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## INFORMATION NOTE

### **Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders: The Issue of Re-extradition**

#### **1. Introduction**

1.1 In March 2001, the Research and Library Services Division (RLSD) of the Legislative Council Secretariat released a report entitled *Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*.<sup>1</sup> Some Members noted that certain countries might be concerned with the future arrangement on the surrender of fugitive offenders between Hong Kong and mainland China, because of the possibility that fugitive offenders extradited from other countries to Hong Kong may be re-surrendered to mainland China. RLSD was therefore asked to provide additional materials in relation to this issue. This information note provides a brief discussion on the issue of the re-extradition of fugitive offenders between Hong Kong and mainland China for the reference of Members.

1.2 In this information note, we will first explain the nature of re-extradition in relation to the agreement on the surrender of fugitive offenders between Hong Kong and mainland China,<sup>2</sup> we then examine legal provisions of mainland China and Hong Kong on the extradition of fugitive offenders. At the same time, we will also discuss some relevant and important cases. Finally, we will provide a summary analysis of this issue.

#### **2. The Nature of the Problem**

2.1 Generally, re-extradition refers to the surrender of a fugitive offender to a third state for trial or the enforcement of sentence after the offender has been extradited to a requesting state for trial or the enforcement of sentence.

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<sup>1</sup> Chau Pak-kwan and Stephen Lam, *Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Hong Kong: The Research and Library Services Division of the Legislative Council Secretariat, 2001, available at <http://www.legco.gov.hk/yr00-01/chinese/library/crp05.pdf>.

<sup>2</sup> This information note will not address the general issue of re-extradition between Hong Kong and mainland China and a third country, such as the issue of re-extradition after extradition from Hong Kong to a requesting country.

2.2 A request for re-extradition can be made before the person to be extradited is surrendered or, it could also be made after the person is surrendered. In the former case, a requested state is actually facing multiple requests for extradition from several countries, which is referred to as coincidence of extradition requests or simultaneous requests.<sup>3</sup> A fugitive offender is re-extradited to another requesting state after one requesting state has tried the fugitive offender or has enforced the sentence. In the latter case, upon receiving an extradition request, the country to which a fugitive offender has been extradited can execute the re-extradition only after it has obtained the consent from the original requested state.<sup>4</sup>

2.3 Mainland China and Hong Kong are parts of the same country, their mutual 'extradition of fugitive offenders' should be regarded as regional surrender of fugitive offenders and treated as such. Because of the 'One Country, Two Systems' principle, each has, on its own, entered into extradition treaties and agreement on the surrender of fugitive offenders with other countries. After the re-unification, Hong Kong continues to negotiate with foreign countries and enter into agreements on the surrender of fugitive offenders according to the authorization of the Central Government pursuant to the *Basic Law*. In addition, Hong Kong enjoys the independence of the judiciary and the right of final adjudication. At the moment, mainland China and Hong Kong have respectively entered into extradition agreements with different countries.<sup>5</sup> Yet, there is not a single country which has entered into an extradition agreement with both mainland China and Hong Kong.

2.4 Countries having an extradition treaty with China are: Thailand, Belarus, Russia, Bulgaria, Kazakhstan, Romania, Mongolia, Kirgizia, Ukraine, Cambodia and Uzbekistan, whereas countries having entered into an agreement on the surrender of fugitive offenders with Hong Kong include Australia, Canada, India, the Netherlands, New Zealand, Philippines, Singapore, the United Kingdom, the United States of America, Indonesia, Malaysia, Sri Lanka and Portugal.

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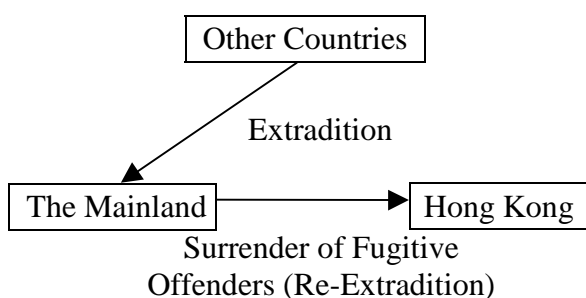
<sup>3</sup> Generally, a requested country may consider a number of factors before deciding the priority of extradition requests, including whether there exists an extradition agreement between the two countries, the seriousness of the offences, the place where the crime is committed, the nationality of the person to be extradited, and the possibility of re-extradition to another country, etc.

<sup>4</sup> This is because the rule of speciality is required to be complied with. See Part III of this information note for a detailed discussion.

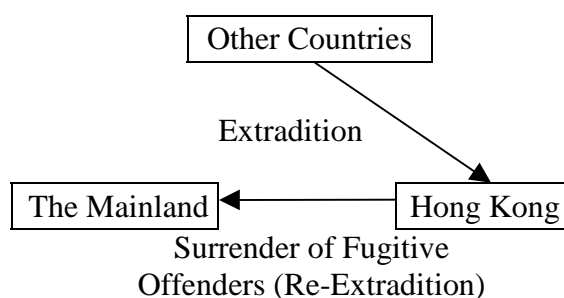
<sup>5</sup> Generally referring to extradition treaties between China and foreign countries and agreements on the surrender of fugitive offenders between Hong Kong and foreign countries.

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2.5 If mainland China and Hong Kong were to make an agreement on the surrender of fugitive offenders in the future, in the event after a fugitive offender extradited from other countries to mainland China or Hong Kong has completed his trial or served his sentence, mainland China or Hong Kong then re-surrenders him to the other side for trial or for the enforcement of sentence in accordance with the agreement reached, this act of re-surrender is similar to having the fugitive offender re-extradited. The following situations 1 and 2 can be referred to as internally bounded re-extradition.

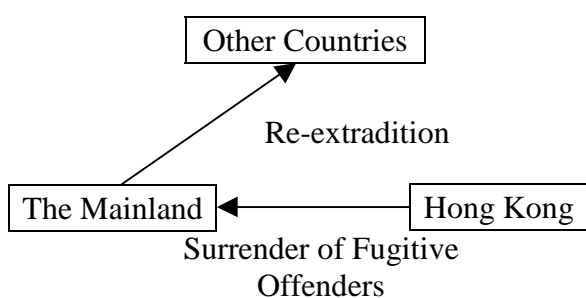


**Situation 1**

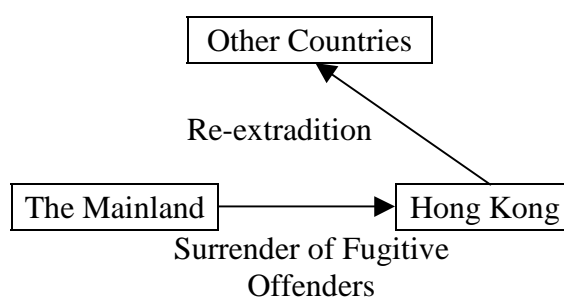


**Situation 2**

2.6 On the other hand, when mainland China and Hong Kong were to make an agreement on the surrender of fugitive offenders, it can also be referred to as re-extradition if either side re-extradites a fugitive offender to other countries after the offender has been surrendered from the other side for trial or for the enforcement of sentence. The following situations 3 and 4 can be referred to as externally bounded re-extradition.



**Situation 3**



**Situation 4**

2.7 Before we give an analysis of the above situations, we will examine and review an extradition principle which is used to govern international re-extradition: the rule of speciality.

### 3. The Rule of Speciality

3.1 The rule of speciality is an extradition principle that has been recognized by laws of nations and international law.<sup>6</sup> The rule of speciality refers to the requirement that the requesting state must assure at the time of making an extradition request that a returned person can only be tried for offences which are specifically listed in the extradition request. A requesting state may not try or punish a returned person for any offence which is outside of the enumerated offences listed in the extradition request.

3.2 The rule of speciality is not created exclusively to limit re-extradition. However, since this rule limits the scope, time and place in the investigation of a requesting state on the liabilities of a person to be extradited, it can be extended as a restriction on re-extradition in principle.

3.3 Article 14 of the *United Nations (UN) Model Treaty on Extradition* refers to the rule of speciality. Article 14(1) provides that a person extradited “*shall not be proceeded against, sentenced, detained, 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*” except an offence for which extradition was granted and except any other offences in respect of which the requested state consents.

3.4 The rule of speciality is normally not absolute. It requires certain conditions for its application. It loses effect after the period of protective time expires or the person extradited has voluntarily returned to the territory of the requesting state after leaving it. Article 14(3) of the *UN Model Extradition Treaty* provides that the rule of speciality “*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 offence for which that person was extradited or if the person has voluntarily returned to the territory of the requesting state after leaving it.*”

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<sup>6</sup> Some scholars are of the opinion that the rule of speciality is one of the two main principles of the modern extradition system. The other principle is the principle of double criminality. See Alun Jones, *Jones on Extradition and Mutual Assistance*, London: Sweet & Maxwell, 2001, p. 34. The principle of double criminality means that the conduct of a person to be extradited is a crime under both the law of the requesting state and the law of the requested state, or under the international treaties that both the requesting state and the requested state participated in.

3.5 Some scholars are of the opinion that the rule of speciality serves the following functions:<sup>7</sup>

- (1) it prevents the abuse of judicial proceedings by a requesting state after the extradition of a fugitive offender;
- (2) it reinforces the protection of the double criminality rule and the rule against extradition for political offences;<sup>8</sup> and
- (3) it ensures that a returned fugitive offender would not be prosecuted for an offence which is unknown to him or has no *prima facie* evidence.

3.6 The rule of speciality mainly serves the purpose of protecting the interests of a requested state. Therefore, a requested state has the rights to agree to relinquish the restriction on the specific offences that can be prosecuted after extradition and the restriction on re-extradition. Actually, the rule of speciality reflects the credit and trust of a state, it requires a requesting state to fulfill the promise it made to a requested state.

#### Legal Provisions in Mainland China

3.7 In mainland China, the rule of speciality is recognized by legislation and bilateral treaties that entered into with other countries.

3.8 Article 14(1) of the *Extradition Law of the People's Republic of China (PRC Extradition Law)*,<sup>9</sup> enacted on 28 December 2001, stipulates that, in seeking extradition request, the requesting state shall make the assurance that “*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 to by the People's Republic of China, or unless that person has not left the requesting state within 30 days from the date of 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*”.

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<sup>7</sup> Ivor Stanbrook & Clive Stanbrook, *Extradition: Law & Practice*, 2<sup>nd</sup> edition, Oxford: Oxford University Press, 2000, p. 47.

<sup>8</sup> The rule against extradition for political offences refers to the practice that a requested state will not allow extradition where the person to be extradited is regarded as a political offender or an offender associated with a political offence.

<sup>9</sup> For detailed introduction to the *Extradition Law of the People's Republic of China*, see Huang Feng, *Zhonghua Renmin Gongheguo Yindu Fa Pingzhu, (Commentaries on the Extradition Law of the People's Republic of China)* Beijing: China Legal System Press, 2001.

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3.9 In addition to Article 14(1), Article 50 of the *PRC Extradition Law* supplements the rule of speciality. Paragraph 2 of the Article provides that, in requesting extradition from a foreign country, “*the judicial organ shall be bound by the assurance made in investigating criminal responsibility.*”

3.10 According to Article 14(1) of the *PRC Extradition Law*, the rule of speciality is applicable to the following scope and under the following conditions:

- (1) The scope of application is limited to “the offences committed before his surrender except for which extradition is granted”, and does not include offences that may have been committed after the surrender.
- (2) The restrictions imposed by this principle can be lifted with the consent of the People’s Republic of China.
- (3) This principle applies within a limited period of time. It does not apply to a person
  - (i) who does not leave the requesting state within 30 days from the date of the proceedings for which extradition is requested are terminated, or the person completes his sentence or is released before the sentence expires; or
  - (ii) after leaving the country, the person has returned of his own free will.

3.11 All of the bilateral extradition treaties mainland China entered into with other countries include the rule of speciality,<sup>10</sup> although it is expressed in different ways. For instance, Article 14(1) of the *Sino-Cambodia Extradition Treaty*<sup>11</sup> provides: “*Persons who are extradited pursuant to this Treaty cannot be detained, tried or punished in the requesting state for an offence which is not one of the offences for which the person is extradited. Neither shall the person be re-extradited to a third state, ...*”

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<sup>10</sup> For detailed analysis, see *Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders*, Chapter one, note 1.

<sup>11</sup> *Extradition Treaty between the People’s Republic of China and the Kingdom of Cambodia.*

3.12 All of the Sino-foreign bilateral extradition treaties expressly state that the requesting state may not prosecute or punish a crime which is committed before a request for extradition is made without the consent of the requested state. For instance, the *Sino-Russia Extradition Treaty*<sup>12</sup> states: “it may not investigate the criminal liability or execute punishment”. The limitations include prosecution or sentencing, but may also extend to the restriction of personal freedom. For instance, Article 16 of the *Sino-Romania Extradition Treaty*<sup>13</sup> provides: “A requesting state shall not investigate the criminal responsibility of a person who has been extradited or execute any punishment on him or restrict his personal freedom for a crime that was committed before the extradition and is not an offence for which the extradition is granted. Neither shall the person be re-extradited to a third state.”

3.13 The time limit in which the rule of speciality applies is 30 days in all of the Sino-foreign bilateral extradition treaties except the *Sino-Kazakhstan Extradition Treaty*,<sup>14</sup> in which the time limit is 15 days. At the same time, all of the Sino-foreign bilateral extradition treaties require that the rule of speciality lose effect if the person extradited has voluntarily returned to the requesting state after leaving it.

#### Legal Provisions of Hong Kong

3.14 Similarly, the rule of speciality is recognized by Hong Kong law and agreements on the surrender of fugitive offenders entered by Hong Kong with other countries.

3.15 Section 5 of the *Hong Kong Fugitive Offenders Ordinance* (Cap. 503 of the Laws of Hong Kong) provides the general restrictions on surrender. Section 5(2) stipulates that a requesting state shall assure that a person extradited will not be dealt with for any non-extraditable offence committed before his surrender.<sup>15</sup>

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<sup>12</sup> *Extradition Treaty between the People’s Republic of China and the Confederation of Russia.*

<sup>13</sup> *Extradition Treaty between the People’s Republic of China and Romania.*

<sup>14</sup> *Extradition Treaty between the People’s Republic of China and Kazakhstan.*

<sup>15</sup> Section 5(2) provides:

“A person shall not be surrendered to a prescribed place, or committed to or kept in custody for the purpose of such surrender, unless provision is made by the law of the place, or by the prescribed arrangements concerned, for securing that he will not, unless he has first had an opportunity to leave that place, be dealt with in that place for or in respect of any offence committed before his surrender to it other than—

- (a) the offence in respect of which his surrender is ordered;
- (b) any equivalent or lesser relevant offence which is disclosed by the particulars contained in the supporting documents in relation to the offence referred to in paragraph (a); or
- (c) subject to subsections (3) and (4), any other offence being a relevant offence in respect of which the Chief Executive may consent to his being dealt with.

3.16 In addition, Section 5 (5)<sup>16</sup> provides a requesting state shall assure that a person extradited will not be re-surrendered by that state to any other place outside Hong Kong unless the person has first had an opportunity to leave the requesting state or with the consents of the Chief Executive to that re-surrender.<sup>17</sup>

3.17 In addition to incorporating the rule of speciality in the externally bounded extradition, the *Fugitive Offenders Ordinance* also applies the principle to internally bounded extradition.<sup>18</sup> Part III of the *Fugitive Offenders Ordinance* sets out the treatment of persons surrendered to Hong Kong.

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<sup>16</sup> Section 5(5) of the *Fugitive Offenders Ordinance* provides: “A person shall not be surrendered to a prescribed place, or committed to or kept in custody for the purposes of such surrender, unless provision is made by the law of the place, or by the prescribed arrangements concerned, for securing that he will not be re-surrendered by that place to any other place outside Hong Kong for any offence committed before his surrender unless—

- (a) he has first had an opportunity to leave that first-mentioned place; or
- (b) subject to subsection (6), the Chief Executive consents to that re-surrender.”

<sup>17</sup> According to provisions of Section 6:

“The Chief Executive shall, before making a decision whether or not to give consent under subsection (5)(b) in respect of the re-surrender of the person referred to in that subsection for an offence referred to in that subsection—

- (a) give notice in writing to that person (or his representative)—
  - (i) stating particulars of the offence; and
  - (ii) advising that person (or his representative) that he has 21 days following receipt of the notice to make representations to the Chief Executive concerning whether or not the Chief Executive should give such consent; and
- (b) take into account the representations, if any, so made.

<sup>18</sup> Externally bounded extradition refers to the extradition of a fugitive offender to a foreign state; internally bounded extradition refers to the extradition of a fugitive offender to Hong Kong.



3.18 Sections 17(1) and (2) of Part III<sup>19</sup> of the *Fugitive Offenders Ordinance* provide that unless in special circumstances,<sup>20</sup> a person, after being surrendered to Hong Kong, shall not be tried for any offence committed in Hong Kong before such surrender, or re-surrendered to any other prescribed place for any offence committed before such surrender. According to the interpretation of the *Fugitive Offenders Ordinance*, a prescribed place means a place outside Hong Kong to or from which a person may be surrendered pursuant to prescribed arrangement. It does not include the other parts of the People's Republic of China.

3.19 Provisions in relation to the application of the rule of speciality in Hong Kong's *Fugitive Offenders Ordinance* are not very different from those in mainland China. The rule does not apply in the following situations:

- (1) where the requested state consented;
- (2) where the person extradited had an opportunity of leaving Hong Kong and has not done so within 40 days (unless otherwise provided) of having been free to do so; or
- (3) where he returned voluntarily to Hong Kong after having left Hong Kong.

<sup>19</sup> Sections 17 (1) and (2) of the *Fugitive Offenders Ordinance* provide:

- “(1) Where any person is surrendered to Hong Kong by a prescribed place pursuant to prescribed arrangements, he shall not, unless he has—
- (a) had an opportunity of leaving Hong Kong and has not done so within—
    - (i) subject to subparagraph (ii), 40 days of having been free to do so; or
    - (ii) such longer period, if any, as is specified in the arrangements; or
  - (b) returned voluntarily to Hong Kong after having left Hong Kong, is triable or tried for any offence committed in Hong Kong before such surrender, other than—
    - (i) an offence in respect of which he was surrendered;
    - (ii) any equivalent or lesser offence—
      - (A) disclosed by the particulars furnished to that place on which his surrender is grounded; and
      - (B) in respect of which the surrender of a person to Hong Kong by that place pursuant to the arrangements is permitted;
    - (iii) any other offence in respect of which—
      - (A) that place consents to his being tried; and
      - (B) the surrender of a person to Hong Kong by that place pursuant to the arrangements is permitted.
- (2) Where any person is surrendered to Hong Kong by a prescribed place pursuant to prescribed arrangements, he shall not be surrendered under this Ordinance to any other prescribed place for or in respect of an offence committed before such surrender unless—
- (a) that first-mentioned place consents thereto; or
  - (b) the person has —
    - (i) had an opportunity of leaving Hong Kong and has not done so within—
      - (A) subject to sub-subparagraph (B), 40 days of having been free to do so; or
      - (B) such longer period, if any, as is specified in the arrangements; or
    - (ii) returned voluntarily to Hong Kong after having left Hong Kong.”

<sup>20</sup> See note 19, (1)(b)(i)—(iii).

3.20 After Hong Kong has entered into bilateral agreements on the surrender of fugitive offenders with other countries, a proper Order must be made according to the provisions in Section 3(1) of the *Fugitive Offenders Ordinance* to give effects to those agreements. According to Section 3(9) of the *Fugitive Offenders Ordinance*, an Order made by the Chief Executive in Council in relation to the surrender of fugitive offenders shall be substantially in conformity with the provisions of the *Fugitive Offenders Ordinance*.

3.21 All of the Orders made subsequent to the agreements on the surrender of fugitive offenders Hong Kong entered into with other countries have incorporated the rule of speciality, although it is expressed in different ways. Some Orders include the provisions of speciality and re-surrender in the same article, such as the *Fugitive Offenders (United States of America) Order*;<sup>21</sup> other Orders put the provisions of speciality and re-surrender in different articles, such as the *Fugitive Offenders (United Kingdom) Order*.<sup>22</sup>

3.22 Although the rule of speciality is stated in different ways in the Orders in relation to different countries, the content is substantially the same, and the wording also follows the related provisions in the *Fugitive Offenders Ordinance*. These Orders use the word 'jurisdiction' where they express prohibition of re-surrender to other 'place'.

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<sup>21</sup> Section 16(1) of the *Fugitive Offenders (United States of America) Order* (Cap. 503 of the Laws of Hong Kong) relates to speciality. Sections 16 (2) and (3) relate to re-surrender, which provide:

“(2) A person surrendered under this Agreement may not be surrendered or transferred beyond the jurisdiction of the requesting Party for the offence for which his surrender was granted, or for an offence committed prior to his original surrender, unless the requested Party consents.

(3) Paragraphs (1) and (2) of this Article shall not prevent a person being proceeded beyond the jurisdiction of the requesting Party to which he has been surrendered and has not done so within thirty days or has voluntarily returned to that jurisdiction having left it.”

<sup>22</sup> Section 17 of the *Fugitive Offenders (United Kingdom) Order* (Cap. 503 of the Laws of Hong Kong) relates to speciality, and Section 18 relates to re-surrender. Section 18 provides:

“(1) Where a fugitive offender has been surrendered to the requesting Party, that Party shall not surrender him to any other jurisdiction for an offence committed before his surrender unless:

(a) the requested Party consents; or

(b) he has first had an opportunity to leave the jurisdiction of the requesting Party and has not done so within forty days of having been free to do so or has returned voluntarily to that jurisdiction having left it.

(2) The Party whose consent is requested may require the production of the documents submitted by the other jurisdiction in support of its request for surrender.”

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#### 4. Relevant Important Cases<sup>23</sup>

##### *The Case of Lui Kin-Hong*

4.1 Lui Kin-Hong was wanted in Hong Kong on a warrant for his arrest for the crime of bribery. After his arrest in Boston in the United States (US) in December of 1995, he petitioned for *habeas corpus* in the court of the US. The case was finally decided by the US Court of Appeals for the First Circuit, which reversed the order of a district court granting the writ of *habeas corpus*.<sup>24</sup> One issue in the case is that the legal basis for Lui's extradition to Hong Kong is the Extradition Treaty signed between the US and the United Kingdom (UK). Since Hong Kong was to be returned to China, and since the US did not have any extradition agreement with China, the US could not be assured that China would adhere to the rule of speciality. But the appellant court was of the opinion that a court could not consider whether a treaty would be enforced. In any event, the extradition treaty recently entered into between the US and Hong Kong had already included the rule of speciality which would be applicable to a fugitive who had been surrendered before the treaty became effective.<sup>25</sup>

##### *The Case of Ewan Launder*

4.2 Another important case involving re-extradition in Hong Kong's arrangement for the surrender of fugitive offenders occurred in the UK. The case occurred before reunification and the debate continued after 1997. In August of 1996, the English Divisional Court quashed an order for the extradition of a Hong Kong fugitive offender, Ewan Launder, on the ground that the offender's rights might be violated after Hong Kong's return to China.<sup>26</sup>

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<sup>23</sup> Only important cases that are related to Hong Kong are introduced. For detailed analysis of American and English court cases dealing with the rule of speciality, see M. Cherif Bassiouni, *International Extradition: United States Law & Practice*, 3rd ed., New York: Oceana Publications, Inc. 1996, Chapter 7 and Ivor Stanbrook & Clive Stanbrook, *Extradition: Law & Practice*, 2<sup>nd</sup> ed., Oxford: Oxford University Press, 2000, Chapter 3.

<sup>24</sup> *United States v Lui Kin-Hong* 110 F. 3d 103 (1<sup>st</sup> Cir. 1997).

<sup>25</sup> Article 16 of the Agreement relates to speciality, see note 21. In addition, Article 20(3) provides: "This Agreement shall apply to requests for surrender made after its entry into force. It shall also apply to requests for surrender pending at the date of its entry into force. Articles 4 and 16 of this Agreement shall apply to fugitive offenders who have been surrendered between the Parties prior to the entry into force of this Agreement." See the *Fugitive Offenders (United States of America) Order*.

<sup>26</sup> *R v Secretary of State for the Home Department, ex parte Launder* (Q.B. Div'l Ct. Aug. 6, 1996), *The Times*, 10/29/1996.

4.3 The decision was subsequently reversed by the House of Lords.<sup>27</sup> One of the issues was whether the relator Ewan Launder would be re-extradited to China after his extradition to Hong Kong. The House of Lords was aware of the fact that there was no arrangement for the surrender of fugitive offenders between China and Hong Kong, and the extradition agreement soon to be reached between Hong Kong and the UK would contain speciality protection.<sup>28</sup> In addition, the *Basic Law* protects personal freedoms and the rights of parties to proceedings.<sup>29</sup> Therefore, the court considered that the relator would enjoy the right not to be surrendered to mainland China.

4.4 In December of 1997, the Chief Executive of Hong Kong gave an undertaking to the UK Government not to re-surrender relator Ewan Launder to mainland China. The relator applied for judicial review on the ground that the Chief Executive did not have the authority to give the undertaking. The court finally held that the undertaking given by the Chief Executive was consistent with the requirements of the UK Extradition Act.<sup>30</sup>

#### *The Case of John Cheung*

4.5 The case of John Cheung does not directly relate to the rule of speciality. The importance of this case is that it establishes the legal status of the Hong Kong-United States agreement on the surrendering of fugitive offenders, and recognizes the special arrangement of 'One Country, Two Systems' between China and Hong Kong on matters relating to extradition.

4.6 In September of 1999, the US District Court for the District of Connecticut held that the extradition agreement entered into between Hong Kong and the US could not be used as the basis for the extradition of a Hong Kong fugitive offender (John Cheung) on the ground that Hong Kong was not a sovereign state.

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<sup>27</sup> *R v Secretary of State for the Home Department, ex parte Launder* [1997] 3 All ER 961 (HL).

<sup>28</sup> The Hong Kong Special Administrative Region and the UK signed the related agreements on 5 November 1997. The *Fugitive Offenders (United Kingdom) Order* came into force on 19 March 1998.

<sup>29</sup> One of the important elements for an effective execution of the rule of speciality is that an extradited person has the opportunity to leave a requesting state after the person has been dealt with for matters relating to the extradition. Article 31 of the *Basic Law* provides: "*Hong Kong residents ... shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.*" Article 87 of the *Basic Law* establishes the rights enjoyed by parties to criminal proceedings.

<sup>30</sup> *R v Secretary of State for the Home Department, ex parte Launder* (No 2) [1998] 3 WLR 221 (Q.B.Div'1 Ct.).

4.7 The US Court of Appeals for the Second Circuit reversed the judgment of the District Court in May of 2000,<sup>31</sup> holding that 'foreign government' did not refer solely to 'a foreign sovereign' or 'foreign central government'. It might include 'sub-sovereign authorities'. Therefore, the agreement entered into between Hong Kong and the US on the surrender of fugitive offenders should be regarded as a 'treaty'. It was consistent with US law and might be used as the basis for the extradition of Hong Kong people.

## **5. Discussion on Re-extradition**

5.1 Having discussed the rules on re-extradition and some relevant and important court cases, we will analyze the different situations mentioned in Part One.

### Internally Bounded Re-extradition

5.2 Where a fugitive is extradited from a foreign state to mainland China or Hong Kong, the re-extradition of the fugitive shall be limited by the rule of speciality as stipulated in the bilateral extradition agreements. Given the 'One Country, Two Systems' principle implementing in mainland China and Hong Kong, whether the rule of speciality is capable of effectively limiting the re-surrender of fugitive offenders to Hong Kong or mainland China is at issue. Nonetheless, mainland China or Hong Kong may re-extradite a fugitive to the other side with the consent of the requested state.

5.3 Where a fugitive is extradited from other countries to mainland China (Situation 1), the Chinese law and extradition treaties China entered into with other countries have incorporated the rule of speciality, but this rule is limited to the re-extradition of a fugitive offender to a third state. Because mainland China and the Hong Kong Special Administrative Region are parts of the same country, the Chinese government may, in compliance with the rule of speciality, re-surrender a fugitive offender extradited to mainland China from another country to Hong Kong for trial. The re-resurrender is, prima facie, consistent with the related provisions. But mainland China and Hong Kong are two different jurisdictions, other countries may raise doubts, arguing that a trial of a fugitive offender in mainland China is different from re-resurrendering the offender to Hong Kong for trial.

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<sup>31</sup> *John Cheung v United States of America*, 213 F. 3d82 (2<sup>nd</sup> Cir. 2000).

5.4 Where a fugitive offender is extradited from another country to Hong Kong (Situation 2), the existing extradition agreements Hong Kong entered into with other countries expressly limit re-extradition of a fugitive offender to another jurisdiction, and should limit the re-surrender of the fugitive offender to mainland China. But as stated above (para. 3.18), the *Fugitive Offenders Ordinance* of Hong Kong does not apply to mainland China. For instance, it does not prohibit the re-surrender of a fugitive offender to mainland China who has been extradited to Hong Kong from a foreign country. Section 17(2) of the *Fugitive Offenders Ordinance* provides expressly that a fugitive offender shall be re-surrendered to any 'prescribed place' except in several specified circumstances. Since mainland China is not a 'prescribed place', Section 17(2) provides no guidance regarding the re-surrender of fugitive offenders to mainland China. It has yet to be tested whether an extradition agreement or order of surrender made pursuant to the *Fugitive Offenders Ordinance* can effectively limit the re-surrender of a fugitive offender to mainland China after the offender has been extradited to Hong Kong from a foreign country, in the condition that there exists a set of arrangements for the surrender of fugitive offenders between mainland China and Hong Kong.

5.5 Because there is no agreement between mainland China and Hong Kong on the surrender of fugitive offenders,<sup>32</sup> the rule of speciality in the bilateral extradition agreements between either mainland China or Hong Kong with respective foreign countries shall effectively limit the re-surrender of fugitive offenders. But if mainland China and Hong Kong were to agree to a set of arrangements for the surrender of fugitive offenders, and no limitations were imposed on the agreements of the re-surrender of fugitive offenders who have been extradited from foreign countries to Hong Kong or mainland China respectively, foreign countries would be easily suspicious and concerned, and the implementation of the existing bilateral extradition agreements entered into by mainland China and Hong Kong respectively would be affected.

#### Externally bounded Re-extradition

5.6 Whether a fugitive offender surrendered according to a surrender agreement between Hong Kong and mainland China can be re-extradited to other countries (Situations 3 and 4) depends on whether the rule of speciality will be adopted in the agreement.

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<sup>32</sup> There is no formal arrangement on the surrender of fugitive offenders between Hong Kong and the mainland. However, there exists an administrative arrangement. According to this administrative arrangement, the mainland would surrender a person who has been alleged to have committed an offence in Hong Kong and who has been arrested in the mainland to Hong Kong for trial. Because there is no other arrangement, Hong Kong has never surrendered any fugitive offender to the mainland. Article 95 of the *Basic Law* provides: "*The Hong Kong Special Administrative Region may, through consultation 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.*" Hong Kong and mainland China are negotiating an arrangement on the surrender of fugitive offenders.

5.7 Scholars hold different views as to whether the future arrangement between mainland China and Hong Kong on the surrender of fugitive offenders should incorporate the rule of speciality. Some scholars take the view that since the extradition systems in both mainland China and Hong Kong recognize the rule of speciality and prohibit re-extradition, both can agree to incorporate this rule in the future arrangement between mainland China and Hong Kong on the surrender of fugitive offenders.<sup>33</sup> Other scholars are of the opinion that this rule does not necessarily apply to the arrangement between mainland China and Hong Kong on the surrender of fugitive offenders, because the arrangement between the two regions ought to be highly cooperative and interactive, and should allow the requesting party to investigate a case according to the nature of the offence and prosecute and try the offender according to the law of the respective jurisdictions.<sup>34</sup>

5.8 As stated above (para. 3.5), the rule of speciality serves the functions of preventing a fugitive offender from being prosecuted for unknown offences or for offences that lack sufficient prima facie evidence. It also prevents an extradition proceedings from being used for other purposes. These factors ought to be considered when mainland China and Hong Kong make an agreement on the surrender of fugitive offenders.

5.9 Since there is not a single country which has entered into a bilateral extradition agreement with both mainland China and Hong Kong, this arrangement may serve as a channel through which either mainland China or Hong Kong may extradite a fugitive offender to a country with which no extradition agreement has been signed.

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<sup>33</sup> See 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, pp. 348-9.

<sup>34</sup> See Huang Feng, "Guanyu woguo neidi yu xianggang zhijian yijiao taofan he zuode ruogan wenti tantao," ("Discussions on several problems relating to the cooperation between Hong Kong and mainland China on the surrender of fugitive offenders" ) in Gao Mingxuan and Zhao Bingzhi (eds.) *Zhongguo Quji Xingfa yu Xingshi Sifa Xiezhu Yanjiu, (Research on Regional Criminal Law and Mutual Assistance in Criminal Matters)* Beijing: China Fangzheng Press, 2000, p. 111.

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