle refers to the exercise of criminal jurisdiction of a state over foreigners who harm a national of that state. This principle has not been universally accepted in the international community. This principle is usually given effect through the protective principle and universality principle.

Protective Principle

4.10 The protective principle refers to the application of the criminal law of a state to crimes endangering the interests of the state or its nationals, regardless of whether the crime occurs within the territory or outside the territory and regardless of whether the crime is committed by foreigners or nationals.⁸² This principle usually applies to criminal behaviour concerning politics and state security.

Universality Principle

4.11 The universality principle refers to the exercise of criminal jurisdiction by each country over crimes harming the common interests of the international community pursuant to the provisions of international treaties, regardless of the nationality of the person who commits the offence and the place where the crime occurs.

Extraterritorial Criminal Jurisdiction

4.12 Except for the territorial principle, other principles stated above involve the application of extraterritorial criminal jurisdiction.

⁸¹ See "Harvard Research Draft Convention on Jurisdiction with Respect to Crime", *American Journal of International Law*, Vol. 29, 1935, Special Supplement, pp. 519-33.

⁸² Iain Cameron, *The Protective Principle of International Criminal Jurisdiction*, Aldershot, Hants: Dartmouth, 1994.

4.13 Traditionally, common law countries emphasize the territorial principle in exercising criminal jurisdiction, taking the view that one should not interfere with the domestic affairs of the state where criminal activities occur, while civil law countries tend to adopt multiple principles of extraterritorial jurisdiction.⁸³

4.14 Criminal jurisdiction in the United Kingdom (UK) firmly adheres to the territorial principle. However, there are individual statutory laws which extend the jurisdiction of the UK courts outside the national borders. The UK courts have jurisdiction over criminal cases occurring on vessels and aircraft under the control of the UK. In addition, the UK courts have jurisdiction over certain criminal cases committed by certain nationals, including English armed force, civil servants serving overseas, observers dispatched by the government, and exchange scientists. The UK courts have jurisdiction over certain criminal offences committed by its nationals overseas, including offences relating to explosive items, official secrets and unlawful entry. The UK courts have jurisdiction over the crimes of murder and manslaughter committed by the UK nationals, regardless of whether the victim is an UK national, or whether the offence occurred in the UK.⁸⁴

4.15 The US has gradually expanded its extraterritorial criminal jurisdiction in recent years in response to rising cross-border and international crimes, such as crimes involving terrorism, international business, drug trafficking, and crime against humanity.⁸⁵ However, the extension of criminal jurisdiction has led to many conflicts in jurisdiction and law.

Jurisdiction of Criminal Litigation

4.16 Jurisdiction of criminal litigation and criminal jurisdiction are also different concepts. Jurisdiction of criminal litigation is usually provided for by criminal procedure law. It defines the jurisdiction of a particular judicial institution in investigating, prosecuting and adjudicating a particular case, in accordance with the nature of the case and the power of the judicial institution. In civil law countries, the above two concepts are clearly distinguished. However, in Anglo-American common law countries, the term “jurisdiction” refers to either criminal jurisdiction or jurisdiction of criminal litigation.⁸⁶

⁸³ Geoff Gilbert, “Crimes Sans Frontiers: Jurisdictional Problems in English Law” in John Dugard and Christine van den Wyngaë eds., *International Criminal Law and Procedure*, Aldershot; Brookfield, Vt.: Dartmouth, 1996.

⁸⁴ *Halsbury’s Laws of England*, Volume II(I), 4th edition (reissue), London: Butterworths, 1990, pp. 461-74.

⁸⁵ Christopher L. Blakesley, “Extraterritorial Jurisdiction” in *International Criminal law*, M. Cherif Bassiouni ed., 2nd ed., Ardsley, N.Y.: Transnational Publishers, Inc., 1999.

⁸⁶ Li Haidong, “Lun xingshi guanxiaquan (On criminal jurisdiction),” in Zhao Bingzhi, ed., *Xingfa Xintansuo (New Explorations on Criminal Law)*, Beijing: Qunzhong Chubanshe, 1993, pp. 138.

Spatial Effect of the Chinese Criminal Law

Characteristics of the Chinese Criminal Law

4.17 Broadly speaking, the criminal laws of the People's Republic of China include the criminal code, separate criminal legislation and supplementary criminal legislation. In the Mainland, the criminal code refers to the *Criminal Law of the People's Republic of China*. The Second Plenary Session of the Fifth National People's Congress passed the first criminal code on 1 July 1979. The current criminal code is the *Criminal Law of the People's Republic of China* as amended by the Eighth National People's Congress on 14 March 1997.

4.18 Separate criminal legislation refers to decisions or supplementary rules that partially amend or supplement the criminal code. When the *Criminal Law of the People's Republic of China* was amended in 1997, the amendment incorporated the relevant amended supplementary rules and decisions made by the Standing Committee of the National People's Congress during the 17 years since the implementation of the *Criminal Law of 1979*. Examples of recent separate criminal legislation include *Decisions on the Punishment of Crimes of Defrauding in the Purchase of, Evading and Illegal Trading in Foreign Exchanges*, which was passed by the Standing Committee of the National People's Congress in December 1998. Supplementary criminal legislation refers to legal provisions in some civil, economic and administrative legislation that impose criminal liabilities. The *Criminal Law of the People's Republic of China* as amended in 1997 also incorporated those supplementary legislation as specific provisions of the amended criminal law.

Spatial Effect of the Chinese Criminal Law

4.19 The spatial effect of the *Chinese Criminal Law*, that is its scope of application, refers to the questions of where and against whom the criminal law applies. The spatial effect of the *Criminal Law of the People's Republic of China* is provided clearly in Articles 6 to 11 of the law.

4.20 The *Criminal Law of the People's Republic of China* as amended in 1997 expands the application of the personality principle and also incorporates the universality principle.

4.21 Some Mainland scholars are of the view that the spatial effect of the *Chinese Criminal Law*⁸⁷ adopts the principle of eclecticism,⁸⁸ which is based upon the territorial principle, supplemented by the personality and protective principles, and at the same time applies the universality principle.⁸⁹

Territorial Principle

4.22 Article 6 of the *Chinese Criminal Law* provides that:

1. “This Law shall be applicable to anyone who commits a crime within the *lingyu* of the People’s Republic of China, except as otherwise specifically provided by law.
2. This Law shall also be applicable to anyone who commits a crime on board a ship or aircraft of the People’s Republic of China.
3. If a criminal act or its consequence takes place within the territorial waters or space of the People’s Republic of China, the crime shall be deemed to have been committed within the *lingyu* of the People’s Republic of China.”

4.23 The basic content of Article 6 is adopted from a previous provision in the *Criminal Law of 1979*, with “aircraft” replacing “airplane” in the provision. According to this article, the *Chinese Criminal Law* applies if a crime takes place within the Chinese *lingyu*, regardless of whether it is committed by a Chinese national or a foreign national.⁹⁰

4.24 *Lingyu* (領域) as mentioned above refers to all the areas within the borders of China, specifically including: 1. territorial land, which means land within the borders and stratum under the land; 2. territorial waters, which means interior waters (interior rivers, interior sea, interior lakes and parts of the boundary river) and territorial sea (China’s territorial sea is 12 miles wide) and the stratum underneath; 3. territorial space, which means the space above the territorial land and territorial waters.⁹¹

⁸⁷ In this part, the *Chinese Criminal Law* means the *Criminal Law of the People’s Republic of China*.

⁸⁸ The principle of eclecticism is not an independent principle of criminal jurisdiction. It only indicates a compromise of the principles.

⁸⁹ Zhao Bingzhi ed., *Xinxingfa Jiaocheng (Textbook of the New Criminal Law)*, Beijing: Zhongguo Renmin Daxue Chubanshe, 1997, p. 69.

⁹⁰ The explanations on Articles 6 and 7 of the *Criminal Law of the People’s Republic of China* in this part are based upon *Explanations of the Criminal Law of the People’s Republic of China*. This book is edited by the Criminal Law Division, Legislative Affairs Commission of the Standing Committee of the National People’s Congress (Hu Kangsheng and Li Fucheng are the editors). It was published by Beijing Law Press in 1997.

⁹¹ *Explanations of the Criminal Law of the People’s Republic of China, ibid.*, p. 8.

4.25 The legal provision of “specifically provided by law” in the article mainly refers to the special provisions in Article 11 of the *Criminal Law* regarding the criminal liabilities of foreign nationals who enjoy diplomatic privileges and immunities; a number of provisions in Article 90 of the *Criminal Law* regarding the adaptive or supplementary criminal laws made by national autonomous areas; and special provisions made by other laws, such as the related provisions in the *Basic Law* of Hong Kong.⁹²

4.26 Paragraph 3 of Article 6 provides that a crime is deemed to have occurred in the Chinese lingyu and that the *Chinese Criminal Law* applies if either the criminal act or the criminal consequence occurred in the Chinese lingyu.

Personality Principle

4.27 Article 7 of the *Chinese Criminal Law* provides that:

1. “*This Law shall be applicable to any citizen of the People’s Republic of China who commits a crime prescribed in this Law outside the lingyu of the People’s Republic of China; however, if the maximum punishment to be imposed is fixed term imprisonment of not more than three years as stipulated in this Law, he may be exempted from the investigation for his criminal responsibility.*”
2. *This Law shall be applicable to any state functionary or serviceman who commits a crime prescribed in this Law outside the lingyu of the People’s Republic of China.*”

4.28 Paragraph 1 of Article 7 provides that where a citizen of the People’s Republic of China commits any offence as specified in the *Chinese Criminal Law* outside the territory, the *Chinese Criminal Law* would apply and his or her criminal liability will be pursued. The only exception that his or her criminal liability will not be pursued is when the offence is relatively minor, that is the maximum penalty as provided in the *Chinese Criminal Law* is not more than a fixed term imprisonment of three years.

⁹² *Explanations of the Criminal Law of the People’s Republic of China, ibid.*, p. 8.

4.29 A citizen of the People's Republic of China refers to a person who is of the nationality of the People's Republic of China, including overseas Chinese who reside in foreign countries without obtaining the respective foreign nationalities, people temporarily visiting foreign countries and people of foreign descent who have obtained Chinese nationality. According to the *Chinese Nationality Law*, China does not admit double nationality. Any Chinese national who has settled in a foreign country, and has been naturalized as a foreign national or has acquired foreign nationality of his or her free will shall automatically lose his or her Chinese nationality and is no longer a Chinese national.⁹³

4.30 "State functionary" stated in paragraph 2 of Article 7 refers to personnel as specified in Article 93 of the *Chinese Criminal Law*, that is a person performing public service in state institutions.⁹⁴ Serviceman includes officials and soldiers of the People's Liberation Army of China and the armed police.

Other Jurisdictions

4.31 Article 8 of the *Chinese Criminal Law* establishes the protective principle by providing that China has criminal jurisdiction over a crime committed by a foreign national outside the Chinese territory against the Chinese state or its national.

4.32 Article 9 of the *Chinese Criminal Law* establishes the universality principle by providing that if China concludes or accedes to a treaty which has provisions on international crimes and punishments, China will bear the obligations to exercise criminal jurisdiction over those international crimes.

4.33 Article 11 of the *Chinese Criminal Law* provides that the criminal liabilities of foreign nationals who enjoy diplomatic privileges and immunities shall be resolved through diplomatic channels.

⁹³ *Explanations of the Criminal Law of the People's Republic of China*, p. 9. In Hong Kong, Chinese nationals refer to those who are of Chinese nationality under the *Nationality Law of the People's Republic of China*, as elaborated in the *Interpretations of Some Questions concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region*. According to Article 5 of the Interpretation: "Any Chinese national residing in the Hong Kong Special Administrative Region who wishes to change his or her nationality may, by providing valid documents, apply to the competent authorities of the Hong Kong Special Administrative Region that handle nationality applications." In other words, a Hong Kong resident who voluntarily joins or has acquired foreign nationality does not automatically lose his/her Chinese nationality. To change the nationality, one has to make an application to the relevant institutions in Hong Kong.

⁹⁴ Including persons who perform public service in state-owned companies, enterprises, institutions or people's organizations, persons who are assigned by state organs, state-owned companies, enterprises and institutions to work in non-state-owned companies, enterprises, institutions, or social organizations to perform public service, and other persons who perform public service according to law.

Criminal Justice not Bound by Foreign Decisions

4.34 Article 10 of the *Chinese Criminal Law* provides that “[A]ny person who commits a crime outside the *lingyu* of the People’s Republic of China, for which he should bear criminal responsibility according to this Law, may still be investigated for his criminal responsibility according to this Law, even if he has already been tried in a foreign country.” This provision indicates that China can exercise criminal jurisdiction over a crime committed outside the Chinese *lingyu* by a Chinese or foreign national, if the provisions in Articles 7 and 8 of the *Chinese Criminal Law* apply, even if a foreign court has tried the case and rendered its decision. Nevertheless, Article 10 of the *Chinese Criminal Law* provides that “he may be exempted from punishment or given a mitigated punishment if he had already received criminal punishment in the foreign country.”

Criminal Jurisdiction of Hong Kong

Characteristics of Hong Kong Criminal Law

4.35 Hong Kong does not have a unified and comprehensive criminal code, criminal law provisions are scattered in different ordinances and criminal case law. Among the existing criminal ordinances, some of them are for a particular offence, such as the *Gambling Ordinance* and the *Prevention of Bribery Ordinance*. Some ordinances are for a particular type of offence, for example, the *Offences against the Person Ordinance* which provides the offences of homicide, kidnapping and many other offences endangering the life and health of others; and other ordinances are for the maintenance of public order, for example, the *Public Order Ordinance* which regulates matters relating to organizations, assembly and riots.

Territorial Jurisdiction

4.36 Hong Kong courts adopt the model of territorial jurisdiction over criminal offences according to the common law to adjudicate criminal cases occurring within Hong Kong.⁹⁵ Generally, the common law does not extend jurisdiction to criminal activities occurring extraterritorially.

Extraterritorial Jurisdiction

4.37 Some Hong Kong ordinances have modified the territorial principle to enable the courts to exercise extraterritorial jurisdiction. For example:

- (1) Section 9 of the *Offences against the Person Ordinance* (Cap. 212) provides that where any person being unlawfully stricken, poisoned, or otherwise hurt at any place in Hong Kong dies at any place out of Hong Kong, every offence committed in respect of any such case may be dealt with, inquired of, tried, determined, and punished in Hong Kong in the same manner in all respects as if such offence had been wholly committed in Hong Kong.
- (2) Section 4 of the *Prevention of Bribery Ordinance* (Cap. 201) provides that any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any bribery to a public servant shall be guilty of an offence.

⁹⁵ *Halsbury's Laws of Hong Kong*, Vol. 9, Hong Kong and London: Butterworths, 1998, p. 408.

- (3) Section 40 (1)(c) of the *Dangerous Drugs Ordinance* (Cap. 134) provides that any person who aids, abets, counsels or procures the commission in a place outside Hong Kong of an offence punishable under a corresponding law in force in that place may be prosecuted for the offence of trafficking in and manufacturing dangerous drugs.
- (4) Offences provided in international treaties that are applicable in Hong Kong and are implemented through Hong Kong legislation, such as genocide,⁹⁶ torture,⁹⁷ and hostage taking.⁹⁸

4.38 The *Criminal Jurisdiction Ordinance*⁹⁹, which became effective in 1996, expanded the jurisdiction of Hong Kong courts over certain offences. The offences are divided into Group A offences and Group B offences. Group A offences include theft, deception, forgery, and using a false instrument, while Group B offences include conspiracy, attempting or incitement to commit a Group A offence. Under section 4(1) of the *Criminal Jurisdiction Ordinance*, a person may be guilty of a Group A or Group B offence, whatever his citizenship or nationality and whether or not he was in Hong Kong at any such time.¹⁰⁰

4.39 In addition, the common law allows Hong Kong courts to exercise jurisdiction over offences that occur outside Hong Kong but have an impact on Hong Kong. A person can be tried in Hong Kong if he counsels or procures outside Hong Kong an offence that occurs in Hong Kong.

4.40 The case of *Somchai Liangsirprasert v USA*¹⁰¹ demonstrates that where a criminal conspiracy is aimed at Hong Kong, Hong Kong courts have jurisdiction over the case even if the conspiracy is completed outside Hong Kong. However, Hong Kong courts do not have jurisdiction over a conspiracy in Hong Kong to be completed outside Hong Kong.

⁹⁶ Section 9A of the *Offences Against the Person Ordinance* (Cap. 212) provides that: “[A] person commits the offence of genocide if he commits any act falling within the definition of “genocide” in Article II of the Genocide Convention as set out in the Schedule.” The related international treaty is the *Genocide Convention*.

⁹⁷ Section 3 (1) of the *Crimes (Torture) Ordinance* (Cap. 427) provides that: “[A] public official or person acting in an official capacity, whatever his nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.” The related international treaty is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

⁹⁸ Section 4(1) of the *Internationally Protected Persons and Taking of Hostages Ordinance* (Cap. 468) provides that: “[A]ny person, whatever his nationality, who is in Hong Kong or elsewhere (a) detains any other person (“the hostage”), and (b) in order to compel a state, an international governmental organization or any person to do or to abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence.” The related international treaty is the *International Convention against the Taking of Hostages*.

⁹⁹ Cap. 461 of Laws of Hong Kong.

¹⁰⁰ Except where jurisdiction is given to try the offence in question by an enactment which makes provision by reference to the citizenship or nationality of the person charged. Section 4(5) of the *Criminal Jurisdiction Ordinance*.

¹⁰¹ *Somchai Liangsirprasert v USA* [1990] 2 **HKLR** 612.

Criminal Jurisdiction Controversies between the Mainland and Hong Kong Arising from the Cheung Tze-keung Case

4.41 At the beginning of 1998, Cheung Tze-keung and his confederates were arrested in Mainland China. Cheung Tze-keung was detained in Mainland China on 26 January 1998, and arrested on 22 July 1998 upon the approval of the People's Procuratorate of Guangdong Province on 21 July 1998.

4.42 Cheung Tze-keung and his confederates (including 18 Hong Kong residents and 18 Mainland residents) were tried on 20 October 1998 by the Intermediate People's Court of Guangzhou City, Guangdong Province. The People's Procuratorate of Guangzhou City, Guangdong Province instituted the prosecution.

4.43 The offences that Cheung Tze-keung was charged with included the offences of unlawfully purchasing, trafficking, and storing explosives, smuggling firearms and ammunition, and the offence of kidnapping. The People's Procuratorate of Guangzhou City demanded that the court punished Cheung Tze-keung as heavily as possible for all the offences he had committed and for all the offences he had organized and directed.¹⁰²

4.44 The Intermediate People's Court of Guangzhou City delivered the following verdict on 30 October 1998: "*Cheung Tze-keung shall be sentenced to death, with deprivation of political rights for life, for the offences of unlawful purchase and sales of explosives; to be sentenced to life imprisonment, with deprivation of political rights for life and supplementary penalty of confiscation of property in the amount of RMB 662 million, for the offence of kidnapping; to be sentenced to life imprisonment, with deprivation of political rights for life and supplementary penalty of confiscation of property in the amount of RMB 100,000, for smuggling firearms and ammunition. The court decides to execute the death sentence, with deprivation of political rights for life and supplementary penalty of confiscation of property in the amount of RMB 662.1 million.*"¹⁰³

4.45 In addition to Cheung Tze-keung, four other defendants were sentenced to death; while another accused was sentenced to death with a two years' suspension. The other 29 accused were sentenced to life imprisonment or fix terms of imprisonment.

¹⁰² The Bill of Prosecution of the People's Procuratorate of Guangzhou City, Guangdong Province, Suijianqiyisu No. 888 of 1998, pp. 19-20. The Hong Kong Government submitted this paper to Legislative Council Members for reference, see LegCo Paper No. CB(2)648/98-99.

¹⁰³ The Criminal Judgement of the Intermediate People's Court of Guangzhou City, Guangdong Province, Suizhongfaxingchuzi, No.: 468 of 1998, p. 41, see LegCo Paper No. CB(2)648/98-99.

4.46 Cheung Tze-keung and other defendants subsequently appealed. The High People's Court of Guangdong Province delivered a verdict of upholding the five death penalty sentences on 4 December 1998.¹⁰⁴ The court reviewed and approved the death penalty sentence in respect of Cheung Tze-keung and others in accordance with the provisions of *The Notice of the Supreme People's Court on Authorizing the High People's Courts to Review and Approve Certain Death Penalty Cases*.¹⁰⁵

Article 6 of the Chinese Criminal Law

4.47 The trial of Cheung Tze-keung in the Mainland immediately caused a debate on the exercise of jurisdiction between Mainland courts and Hong Kong courts over cases involving cross-border crime. Some members of Hong Kong's legal community were concerned that jurisdiction of the Hong Kong Special Administration Region (HKSAR) would be infringed if Mainland courts exercised jurisdiction over criminal activities committed within Hong Kong by Hong Kong residents.¹⁰⁶ They were also concerned about whether the accused could receive fair trials.¹⁰⁷

¹⁰⁴ *Gazette of the Supreme People's Court of the People's Republic of China*, Vol. 1, 1999, pp. 26-28.

¹⁰⁵ This Notice was issued by the Supreme People's Court in September 1983. It explicitly stated that the review and approval of certain death penalty cases be delegated to the high people's courts of the provinces, autonomous regions and cities directly under the control of the Central Government and the military court of the People's Liberation Army. It also clearly stated the scope of the review and approval of the death penalty. For detailed discussion, see Chen Weidong and Liu Jihua "Guanyu sixing fuhe chengxu de xianzhuang ji cunfei de sikao (On the procedural considerations of the current situations of review procedure for death penalty: its preservation and abolition)," *Chinese Legal Science*, 1998(5), pp. 97-103.

¹⁰⁶ Gladys Li, "Alarmed by Top Official's Lame Excuse," *South China Morning Post*, October 28, 1998.

¹⁰⁷ Hon. Margaret Ng asked the Hong Kong Government a question on "Trial of Crimes Committed in Hong Kong" at the Legislative Council meeting on 18 November 1998. See *Hong Kong Hansard*, 18 November 1998, pp. 3142-3155.

4.48 In a press conference on 3 November 1998, the Secretary for Justice Elsie Leung pointed out: “[T]he case against Cheung Tze-keung and others in the Guangzhou court involved the kidnapping committed by eight Hong Kong residents in Hong Kong, in addition to the offence of smuggling firearms and ammunition in the Mainland. Mainland courts cited Article 6 of the Criminal Law of the People’s Republic of China for the prosecution. Article 6 states that this Law shall be applicable to anyone who commits a crime within the *lingyu* of the People’s Republic of China, except as otherwise specifically provided by law. If a criminal act or its consequence takes place within the *lingyu* of the People’s Republic of China, the crime shall be deemed to have been committed within the *lingyu* of the People’s Republic of China. In the case of Cheung Tze-keung, although the kidnappings were allegedly perpetrated in Hong Kong, the planning of the kidnapping was carried out in the Mainland. According to Article 22 of the Chinese Criminal Law,¹⁰⁸ planning for a crime is preparation for the crime, and is a crime itself.”¹⁰⁹

4.49 Elsie Leung further explained: “Cheung Tze-keung and his co-accused were tried in the Mainland not just for kidnapping offences allegedly committed in Hong Kong, but also for offences involving the illegal sale and purchase of explosives and smuggling of weapons and ammunition, which occurred in the Mainland where they were arrested. Although the kidnappings were allegedly perpetrated in Hong Kong, they were planned in the Mainland: the preparatory work, including the purchase of vehicles, weapons and equipment for use in the kidnappings, was carried out in the Mainland. Article 6 of the PRC Criminal Law provides that the occurrence of either an act or a consequence of the crime within the territory of the PRC is deemed to constitute the commission of a crime within the PRC. The Mainland courts exercise jurisdiction because the case falls within their jurisdiction according to the Mainland laws. There is no question of undermining the judicial jurisdiction of the SAR.”¹¹⁰

4.50 In Hong Kong, there were views that under the provisions of Articles 18¹¹¹ and 19¹¹² of the *Basic Law*, Hong Kong courts not only had jurisdiction, but had exclusive jurisdiction over criminal activities occurred within HKSAR.

¹⁰⁸ Article 22 of the *Criminal Law of the People’s Republic of China* provides that: “[P]reparation for a crime refers to the preparation of the instruments or the creation of the conditions for a crime. An offender who prepares for a crime may, in comparison with one who completes the crime, be given a lighter or mitigated punishment or be exempted from punishment.”

¹⁰⁹ See LegCo Paper No. CB(2)566/98-99(01).

¹¹⁰ Elsie Leung, “Viewing the Jurisdictional Issue from a Proper Perspective”, *Hong Kong Lawyer*, Jan. 1999, p. 58.

¹¹¹ Article 18 of the *Basic Law* provides that: “[T]he law in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by legislature of the Region. National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law.”

¹¹² Article 19 of the *Basic Law* provides that: “[T]he Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region,

4.51 Scholar Benny Tai¹¹³ was of the view that Article 18 of the *Basic Law* had excluded the extension of the *Chinese Criminal Law* to HKSAR, and Article 6 of the *Chinese Criminal Law* could not apply to any act that occurred within Hong Kong. He also pointed out: “[A]rticle 19 of the *Basic Law* provides that courts in the HKSAR have jurisdiction over all cases in the HKSAR. Article 19 is in Chapter 2 of the *Basic Law*, which is related to the relationship between the central authorities and the HKSAR. Therefore, Article 19 does not only define judicial jurisdiction of HKSAR courts, more importantly, it divides judicial jurisdiction between courts in the HKSAR and courts in the Mainland. Article 19 provides that the courts of the HKSAR shall have jurisdiction over all cases in the HKSAR, and it follows that jurisdiction over a case by the courts in the HKSAR precludes the jurisdiction of the Mainland courts over the same case. This is to say the *Basic Law* has categorically given the jurisdiction over a crime to courts of the HKSAR if part of the crime occurs within the HKSAR, even though part of the crime occurs within the lingyu of China. This arrangement is consistent with the principle of One Country, Two Systems and high degree of autonomy.”

4.52 In addition, there were views that because of the provisions in Article 22 of the *Basic Law*,¹¹⁴ no Mainland government departments at any level may interfere with affairs that are within the autonomy of Hong Kong according to the *Basic Law*. As a result, does the exercise of jurisdiction by HKSAR courts over a case preclude jurisdiction of the Mainland courts? If the preclusion is not categorical, what is the principle that should be used in determining whether the Hong Kong courts or Mainland courts have the jurisdiction?¹¹⁵

except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”

¹¹³ Benny Tai, "Wei hu bengang zizhi zewu pangdai (The government is duty-bound to sustain self-governance of Hong Kong)," *Mingpao*, November 2, 1998.

¹¹⁴ Paragraph 1 of Article 22 of the *Basic Law* provides that: “[N]o department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.”

¹¹⁵ Margaret Ng, “The Protection of Justice under Hong Kong’s System of Laws,” *Hong Kong Lawyer*, December 1998, p. 18.

Article 24 of the Chinese Criminal Procedure Law¹¹⁶

4.53 Although the Secretary for Justice took the view that the exercise of jurisdiction of Mainland courts over the case of Cheung Tze-keung was based on Articles 6 and 22 of the *Chinese Criminal Law*, the Mainland court held in the trial of Cheung Tze-keung that their jurisdiction over the case was based on the provision of Article 24 of the *Chinese Criminal Procedure Law*.¹¹⁷

4.54 The Intermediate People's Court of Guangzhou City made the following statements on the jurisdiction of Mainland judicial institutions in its verdict:

4.55 “Accused Cheung Tze-keung, Liu Dingxun and others raised jurisdictional questions in relation to the offences of unlawful purchase of, and trafficking in, explosives, kidnapping, and robbing goldsmith shops in Hong Kong. After investigation, it is found that the above offences were committed by both Hong Kong and Mainland residents. Although the offences of kidnapping and robbing goldsmith shops occurred in Hong Kong, the plotting, planning and other preparatory work to implement the offences occurred in the Mainland; explosives and main tools for the crimes were unlawfully purchased in the Mainland and then smuggled to Hong Kong; all the accused were caught in the Mainland; a large amount of stolen money and stolen goods and other evidence were obtained after investigation in the Mainland. Therefore, Mainland judicial organs have jurisdiction over the above offences according to the provision of Article 24 of the *Criminal Procedure Law of the People's Republic of China*.”¹¹⁸

¹¹⁶ In this part, the *Chinese Criminal Procedure Law* means the *Criminal Procedure Law of the People's Republic of China*. Chinese laws on criminal procedure include the *Criminal Procedure Law of the People's Republic of China* and other laws relating to criminal litigation, such as the *Organic Law of the People's Courts*, the *Organic Law of the People's Procuratorate and Lawyers' Law*. The first *Criminal Procedure Law of the People's Republic of China* was adopted at the Second Session of the Fifth National People's Congress on 1 July 1979. The existing *Criminal Procedure Law*, as an amendment to the *Criminal Procedure Law of 1979*, was adopted at the Fourth Session of the Eighth National People's Congress on 17 March 1996.

¹¹⁷ Article 24 of the *Criminal Procedure Law of the People's Republic of China* provides that: “[A] criminal case shall be under the jurisdiction of the people's court in the place where the crime is committed. If it is more appropriate for the case to be tried by the people's court in the place where the defendant resides, then that court may have jurisdiction over the case.”

¹¹⁸ Criminal Decision of the Intermediate People's Court of Guangzhou City, Guangdong Province, Guangzhou Intermediate Court, Suizhongfaxingchuzi, No. 468 of 1998, p. 40.

4.56 Mainland scholar Wang Zhongxing offered further explanation in relation to the opinion that Mainland courts have jurisdiction over the case of Cheung Tze-keung on the basis of Article 24 of the *Criminal Procedure Law of the People's Republic of China*. Wang Zhongxing was of the opinion that the place of crime in Article 24 should be understood in accordance with section 2 of the *Interpretations of Some Questions concerning the Implementation of the Criminal Procedure Law of the People's Republic of China*, enacted by the Adjudicative Committee of the Supreme People's Court on 29 June 1998, which stated that: “[P]lace of crime refers to the place where a criminal behaviour is occurred. In the case of property offences with the purpose of unlawful possession, the place of crime includes the place where the crime is committed and the place where the criminal consequence occurs, i.e. a criminal takes in possession of the property.” Wang Zhongxing took the view that since part of the crimes committed by Cheung Tze-keung occurred in the Mainland, people's courts in the Mainland also had the lawful authority to try the case.¹¹⁹

4.57 The view that the exercise of jurisdiction of Mainland courts over the case of Cheung Tze-keung was based on the *Criminal Procedure Law* was questioned by other scholars. Mainland scholars Zhao Bingzhi and Tian Hongjie pointed out that criminal jurisdiction involved substantive questions, which should be provided by substantive laws such as the criminal law; while the criminal procedure law was a procedural law, which only provided the division of criminal jurisdiction among different judicial institutions.¹²⁰ In addition, the two scholars took the view that as the Mainland criminal procedure law did not apply in Hong Kong according to the relevant provisions in the *Basic Law*, it was therefore inappropriate to define the conflict of criminal jurisdiction between the Mainland and Hong Kong by using the Mainland's criminal procedure law.

¹¹⁹ Wang Zhongxing, "Neidi weihe dui xianggang jumin zhang ziqiang an you xingshi guanxiaquan (Why do the Mainland judicial institutions have the criminal jurisdiction over the case of Hong Kong resident Cheung Tze-keung)," *Zhongguo Falu*, March 1999, p. 4.

¹²⁰ Zhao Bingzhi & Tian Hongjie "Zhongguo neidi yu xianggang xingshi guanxiaquan chongtu yanjiu: you Zhang Zi-qiang anjian yinfa de sikao (Research on the conflict of criminal jurisdiction between Mainland China and Hong Kong: reflections on the case of Cheung Tze-keung)," in Zhao Bingzhi ed., *Shiji Dajiean: Zhang Zi-qiang Anjian jiqi Falu Sikao: Zhongguo Neidi yu Xianggang Xingshi Guanxiaquan Chongtu Wenti (Robbery of the Century: The Case of Cheung Tze-keung and its Legal Considerations – The Problem of Conflict of Criminal Jurisdiction between Mainland China and Hong Kong)*, Beijing: Zhongguo Fangzheng Chubanshe, 2000, p.225.

4.58 Scholar Albert H.Y. Chen was of the view that Hong Kong courts also had jurisdiction according to the Hong Kong law because the kidnapping and part of the robbery occurred in Hong Kong. The case of Cheung Tze-keung involved a situation of concurrent jurisdiction. If the Hong Kong authorities intended to exercise jurisdiction, they could discuss with the Mainland authorities, and reach a consensus on which side would try the case. Additionally, he pointed out that in the circumstances surrounding this case, it was reasonable for Mainland courts to exercise jurisdiction under the principles of “actual control” and “first control” (the party that first handles the case has jurisdiction). “Actual control” referred to the fact that the Mainland authorities seized the relevant suspects first, while “first control” referred to the fact that Mainland authorities first handled the investigation and collection of evidence and the prosecution of the case.¹²¹

¹²¹ Albert H.Y. Chen, “Huiguohou xianggang yu neidi fazhi de hudong: huigu yu qianzhan (Interaction between the legal systems of Hong Kong and the Mainland after the reunification: reflections and prospects),” in Xianggang Falu Jiaoyu Xintuo Jijin ed, *Zhongguo Neidi XianggangFalu Zhidu Yanjiu yu Bijiao (Comparative Studies on the Legal Systems of Mainland China and Hong Kong)*, Beijing: Beijing Daxue Chubanshe, 2000, p. 24.

Criminal Jurisdiction Controversies between the Mainland and Hong Kong Arising from the Li Yuhui Case

4.59 On 21 July 1998, a case involving five females being killed by poison occurred at a residential unit in Telford Garden, Kowloon. The Hong Kong Police identified a Shantou resident from the Mainland, Li Yuhui, as the suspect of the case. On 15 September of the same year, Li Yuhui was arrested by the Chinese Police when he fled to Tongcheng, Hubei Province.

4.60 On 3 February 1999, the People's Procuratorate of Shantou City instituted a public prosecution against Li Yuhui in the Intermediate People's Court of Shantou City for the offences of murder and robbery. On 4 March 1999, the Intermediate People's Court of Shantou City held a trial in public. On 23 March 1999, the Court announced the death sentence against him. Subsequently, the People's Court of Guangdong Province heard the appeal on affidavit evidence and announced the appellants' decision on 20 April. The original decision was upheld and the sentence was carried out on the same day.

Controversy over "Lingyu" (領域) and "Fayu" (法域)

4.61 The Secretary for Justice of Hong Kong and some scholars considered that Mainland courts had jurisdiction over the case of Li Yuhui, which was based on the personality principle under Article 7 of the *Chinese Criminal Law*. This principle applies to Mainland residents anywhere outside of China. The meaning of "lingyu" under Article 7 should be interpreted as "lingyu of judicial jurisdiction". They also took the view that Hong Kong should be regarded as outside the "lingyu" of China. Since Li Yuhui was a Mainland resident, the *Chinese Criminal Law* applied to the criminal act he committed in Hong Kong.

4.62 At a press conference on 3 November 1998, the Secretary for Justice Elsie Leung made the following comments: "[I]n the Telford Garden case, the act of murder occurred in Hong Kong, but the suspect is a Chinese national and Mainland resident. Therefore, under Article 7 of the Chinese Criminal Law, Mainland courts have jurisdiction over the case".¹²²

4.63 The Department of Justice submitted a paper to the LegCo Panel on Security in December 1998,¹²³ which stated that "a resident of the Hong Kong Special Administrative Region" should be distinguished from "a resident of the Mainland". "Nationals of the People's Republic of China" within the meaning of Article 7 of the *Chinese Criminal Law* only included "residents of the Mainland", and Hong Kong was not within the "lingyu" within the meaning of Article 7 of the law.

¹²² LegCo Paper No. CB(2)566/98-99(01).

¹²³ LegCo Paper No. CB(2)830/98-99(04).

4.64 Elsie Leung later further explained that:“..... the case relates to Li Yuhui, a Mainland resident who is alleged to have committed five murders in Hong Kong and arrested in the Mainland. Article 7 of the PRC Criminal Law gives the Mainland courts extra-territorial jurisdiction over the crimes committed by Chinese nationals. I have explained before and still hold the opinion that whilst the PRC Criminal Law does not apply in Hong Kong as it is not in Annex III of the Basic Law, the extra-territorial reach of Article 7 does extend to Hong Kong. The terms used in Article 6 and 7 are “lingyu” (領域) and not “lingtu” (領土). The necessary implication of “lingyu” is jurisdictional territory and not territory simpliciter. I believe that the only sensible way to interpret the PRC Criminal Law is to see how it interfaces with the Basic Law”.¹²⁴

4.65 On 9 December 1998, Elsie Leung reiterated in her speech during the LegCo debate on the motion “Hong Kong Special Administrative Region’s Judicial Jurisdiction” that “[O]n what basis do the Mainland courts exercise jurisdiction in this case? The answer is supplied by Article 7 of the Chinese Criminal Law which gives the Mainland courts extra-territorial jurisdiction over crimes committed by Chinese nationals...It is my understanding that, whilst the Chinese Criminal Law does not apply in Hong Kong, the extra-territorial reach of Article 7 does extend to Hong Kong. I would ask Honourable Members to note that the words used in Articles 6 and 7 are “lingyu” (領域) and not “lingtu”(領土). The necessary implication of “lingyu” is jurisdictional territory.”¹²⁵

4.66 The Secretary for Justice cited the opinion of scholar Wang Chenguang on numerous occasions in explaining Article 7 of the *Chinese Criminal Law*. Wang Chenguang, in an article entitled “Conflict of criminal jurisdiction between the Mainland and Hong Kong and the solution”, pointed out that “precisely speaking, *lingyu* is a territorial concept in the sense of jurisdiction, and *lingtu* is a concept in the sense of sovereignty. As far as sovereignty is concerned, *lingtu* includes Hong Kong. Any attempt to make Hong Kong independent from China is to harm China’s territorial integrity. But as far as jurisdiction is concerned, the Basic Law of Hong Kong separates Hong Kong from the rest of China and creates an independent *fayū*, making it an exception of the territorial jurisdiction of the Mainland criminal law. As far as legal jurisdiction is concerned, Hong Kong is of course outside the Chinese *lingyu*.”¹²⁶

¹²⁴ Elsie Leung, “Viewing the Jurisdictional Issue from a Proper Perspective” [note 110 above].

¹²⁵ *Hong Kong Hansard*, 9 December 1998, pp. 3948-9.

¹²⁶ Wang Chenguang, “Neidi yu xianggang xingshi guanxiaquan de chongtu ji qijie (Conflict of criminal jurisdiction between the Mainland and Hong Kong and the solution),” in Gao Mingxuan & Zhao Bingzhi ed, *Xingfa Luncong (Commentaries on Criminal Law)*, Vol. 3, Beijing: Falu Chubanshe, 1999. pp. 591-2.

4.67 However, some scholars offered different opinions on the explanations of “lingyu” and “Chinese nationals”. Ling Bing took the view that the explanation offered by the Hong Kong Government on paragraph 1 of Article 7 of the *Chinese Criminal Law*, i.e. equating “lingyu” to “jurisdictional lingyu”, was seriously defective in logic, and the concept of “jurisdictional lingyu” (in both international law and Chinese law) was absurd and unscientific.”¹²⁷

4.68 Ling Bing pointed out: “*the fundamental fallacy in the Government’s interpretation lies in its doomed attempt to define the sphere of application of the national Criminal Law without reference to the sphere of national sovereignty. It is true that sovereignty and jurisdiction are two separate legal concepts. But it is also an elementary truth of international law that jurisdictional competence is an attribute of state sovereignty. As the territorial principle is admittedly the primary yardstick for defining a state’s criminal jurisdiction, the scope of application of the criminal law of any state is, first and foremost, determined by reference to the scope of the territorial sovereignty of that state. This is recognized both in international law and Chinese law. The Government’s interpretation, in an explicit attempt to divorce jurisdiction from sovereignty, tries to define the scope of application of China’s national criminal code without any reference to the scope of China’s territorial sovereignty. Such is the foundational defect in the Government’s interpretation.*”¹²⁸

4.69 Two Mainland scholars, Zhao Bingzhi and Tian Hongjie, held the view that “*to limit the interpretation of lingyu to Mainland China at the exclusion of Hong Kong and to limit Chinese nationals to Mainland nationals at the exclusion of Hong Kong nationals are not only inconsistent with the original meaning of the Criminal Law of the People’s Republic of China, but also violate the substantive spirit of One Country, Two Systems as provided in the Constitution of the People’s Republic of China and the Basic Law of the Hong Kong Special Administrative Region.*”¹²⁹

¹²⁷ Ling Bing, “Neidi yu xianggang xingshi guanxiaquan Chongtu ji yindu wenti yanjiu (A Study on the Conflict of Criminal Jurisdiction between the Mainland and Hong Kong and the Problem of Extradition),” in Zhao Bingzhi ed., *Shiji Dajiean: Zhang Ziqiang Anjian jiqi Falu Sikao — Zhongguo Neidi yu Xianggang Xingshi Guanxiaquan Chongtu Wenti (Robbery of the Century: The Case of Cheung Tze-keung and its Legal Considerations—the Problem of Conflict of Criminal Jurisdiction between Mainland China and Hong Kong)*, Beijing: China Fangzheng Press, 2000, p. 331.

¹²⁸ *Ibid.*, p. 332.

¹²⁹ Zhao Bingzhi & Tian Hongjie, “Zhongguo neidi yu xianggang xingshi guanxiaquan chongtu yanjiu—yong Zhang Ziqiang anjian yinfa de sikao (Research on the conflict of criminal jurisdiction between Mainland China and Hong Kong – reflections on the case of Cheung Tze-keung),” [note 120 above], p. 232.

4.70 Zhao Bingzhi and Tian Hongjie took the view that Hong Kong government officials mixed up the concepts of “lingyu” and “fayu”. They opined that *“lingyu coincides with the scope of sovereignty of a state, including territorial land, territorial waters, and territorial space, but fayu as a specific concept principally refers to a region where a legal system applies, or the scope within which a legal structure is effective. A fayu may take the state as a unit, and a sovereignty state is a fayu; it may also take an administrative unit such as a special administrative region or a state as a unit, one administrative region becomes a fayu.... Hong Kong Special Administrative Region is a special administrative region within the lingyu of the People’s Republic of China but outside the Mainland fayu. This should be the true meaning of the One Country, Two Systems. Thus, Chinese nationals within the meaning of Article 7 of the Criminal Law should be understood from the perspective of nationality, not from the perspective of residence. According to the provisions of the Nationality Law of the People’s Republic of China, a natural person with the nationality of People’s Republic of China is a national of the People’s Republic of China, regardless of whether this person resides in the Mainland where the socialist system is practised or Hong Kong where capitalist system is practised or other special administrative regions.”*¹³⁰

4.71 Scholar Albert H.Y. Chen took the view that *“the explanation (offered by the Secretary for Justice) on ‘Chinese lingyu’ and ‘Chinese national’ is in fact far-fetched. But it does not necessarily mean that it is incorrect for Mainland courts to adapt the ‘personality principle’ and exercise jurisdiction over a crime that was committed in Hong Kong by a Mainland resident if it is inconvenient to transfer the case to Hong Kong for trial. In reality, in order to deter and punish crimes committed by Mainland residents who come to Hong Kong to travel, visit or work, it could be a reasonable arrangement to allow Mainland courts to try Mainland residents who have committed crimes in Hong Kong in the situation where Hong Kong and the Mainland have not agreed to any criminal mutual assistance arrangement regarding the surrender of fugitive offenders.”*¹³¹

¹³⁰ Ibid., pp. 231-2.

¹³¹ Albert H.Y. Chen, “Interaction between the legal systems of Hong Kong and the Mainland after the reunification: reflections and prospects”[note 121 above], p. 27.

Principles in Dividing Criminal Jurisdiction between the Mainland and Hong Kong

4.72 The Secretary for Justice Elsie Leung stated during a LegCo motion debate in December 1998¹³² that an administrative arrangement existed between Mainland and Hong Kong under which a person who was alleged to have committed an offence in Hong Kong and who was arrested in the Mainland would be returned to Hong Kong if three conditions were satisfied, i.e. (1) he was a Hong Kong resident, (2) the offence was committed entirely in Hong Kong and (3) he was not accused of having committed any offence in the Mainland. Elsie Leung revealed in her speech that 128 fugitive offenders had been returned to Hong Kong since 1990.

4.73 Former Basic Law Drafting Committee Member Martin Lee pointed out in the same debate that the issue had been discussed in the Legal Sub-group of the Basic Law Drafting Committee when it met in Shenzhen in 1987. The group reached agreement on the following four points:¹³³

1. Whether or not a particular act should be regarded as constituting an offence in a certain locality should be determined by the laws of that locality where the act concerned occurred;
2. Where a trial had been held for a particular act in one locality, and irrespective of acquittal or conviction, the same act should not be tried or sentenced in the other locality;
3. Offences had to be heard before the courts of the locality where they were committed; and
4. Fugitives had to be rendered for trial to the locality where they committed their crimes.

4.74 Since the beginning of the 1990s, scholars in Mainland China had already begun the study on jurisdiction over criminal cases involving Hong Kong after 1997.¹³⁴ More scholars participated in the discussion after the cases of Cheung Tze-keung and Li Yuhui.¹³⁵

¹³² *Hong Kong Hansard*, 9 December 1998, p. 3949.

¹³³ *Ibid.*, pp. 3936-3937.

¹³⁴ Including Zhao Bingzhi & Sun Li, "Xianggang tebie xingzhengqu yu neidijian hushe xingshi falu wenti yanjiu (Research on questions concerning the interaction of criminal laws between the Hong Kong Special Administrative Region and the Mainland)," *Zhongguo Faxue*, 1993(2), pp. 79-88 and Zhang Xiaoming, "Lun jiuqi nian hou shegang xingshi anjian de sifa guanxiaquan (On the jurisdiction over criminal cases involving Hong Kong after 1997)," in Zhao Bingzhi ed., *Xingfa Xintansuo (New Explorations on Criminal Law)*, Beijing: Qunzhong Chubanshe, 1993, pp. 147-59.

¹³⁵ Most of the articles are included in the following two books: Zhao Bingzhi ed. *Shiji Dajiean: Zhang Ziqiang Anjian jiqi Falu Sikao: Zhongguo Neidi yu Xianggang Xingshi Guanxiaquan Chongtu Wenti (Robbery of the Century: The Case of Cheung Tze-keung and its Legal Considerations--The Problem of Conflict of Criminal Jurisdiction between Mainland China and Hong Kong)*, Beijing: Zhongguo Fangzheng Chubanshe, 2000; and Gao Mingxuan & Zhao Bingzhi ed., *Zhongguo Quji*

4.75 Principles of dividing criminal jurisdiction between the Mainland and Hong Kong cannot be inconsistent with the guarantee of the basic policies of China regarding Hong Kong in the *Basic Law* and other articles of the *Basic Law*. These articles are:

1. Article 8 provides that: “[T]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”
2. Paragraph 1 of Article 18 provides that: “[T]he laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.”
3. Paragraph 2 of Article 18 provides that: “[N]ational laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law.”
4. Paragraph 1 of Article 19 provides that: “[T]he Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.”
5. Paragraph 2 of Article 19 provides that: “[T]he courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”
6. Paragraph 3 of Article 19 provides that: “[T]he courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs.”
7. Paragraph 1 of Article 22 provides that: “[N]o department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.”
8. Article 23 provides that: “[T]he Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets.....”
9. Article 84 provides that: “[T]he courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.”

Xingfa yu Xingshi Sifa Xiezhu Yanjiu (Research on China’s Regional Criminal Law and Mutual Legal Assistance in Criminal Matters), Beijing: Zhongguo Fangzheng Chubanshe, 2000.

4.76 Apparently, Hong Kong applies the strict territorial principle in exercising criminal jurisdiction, and extra-territorial jurisdiction is an exception provided by law. The Mainland takes an eclectic approach where the territorial principle is the rule, with personality and protective principles as the supplements. There are views that as Hong Kong is a Special Administrative Region of China, neither the Mainland nor Hong Kong can use its own extra-territorial principles without considering the other side in dividing criminal jurisdiction between them. Otherwise an asymmetry would occur where the criminal jurisdiction of the Mainland greatly exceeds that of Hong Kong.¹³⁶

4.77 The ways of controlling international conflict of jurisdiction can be classified as unilateral, and bilateral or multilateral mechanisms.¹³⁷ Unilateral mechanisms include the act of a state in limiting the jurisdiction it has claimed or limiting the jurisdiction of other states that is regarded excessive. Multilateral mechanisms include the harmonisation of legislation, agreements on the transfer of litigation, arrangement of conflict resolution and mutual assistance in criminal matters.

4.78 The conflict of criminal jurisdiction between Mainland China and Hong Kong is a regional conflict occurring within one country. However, this conflict takes place between two *fayu* with fundamental differences in economic and social conditions and jurisprudence. For example, the Mainland legal system is of the nature of the socialist legal system, while the Hong Kong legal system belongs to the common law system. In addition, the conflict of criminal jurisdiction occurs on the premise that Hong Kong enjoys a high degree of autonomy, an independent legislative power and the power of final adjudication. No unified substantive law can be relied upon to solve the cross-border conflict of jurisdiction since each side has its own criminal law system. The Mainland criminal law cannot be applied in Hong Kong. It is also not possible to resort to a unified court of final adjudication as Hong Kong courts are not subordinate to Mainland courts.¹³⁸

¹³⁶ Zhao Bingzhi and Tian Hongjie, "Zhongguo neidi yu xianggang xingshi guanxiaquan chongtu yanjiu: you Zhang Ziqiang anjian yinfa de sikao (Research on the conflict of criminal jurisdiction between Mainland China and Hong Kong: reflections on the case of Cheung Tze-keung)," [note 120 above], p. 241.

¹³⁷ European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Strasbourg, Council of Europe, 1990, Chapter IV.

¹³⁸ The existing arrangements for mutual legal assistance between the Mainland and Hong Kong include the *Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts* and the *Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*. Both Arrangements are implemented by way of judicial interpretation in the Mainland and by way of legislative amendment in Hong Kong. See Chapter 5 of this Report for more detailed discussion.

4.79 In an article published in 1993 on the subject of jurisdiction over criminal cases involving Hong Kong after 1997, Mainland scholar Zhang Xiaoming proposed some general principles of jurisdiction over criminal cases involving Hong Kong.¹³⁹ They can be summarized as follows:

- Jurisdiction over a crime involving China and Hong Kong should be exercised by judicial institutions of the place where the crime occurs;
- Where the act of a crime and the consequence of the crime occur in different places, judicial institutions of the place where the consequence occurs should have jurisdiction;
- Where a crime is committed partially in HKSAR and partially in the Mainland, the jurisdiction should be exercised by judicial institutions of the place where the main criminal act or the main element of the crime occurs;
- Where the accused commits crimes in HKSAR and the Mainland consecutively, judicial institutions of each side have jurisdiction over the respective crime that occurred in its own jurisdiction. There should be separate trials, and the punishment could be administered separately or jointly by the related judicial institutions of one side. Related judicial institutions from both sides could solve this problem through consultation.

4.80 Zhao Bingzhi and Tian Hongjie, in an article on the conflict of criminal jurisdiction between Mainland China and Hong Kong, proposed a number of suggestions about the concrete rules governing the resolution of conflict of criminal jurisdiction between Mainland China and Hong Kong. They were of the view that the conflict of criminal jurisdiction between Mainland China and Hong Kong should be resolved on the basis of territorial principle, while supplementing by the principles of "actual control" and "first control".¹⁴⁰

(i) Jurisdiction over a crime that occurs in either Hong Kong or the Mainland

Principle of jurisdiction - the territorial principle should be adopted.

(ii) Jurisdiction over a crime that occurs in both Hong Kong and the Mainland

Principle of jurisdiction -

(1) where the act and consequence of a crime occur in Hong Kong and the Mainland separately, the place of the act exercises jurisdiction.

¹³⁹ Zhang Xiaoming, "Lun jiuqi nian hou shegang xingshi anjian de sifa guanxiquan (On the jurisdiction over criminal cases involving Hong Kong after 1997)," [note 134 above], p. 159.

¹⁴⁰ Zhao Bingzhi & Tian Hongjie, "Zhongguo neidi yu xianggang xingshi guanxiquan chongtu yanjiu: you Zhang Ziqiang anjian yinfa de sikao (Research on the conflict of criminal jurisdiction between Mainland China and Hong Kong: reflections on the case of Cheung Tze-keung)," [note 120 above], pp. 240-5.

- (2) where the act of preparation and the commission of a crime occur in Hong Kong and the Mainland separately, the place of commission exercises jurisdiction.
 - (3) where the act of a crime continuously occurs in both Hong Kong and the Mainland, the place of the principal criminal act exercises jurisdiction.
 - (4) where it is difficult to differentiate the place of act from the place of consequence and the place of preparation from the place of commission, the principle of “actual control” and “first control” should be used. In other words, the party, that has arrested the accused, or has started the trial, exercises the jurisdiction.
- (iii) Jurisdiction over multiple crime involving both the Mainland and Hong Kong
- Principle of jurisdiction - the territorial principle should be adopted and supplemented by the principle of “actual control”.
- (iv) Jurisdiction over crimes that occur outside the Mainland and Hong Kong
- Principle of jurisdiction - the principles of “first control” or “actual control” should be adopted if both sides have criminal jurisdiction.
- (v) Jurisdiction over crimes that occur in the Mainland, Hong Kong and other countries or regions
- Principle of jurisdiction - reference should be made to the general principle of jurisdiction governing cross-border crimes.
- (vi) Jurisdiction over crimes jointly committed by both Hong Kong and Mainland residents of Chinese nationality
- Principle of jurisdiction -
- (1) where a joint crime occurs in one place, the place has jurisdiction.
 - (2) where a joint crime occurs in both places, the primary place of crime exercises jurisdiction. Where it is difficult to distinguish the primary place of crime from the secondary place of crime, judicial institutions of the place where the principal suspect is caught exercise jurisdiction. Where it is difficult to distinguish the principal suspect from other suspects, the principle of “first control” should be adopted.

(vii) Jurisdiction over treason and secession

Principle of jurisdiction - the court of the place where the crime occurs exercises the jurisdiction.

(ix) Jurisdiction over criminal offences relating to national defence and foreign affairs

Principle of jurisdiction - Mainland courts have jurisdiction.

(x) Jurisdiction over crimes committed by personnel stationed in the other side

Principle of jurisdiction - the host place has jurisdiction if the crimes violate the interest and social interest of the host place; otherwise, the sending place exercises jurisdiction.

4.81 All Mainland scholars aforementioned suggested the adoption of the territorial principle as the leading principle of jurisdiction, which was considered to be a workable approach to follow. The article by Zhao Bingzhi and Tian Hongjie proposed concrete recommendations for the resolution of cross-border conflicts of criminal jurisdiction in different circumstances. However, several major issues may still need further exploration.

4.82 Firstly, the meaning of “first control” should be clarified. “First control” was a very important principle in Zhao Bingzhi and Tian Hongjie’s article. Is “first control” determined by where a victim first reports the case, where the law enforcement agency or its judicial personnel first starts the investigation, or where the procuratorial organ first institutes the prosecution?

4.83 Secondly, what is the meaning of the “primary place of crime”? Criminal laws of the Mainland and Hong Kong differ in the classification of crimes, definitions and elements of some of the crimes, and the penalty system.¹⁴¹ Which principles should be used by China and Hong Kong to define the boundary between the primary place of crime and the secondary place of crime?

¹⁴¹ See Xuan Bingzhao, "Zhongguo neidi xingfa yu xianggang tequ xingfa bijiao (Comparing the criminal law of Mainland China with the criminal law of the Hong Kong Special Administrative Region)," in Xianggang Falu Jiaoyu Xintuo Jijin (Hong Kong Legal Education Trust Fund) ed., *Zhongguo Neidi Xianggang Falu Zhidu Yanjiu yu Bijiao (Comparative Studies on the Legal Systems of Mainland China and Hong Kong)*, Beijing: Beijing Daxue Chubanshe, 2000, pp. 516-538; Xie Wang ed., *Tai Gang Ao Xingfa yu Dalu Xingfa BiJiao Yanjiu(Comparative Studies of the Criminal Laws in Taiwan, Hong Kong, Macau and the Mainland)*, Beijing: Zhongguo Renmin Gongan Daxue Chubanshe, 1998, and Chen Zhengyun ed., *Zhongguo Xingshi Falu Chongtulun, (Conflict of Criminal Law in China)*, Beijing: Zhongguo Fazhi Chubanshe, 1996, Chapter 7.

4.84 Thirdly, criminal laws in the Mainland and Hong Kong are very different in structure. Mainland China has a set of comprehensively compiled criminal codes, while Hong Kong criminal law is scattered in different ordinances and judicial cases. If the principles of criminal jurisdiction aforementioned need to be codified in detailed rules and be incorporated in Hong Kong's criminal law, this will be a very difficult task that requires considerations of jurisprudence and matters outside jurisprudence.

CHAPTER 5 - REGULATORY MODEL FOR THE AGREEMENT ON THE SURRENDER OF FUGITIVE OFFENDERS BETWEEN THE MAINLAND AND HONG KONG

5.1 In the last chapter, we will first discuss the regulatory model for the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong and then explore some major issues in terms of its scope and contents that may arise in the formulation of such an agreement.

Regulatory Model for the Agreement on the Surrender of Fugitive Offenders between the Mainland and Hong Kong

5.2 The Mainland and Hong Kong have their own respective judicial systems on the surrender of fugitive offenders. Before the end of 2000, the Mainland's system on extradition of fugitive offenders had mainly been governed by bilateral diplomatic treaties and internal regulations (please refer to Chapter 1 of this research report). On 28 December 2000, the 19th Session of the Standing Committee of the 9th National People's Congress formally adopted the *Extradition Law of the People's Republic of China (Extradition Law)*¹⁴², which was promulgated and became effective on the same day.

5.3 After its reunification with China, HKSAR has, under the *Basic Law*, been authorized by the Central Government to negotiate and conclude agreements on the surrender of fugitive offenders with foreign countries. Hong Kong has so far entered into such agreements with more than 10 countries. The law governing the surrender of fugitive offenders in Hong Kong is the *Fugitive Offenders Ordinance* (Cap. 503). The existing *Fugitive Offenders Ordinance* does not apply to the Mainland.

5.4 There is no formal arrangement for the surrender of fugitive offenders between Hong Kong and the Mainland. However, there is an administrative arrangement, under which the Mainland will surrender to Hong Kong for trial those fugitive offenders who have committed offences in Hong Kong but are arrested in the Mainland. In the absence of other arrangements, Hong Kong has never surrendered any fugitive offenders to the Mainland.

¹⁴² See Appendix VII.

Past Experience of Judicial Assistance between the Mainland and Hong Kong

5.5 Article 95 of the *Basic Law* provides that “[T]he Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other”. After the reunification in 1997, the Mainland and Hong Kong have entered into agreements on the following areas of judicial assistance.¹⁴³

Arrangement on the Delivery of Judicial Documents in Civil and Commercial Areas

5.6 On 14 January 1999, representatives from the Mainland and Hong Kong signed in Shenzhen the memorandum on the *Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts*. The relevant arrangement focuses on the continuation of the pre-existing practice before 1997 and makes reference to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, to which both the Mainland and Hong Kong acceded before the reunification.¹⁴⁴

5.7 The Supreme People’s Court in the Mainland later issued a corresponding judicial interpretation¹⁴⁵. In March 1999, Hong Kong completed the scrutiny of the *Rules of the High Court (Amendment) Rules*, which came into effect on 30 March 1999.

¹⁴³ For a discussion on mutual judicial assistance in police and anti-corruption matters between the Mainland and Hong Kong, see Zhao Yongchen, “Woguo neidi yu xianggang jingfang hezuo wenti yanjiu (A study of issues relating to police co-operation between the Mainland and Hong Kong),” *Faxue Jia*, 1998(3), pp. 88-98 and H L Fu, “The form and substance of legal interaction of legal interaction between Hong Kong and Mainland China: towards Hong Kong’s new legal Sovereignty,” in Raymond Wicks ed., *The New Legal Order in Hong Kong*, Hong Kong: Hong Kong University Press, 1999, pp. 95-132.

¹⁴⁴ See Gao Shawei, “Neidi yu xianggang tebie xingzhengqu sifa xiezhu de zhongyao jucuo (Important measures taken on the judicial assistance between the Mainland and Hong Kong Special Administrative Region),” *Zhongguo Falu*, 1999(6), pp. 11-2.

¹⁴⁵ *The Arrangement of the Supreme People’s Court for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Courts in the Mainland and Hong Kong Special Administrative Region* was adopted by the Judicial Committee of the Supreme People’s Court on 30 December 1998 and came into force on 30 March 1999. See the *Gazette of the Supreme People’s Court of the People’s Republic of China*, Vol. 3 of 1999, pp. 95-96 and Appendix VIII to this report.

Arrangement on Mutual Enforcement of Arbitral Awards

5.8 On 21 June 1999, representatives from the Mainland and Hong Kong signed in Shenzhen the memorandum on the *Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*. On 24 January 2000, the Supreme People's Court promulgated in the form of judicial interpretation the *Arrangement of the Supreme People's Court on Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*.¹⁴⁶

5.9 On 7 July 1999, the Hong Kong Government introduced the Arbitration (Amendment) Bill 1999 into LegCo. The objective of the Bill was to implement the arrangements for mutual enforcement of arbitral awards between the Mainland and Hong Kong. The Bill was given the third reading and passed by LegCo on 5 January 2000.

5.10 There were views that the making of the arrangements followed several important principles, including (1) the principle of one country, two systems, with full consideration given to the difference in judicial systems between the Mainland and Hong Kong; (2) the principle of reaching consensus through consultation, and resolving conflict of laws between the Mainland and Hong Kong through negotiation and consultation; (3) the principle of effectiveness by setting up a mechanism which is simpler and speedier than international judicial assistance; and (4) the principle of making reference to international conventions and customs, essentially following the provisions of the "New York Convention".¹⁴⁷

Reciprocal Notification Mechanism between the Mainland and Hong Kong

5.11 On 13 October 2000, representatives from the Mainland and Hong Kong signed in Beijing the *Arrangements on the Establishment of Reciprocal Notification Mechanism between Mainland Public Security Authorities and the Hong Kong Police*.¹⁴⁸ Such reporting mechanism is an administrative arrangement. The scope for Mainland notification units to notify the Hong Kong Police covers the imposition of criminal compulsory measures on Hong Kong residents by the public security authorities (including customs authorities in respect of investigations into smuggling activities), and unnatural deaths of Hong Kong residents in the Mainland.

¹⁴⁶ It was adopted by the Judicial Committee of the Supreme People's Court on 18 June 1999 and came into force on 1 February 2000. See the *Gazette of the Supreme People's Court of the People's Republic of China*, Vol. 2, 2000, pp. 59-60 and Appendix IX to this report.

¹⁴⁷ See Gao Shawei, "Neidi yu xianggang tebie xingzhengqu xianghu zhixing duifang zhongcai caijue youzhang kexun (Rules for the Mainland and Hong Kong to follow in mutual enforcement of arbitral awards)," *Zhongguo Falu*, 1999(10), pp. 18-9.

¹⁴⁸ See Appendix X and LegCo Paper No. CB(2)86/00-01.

5.12 With regard to the arrangement on notification by Hong Kong to the Mainland, the scope for Hong Kong notification units to notify Mainland public security organs covers criminal prosecutions instituted by the Hong Kong Police Force, Customs and Excise Department and Immigration Department against Mainland residents, and unnatural deaths of Mainland residents in Hong Kong.

Commitments made by the Hong Kong Government

5.13 In a paper presented to the meeting of the LegCo Panel on Security on 3 December 1998, the Security Bureau stated that the following five principles should be adhered to when the HKSAR Government devises a rendition arrangement with the Mainland¹⁴⁹:

- “(1) Our approach should be consistent with the provision under Article 95 of the Basic Law which provides that the HKSAR may through consultations and in accordance with the law, maintain judicial relations with the other parts of the country, and they may render assistance to each other.*
- (2) Any rendition arrangement must be underpinned by legislation in the HKSAR.*
- (3) Any rendition arrangement will have to be acceptable to both the HKSAR and the Mainland.*
- (4) Any rendition arrangement should take into account of the One Country Two Systems principle and the differences in the legal and judicial systems of the two places. It should balance the need to prevent criminals from escaping justice and the need to safeguard the rights of individuals. The usual safeguards (including double criminality, speciality, protection against resurrender to a third country, death penalty and the normal exclusion in relation to political offences and political prejudice) in our SFO Agreements with other jurisdictions will be of useful reference.*
- (5) Any rendition arrangement must be consistent with Article 19 of the Basic Law which confers to the SAR courts jurisdiction over offences committed in the HKSAR. However, it must be acknowledged that there will be situations of concurrent jurisdiction. Our rendition arrangement should seek to lay down some guiding principles for transfer of cases in such situation, and for determining surrender where cross boundary crimes are involved.”*

¹⁴⁹ See LegCo Paper No. CB(2) 748/98-99(02), p. 3.

5.14 The Secretary for Security also assured Members of LegCo at the same Panel meeting held on 3 December that the Administration would consult the public on the rendition arrangement with the Mainland upon completion of the discussion with the Mainland. Views from Members would be sought when the legislation as regards a statutory framework for the rendition arrangement was introduced.¹⁵⁰

5.15 As at January 2001, the relevant authorities of the Mainland and Hong Kong had held four rounds of expert meetings (held in March, August and November 1999 and March 2000 respectively). Experts from both sides had had in-depth discussion on various major issues pertinent to the formulation of a rendition arrangement, including safeguards, concurrent jurisdiction and procedures.¹⁵¹

Regulatory Model for the Agreement on the Surrender of Fugitive Offenders between the Mainland and Hong Kong

5.16 The Hong Kong Government has expressed clearly that if there is a need for any agreement on the surrender of fugitive offenders between the Mainland and Hong Kong to be implemented in Hong Kong, such an agreement will be given effect by local legislation.

5.17 The issue as to how the Mainland should implement the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong is originally not a matter for Hong Kong to decide. However, since the arrangement on the surrender of fugitive offenders concerns both Hong Kong and the Mainland, it is unlikely that the regulatory models of the two sides can be separated completely.

5.18 Two main arrangements on judicial assistance between the Mainland and Hong Kong after the reunification are implemented through the promulgation of judicial interpretation by judicial organs in the Mainland and through the amendment of local legislation in Hong Kong. In addition to the models discussed above, Professor Zhao Bingzhi has summarized the opinions of other scholars on the models for criminal judicial assistance between different regions of China, and he considers that the following options are available:¹⁵²

¹⁵⁰ See LegCo Paper No. CB(2) 1258/98-99, paragraph 6.

¹⁵¹ See LegCo Paper No. CB(2)688/00-01.

¹⁵² See Zhao Bingzhi, "Guanyu zhongguo neidi yu xianggang tebie xingzhengqu jianli xingshi sifa huzhu guanxi de yantao (Discussion on the establishment of criminal judicial assistance relationship between the Mainland and Hong Kong)," in Gao Mingxuan and Zhao Bingzhi ed., *Zhongguo Quji Xingfa yu Xingshi Si fa Xiezhu Yanjiu (Study of Chinese Regional Criminal Law and Criminal Judicial Assistance)*, Beijing: Zhongguo Fangzheng Chubanshe, 2000, pp. 79-85.

- (1) Adoption of the central, unified legislation model: According to the mechanism laid down in Article 18 of the *Basic Law*, the central legislation can, thereafter, be listed in Annex III of the *Basic Law* for its implementation in Hong Kong. This opinion holds that judicial assistance relates to the interests of different jurisdictions in China and should not be regarded as legislation falling within the autonomy of the Special Administrative Region¹⁵³.
- (2) Adoption of the model law model: A model law on reconciling criminal judicial assistance between Hong Kong and the Mainland should be put forward by an organization with public confidence for soliciting views from all aspects. It can then be incorporated into the judicial system of each side.¹⁵⁴
- (3) Adoption of the regional agreement model: Firstly, such a regional judicial assistance agreement can be entered into between one region in the Mainland and Hong Kong. Such an agreement can later be expanded to other regions in the Mainland. Different jurisdictions may also establish regional criminal judicial assistance committee to harmonize the conclusion of such agreements. Finally, such regional agreements can be implemented in the Mainland through legislation by domestic legislative organs or through the promulgation of judicial interpretation by judicial organs. In Hong Kong, it can be affirmed through legislation by LegCo.

¹⁵³ See Liu Zhengjiang, "Zhongguo quji sifa xiezhu wenti de tantao (Exploration of China's regional judicial assistance)," in Huang Jing & Huang Feng ed., *Quji Sifa Xiezhu Yanjiu (Study of Regional Judicial Assistance)*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1993, pp. 51-52.

¹⁵⁴ It mainly refers to the practice in the United States. For detailed discussion, please refer to Chapter 2 of this research report.

Scope and Contents in the Formulation of the Agreement on the Surrender of Fugitive Offenders between the Mainland and Hong Kong

5.19 The main contents of an international extradition treaty usually include (1) extraditable offences; (2) circumstances under which extradition should be refused; (3) circumstances under which extradition may be refused; (4) communication channels; (5) the methods for the surrender of persons and assets; and (6) dispute resolution mechanism.¹⁵⁵

5.20 In drafting the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong, one important issue to be considered is whether or not this agreement should adopt internationally recognized principles and standards.

5.21 One school of opinions is that Hong Kong should continue to adopt these internationally recognized principles and standards. At present, the procedures and review mechanism prescribed in the *Fugitive Offenders Ordinance* help protect the fundamental interests of Hong Kong residents and should form the basis for future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong.¹⁵⁶

5.22 Another school of opinions is that as judicial assistance between the Mainland and Hong Kong is only regional in nature, the principle of convenience, speed, and effectiveness in combating cross-border crimes should be followed. Meanwhile, some international principles and customs may not apply.¹⁵⁷

5.23 The following parts of this report discuss and analyze the important issues that may be encountered in drafting the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong. The discussion and analysis are based on the current extradition judicial practice in Hong Kong and the Mainland, with different views set out for Members' reference.

¹⁵⁵ For *The United Nations Model Treaty on Extradition*, see Appendix XI. The Secretary for Security said at the meeting of the LegCo Panel on Security that the rendition arrangement to be made between the Mainland and Hong Kong should be in line with the principles laid down in the *United Nations Model Treaty on Extradition*. See LegCo Paper No. CB(2)1258/98-99, paragraph 16.

¹⁵⁶ See the minutes of the meeting of the LegCo Panel on Security held on 3 December 1998, LegCo Paper No. CB(2)1258/98-99.

¹⁵⁷ See Zhao Yongcheng, "Lun woguo quji sifa xiezhu de xianzheng jichu (Analysis of the constitutional basis of Chinese judicial assistance)," in *Academic Conference on Judicial Cooperation under One Country Two Systems*, Hong Kong: Faculty of Law of the University of Hong Kong, 1999.

Principle of Double Criminality

5.24 The *Fugitive Offenders Ordinance* of Hong Kong defines an extraditable offence as a conduct which amounts to an offence in both the requesting Party and Hong Kong, and is punishable under the law of both parties by imprisonment for more than 12 months, or by a more severe penalty. The *Fugitive Offenders Ordinance* has adopted the method of listing to set out 46 extraditable offences in its Schedule 1 on Description of Offences.

5.25 At present, all extradition treaties signed between the Mainland and other countries have adopted the method of exclusion¹⁵⁸ – that is to limit the extraditable offences by the restriction on the criminal penalty to be imposed. As in Hong Kong, the Mainland also adopts the minimum penalty of a 12-month imprisonment as the starting point for extradition. The recently adopted *Extradition Law* has also adopted the same criterion.

5.26 Should the principle of double criminality be adopted in the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong? If yes, how should it be adopted? Should the method of listing or the method of exclusion be adopted in its implementation? What should the length of imprisonment as the starting point for extraditable offences be?

5.27 There are views that “the principle of double criminality” is an international custom of extradition judicial practice between countries and therefore should not be adopted in the regional judicial assistance between the Mainland and Hong Kong.¹⁵⁹ The reasons are as follows: the provisions on criminal offences in the Mainland and Hong Kong are different, and fugitive offenders should be surrendered to the judicial organs where the offences were committed according to the principle of territorial jurisdiction.

¹⁵⁸ Please refer to the discussion on the principles and modes of extradition treaties signed by China and foreign countries in this report, paragraphs 1.20-1.22.

¹⁵⁹ See Zhao Bingzhi, “Guanyu zhongguo neidi yu xianggang tebie xingzhengqu jianli xingshi sifa huzhu guanxi de yantao (Discussion on the establishment of criminal judicial assistance relationship between the Mainland and Hong Kong),” same as note 152, pp. 73-4; and Zhao Guoqiang, “Guanyu neidi yu xianggang xianghu yijiao fazui xianyiren de jidian sikao (Several thoughts on the surrender of fugitive offenders between the Mainland and Hong Kong),” p. 6, in *Academic Conference on Judicial Cooperation under One Country Two Systems*, Hong Kong: Faculty of Law of the University of Hong Kong, 1999.

5.28 There are other views that the extradition judicial practice in both the Mainland and Hong Kong has followed the principle of double criminality. It should not be too difficult to continue to adopt this principle in the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong. It is proposed that the method of exclusion should be adopted in the implementation of the agreement, whereas the method of listing may be used for some sensitive offences.¹⁶⁰

Issue of Death Penalty

5.29 Article 39(1) of the *Basic Law* provides that the *International Covenant on Civil and Political Rights (ICCPR)* shall remain in force and shall be implemented through the laws of HKSAR. The *Hong Kong Bill of Rights Ordinance*¹⁶¹ has incorporated into the laws of Hong Kong the provisions of the Covenant which are applicable to Hong Kong. Article 6 of the Covenant provides for the protection to the right to life. Article 2¹⁶² of Part II of the *Hong Kong Bill of Rights Ordinance* was drafted with reference to Article 6 of the Covenant.

¹⁶⁰ Ling Bing, "Neidi yu xian gang xingshi guanxia quantu ji yindu wenti (A Study on the conflict of criminal jurisdiction between the Mainland and Hong Kong and the problem of extradition)," in Zhao Bingzhi ed., *Shiji Dajiean: Zhang Ziqiang Anjian jiqi Falu Sikao: Zhongguo Neidi yu Xianggang Xingshi Guanxiaquan Chongtu Wenti (Robbery of the Century: The Case of Cheung Tze-keung and its Legal Considerations — the Problem of Conflict of Criminal Jurisdiction between Mainland China and Hong Kong)*, Beijing: China Fangzheng Press, 2000, p. 331.

¹⁶¹ Laws of Hong Kong, Cap. 383.

¹⁶² Article 2 of Part II of the *Hong Kong Bill of Rights Ordinance* makes the following provisions on the right to life:

- "(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- (2) Sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of this Bill of Rights and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
- (3) When deprivation of life constitutes the crime of genocide, nothing in this article shall authorize the derogation in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
- (4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
- (5) Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.
- (6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment in Hong Kong."

5.30 Under section 13(5) of the *Fugitive Offenders Ordinance* of Hong Kong, where an offence is punishable by death, an order for surrender may only be made to that person if the requesting Party gives an assurance which satisfies CE that death penalty will not be imposed or, if imposed, will not be carried out.

5.31 With regard to the issue of death penalty, the agreements on the surrender of fugitive offenders signed between Hong Kong and other countries have stipulated that the requested Party may refuse surrender unless the requesting Party provides assurance that death penalty will not be imposed or, if imposed, will not be carried out.¹⁶³

5.32 In October 1998, the Chinese Government signed *ICCPR*, which is at present under deliberation through the normal procedure.¹⁶⁴ The principle of non-extradition for death penalty has not been incorporated into the *Extradition Law* adopted on 18 December 2000.

5.33 Chapter 1 of this research report indicates, in discussing the bilateral extradition treaties signed between China and other countries, indicates that the principle of non-extradition for death penalty has been accepted to a certain extent in China's extradition judicial practice.

5.34 There are no indispensable relationships between whether or not a region or country maintains death penalty and whether or not it advocates and accepts the principle of non-extradition for death penalty. Some countries maintain death penalty, but comply with the principle of non-extradition for death penalty in concluding extradition treaties with other countries.

5.35 Hong Kong abolished death penalty in 1993, and has expressly implemented the principle of non-extradition for death penalty in its extradition judicial system. Although the scope of application of death penalty in Chinese law is rather broad, the principle of non-extradition for death penalty can be accepted in its extradition judicial practice.

¹⁶³ For example, article 4 of the Agreement on the Surrender of Fugitive Offenders signed with New Zealand provides: “[I]f the offence for which surrender is requested under this Agreement is punishable according to the law of the Requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the Requested Party or is not normally carried out, surrender may be refused unless the Requesting Party gives such assurances as the Requested Party considers sufficient that this penalty will not be imposed or, if imposed, will not be carried out.” (Laws of Hong Kong, Cap. 503)

¹⁶⁴ It requires the approval of the Standing Committee of the National People's Congress.

5.36 It is a very controversial issue whether or not the principle of non-extradition for death penalty should be implemented in the arrangement on the surrender of fugitive offenders between the Mainland and Hong Kong.¹⁶⁵ There are views that non-extradition for death penalty is an extradition principle among countries, and cannot be applied to the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong.¹⁶⁶ The reasons are that, if the principle of non-extradition for death penalty is implemented by Hong Kong towards the Mainland, not only Mainland felony offenders may explore the loopholes of the differences between the laws of the two sides to treat Hong Kong as a haven for fugitive offenders, which will henceforth affect the enforcement of law in the Mainland, but law and order in Hong Kong will also be adversely affected.¹⁶⁷

5.37 Since the *Basic Law* provides that *ICCPR* shall remain in force in Hong Kong, the future agreement related to fugitive offenders between the Mainland and Hong Kong is bound to give consideration to Articles 6 and 7 of *ICCPR* on the issue of death penalty.

5.38 Article 7 of *ICCPR* provides that “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation*”.

¹⁶⁵ For example, Lao Qichang, “Sixing zai zhongguo neidi ji xianggang liangdi dacheng yijiao taofan xieding shang de wenti yanjiu (Study of the Issues concerning death penalty in the agreement on the surrender of fugitive offenders between the Mainland and Hong Kong),” in Xiao Weiyun ed., *Xianggang Jibenfa de Chenggong Shijian (The Successful Practice of the Hong Kong Basic Law)*, Beijing, Beijing University Press, 2000, pp. 172-181; and Huang Feng, “Guanyu woguo neidi yu xianggang zhijian yijiao taofan hezuo de ruogan wenti tantao (Exploration of several issues on the Mainland and Hong Kong cooperation on surrender of fugitive offenders),” in Gao Mingxuan & Zhao Bingzhi ed., *Zhongguo Quji Xingfa yu Xingshi Sifa Xiezhuzhu Yanjiu (Research on China’s Regional Criminal Law and Mutual Legal Assistance in Criminal Matters)*, Beijing: Zhongguo Fangzheng Chubanshe, 2000.

¹⁶⁶ See Zhao Bingzhi, “Guanyu zhongguo neidi yu xianggang tebie xingzhengqu jianli xingshi sifa huzhu guanxi de yantao (Discussion on the establishment of criminal judicial assistance relationship between the Mainland and Hong Kong),” [note 152 above], pp. 71-72; and Zhao Guoqiang, “Guanyu neidi yu xianggang xianghu yijiao fanzui xianyiren de jidian sikao (Several thoughts on the surrender of fugitive offenders between the Mainland and Hong Kong),” [note 159 above], p. 5.

¹⁶⁷ See Zhao Bingzhi, “Guanyu zhongguo neidi yu xianggang tebie xingzhengqu jianli xingshi sifa huzhu guanxi de yantao (Discussion on the establishment of criminal judicial assistance relationship between the Mainland and Hong Kong),” [note 152], p. 72.

5.39 The Human Rights Committee of the United Nations in a Canadian case *Ng v. Canada*¹⁶⁸, held that the fact that Canada, which had abolished death penalty, extradited Ng to the US after an extensive trial process, but without requesting the US to give the assurance that death penalty should not be carried out, was not in violation of Article 6 of *ICCPR*.¹⁶⁹ However, the Committee was of the view that since Ng was very likely to be sentenced to death penalty after being extradited to California of the US, and California carried out death penalty by using poison gas, which might result in prolonged agony, Canada was in violation of Article 7 of *ICCPR*.¹⁷⁰

5.40 In June 1997, Hong Kong promulgated the *Fugitive Offenders (Torture) Order*¹⁷¹, which was a subsidiary legislation adopted according to the *Fugitive Offenders Ordinance* of Hong Kong. CE may exercise his discretionary power to refuse to surrender to another jurisdiction a fugitive offender who is likely to face the danger of torture.

Principle of Non-extradition for Political Offences

5.41 Sections 5(1)(a) and 5(1)(c) of the *Fugitive Offenders Ordinance* of Hong Kong provide that a person shall not be surrendered if the offence in respect of which such surrender is sought is an offence of a political character, or if the purpose of the extradition request is made for the purpose of prosecuting or punishing him on account of his political opinions.

5.42 Among the extradition treaties signed between China and other countries, some incorporate this principle explicitly.¹⁷² Some other extradition treaties provide that extradition should be refused if the requested Party has sufficient reasons to believe that the requesting Party shall prosecute the fugitive offender for political opinions.

5.43 The recently adopted *Extradition Law* states clearly that extradition should be refused if a request is made due to political offences.¹⁷³

¹⁶⁸ *Ng v. Canada*, Communication No. 469/1991, United Nations Document CCPR/C/49/D/469/1991(1994).

¹⁶⁹ On the other hand, the Human Rights Committee had previously ruled a violation of Article 6 of *ICCPR* when prisoners on death row were deprived of procedural protection in the process of being sentenced to death, including the minimum guarantees of the right to fair trial by an independent judicial organ, the principle of the presumption of innocence and the right to defence. See Ved P. Nanda, "Bases for refusing international extradition requests – capital punishment and torture", *Fordam International Journal*, June 2000.

¹⁷⁰ For a discussion on the principle of non-extradition for death penalty and torture, refer to note 169.

¹⁷¹ Laws of Hong Kong, Cap. 5031.

¹⁷² Thailand, Romania and Cambodia are included.

¹⁷³ See Article 8(3).

5.44 Non-extradition for political offences is a general principle on extradition with international recognition. Its purpose is to protect fundamental human rights, and to prevent political oppression and unfair trial of persons holding different political opinions. The international community does not have a commonly accepted definition of “political offences”¹⁷⁴. Each country may base on its own legal system and discretion to make its judgement about the nature of relevant “political offences” and decide whether or not to approve the extradition.

5.45 Chapter one of Part II of the *Criminal Law of the People’s Republic of China* as amended in 1997 is about crimes against national security. Article 102 of the Criminal Code provides that whoever colludes with a foreign State to endanger the sovereignty, territorial integrity and security of the People’s Republic of China shall be sentenced to life imprisonment or fixed-term imprisonment of not less than 10 years.

5.46 Article 23 of the *Basic Law* also provides that “[T]he Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies”.

5.47 Whether or not the principle of “non-extradition for political offences” should be incorporated into the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong is believed to be another extremely sensitive issue. There are views that the primary objective of this principle is to maintain the sovereignty and political system of one country. Since Hong Kong and the Mainland belong to the same country, the principle of “non-extradition for political offences” should not be applicable.¹⁷⁵

¹⁷⁴ For a relevant discussion on the principle of “non-extradition for political offences”, please refer to Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1998, Chapter 6 and Ivor Stanbrook & Clive Stanbrook, *Extradition: Law & Practice*, 2nd ed., Oxford: Oxford University Press, 2000, pp. 65-67. You may also refer to a document submitted by the Administration to LegCo on “Summary of the Reference Material on Offence of Political Character”, LegCo Paper No. CB(2)799/98-99(01).

¹⁷⁵ See Zhao Yongcheng, “Lun woguo quji sifa xiezhu de xianzheng jichu (Analysis of the constitutional basis of Chinese judicial assistance),” [note 157 above], p. 5; and Zhao Bingzhi, “Guanyu zhongguo neidi yu xianggang tebie xingzhengqu jianli xingshi sifa huzhu guanxi de yantao (Discussion on the establishment of criminal judicial assistance relationship between the Mainland and Hong Kong),” [note 152 above], pp. 69-70.

5.48 On the other hand, there are other views that Hong Kong and the Mainland have different political systems and different protection of political rights for citizens. Moreover, Hong Kong will have its own legislation on crimes of treason, sedition and the like. The application of the principle of “non-extradition for political offences” in the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong shall contribute to the guarantee of Hong Kong’s original system and living style under the *Basic Law*.¹⁷⁶

Fair Trial

5.49 The right to fair trial of the residents of HKSAR and other persons is guaranteed by Articles 25¹⁷⁷, 28¹⁷⁸, 39¹⁷⁹, and 41¹⁸⁰ of the *Basic Law*.

¹⁷⁶ See Ling Bing, “Neidi yu xian gang xingshi guanxia quantu ji yindu wenti (A Study on the conflict of criminal jurisdiction between the Mainland and Hong Kong and the problem of extradition),” [note 160 above], pp. 351-352

¹⁷⁷ “All Hong Kong residents shall be equal before the law.”

¹⁷⁸ “The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.”

¹⁷⁹ “The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

¹⁸⁰ “Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.”

5.50 Article 10 of Part II of the *Hong Kong Bill of Rights Ordinance* provides for the right to equal and fair trial before the courts for any person¹⁸¹ while Article 11 provides for the right for persons who have been either prosecuted or convicted¹⁸².

¹⁸¹ Article 10 is enacted with reference to Article 14(1) of ICCPR. Article 10 provides that “[A]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

¹⁸² Article 11 is enacted with reference to Article 14(2)-(7) of ICCPR. Article 11 provides that:

“(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality-

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

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

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

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

(g) not to be compelled to testify against himself or to confess guilt.

(3) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

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

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

(6) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong.”

5.51 In the *United Nations Model Treaty on Extradition*, fair trial can be regarded as a ground for refusing extradition. Article 3(6) of the Model Treaty provides that “if the person ... has not or would not receive the minimum guarantees in criminal proceedings as contained in Article 14 of the *International Covenant on Civil and Political Rights*”, extradition shall not be granted.

5.52 Some scholars¹⁸³ point out that in international extradition judicial practice, the judicial organs in some countries will consider, in their extradition judicial scrutiny process, the criminal trial standards of the requesting country¹⁸⁴. However, there are also judicial organs in many countries (including the US, Canada and the UK) who favour compulsory enforcement in their interpretation of extradition treaties and legislation. For example, there is a so-called Rule of Noninquiry in the US extradition judicial system. The Rule states that the US courts will not inquire into how the requesting country has collected evidence on which the extradition is made, or the criminal penalty which the person requested for extradition shall face after being surrendered to his home country.¹⁸⁵

5.53 The Mainland made major amendments in 1996 to its *1979 Criminal Procedure Law*. The new *Criminal Procedure Law of the People’s Republic of China* came into force on 1 January 1997. Article 191 of the new *Criminal Procedural Law*, which concerns how the people’s courts of second instance deal with violation of statutory procedural rules, mentions for the first time the term of “impartiality of a trial”.¹⁸⁶

¹⁸³ See John Dugard & Christine Vanden Wyngaert, “Reconciling extradition with human rights”, *American Journal of International Law*, Vol. 92, No. 2, April 1998, pp. 189-191.

¹⁸⁴ For example, England, the Netherlands and Germany. The *English 1989 Extradition Act* allows the courts to examine the criminal justice standards in the requesting country. In the case of *Regina v. Secretary of State for the Home Department, Ex parte Launder* [1997] 1 WLR 839, the British court refused to extradite a fugitive offender on the ground that the human rights of the offender might be infringed after Hong Kong’s return to China in 1997. That judgement was later overruled by the Judicial Committee of the Privy Council. See *The Times*, 26/5/1997.

¹⁸⁵ See M. Cherif Bassiouni, *International Extradition: United States Law & Practice*, 3rd ed., New York: Oceana Publications, Inc. 1996, pp. 486-492.

¹⁸⁶ Article 191 provides that “[I]f a people’s court of second instance discovers that when hearing a case, a people’s court of first instance violates the litigation procedures prescribed by law in one of the following ways, it shall rule to rescind the original judgement and remand the case to the People’s Court which originally tried it for retrial:

- (1) violating the provisions of this Law regarding trial in public;
- (2) violating the withdrawal system;
- (3) depriving the parties of their litigation rights prescribed by law or restricting, such rights, which may hamper impartiality of a trial;
- (4) unlawful formation of a judicial organization; or
- (5) other violations against the litigation procedures prescribed by law which may hamper impartiality of a trial.”

5.54 The new *Criminal Procedure Law* has made some important changes in the aspect of fair trial, including (1) abolition of sheltering for examination system; (2) establishment of the principle that no person shall be found guilty without being tried by a people's court according to law; (3) moving ahead of the time of participation of lawyers in criminal litigation; and (4) the change from primary reliance on inquisitorial adjudicative method to adversarial adjudicative method.

5.55 The people's courts in the Mainland have also undergone reforms in recent years. In the *Five-Year Reform Outline for the People's Court*¹⁸⁷ promulgated and implemented on 20 October 1999, proposals have been put forward to strengthen the obligations of adjudicative organizations, improve adjudicative methods, and reform the recruitment of judges.

5.56 Although the reform of the Mainland's criminal law in recent years has led to distinct improvement in the aspect of fair trial, some people (including famous Mainland scholars) continue to hold the view that disharmony still exists between the present Mainland criminal justice system and international standards of criminal justice.¹⁸⁸

5.57 It is believed that whether or not the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong should give consideration to their differences in the protection of fair trial in criminal trials is also a very controversial issue. There are views that both sides should follow the principle of mutual respect and should not interfere with each other's criminal trial procedure.¹⁸⁹ There are other views that the protection of these rights under the *Basic Law* should be the baseline for the negotiation on the agreement for the surrender of fugitive offenders between the Mainland and Hong Kong.¹⁹⁰

¹⁸⁷ See Renmin Fayuan Yanjiushi ed., *Renmin Fayuan Wunian Gaige Wangyao (The Five-Year Reform Outline for the People's Court)*, Beijing: Renmin Fayuan Chubanshe, 2000.

¹⁸⁸ See Chen Guangzhong & Zhang Jianwei, "Lianheguo gongmin quanli he zhengzhi quanli guoji gongyue yu woguo xingshi susong (The United Nations' ICCPR and China's criminal litigation)," *Zhongguo Faxue*, 1998(6), p104 and H L Fu, "The right to a fair trial in China: the New Criminal Procedural Law", in *The Right to Fair Trial in International & Comparative Perspective*, Andrew Byrnes ed., HK: Centre for Comparative and Public Law, The University of Hong Kong, 1997.

¹⁸⁹ Zhao Bingzhi, "Guanyu zhongguo neidi yu xianggang tebie xingzhengqu jianli xingshi sifa huzhu guanxi de yantao (Discussion on the establishment of criminal judicial assistance relationship between the Mainland and Hong Kong)," same as note 152, p. 75.

¹⁹⁰ See Margaret Ng, "Jurisdiction and Rendition: Fundamental Questions Raised by the Trial of Cheung Tze Keung & Others", *Policy Bulletin*, HK: Hong Kong Policy Research Institute, No. 9, Feb/Mar, 1999.

Principle of Double Jeopardy

5.58 The *Fugitive Offenders Ordinance* of Hong Kong provides that the surrender of fugitive offenders may be refused on the principle of double jeopardy.¹⁹¹ This principle means that the fugitive offender has already been tried and acquitted, or been convicted and served his criminal sentence.

5.59 Section 11(6) of the *Hong Kong Bill of Rights Ordinance* provides that “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong”. The common law principle as applied in Hong Kong also stipulates that so long as the relevant foreign court has exercised valid jurisdiction over the defendant, then the defendant cannot be tried in Hong Kong for the same offence regardless of whether or not he was convicted or held not guilty by the foreign court.¹⁹²

5.60 Article 7(2) of the *Extradition Law* provides that extradition should be refused “if the judicial organs of the People’s Republic of China has made a valid judgement on the crime indicated by the extradition request or the criminal judicial proceedings has been completed”. Meanwhile, Article 9(1) of the same Law provides that “extradition may be refused if the People’s Republic of China has criminal jurisdiction over the crime indicated by the extradition request and criminal prosecution is either going on or under preparation against the person requested to be extradited.” The same principle has also been adopted in the extradition treaties concluded between China and other countries.¹⁹³

5.61 Although under the extradition judicial procedure in the Mainland, “double jeopardy” can be a ground for refusing extradition, the criminal justice system in the Mainland is not bound by the validity of foreign judgements. Article 10 of the *Criminal Law of the People’s Republic of China* provides that “any person who commits a crime outside the territory and territorial waters and space of the People’s Republic of China, for which according to this Law he should bear criminal responsibility, may still be investigated for his criminal responsibility according to this Law, even if he has already been tried in a foreign country. However, if he has already received criminal punishment in the foreign country, he may be exempted from punishment or given a mitigated punishment”.

¹⁹¹ See s. 5(1)(e) of the *Fugitive Offenders Ordinance*.

¹⁹² Albert Chen, “Zhongguo nei i yu xianggang de xingshi falu chongtu wenti (Conflict of law issues in criminal matters between the Mainland and Hong Kong),” p. 286 in Zhao Bingzhi ed., *Shiji Dajiean: Zhang Ziqiang Anjian jiqi Falu Sikao: Zhongguo Neidi yu Xianggang Xingshi Guanxiaquan Chongtu Wenti (Robbery of the Century: The Case of Cheung Tze-keung and its Legal Considerations — the Problem of Conflict of Criminal Jurisdiction between Mainland China and Hong Kong)*, Beijing: Zhongguo Fangzheng Chubanshe., 2000.

¹⁹³ See Huang Feng, *Zhongguo Yindu Zhidu Yanjiu (Study of China’s Extradition System)*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1997, pp. 116-120.

5.62 When the arrangement on the surrender of fugitive offenders between the Mainland and Taiwan is being discussed in this report, it has already been pointed out that some Mainland hijackers who had served criminal sentence in Taiwan were prosecuted and imposed criminal sentence again when they were surrendered to the Mainland.¹⁹⁴

5.63 How should the principle of “double jeopardy” be implemented in the future arrangement on the surrender of fugitive offenders between the Mainland and Hong Kong? There are views that although the relationship between the Mainland and Hong Kong is not international in nature, the principle of “double jeopardy” should be adopted in the arrangement on the surrender of fugitives between the Mainland and Hong Kong.¹⁹⁵ In the draft agreement on the arrangement of the surrender of hijackers between the two sides of the Taiwan Strait, consensus has been reached on the principle of “double jeopardy”.¹⁹⁶ However, there is one point worth noting, i.e., for certain cases over which both sides have jurisdiction, how to avoid a situation that either side may easily refuse extradition on the grounds that the case has proceeded to the criminal litigation stage.

Habeas Corpus

5.64 Section 12(1)(a) of the *Fugitive Offenders Ordinance* of Hong Kong provides that the court of committal shall inform the person in concern of his right to make an application for habeas corpus. Meanwhile, a person in relation to whom an order of committal has been made shall not be surrendered until the expiration of 15 days beginning with the day on which the order is made, or if an application for habeas corpus is made in his case, so long as proceedings on that application are pending.¹⁹⁷

¹⁹⁴ See paragraph 3.47 of this report.

¹⁹⁵ See Gao Mingxuan and Wang Xiumei, “Woguo quji xingshi guanxia chongtu de neihan ji jie jue yuanze (The contents of China’s regional conflict of criminal jurisdiction and the principle for its solution),” p. 281 in Zhao Bingzhi ed., *Shiji Dajiean: Zhang Ziqiang Anjian jiqi Falu Sikao: Zhongguo Neidi yu Xianggang Xingshi Guanxiaquan Chongtu Wenti (Robbery of the Century: The Case of Cheung Tze-keung and its Legal Considerations — the Problem of Conflict of Criminal Jurisdiction between the Mainland China and Hong Kong)*, Beijing: Zhongguo Fangzheng Chubanshe, 2000, and Ling Bing, “A study on the conflict of criminal jurisdiction between the Mainland and Hong Kong and the problem of extradition”, pp. 357-358.

¹⁹⁶ See paragraph 3.43 of this report.

¹⁹⁷ See section 12(2) of the *Fugitive Offenders Ordinance*.

5.65 The application for and grant of habeas corpus in Hong Kong is governed by sections 22A, 23 and 24 of the *High Court Ordinance*. The objective of habeas corpus is to provide legal remedy to unlawful arrest, which is applicable to any person in Hong Kong (including those who are not citizens).¹⁹⁸

5.66 There is no habeas corpus system in the present criminal litigation system in the Mainland.

5.67 How to implement the habeas corpus arrangement in the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong is also an issue worth further consideration.¹⁹⁹ The inter-state rendition arrangement in the US also allows the person concerned to have the right to apply for habeas corpus.²⁰⁰

Review Mechanism

5.68 Every extradition request made by a foreign country to Hong Kong is required to go through both administrative review and judicial scrutiny.²⁰¹ Administrative review includes preliminary administrative review and final administrative decision after judicial scrutiny. Preliminary administrative review examines primarily whether or not the extradition request is made according to legally prescribed channel and whether or not requesting documents are complete.

5.69 The judicial scrutiny procedure for extradition requests in Hong Kong courts is conducted according to the laws of Hong Kong, including:

- (1) considering whether or not to issue warrant of arrest and start judicial proceedings;
- (2) undertaking both procedural and substantive examination in conducting hearing for committal (see paragraph 5.70); and

¹⁹⁸ The existence of habeas corpus in Hong Kong brings into effect the legal principle as stipulated by Article 5(4) of the Hong Kong Bill of Rights Ordinance and Article 9(4) of ICCPR: “[A]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

¹⁹⁹ For a detailed discussion on habeas corpus, see David Clark & Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*, Oxford: Clarendon Press, 2000.

²⁰⁰ Please refer to paragraphs 3.16-3.18 of this report for details.

²⁰¹ For detailed discussion, please refer to Ji Huiling, “Cong xianggang yijiao taofan de falu chufa tansuo xianggang he neidi youguan anpai de luxiang (Exploring the future of the relevant arrangement from Hong Kong’s Law on the surrender of fugitive offenders),” in *Academic Conference on Judicial Cooperation under One Country Two Systems*, Hong Kong: Faculty of the Law of the University of Hong Kong, 1999, pp. 1-11.

- (3) considering the grounds submitted by the fugitive offender against surrender in order to decide whether or not the restrictions stipulated by the *Fugitive Offenders Ordinance* apply to the relevant case²⁰².

5.70 As for judicial scrutiny of extradition requests in Hong Kong, the Ordinance stipulates that the evidence relied on to support the charge of an offence committed by the person requested for surrender is required to satisfy the principle of prima facie evidence²⁰³. In other words, if the fugitive offender had committed the same offence in Hong Kong, that would amount to sufficient evidence sufficient to warrant a person's committal for trial according to the law of Hong Kong.²⁰⁴

5.71 After the completion of judicial scrutiny, the next stage is the final administrative process to consider issuing an order for surrender. Factors to be considered in deciding whether or not to surrender the fugitive offender are the relevant arrangement on the surrender of fugitive offenders and various restrictions under the *Fugitive Offenders Ordinance*, which include:²⁰⁵

- (i) the seriousness of the offence;
- (ii) whether or not there is undue delay in the requesting Party's handling of the case and making the request;
- (iii) whether or not the consent to surrender will be in violation of Hong Kong's obligations under relevant international treaties;

²⁰² Section 5 of the *Fugitive Offenders Ordinance* provides grounds for refusing surrender, which include: the offence in respect of which such surrender is sought is an offence of a political character; the request for surrender concerned (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions, or he may, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions; the offence in respect of which such surrender is sought was prosecuted in his absence and a conviction obtained; if the offence had occurred in Hong Kong, the law of Hong Kong relating to previous acquittal or conviction would preclude the prosecution, or the imposition or enforcement of a sentence, in respect of that offence; the relevant side has not assured that the fugitive offender will not be tried for or in respect of any offence committed before his surrender to it; and the relevant side cannot assure that the fugitive offender will not be re-surrendered by that place to any other place outside Hong Kong for any offence committed before his surrender.

²⁰³ Section 10(6)(b)(iii) of the *Fugitive Offenders Ordinance* provides that the court of committal needs to be satisfied that “where the person is wanted for prosecution in respect of the offence, that the evidence in relation to the offence would be sufficient to warrant the person's committal for trial according to the law of Hong Kong if the offence had been committed within the jurisdiction of that court or any other court”.

²⁰⁴ For details, please refer to the information paper submitted by the Administration to LegCo “Provisions on Evidence concerning Committal Procedure for Fugitive Offenders”, LegCo Paper No. CB(2)2631/98-99.

²⁰⁵ See Ji Huiling, “Cong xianggang yijiao taofan de falu chufa tansuo xianggang he neidi youguan anpai de luxiang (Exploring the future of the relevant arrangement from Hong Kong's Law on the surrender of fugitive offenders),” [same as note 201], pp. 6-7.

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- (iv) whether or not the unique personal circumstances of the fugitive offender constitute grounds for non-surrender;
 - (v) whether or not Hong Kong has jurisdiction over the fugitive offender or the crime committed by him;
 - (vi) whether or not the fugitive offender is a Chinese national;
 - (vii) whether or not there is assurance of non-execution if the offence is subject to death penalty; and
 - (viii) the statement and grounds raised by the fugitive offender for refusing surrender.

5.72 Before the adoption of the *Extradition Law*, the Mainland's extradition review mechanism did not have a fixed model. The organ in charge of extradition in the Mainland is defined by the extradition treaties concluded by the Mainland and other countries. It may be a diplomatic organ, or a designated organ, or concurrently in charge by a diplomatic organ and a designated organ.²⁰⁶

5.73 The current *Extradition Law* contains a clear set of provisions on extradition procedure and the organs in charge.²⁰⁷ The Ministry of Foreign Affairs first examines the request for extradition. If it is of the view that the relevant provisions are satisfied, then the extradition request and the relevant documents shall be transferred to the Supreme People's Court and Supreme People's Procuratorate. The Higher People's Court designated by the Supreme People's Court shall be responsible to conduct judicial scrutiny of the extradition request and make a ruling. The Supreme People's Procuratorate is responsible for reviewing whether or not the crime as indicated by the extradition request or any other crimes committed by the person requested for extradition shall be prosecuted by Mainland judicial organs. After receiving from the Supreme People's Court the ruling that the extradition conditions are satisfied, the Ministry of Foreign Affairs shall report the case to the State Council for its decision. The Ministry of Public Security is responsible for taking extradition detention measures and enforcing the relevant extradition.

²⁰⁶ See Zhang Zhihui, "Yindu wenti yanjiu (A study of the issue of extradition)," in Gao Mingxuan & Zhao Bingzhi ed., *Xingfa Luncong, (Criminal Law Review)* Vol. 2, Beijing: Falu Chubanshe, 1999, pp. 437-483., and Zhang Xiaohong, "Zhongguo guoji sifa xiezhu ji zhongguo nei i yu xiang ang quyue sifa xiezhu (China's international judicial assistance and regional judicial assistance between the Mainland and Hong Kong)," in *Academic Conference on Judicial Cooperation under One Country Two Systems*, Hong Kong: Faculty of Law of the University of Hong Kong, 1999, Appendix 3.

²⁰⁷ See Articles 3 to 5 of the *Extradition Law of the People's Republic of China*.

5.74 If it is necessary to make an extradition request to a foreign country, the Mainland's *Extradition Law* stipulates that the authorities of adjudication, prosecution, public security, state security or prison management of Chinese provinces, autonomous regions or municipalities directly under the Central Government responsible for handling relevant cases shall submit their written opinions, together with relevant papers and certified Chinese translations, to the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice respectively. The Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice shall, upon examining the documents and obtaining consent individually with the Ministry of Foreign Affairs, make requests through the Ministry of Foreign Affairs to the foreign countries concerned.²⁰⁸

5.75 At present, the Mainland and Hong Kong have their respective mechanisms for reviewing extradition requests. Whether or not the arrangements under these two sets of mechanisms should be incorporated into the future agreement on the surrender of fugitive offenders between the Mainland and Hong Kong is an issue requiring detailed examination.

5.76 According to the analysis of a Mainland scholar, the Mainland's extradition request review mechanism is similar to that of countries adopting continental legal system. It is mainly a formality type of review and no substantive review is carried out on the case targeted by the extradition request²⁰⁹.

5.77 On the other hand, Hong Kong conducts, to a certain extent, a substantive review of the offence indicated by the request for extradition. Should such mechanism be applied to the future judicial co-operation on the surrender of fugitive offenders between the Mainland and Hong Kong? At present, the *Fugitive Offenders Ordinance* of Hong Kong adopts a dual review mechanism, which is conducive to the protection of fundamental rights of individuals. However, there are views that the future judicial co-operation on the surrender of fugitive offenders between the Mainland and Hong Kong should be based on the principles of simplicity and high efficiency so that it is worthy of consideration that the review of the evidence concerning the merits of the case should be waived and only a formality review of the relevant request be conducted.²¹⁰

²⁰⁸ See Article 47 of the *Extradition Law of the People's Republic of China*.

²⁰⁹ See Huang Feng, "Guanyu woguo neidi yu xianggang zhijian yijiao taofan hezuo de ruogan wenti tantao (Exploration of several issues on the Mainland and Hong Kong co-operation on the surrender of fugitive offenders)," [note 165 above], p. 105.

²¹⁰ See Huang Feng, "Guanyu woguo neidi yu xianggang zhijian yijiao taofan hezuo de ruogan wenti tantao (Exploration of several issues on the Mainland and Hong Kong co-operation on the surrender of fugitive offenders)," [note 165 above], p. 112.

Appendix I
(Chinese version only)

**全国人民代表大会常务委员会
关于批准《中华人民共和国和罗马尼亚
引渡条约》的决定**

(1 9 9 7 年 2 月 2 3 日 通 过)

第八届全国人民代表大会常务委员会第二十四次会议决定：批准国务院副总理兼外交部部长钱其琛代表中华人民共和国于1996年7月1日在布加勒斯特签署的《中华人民共和国和罗马尼亚引渡条约》。

中华人民共和国和罗马尼亚引渡条约

中华人民共和国和罗马尼亚(以下简称“缔约双方”)在尊重主权、平等和互利的基础上,为加强两国在惩治犯罪方面的合作,达成协议如下:

第一条 引渡的义务

缔约双方有义务按照本条约的规定,根据请求相互引渡在本国境内的人员,以便对其追究刑事责任或执行刑罚。

第二条 可引渡的犯罪

一、就本条约而言,可引渡的犯罪是指根据缔约双方法律均构成犯罪,并可处至少一年有期徒刑。

二、在前款规定为犯罪的情况下,对旨在执行刑罚而提出的引渡请求,只有在被请求引渡人尚未执行的刑期至少为六个月时,才可予以引渡。

三、在确定某一行为是否根据缔约双方法律均构成犯罪时,不应因缔约双方法律是否将该行为归入同类犯罪或使用同一罪名而产生影响。

四、如果引渡请求涉及两个以上根据缔约双方法律均可处罚的犯罪,只要其中有一项犯罪符合第一、二款规定的有关刑罚期限的条件,也可因这些犯罪引渡该人。

五、就财税犯罪而言,被请求方不得以其法律未规定与请求方法律同类的捐税或关税,或者无同样的有关捐税、关税、海关或货币汇兑的法规为由拒绝引渡。

第三条 应当拒绝引渡的情形

有下列情形之一的，应当拒绝引渡：

- (一) 被请求引渡人为被请求方的国民；
- (二) 被请求方认为请求方引渡请求所涉及的犯罪属于政治性质的犯罪；
- (三) 被请求方有充分理由认为请求方提出的引渡请求旨在对被请求引渡人因其种族、宗教、国籍、政治见解等原因而提起刑事诉讼或者执行刑罚，或者被请求引渡人在司法程序中的地位将会因上述原因受到损害；
- (四) 引渡请求所涉及的犯罪只是军事性质的犯罪，而根据普通刑法不构成犯罪；
- (五) 根据缔约任何一方的法律，被请求引渡人获得了追究和审判豁免权，或根据包括时效或赦免的法律，获得了免于刑罚的豁免权。
- (六) 在收到引渡请求前，被请求方已对被请求引渡人就同一犯罪提起诉讼、作出终审判决或终止诉讼。

第四条 可以拒绝引渡的情形

有下列情形之一的，可以拒绝引渡：

- (一) 根据被请求方法律，引渡请求所涉及的犯罪全部或部分发生在其境内或发生在被认为是其境内的地方；
- (二) 犯罪发生在请求方境外，并且被请求方的法律不允许对其境外的这种犯罪进行刑事诉讼；
- (三) 如果同意引渡将与被请求方法律的一些基本原则相抵触。

第五条 依法进行刑事诉讼的义务

一、根据本条约第三条第(一)项和第四条第(一)项规定的理由拒绝引渡时，如果引渡请求涉及的行为按照被请求方法律构成犯罪，则根据请求方的请求，被请求方应将其移交主管司法机关以便追究刑事责任。

二、请求应通过本条约第六条规定的途径以书面形式提出，并附本条约第八条规定的有关文件和证据。

三、被请求方应及时向请求方通知审判结果。

第六条 联系途径

为实施本条约，缔约双方应通过外交途径进行联系，但本条约另有规定者除外。

第七条 语文

在执行本条约时，缔约双方应使用本国官方文字并附有对方的官方文字或英文译文。

第八条 引渡请求及所附文件

一、引渡请求应以书面形式提出，并载明下列内容：

- (一) 请求机构的名称；
- (二) 被请求引渡人的姓名、国籍以及其他已知的与其身份有关的情况及其居所；
- (三) 关于犯罪事实的说明，包括犯罪的时间、地点以及犯罪造成的物质损失；
- (四) 关于认定犯罪及该项犯罪所处刑罚的法律规定。

二、引渡请求应附下列材料：

- (一) 如有可能，有关被请求引渡人特征的材料，包括照片、指纹及任何能证明其身份、国籍和居所的其他材料；
- (二) 有关物质损失的材料以及任何物质损失的性质、数量及重要性的说明；
- (三) 有关法律条文的副本或说明，包括认定犯罪、所处刑罚和追诉时效的法律规定。

三、旨在对被请求引渡人提起诉讼而提出的引渡请求，还应附有请求方主管机关签发的逮捕证原件或副本或其他具有同等效力的文件。

四、旨在对被请求引渡人执行刑罚而提出的引渡请求，还应附有请求方法院终审判决书的原件或经证明无误的副本以及关于未服刑期的说明。

五、引渡请求及所附文件均应该主管机关正式盖章，无须认证。

第九条 补充材料

被请求方如果认为引渡请求所附材料不够充分，可以要求请求方在六十天内提交补充材料。经请求方的合理要求，这一期限还可延长十五天。如果请求方未在上述期限内提交补充材料，应视为自动放弃请求，已被羁押的被请求引渡人应予释放，但不妨碍请求方就同一犯罪再次提出引渡请求。

第十条 为引渡而逮捕

收到引渡请求后，除根据本条约不能引渡的情形外，被请求方应立即逮捕被请求引渡人。

第十一条 临时逮捕

一、在紧急情况下，请求方可以请求被请求方在其收到引渡请求前临时逮捕准备请求引渡的人。此种请求可以书面形式通过外交途径或国际刑警组织途径以任何被请求方接受的通讯方式提出。

二、请求方应包括本条约第八条第一款的内容，并说明对该人已签发了逮捕证或已作出了刑事判决以及将尽快对该人提出引渡请求。

三、被请求方应将对该项请求的决定及有关情况及时通知请求方。

四、被请求方在对被请求引渡人逮捕后三十天内，如未收到本条约第八条所指的引渡请求及文件，可释放临时被逮捕的人。上述期限可经请求方的合理要求延长十五天，但仅限一次。

五、如果请求方随后提交了引渡请求及文件，则对临时被逮捕人的释放不应影响对该人的重新逮捕和引渡。

第十二条 移交被引渡人

一、被请求方应立即将其对引渡请求所作出的决定通知请求方。

二、如果部分或全部拒绝引渡请求，被请求方应说明理由。

三、如果同意引渡请求，被请求方应确定一个合理的移交期限，缔约双方应在该期限内商定移交被引渡人的时间、地点；同时，被请求方应告知请求方有关被请求引渡人已被拘留的时间。

四、如果请求方自商定执行引渡之日起十五天内不接收被引渡人，应被视为放弃该项引渡请求，被请求方应立即释放该人，并可拒绝请求方就同一犯罪对该人再次提出的引渡请求。

五、如果缔约一方因其无法控制的原因不能在商定执行引渡的期限内移交或接收被引渡人，该方应及时通知另一方。缔约双方应重新商定移交被引渡人的有关事宜。

第十三条 暂缓移交和临时移交

一、如果被引渡人正在被请求方境内因请求引渡的犯罪以外的其他犯罪受审或服刑，被请求方可以暂缓移交该人，直至诉讼终结、服刑期满或提前释放，并将此通知请求方。

二、如果前款规定的暂缓移交可能导致超过刑事追诉时效或难以对犯罪进行调查，被请求方可以根据请求方的请求，临时移交被引渡人。

三、请求方在完成有关诉讼行为后，应立即将被临时移交的人归还被请求方。

第十四条 重新引渡

如果被引渡人逃避刑事追诉、审判或执行刑罚，并自愿返回被请求方境内，被请求方应根据请求方的请求将其再次引渡。在这种情况下，请求方无需提交本条约第八条规定的文件。

第十五条 数国提出的引渡请求

如果包括请求方在内的数国对同一人就同一行为或不同行为提出引渡请求，被请求方有权决定将该人引渡给其中任何一个国家。被请求方在决定引渡时，应考虑各种情况，特别是有无条约关系、犯罪的严重性、犯罪行为地、提出请求的时间、被请求引渡人的国籍以及再引渡的可能性。

第十六条 特定原则

请求方不得对已移交的被引渡人在引渡前所犯的非准予引渡的罪行追究刑事责任或执行刑罚或限制其人身自由，也不得将该人再引渡给第三国，但下列情况除外：

（一）被请求方同意。为此，请求方应通过本条约第六条规定的途径以书面方式提出请求，并附本条约第八条规定的有关文件和被引渡人陈述的法律记录。如请求方引渡所涉及的罪行本身根据本条约应予引渡，则应予同意；

（二）被引渡人在刑事审判终结或刑罚执行完毕后三十天内可以自由离开请求方领土而未离开，或离开后又自愿返回。但被引渡人由于其无法控制的原因不能离开请求方领土的时间不计入此期限。

第十七条 财物的移交

一、被请求方应在其法律允许的范围内，应请求方的请求向其移交已查获的被引渡人在据以引渡的犯罪中获得的财物和作为证据的财物。

二、在同意引渡后，如果因被引渡人死亡、脱逃或其他原因而不能执行引渡，本条第一款所指的财物仍应予以移交。

三、如果被请求方需要将本条第一款所指的财物用作正在进行的其他刑事案件的证据，可以暂缓移交直至案件诉讼程序终结。在此情况下，被请求方应通知请求方。

四、被请求方或任何第三方对本条第一款所指财物的权利，应予保留。如果存在该项权利，则应在审判终结后尽快将该项财物无偿归还被请求方。

第十八条 过境

一、根据缔约另一方的请求，缔约一方应允许缔约另一方从第三国引渡的人经过其领土。如果使用空运且未计划在缔约一方境内降落，则无需其同意。

二、过境请求应通过本条约第六条规定的途径以书面方式提出，并附本条约第八条规定的有关文件。

三、根据本条约规定不应引渡的人，被请求方可以拒绝其过境。

第十九条 通报

请求方应向被请求方及时通报对被引渡人刑事诉讼、执行刑罚或者再引渡给第三国的情况。

第二十条 处理引渡请求适用的法律

除本条约另有规定外，被请求方根据其本国处理与引渡有关的请求。

第二十一条 费用

一、被请求方应承担移交被引渡人之前在其境内因引渡所产生的费用。

二、与过境有关的费用由过境请求方负担。

第二十二条 争议的解决

因解释和适用本条约所产生的任何争议，均通过外交途径解决。

第二十三条 批准和生效

本条约须经批准，批准书在北京互换。本条约自互换批准书之日起第三十天开始生效。

第二十四条 终止

一、本条约自缔约任何一方通过外交途径书面通知另一方终止之日起六个月后失效，否则，本条约无限期有效。

二、本条约的终止不应影响在本条约终止前已经开始的引渡程序。

缔约双方全权代表本条约上签字，以昭信守。

本条约于一九九六年七月一日在布加勒斯特签订，一式两份，每份均用中文和罗文写成，两种文本同等作准。

中华人民共和国代表

钱其琛

罗马尼亚代表

梅列什卡努

Appendix II

Details of Hong Kong Legislation Relating to Mutual Legal Assistance in Criminal Matters

Drug Trafficking (Recovery of Proceeds) Ordinance

1. The Drug Trafficking (Recovery of Proceeds) Bill was enacted in 1989. Assistance provided by Hong Kong under the Drug Trafficking (Recovery of Proceeds) Ordinance (the DT(RP)O) is confined to the combat of drug trafficking and cannot be made available to deal with other serious crimes.
2. Section 28 of the DT(RP)O provides that the Chief Executive (CE) in Council may, with the approval of the Legislative Council (LegCo), by order direct in relation to a country, territory or place outside Hong Kong designated by the order (a designated country) that, subject to such modifications as may be specified, the Ordinance shall apply to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there.
3. Section 29 of the DT(RP)O provides for the registration of external confiscation orders by the Court of First Instance.
4. The Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order (Cap. 405 sub. leg.) has been made. Schedule 1 to the Order provides for a list of designated countries to which the Order applies. China (except Hong Kong) is on the list.

Evidence Ordinance

5. In view of the limitations of the DT(RP)O in taking of evidence, the Administration introduced the Evidence (Amendment) Bill 1996 to enhance the powers of the then High Court in meeting requests from overseas jurisdictions to take evidence in Hong Kong for use in criminal matters. The provisions in relation to the obtaining of evidence for overseas jurisdictions were meant to be a stop-gap measure pending the introduction of a more comprehensive bill on mutual legal assistance. Members of the Bills Committee on the Evidence (Amendment) Bill 1996 did not support the proposed amendments which were considered piecemeal. As a bill on mutual legal assistance was then already in the pipeline, Members agreed to delete the provisions of the Evidence (Amendment) Bill 1996 in relation to the obtaining of evidence. In view of Members' position, the Administration decided not to resume the Second Reading debate on the Bill which lapsed accordingly at the end of the session.

6. Other provisions in the Evidence Ordinance (the EO) enabling the taking of evidence by a local court on request of an overseas jurisdiction or by an overseas court upon a request of the local court will be discussed in the following two paragraphs.

7. Section 77B of the EO provides for power of Hong Kong court to assist in obtaining evidence for criminal proceedings in an overseas court. The provision does not apply in the case of criminal proceedings of a political character. Further, the evidence to which the request relates is to be obtained for criminal proceedings which have been instituted or whose institution is likely if the evidence is obtained.

8. Part VIIIA of the EO provides that where it appears to the Court of First Instance that any criminal proceedings have been instituted in Hong Kong or are likely to be instituted in Hong Kong if evidence is obtained for the purposes of those criminal proceedings by virtue of an order made under this Part, the Court of First Instance may order that a letter of request shall be issued and transmitted in such manner as the Court of First Instance may direct to a court or tribunal specified in the order and exercising jurisdiction in a place outside Hong Kong, requesting such court or tribunal to assist in obtaining evidence for the purposes of those criminal proceedings.

Mutual Legal Assistance in Criminal Matters Ordinance

9. The Mutual Legal Assistance Bill has embodied most of the provisions of the Evidence (Amendment) Bill 1996 in relation to the obtaining of evidence for overseas jurisdictions.

10. Section 3 of the Mutual Legal Assistance in Criminal Matters Ordinance (the MLAO) provides that the Ordinance-

- (a) does not regulate requests involving Hong Kong and the People's Republic of China (PRC);
- (b) does not prevent assistance being provided otherwise than pursuant to the Ordinance and arrangements for mutual legal assistance; and
- (c) does not operate to prejudice the generality of section 4 of the Inland Revenue Ordinance (Cap. 112) which provides for secrecy of tax information.

11. Section 4 of the MLAO provides that the Ordinance may be applied as between Hong Kong and a place outside Hong Kong subject to such modifications as may be specified in the applying order. The CE in Council has made a number of orders, with the approval of LegCo, to apply the MLAO with such modifications as necessary, to arrangements for mutual legal assistance between Hong Kong and other jurisdictions, namely Australia, France, New Zealand, the United Kingdom, the United States of America, Italy and South Korea.

12. Section 5 of the MLAO sets out the grounds on which a request by a place outside Hong Kong for assistance shall, or may, be refused. A request shall be refused if-

- (a) the granting of the request would impair the sovereignty of the PRC or the security or public order of the PRC;
- (b) the request relates to an offence of a political character;
- (c) the request relates to an offence only under military law;
- (d) the request will result in a person being prejudiced on account of his race, religion, nationality or political opinions;
- (e) the request relates to prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the requested party;
- (f) granting the request would seriously impair the essential interests of Hong Kong ;
- (g) the criminal conduct in question would not have constituted an offence in Hong Kong if it had occurred there;
- (h) the request relates to an investigation into an offence relating to taxation, if the requesting party is not a party which has entered into a mutual legal assistance agreement with Hong Kong (a prescribed place) or the Secretary for Justice is not supplied with information that satisfies her that the primary purpose of the request is not the assessment or collection of tax; and
- (i) the requesting party is not a prescribed place and it fails to give an undertaking to the Secretary for Justice that it will comply in future request by Hong Kong to the place for assistance in criminal matter.

A request may be refused, if-

- (a) the requesting party is not a prescribed place;
- (b) the requesting party is a prescribed place, pursuant to the terms of the arrangements concerned; and
- (c) the request relates to an offence punishable with death and the requesting party fails to give an undertaking that the death sentence will not be imposed in respect of the offence or, if imposed, will not be carried out.

13. Section 7 of the MLAO empowers the Secretary for Justice to make a request to a place outside Hong Kong for assistance in a criminal matter.

14. Parts II to VI of the MLAO provide for heads of assistance which could be requested by or to Hong Kong. These heads of assistance are as follows-

- (a) taking of evidence;
- (b) searching for and seizing items;
- (c) producing documentary evidence;
- (d) transferring persons to other jurisdictions to provide assistance;
- (e) confiscating the proceeds of crime; and
- (f) serving documents.

15. The MLAO gives power to take evidence at the investigation stage (sections 9 and 10). In this respect, the relevant provisions of the EO only authorizes the taking of evidence relating to any criminal proceedings which have been instituted or are likely to be instituted. To better protect individual's rights under the MLAO, a witness can refuse to answer questions which he could refuse to answer under Hong Kong law if the proceedings were local proceedings, in particular, the privilege against self-incrimination is preserved. Evidence obtained at foreign request will not be able to be used in local proceedings except for the offences of perjury or contempt of court.

16. Section 11 of Schedule 3 to the MLAO repeals sections 28 and 29 of the DT(RP)O; whereas section 15 of Schedule 3 to the MLAO repeals the Drug Trafficking (Recovery of Proceedings) (Designated Countries and Territories) Order. However, both sections have not yet come into operation. Eventually, the powers to render mutual legal assistance under the DT(RP)O will fade out and be taken over by the MLAO.

Appendix III

Jinmen Agreement

1. Principles of Surrender

Ensuring that the operation of surrender is consistent with humanitarianism and the principles of safety and convenience.

2. Persons to be surrendered

- (i) Residents who entered the region of the other side in violation of the relevant rules (except those who entered the region of the other side during fishing operation to avoid typhoon or other force majeure).
- (ii) Criminal suspects or convicted criminals.

3. Place of Surrender

Both sides decide Mawei-Mazu (Mazu-Mawei) as the designated places, and agree Xiamen-Jinmen (Jinmen-Xiamen) as the alternative if necessary after considering the residence of the people being surrendered, the weather, conditions at sea and other factors.

4. Procedures of Surrender

- (i) The requesting party shall notify the requested party of the information relating to the persons to be surrendered, and the requested party shall verify the information, reply to the requesting party within 20 days, and execute the surrender according to the agreed time and place. Where the requested party has questions in verifying the persons to be surrendered, it shall notify the requesting party for double checking.
- (ii) During the surrender, both parties shall use a Red Cross vessel, which shall be guided by a civilian vessel. Both the vessel used for the surrender and the pilot vessel shall hoist a Red Cross flag with white background (no other flags can be hoisted and no other signs can be used).
- (iii) During the hand-over process, two representatives whose appointment has been confirmed by both parties shall sign the hand-over documents.

5. Others

Both parties shall resolve the related technical problems as soon as possible after signing this Agreement, and put this Agreement into effect within the shortest period of time possible. Both Parties shall decide after consultation matters which are not covered by this Agreement.

Appendix IV

Table 1 - Statistics of Cross-Strait Mutual Request for Assistance in Detaining Criminal Suspects Escaped to the Other Side and Frequency of Successful Detention by the Police Administration of the Ministry of Internal Affairs of Taiwan on the Enforcement of the "Jinmen Agreement".* Produced on 10 February 2000.

Item	Year												Total	Remarks
	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000			
Requesting the assistance of the Mainland in detaining and surrendering criminal suspects	5	5	7	39	2	17	20	115	33	92	5	340	The dates of all assistance rendered in detention and the actual detention refer to the dates of the issuance of the letter of request.	
a) Detained and surrendered by the Mainland			1	1				5 (2)	(3)	1	2	10	The date here refers to the date of surrender. Number in bracket represents the number of persons surrendered in that year.	
b) Detained by Taiwan and cases closed		4	3	3		4	4	21	1	39		79	The date here refers to the date of assistance in detention (including Wu Wenxin who had been executed by the Chinese Communist Party)	
c) Cases Pending	5	1	3	35	2	13	16	89	32	52	3	251		
The Mainland surrendered the wanted suspects of its own volition	3	7	1	2	1	4	10	1	7	2	4	42	Liu Shanzhong and 'Xin Hualun' do not fall within the scope of the Jinmen Agreement, they are not included here.	
Requesting assistance of Taiwan in detaining and surrendering criminal suspects by the Mainland	3	8		1			1		1	1		15		
Detained and surrendered by Taiwan	3	7					1		1			12	Wang Dongping went back to the Mainland voluntarily in 1993.	
Detained and surrendered by Taiwan of its volition								2	1	5		8	All numbers recorded from 1997 to 1999 are aircraft hijackers.	
Cases Pending		1								1		2	Wang Shuyi and Yu Xiubo are still at large and authorities are unable to ascertain whether they have entered Taiwan.	

* Sources: Mainland Affairs Council of Taiwan.

Appendix V

Draft Agreement on the Surrender of Aircraft Hijackers between the Two Sides and Related Matters*

1. Method of Communications

Matters relating to the surrender of aircraft hijackers between the two sides shall be conveyed through the Straits Exchange Foundation and the Association for Relations Across the Taiwan Straits, both of which are corporate bodies.

2. Scope of Application

This Agreement shall be applicable to persons from either of the two sides who hijack a civil aircraft of one side to the other by violence, threat or other means. This Agreement applies after it becomes effective.

3. Principles of Surrender

- (i) Hijackers of an aircraft are to be prosecuted and punished by the side which owns the aircraft or the party which manages the aircraft.
- (ii) If a person on whom a surrender request is made is the personnel of the requested party, the requested party shall be in charge of handling the case.
- (iii) Rules of Double Jeopardy
 - (a) For the same offence: where a criminal on whom a surrender request is made, the requested party shall conduct the necessary investigation and make the surrender. However, in the special circumstances where the requested party is of the opinion that it has closer relations to the case or its rights and interests are damaged more severely, it shall have the right to consider the circumstances and decide whether to surrender or not.
 - (b) For other offences: where the aircraft hijackers committed other criminal offences, they shall be surrendered after the end of the criminal proceedings.
- (iv) The surrender of aircraft hijackers shall be consistent with humanitarianism.
- (v) Proceedings after the rejection of surrender request: the requesting party may request the other party to provide materials for further proceeding. The other party may also request the supply of materials for further proceeding.

* Source: China Times, p. 2, 25 January 1995.

4. Compulsory Measures

The party with jurisdiction over the landing site of the hijacked aircraft shall take compulsory measures and detain aircraft hijackers.

5. Discounting Length of Detention

Where an aircraft hijacker is detained for the offence for which a surrender request is made, the period of detention may be discounted from the sentence.

6. Requesting Documents

The requesting party shall state in the requesting documents the age, sex, and characteristics of the hijacker, specify the offences, list the relevant provisions of law, provide legal materials, and demand the provision of replies.

7. Scope of Prosecution

A person who has been surrendered cannot be punished for an offence other than the offence in respect of which the surrender is made. Where a party intends to prosecute the surrendered person for other offences, the requesting party shall notify the other party immediately and shall also notify the other side of the punishment imposed.

8. Surrender of Evidence

The requested party shall surrender evidence relating to the crime to the requesting party.

9. Method of Surrender

Aircraft hijackers shall be surrendered principally by sea, and in special circumstances and after consultation, may be surrendered by air via Hong Kong.

10. Place of Hand-over

The place for handing over aircraft hijackers shall be Jinmen/Xiamen, Mazu/Mawei in principle. The hand-over documents shall specify the period of time in custody.

11. Form of Documents

The surrender requesting documents and the hand-over documents shall be consistent with this Agreement and used in conjunction with it.

12. Cost of Surrender

The requesting party shall meet the cost of surrender. The aircraft landing and other related fees incurred after the landing of the aircraft shall be settled by the aviation companies involved.

13. Application to Criminal Offenders

This Agreement shall apply to criminal offenders and criminal suspects unless the application contravenes the relevant regulations of either side.

14. Implementation, Amendment and Termination

Both parties shall abide by the Agreement. Unless both parties consent after consultation, this Agreement cannot be amended or terminated.

15. Resolution of Dispute

Where a dispute occurs in relation to this Agreement, both parties shall consult expeditiously to arrive at a solution.

16. Signing and Entry into Force

This Agreement enters into force on a date to be specified by both sides after each side has completed the relevant procedures.

Appendix VI

**Legislative Explanations of the Draft Regulation
on Handling Criminal Cases Entrusted by the Mainland Region**

Provisions	Explanations
<p>(Purpose of Legislation)</p> <p>Article 1 This Regulation is enacted to deal with cross-strait criminal cases, to enhance judicial co-operation in criminal matters and to prevent crimes.</p>	<p>The purpose of enacting this Regulation is to deal with cross-strait criminal matters, and to achieve the goal of prevention of crimes through cross-strait judicial cooperation in criminal matters.</p>
<p>(Definition)</p> <p>Article 2 The term 'Taiwan Region', 'residents of the Taiwan Region', 'Mainland Region', 'residents of the Mainland Region' are defined in accordance with article 2 of the Regulation on the Relations between Residents of the Taiwan Region and the Mainland Region.</p>	<p>The Regulation on the Relations between Residents of the Taiwan Region and the Mainland Region has already set out the definitions of 'Taiwan Region', 'residents of Taiwan Region', 'Mainland Region' and 'residents of the Mainland Region'. For the purpose of consistency, those definitions are adopted in this Regulation.</p>
<p>(Scope of Application)</p> <p>Article 3 Judicial assistance relating to crimes committed in the Mainland Region or cases prosecuted in the Mainland Region are dealt with in accordance with this Regulation.</p>	<p>This Regulation governs matters that are related to the provision of judicial assistance to Mainland courts in crimes committed or prosecuted in the Mainland.</p>
<p>(Items)</p> <p>Article 4 Judicial assistance upon request under this Regulation is restricted to the following matters:</p> <ol style="list-style-type: none"> 1. Service of criminal litigation documents. 2. Interrogation of witnesses, victims and expert witnesses. 3. Conduct of examination. 4. Collection and transfer of exhibits and the relevant documents. 5. Interrogation of the suspects or taking statements from the suspects. 6. Surrender of suspects. 	<p>This article clearly states that judicial assistance provided under this Regulation includes: service of criminal litigation documents, interrogation and examination of witnesses, victims and expert witnesses, conduct of examination, collection and transfer of exhibits and the relevant documents, interrogation of suspects, taking statements from the suspects and surrender of suspects.</p>

Provisions	Explanations
<p>(Service of Documents)</p> <p>Article 5 All requests for the service of criminal litigation documents should be dealt with in accordance with the provisions concerning service of documents in the Criminal Procedure Law.</p>	<p>Since the Criminal Procedure Law of our country has already set out the way to deal with service of criminal litigation documents in great detail, a request by the Mainland Region for the service of criminal litigation documents may follow the relevant provisions in the Criminal Procedure Law of our country.</p>
<p>(Investigating Evidence and Examination)</p> <p>Article 6 All requests for investigating or collecting evidence or examination in criminal cases should be dealt with in accordance with the provisions concerning evidence in the Criminal Procedure Law.</p>	<p>Request from the Mainland Region for investigation, collection and examination of evidence in criminal cases involving the Mainland Region should be dealt with in accordance with the provisions relating to evidence in the Criminal Procedure Law.</p>
<p>(Application)</p> <p>Article 7 The method of requesting service of documents or investigation of evidence should be in accordance with the relevant provisions in the Law on Requests for Assistance by Foreign Courts.</p>	<p>The method of requesting service of criminal litigation documents or investigation of evidence in criminal cases involving the Mainland Region should be dealt with in accordance with the provisions dealing with requests for assistance by foreign courts.</p>
<p>(Taking Statements from Suspects)</p> <p>Article 8 The prosecutor of the district court where the suspect is detained should be responsible for interrogating the suspect or taking the suspect's statement.</p> <p>To interrogate the suspect, summons or detention warrant may be issued against the criminal suspect if necessary.</p> <p>The prosecutor should complete the interrogation of the suspect within 24 hours after the detention.</p> <p>Interrogation, summons and detention should be dealt with in accordance with the relevant provisions in the Criminal Procedure Law.</p>	<p>The compulsory measures in dealing with suspects of crime involving the Mainland Region can be divided into two types:</p> <ol style="list-style-type: none"> 1. It is clearly stated that the prosecutor of the district court where the suspect is detained should interrogate the criminal suspect or take statements from the suspect. 2. The relevant provisions in the Criminal Procedure Law should apply in dealing with the interrogation, summons and detention of the suspect.

Provisions	Explanations
<p>(Fees)</p> <p>Article 9 The requesting party shall meet the fixed daily fees and travelling expenses of witnesses and expert witnesses and the remuneration and reimbursement for expert witnesses.</p>	<p>For criminal cases involving the Mainland Region, the requesting party shall meet all the fixed daily fees and travelling expenses of the witnesses and expert witnesses, and the remuneration and reimbursement for expert witnesses.</p>
<p>(Letter of Request)</p> <p>Article 10 The party requesting judicial assistance shall produce the requesting document, accompanied by documents proving related criminal facts for which the request is made.</p> <p>The above letter of request and the relevant documents shall be signed and sealed by the relevant authority of the requesting party.</p>	<p>The request for assistance of the Taiwan Region by a Mainland court should be made in a designated format:</p> <ol style="list-style-type: none"> 1. The request for judicial assistance should be in writing, accompanied by relevant documents proving related criminal facts for which the request is made. 2. To ensure the authenticity of the documents, the letter of request and the relevant documents should be signed and sealed by the authority which makes the request.
<p>(Refusal of Assistance)</p> <p>Article 11 Request for assistance may be refused if the relevant authority of the requested party considers that the provision of judicial assistance may harm the jurisdiction, safety, public order or important interests of the Taiwan Region or the request is an obvious violation of the principle of equality and reciprocity. Reasons for the refusal should be given to the requesting party.</p>	<p>The provision of judicial assistance by the Taiwan Region to a Mainland court shall not violate regional jurisdiction and not harm security, public order or important interests of the Taiwan Region. It shall not explicitly violate the principle of equality and reciprocity. No assistance may be offered if the provision of the assistance will violate any of the above principles. The reasons for refusal of assistance should be given to the requesting party.</p>

Provisions	Explanations
<p>(Assistance in Surrender)</p> <p>Article 12 Upon satisfying the following requirements, a resident of the Mainland Region who entered the Taiwan Region after committing a crime in the Mainland Region or in a place outside the Mainland Region should be surrendered:</p> <ol style="list-style-type: none"> 1. The crime committed is punishable under the criminal law of both the Taiwan and Mainland Regions. 2. The crime has not exceeded the time limit for prosecuting and punishing the offender under the criminal law of the Taiwan Region. 3. The crime has not been punished by a court of the Taiwan Region. 4. The crime has not infringed on the rights and interests of the residents of the Taiwan Region. <p>A suspect on whom a surrender request is made should only be surrendered upon the completion of criminal proceedings or the serving of the sentence if the Taiwan Region has already started to investigate the crime or a court of the Taiwan Region has assumed jurisdiction over it.</p>	<p>The procedures for the Taiwan Region to deal with persons from the Mainland Region after committing a crime are as follows:</p> <ol style="list-style-type: none"> 1. The surrender of Mainland residents must comply with certain conditions. 2. If the Taiwan Region has already started to investigate the case or a Taiwan court has assumed jurisdiction over the case, then surrender shall only be made upon the completion of the criminal proceedings or the serving of the sentence.
<p>(Cross-border Crimes)</p> <p>Article 13 A crime will be deemed to have been committed in the Taiwan Region if either the act or the consequence occurs in the Taiwan Region.</p>	<p>If a criminal act takes place in the Taiwan Region but the consequence takes place outside the Taiwan Region, or if the act is committed outside the Taiwan Region but the consequence takes place in the Taiwan Region, the crime is deemed to have been committed within the Taiwan Region according to article 4 of the Criminal Law.</p>

Appendix VII

Extradition Law of the People's Republic of China (Adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on 28 December 2000)

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Chapter I General Provisions

Article 1 This Law is enacted for the purpose of ensuring normal extradition, strengthening international cooperation in punishing crimes, protecting the lawful rights and interests of individuals and organizations, safeguarding national interests and maintaining public order.

Article 2 This Law is applicable to extradition conducted between the People's Republic of China and foreign states.

Article 3 The People's Republic of China co-operates with foreign states in extradition on the basis of equality and reciprocity.

No cooperation in extradition may impair the sovereignty, security or public interests of the People's Republic of China.

Article 4 The People's Republic of China and foreign states shall communicate with each other through diplomatic channels for extradition. The Ministry of Foreign Affairs of the People's Republic of China is designated as the communicating authority for extradition.

Where in an extradition treaty there are special provisions to govern the communicating authority, the provisions there shall prevail.

Article 5 In handling cases of extradition, compulsory measures including detention, arrest and residential surveillance may, depending on the circumstances, be taken against the person sought.

Article 6 The terms used in this Law are defined as follows:

- (1) “the person sought” refers to the person for whom a request for grant of extradition is made by a requesting state;
- (2) “the person extradited” refers to the person extradited from the requested state to the requesting state;
- (3) “extradition treaty” refers to a treaty on extradition, which is concluded between the People’s Republic of China and a foreign state or to which both the People’s Republic of China and a foreign state are parties, or any other treaty which contains provisions in respect of extradition.

Chapter II Request Made to the People’s Republic of China for Extradition

Section 1 Conditions for Extradition

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

- (1) the conduct indicated in the request for extradition constitutes an offence according to the laws of both the People’s Republic of China and the Requesting State; and
- (2) where the request for extradition is made for the purpose of instituting criminal proceedings, the offence indicated in the request for extradition is, under the laws of both the People’s Republic of China and the Requesting State, punishable by a fixed term of imprisonment for one year or more or by any other heavier criminal penalty; where the request for extradition is made for the purpose of executing a criminal penalty, the period of sentence that remains to be served by the person sought is at least six months at the time when the request is made.

If the request for extradition concerns miscellaneous offences which conform to the provisions of Subparagraph (1) of the preceding paragraph, as long as one of the offences conforms to the provisions of Subparagraph (2) of the preceding paragraph, extradition may be granted for all of those offences.

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

- (1) the person sought is a national of the People's Republic of China under the laws of the People's Republic of China;
- (2) at the time the request is received, the judicial organ of the People's Republic of China has rendered an effective judgement or terminated the criminal proceedings in respect of the offence indicated in the request for extradition;
- (3) the request for extradition is made for a political offence, or the People's Republic of China has granted asylum to the person sought;
- (4) the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings;
- (5) the offence indicated in the request for extradition is a purely military offence under the laws of the People's Republic of China or the laws of the Requesting State;
- (6) the person sought is, under the laws of the People's Republic of China or the laws of the Requesting State, immune from criminal responsibility because, at the time the request is received, the limitation period for prosecuting the offence expires or the person is pardoned, or for other reasons;
- (7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State;
- (8) the request for extradition is made by the Requesting State on the basis of a judgement rendered by default, unless the Requesting State undertakes that the person sought has the opportunity to have the case retried under conditions of his presence.

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

- (1) the People's Republic of China has criminal jurisprudence over the offence indicated in the request and criminal proceedings are being instituted against the person or preparations are being made for such proceedings; or
- (2) extradition is incompatible with humanitarian considerations in view of the age, health or other conditions of the person sought.

Section 2 Submission of the Request for Extradition

Article 10 The request for extradition made by the Requesting State shall be submitted to the Ministry of Foreign Affairs of the People's Republic of China.

Article 11 The Requesting State shall present a letter of request for extradition which shall specify:

- (1) the name of the requesting authority;
- (2) the name, sex, age, nationality, category and number of identification documents, occupation, characteristics of appearance, domicile and residence of the person sought and other information that may help to identify and search for the person;
- (3) facts of the offence, including the time, place, conduct and outcome of the offence; and
- (4) legal provisions on adjudgement, measurement of penalty and prescription for prosecution.

Article 12 A letter of request for extradition submitted by the Requesting States shall be accompanied by:

- (1) where extradition is requested for the purpose of instituting criminal proceedings, a copy of the warrant of arrest or other document with the same effect; where extradition is requested for the purpose of executing criminal punishment, a copy of legally effective written judgment or verdict, and where part of punishment has already been executed, a statement to such an effect; and
- (2) the necessary evidence of the offence or evidentiary material.

The Requesting State shall provide the photographs and fingerprints of the person sought and other material in its control which may help to identify that person.

Article 13 The letter of request for extradition and other relevant documents submitted by the Requesting State in accordance with the provisions of this Section shall be officially signed or sealed by the competent authority of the Requesting State and be accompanied by translations in Chinese or other languages agreed to by the Ministry of Foreign Affairs of the People's Republic of China.

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

- (1) no criminal responsibility shall be investigated against the person in respect of the offences committed before his surrender except for which extradition is granted, nor shall that person be re-extradited to a third state, unless consented by the People's Republic of China, or unless that person has not left the Requesting State within 30 days from the date the proceedings in respect of the offence for which extradition is requested are terminated, or the person completes his sentence or is released before the sentence expires, or after leaving the country the person has returned of his own free will; and
- (2) where after submitting the request for extradition, the Requesting State withdraws or waives it, or it is a mistake for the Requesting state to submit such a request, the Requesting State shall bear the responsibility for the harm thus done to the person.

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

Section 3 Examination of the Request for Extradition

Article 16 Upon receiving the request for extradition from the Requesting State, the Ministry of Foreign Affairs shall examine whether the letter of request for extradition and the accompanying documents and material conform to the provisions of Section 2 in Chapter II of this Law and the provisions of extradition treaties.

The Higher People's Court designated by the Supreme People's Court shall examine whether the request for extradition made by the Requesting State conforms to the provisions of this Law and of extradition treaties regarding conditions for extradition and render a decision on it. The decision made by the Higher People's Court is subject to review by the Supreme People's Court.

Article 17 Where two or more states request extradition of the same person for the same or different conducts, the order of priority of the request for extradition shall be determined upon considering the factors such as the time when those requests for extradition are received by the People's Republic of China and the fact whether there are extradition treaties between the People's Republic of China and the Requesting states to go by.

Article 18 Where the Ministry of Foreign Affairs, after examination, believes that the request for extradition submitted by the Requesting State does not conform to the provisions of Section 2 in Chapter II of this Law or the provisions of extradition treaties, it may ask the Requesting State to furnish supplementary material within 30 days. The time limit may be extended for 15 days at the request of the Requesting State.

If the Requesting State fails to provide supplementary material within the time limit mentioned above, the Ministry of Foreign Affairs shall terminate the extradition case. The Requesting State may make a fresh request for extradition of the person for the same offence.

Article 19 Where the Ministry of Foreign Affairs, after examination, believes that the request for extradition submitted by the Requesting State conforms to the provisions of Section 2 in Chapter II of this Law and the provision of extradition treaties, it shall transmit the letter of request for extradition and the accompanying documents and materials to the Supreme People's Court and the Supreme People's Procuratorate.

Article 20 Where the person sought is detained for extradition before a foreign state makes a formal request for extradition, the Supreme People's Court shall, without delay, transmit the letter of request for extradition and the accompanying documents and material it has received to the Higher People's Court concerned for examination.

Where the said person is not detained for extradition before a foreign state makes a formal request for extradition, the Supreme People's Court shall, after receiving the letter of request for extradition and the accompanying documents and material, notify the Ministry of Public Security to search for the person. Once finding the person, the public security organ shall, in light of the circumstances, subject that person to detention or residential surveillance for extradition and the Ministry of Public Security shall notify the Supreme People's Court of the fact. Upon receiving the notification of the Ministry of Public Security, the Supreme People's Court shall, without delay, transmit the letter of request for extradition and the accompanying documents and material to the Higher People's Court concerned for examination.

Where, after searching, the public security organ is certain that the person sought is not in the territory of the People's Republic of China or it cannot find the person, the Ministry of Public Security shall, without delay, notify the Supreme People's Court of the fact. The latter shall, immediately after receiving the notification of the Ministry of Public Security, notify the Ministry of Foreign Affairs of the results of the search, and the Ministry of Foreign Affairs shall notify the Requesting State of the same.

Article 21 Where the Supreme People's Procuratorate, after examination, believes that the offence indicated in the request for extradition or other offences committed by the person sought are subject to prosecution by a Chinese Judicial organ, although criminal proceedings have not yet been instituted, it shall, within one month from the date the letter of request for extradition and the accompanying documents and material are received, notify the Supreme People's Court and the Ministry of Foreign Affairs respectively of its opinions to institute criminal proceedings.

Article 22 The Higher People's Court shall, in accordance with the relevant provisions of this Law and of extradition treaties regarding conditions for extradition, examine the request for extradition made by the Requesting State, which shall be conducted by a collegial panel composed of three judges.

Article 23 When examining an extradition case, the Higher People's Court shall hear the pleadings of the person sought and the opinions of the Chinese lawyers entrusted by the person. The Higher People's Court shall, within 10 days from the date it receives the letter of request for extradition transmitted by the Supreme People's Court, serve a copy of the letter to the person. The person shall submit his opinions within 30 days from the date he receives the copy.

Article 24 After examination, the Higher People's Court shall:

- (1) where the request for extradition made by the Requesting State is regarded as being in conformity with the provisions of this Law and of extradition treaties, render a decision that the request meets the conditions for extradition. Where the person whose extradition requested falls under the category for postponed extradition according to Article 42 of this Law, it shall be so specified in the decision; or
- (2) where the request for extradition made by the Requesting State is regarded as not being in conformity with the provisions of this Law and of extradition treaties, render a decision that no extradition shall be granted.

Upon request by the Requesting State, the Higher People's Court may, on condition that other proceedings being conducted in the territory of the People's Republic of China are not hindered and the lawful rights and interests of any third party in the territory of the People's Republic of China are not impaired, decide to transfer the property related to the case, while rendering the decision that the request meets the conditions for extradition.

Article 25 After making the decision that the request meets the conditions for extradition or the decision that no extradition shall be granted, the Higher People's Court shall have it read to the person sought and, within seven days from the date it makes the decision, submit the decision and the relevant material to the Supreme People's Court for review.

Where the person sought refuses to accept the decision made by the Higher People's Court that the request meets the conditions for extradition, he and the Chinese lawyers entrusted by him may, within 10 days from the date the People's Court has the decision read to the person, submit their opinions to the Supreme People's Court.

Article 26 The Supreme People's Court shall review the decision made by the Higher People's Court and shall do the following respectively:

- (1) where it believes that the decision made by the Higher People's Court conforms to the provisions of this Law and of extradition treaties, it shall approve it; and

- (2) where it believes that the decision made by the Higher People's Court does not conform to the provisions of this Law and of extradition treaties, it may quash it and send the case back to the People's Court which has originally reviewed it for fresh review, or modify the decision directly.

Article 27 In the course of examination, the People's Court may, when necessary, request through the Ministry of Foreign Affairs that the Requesting State provide supplementary material within 30 days.

Article 28 After making the decision of approval or modification, the Supreme People's Court shall, within seven days from the date it makes the decision, transmit the letter of decision to the Ministry of Foreign Affairs and, at the same time, serve it on the person sought.

After approving the decision or making the decision that no extradition shall be granted, the Supreme People's Court shall immediately notify the public security organ to terminate the compulsory measures against the person sought.

Article 29 After receiving the decision made by the Supreme People's Court that no extradition shall be granted, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same.

Upon receiving the decision made by the Supreme People's Court that the request meets the conditions for extradition, the Ministry of Foreign Affairs shall submit the decision to the State Council for which to decide whether to grant extradition.

Where the State Council decides not to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. The People's Court shall immediately notify the public security organ to terminate the compulsory measures against the person sought.

Section 4 Compulsory Measures for Extradition

Article 30 Where before making a formal request for extradition, a foreign state applies, under urgent circumstances, for keeping in custody the person sought, the public security organ may detain the said person for extradition upon request by the foreign state.

The request mentioned in the preceding paragraph shall be submitted through diplomatic channels or to the Ministry of Public Security in written form and shall contain the following:

- (1) the contents provided for in Articles 11 and 14 of this Law;
- (2) statement of availability of the material provided for in Subparagraph (1), Article 12 of this Law; and
- (3) statement that a formal request for extradition is to be made soon.

If the request is submitted through diplomatic channels, the Ministry of Foreign Affairs shall, without delay, transmit it to the Ministry of Public Security. If the request is submitted to the Ministry of Public Security, the Ministry of Public Security shall impart to the Ministry of Foreign Affairs information about the request.

Article 31 When the public security organ, in accordance with the provisions of Article 30 of this Law, takes measures to detain the person for extradition, as requested, if the request is submitted to the Ministry of Public Security, the Ministry of Public Security shall, without delay, notify the Requesting State of the fact; if the request is submitted through diplomatic channels, the Ministry of Public Security shall notify the Ministry of Foreign Affairs of the fact and the latter shall, without delay, notify the Requesting State of the same. When doing the notification through the above-mentioned channels, the time limit for submitting a formal request for extradition shall be informed at the same time if the person has been detained for extradition as requested.

If, within 30 days after the public security organ takes the measure of detention for extradition, the Ministry of Foreign Affairs receives no formal request for extradition from the foreign state, the public security organ shall terminate the detention for extradition. At the request of the foreign state, the time limit may be extended for 15 days.

Where the detention for extradition is terminated in accordance with the provisions in the second paragraph of this Article, the Requesting State may make a formal request for extradition of that person for the same offence afterwards.

Article 32 After receiving the letter of request for extradition and the accompanying documents and material, the Higher People's Court shall, without delay, make a decision to arrest the person for extradition, where normal extradition may be impeded if such a measure is not taken. Where the measure of arrest for extradition is not taken against the person sought, a decision for residential surveillance shall be made without delay.

Article 33 Detention for extradition, arrest for extradition and residential surveillance for extradition shall be executed by the public security organs.

Article 34 The organ that takes a compulsory measure for extradition shall, within 24 hours after the measure is taken, interrogate the person against whom the compulsory measure for extradition is taken.

The person against whom a compulsory measure for extradition is taken may, beginning from the date the compulsory measure is taken, employ Chinese lawyers for legal assistance. When executing the compulsory measure for extradition, the public security organ shall inform that person of the above-mentioned right he is entitled to.

Article 35 Where the person sought, who should otherwise be arrested for extradition, is seriously ill or is a woman who is pregnant or is breast-feeding her own baby, residential surveillance may be taken against him or her.

Article 36 After making the decision to grant the extradition, the State Council shall, without delay, notify the Supreme People's Court of the decision. If the person sought is not arrested for extradition, the People's Court shall immediately make a decision to arrest that person for extradition.

Article 37 If the foreign state withdraws or waives the request for extradition, the compulsory measure taken against the person sought shall be terminated immediately.

Section 5 Execution of Extradition

Article 38 Extradition shall be executed by the public security organs. Where the State Council decides to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Ministry of Public Security of the decision, and notify the Requesting State to consult with the Ministry of Public Security for arrangements with regard to the time, place, manners for surrender of the person sought and other matters related to execution of the extradition.

Article 39 Where extradition is to be executed in accordance with the provisions of Article 38 of this Law, the public security organ shall, in accordance with the decision of the People's Court, transfer the property related to the case to the Requesting State.

When extradition cannot be executed for reasons of death or escape of the person sought or for other reasons, the property mentioned above may, all the same, be transferred to the Requesting State.

Article 40 Where, within 15 days from the date agreed on for surrender, the Requesting State does not take over the person sought, it shall be regarded as waiving the request for extradition of its own accord. The public security organ shall immediately release the person, and the Ministry of Foreign Affairs may refuse to accept any fresh request by the Requesting State for extradition of the person for the same offence.

Where, for reasons beyond its control, the Requesting State fails to take over the person sought within the above-mentioned time limit, it may request an extension of the time limit for not more than 30 days, or seek to negotiate for fresh arrangements for surrender in accordance with the provisions of Article 38 of this Law.

Article 41 Where the person under extradition escapes back to the People's Republic of China before criminal proceedings are terminated or his sentence is served in the Requesting State, that person may be re-extradited upon a fresh request for extradition made by the Requesting State in respect of the same offence and the Requesting State need not submit the documents and material provided for in Section 2 of this Chapter.

Section 6 Postponed and Temporary Extradition

Article 42 Where the judicial organ of the People's Republic of China is, for other reasons, conducting criminal proceedings or executing criminal punishment against the person sought, the State Council may decide to postpone the extradition while approving it.

Article 43 If postponed extradition may seriously impede the criminal proceedings in the Requesting State, the person sought may be extradited temporarily upon the request of the Requesting State on condition that the criminal proceedings before conducted in the territory of the People's Republic of China are not hindered and the Requesting State undertakes to send back that person unconditionally and immediately after concluding the relevant proceedings.

The decision on temporary extradition shall be made by the State Council after obtaining consent of the Supreme People's Court or the Supreme People's Procuratorate, as the case may be.

Section 7 Transit for Extradition

Article 44 Where extradition between foreign states involves transit through the territory of the People's Republic of China, the foreign states shall, in accordance with the relevant provisions of Article 4 and Section 2 of this Chapter of this Law, make a request for such transit.

The preceding paragraph is not applicable where air transport is used for transit and no landing in the territory of the People's Republic of China is scheduled. In the event of an unscheduled landing, a request for transit shall be submitted in accordance with the provisions of the preceding paragraph.

Article 45 The Ministry of Foreign Affairs shall, in accordance with the relevant provisions of this Law, examine the request for transit made by a foreign state, and make a decision on whether to permit it or not.

The decision to permit transit or to refuse transit shall be notified to the Requesting State by the Ministry of Foreign Affairs through the same channels as the ones through which the request is received.

After making the decision to permit transit, the Ministry of Foreign Affairs shall, without delay, notify the Ministry of Public Security of the same. The Ministry of Public Security shall decide on such matters as the time, place and manners for the transit.

Article 46 The public security organ in the place of transit shall supervise or assist in the execution of transit for extradition.

The public security organ may provide a temporary place for custody upon the request of the Requesting State.

Chapter III Request Made to Foreign States for Extradition

Article 47 When requesting a foreign state to grant extradition or transit for extradition, the adjudicative organ, procuratorate organ, public security organ, state security organ or prison administration organ responsible for handling the case concerned in a province, autonomous region and municipality directly under the Central Government shall submit its written opinions accompanied by relevant documents and material with certified correct translation respectively to the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice. After the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice have, respectively in conjunction with the Ministry of Foreign Affairs, reviewed the opinions and approved to make the request, the request shall be submitted to the foreign state through the Ministry of Foreign Affairs.

Article 48 Under urgent circumstances, before a formal request for extradition is made, the request to take compulsory measures against the person concerned may be submitted to the foreign state through diplomatic channels or other channels consented by the Requested State.

Article 49 The instruments, documents and material required for request for extradition, for transit for extradition, or for taking compulsory measures shall be submitted in accordance with the provisions of extradition treaties, or where there are no such treaties or no such provisions in such treaties to go by, the provisions of Sections 2, 4 and 7 of this Chapter may be applied *mutatis mutandis*, or where the Requested State raises specific requirements, those requirements may be complied with on condition that the basic principles contained in the laws of the People's Republic of China are not violated.

Article 50 Where the Requested State grants extradition with strings attached, the Ministry of Foreign Affairs may, on behalf of the Government of the People's Republic of China, make assurance on condition that the sovereignty, national interests and public interests of the People's Republic of China are not impaired. The assurance with regard to restriction on prosecution shall be subject to decision by the Supreme People's Procuratorate; and the assurance with regard to measurement of penalty shall be subject to decision by the Supreme People's Court.

In investigating criminal responsibility of the person extradited, the judicial organ shall be bound by the assurance made.

Article 51 The public security organ shall be responsible for taking over the person whose extradition is granted by the foreign state as well as the property related to the case.

Where the request for extradition is made by other organs, the public security organ shall, after taking over the person extradited and the property related to the case, transfer them to the said organs without delay, or take over the said person and related property in conjunction with the organs concerned.

Chapter IV Supplementary Provisions

Article 52 Where, in accordance with the provisions of this Law, whether to grant extradition is subject to decision by the State Council, the State Council may, when necessary, authorize relevant departments to make the decision.

Article 53 Where the person sought suffers any harm because the Requesting State, after submitting the request for extradition, withdraws or waives the request, or makes a mistake in requesting for extradition and the person presents a claim for compensation, such claims shall be presented to the Requesting State.

Article 54 The expenses arising from the handling of a case of extradition shall be defrayed in accordance with extradition treaties or agreements which both the Requesting State and the Requested State have acceded to or signed.

Article 55 This Law shall go into effect as of the date of promulgation.

Appendix VIII

Arrangement of the Supreme People's Court on the Service of the Civil and Commercial Judicial Documents by Reciprocal Mandate between the Courts of the Mainland and the Hong Kong Special Administrative Region

Fa Shi [1999] No.9

(Adopted at the 1038th meeting of the Adjudicative Committee of the Supreme People's Court on 30 December 1998 and promulgated on 30 March 1999)

In accordance with Article 95 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, through the mutual consultation of the representatives of the Supreme People's Court and the Hong Kong Special Administrative Region, these Rules on the service of civil and commercial judicial documents by reciprocal mandate between the courts of the Mainland and the Hong Kong Special Administrative Region are hereby formulated as follows:

Article 1 The courts of the Mainland and the Hong Kong Special Administrative Region may entrust each other to serve civil and commercial judicial documents.

Article 2 Service of judicial documents by mandate between two parties shall be conducted via the high people's courts of various localities and the High Court of the Hong Kong Special Administrative Region. The judicial documents of the Supreme People's Court may be directly mandated to the High Court of the Hong Kong Special Administrative Region for service.

Article 3 The mandating party, in requesting service of judicial documents, shall produce the letter of mandate affixed with its seal. The letter of mandate shall bear the name of the mandating party, the names or titles and detailed addresses of the parties to be served and the nature of the case.

The letter of mandate shall be produced in Chinese version. If the judicial documents have no original Chinese text, the translated Chinese version shall be provided. The said documents shall be in duplicate. If the party to be served has more than two persons, the documents shall be prepared for each person in duplicate.

The party being mandated shall, considering that there is discrepancy between the letter of mandate and this Arrangement, notify the mandating party and explain the objection to the letter of mandate and, if necessary, request the mandating party to provide supplementary materials.

Article 4 No matter whether or not the date for court appearance has passed or the corresponding time limit has expired, the party being mandated shall serve the documents. The mandating party shall try to tender the mandate requirement within a reasonable time limit.

The party being mandated shall, upon receiving the letter of mandate, fulfil the duty of service in a timely fashion, not exceeding two months from the date of receiving the letter of mandate at the latest.

Article 5 After serving the judicial documents, the people's courts of the Mainland shall issue the return of service; while the courts of Hong Kong Special Administrative Region shall issue the proof of service. The issued return of service and the proof of service shall be affixed with the seals of the corresponding courts.

If the party being mandated fails to serve the documents to the related parties, it shall give clear explanation of the reasons hindering the service, the causes and date of rejection of the documents and return the letter of mandate and all attached documents.

Article 6 Service of the judicial documents shall proceed in the local statutory procedure of the mandated party.

Article 7 The mandated party shall have no legal liability to the contents of and consequence incurred by the judicial documents mandated by the mandating party for service.

Article 8 The expenses for service of judicial documents by mandate are exempted reciprocally. However, the expense incurred in the special service mode required by the mandating party in the letter of mandate shall be borne by the mandating party.

Article 9 The judicial documents referred to in this Arrangement include, for the part of the Mainland, a copy of the bill of complaint, a copy of the appeal, the letter of mandate, the summon, the written judgement, the conciliation statement, the written order, the instrument of intermediate order, the notice, the return of service; and, for the part of the Hong Kong Special Administrative Region, a copy of the bill of complaint, a copy of the appeal, the summon, the written complaint, the oath, the statement of adjudication, the written judgement, the written order, the notice, the order of the court and the proof of service.

The above said judicial documents mandated for service shall refer to the exchanged samples of judicial documents.

Article 10 In case of any problem or amendment in the enforcement of this Arrangement, the Supreme People's Court and the High Court of the Hong Kong Special Administrative Region shall resolve through consultation.

Appendix IX**Arrangement of the Supreme People's Court on Reciprocal Enforcement of the Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region**

Fa Shi [2000] No.3

(Adopted at the 1069th meeting of the Adjudicative Committee of the Supreme People's Court on 18 June 1999 and promulgated on 1 February 2000)

In accordance with Article 95 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, through the mutual consultation of the Supreme People's Court and the Government of Hong Kong Special Administrative Region (hereinafter referred to as "HKSAR"), the courts of HKSAR agree to enforce the awards made by the Mainland arbitral institutions (the list is to be furnished by the Law System Office of the State Council through Hong Kong & Macao Affairs Office of the State Council) in accordance with the *Arbitration Law of the People's Republic of China*, and the people's courts in the Mainland agree to enforce the awards made by HKSAR in accordance with the *Regulations on Arbitration* of HKSAR. The Arrangement on reciprocal enforcement of arbitral awards between the Mainland and HKSAR is as follows:

Article 1 If one party to an arbitral award made in the Mainland or HKSAR fails to perform the arbitral award, the other party may apply to the concerned court with the jurisdiction over his residence or the place where his property is located for enforcement.

Article 2 The said courts in the previous paragraph refer to, for the part of the Mainland, the intermediate people's courts with the jurisdiction over the residence of the party subject to application or the place where the property of the party subject to application is located; and for the part of HKSAR, the High Court of HKSAR.

Where the residence of the party subject to application or the places where the property of the party subject to application are scattered in or spread over jurisdictional areas of different people's courts in the Mainland, the applicant may choose one of the courts to apply for enforcement and shall not submit application to two or more people's courts respectively.

Where the residence of the party subject to application or the places where the property of the party subject to application are scattered in both the Mainland and in HKSAR, the applicant shall not submit application to the courts of both places simultaneously. If the enforced property by the court of one region is not enough to pay off the debt, then he may apply to the court of the other region for enforcement regarding the remaining portion. The total amount obtained from the consecutive enforcement of the arbitral award shall not exceed the total amount awarded.

Article 3 The applicants applying for the enforcement of the arbitral awards decided in the Mainland or in HKSAR shall submit the following documents:

1. Application for enforcement;
2. Arbitral award; and
3. Agreement on arbitration.

Article 4 The application for enforcement shall contain the following contents:

1. Under the condition that the applicant is a natural person: the name and address of the applicant; under the condition that the applicant is a legal person or any other organization: the name and address of the legal person or any other organization and the name of the legal representative;
2. Under the condition that the party subject to application is a natural person: his name and address; under the condition that the party subject to application is a legal person or any other organization: the name and address of the legal person or any other organization and the name of the legal representative;
3. If the applicant is a legal person or any other organization, it shall submit a duplicate copy of its enterprise business registration certificate. If the applicant is a legal person or any other organization of foreign nationality, the corresponding notarization and accreditation materials shall be furnished; and
4. The reasons for the application of enforcement and contents of application, the place of the property and financial status of the party subject to application.

The application for enforcement shall be in Chinese text. If the award or the agreement on arbitration has no Chinese text, the party subject to application shall furnish an officially certified translated Chinese version.

Article 5 The time limit for applying for enforcement of the arbitral awards made in the Mainland or in HKSAR shall refer to the provisions of the relevant laws on the time limit of the place where the enforcement is carried out.

Article 6 The concerned courts shall, upon receiving the application from an applicant, handle and enforce according to the legal procedure of the place where the enforcement is sought.

Article 7 When the parties subject to application furnish sufficient evidence upon receiving the notice and prove the arbitral awards applied for enforcement in the Mainland or in HKSAR involve any of the following circumstances, the concerned courts may, upon verification, make orders rejecting the application for enforcement:

1. The parties to the agreement on arbitration, in accordance with the law applicable to them, are in a certain incapable circumstance; or the agreements on arbitration, in accordance with the agreed governing law, the agreement on arbitration are invalid; or when there is no indication of the governing law, according to the law of the place of award, this invalidates the agreements on arbitration;
2. The parties subject to application have not received the proper notice from the dispatched arbitrator or fail to make statements due to other reasons;
3. The dispute decided by the award is not the subject put for arbitration or not covered within the terms and conditions of the agreement on arbitration; or the award carries decisions beyond the scope put for arbitration; while the decisions for the matters within the scope put for arbitration can be separable from the decisions on matters beyond the scope for arbitration, the decisions for the matters within the scope put for arbitration shall be enforced;
4. The formation of the arbitral tribunal or the procedure of the arbitral tribunal is inconsistent with the agreement on arbitration or the law of the place of arbitration when such an agreement is not existing; or
5. The award is not binding on the parties yet or has been vacated by the courts of the place of arbitration or terminated in accordance with the law of the place of arbitration.

If the concerned courts consider the disputed matters cannot be settled through arbitration in accordance with the law of the place of enforcement, then the award may not be granted for enforcement.

If the courts of the Mainland consider executing the arbitral award in the Mainland violates the social public interests of the Mainland, or the courts of HKSAR consider executing the arbitral awards violates the public policy of HKSAR, they may choose not to enforce the arbitral awards.

Article 8 Applicants, when applying to the concerned courts for enforcement of arbitral awards made in the Mainland or in HKSAR, shall pay the enforcement fee in accordance with the measures on collection of litigation costs of the place of enforcement.

Article 9 Applications for enforcement of arbitral awards made in the Mainland or in HKSAR submitted after 1st July 1997 shall be handled in accordance with this Arrangement.

Article 10 For the applications between 1st July 1997 and the date of effectiveness of the Arrangement, both parties agree as follows:

Any applicant failing to apply for enforcement for special reasons in the Mainland or in HKSAR between 1st July 1997 and the date of effectiveness of this Arrangement may, if the applicant is a legal person, or any other organization, submit the application within six months upon the effectiveness of this Arrangement; and if the applicant is a natural person, then he may submit his application within one year upon the effectiveness of this Arrangement.

With regard to cases on arbitral awards that the courts of the Mainland or HKSAR refuse to accept or refuse to enforce between 1st July 1997 and the date of effectiveness, the parties shall be permitted to apply for enforcement again.

Article 11 In case of any problem and amendment in the enforcement of this Arrangement, the Supreme People's Court and the Government of HKSAR shall resolve through consultation.

The List of Arbitration Committees in the Mainland (Omitted)

Appendix X

Arrangements on the Establishment of a Reciprocal Notification Mechanism between the Mainland Public Security Authorities and the Hong Kong Police (14 October 2000)

- The Office of Hong Kong, Macao and Taiwan Affairs of the Ministry of Public Security of the Mainland and the Security Bureau of the Hong Kong Special Administrative Region (“HKSAR”) have reached an agreement on the arrangements of a reciprocal notification mechanism on the relevant matters between the enforcement authorities of both parties. The mechanism is established in accordance with the principle of ‘one country, two systems’ and on the basis of mutual respect, mutual support and non-intervention with each other’s law enforcement activities. (The agreed arrangements took effect from 1 January 2001).
- The mechanism is an administrative arrangement to be implemented on the basis of mutual respect for the relevant laws of both parties.

Notification Channels

- The Liaison Officer of the Ministry of Public Security (hereinafter referred to as “the Mainland Notification Unit”) shall be responsible for making notifications to the Liaison Bureau of the Hong Kong Police Force, while the latter (hereinafter referred to as “the Hong Kong Notification Unit”) shall be responsible for making notifications to the Mainland Notification Unit. For cases involving customs authorities of the Mainland in respect of investigations into smuggling activities, notifications shall be made to the Hong Kong Notification Unit direct by the Anti-Smuggling Criminal Investigation Bureau of the General Administration of Customs as assigned by the Ministry of Public Security.

Arrangements Concerning Mainland Side’s Notifications to Hong Kong - Scope of Notification

- Matters which the Mainland Notification Unit should notify the Hong Kong Police include the imposition of criminal compulsory measures by the public security authorities (including customs authorities in respect of investigations into smuggling activities) on Hong Kong residents suspected of committing offences, and unnatural deaths of Hong Kong residents in the Mainland.

Contents of Notification

- Under the arrangements, a notification should be made by the Mainland Notification Unit to the Hong Kong Notification Unit on the particulars of the criminal compulsory measures imposed, including the date of detention, suspected offence, the type of compulsory measure taken, the place where the compulsory measure is taken, the enforcement agency, etc.

- A notification in respect of unnatural death should include information on the time and place of death, cause of death, etc.

Arrangements Concerning HKSAR's Notifications to the Mainland - Scope of Notification

- Matters which the Hong Kong Notification Unit should notify the public security authorities in the Mainland include criminal prosecutions instituted by the Hong Kong Police Force, Customs and Excise Department and Immigration Department against Mainland residents and unnatural deaths of Mainland residents in Hong Kong.
- Notifications made by the Hong Kong Notification Unit on its own initiative should not include prosecutions instituted against Mainland residents for illegal immigration, illegal stay or violation of conditions of stay.

Contents of Notification

- Under the arrangements, a notification made by the Hong Kong Notification Unit to the Mainland Notification Unit concerning criminal prosecution and appearance in court of Mainland residents should include information on the date of detention, suspected offence, place of detention, the detention department/unit, etc.
- A notification in respect of unnatural death should include information on the time and place of death, cause of death, etc.

Other Related Arrangements

- It is agreed that if either party considers that there is any case or item which has not been notified under the arrangements, or if there is any doubt, either party shall be free to make enquiry. Notifications and enquiries should be made and replied to as soon as practicable.
- Since making notifications is only an administrative arrangement, it will under no circumstances affect the legal rights enjoyed by the person against whom criminal compulsory measures has been imposed or prosecution instituted, as well as the legal rights enjoyed by the person's family.
- The operation of the arrangements may be reviewed regularly through discussion and agreement by both parties.

Appendix XI

Model Treaty on Extradition

Article 1 Obligation to extradite

Each Party agrees to extradite to the other any person who is wanted in the requesting State for prosecution for an extraditable offense or for the imposition or enforcement of a sentence in respect of such an offense.

Article 2 Extraditable offenses

1. Extraditable offenses are those punishable under the laws of both Parties by imprisonment or deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty. Where request for extradition relates to a person wanted for enforcement of a sentence, extradition shall be granted only if a period of at least [four/six] months remains to be served.

2. In determining whether or not an offense is punishable under the laws of both Parties, it shall not matter whether:

- (a) The laws of both Parties place the acts or omissions constituting the offense within the same category of offense or denominate the offense by the same terminology;
- (b) Under the laws of the Parties the constituent elements of the offense differ, it is the totality of the acts or omissions that shall be taken into account.

3. Where extradition is sought for an offense against a law relating to taxation, customs duties or other revenue matters, extradition may not be refused on the ground that the law of the requesting State does not impose the same kind of tax or duty.

4. If the request for extradition includes several separate offenses each of which is punishable under the laws of both Parties, but some of which do not fulfill other conditions set out in paragraph 1 of this Article, the requested Party may grant extradition for the latter offenses provided that the person is to be extradited for at least one extraditable offense.

Article 3 Mandatory grounds for refusal

Extradition shall not be granted in any of the following circumstances:

- (a) If the offense for which extradition is requested is regarded as a political offense;
- (b) If there are grounds to believe the request has been made to prosecute or punish a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that the person's position may be prejudiced for any of these reasons;
- (c) If the offense is an offense under military law and not also an offense under criminal law;
- (d) If final judgment has been rendered against the person in the requested State in respect of the offense for which the persons' extradition is requested;
- (e) If the person whose extradition has been requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;
- (f) If the person would be subjected to torture or cruel, inhuman treatment or degrading punishment or if that person has not or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights, Article 14;
- (g) If the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial nor opportunity to arrange for a defense and has not or will not have the opportunity to have the case retried.

Article 4 Optional grounds for refusal

Extradition may be refused in any of the following circumstances:

- (a) If the person whose extradition is requested is a national of the requested State;
- (b) If the competent authorities of the requested State have decided either not to institute or to terminate proceedings against the person for the offense for which extradition is requested;
- (c) If prosecution in the requested State is pending for the same offense;

(d) If the offense carries the death penalty under the law of the requesting State;

(e) If the offense has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offense committed outside its territory;

(f) If the offense is regarded under the law of the requested State as having been committed in whole or in part within that State;

(g) If the person whose extradition has been requested has been sentenced or would be liable to be tried in the requesting State by an extraordinary or ad hoc court or tribunal;

(h) If extradition would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

Article 5 Channels of communication and required documents

1. A request for extradition shall be made in writing and transmitted, along with supporting documents, through diplomatic channels directly between the ministries of justice or other designated authorities.

2. A request shall be accompanied by the following:

(a) In all cases,

(i) As accurate a description as possible of the person sought and information to help establish that person's identity, nationality and location;

(ii) The text of the relevant provision of the law creating the offense and a statement of the penalty that can be imposed;

(b) If a warrant for arrest has been issued, by a certified copy of that warrant, a statement of the offense for which extradition is requested and a description of the acts or omissions constituting the alleged offense;

(c) If the person has been convicted, by a statement of the offense and a description of the acts or omissions constituting the offense and by the original or certified copy of the judgment;

(d) If the person has been convicted in his or her absence, in addition to the documents set out in paragraph 2(c), by a statement as to the legal means available to the person to prepare a defense or have the case retried;

(e) If the person has been convicted but no sentence imposed, by a statement of the offense, a document setting out the conviction and a statement affirming intent to impose a sentence.

3. The documents shall be accompanied by a translation into the language of the requested State or another language acceptable to that State.

Article 6 Simplified extradition procedure

The requested State may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority.

Article 7 Certification and authentication

Except as provided by this Treaty, a request for extradition and the supporting documents thereto, shall not require certification or authentication.

Article 8 Additional information

If the requested State considers that the information provided in a request for extradition is not sufficient, it may request additional information to be furnished within such reasonable time as it specifies.

Article 9 Provisional arrest

1. In case of urgency, the requesting State may apply for the provisional arrest of the person sought pending presentation of the request or extradition.

2. The application for provisional arrest shall contain a description of the person sought, a statement of the existence of one of the documents mentioned in paragraph 2 of Article 5, a statement of the punishment that has or can be imposed and a concise statement of the facts of the case and the location, where known, of the person.

3. The requested State shall decide on the application and communicate its decision without delay.

4. The person arrested shall be set at liberty upon the expiration of [40] days if a request for extradition supported by the relevant documents has not been received.

5. Such release shall not prevent rearrest and institution of extradition proceedings if the request is subsequently received.

Article 10 Decision on the request

1. The requested State shall promptly communicate its decision on the request for extradition to the requesting State.

2. Reasons shall be given for any complete or partial refusal of the request.

Article 11 Surrender of the person

1. Upon being informed that extradition has been granted, the Parties shall without undue delay arrange for the surrender of the person sought and the requested State shall inform the requesting State of the length of time for which the person was detained with a view to surrender.

2. The person shall be removed from the territory of the requested State within such reasonable time as the requested State specifies and, if the person is not removed by then, the requested State may release the person and may refuse extradition for the same offense.

3. If circumstances beyond its control prevent a Party from surrendering or removing the person to be extradited it shall notify the other Party and a new date of surrender will be agreed upon.

Article 12 Postponed or conditional surrender

1. The requested State may postpone the surrender of a person sought in order to proceed against that person or enforce a sentence imposed for an offense other than that for which extradition is sought.

2. The requested State may, instead of postponing surrender, temporarily surrender the person sought to the requesting State in accord with conditions determined between the Parties.

Article 13 Surrender of property

1. To the extent permitted under the law of the requested State and subject to the rights of third parties, all property found in the requested State that has been acquired as a result of the offense or that may be required as evidence shall, upon request, be surrendered if extradition is granted.

2. Said property may, on request, be surrendered to the requesting State even if the extradition having been agreed to cannot be carried out.

3. When said property is liable to seizure or confiscation in the requested State, it may retain it or temporarily hand it over.

4. Where the law of the requested State or protection of the rights of third parties so require, any property so surrendered shall be returned to the requested State free of charge after completion of proceedings, if that State so requests.

Article 14 Rule of speciality

1. A person extradited under this Treaty shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than:

(a) An offence for which extradition was granted;

(b) Any other offence in respect of which the requested State consents.

2. A request for the consent of the requested State under this Article shall be accompanied by the documents mentioned in paragraph 2 of Article 5 and a legal record of any statement made by the extradited person with respect to the offense.

3. Paragraph 1 of this Article shall not apply if the person has had an opportunity to leave the requesting State and has not done so within [30/45] days of final discharge in respect of the offense for which that person was extradited or if the person has voluntarily returned to the territory of the requesting State after leaving it.

Article 15 Transit

1. Where a person is to be extradited to a Party from a third State through the territory of the other Party, the Party to which the person is to be extradited shall request the other Party to permit transit through its territory.

2. The requested State shall grant such a request expeditiously unless its essential interests would be prejudiced thereby.

3. The State of transit shall ensure legal provisions enabling the person to be held in custody during transit.

4. In the event of an unscheduled landing, the Party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for [48 hours] pending receipt of the transit request.

Article 16 Concurrent requests

If a party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited.

Article 17 Costs

1. The requested State shall meet the cost of any proceedings in its jurisdiction arising out of a request for extradition.

2. The requested State shall also bear the costs incurred in its territory with the seizure and handing over of property or the arrest and detention of the person sought.

3. The requesting State shall bear the costs incurred in conveying the person from the territory of the requested State, including transit costs.

Article 18 Final provisions

1. This Treaty is subject to (ratification, acceptance or approval).

2. This Treaty shall enter into force on the thirtieth day after the day on which the instruments of (ratification, acceptance or approval) are exchanged.

3. This Treaty shall apply to requests made after its entry into force, even if the relevant acts or omissions occurred prior to that date.

4. Either Party may denounce this Treaty by giving notice in writing to the other Party. Such denunciation shall take effect six months following the date on which notice is received by the other Party.

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