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# Extradition and the Hong Kong Special Administrative Region

Janice M. Brabyn\*

## I. INTRODUCTION

A power to extradite is a legal power specifically developed to enable a person, convicted or accused of a relevant criminal offense by the authorities of one jurisdiction,<sup>1</sup> to be lawfully arrested and surrendered into the custody of that jurisdiction by the authorities of another jurisdiction<sup>2</sup> within whose territory that person happened to be found. Hong Kong<sup>3</sup> currently has significant extradition powers of this kind. The Governor also has power to request the surrender of fugitives to Hong Kong by other jurisdictions.

International law is commonly said to not impose a duty upon sovereign states to extradite fugitive criminals to other states pursuant to such powers.<sup>4</sup> If there is no duty then there can be no obligation. Yet without obligation, the outcome of every request for extradition must be uncertain. To overcome this, various means of creating an obligation to

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<sup>1</sup> The most common incidents of extradition are between sovereign states but the term is not confined to such occasions. "Extradition" is used to describe the surrender of fugitives between the various states and territories, for example the United States and Australia. See 31 AM. JUR. 2D *Extradition* § 1 (1967); Shearer, *Extradition and Asylum*, in INTERNATIONAL LAW IN AUSTRALIA 179 (D. O'Connell 2d ed. 1984). The essential prerequisite is not two independent states but two legally distinct criminal jurisdictions. Since the HKSAR will not be a sovereign state the term "jurisdiction" is used in the definition given, but for convenience "requesting state" rather than "requesting jurisdiction" is sometimes used in the remainder of the text. Provided it is remembered that "state" does not necessarily mean "sovereign state" there should be no difficulty.

<sup>2</sup> Refer to argument *supra* note 1. The appropriate terms are "requested state" and "requested jurisdiction."

<sup>3</sup> In the context of U.K. law, Hong Kong has the status of a colony by virtue of three documents: a charter dated April 5, 1843, effective June 26, 1843; an order in council dated October 24, 1860 which annexed the peninsula now known as Kowloon to the colony; and an order in council dated October 20, 1898 which added the New Territories. Texts of these documents can be found in 23 LAWS OF HONG KONG app. IV. The effects of this status relevant to our purpose are: the government of Hong Kong is legally subordinate to the government of the United Kingdom, specifically to the English Crown, and enjoys only such powers as the English Crown chooses to allow; both the English Crown and the U.K. Parliament have power to legislate for Hong Kong; since Hong Kong is not a sovereign state, it is not a separate subject of international law but is merely part of the subject known as the United Kingdom, hence the United Kingdom has sole responsibility for conducting all of Hong Kong's external affairs.

<sup>4</sup> I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 23-27 (1971) [hereinafter SHEARER].

surrender have been developed. One such means is the entry into extradition treaties. Another is for a group of like-minded states to agree to enact reciprocal legislation. A third is to make surrender which is pursuant to statute conditional upon some less formal undertaking of reciprocity by the requesting government. These processes for imposing and accepting obligations to extradite may usefully be expressed by the concept of creating extradition relations between states.<sup>5</sup> In this sense, Hong Kong presently enjoys extradition relations with at least seventy-five states, their colonies and dependent territories.<sup>6</sup>

Will these powers and relations continue after July 1, 1997? There has been significant extradition traffic to and from Hong Kong over the years to the mutual benefit of Hong Kong and many other states.<sup>7</sup> There is no reason to suppose that the circumstances responsible for this will change after 1997.<sup>8</sup> On the contrary, if the Hong Kong Special Administrative Region ("HKSAR") becomes an economic engine for the People's Republic of China ("PRC"), the need for efficient extradition procedures and widespread extradition relations is likely to increase. Therefore it seems desirable at least to attempt to ensure that the extradition powers and relations presently enjoyed by Hong Kong will also be enjoyed by the HKSAR after 1997. This may have been implicitly recognized in the Sino-British Joint Declaration ("Joint Declaration")<sup>9</sup> itself. The last par-

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<sup>5</sup> The terminology is the author's own. A state's extradition relations are the arrangements it has entered into with other states. These arrangements impose legal obligations upon both parties to surrender fugitives according to their respective domestic laws and the terms of the arrangement.

<sup>6</sup> See *infra* notes 50 & 71.

<sup>7</sup> An informal record supplied to the author by the Hong Kong Attorney General's Chambers indicates that twenty-three persons have been extradited from Hong Kong since 1983, mainly to Australia, the United States and the Netherlands. The author is aware of at least three other recent cases: Gan Tua-Soon was returned to Singapore to face a charge of murder, as reported by the South China Morning Post [hereinafter SCMP] July 16, 1987; Philip Ng and Henry Wong were returned to the United States on drug smuggling charges as reported by the SCMP, July 18, 1987; Gregory Richardson was returned to Australia on drug-related charges as reported by the SCMP, June 9, 1987. The informal record also indicated that nine persons were returned to Hong Kong from other jurisdictions.

<sup>8</sup> These include Hong Kong's position as a major international trading, commercial, and finance center, its large tourist and transport transit industries, and its proximity to the opium producing areas of Asia. The former generates opportunities for fraud and corruption within the territory. Fraud was the crime stated in eight of the cases involving surrender to Hong Kong listed by the Attorney General's chambers. All combine to attract persons to Hong Kong who are actively sought by other jurisdictions for various offenses, often drug-related (11 of the 26 instances of surrender) but also murder (8), robbery (7), kidnapping (1) and other property crimes (3). *Note*: Five persons were returned to Macau for both murder and robbery.

<sup>9</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, United Kingdom-People's Republic of China, 1984 Gr. Brit. T.S. No. 20 (Cmd. 9352) para. 3(4) [hereinafter the Joint Declaration], *reprinted in* 23 I.L.M. 1371 (1984) (within the British White Paper referred to as the Draft Agreement). In reference to § III of Annex I, see A.H.Y.

agraph of article III of Annex I of the Declaration provides: "[t]he Central People's Government shall assist or authorise the Hong Kong Special Administrative Region Government to make appropriate arrangements for reciprocal juridical assistance with foreign states."

"Juridical" is defined as "[o]f, relating to, or connected with the administration of law or judicial proceedings; sometimes in more general sense = legal."<sup>10</sup> It is an unusual term in this context, as more common expressions are "judicial assistance," "mutual assistance," or terms referring to specific legal processes such as the enforcement of judgments, service of documents and administration of letters rogatory. However, neither of the general terms mentioned has a single fixed meaning. In particular, there is a difference in usage with respect to judicial assistance and extradition. Some authorities use judicial assistance broadly and include extradition as a form of judicial assistance.<sup>11</sup> Others confine judicial assistance to functions such as the administration of letters rogatory by a court, preferring to classify extradition as a completely separate subset of international cooperation in legal matters.<sup>12</sup> The latter usage would certainly be more consistent with the existence of an extradition process which does not require the participation of a state's judicial arm.<sup>13</sup> It is also the usage presently found in Hong Kong legislation and treaties.<sup>14</sup> "Juridical" may have been selected in order to avoid these linguistic difficulties and to provide for central government assistance in

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Chen, *Hong Kong's Legal System: Adaptations for 1997 and Beyond*, in HONG KONG AND 1997: STRATEGIES FOR THE FUTURE 235, 250 (1985).

<sup>10</sup> 5 OXFORD ENGLISH DICTIONARY 634 (1933).

<sup>11</sup> Grutzner, *International Judicial Assistance and Cooperation in Criminal Matters*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 191-94 (S. Bassiouni & V. Nanda eds. 1973).

<sup>12</sup> Muller-Rappard, *The European System*, in 2 INTERNATIONAL CRIMINAL LAW 95-149 (Bassiouni ed. 1986).

<sup>13</sup> There are other arguments in favor of this interpretation, e.g., the proliferation of treaties using the term "judicial assistance" are confined to the taking of evidence, service of process and similar functions. Paradoxically, in the United Kingdom, it was § 24 of the Extradition Act 1870 which provided the only basis for judicial assistance in its narrow sense with respect to criminal matters for many years. Extradition Act, 1870, 33 & 34 Vict., ch. 52, reprinted in 17 HALSBURY'S STATUTES OF ENGLAND 478 (4th ed. 1986).

<sup>14</sup> For existing legislation and orders, see Foreign Judgments (Reciprocal Enforcement) Ordinance, cap. 319; Foreign Judgments (Reciprocal Enforcement) Order, 1968 (L.N. 101/68) as amended; Foreign Judgments (Reciprocal Enforcement) (Application to the Commonwealth) Order, 1965 (L.N. 8/65); Foreign Judgments (Restrictions on Recognition and Enforcement) Ordinance, cap. 46; Judgments (Facilities for Enforcement) Ordinance, cap. 9 together with numerous orders made thereunder; Maintenance Orders (Reciprocal Enforcement) Ordinance, cap. 118; Maintenance Orders (Reciprocal Enforcement) Rules Order, 1979 (L.N. 29/79); Maintenance Orders (Reciprocal Enforcement) (Designation of Reciprocating Countries) Order, 1979 (L.N. 28/79). See also the following U.K. orders: Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions) Order, 1933 (1933 No. 1073); Hong Kong (Evidence) Order, 1977 (1977 No. 589); Reciprocal Enforcement of Maintenance Orders (Designation of Reciprocating Countries) Order, 1979 (1979 No. 115); Extradition Act, 1870, § 24.

or authorization of a wide range of international arrangements concerning legal matters by the HKSAR, including extradition, should that prove possible. If so, the only question would then be what form such assistance or authorization should take.

## II. THE NATURE OF THE PROBLEM

With the exception of an ordinance concerning the return of Chinese citizens to the mainland,<sup>15</sup> the legal basis for all powers to extradite persons from Hong Kong are statutes passed by the British Parliament,<sup>16</sup> and a series of orders in council made pursuant to those statutes by the British Crown.<sup>17</sup> The only Hong Kong ordinance<sup>18</sup> on this issue does not go beyond practical implementation of British legislation.<sup>19</sup> The power to request surrender to Hong Kong from other jurisdictions is an aspect of the prerogative which is not expressly dealt with by statute at all.<sup>20</sup>

<sup>15</sup> Chinese Extradition Ordinance, 1889 (originally ch. 26 of 1889, printed as ch. 7 of 1889 in LAWS OF HONG KONG 1938 (J. Fraser ed.)), LAWS OF HONG KONG, ch. 235 (1964 rev. ed.).

<sup>16</sup> Extradition Act, 1870; Fugitive Offenders Act, 1967, reprinted in 17 HALSBURY'S STATUTES OF ENGLAND 517 (4th ed. 1986). In 1815, the British law officers advised that there was no prerogative power to surrender persons lawfully within British territory to another state or jurisdiction for the purpose of prosecution or punishment. Statutory authority was required. The opinion is reported in 6 BRITISH DIGEST OF INTERNATIONAL LAW 453-61 (1965), and has been accepted as a correct statement of the common law ever since. See also SHEARER, *supra* note 4, at 24-25.

<sup>17</sup> These include numerous orders in council which apply the Extradition Act 1870 with respect to particular states, or various other orders in council which have this effect, and the Fugitive Offenders (Hong Kong) Order, 1967 (S.I. 1967, No. 1911 as amended by S.I. 1968, No. 292 and S.I. 1968, No. 1375) discussed below.

<sup>18</sup> Extradition (Hong Kong) Ordinance, 1875, LAWS OF HONG KONG, ch. 236 (1964 rev. ed.).

<sup>19</sup> See *supra* note 78. Legislative powers to make laws "for the peace, order, and good government of the Colony" are given to the Governor of Hong Kong acting together with a Legislative Council by cl. VII of the Letters Patent, 1917 to 1986. Broad though these powers are, they have generally been interpreted to exclude power to pass extraterritorial legislation; specifically the extraterritorial legislation required for interstate extradition. *Kwok Ah-sing v. Attorney Gen. of Hong Kong*, 5 L.R.-P.C. 179, 198 (1873); *Rediffusion (Hong Kong) Ltd. v. Attorney Gen. of Hong Kong*, 1970 App. Cas. 1136, 1154 (P.C.). See also P. Wesley-Smith, *Extraterritoriality and Hong Kong*, 1980 PUBLIC LAW 150; W. Clarke, *The Constitution of Hong Kong and 1997*, in HONG KONG AND 1997: STRATEGIES FOR THE FUTURE 215, 225-26 (1985). The Hong Kong, (Legislative Powers) Order 1986 (L.N. 219/86) gives the Governor of Hong Kong, "by and with the advice of the Legislative Council", power to make laws having extraterritorial operation; *i.e.*, laws relating to civil aviation, merchant shipping and admiralty jurisdiction. The grant is express and is in addition to a grant to repeal or amend any enactment which is part of the law of Hong Kong relating to the same subjects. See also Hong Kong Act, 1985, sched., cl. 3. These provisions would be unnecessary if the Hong Kong Legislature already had power to make extraterritorial legislation. *But see* K. ROBERTS-WRAY, *COMMONWEALTH AND COLONIAL LAW* 387-93, 623 (1966).

<sup>20</sup> See *Barton v Commonwealth of Australia* 131 C.L.R. 477, 485 (1974-75). See also P. WESLEY-SMITH, 1 *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG* 151-57 (1987) as to the exercise of prerogative powers by the governor of Hong Kong. It is submitted that the governor may be said to possess the prerogative power mentioned here as a necessary implication from his

As for extradition relations with other states, the executive powers granted to the governors of Hong Kong have never extended to the colony's external affairs.<sup>21</sup> Consequently Hong Kong does not have any legal power to enter into treaties or other arrangements with other governments or multinational organizations on its own behalf.<sup>22</sup> Responsibility for the development of Hong Kong's extradition relationships with other states has always been exclusively vested in the British Crown. In short, Hong Kong's present extradition powers and relations are a direct consequence of, and are dependent upon, its colonial status. If nothing is done between now and 1997, both powers and relations will end when that colonial status ends.

In this respect Hong Kong's position is by no means unique. The extradition powers and relations of most, if not all, British colonies have been similarly derived from and dependent upon their colonial status.<sup>23</sup> For most colonies, maintaining their extradition powers and relations after independence was comparatively easy. The British legislation which gave the legal powers to extradite needed only to be permitted to continue in force.<sup>24</sup> To maintain extradition relations, the government of an

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express powers under the Extradition Act 1870 and the original Fugitive Offenders Act 1881, if not otherwise.

<sup>21</sup> The powers of the Governor and the Executive Council are circumscribed by the Letters Patent, the Royal Instructions, the Colonial Regulations, specific directions which may be given by the Secretary of State for Foreign and Commonwealth Affairs, constitutional conventions, British Acts of Parliament and Hong Kong ordinances. See N. MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 76 (1981) (the Letters Patent, Royal Instructions, and Colonial Regulations, as they were in 1981, are included in the appendices); J. Rear, *The Law of the Constitution*, in *HONG KONG: THE INDUSTRIAL COLONY* 342-50 (1971).

<sup>22</sup> In recent years, in commerce and trade, Hong Kong has enjoyed considerable de facto autonomy. N. MINERS, *supra* note 21, at 283. Hong Kong has negotiated bilateral commercial agreements, established its own Trade, Industry and Customs Department offices in several foreign cities and, though officially part of the British delegation, taken independent positions at the international conferences concerning the General Agreement on Trade and Tariffs (GATT). See also Rear, *supra* note 21, at 369-70. Acting with the consent of the U.K. government, the government of Hong Kong concluded a commercial treaty with the government of the Union of Burma, 1959 Gr. Brit. T.S. No. 37 (Cmd. 738). But even this degree of autonomy has never extended to the area of international cooperation with respect to criminal justice generally and extradition in particular.

<sup>23</sup> Both the Extradition Act, 1870 and the original Fugitive Offenders Act, 1881 (44 & 45 Vict., ch. 69) applied to all British possessions. See also the Fugitive Offenders (Protected States) Act, 1915 (5 & 6 Geo. V, ch. 39); the Colonial Prisoners Removal Act, 1869 (32 & 33 Vict., ch. 10); the Colonial Prisoners Removal Act, 1884 (47 & 48 Vict., ch. 31). U.K. extradition treaties also applied to all British possessions, more recently to specified British overseas territories. As to the Fugitive Offenders Act, 1881 and the Colonial Prisoners Removal Acts, see K. ROBERTS-WRAY, *supra* note 19, at 200, 223.

<sup>24</sup> With respect to Australia, Canada, and New Zealand, it was generally assumed that U.K. statutes which were extended to them during the period of their status as colonies continued to have effect in their respective territories long after the colonial status had passed. But see *In re Ashman Best*, 1976 RECENT LAW 158; Fugitive Offenders Amendment Act, 1976 (N.Z.). States which gained independence upon a particular day passed internal legislation in order to continue in force

ex-colony which had chosen to become a full member of the Commonwealth had only to ask the other members to designate the new state as one to which their Commonwealth rendition legislation applies.<sup>25</sup> For treaty-based relations, ex-colonies can often rely upon the general principles of treaty succession.<sup>26</sup> In addition, former colonies could enter into inheritance agreements or make unilateral declarations of continuity which were normally accepted by the other treaty partners.<sup>27</sup> However, these methods may not be options for Hong Kong. Hong Kong is not moving from colonial status to independence. It is being restored to the sovereignty,<sup>28</sup> or resuming its place as part,<sup>29</sup> of the PRC. Although it is intended that laws, treaties, and agreements which currently have effect in Hong Kong will, as far as possible, continue to have effect in the HKSAR, this must be read as subject to incompatibility with the sovereignty of the PRC.<sup>30</sup> It is noteworthy that the Joint Declaration omits any reference to British legislation or orders in council when listing the laws of Hong Kong which are to continue in force.<sup>31</sup> Of course, the British extradition legislation could be "domesticated" by either the Hong Kong or the PRC legislature,<sup>32</sup> but continued enjoyment of the benefits of the treaties and the Commonwealth arrangement presents formidable problems.

Neither the PRC nor the HKSAR will succeed to the British treaties as of right.<sup>33</sup> Securing continuity will therefore be subject to the will-

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such U.K. legislation as they each wished to retain. *E.g.*, Republic of Singapore Independence Act, 1965, § 13(1) (this Act also dealt with relevant Malaysian laws). As to India before the adoption of its Constitution, see Indian Independence Act, 1947, § 18.

<sup>25</sup> For an explanation of the system of reciprocal legislation and designation of jurisdictions within the Commonwealth, see notes 42-62 *infra* and accompanying text.

<sup>26</sup> As to succession and extradition treaties, see [1970] 2 Y.B. INT'L L. COMM'N 106-07, U.N. Doc. A/CN. 4/299; see generally P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW (1967); K. ROBERTS-WRAY, *supra* note 19, at 268-69.

<sup>27</sup> SHEARER, *supra* note 4, at 47-50; K. ROBERTS-WRAY, *supra* note 19, at 273-79.

<sup>28</sup> The Joint Declaration provides: "[t]he Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997." Joint Declaration, *supra* note 9, para. 2.

<sup>29</sup> The Joint Declaration provides: "[t]he Government of the People's Republic of China declares that to recover the Hong Kong area . . . is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997." *Id.* para. 1.

<sup>30</sup> *Id.* para. 3(2)-(3); *id.* Annex I, § XI.

<sup>31</sup> *Id.*

<sup>32</sup> See HONG KONG 1987, at 42 (A. Ismail ed. 1987); Chen, *supra* note 9, at 236-37.

<sup>33</sup> The inability of the PRC to succeed to the treaties is obvious. The position may be loosely compared with the incorporation of Estonia, Latvia, and Lithuania into the Soviet Union. At least with respect to states which have recognized the incorporation, it has never been suggested that the Soviet Union has rights or obligations under extradition treaties with those states. As between the original parties, the treaties are regarded as having lapsed. See 478 H.C. Official Report 464, noted in 16 HALSBURY'S LAWS OF ENGLAND 561, ¶ 1153 (3d ed. 1969); SHEARER, *supra* note 4, at 35.

ingness of the other parties to the relevant treaty or agreement to accept the HKSAR's exceptional position. The same is true of continuing special arrangements with Commonwealth countries. The HKSAR will no longer be associated with a Commonwealth member. Will any Commonwealth governments be willing to extend their special arrangements to a jurisdiction which, though itself once associated with a Commonwealth country, is now part of and ultimately subordinate to a foreign state which has never had any connection with the Commonwealth at all, and has a fundamentally different legal, political and economic system as well?

Nor is it possible to replace the present British-based statutes, treaties and relations with comparable statutes, treaties and relations derived from the extradition laws and relations of the PRC. The PRC has no general extradition statute or written law of any kind.<sup>34</sup> There is some evidence which suggests that the PRC executive may claim some form of inherent extradition power, in practice exercised in accordance with a principle of mutual benefit or reciprocity.<sup>35</sup> However, the government of the PRC apparently has taken the view that there is no legal obligation to extradite a person in the absence of a relevant treaty.<sup>36</sup> Where a relevant treaty does exist it may provide legal authority for extradition by itself.<sup>37</sup> The government of the PRC has ratified the Convention for the Suppression of Unlawful Seizure of Aircraft 1970, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 and the Convention on the Prevention of Crimes Against Internationally Pro-

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*But see* P. O'CONNELL, *supra* note 26, at 39-42 (for discussion as to partial succession and the ceding of territory).

<sup>34</sup> This is not necessarily fatal to extradition from the PRC, but it would be fatal with respect to the existence of extradition powers within the confines of the HKSAR legal system. See Joint Declaration, *supra* note 9, para. 3(2)-(3); *id.* Annex I, § 2 and accompanying text. See also *supra* note 16 and accompanying text.

<sup>35</sup> See *infra* note 95; YANG CHUNXI, A GENERAL DISCUSSION OF CRIMINAL LAW 56 (1981). Since such surrender is only conceivable with respect to non-PRC nationals (even without an extradition law), current immigration legislation could provide sufficient legal authority for a surrender of this sort. See *Procedures for Alien Entry into and Exist from the PRC*, 1986 CHINESE Y.B. INT'L L. & AFF. 490 (Chinese ed.). In this context, it is worth noting that many civil law states regularly extradite persons on the basis of reciprocity rather than a formal treaty. See J. Rezek, *Reciprocity as a Basis for Extradition*, 52 BRIT. Y.B. INT'L L. 171-202 (1981); SHEARER, *supra* note 4, at 31-33 (note the example to the Commonwealth Scheme). However, both civil and Commonwealth states nevertheless have specific extradition legislation. The author is indebted to Miss Wu Zongxian, assistant professor at the China University of Political Science and the Law, for her many detailed comments concerning the present state of extradition law within the PRC and the possibilities for future development.

<sup>36</sup> Since there is not general extradition law in the PRC, the principle of "no treaty, no extradition" acknowledged is apparently based upon PRC perceptions of international custom and state sovereignty.

<sup>37</sup> This is not a unique position. Extradition treaties have also been held to be self-executing in the United States. *In re Metzger*, 46 U.S. (5 How.) 176 (1847); *Valentine v. U.S.*, 299 U.S. 5 (1936).



tected Persons, Including Diplomatic Agents 1973, and is apparently prepared to extradite hijackers to other states on the basis of these ratifications.<sup>38</sup> However, the PRC has not entered into any other extradition treaties since 1948. Nor has the PRC ever purported to inherit the extradition obligations of the last imperial dynasty stipulated in the Supplementary Treaty.<sup>39</sup> Consequently the present extradition powers and relations of the PRC are severely limited. This may change in the future, but the development of extradition relations is necessarily slow.

It follows that, if the HKSAR is to enjoy and provide the same level of international cooperation with respect to the surrender of fugitives as Hong Kong currently enjoys and provides, a means of avoiding what is otherwise a certain hiatus must be devised. The options available are discussed in the fourth part of this Article. The third part is intended to give a fuller account of the nature of the system which will need to be replaced.

### III. THE PRESENT POSITION

An examination of Hong Kong's current extradition powers and relations reveals three distinct systems: one for extradition to and from member states of the Commonwealth, their dependent territories and colonies; one based upon a system of reciprocal treaties for extradition to and from other foreign states, their dependent territories and colonies; and one for extradition to the PRC.<sup>40</sup>

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<sup>38</sup> But note that the obligation imposed by these conventions is "extradite or prosecute." At least where a hijacker has landed on Chinese territory, the PRC has shown a preference for the prosecution alternative. See Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao, June 20, 1986 (No. 2); *The Decision Concerning the Exercise of Criminal Jurisdiction of Crimes Stipulated in International Conventions Entered into or Participated in by the PRC*, June 23, 1987, decided by the Standing Committee of the PRC National People's Congress. Since there is no provision for any form of judicial hearing, if extradition were considered under these conventions, the procedure is likely to concern executive organs of government only with an application being made through diplomatic channels to the Foreign Affairs Ministry. The Ministry would then enter into negotiations with the requesting state as to where and when delivery should take place.

<sup>39</sup> See *infra* notes 86-88 and accompanying text.

<sup>40</sup> This form of tripartite division was not uncommon among British colonies and dependencies. The different systems for foreign state and Commonwealth extradition were a reflection of, or determined by, the two British systems, and were implemented by different legislation. The third system usually involved a much simplified backing of warrants procedure, designed to deal with the heavy extradition traffic expected between two culturally and legally similar jurisdictions which were also physically proximate to one another. A legislative basis for such arrangements between British possessions was provided by Part II of the Fugitive Offenders Act, 1881. See SHEARER, *supra* note 4, at 57. The order in council under the Fugitive Offenders Act, 1881, dated January 2, 1918, applied Part II between Hong Kong, British India, Ceylon, the Straits Settlements, the Federation of Malaya (e.g., Johore, Kedah, Perlis, Kelantan, Trengganu), North Borneo, Brunei, and Sarawak. See J. Brabyn, *Extradition in Singapore and Malaysia*, 27 MALAYA L. REV. 243, 247 (1985). Singapore recognized the continued application of this order in council with respect to an application for

### A. Rendition to Commonwealth Jurisdictions<sup>41</sup>

The "Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth" was initially approved at a meeting of Commonwealth law ministers in 1966.<sup>42</sup> Since treaty-based extradition has been specifically rejected by the majority of the ministers,<sup>43</sup> the Scheme is not a treaty but requires substantive legislation in each sovereign jurisdiction for its implementation. The Fugitive Offenders Act 1967<sup>44</sup> is the relevant U.K. statute.

Section 17 of the Fugitive Offenders Act 1967 provides for the Act to be extended to British colonies by means of an order in council. Such extension would give the colony statutory authority to surrender persons found within their territory to other Commonwealth jurisdictions. Pursuant to this provision, the Fugitive Offenders (Hong Kong) Order 1967<sup>45</sup> extends sections 1-15, 19-22 and schedules 1 and 2 of the Fugitive Offenders Act 1967 to Hong Kong but only as modified by the Order in Council itself. The modifications are contained in a long schedule and are mainly technical substitutions of appropriate Hong Kong institutions and laws for those of the United Kingdom. Significant features of the Order include:

- 1) initial processing of the request by the Governor of Hong Kong,<sup>46</sup> subject to provisional warrant procedure;<sup>47</sup>
- 2) a prerequisite that a request for rendition must relate either to the United Kingdom,<sup>48</sup> the Republic of Ireland,<sup>49</sup> a Commonwealth state

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extradition from Hong Kong as late as 1963, P.P. v. Anthony Wee Boon Chye & Anor., 1 Malaysia L.J. 189 (1965). However the order lapsed with respect to Hong Kong in 1967 with the repeal of the original Fugitive Offenders Act 1881 by the present Fugitive Offenders Act 1967. Of course, arrangements between Hong Kong and China could not be based upon the Fugitive Offenders Act 1881.

<sup>41</sup> British legislation dealing with extradition within the Empire or the Commonwealth has used the term "rendition of fugitive offenders" rather than "extradition." I. STANBROOK, *THE LAW AND PRACTICE OF EXTRADITION* xxv (1980), suggests that "rendition" may be distinguished from "extradition" in that it includes surrender of accused persons between different parts of a single state or between colonies and the mother country whereas extradition has been confined to surrender between sovereign states. The use of "extradition" is not so confined, *supra* note 1, but there does seem to be a basis for regarding "rendition" as a subset of extradition, which is normally confined to surrender of persons within the Commonwealth or between different jurisdictions within a single nation state.

<sup>42</sup> Cmnd. 3008. The Scheme has been published separately by the Commonwealth Secretariat. See Cmnd. 3008. See also SHEARER, *supra* note 4, at app. 4.

<sup>43</sup> SHEARER, *supra* note 4, at 55.

<sup>44</sup> See V. HARTLEY-BOOTH, 2 *BRITISH EXTRADITION LAW AND PROCEDURE* 201-06 (1980) (for commentary on the Fugitive Offenders Act 1967); STANBROOK, *supra* note 41, at 37-66.

<sup>45</sup> See *supra* note 18.

<sup>46</sup> See Fugitive Offenders (Hong Kong) Order 1967, § 5.

<sup>47</sup> *Id.* §§ 6(1)(b), 6(2)(3).

<sup>48</sup> *Id.* § 1(a).

which has been designated for the purpose by the Governor of Hong Kong subject to the approval of the Secretary of State,<sup>50</sup> or a U.K. dependency,<sup>51</sup>

3) a requirement that the principle of double criminality be satisfied;<sup>52</sup>  
 4) prohibition on rendition where the offense relied upon is an offense of a political character, where it appears that the request for the fugitive's surrender has in fact been made for the purpose of prosecuting or punishing the offender on account of the offender's race, religion, nationality or political opinions, where it appears that if surrendered the fugitive might be prejudiced at the trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political

<sup>49</sup> *Id.* § 1(b).

<sup>50</sup> *Id.* §§ 1-2. The following orders have been made under this provision: Fugitive Offenders (United Kingdom Dependencies) Order, 1969 (L.N. 15/69 as amended by L.N. 78/77, L.N. 158/80); Fugitive Offenders (Designated Commonwealth Countries) Order, 1968 (L.N. 13/68 as amended by L.N. 32/68, L.N. 99/68, L.N. 155/70, L.N. 193/70, L.N. 135/71, L.N. 186/74, L.N. 233/75, L.N. 176/76, L.N. 23/77, L.N. 87/79, L.N. 157/80, L.N. 249/82); Fugitive Offenders (Forms) Order, 1968 (L.N. 14/68).

<sup>51</sup> Fugitive Offenders (Hong Kong) Order 1967, § 2(2).

'United Kingdom dependency' means—(a) any colony (not being a colony for whose external relations a country other than the United Kingdom is responsible); (b) any associated state within the meaning of the West Indies Act 1967; and (c) any country outside Her Majesty's dominions (being a country in which Her Majesty has jurisdiction, or over which She extends protection, in right of Her Government in the United Kingdom) to which . . . the Governor may, with the approval of the Secretary of State, by order apply this subsection, not being in any case a country which is or forms part of a designated Commonwealth country.

<sup>52</sup> Section 3 provides:

(1) For the purposes of this Act an offence of which a person is accused or has been convicted in the United Kingdom, a designated Commonwealth country or the Republic of Ireland or a United Kingdom dependency is a relevant offence if—(a) in the case of an offence against the law of a designated Commonwealth country or the Republic of Ireland, it is an offence which, however described in that law, falls within any of the descriptions set out in Schedule 1 to this Act, and is punishable under that law with imprisonment for a term of twelve months or any greater punishment; (b) in the case of an offence against the law of the United Kingdom or a United Kingdom dependency, it is punishable under that law, on conviction by or before a superior court, with imprisonment for a term of twelve months or any greater punishment; and (c) in any case, the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Hong Kong if it took place within Hong Kong or, in the case of an extraterritorial offence, in corresponding circumstances outside Hong Kong.

(2) In determining . . . whether an offence against the law of a designated Commonwealth country or the Republic of Ireland falls within a description set out in the said Schedule 1, any special intent or state of mind or special circumstances of aggravation which may be necessary to constitute that offence under the law shall be disregarded.

[Subsection (3) deals with inchoate offenses and complicity.]

(4) References . . . to the law of any country include references to the law of any part of that country.

*Id.* § 3.

opinions;<sup>53</sup>

5) prohibition on rendition where the fugitive, if charged in Hong Kong with the offense relied upon, would be entitled to be discharged under any rule of law relating to previous acquittal or conviction;<sup>54</sup>

6) a requirement that provision be made, by arrangement or by the law of the requesting state, for the observance of a speciality restriction by that state;<sup>55</sup>

7) a committal hearing to be conducted by a magistrate<sup>56</sup> at which evidence sufficient to warrant the fugitive's trial for the relevant offense if it had been committed within the jurisdiction of the court,<sup>57</sup> or proof of a relevant conviction together with evidence from which it appears that the fugitive is unlawfully at large,<sup>58</sup> must be produced if the request is to be successful;

8) a right to apply for habeas corpus as the method of review;<sup>59</sup>

9) a duty upon a court hearing an application for habeas corpus to consider any claim that, by reason of the trivial nature of the relevant offense, the passage of time or because the accusation against the fugitive was not made in good faith in the interests of justice, it would, having regard to all the circumstances, be unjust or oppressive to surrender the fugitive;<sup>60</sup>

10) general discretion given to the Governor of Hong Kong as to whether a person the courts have determined may lawfully be surrendered will in fact be surrendered, and specific discretion not to surrender a person if that person could be or has been sentenced to death for an offense which is not a capital offense in Hong Kong, or if in all the cir-

<sup>53</sup> *Id.* § 4(1). This provision does not apply with respect to the United Kingdom or U.K. dependencies. *See also id.* § 4(5) (as to offenses against the life or person of the Head of the Commonwealth).

<sup>54</sup> *Id.* § 4(2).

<sup>55</sup> *Id.* § 4(3).

A person shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return, unless provision is made by the law of that country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Hong Kong be dealt with in that country for or in respect of any offence committed before his return under this Act other than—(a) the offence in respect of which his return under this Act is requested; (b) any lesser offence proved by the facts proved before the court of committal; or (c) any other offence being a relevant offence in respect of which the Governor may consent to his being so dealt with.

*See also id.* § 4(4) as to the possible character of an arrangement under this provision.

<sup>56</sup> *Id.* § 7.

<sup>57</sup> *Id.* § 7(5)(a).

<sup>58</sup> *Id.* § 7(5)(b).

<sup>59</sup> *Id.* § 8(1)-(2)(a). A committed fugitive must be informed of this right and may not be surrendered before either the conclusion of habeas corpus proceedings or 15 days after committal, whichever is the later.

<sup>60</sup> *Id.* § 8(3).

cumstances preference should be given to another request or requisition from a third jurisdiction;<sup>61</sup> and  
 11) the release of an alleged fugitive if rendition after committal is unnecessarily delayed.<sup>62</sup>

### B. Treaty-Based Extradition to Foreign States

The statutory basis for the power to surrender persons lawfully within Hong Kong to non-Commonwealth states is the Extradition Act 1870.<sup>63</sup> By itself, the Extradition Act 1870 has very little effect. Before a request for extradition can be entertained, the Extradition Act 1870 must have been applied to the requesting state by means of an order in council.<sup>64</sup> Such order in council may only be made where the foreign state has entered into an appropriate arrangement—in practice a formal treaty—with Her Majesty's Government.<sup>65</sup> Every order in council for this purpose must be laid before both Houses of the British Parliament.<sup>66</sup>

No separate order in council is required to give the Extradition Act 1870 effect in U.K. colonies. By virtue of section 6, whereby the Extradition

<sup>61</sup> *Id.* § 9.

<sup>62</sup> *Id.* § 10.

<sup>63</sup> More accurately, the Extradition Acts 1870-1935; the Extradition Act, 1870, was amended in 1873, 1895, 1906, 1932, and 1935, the last mentioned amendment being by virtue of § 4 and § 6(4) of the Counterfeit Currency (Convention) Act, 1935. All but the 1895 amendment added offenses to the list in the first schedule and each provided that the previous Act or Acts might be cited together with it in the manner indicated above. As to the application of these amendments and other later additions to the list of extradition offenses in Hong Kong, see *In re an Application by the Attorney General for Judicial Review by Way of Declaration*, HONG KONG L.J. 381 (1985).

<sup>64</sup> Extradition Act, 1870, § 2.

<sup>65</sup> In 1870, the then Attorney General told the House of Commons that the word "arrangement" was used so as to permit extradition pursuant to something less than a formal treaty but that this has never in fact occurred. HARTLEY-BOOTH, *supra* note 44, at 12-13. See also I. STANBROOK, *supra* note 41, at 2. Note however the Hijacking Act, 1971 provides that the Hague Convention on the Unlawful Seizure of Aircraft, 1970 (22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105) might itself amount to the requisite arrangement with respect to foreign states which are parties to the Convention but not parties to a bilateral extradition treaty with the United Kingdom. Hijacking Act, 1971, 19 & 20 Eliz. II, ch. 70, § 3(2). See also Protection of Aircraft Act, 1973, 21 & 22 Eliz. II, ch. 47, with respect to the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 (24 U.S.T. 564, 1974 U.K.T.S. 10, Cmnd. 5524); Internationally Protected Persons Act, 1978, 26 & 27 Eliz. II, ch. 17, § 3(2) with respect to the New York Convention on Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1974 (G.A. Res. 3166, 28 U.N. GAOR Annex Supp. (No. 10) at 146; 28 U.S.T. 1975); Taking of Hostages Act, 1982, 30 & 31 Eliz. II ch. 18, § 3(3) with respect to the Taking of Hostages Convention, 1979 (G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245). See *supra* notes 69-76 and accompanying text (as to the application of these provisions in Hong Kong).

<sup>66</sup> Extradition Act, 1870, § 2. The period stipulated in which an order in council must be laid before the Houses of Parliament is within six weeks of the time the order is made, or within six weeks of the next sitting of Parliament, whichever is sooner. See Statutory Instruments Act, 1946, 9 & 10 Geo. 6, ch. 36, §§ 4(3), 7(2), 7(3), reprinted in 32 HALSBURY'S STATUTES OF ENGLAND 668 (3d ed. 1971).

tion Act 1870 applies in the case of a foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in an order applying the Extradition Act 1870 is liable to be apprehended and surrendered.<sup>67</sup> Section 17 provides that, when applied to a particular foreign state by an order in council, the Extradition Act 1870 shall, unless the order in council provides otherwise, extend to every British possession as if every reference to the United Kingdom or to England in the Act were a reference to that British possession but subject to certain modifications.<sup>68</sup> The modifications are intended to make the procedure more appropriate to the comparatively limited facilities and institutions existing in these possessions.<sup>69</sup> However, the colonies were not given any separate power to extend the Extradition Act 1870 to foreign states in their own right.

The United Kingdom has generally applied the Extradition Act 1870<sup>70</sup> to at least forty-five foreign states with respect to Hong Kong.<sup>71</sup> Additional offenses have been added by other orders in council giving effect to recent multilateral conventions relating to genocide,<sup>72</sup> hijacking,<sup>73</sup> other offenses on aircraft,<sup>74</sup> internationally protected persons<sup>75</sup>

<sup>67</sup> As to the meaning of "Her Majesty's dominions", see K. ROBERTS-WRAY, *supra* note 19, at 23. The term clearly includes British colonies and independent members of the Commonwealth of which the Queen is still the Head of State. Of course, the latter group did not exist in 1870.

<sup>68</sup> The Extradition Act, 1870, § 26 in part provides: "'British possession' means any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, Channel Islands, and Isle of Man . . ."

<sup>69</sup> Extradition Act, 1870, § 17(1) provides that a request for surrender may be made directly to the governor of the possession by an appropriate consul general, consul, vice consul or governor of a foreign colony or dependency. Extradition Act, 1870, § 17(2) dispenses with the requirement of a Secretary of State's warrant and permits powers vested in or authorized or required to be done under the Extradition Act, 1870, by the police magistrate and/or the Secretary of State in relation to the surrender of a particular fugitive to be exercised or done by the governor of the possession alone. Extradition Act, 1870, § 17(4) provides that a judge of a court which exercises in the possession the same powers as the Court of Queen's Bench in England, may discharge a committed fugitive who has not been surrendered within the requisite two months.

<sup>70</sup> As to limited application for the purpose of giving effect to certain multilateral conventions, see *supra* note 65, *infra* notes 71-76.

<sup>71</sup> H. Sinclair, *Extradition*, 9:4 OBITER DICTA 1 (1982). The figure is supported by this author's own search of relevant orders in council, provided that two doubtful states are included. These are the Cameroons and Togo Republics, both includable by virtue of the France Extradition Order, 1928 (1928 No. 575). Note that the United Kingdom does not have a general extradition treaty with the PRC, but the PRC is listed in S.I. 1985/1989 (Hijacking Act, 1971) and in S.I. 1985/1991 (Protection of Aircraft Act, 1973). See also *supra* note 65.

<sup>72</sup> Extradition (Genocide) Order, 1970 (S.I. 1970 No. 147) 18 HALSBURY'S LAWS OF ENGLAND ¶ 209 (4th ed. 1977).

<sup>73</sup> Hijacking Act, 1971 (Overseas Territories) Order, 1971 (S.I. 1971 No. 1739) as amended by S.I. 1973, No. 1893, 18 HALSBURY'S LAWS OF ENGLAND ¶ 209; Extradition (Hijacking) Order, 1971, S.I. 1971, No. 2102, 18 HALSBURY'S LAWS OF ENGLAND ¶ 209, as amended by S.I. 1982, No. 146, 1982 HALSBURY'S LAWS OF ENGLAND ANNUAL ABRIDGEMENT ¶ 1394 (4th ed.) [hereinafter HALSBURY'S ABRIDGEMENT]. See also Tokyo Convention Act, 1967 (Overseas Territories) Order,

and hostage taking.<sup>76</sup> These orders also establish very limited extradition relations with additional states in which the only extraditable offenses are those stipulated in the U.K. legislation that gives domestic effect to the relevant conventions.<sup>77</sup>

Section 18 is also significant. A legislature of a British possession may have made, or may in the future make, provision for "carrying into effect within such possession the surrender of fugitive criminals who are suspected of being in such British possession." In such circumstances, an order in council made under the Extradition Act 1870—applying that Act to a particular foreign state—might suspend the operation of the Act, or part of it, within that British possession for as long as the British possession's law continued in force. Alternatively, the British government may, again by order in council, direct that the law or ordinance or any part thereof of the British possession shall have effect in that possession as if it were a part of the Extradition Act 1870. The Hong Kong legislature passed an ordinance in 1875 to give better effect to the Extradition Act 1870.<sup>78</sup> That Ordinance is to be read as part of the Extradition Act 1870 in Hong Kong.<sup>79</sup>

The procedure specified for an individual application under the Extradition Act 1870 is similar to that in the Fugitive Offenders Act 1967 except that the "unjust and oppressive" discretion does not apply,<sup>80</sup> the

1968 (S.I. 1968, No. 1864), 2 HALSBURY'S LAWS OF ENGLAND ¶ 825; Extradition (Tokyo Convention) Order, 1971, S.I. 1971, No. 2103, 2 HALSBURY'S LAWS OF ENGLAND ¶ 1358, *as amended by* S.I. 1982, No. 149, 1982 HALSBURY'S ABRIDGEMENT ¶ 1401.

<sup>74</sup> Protection of Aircraft Act, 1973 (Overseas Territories) Order, 1973 (S.I. 1973, No. 1757), 18 HALSBURY'S LAWS OF ENGLAND ¶ 241; Extradition (Protection of Aircraft) Order, 1973 (S.I. 1973, No. 1756), *as amended by* S.I. 1982, No. 148, 1982 HALSBURY'S ABRIDGEMENT ¶ 1399.

<sup>75</sup> Internationally Protected Persons Act, 1978 (Overseas Territories) Order, 1979 (S.I. 1979, No. 456), 1979 HALSBURY'S ABRIDGEMENT ¶ 1354; Extradition (Internationally Protected Persons) Order, 1979 (S.I. 1979, No. 453), 1979 HALSBURY'S ABRIDGEMENT ¶ 1285, *as amended by*, S.I. 1982, No. 147, 1982 HALSBURY'S ABRIDGEMENT ¶ 1397.

<sup>76</sup> Taking of Hostages Act (Overseas Territories) Order (S.I. 1982, No. 1540) 1982 HALSBURY'S ABRIDGEMENT ¶ 1464; Extradition (Taking of Hostages) Order, 1985 (S.I. 1985, No. 751) 1985 HALSBURY'S ABRIDGEMENT ¶ 1016.

<sup>77</sup> See *supra* notes 65, 70-76.

<sup>78</sup> See *supra* note 18. The Ordinance provides that the powers vested in the Secretary of State with respect to particular applications under the Extradition Act 1870 (as amended in 1873) shall be exercised by the Governor of Hong Kong. The powers vested in a police magistrate under the Extradition Act 1870 may be exercised by any magistrate in Hong Kong. Furthermore, any prison set aside for the time being as such under the Prisons Ordinance, 1954 (cap. 234) may be used as a prison for the purposes of the Acts.

<sup>79</sup> Order in Council, March 20, 1877, directing that the "Extradition Ordinance (Hong Kong) 1875" shall have effect in Hong Kong as if it were part of the Imperial Act.

<sup>80</sup> Apart from allegations under the political offense exception, English courts have consistently refused to entertain allegations of bad faith, oppression or breaches of natural justice arising from a request under the Extradition Act 1870. *In re Arton* No. 1, 1 Q.B. 108 (1896); *Atkinson v. United*

political offenses exception is narrower<sup>81</sup> and there is no express mention of capital sentences.<sup>82</sup> The term "extradition crime" is also significantly different from "relevant offence".<sup>83</sup> The Governor has an apparently unqualified residual discretion to refuse an extradition request which the courts have said could legally be allowed, although in practice the exercise of this discretion is largely governed by treaty.

### C. Extradition to China

Hong Kong's early interests in extradition were largely confined in two classes of cases: those involving persons sought by authorities in mainland China;<sup>84</sup> and those involving persons sought by or having escaped to the neighboring Portuguese territory of Macau. Extradition to and from Macau is now governed by the Extradition Act 1870 in conjunction with the Portugal (Extradition) Order 1894<sup>85</sup> and need not be

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States, 1971 A.C. 197. These are matters for the Secretary of State in the United Kingdom and for the Governor in Hong Kong.

<sup>81</sup> See Extradition Act, 1870, § 3(1). See also § 9 as to the receipt of evidence by the magistrate and § 7 as to the functions of the Secretary of State in this respect. In reference to extradition between Hong Kong and the United States, see *Exchange of Notes amending the supplementary treaty of 25 June 1985 concerning the Extradition Treaty signed at London on 8 June 1972*, Cmnd. 9915; United States (Extradition) (Amendment) Order, S.I. 1986, No. 2020, discussed in Current Legal Developments, *Extraterritorial Jurisdiction and Extradition*, 36 INT'L & COMP. L.Q. 398 (1987).

<sup>82</sup> A few treaties do include capital offense restrictions: Portugal (mandatory prohibition); Peru, Romania, United States (discretionary).

<sup>83</sup> Extradition Act, 1870, § 26, as it applies to Hong Kong, defines "extradition crime" as "a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act." The first schedule provides that the list of crimes therein is to be construed according to the law existing in Hong Kong. The effect of this is that the criminality of the fugitive's behavior with respect to the law of the requesting State will be assumed by the court without specific proof unless the relevant treaty provides otherwise. *In re Nielsen*, 1 A.C. 606 (1984); *McCaffery v. United States*, 1 W.L.R. 867 (1984); *Levy v. Attorney Gen. of H.K.*, 1 H.K.L.R. 777 (1987); Brabyn, *Exceptional Accusation Cases under the Extradition Acts 1870 to 1935* [1987], 1988 CRIM. L.R. 796 (as yet an unpublished manuscript).

<sup>84</sup> Early difficulties involving the transfer of prisoners from Hong Kong to the Mainland are chronicled in 1 J. NORTON-KYSHE, *THE HISTORY OF THE LAWS AND COURTS OF HONG KONG* 92-93, 257, 260, 276 (1971) [hereinafter NORTON-KYSHE]. See also 2 NORTON-KYSHE 83, 187, 411. References to extradition in vol. 2 all relate to extradition under the Treaty of Tiensin as discussed in the text below.

<sup>85</sup> 1894 No. 102, as amended by S.R. & O. 1933 No. 678. Extradition between Hong Kong and Macau has had a colorful history. The British government at one time purported to doubt whether Macau was a Portuguese colony and, through the Hong Kong legislature, asserted jurisdiction over British subjects there. Macau was assimilated to the Chinese mainland for this purpose. See Ordinance No. 1 of 1844. Certain Portuguese persons lawfully within Hong Kong were summarily dispatched to Macau for trial despite the complete absence of any statutory authority to do so. 1 NORTON-KYSHE, *supra* note 84, at 105-06. The Hong Kong legislature eventually passed a series of ordinances to provide for extradition to Macau; the first in 1870, the last in 1881 (and repealed by Proclamation No. 3 of 1920). These ordinances were open to the same objections as to their extra-



further considered here. As to persons sought by the authorities in mainland China, article IX of the Supplementary Treaty of 1843 provided for the surrender to China of Chinese subjects, found within Hong Kong or on board British ships, whose surrender was requested by the Chinese authorities in order for them to face criminal charges, and for the surrender of British subjects found on Chinese territory whose return was sought by the British Crown.<sup>86</sup> With the requisite statutory authority for such surrender being necessarily extraterritorial in nature, views as to the legislative powers of colonies at the time would have suggested it ought to have been enacted by the British Parliament.<sup>87</sup> In fact, it was enacted by the Governor and Legislative Council of Hong Kong. The first of a series of ordinances was passed in 1850,<sup>88</sup> the last in 1889.<sup>89</sup>

Whether the Governor and Legislative Council had any power to pass these various ordinances does not appear to have been considered or challenged until 1908.<sup>90</sup> At that time, an ingenious argument was adopted in order to enable the courts to uphold the legality of the 1889 Ordinance<sup>91</sup> which as a consequence is still part of the Hong Kong stat-

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territorial effect and the competence of the Hong Kong legislature as those dealing with extradition to China, but the point never appears to have been tested. See *In re Kong Chi-ien*, 14 H.K.L.R. 48 (1919).

<sup>86</sup> Supplementary Treaty, reprinted in 6 HERTSLET'S COMMERCIAL TREATIES 262 (under the heading "Supplementary Treaty between Great Britain and China). Signed (in English and Chinese languages) at Hooman-Chae, 8th October, 1843." See also G. ENDACOTT, GOVERNMENT AND PEOPLE IN HONG KONG 27-37 (1964). Note that the article extends to deserting British soldiers and British seamen.

<sup>87</sup> *Supra* note 19.

<sup>88</sup> An Ordinance to provide for the more Effective Carrying out of the Treaties between Great Britain and China insofar as relates to Chinese Subjects within the Colony of Hong Kong (1889 No. 2). There were also a number of ordinances designed to deal with Chinese accused of piracy on the open sea; e.g. An Ordinance for the Rendition in Certain Cases of Chinese Subjects charged with Piracy (1895 No. 13). These appear to have had a separate origin.

<sup>89</sup> *Supra* note 15. This ordinance refers to the Treaty of Tiensin 1858, Article XXI which also provided for extradition, but only from Hong Kong. The text of this treaty is reprinted in 10 HERTSLET'S COMMERCIAL TREATIES 50. The duplication of extradition provisions actually caused some confusion so that it was thought necessary in 1871 to pass an ordinance to remove doubts as to the continued application of the 1850 Ordinance. See *Kwok Ah-sing v. Attorney Gen. of Hong Kong*, 5 L.R.-P.C. 179 (1873) and Ordinance No. 2 of 1871. Both the 1850 and 1871 Ordinances were repealed by the present one which has itself been amended several times. See 1908 No. 5; 1909 No. 37; 1911 Nos. 50, 51, 62, 63; 1915 No. 20; 1924 No. 5; 1927 No. 17; 1937 No. 27; 1970 No. 21, sch. II. Indirect reference to the Supplementary Treaty, the Treaty of Tiensin and the 1889 Ordinance is made in the Peking Convention 1898 by virtue of which the lease over the land commonly called the New Territories was acquired. See P. WESLEY-SMITH, UNEQUAL TREATY 1898-1997 CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES 175-76 (1980) [hereinafter WESLEY-SMITH, UNEQUAL TREATY].

<sup>90</sup> *In re Iu Ki-shing*, 3 H.K.L.R. 20 (1908).

<sup>91</sup> The then Chief Justice, Sir Francis Piggott, accepted that the Hong Kong colonial legislature had no power to enact extraterritorial legislation and the fact of the King having approved or not disallowed the Ordinance did not alter this position. However, he concluded that Hong Kong

ute books today. However, the Ordinance is no longer in use.<sup>92</sup>

As a consequence, extradition relations between the PRC and Hong Kong are effectively confined to cases falling within the terrorist conventions by which both governments are bound. It is possible that informal cooperation in the nature of disguised extradition<sup>93</sup> on the part of Hong Kong may occur but the author has been unable to document this.<sup>94</sup> It is understood that it is not the practice of the Hong Kong government to request the surrender of fugitives who have returned to the PRC.<sup>95</sup>

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was a Crown Colony. What the Hong Kong legislature had no power to do, the U.K. King was able to do by virtue of his undoubted prerogative powers. The King's failure to disallow the Ordinance meant that the King must be assumed to have approved it; such approval is an exercise of the prerogative power to legislate and hence the Ordinance is valid. This argument was expanded in later cases but has recently been doubted, such as in *Winfat Enterprises (H.K.) Co. Ltd. v. Attorney Gen.*, 14:2 H.K.L.R. 227-30 (1984), and has not been adopted in other jurisdictions. See Clarke, *supra* note 19, at 225-26 and Wesley-Smith, *supra* note 19, at 162-66.

<sup>92</sup> Hong Kong officials have indicated that the PRC authorities refuse to take advantage of the legislation because of reference therein to the unequal Treaty of Tiensin. See *supra* note 84. As to the PRC position concerning the Treaty of Tiensin in general, see P. WESLEY-SMITH, *UNEQUAL TREATY*, *supra* note 89 at 161-63; *Report on the Hong Kong Accord by Chinese Foreign Minister and State Councillor Wu Xueqian*, in *THE HONG KONG SOLUTION* 51-53; *A Great Event of Historic Significance*, in *THE HONG KONG SOLUTION* 67-68 (Renmin Ribao editorial); Huang Xiang, *Sino-British Agreement—a Landmark*, in *THE HONG KONG SOLUTION* 99-100. The Nationalist government also rejected certain treaties with Western countries as being unequal. NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* 201-05 (1971). Nevertheless, the Hong Kong legislation was relied upon by various Chinese authorities prior to 1939. See *In re Wong Ka-cheong*, 1 H.K.L.R. 1 (1905); *In re Iu Ki-shing*, 3 H.K.L.R. 20 (1908); *Sun Ah-wan v. Regina*, 5 H.K.L.R. 58 (1910); *In re Li Yu-mui*, 5 H.K.L.R. 227 (1910); *In re Chung Sau-nam*, 9 H.K.L.R. 26 (1914); *In re Hung Siu-lun*, 10 H.K.L.R. 114 (1910); *Un Kin v. Regina*, 23 H.K.L.R. 34 (1928); *In re Joseph Evangelist Besa*, 26 H.K.L.R. 35 (1933); *In re Tong Wan-kui* 27 H.K.L.R. 42 (1935).

<sup>93</sup> SHEARER, *supra* note 4, at 78 explains the term. Normally, deportation or expulsion is intended simply to remove a person from the territory of a particular state. Then a deporting state has little interest in the destination of the deportee, except to ensure that it is one by which the deportee will be accepted. Sometimes the prime concern is to return a person to a particular state for criminal prosecution and punishment with deportation merely being the method selected to achieve this end. This is really extradition in disguise, hence the common term "disguised extradition."

<sup>94</sup> In any case, it would be difficult to prove since people who have a right of abode in Hong Kong are not liable to deportation. Thus the only persons returned from Hong Kong would be PRC or third-state nationals, for the vast majority of whom the PRC is likely to be a reasonable destination (whether by virtue of nationality, proximity or port of entry criteria). The deportation does not become a disguised extradition simply because the authorities of the state to which a deportee is sent are coincidentally anxious to prosecute or punish the deportee for a criminal offense. The term "disguised extradition" is only appropriate where achieving the function of extradition is one of the principal motivations for the deportation. As to Hong Kong immigration laws, see Immigration Ordinance, 1964 Laws of Hong Kong, cap. 115 as amended by L.N. 382/1984, 1985 No. 40, L.N. 353/85, 1986 No. 61, L.N. 277/1986, 1987 Nos. 21, 31. See also W. Clarke, *Hong Kong Immigration Control: The Law and The Bureaucratic Maze* 16 HONG KONG L.J. 342 (1986).

<sup>95</sup> Although there may be an informal exchange of information as to the activities of certain persons while they were in Hong Kong. PRC law specifically provides for the prosecution of Chinese citizens who commit offenses in Hong Kong. See *The Criminal Law of the People's Republic of China*, arts. 4, 5 [hereinafter *Criminal Law of China*] (adopted by the Second Session of the Fifth

## IV. OPTIONS AFTER 1997

A. *A Separate Criminal Justice System*

There is one essential prerequisite for the successful development of any HKSAR extradition process after 1997 which has not yet been mentioned: virtually complete legal and effective separation between the HKSAR criminal justice system and the criminal justice system of the PRC. Without such separation the HKSAR would not be able to guarantee requested states that a surrendered fugitive would not be:

- 1) prosecuted, detained or punished for conduct committed before surrender other than that on the basis of which the fugitive is surrendered unless the fugitive has been given an opportunity to leave the HKSAR or the returning jurisdiction so consents;<sup>96</sup>
- 2) executed even if a lawful death sentence may be imposed;<sup>97</sup> or
- 3) liable to be dealt with otherwise than within the territory of the HKSAR and in accordance with the criminal laws and procedures of the HKSAR, again, unless the fugitive has been given an opportunity to leave the HKSAR or the returning jurisdiction so consents.<sup>98</sup>

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National People's Congress, July 1, 1979 and effective as of January 1, 1980), reprinted in *THE CRIMINAL LAW AND CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 5* (1984) (Foreign Languages Press ed.). Even previous prosecution in a foreign court is not a bar to the exercise of such jurisdiction. The Hong Kong authorities may take a different view in the case of a person who has escaped from custody in Hong Kong and then fled into the PRC. Such a situation arose recently with respect to a person who escaped from custody in Macau. He was eventually recaptured by the PRC police. The Macau authorities had apparently requested PRC assistance. His repatriation to Macau was reported in the S.C.M.P., Oct. 17, 1987. The operation was said to be low-key because of the absence of any formal extradition agreement between Macau and the PRC.

<sup>96</sup> See *supra* note 55. Exclusive control over all prosecutions within the HKSAR territory is the requirement. This must extend to prosecutions for counterrevolutionary and other political offenses.

<sup>97</sup> In practice this means the HKSAR must have final authority to stay an execution and commute a death sentence imposed by courts within its jurisdiction, and that PRC criminal law, specifically PRC punishments, are not applied in the HKSAR. See *Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals who Seriously Undermine the Economy*, adopted by the 22nd Session of the Standing Committee of the Fifth National People's Congress, Mar. 8, 1982; *Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminal Elements who Seriously Endanger Public Safety*, adopted by the Second Session of the Standing Committee of the Sixth National People's Congress, Sept. 2, 1983. The text of these and other decisions affecting the procedure for the imposition and carrying out of death sentences are reproduced in *THE CRIMINAL LAW AND CRIMINAL PROCEDURE LAW OF CHINA 217-51* (1984).

<sup>98</sup> This is really an extension of the specialty guarantee but a prohibition upon surrender to third states is specifically mentioned in many extradition laws and treaties, including U.K. treaties with Belgium and the United States. For the HKSAR, the prohibition must extend even to surrender to another jurisdiction within the same state. For this reason, the HKSAR must be in a position to resist any request for physical or legal control of a returned person by the central or other provincial authorities, at least until the expiration of any requisite or reasonable time period within which the returned person has had an opportunity to leave the PRC territory completely. Again, this

Most states would not even consider surrendering fugitives to the HKSAR unless they were confident of obtaining these guarantees.<sup>99</sup> However, it is unlikely that satisfying this prerequisite will be a problem. According to the Joint Declaration, the HKSAR "will enjoy a high degree of autonomy except in foreign affairs and defence affairs."<sup>100</sup> More specifically, "the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained save for any that contravene the Basic Law and subject to amendment by the Hong Kong Special Administrative Region legislature."<sup>101</sup> The Hong Kong judicial system is also to continue in its present form.<sup>102</sup> A prosecuting authority of the HKSAR is to "control criminal prosecutions free from any interference" from Beijing.<sup>103</sup> The Royal Hong Kong Police are to remain as a separate, though presumably no longer "Royal," entity.<sup>104</sup> As a general proposition, the HKSAR government will be responsible for the maintenance of public order within the HKSAR.<sup>105</sup> These provisions must be intended to mean that the HKSAR will have a distinct criminal justice system, with its own substantive laws and procedures and with exclusive criminal jurisdiction over persons within its boundaries.<sup>106</sup>

In the context of extradition, it is also significant that the Joint Declaration provides that the HKSAR will be entitled to apply its own immi-

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ability must extend to political offenses. This is unlikely to pose a serious threat to the security of the PRC since persons who are of substantial political significance to the PRC are unlikely to be returned to the HKSAR in any case.

<sup>99</sup> *E.g.*, all states and territories with which Hong Kong currently has extradition relations insist upon a specialty guarantee as a prerequisite for surrender. This guarantee may be provided by evidence of the law of the requesting state, the terms of any relevant treaty (compliance with which will be presumed) or executive undertaking in a particular case. The requested state's authorities, however, will wish to be satisfied as to the requesting state's actual ability to comply. As for capital sentences, see *supra* note 82. The Commonwealth Scheme has an optional clause of this kind and even more states are likely to become concerned if execution may be imposed within the HKSAR for the wide range of offenses for which it may presently be imposed in the PRC.

<sup>100</sup> Joint Declaration, *supra* note 9, para. 3(2). See also Annex I, § I.

<sup>101</sup> *Id.* Annex I, § II. The omission of U.K. acts and orders in council currently in force in Hong Kong would not present any difficulties for a separate criminal justice system since all significant aspects of Hong Kong criminal law and procedure have either been fully domesticated or are part of the common law only.

<sup>102</sup> *Id.* Annex I, § III.

<sup>103</sup> *Id.*

<sup>104</sup> This may be inferred from the Joint Declaration, *supra* note 9, Annex I, §§ IV, XII.

<sup>105</sup> *Id.* Annex I, § XII.

<sup>106</sup> This can be inferred from a report as to a Basic Law Drafting Committee Sub-group meeting, reported in SCMP, March 18, 1987 by S. Leung, in which it was accepted that provision should be made in the Basic Law for extradition between the HKSAR and the remainder of the PRC. It was also accepted that the principle of double criminality would apply. Extradition would not be necessary at all if the HKSAR was not to be a legally distinct jurisdiction. Double criminality is only relevant where there is a possibility of different substantive offenses.

gration controls on entry to, stay in and departure from the HKSAR by persons from foreign states and regions,<sup>107</sup> and that persons holding valid travel documents will be free to leave the HKSAR without special authorization.<sup>108</sup> Added to the separate criminal justice system, these provisions should mean that the HKSAR will be in a position to give requested states the requisite guarantees.

It might even be possible to bypass the diplomatic channels in Beijing. Subject to approval by the Central People's government, the Joint Declaration provides that consular, official, and unofficial missions may be established in the HKSAR.<sup>109</sup> Where a relevant treaty or foreign law requires requests to be sent or received through diplomatic channels, appropriate persons stationed in the HKSAR could often be used.<sup>110</sup>

There is another important corollary. A separate HKSAR jurisdiction means that it will be necessary to develop effective extradition relations between the HKSAR and other jurisdictions within the PRC. This has already been recognized.<sup>111</sup> There is only one complication. The Criminal Law of the PRC creates extensive extraterritorial jurisdiction. A person found within the PRC may presently be prosecuted in the People's courts for conduct which occurred within Hong Kong territory by virtue of the territory being regarded as a part of the PRC,<sup>112</sup> the person being a PRC national<sup>113</sup> or the conduct having a relevant consequence within the PRC.<sup>114</sup> If these provisions remain in effect with respect to conduct occurring within the HKSAR, there is a possibility that extradi-

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<sup>107</sup> Joint Declaration, *supra* note 9, Annex I, § XIV.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* § XI.

<sup>110</sup> Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468. Article VII provides that the request for extradition shall be made through diplomatic channels, subject only to provisional warrants procedures. The present practice is for the U.S. Consul in Hong Kong to make a request for extradition from Hong Kong directly to the Governor.

<sup>111</sup> See *supra* note 106. The report suggested that arrangements may be made at a provincial level, with priority being given to extradition relations between Hong Kong and Guangdong, reflecting their especially close ties. No doubt, whatever arrangements are made will later be extended to extradition between Hong Kong and Macau when China resumes complete control over that territory.

<sup>112</sup> Criminal Law of China, art. 3. As to the PRC view that all of Hong Kong, including Hong Kong Island, is part of the PRC; see COHEN & CHIU, 1 PEOPLE'S CHINA AND INTERNATIONAL LAW 373-84 (1974) and documents cited therein, particularly the PRC government's statement to the U.N. Gen. Ass. Special Comm. on Colonialism, Mar. 10, 1972 at 382-84.

<sup>113</sup> Criminal Law of China, arts. 4, 5. Art. 4 applies to the following crimes: crimes of counterrevolution; crimes of counterfeiting national currency and valuable securities; crimes of corruption, accepting bribes and disclosing state secrets; crimes of posing as state personnel to cheat and bluff; forging official documents, certificates and seals. Art. 5 applies to crimes for which the Criminal Law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment provided that the crime was also punishable according to the law of the place where it was committed.

<sup>114</sup> Criminal Law of China, art. 6.

tion traffic between the PRC and the HKSAR will be almost exclusively one way.

### *B. Criminal Justice and Foreign Affairs*

We have seen that the HKSAR will probably have a criminal justice system which is legally and effectively separate from that of the remainder of the PRC. We have also seen that the high degree of autonomy to be enjoyed by the HKSAR will not extend to foreign affairs or defense affairs. The Joint Declaration provides that these are to be the responsibility of the Central People's government.<sup>115</sup> How might the maintenance of Hong Kong's present extradition powers and relationships by the HKSAR be fitted into this division of responsibilities?

Normally, all aspects of the extradition process could be carried out within a single legal jurisdiction—the jurisdiction of the requested state—but this need not necessarily be so. Where a system of government provides that, within that system, criminal justice is to be administered by largely autonomous but less than sovereign units, responsibility for the judicial aspects of extradition may be given to the judicial organs of those units while responsibility for the executive functions in the process is reserved for the organs of the sovereign parent state.<sup>116</sup> However, not all the executive functions need be reserved for the sovereign state. They too may be divided between the different executive authorities. In such cases, the most obvious division is between functions which concern the creation of extradition relations with other jurisdictions, and functions which relate to the resolution of a particular request; the former being the responsibility of the sovereign executive, the latter of the executive of the entity which administers the criminal justice system. As we have seen, this is the division of functions which presently exists between the U.K. executive and the executive of Hong Kong with respect to extradition from Hong Kong to non-Commonwealth states. Why not then simply allocate the present functions of the U.K. executive to some branch of the executive of the PRC and the specific case functions of the Hong Kong courts and the Hong Kong executive to the courts and executive of the HKSAR?

If this solution were adopted, the general statutory authority for extradition from the HKSAR would consist of a PRC statute by the terms of which responsibility for all aspects of individual applications would be

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<sup>115</sup> Joint Declaration, *supra* note 9, para. 3(2), *id.* Annex I, § I.

<sup>116</sup> *E.g.*, U.S. foreign state extradition law requires the executive extradition function—excluding the initial arrest and detention—to be carried out by the federal authorities, but assigns the judicial functions to the state courts. See 18 U.S.C. 3184. See also Extradition (Foreign States) Act, 1966-85 and Extradition (Commonwealth Countries) Act, 1966-85 (with respect to Australian legislation); Extradition Act (1970 R.S.C. cap. E-21) and Fugitive Offenders Act (1970 R.S.C. cap. F-32) (with respect to Canadian legislation).

handled by the institutions of the HKSAR. Provision for statutes of this kind could be expressly made in the HKSAR Basic Law.<sup>117</sup> Special mention of the fact that the maintenance and development of the HKSAR's extradition relationships would be the sole responsibility of the executive organs of the PRC would not be required.<sup>118</sup>

As to how the PRC might discharge its responsibilities under such a division, the Joint Declaration clearly provides that international agreements to which the PRC is not a party but which are implemented in Hong Kong may continue in force in the HKSAR.<sup>119</sup> However, this is only a statement of agreement by the PRC and the United Kingdom; other parties to U.K. extradition treaties and individual members of the Commonwealth would also have to agree. Extensive negotiations would be required. In this context, Annex II to the Joint Declaration is interesting. That Annex requires the establishment of a Sino-British Joint Liaison Group that is charged with various duties designed to assist in achieving a smooth transition. By virtue of clause 4, matters for consideration during the first half of the period between the time of the establishment of the Joint Liaison Group and July 1, 1997 include "action to be taken by the two Governments to ensure the continued application of

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<sup>117</sup> Such as by including international extradition in a list of subjects concerning which the National People's Congress or its Standing Committee has exclusive authority to legislate with respect to the HKSAR. However, it may be that an express statement would be unnecessary. The U.S. Constitution does not expressly grant power to the U.S. Congress to legislate on international extradition and yet it is not disputed that all proceedings concerning extradition from the United States must be negotiated through the federal authorities. The power of the United States "to surrender a fugitive from a foreign country is included in the constitutional treaty-making power, and in the corresponding power to appoint and receive ambassadors and other public ministers." 31 AM. JUR. 2D *Extradition* § 8. Furthermore, Congress has the power under art. 1, § 8(18) to make all laws necessary and proper for carrying into execution powers vested by the Constitution in the Government of the United States. Since powers with respect to foreign relations are denied to the states, the federal government has exclusive legal jurisdiction to make laws or treaties with respect to international extradition. Presumably, exclusive jurisdiction for the National People's Congress or its Standing Committee to legislate on international extradition could likewise be inferred from an express reservation of responsibility for the HKSAR's foreign relations to the Central People's government in the Basic Law. It is true that the HKSAR might have limited treaty-making and international diplomatic powers in specific areas, but an express grant of limited foreign relations powers must imply the exclusive retention of all other foreign relations powers by the government originally given general responsibility for international affairs. See Chen, *supra* note 9, at 239.

<sup>118</sup> This would be a direct consequence of the reservation of foreign affairs to the Central People's government, together with that government's existing treaty-making powers. The PRC's treaty-making powers are given to the State Council. PRC Const. art. 89(9). Of course, there could be no objection to the Central People's government's responsibility for the HKSAR's extradition relations with other states being expressly stated if such clarification were desirable. A simpler method would be to include in the Basic Law a clause which stipulates the matters upon which the HKSAR has power to negotiate formal agreements with other countries. Extradition need only be excluded from the list.

<sup>119</sup> Joint Declaration, *supra* note 9, § XI. The context does not appear to limit this statement to multilateral agreements.

international rights and obligations affecting Hong Kong."<sup>120</sup> The two governments referred to are those of the PRC and the United Kingdom, but it was inevitable that the government of Hong Kong would also have to be involved. In fact, a new Special Duties Unit, formally part of the Hong Kong Attorney General's Chambers, has been given the tasks of reviewing Hong Kong's existing treaty rights and obligations and of assisting in negotiations undertaken to maintain those rights and obligations in force.<sup>121</sup> Extradition treaties are an important part of this review.

As to negotiations with Commonwealth states, if the PRC government is prepared to accept extradition relations which are not treaty-based, the fact that the HKSAR is not a member of the Commonwealth need not be an insuperable difficulty. There is a partial precedent in the special designation of the Republic of Ireland by some Commonwealth jurisdictions.<sup>122</sup> Since the criminal law and procedure of the HKSAR will remain within the Commonwealth tradition, designation of the HKSAR under relevant Commonwealth legislation may not be as improbable as it initially seems. This would seem true at least by Commonwealth countries from which Hong Kong has already received extradition requests.<sup>123</sup>

As a matter of style, the PRC could either adopt an essentially supportive role in these negotiations, lending authority to a team of mainly Hong Kong officials and thereby increasing the likelihood that the HKSAR would be permitted to take Hong Kong's place within the various arrangements, or it could choose to take a leading role. In the latter case, the commitment required in terms of time and resources would be considerable. Nor can the possibility of a need to negotiate completely new treaties be overlooked, whether to replace existing treaties or to create new ones.<sup>124</sup> Would it be reasonable to expect the PRC to undertake

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<sup>120</sup> The Joint Liaison Group has been established and is functioning actively. See HONG KONG 1987, *supra* note 32, at 41.

<sup>121</sup> Brief reference to the Special Duties Unit is made in HONG KONG 1987, *supra* note 32, at 36. See also references to the Joint Liaison Group Sub-group on International Rights and Obligations, *id.* at 42-43.

<sup>122</sup> The precedent is partial because the Republic of Ireland is a sovereign state. The common point is that while it has no formal connection with the Commonwealth, it does have a compatible criminal justice system.

<sup>123</sup> Australia (5), Canada (1), and United Kingdom (1). These figures are from the Attorney General's Chamber's informal list of extradition cases since 1983. See *supra* notes 7 & 8.

<sup>124</sup> New Treaties might be required by some commonwealth states. There are also some important gaps in Hong Kong's present extradition treaty network. These include relations with Indonesia, the Philippines, Japan, either of the states in the Korean peninsula, any of the states of Indochina and most of the Middle East. Taiwan is another important gap, probably the most significant in fact since a number of Hong Kong criminals are known to have fled there. But the creation of formal extradition relations with that jurisdiction is politically impossible within the foreseeable future. There is some informal cooperation at police level.



these commitments at a national level for what will essentially be a regional return? This raises the possibility of devolution of a limited treaty making power to the HKSAR.

### C. *Devolution of a Treaty Making Power?*

Since the benefits of maintaining Hong Kong's existing extradition relations after 1997 will be enjoyed primarily by the HKSAR, perhaps the principal burden in terms of time and resources should also be borne by the HKSAR. One way of ensuring this would be for the Basic Law to confer the power to negotiate extradition treaties and agreements on the government of the HKSAR.<sup>125</sup> This would certainly be an unusual provision<sup>126</sup> but not, it is submitted, inconsistent with the Joint Declaration.

In the first place, the Joint Declaration specifically provides that the Central People's government will authorize the HKSAR to conduct certain external affairs on its own.<sup>127</sup> These are the external affairs specified in section XI of Annex I. Section XI refers to "appropriate fields" and then gives a number of examples: economic, financial, monetary, shipping, communications, touristic, cultural and sporting fields. It is true that none of these examples are directly connected with extradition but the list does not purport to be exhaustive. In any case, recognition that some aspects of foreign affairs may be delegated to the HKSAR is surely significant.

Secondly, Annex I, section XI mentions both assistance and authorization. Delegation of the requisite treaty making power is a form of authorization. Even if the paragraph was not intended to extend to ex-

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<sup>125</sup> If a full treaty-making power were regarded as inappropriate, a purely domestic power of exclusive designation might be an appropriate alternative, at least with respect to foreign states which do not have a treaty prerequisite. A state could be designated unilaterally if the HKSAR government concluded that the criminal justice system and extradition laws of that state are satisfactory, or after comparatively low-key negotiations. For states which do not insist upon a treaty prerequisite, such designation could provide sufficient grounds to grant reciprocity to the HKSAR. Designation would also be appropriate for those Commonwealth states prepared to grant the HKSAR a special status within the Commonwealth Scheme. The PRC would then only need to be involved where the foreign state insisted upon a full treaty prerequisite.

<sup>126</sup> An examination of the constitutions of other autonomous or special administrative regions reveals a few which indicate a devolution of levels of internal management powers similar to that contemplated for the HKSAR. See generally BLAUSTEIN & BLAUSTEIN, *CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES*. Some U.K. self-governing colonies were granted a measure of control over some economic aspects of their external affairs. ROBERTS-WRAY, *supra* note 19, at 266. Note, however, that these autonomous regions, special administrative regions, or self-governing colonies have or had a parent state with established extradition laws and procedures so that the absence of these powers does or did not place the subordinate entity in a disadvantaged position. This would not be the case for the HKSAR. See also L. di Marzo, *The Legal Status of Agreements concluded by Component Units of Federal States with Foreign Entities*, 1978 CAN. Y.B. INT'L L. 197.

<sup>127</sup> Joint Declaration, *supra* note 9, Annex I, § I.

tradition, it does indicate an approach to international cooperation in the pursuit of legal justice which might reasonably be applied to extradition as well.

It is submitted that a grant of extradition treaty making powers to the HKSAR could be justified by reference to the special circumstances of the PRC and the HKSAR. However, the Central People's government may wish to retain ultimate control as to treaty partners and terms. This could be done by making the implementation of a particular treaty subject to central government approval or by reserving a power of veto to be exercised by the Central People's government within a fixed period after the signing of the treaty. The similarities between such a provision and the "subject to the Secretary of State's approval" proviso to the Hong Kong Governor's present power to designate Commonwealth jurisdictions under the Fugitive Offenders (Hong Kong) Order are obvious. That such a veto would rarely need to be exercised, or approval rarely not be given, in no way detracts from the efficacy of such a provision which may have the added advantage of making direct negotiations with the HKSAR more attractive to other states.<sup>128</sup>

It is perhaps worth noting as a final point that if an extradition treaty or designation power is given to the HKSAR government in the Basic Law, the logical corollary would seem to be that the statute which authorizes extradition in particular cases might be passed by the HKSAR legislature. Again, provision for this could be made in the Basic Law. The Basic Law could also include stipulations as to provisions which the HKSAR extradition must contain, for example, a political offenses exception and a discretion not to surrender PRC citizens to foreign states.

## V. CONCLUSION

It is not a coincidence that at a time when numerous U.K. statutes which originally formed part of Hong Kong's legal system have been domesticated, the U.K. statutes and treaties which provide the basis for Hong Kong's extradition powers and relations have not. The process of extradition is not a purely domestic process. The United Kingdom has retained direct responsibility for Hong Kong's extradition powers and relations as a part of its overall responsibility for the colony's foreign affairs. After 1997, that responsibility will shift to the PRC. However, PRC extradition law may not be compatible with the HKSAR's domestic legal system. Furthermore, the PRC has very limited formal extradition relations with other states. Unless special arrangements are made, it is probable that Hong Kong's present abilities to extradite and to obtain

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<sup>128</sup> It is submitted that a provision of this kind could enable difficult political questions as to the consequences of sovereignty to be avoided.

extradition will be seriously curtailed after 1997. Discussions as to the possible nature of those special arrangements are already in progress.

Two major questions arise. Should the statutory authority to extradite required by the HKSAR legal system be supplied directly by the National People's Congress, or its Standing Committee, or by the legislature of the HKSAR? Should the requisite executive authority be that of the Central People's government or of the government of the HKSAR or some combination of both? Answers to both questions will depend upon three factors: 1) the drafters' perceptions as to the importance of the foreign affairs aspect of extradition; 2) the perceived preferences of other sovereign states as between entering into extradition relations with the PRC on the HKSAR's behalf and entering into extradition relations with the HKSAR directly; and 3) allocation of resource expenditure between the Central People's government and the government of the HKSAR. Whatever course is eventually adopted, if the consequence is that the HKSAR is able to assume the present extradition powers and relations of Hong Kong, we can be certain that the position of the HKSAR within the international community will be unique.