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# THE RELEVANCE OF CHINESE CRIMINAL LAW TO HONG KONG AND ITS RESIDENTS

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The purpose of this article is to examine the possible relevance of the criminal law of the People's Republic of China to the Hong Kong Special Administrative Region ('SAR') and its residents.<sup>1</sup> Under the 'one country, two systems' doctrine, the legal system in the SAR will remain unchanged for fifty years after the transition, and PRC criminal law will not be extended to the SAR. The SAR courts, as a result, will have exclusive criminal jurisdiction over crimes within the SAR and SAR residents will have no duty to abide by PRC criminal law.<sup>2</sup>

The common law adopted in Hong Kong will continue to be different from the laws in the mainland. The difference will create conflicts of laws which are governed by similar principles regardless whether the conflict occurs within a sovereign state or between sovereign states.<sup>3</sup> As mandated by the Joint Declaration ('JD') and the Basic Law ('BL'), no PRC national laws will be applied in the SAR unless they are incorporated in the BL or extended by the SAR legislature. As far as criminal jurisdiction is concerned, the SAR is a separate sovereign, and its conflict with the mainland is a microcosm of international law conflicts.

The 'one country, two systems' formula does not deny the relevance of PRC criminal law to the SAR and its residents. On the contrary, the impact of PRC criminal law on the SAR and its residents will increase as the transition approaches. Indeed, more and more SAR residents have already been subjected to criminal punishment in China. It is to the advantage of the SAR to expand legal co-operation with the mainland in a formal and institutionalised manner.<sup>4</sup> The urgent issue is to identify clearly the relevance of PRC criminal law to Hong Kong.

This article is divided into three parts. The first part examines whether or to what extent the criminal jurisdiction authorised under PRC Criminal Law

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<sup>1</sup> The nationality issue for SAR residents is governed by the PRC Nationality Law 1980 and a resolution by the NPC Standing Committee, 'Explanation of Some Questions Concerning the Implementation of the PRC Nationality Law in the HKSAR' passed on 23 May 1996. For commentaries on the laws, see Yash Ghai, 'Nationality and the Right of Abode' (1996) 26 HKLJ 155 and Susan Finder, 'The Status of Hong Kong Compatriots under Chinese Law' (1996) 26 HKLJ 232.

<sup>2</sup> In this paper I refer to Hong Kong (the SAR) and rest of the PRC (the mainland) as separate entities. When I refer to Hong Kong as being a part of the juristic entity known as China, I use the term the PRC.

<sup>3</sup> J H C Morris, *The Conflict of Laws* (London: Sweet & Maxwell, 4th ed 1993).

<sup>4</sup> Albert Chen, 'The Conflict of Law Between Mainland China and Hong Kong' in Albert Chen and Johannes Chan, *Renchuan Yu Fazhi* (Human Rights and the Rule of Law) (Hong Kong: Wide Angle Press, 1987); Zhao Yongchen, *Guoji Xingfa Yu Sifa Hexuo* (International Criminal Law and Judicial Co-operation) (Beijing: Law Press, 1994).

will be extended to the SAR and its residents; the second part discusses the issue of how, where criminal jurisdiction of a mainland court is claimed, a criminal suspect in the SAR would be brought before a mainland court for trial; the final part of the article explores the possibility of future co-operation between the SAR and the mainland on related matters. As with many areas of legal interaction between the mainland and the SAR, this topic is very much uncharted territory. The article highlights and clarifies some of the areas of uncertainty and offers, where possible, commentary on the questions raised by relying on general principles.

### The jurisdiction of Chinese criminal law

There is no universal standard as to how far a legal system may extend its criminal jurisdiction to another. Much depends on how the latter recognises the former jurisdiction. In international criminal law, a state may exercise criminal jurisdiction according to five principles, namely, the territorial principle, the national principle, the protective principle, the universal principle, and the passive personality principle.<sup>5</sup> Under PRC criminal law, a mainland court may exercise criminal jurisdiction according to the five principles.<sup>6</sup>

#### *The territorial principle*

In common law countries, criminal jurisdiction is subject to territorial limitations. Under English law, for example, criminal courts have jurisdiction only in offences committed within the territory, with certain statutory exceptions.<sup>7</sup> Whether a crime occurs within the territory depends first on whether the crime is completed within the country; that, in turn, depends on whether the crime concerned is one of conduct or one of consequence.<sup>8</sup>

However, the territorial principle is itself expanding, and the territorial principle is stretched so far as to amount to extraterritorial jurisdiction.<sup>9</sup> Legislatures and courts in many common law countries have exercised jurisdiction over a crime committed abroad if an element of the crime is committed within the country.<sup>10</sup>

<sup>5</sup> Research in International Law, 'Harvard Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 American Journal of International Law 437.

<sup>6</sup> The main criminal law legislation in China is the 1979 Criminal Law. The 1979 Criminal Law was amended in March 1997. The 1997 Criminal Law will take effect on 1 October 1997.

<sup>7</sup> One of the exceptions relates to crimes committed by British nationals on the high seas in relation to the Offences at Sea Act 1799: Kodwo Bentil, 'Crimes Committed on Board Foreign Ships on the High Seas and the Jurisdiction of the English Courts' (1983) Lloyd's Maritime & Commercial Law Quarterly 60. For a general review, see Glanville Williams, 'Venue and the Ambit of the Criminal Law' (1965) 81 LQR 276, 395, 518.

<sup>8</sup> *Treace v DPP* [1971] 1 All ER 110. See Geoff Gilbert, 'Who Has Jurisdiction for Cross-Frontier Financial Crimes?' (1995) 2 Web Journal of Current Legal Issues 1.

<sup>9</sup> Geoff Gilbert, *Aspects of Extradition Law* (Dordrecht: Martinus Nijhoff Publishers, 1991), p 40.

<sup>10</sup> *Ibid.*

Section 1 of the Criminal Justice Act 1993 (UK), for example, authorises jurisdiction over offences of forgery, theft, deception, and other offences if one 'relevant event' in relation to an offence occurs in the UK. A relevant event is defined as 'any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.' In addition, 'judicial acrobatics'<sup>11</sup> were able to interpret offences occurring abroad in such a way as to hold them occurring within the jurisdiction.<sup>12</sup> In Canada, the Supreme Court has held that a Canadian court has jurisdiction over a crime if 'a significant portion of the activities constituting the offence took place in Canada' and there is a 'real and substantial link' between the crime and Canada.<sup>13</sup>

Chinese criminal law is applicable to all who commit crimes within the territory. Under Art 3(3) of the 1979 Criminal Law, a crime is deemed to have taken place in the PRC when 'either the act or consequence of a crime takes place within the territory.' This article creates an objective territorial principle, according to which a criminal act and its consequence are divided. The criminal consequence is separated from the conduct creating it in time and place, and a Chinese criminal court has jurisdiction in both cases. In particular, a mainland court has the power to exercise criminal jurisdiction over a crime, such as fraud, which originated in the SAR but takes effect in the mainland.

The claim that the PRC Criminal Law applies to all crimes committed within its territory has to be qualified in the special case of the SAR. The SAR government will be responsible for all SAR matters except those related to foreign affairs and national defence, which are the responsibility of the central government.<sup>14</sup> The high degree of autonomy in social, political, and economic aspects of the SAR, together with its geographic separateness, make the SAR a quasi-state within PRC national territory. Any extension of PRC criminal law will necessarily infringe the SAR's power over criminal law and ultimately the right to a high degree of autonomy.

This territorial limitation of PRC criminal law is clearly recognised in mainland criminal law theory and practice. Professor Zhao Bingzhi from the People's University, a prominent authority on PRC criminal law, asserted in 1989 that PRC criminal law could be extended to Taiwan,<sup>15</sup> but changed his stance when considering the extension of the same law to Hong Kong and Macau. He clearly recognises the conceptual and geographical separateness of the SAR's criminal jurisdiction and calls for negotiation to reconcile conflicts

<sup>11</sup> P W Ferguson, 'Jurisdiction and Criminal Law in Scotland and England' [1987] *Juridical Review* 179, 187.

<sup>12</sup> *R v Treacy* [1971] AC 537; *Board of Trade v Owen* [1957] 602; *AG's Reference (No 1 of 1982)* [1983] 1 QB 751; *R v Berry* [1985] 1 AC 246; and *Secretary of State for Trade v Markus* [1976] AC 35.

<sup>13</sup> *Libman v R* (1986) 21 DLR (4th) 174.

<sup>14</sup> BL13 & 14.

<sup>15</sup> Zhao Bingzhi, 'Issues in Criminal Law Across the Taiwan Strait' (1989) 3 *Journal of Chinese Law* 229.

of laws in the future.<sup>16</sup> The 'high degree of autonomy' of the SAR's criminal jurisdiction is clearly recognised by other mainland scholars.<sup>17</sup>

The PRC central government has acknowledged the 'separateness' of the SAR criminal jurisdiction.<sup>18</sup> The PRC Garrison Law, for instance, partially subjects soldiers from the People's Liberation Army ('PLA') to be stationed in Hong Kong to the SAR courts.<sup>19</sup> The merits of the law is beyond the scope of this paper. What is important is that the law considers and, to a large extent, follows international practice of criminal jurisdiction with regard to visiting foreign troops.<sup>20</sup> Thus international law and practice are regarded as relevant and persuasive even in the context of a special administrative region within the sovereignty of the PRC. It is especially significant that this is the first time that the PLA subjects its personnel to civilian jurisdiction in criminal law matters, and before a court which may be presided over by non-Chinese nationals. This clear departure from the practice in the mainland illustrates the 'separateness' of SAR criminal law.<sup>21</sup>

Article 23 of the BL has generally been regarded negatively as curtailing political rights in the SAR. But the insertion of this article could also be read as an admission by the central government that SAR courts should have exclusive jurisdiction over crimes in the SAR, even if the crimes are politically sensitive. On this view, PRC criminal law will not be applicable to the SAR even in the case of serious crimes such as treason committed in the SAR.

#### *The personality principle*

A rigid personality principle authorises a state to punish its own citizens for violating criminal law abroad, even if the act is not criminal under the *lex loci*. This principle was defended under the former West German Penal Code as

<sup>16</sup> Zhao Bingzhi and Hao Xingwang, 'Legal Co-operation between Mainland China and Hong Kong and Macau Special Administrative Regions' (1995) 2 *Fa Xue Jia* (Jurists' Review) 47.

<sup>17</sup> Zhao Yongchen (note 4 above) and 'Preliminary Studies on the Investigative Co-operation between the Mainland and Hong Kong under the One Country, Two Systems Policy' (1996) 47 *Gonggan Yanjiu* (Public Security Studies) 55.

<sup>18</sup> According to an official from the Ministry of Public Security ('MPS'), the MPS will follow the following principles in dealing with the SAR police: 'not being subordinate to each other, not interfering with each other's work, co-operating with each other, and supporting each other': Liu Guoxiang, 'Legal Problems in Handling Criminal Cases Involving Hong Kong by Mainland Public Security Organs and Post-1997 Strategies' (1997) 51 *Gonggan Yanjiu* (Public Security Studies) 32. Mr Liu is from the Legal Department of the MPS.

<sup>19</sup> The SAR courts can exercise criminal jurisdiction over a crime committed by a PLA soldier in the SAR who is not on duty when he commits the crime: Art 20, Garrison Law of the People's Republic of China for the Hong Kong Special Administrative Region (1996) 38 *Zhonghua Renmin Gonggheguo Guowuyuan Gongbao* (Gazette of the State Council of the People's Republic of China, hereafter 'State Council Gazette') 1544.

<sup>20</sup> R R Baxter, 'Criminal Jurisdiction in the NATO Status of Forces Agreement' (1958) 7 *ICLQ* 72; Archibald King, 'Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces' (1946) 40 *American Journal of International Law* 257; and Joseph H Rouse and Gordon B Baldwin, 'The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement' (1957) 51 *American Journal of International Law* 29.

<sup>21</sup> For the study of military criminal jurisdiction in the mainland, see Tu Men (ed), *Junshi Faxiu Jiaocheng* (Military Law Materials) (Beijing: Law Press, 1992).

servicing German prestige, preventing Germans from lapsing into unacceptable behaviour, and protecting foreign interests by disciplining Germans abroad.<sup>22</sup> Indeed, it has been the civil law tradition, especially among the states in continental Europe, that extraterritorial jurisdiction is based upon nationality.<sup>23</sup> It is closely related to another civil law practice that states do not extradite their own citizens. Instead, they prosecute them for the crimes committed abroad.<sup>24</sup>

On the other hand, the US does not prosecute its own citizens who commit crimes abroad. If a state where a US national commits a crime fails to prosecute, that person would escape prosecution altogether because US courts lack jurisdiction.<sup>25</sup> English criminal law also operates within a similar setting. In both US and English law, the principle has a few, mainly statutory, exceptions.<sup>26</sup> The difference between civil law and common law could be attributed to the different trial procedures and rules of evidence in civil law and common law jurisdictions.<sup>27</sup>

The territorial principle in PRC criminal law is supplemented by the nationality principle. Under Art 4 of the 1979 PRC Criminal Law, the code is applicable to PRC citizens who commit the following crimes outside PRC territory:

- 1 counter-revolution,
- 2 counterfeiting national currency and valuable securities,
- 3 corruption,
- 4 accepting bribes,
- 5 disclosing state secrets, and
- 6 posing as state personnel to deceive, and forging official documents, certificates and seals.

These acts are punishable according to Chinese criminal law regardless of whether they are regarded as crimes under the *lex loci*. The implications of this

<sup>22</sup> See Jurgen Meyer, 'The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction' (1990) 31 *Harvard International Law Journal* 108, and 'German Criminal Law Relating to International Terrorism' (1989) 60 *University of Colorado Law Review* 571.

<sup>23</sup> Geoffrey R Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction' (1992) 17 *Yale Journal of International Law* 41.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> For example, in a case of treason, extraterritorial jurisdiction can be claimed based on nationality. See Michael Hirst, 'The Criminal Law Abroad' (1982) *Criminal Law Review* 496 and Watson (note 23 above).

<sup>27</sup> Watson, *ibid.* A English judge, Lord Goddard CJ, said in *Page* [1954] 1 QB 171, 175 that, if criminal jurisdiction is asserted extraterritorially, a jury could not 'have knowledge of crimes committed abroad sufficient to present them to the Sovereign's court.' For an analysis see Hirst (note 26 above).

article are serious.<sup>28</sup> It is supplemented by Art 5 of the 1979 Criminal Law, which punishes other crimes committed by a PRC citizen outside the territory, if the crime is punishable by a minimum sentence of not less than a three years fixed term of imprisonment. Article 5 is different from Art 4 of the Criminal Law in an important respect in that Art 5 is applicable only if an act is punishable by the criminal law of the place where the act is committed.

The 1997 Criminal Law affirms and expands the extraterritorial application of the Criminal Law under the nationality principle. Article 7 of the Law provides that any PRC citizen who commits any crime under the PRC Criminal Law outside the PRC territory will be liable, regardless of whether the conduct is punishable under the *lex loci*. The only exception is that the conduct may not be punished if the maximum punishment for the crime is under three years imprisonment.

The nationality of Hong Kong Chinese has been distinctive under Chinese law, because, in spite of the fact that the PRC regards all Chinese who have been naturalised or born in Hong Kong as its nationals, Chinese law never treats Hong Kong Chinese as its nationals with any consistency.<sup>29</sup>

Under the BL and the JD, the SAR has its own international legal personality, with its own nationality regime.<sup>30</sup> Professor Yash Ghai points out that, in determining the right of abode in the SAR, Chinese nationality cannot be the exclusive criterion.<sup>31</sup> While the PRC nationality law applies to the SAR, the National People's Congress ('NPC') has to recognise that the high degree of autonomy of Hong Kong creates a distinctive regime of 'quasi-nationality' for its residents.

Thus, the issue of nationality and residence in Hong Kong has to be determined by 'both the complexities of the past and the imperatives of "one country, two systems."' <sup>32</sup> The assertion of quasi-nationality in the SAR is further supported by several important factors, including: the SAR formulates its own immigration policy, issues its own passports to its residents, and has independent participation in certain international organisations.<sup>33</sup> SAR residents are Chinese nationals, but they are primarily SAR residents, subject to SAR laws and jurisdiction. They have no duty to abide by PRC national laws, unless these laws are legally extended to the SAR.<sup>34</sup> Any discussion of the PRC

<sup>28</sup> There is a possibility that those who have said and done what Wei Jingshen, Wang Juntao, and Wang Dan have said and done, outside PRC territory, may still be arrested, prosecuted, and convicted of the offences of counter-revolutionary incitement and subversion. For a study of political offences in the PRC, see H L Fu and Richard Cullen, *Media Law in the PRC* (Hong Kong: Asia Law and Practice, 1996).

<sup>29</sup> Finder (note 1 above).

<sup>30</sup> Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1996).

<sup>31</sup> Ghai (note 1 above).

<sup>32</sup> *Ibid*, p 155.

<sup>33</sup> *Ibid* and Mushkat (note 30 above).

<sup>34</sup> For further elaboration on this point, see Albert Chen (note 4 above), p 38.

Criminal Law's jurisdiction over the SAR should be informed by the SAR's relative immunity.

*The protective principle*

Both the territorial principle and the personality principle are based upon sovereign power. A state's criminal jurisdiction does not extend beyond its territory and is confined to its own nationals. Each sovereign power generally forecloses any unilateral law enforcement action by another sovereign state within the domain of the first state.<sup>35</sup> However, states are increasingly asserting extraterritorial criminal jurisdiction due to the increase in international interaction and transnational criminal activities, on the one hand, and on the other the willingness of a state to assert such a right and the corresponding increase in capacity for extraterritorial enforcement.<sup>36</sup>

The protective principle is claimed to assert extraterritorial criminal jurisdiction by a state in order to punish activities occurring beyond its borders which threaten vital national interests. The jurisdiction is exercised because these extraterritorial activities are potentially dangerous to the state's security. Thus the exercise of extraterritorial jurisdiction over inchoate offences, as long as they remain inchoate, has to be based upon the protective principle.<sup>37</sup>

Under German criminal law, if the national interest is adversely affected German courts may claim jurisdiction regardless of the law where the 'crime' is committed.<sup>38</sup> French criminal law specifically asserts criminal jurisdiction over an alien who commits certain criminal offences outside French territory.<sup>39</sup> The principle applies to offences such as treason and espionage which directly challenge state security. Ordinary criminal offences, even murder, would not trigger this principle.<sup>40</sup> The problem with this principle is that the 'vital interest' of a state may encompass a broad range of national interests and may accordingly be open to abuse.<sup>41</sup> Thus French courts had jurisdiction over a Spanish national who maintained contact with the enemies of France, and US

<sup>35</sup> Ethan A Nadelmann, 'The Role of the United States in the International Enforcement of Criminal Law' (1990) 31 *Harvard International Law Journal* 37.

<sup>36</sup> *Ibid.*

<sup>37</sup> Christopher L Blakesley, 'United States Jurisdiction over Extraterritorial Crime' (1982) 73 *Journal of Criminal Law and Criminology* 1109. According to Blakesley, 'the qualified territorial jurisdiction ... requires either that an element of the offence takes place or that the effects of the offences are felt in the State, whereas protective jurisdiction can be exercised whenever the State's vital interests are damaged or challenged, even if the crime is committed outside of and its consequences have no direct effect within the State's territory. In many cases where the court exercises criminal jurisdiction, couched in terms of territorial principle, they are actually based upon the protective principle, and vice versa.' See also Geoff Gilbert, 'Crimes Sans Frontiers: Jurisdictional Problems in English Law' (1992) 63 *British Year Book of International Law* 415.

<sup>38</sup> Meyer (note 22 above).

<sup>39</sup> The offences include: crimes against the security of the state, counterfeiting the seal of the state and national currency in circulation, and crimes against French diplomatic or consular agents: Art 694, Criminal Procedure Code, as translated and quoted by Gilbert (see note 37 above), p 420.

<sup>40</sup> Watson (note 23 above), p 43.

<sup>41</sup> Gilbert (see note 37 above).



courts had jurisdiction over drug traffickers targeting the US market, terrorists attacking US citizens, and aliens who lied to US consular officials abroad in order to enter and stay in the US.<sup>42</sup>

Chinese courts can also exercise extraterritorial jurisdiction relying upon a basis similar to the protective principle. Under Art 5 of the 1979 Criminal Law (Art 8 of the 1997 Criminal Law), an alien who, outside the territory of the PRC, commits a crime against the PRC state can be punished under PRC criminal law if the minimum sentence for the crime is above three years imprisonment, but only if the conduct is also a crime under the *lex loci*.

While the SAR has its quasi-nationality regime, Hong Kong residents are not aliens under the PRC Criminal Law, and the protective principle does not apply to SAR residents. Thus an SAR resident who carried out activities in the SAR against the PRC state would not be subject to mainland criminal jurisdiction under the protective principle. This argument also applies to an alien who commits a crime against the PRC state within the SAR.<sup>43</sup>

#### *The passive personality principle*

The passive personality principle determines jurisdiction according to the nationality of crime victims. It offers protection to the nationals of a country who are victimised abroad by seeking to punish the perpetrators who are not its nationals. While the principle has not received international approval,<sup>44</sup> national law does provide protection for its nationals abroad. Under German law, for example, if the personal interests of German citizens are adversely affected abroad the German criminal law may apply, if the conduct is punishable also under the *lex loci*.<sup>45</sup> Similarly, US courts have gradually recognised this principle. In *US v Layton*<sup>46</sup> a US court, in 1981, decided that the passive personality principle could not stand alone to justify jurisdiction, but the court allowed its invocation in conjunction with other principles. Three years later another US court, in *US v Benitez*,<sup>47</sup> allowed jurisdiction based on the passive personality principle where the victim was a US governmental official. In *US v Yunis*, decided in 1988, the court asserted that the passive personality principle alone could justify jurisdiction.<sup>48</sup>

<sup>42</sup> Ibid, p 420.

<sup>43</sup> The PRC courts, of course, may assert jurisdiction by broadly interpreting the qualified territorial principle, arguing that the consequence of conduct which has occurred in the SAR is felt in the mainland.

<sup>44</sup> *The Lotus Case (France v Turkey)* [1927] PCIJR, A/10.

<sup>45</sup> Meyer (note 22 above).

<sup>46</sup> 452 US 972 (1981).

<sup>47</sup> 741 F 2d 1312 (11th Cir 1984), 1316–17.

<sup>48</sup> 681 F Supp 896 (DDC 1988). The only relationship between the defendant and the US in that case was that three Americans were present in the airplane hijacked by the defendant. Yunis was tried in a US court for hijacking a Jordanian airliner in Beirut. See Abraham Abramovsky, 'Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok' (1991) 31 *Virginia Journal of International Law* 151, 179.

A PRC court can exercise jurisdiction according to the passive personality principle. Article 5 of the 1979 Criminal Law (Art 8 of the 1997 Criminal Law) provides that an alien who, outside the territory of the PRC, commits a crime against PRC citizens abroad can be punished under PRC criminal law if the minimum sentence for the crime is above three years imprisonment, and if the conduct is also a crime under the *lex loci*.

The relevance to the SAR of the mainland courts' assertion of criminal jurisdiction according to the passive personality principle is limited. As SAR residents are regarded as Chinese nationals, they are entitled to China's protection while they are overseas. The passive personality principle not only compensates for the absence of such an extraterritorial protection in Hong Kong laws, but it is also of increasing effectiveness due to China's growing importance in the world. The double identities of SAR residents give them the advantage that, while they are protected by PRC criminal law under the passive personality principle, they may not be caught by the law under the protective principle.

#### *The universal principle*

The universal principle gives a domestic court criminal jurisdiction over certain kinds of crimes regardless of the nationality of the victims or perpetrators and the place where it occurs. The jurisdiction is created by customary international law, such as that governing the offence of piracy, and by treaties, such as those governing the offence of terrorism.<sup>49</sup> This jurisdiction mainly arises from multilateral international treaties sponsored by the United Nations on war crimes and terrorism. Under these provisions, a state can exercise criminal jurisdiction over a relevant suspect who is present in that state. The jurisdiction is rarely exercised, and when exercised it is used in conjunction with other principles, such as the active personality and protective principles. In the case of *Eichmann*, Israel's conviction of an ex-Nazi for his role in the holocaust could be justified under both the protective and universal principles.<sup>50</sup> Some states, such as the US, have passed so-called 'long arm statutes' to exercise universal jurisdiction.<sup>51</sup>

The universal principle is not stipulated in the 1979 Criminal Law, due to China's isolation from the international community. However, the increase in international legal co-operation makes it necessary for China to recognise its responsibility within this community and to assert universal jurisdiction over

<sup>49</sup> Gilbert (see note 9 above); Kenneth C Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review* 785.

<sup>50</sup> Reiss, 'The Extradition of John Demjanjuk', (1987) 20 *Cornell International Law Journal* 281.

<sup>51</sup> The antiterrorist legislation in the US authorises US courts to exercise jurisdiction over certain offence committed abroad which are either aircraft-related or in which US nationals are taken as hostage. See G Gregory Schuets, 'Apprehending Terrorists Overseas under United States and International Law: A Case Study of the Fawaz Younis Arrest' (1988) 29 *Harvard International Law Journal* 499.

certain crimes. China has signed several international conventions against international crimes, and has the right to prosecute related crimes under the conventions. In 1987, the Standing Committee of the NPC resolved to activate this criminal jurisdiction by deciding that 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.'<sup>52</sup>

The 1997 Criminal Law affirms the legal effect of those bilateral and multilateral treaties. Article 9 authorises criminal jurisdiction in domestic courts, within the scope of treaty obligations, over crimes specified in those treaties. In a recent case in which a Taiwanese hijacked a Taiwan airliner to China, the Chinese government expressed its intention to prosecute the hijacker in a domestic court according to the universal principle, instead of sending him back to Taiwan.<sup>53</sup>

The universal principle makes a state a responsible member of the international community. It poses its own dangers, however. Terrorism and terrorists are vaguely defined terms. If a person or a group of persons in the SAR are identified by mainland officials as terrorists and the SAR government refuses to institute prosecution, China may have a legal basis to assert jurisdiction.<sup>54</sup>

### Rendition of criminal suspects

Once a court in China asserts criminal jurisdiction, it may demand that the SAR government has the suspect deported or extradited or otherwise surrenders him to the court. The rendition can also be achieved through less formal means, including tricking a fugitive back to the mainland, and even abducting him from the SAR.

### *Deportation*

In the absence of an extradition agreement, deportation may become an alternative to satisfy a request for rendition. However, if deportation is ordered

<sup>52</sup> *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 (1987)*. The following conventions are attached to the Decision: Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; Convention on the Physical Protection of Nuclear Material; and International Convention Against the Taking of Hostages. China became a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1989.

<sup>53</sup> Pamela Pun and Fong Tak-ho, 'China Rejects Call for Hijacker's Return,' *Hong Kong Standard*, 12 March 1997.

<sup>54</sup> Terrorism is becoming the synonym for subversion in the practice of national security establishments in Western democracies. For a summary of the literature, see H L Fu and Richard Cullen, 'Subversion and Article 23 of the Basic Law,' paper presented to the Conference on Trends of Constitutional Law held at the Faculty of Law, University of Hong Kong on 13-14 December 1996.

to mask a disguised extradition, it may be held illegal as an abuse of discretion.<sup>55</sup> In *Meng Ching-hai v AG*<sup>56</sup> the Hong Kong Court of Appeal held, obiter, that if a deportation order were 'a mere pretext for an unlawful extradition' it would be quashed by the court.<sup>57</sup> The same principle has been upheld in the UK<sup>58</sup> and New Zealand.<sup>59</sup>

Deception has also been used for the purpose of rendition and has been legally justified. The US has lured many fugitives from their foreign legal havens.<sup>60</sup> It has induced many drug traffickers to travel to a third country and then had them arrested and deported to the US to face trial.<sup>61</sup> The Privy Council has decided that it is not an abuse of process to entice a suspect from Thailand to Hong Kong for the purpose of extraditing that person to the US to face trial for drug offences. The irregularity is justified because '[i]nternational crime has to be fought by international co-operation between law enforcement agencies,' said Lord Griffiths.<sup>62</sup>

Mainland law enforcement agencies have lured many suspects from Hong Kong to the mainland to face trial. These include PRC businessmen based in Hong Kong as well as Hong Kong residents who operated joint ventures in the mainland. A typical method which is used (and will be used in the future) is to entice a Hong Kong businessman involved in an economic dispute to the mainland where he is detained for fraud until money is paid.<sup>63</sup>

### Extradition

Extradition is the most common way of rendition among states. It exists to facilitate the rendition of criminal suspects.<sup>64</sup> Extradition exists whenever there are different criminal jurisdictions. It exists between sovereign states, and it also exists between legal entities, such as the extradition scheme among the former British colonies, where parts of the Dominions have a special arrangement for the extradition of fugitives,<sup>65</sup> or in federal states such as the US, where rendition of interstate fugitives has been regulated by the constitution and by federal and state laws.<sup>66</sup> Even in a unitary state, such as China, in which there

<sup>55</sup> Mushkat (note 30 above), p 78.

<sup>56</sup> Crim App Nos 150 and 151 of 1990.

<sup>57</sup> Ibid. Fuad VP said that a deportation order would be unlawful if 'the true or dominant purpose of the Director of Immigration in having [the applicant] removed to Taiwan was to bring about an unlawful extradition rather than properly to set in motion a genuine deportation in accordance with the duty and authority given to him by the Ordinance.'

<sup>58</sup> *R v Bow St Magistrates, ex p Mackeson* (1981) 75 Cr App R 24.

<sup>59</sup> *R v Hartley* [1978] 2 NZLR 199.

<sup>60</sup> Nadelmann (note 35 above), p 73.

<sup>61</sup> Ibid.

<sup>62</sup> *Liangsiriprasert v Government of the United States* [1990] 2 All ER 866, 871-2.

<sup>63</sup> Finder (note 1 above), p 252.

<sup>64</sup> See Gilbert (note 9 above).

<sup>65</sup> Patrick L Robinson, 'The Commonwealth Scheme Relating to the Rendition of Fugitive Offenders: A Critical Appraisal of Some Essential Elements' (1984) 33 ICLQ 614.

<sup>66</sup> Jacob A Manheimer, 'Interstate Rendition Violations and Section 1983: Locating the Federal Rights of Fugitives' (1982) *Fordham Law Review* 1268.

is no conflict of laws among the provinces, rendition of fugitives occurs in an informal manner due to the conflict of jurisdictions.

But there are a few restrictions on extradition. Foremost among them is the political offence exception which is a possible bar to extradition. As a general principle, a court will reject an extradition request if the crime the suspect is requested for is political. The Hong Kong extradition law also recognises the political offence exception.<sup>67</sup>

However, the conception of a political offence lacks clear definition:

Political offences may be either purely or relatively political — that is, political in either an objective or subjective sense. The introduction of ‘relatively’ political offences — those ‘related,’ ‘mixed,’ or ‘connected’ with political questions — has meant that any ordinary crime may be deemed political on the ground that its motive or basis was political.<sup>68</sup>

As an extradition treaty does not define political offences, each requested state has the discretion to apply its own national standard. It is a matter for the law of the requested state alone.<sup>69</sup> Under German law, for example, an offence has to be ‘predominantly’ political in order to qualify for the political offence exception.<sup>70</sup> In the US, an offence is political if it is committed in the course of or in furtherance of a political disturbance.<sup>71</sup> More recently, the courts have decided that a crime is political if it is incidental to severe political disturbance.<sup>72</sup> UK law is similar to that of the US.<sup>73</sup> While the Chinese government has denied there is any political offence in China, Chinese law recognises the principle of political asylum. Article 32 of the PRC 1982 Constitution provides that: ‘The People’s Republic of China may grant asylum to foreigners who request it for political reasons.’ The political offence exception is expressly provided in some Extradition Treaties China entered into with, for example, Thailand in 1994<sup>74</sup> and Belarus in 1996,<sup>75</sup> and in some agreements on legal

<sup>67</sup> The Hong Kong SAR Basic Law Consultation Committee, *Final Report on Conflict of Laws, Extradition and Other Related Issues* (12 June 1987).

<sup>68</sup> David M Kennedy, Torsten Stein, and Alfred P Rubin, ‘The Extradition of Mohammed Hamadei’ (1990) 31 *Harvard International Law Journal* 5, 22.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, p 23.

<sup>71</sup> 62 F.972 (1894).

<sup>72</sup> *Sindona v Grant* 619 F 2d 167, 173 (1980).

<sup>73</sup> *Re Casiano* [1891] 1 QB 149.

<sup>74</sup> Art 3(2), Extradition Treaty between the People’s Republic of China and the Kingdom of Thailand, approved by the Standing Committee of the NPC on 5 May 1994 (1994) 9 *State Council Gazette* 327.

<sup>75</sup> Art 3(3), Extradition Treaty between the People’s Republic of China and Republic of Belarus, approved by the Standing Committee of the NPC on 1 March 1996 (1996) 6 *State Council Gazette* 183. The extradition treaty China entered into with the Russian Federation in 1996 does not contain a political offences exception: Extradition Treaty between the People’s Republic of China and the Russian Federation (1996) 6 *State Council Gazette* 170.

assistance China has entered into, for example with Egypt in 1994.<sup>76</sup> China has also accepted the doctrine in practice. In a rendition request made to the Japanese government, the Chinese government produced evidence in a Japanese court to prove that the offence for which the fugitive suspect was extradited was not of a political nature.<sup>77</sup>

The political offence exception has been criticised by nation-states as providing loopholes for terrorists. Governments are making efforts to undermine the defence by excluding (vaguely defined) terrorism from the political offence exception. The US relied mainly on bilateral treaties with other states for extradition, and during the negotiation and re-negotiation of such treaties it has been consistent in trying to narrow or even eliminate the political offence exception and at the same time expand the list of extraditable offences.<sup>78</sup> While it is true that the list of political offences within an extradition treaty may need to be shortened, any extradition agreement with China should be informed by the fact that people in China are still prosecuted for crimes of conscience.<sup>79</sup>

China had not entered into any extradition agreement with any country before 1993, nor had China passed any domestic legislation on extradition. The bilateral treaties on judicial co-operation entered into by China have no extradition clauses. But China has been a signatory in several multilateral agreements with extradition clauses, bearing the duty either to prosecute or extradite certain suspects as defined by the agreements.<sup>80</sup> With China's increasing international interaction, international crime has become a serious problem for the PRC and the rendition of fugitives to and from China has been on the PRC policy agenda for some time. Especially since China joined the International Criminal Police Organisation (Interpol) in 1984, rendition in a formal and institutionalised manner has become increasingly important.<sup>81</sup> However, short of any extradition agreement, rendition was often requested and granted informally, according to the principle of reciprocity.<sup>82</sup> Before 1992,

<sup>76</sup> Art 29(1), Agreement on Legal Assistance in Civil, Commercial and Criminal Matters between the People's Republic of China and the Arab Republic of Egypt, approved by the Standing Committee of the NPC on 29 December 1994 (1994) 31 State Council Gazette 1195. But the agreement with Cuba does not contain this exception. See Agreement on Legal Assistance in Civil and Criminal Matters between the People's Republic of China and the Republic of Cuba, approved by the Standing Committee of the NPC on 2 September 1993 (1993) 21 State Council Gazette 989.

<sup>77</sup> The fugitive Zhang Zhenghai, a PRC national, hijacked an Air China airliner from China to Japan in December 1989. After the Chinese government filed an extradition request to the Japanese government, Zhang argued in a Japanese court that he hijacked the airliner for political purpose. Zhang was extradited to China in April 1991: Fei Zhongwei and Tong Chengyuan, *Zhongguo Sifa Xiezhu De Lilun Yu Shijian* (Theories and Practice of Judicial Co-operation in China) (Beijing: People's Court Press, 1992), p 209.

<sup>78</sup> Nadelmann (note 35 above), p 65.

<sup>79</sup> Although the political offence exception is increasingly limited to facilitate the rendition of fugitives, international law has created new exceptions to extradition, based on lack of confidence in foreign legal systems. An anti-persecution clause may apply while the political offence exception does not. See *Soering* 161 ECHR (ser A) 28 (1989).

<sup>80</sup> Zhao (note 4 above), p 222.

<sup>81</sup> *Ibid.* For the background to China's entry into Interpol, see Malcolm Anderson, *Policing the World: Interpol and the Politics of International Police Co-operation* (Oxford: Clarendon Press, 1989), p 46.

<sup>82</sup> Fei and Tong (note 77 above), p 209. Janice M Brabyn, 'Extradition and the Hong Kong Special Administrative Region' (1988) 20 Case Western Reserve Journal of International Law 169.

China had failed to have hijackers of its aircraft extradited from Australia, South Korea, and Taiwan, but had been successful in securing fugitives from the governments in Brazil, Columbia, Japan, the Philippines, and Thailand through irregular extradition.<sup>83</sup> Since 1993, China has entered into extradition treaties with six countries.<sup>84</sup>

Extradition arrangements in Hong Kong are totally dependent upon UK legislation.<sup>85</sup> The Extradition (Hong Kong) Ordinance, which extends the Extradition Act 1870 to Hong Kong, applies in the case of extradition to a foreign state, and the Fugitive Offenders (Hong Kong) Order applies in the case of extradition between Hong Kong and the UK or other Commonwealth countries. The rendition of fugitives from Hong Kong to China is formally governed by the Chinese Extradition Ordinance, the history of which can be traced back to a 1843 treaty signed between Great Britain and China.<sup>86</sup>

The Chinese Extradition Ordinance has not been used since 1949 because the PRC government refuses to request an extradition according to an ordinance tainted by a treaty which is regarded as unequal.<sup>87</sup> There has been co-operation between law enforcement agencies in Hong Kong and the mainland on various matters of law enforcement since the early 1980s. But co-operation on the rendition of fugitives has been informal, in the sense of extradition disguised in deportation, and non-reciprocal in the sense that it is always the mainland authorities returning fugitives to Hong Kong to face trial. There is widespread resentment on the part of mainland law enforcement agencies that, while mainland authorities have returned more than seventy fugitives wanted in Hong Kong through either Interpol or other informal channels, Hong Kong authorities have been unwilling to reciprocate.<sup>88</sup> As Liu has lamented, once a fugitive enters Hong Kong there is not much the mainland authorities can do.<sup>89</sup>

### *Abduction*

Abduction has been used by countries to assert criminal jurisdiction over a foreign citizen, although the practice has been condemned as a flagrant violation of international law.

<sup>83</sup> Fei and Tong (note 77 above).

<sup>84</sup> They are Belarus, Bulgaria, Kazakhstan, Romania, the Russian Federation, and Thailand. The information is provided by Professor Zhao Yongchen from People's University of Public Security. Professor Zhao is considered to be the leading authority in international criminal law in China.

<sup>85</sup> For a review of Hong Kong's extradition law, see Brabyn (note 82 above).

<sup>86</sup> See Brabyn (see note 82 above) for a short review of the legislative history of the ordinance.

<sup>87</sup> *Ibid*, p 185; Darren Goodsir, 'Hijack Suspect to Stay in Hong Kong,' *South China Morning Post*, 30 June 1995.

<sup>88</sup> The Hong Kong government has rejected rendition requests from the mainland on the following grounds: no crime has been committed in Hong Kong, no sufficient evidence produced by the mainland law enforcement, the offence is not extraditable because the death penalty may be imposed, or a crime should be prosecuted in a Hong Kong court. See Liu (note 18 above). In a recent case, Hong Kong rejected China's request for the extradition of a mainland Chinese who participated in the hijacking of the jetfoil *Guia* on the ground that court proceedings had started in Hong Kong: Darren Goodsir (note 87 above).

<sup>89</sup> Liu (note 18 above), p 32.

Abduction is an informal apprehension and rendition of fugitives with or without the consent or acquiescence of the country from which the fugitives are rendered. The increasing use of abduction is directly related to the protective principle. Weller argues that: 'Under the "protective" or "effects" doctrine, more and more States now unilaterally extend their jurisdictions to cover foreign nationals who may never have set foot onto the soil of the state seeking to try them.'<sup>90</sup> A state adopts the policy of 'catch and snatch' due to its frustration with the formal extradition process. Extradition may be barred or frustrated because some states bar the extradition of their own citizens, because other states are reluctant to comply with the request, because the targets may be alerted and avoid punishment through corrupt officials in the requested states, or simply because extradition is tedious.<sup>91</sup>

In the US, especially, there has been a trend of abandoning the traditional extradition process in favour of informal rendition. Under the so called *Ker-Frisbie* doctrine,<sup>92</sup> an abduction from a country does not violate the extradition treaty with that country. Moreover, due process and fair trial protection under US law covers the trial stage only. The courts need not concern themselves with how a defendant is brought to the courts.<sup>93</sup>

In 1994, Chinese police abducted James Peng from Macau, apparently with the assistance of Macau authorities, to face trial in Zhuhai, where he was tried and convicted. The abduction has received widespread adverse international publicity.<sup>94</sup> While cross-provincial abduction has been common in the mainland, it will infringe the autonomy of the SAR and outrage the public if such an abuse is extended to the Hong Kong SAR.

### Negotiating jurisdiction

The issue of criminal jurisdiction in a federal state may shed light on the future relationship between the SAR and the mainland. While China does not admit federalism, the SAR will, according to the BL, enjoy a higher degree of

<sup>90</sup> Marc Weller, 'Noriega's Sorrows' (February 1992) *New Law Journal* 289, 290.

<sup>91</sup> The US abducts drug traffickers because of the disproportionate impact of drugs on the US and the lack of effective law enforcement in some of the source countries: Abramovsky (note 48 above). For a justification of the US practice, see Andrew K Fletcher, 'Pirates and Smugglers: An Analysis of the Use of Abduction to Bring Drug Traffickers to Trial' (1991) *Virginia Journal of International Law* 233.

<sup>92</sup> The doctrine is derived from *Ker v Illinois* 111 US 436 (1886) and *Frisbie v Collins* 342 US 519 (1952).

<sup>93</sup> There are two exceptions to the doctrine. First, the court will divest itself of jurisdiction if the abduction is extremely brutal and shocks the conscience. The principle has never been used again after *Toscarino* 500 F 2d 2678 (2d Cir, 1974), and thus remains purely academic. The second exception can be called the international law exception, decided by the case *US v Caro-Quintero* 745 F Supp 599 (CD Cal 1990). According to that case, a court would have no jurisdiction over a defendant if he had been abducted from another country which protests against the abduction: Jacques Semmelman, 'Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The *Ker-Frisbie* Doctrine Reexamined' (1992) 30 *Columbia Journal of Transnational Law* 513.

<sup>94</sup> For a thoughtful analysis of the case, see Roman Tomasic, 'Company Law and the Limits of the Rule of Law in China' (1995) 4 *Australian Journal of Corporate Law* 470.



autonomy than any state or province in a federal state. The experience in federal states may provide a minimum standard for the SAR-mainland relationship in this respect.

In a federal state, power between federal and regional governments is divided in such a way that an individual is subject to the laws of both central and local authorities.<sup>95</sup> Thus two sets of laws co-exist, governing their own spheres. The federal law extends to the whole nation and regional law is confined to the region. In most federal states federal law prevails if there is inconsistency between the two laws.<sup>96</sup> However, 'federal states may be placed on a "spectrum" running from a point that is close to disintegration into separate countries to a point that is close to the centralized power of a unitary state or an empire.'<sup>97</sup> A state's position in this spectrum is decided by the autonomy a province or state enjoys under the country's constitutional law.

Where might the SAR stand along this spectrum of federalism? While the SAR has exclusive criminal law power within the SAR, and the central government may not extend its criminal jurisdiction into the inherent SAR sphere, PRC criminal law is relevant in dealing specifically with cross-border crimes, including the smuggling of drugs, humans, and cultural relics and offences related to family law such as bigamy. US experience has shown that the federal law enforcement system and federal courts are in a better position than their state counterparts in exercising criminal jurisdiction over sensitive crimes, such as civil rights offences, and intra-states offences.<sup>98</sup>

However, such experience has only very limited, if any, value for the SAR. While the federal courts in the US have jurisdiction over federal offences, there is no such alternative yet available across the SAR-mainland border. No Chinese court has any jurisdiction over the SAR. The establishment of the Court of Final Appeal in the SAR prevents any possibility of direct intervention by mainland courts. The question is not how to create a judicial body exercising universal criminal jurisdiction over the cross border or 'federal crime' but how to create a body to negotiate the matter of criminal jurisdiction. Given the fact that SAR has exclusive power over criminal law and law enforcement, and given the differences in substantive and procedural criminal law between the SAR and the sovereign authority, and, most importantly, given the lack of confidence in each other's systems, the 'federalisation' of certain crimes is impossible in the near future. The long-term likelihood should not be dismissed out of hand, however.

The SAR government needs to reach an agreement with the central government on both jurisdictional matters and matters concerning the

<sup>95</sup> Peter Hogg, *Constitutional Law of Canada* (Ontario: Carswell, 1992).

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, p 99.

<sup>98</sup> Jamie S Gorelick and Harry Litman, 'Prosecutorial Discretion and the Federalisation Debate' (1995) 46 *Hastings Law Journal* 967. See also other articles in this special issue on the federalisation of crime in the US.

rendition of criminal suspects. The agreement should be formalised, with specific obligations and equally specific exceptions; and written rules should replace tacit understandings. It should also be institutionalised in the sense that a commission, composed of authorities from both sides, should be set up for the purpose of legal co-operation. Such an institutionalised format would provide a deliberative framework which could prevent hasty decisions and avoid the possibility of confrontation.<sup>99</sup>

In dealing with the issue of concurrent jurisdiction, primacy might be assigned to either the SAR or the mainland courts, depending on the nature of the offence.<sup>100</sup> Accordingly, one side might have the primary right to exercise criminal jurisdiction over certain offences and in normal circumstances should be accorded it. But the primary right might be waived. Where a case is considered as particularly important by the side without primary jurisdiction, that side could request the other side to waive its jurisdiction and to give sympathetic consideration to such a request.<sup>101</sup>

Any waiver of criminal jurisdiction would be conditional. If one side failed to exercise its jurisdiction, that is there was no prosecution, then the waiving side could resume the jurisdiction. However, an acquittal should not lead to the reversion of jurisdiction to the other side. Therefore, if a requested party were to try the case itself instead of granting rendition, the trial should be genuine and in accordance with the spirit of any rendition agreement. The party should not harbour any intention of an acquittal after a mock trial, a light sentence, or pardoning after conviction.

The SAR would have to surrender fugitives, Hong Kong residents or not, wanted in the mainland according to any rendition agreement. There should be three exceptions to a rendition. First, given the extensive use of the death penalty in China, no person should be sent to China who is suspected of having committed a serious criminal offence. Hong Kong 'normally' refuses an extradition or rendition request unless the requesting party undertakes that a death sentence will not be imposed.<sup>102</sup> But, given increasing integration between Hong Kong and the mainland, it may not be viable to insist that the possibility of a death sentence act as a bar to rendition in the future. The SAR government would be in a difficult position if a person committed a capital offence in the mainland and sought refuge in Hong Kong. If no undertaking of no death sentence were given from the mainland, and the person were not extraditable, should the SAR court be bound to prosecute the offence vicariously? Given the rigid rules of evidence under the common law and substantial differences to

<sup>99</sup> For a study of such a commission set up between the US and Mexican governments, see Abramovsky (note 48 above), p 209.

<sup>100</sup> In this section, I rely on literature on criminal jurisdiction over friendly visiting foreign troops (see note 19 above).

<sup>101</sup> Art 20 of the PRC Garrison Law provides a similar principle.

<sup>102</sup> Hong Kong SAR Basic Law Consultation Committee (note 67 above), p 4.

PRC national laws, such a vicarious prosecution, although possible in a civil law tradition, would be unlikely. One possible solution would be to allow rendition of capital fugitives to the mainland but subject to a test according to international human rights standards before any rendition took place.

A political offences exception should be inserted in any such agreement and strictly adhered to. The UK and US tests for political offences are too strict because they require the existence of disturbance and proof that the fugitive is a member of a well-organised and disciplined political organisation with a clear political agenda. Given the sporadic nature of political dissidence related to the PRC and its generally non-violent nature, this test is unacceptable. Consideration should be given to the nature of the act and its connection with, and proportionality to, the declared political goal.

Finally, the principle against double jeopardy is rooted in both international law and domestic law. An SAR resident may not be charged with, and punished for, the same crime which has been tried in an SAR court, although a PRC national, if he is not a SAR resident, may be subject to further penalty imposed by a mainland court after serving the punishment imposed by an SAR court.<sup>103</sup>

## Conclusion

China expects to apply the 'one country, two systems' formula to Hong Kong, Macau, and Taiwan. Any future agreement on judicial co-operation must necessarily be informed by the fact that each region will have its own exclusive criminal jurisdiction. Judicial co-operation rather than confrontation is necessary. But confrontation may be unavoidable and even necessary when the SAR's autonomy is infringed.

China's claims of criminal jurisdiction over the SAR could be excessive, and the recent amendment of the Criminal Law has expanded China's extraterritorial criminal jurisdiction. Self-restraint in limiting that extraterritorial jurisdiction in the SAR on the part of the mainland is important. Given the substantial differences in the substantive and procedural criminal laws of the SAR and the mainland, and the lack of confidence in each other's systems, an excessive assertion of extraterritorial jurisdiction would be detrimental to the high degree of autonomy to be enjoyed by the SAR. At the same time, since the Basic Law has granted 'a high degree of autonomy' to the SAR and recognised a different legal system in Hong Kong, the central government should have confidence in the SAR's capacity to exercise effectively its criminal jurisdiction.

<sup>103</sup> Art 7 of the PRC 1979 Criminal Law provides: 'If any person commits a crime outside the territory of the People's Republic of China for which according to this Law he would bear criminal responsibility, he may still be dealt with 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.' The same principle is affirmed in Art 10 of the 1997 Criminal Law.