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Choy Dick Wan

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# PRISONER TRANSFER BETWEEN HONG KONG AND MAINLAND CHINA: A PRELIMINARY ASSESSMENT

*Choy Dick Wan*\*

## INTRODUCTION

Since the handover of Hong Kong to the People's Republic of China ("PRC"), the number of cross-border crimes committed by residents of Hong Kong in mainland China ("the Mainland") and vice versa has increased drastically. The increase in cross-border crimes and punishments has naturally led to a rise in the number of each jurisdiction's residents serving sentences in the other jurisdiction. However, even though ten years have passed since the sovereignty of Hong Kong reverted to the PRC on July 1, 1997,<sup>1</sup> no prisoner has been transferred to his home jurisdiction from either Hong Kong or the Mainland.

Prisoner transfer, which allows foreign prisoners to be transferred back to their home countries to serve their remaining sentences, is internationally regarded as necessary on both humanitarian and rehabilitative grounds.<sup>2</sup> It also improves the administrative efficiency of prisons in jurisdictions that sentence foreigners by minimizing the costs and difficulties associated with incarcerating foreigners (such as language barriers and different dietary habits). The principal cause of the failure to transfer prisoners to their home jurisdictions in Hong Kong or the Mainland is the lack of a prisoner transfer agreement ("PTA") between the two jurisdictions.

Michal Plachta has remarked that a standing (bilateral or multilateral) PTA is essential to international prisoner transfer because it provides "an appropriate legal basis" for the relevant transfer and facilitates smoother and more expedient transfers.<sup>3</sup> However, various fundamental principles commonly adopted in bilateral and multilateral PTAs have already

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\* L.L.B., P.C.L.L., L.L.M., Research Fellow, Department of Law, University of Hong Kong. The Author would like to thank Professor Richard Cullen and Professor Fu Hualing for their comments on earlier versions of this Article and the Editorial Board of the *Brooklyn Journal of International Law* for their assistance in preparing this Article for publication.

1. Edward A. Gargan, *Hong Kong, China: The Overview; China Resumes Control of Hong Kong, Concluding 156 Years of British Rule*, July 1, 1997, N.Y. TIMES, at A1.

2. Council of Europe, Explanatory Report to the Convention on the Transfer of Sentenced Persons para. 9, available at <http://conventions.coe.int/Treaty/en/Reports/Html/112.htm> [hereinafter Explanatory Report to the CTSP].

3. MICHAL PLACHTA, TRANSFER OF PRISONERS UNDER INTERNATIONAL INSTRUMENTS AND DOMESTIC LEGISLATION: A COMPARATIVE STUDY 255 (1993).

proved problematic in international practice. Given the fact that Hong Kong and the Mainland are two independent jurisdictional sovereignties under the One Country, Two Systems principle,<sup>4</sup> it can be anticipated that the same problems that arise in international prisoner transfer are likely to arise in prisoner transfer between Hong Kong and the Mainland. Moreover, the political, legal, economic, social, and cultural differences between the two jurisdictions can be expected to cause additional troubles and controversy. Therefore, reaching a PTA that will satisfy both Hong Kong and the Mainland is bound to be an extremely difficult and tedious process.

Should the prisoners in both Hong Kong and the Mainland be deprived of the right to be transferred home to serve their remaining sentences simply because of the lack of a PTA between the two jurisdictions? How effective will any future Hong Kong-Mainland PTA be in facilitating prisoner transfer between the two jurisdictions? Are there any alternatives to transfer on the basis of a standing PTA? This Article assesses the challenges to negotiating and implementing a PTA between Hong Kong and the Mainland and explores alternative mechanisms to facilitate prisoner transfer absent a standing PTA.

Part I of this Article briefly explains the necessity of prisoner transfer between Hong Kong and the Mainland. Part II discusses the international norms regarding prisoner transfer and highlights the five fundamental principles that are commonly included in international PTAs, namely the requirements of nationality/residence, double criminality, finality of judgment, minimum remaining sentence, and tripartite consent. Additionally, the bilateral PTAs China and Hong Kong, respectively, have signed with other jurisdictions will be introduced. These PTAs and the two jurisdictions' experiences in concluding them are useful references in assessing the problems likely to arise in the negotiation of a PTA between Hong Kong and the Mainland. Focusing on the five fundamental principles governing international prisoner transfer, Part III analyzes the possible problems Hong Kong and the Mainland would face if those principles were adopted in any future PTA between the two jurisdictions. Part IV examines the possibility of ad hoc prisoner transfer and repatriation/deportation as alternative means to facilitate the transfer of prisoners between Hong Kong and the Mainland, and argues that these methods

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4. For detailed arguments on the jurisdictional issues between Hong Kong and the Mainland, see, for example, H.L. Fu, *The Relevance of Chinese Criminal Law to Hong Kong and Its Residents*, 27 H.K. L.J. 229 (1997); Hualing Fu, *One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?*, H.K. LAWYER, Jan. 1999.

may be more practical, especially while a formal PTA between Hong Kong and the Mainland has yet to be concluded.

#### I. THE NEED FOR A PRISONER TRANSFER MECHANISM BETWEEN HONG KONG AND THE MAINLAND

As a direct consequence of the increase in cross-border crime between the Mainland and Hong Kong, the Mainland-resident inmate population in Hong Kong has soared.<sup>5</sup> In 1999, for example, 3024 out of 11,571 prisoners in Hong Kong came from the Mainland.<sup>6</sup> In 2003, among the 13,086 prisoners in Hong Kong, 3759 of them came from the Mainland.<sup>7</sup> Thus, the number of Mainland prisoners increased by 24% during the period from 1999 to 2003.<sup>8</sup> As of November 2005, there were 3502 Mainlanders serving sentences in Hong Kong, representing 28.8% of the prison population.<sup>9</sup> Despite a gradual improvement in this situation in the last several years, Mainlanders still constituted 23% of Hong Kong's prison population as of mid-January 2008.<sup>10</sup> The large Mainland prison population in Hong Kong is particularly striking with respect to female prisoners. Mainland women constituted about 70% of the total female penal population in Hong Kong in 2006.<sup>11</sup> A majority of the female Mainland prisoners in Hong Kong were imprisoned for breach of conditions of stay and prostitution.<sup>12</sup>

The large number of Mainland prisoners has aggravated the already overcrowded prison conditions in Hong Kong, increasing the workload of the penal staff and causing hardship for the inmates.<sup>13</sup> Given that

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5. See Dennis Chong, *Mainlanders Pour into Jail*, THE STANDARD (H.K.), Nov. 18, 2003.

6. *Id.*

7. *Id.*

8. *Id.*

9. LEGISLATIVE COUNCIL SECRETARIAT, PANEL ON SECURITY, LC PAPER NO. CB(2)755/05-06, at 5 (2005), available at <http://www.legco.gov.hk/yr05-06/english/panels/se/minutes/se051101.pdf> [hereinafter LC PAPER NO. CB(2)755/05-06].

10. *Jianyu jipo; Jian-guan-bu jihua chongjian Chi Ma Wan cheng-jiao-shu* [Prisons Are Overcrowded; Correction Services Department Plans to Rebuild Chi Ma Wan Prison], WENHUI BAO [WEN HUI DAILY], Jan. 18, 2008.

11. Wendy Leung, *Safety Fears for Inmates at Overcrowded Female Jails*, THE STANDARD (H.K.), Jan. 18, 2006.

12. *Id.*; Kristine Kwok, *Jail Revamp to Create 2,600 Places in Ten Years*, SOUTH CHINA MORNING POST, Feb. 3, 2005.

13. See Kwok, *supra* note 12. According to the Commissioner of Correctional Services in Hong Kong, as of February 2005, prisons in Hong Kong were fourteen percent over capacity. *Id.*

Hong Kong has been a role model for the Mainland in many respects,<sup>14</sup> the Correctional Services Department of Hong Kong has been further stressed by the pressure to maintain the high standards of Hong Kong's penal system. Poor prison conditions and substandard treatment of the inmates threatens to tarnish the image of the Hong Kong system in the eyes of both the inmates and the Mainland authorities. Worse, it may eventually undermine Hong Kong's image in the international community.

Hong Kong is part of the PRC; as with most of Hong Kong's residents, a majority of the Mainlanders who serve sentences in Hong Kong are ethnically Chinese.<sup>15</sup> But there are in fact a wide range of differences between Hong Kong residents and Mainland residents. These include different spoken dialects, written characters, living styles, and dietary habits.<sup>16</sup> These differences are most palpable with respect to Mainlanders from the northern part of China. As a result of these differences, a Mainland prisoner in Hong Kong may have an experience not unlike a

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14. For example, China drew on Hong Kong's Independent Commission Against Corruption as a model when considering the establishment and mode of operation of its National Bureau of Corruption Prevention (which was established on May 31, 2007). *Xianggang dute tiwei nanyi tidai [Hong Kong's Unique Status Is Difficult to Replace]*, DAGONG BAO [DA KUNG PAO NEWS], June 29, 2007. In order to further promote Mainland adoption of Hong Kong-style governance, Gao Siren, Director of the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region ("HKSAR"), has pointed out that the Mainland could learn about economic innovation from Hong Kong. *Id.* In addition, Chen Cunyi, Deputy Chief of the Ministry of Public Security's Drug Control Bureau, has opined that Hong Kong's anti-drug measures, including drug use prevention and rehabilitation, and methods of combating drug-related crimes could serve as models for counterpart measures in the Mainland. Yang Zhe, *Gongan-bu gaoguan tan Xianggang jin du [High Official of Ministry of Public Security Talked About Hong Kong's Drug Controls]*, ZIJING ZAZHI WANGLUO BAN [BAUHNIA MAGAZINE ONLINE], Mar. 2007, available at <http://www.baumag.com.hk/BIG5/channel3/03/0334.html>.

15. As of January 2002, ninety percent of the inmates in Hong Kong prisons were ethnically Chinese; 27.5% of the inmates were Mainland Chinese. See SECURITY BUREAU OF THE HKSAR, PRISON DEVELOPMENT PLAN, LC PAPER NO. CB(2)1023/01-02(03), annex A, app. C (2002), available at <http://www.legco.gov.hk/yr01-02/english/panels/se/papers/se0207cb2-1023-3e.pdf> [hereinafter LC PAPER NO. CB(2)1023/01-02(03)].

16. *Faguan zhi yuyan yinshi butong zeng zuo jian zhi ku; she fei lie waiji fan huo jian xing [Judge Pointed Out That Differences in Language and Dietary Habit Increases the Hardship of Imprisonment; Criminals Who Illegally Entered Hong Kong Being Classified as Foreign Prisoners and Granted Sentencing Reductions]*, XIN BAO [H.K. DAILY NEWS], Sept. 15, 2001, at A5 [hereinafter *Differences in Language and Dietary Habit*]. For example, a majority of people in the Mainland speak Mandarin and write with simplified Chinese characters, while a majority of the Chinese people in Hong Kong speak Cantonese and write with traditional Chinese characters.

non-Chinese foreign prisoner. Moreover, the strict outbound travel policy for residents of the Mainland (though this has been substantially relaxed in recent years)<sup>17</sup> makes it difficult for Mainland prisoners to receive visits from their families. Overall, Mainland prisoners and foreign prisoners face similar hardships, and both are non-locals in Hong Kong.

This similarity was captured in an opinion by a district court judge in Hong Kong.<sup>18</sup> In deciding a case involving a burglary by two Mainland illegal immigrants, the judge pointed out that both Mainlanders and expatriates are “outsiders” within Hong Kong and Mainlanders should thus be considered “foreigners.”<sup>19</sup> Mainland prisoners, the judge noted, suffer the same (or greater) hardships as expatriate prisoners.<sup>20</sup> Taking this into consideration, the judge reduced the sentences of the prisoners by two months.<sup>21</sup> This judgment was subsequently reversed by the Court of Appeal of the High Court on two grounds: 1) “foreignness” does not entitle non-local prisoners, including foreign nationals and Chinese nationals, to a reduction of sentence as a matter of right; and 2) Chinese nationals from the Mainland are not “foreigners” because Hong Kong is a part of China.<sup>22</sup> The Court of Appeal’s consideration of the “foreignness” of both foreigners and Mainlanders as non-locals implied that both foreign nationals and Mainlanders in Hong Kong prisons should receive equal treatment. Furthermore, although the court emphasized that Mainlanders should not be regarded as foreigners, it still considered the hardships that

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17. One measure that relaxed the stringent outbound travel policy in the Mainland was the Individual Visit Scheme. See Government of the Hong Kong Special Administrative Region [HKSAR], Tourism Commission, Visitor Information: Individual Visit Scheme, [http://www.tourism.gov.hk/english/visitors/visitors\\_ind.html](http://www.tourism.gov.hk/english/visitors/visitors_ind.html) (last visited Feb. 19, 2008). In the past, it was very difficult for Mainlanders to travel to Hong Kong, even as tourists. Since the introduction of the Individual Visit Scheme on July 28, 2003, it has become easier for Mainlanders to visit Hong Kong. As of February 2008, the scheme had been extended to forty-nine cities in mainland China. *Id.*

18. *Differences in Language and Dietary Habit*, *supra* note 16.

19. *Id.*

20. *Id.* The judge noted that, as with expatriate prisoners, Mainland prisoners encounter hardships stemming from dietary differences and problems receiving visits from their families. *Id.* Mainland prisoners are also discriminated against by the local prisoners in the same way that many Mainland residents generally feel discriminated against in Hong Kong. *Id.*

21. *Id.*; *Guan zhi bi waiji jiu fan geng ku; liang she ke bu guan gang jian yu huo jian xing* [Judge Pointed Out That They Suffer More Hardship Than Foreign Prisoners; Two Illegal Immigrants Unaccustomed to Hong Kong Prison Being Granted Sentencing Reductions], SINGTAO RIBAO [SINGTAO DAILY], Sept. 15, 2001, at A13.

22. See Secretary of Justice v. Ng Kit, [2001] CAAR 14/2001, <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp> (C.A.).

the two prisoners might face as Mainlanders.<sup>23</sup> Because foreign prisoners in Hong Kong have the right to request a transfer to their home countries to serve their sentences (based on standing PTAs between Hong Kong and their home countries or in the form of ad hoc transfer),<sup>24</sup> there is no reason, practical or theoretical, why Mainland prisoners should be deprived of such right.

## II. INTERNATIONAL NORMS AND DOMESTIC LAW

### *A. Major Conditions for Prisoner Transfer Under International Law*

The Convention on the Transfer of Sentenced Persons (“CTSP”), drafted by the Council of Europe in 1983,<sup>25</sup> is the foremost multilateral treaty governing the transfer of prisoners.<sup>26</sup> As the Explanatory Report to the CTSP states, “[t]he purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious.”<sup>27</sup> Unlike other European conventions, the CTSP is open to both member states and non-member states of the Council of Europe.<sup>28</sup> As of February 2008, forty-seven member states and seventeen non-member states had signed and/or ratified the CTSP.<sup>29</sup>

In 1985, almost two years after the entry into force of the CTSP, the United Nations adopted the Model Agreement on the Transfer of Foreign Prisoners (“Model Agreement”).<sup>30</sup> The Model Agreement is largely a

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23. *Id.*

24. SECURITY BUREAU OF THE HKSAR, PROVISIONAL LEGISLATIVE COUNCIL PANEL ON SECURITY, TRANSFER OF PRISONERS (1997), available at <http://www.legco.gov.hk/yr97-98/english/panels/se/papers/se2011-5.htm> [hereinafter SECURITY BUREAU, TRANSFER OF PRISONERS].

25. Council of Europe Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 1496 U.N.T.S. 92, 22 I.L.M. 530 [hereinafter CTSP].

26. Torben Akel, *Barred from Jail Time at Home*, N.Z. HERALD, Dec. 8, 2007, available at [http://www.nzherald.co.nz/section/1/story.cfm?c\\_id=1&objectid=10481059&num=0](http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10481059&num=0).

27. Explanatory Report to the CTSP, *supra* note 2, para. 8.

28. CTSP, *supra* note 25, art. 19.

29. Council of Europe, Convention on the Transfer of Sentenced Persons: Status, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=&CL=ENG> (last visited Feb. 19, 2008) [hereinafter CTSP Status].

30. United Nations [U.N.] Dep't of Int'l and Soc. Affairs, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Report Prepared by the Secretariat*, annex 1, Model Agreement on the Transfer of Foreign Prisoners, U.N. Doc. A/CONF.121/22/Rev.1 (1986) [hereinafter Model Agreement]. See also Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Formulation and Application of United Nations Standards and Norms in Criminal Justice: Model Agree-*

simplified version of the CTSP. Both documents set out five major conditions for prisoner transfer.

1. *Nationality/Residency Status.* Under the CTSP and the Model Agreement, to be eligible for a transfer, a prisoner must be a national or resident of the state to which he requests a transfer.<sup>31</sup>

2. *Double Criminality.* According to international practice, a prisoner transfer can be carried out only if the double criminality requirement is fulfilled, i.e., the act that forms the basis of the foreign prisoner's conviction is a crime under the laws of both the sentencing state and the receiving state.<sup>32</sup> The double criminality principle saves the receiving state from imprisoning a person in its territory for an offense that is not a crime under its law and from any possible legal or constitutional conflict arising from the enforcement of a foreign sentence that has no basis in its domestic laws.<sup>33</sup>

3. *Finality of Judgment.* Under both the CTSP and the Model Agreement, a transfer can only be conducted if the relevant judgment is final; that is, the prisoner must have exhausted all available remedies in the sentencing state or the time limit for seeking those remedies has expired.<sup>34</sup>

4. *Minimum Remaining Sentence.* Both the CTSP and the Model Agreement set the minimum duration of sentence remaining to be served by the prisoner at the time he applies for a transfer at six months.<sup>35</sup> This

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*ment on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners*, pt. 1, U.N. Doc. A/CONF.121/10 (Apr. 25, 1985) [hereinafter Explanatory Notes on the Model Agreement].

31. CTSP, *supra* note 25, art. 3(1)(a); Model Agreement, *supra* note 30, para. 1.

32. The double criminality principle does not require the act committed by the prisoner to be classified as exactly the same offense under the laws of the sentencing state and the receiving state. The Explanatory Report to the CTSP comments:

For the condition of dual criminal liability to be fulfilled it is not necessary that the criminal offence be precisely the same under both the law of the administering State and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.

Explanatory Report to the CTSP, *supra* note 2, para. 24.

33. See PLACHTA, *supra* note 3, at 306–07.

34. See CTSP, *supra* note 25, art. 3(1)(b); Model Agreement, *supra* note 30, para. 10.

35. CTSP, *supra* note 25, art. 3(1)(c); Model Agreement, *supra* note 30, para. 11.



requirement is a practical necessity on three grounds. First, prisoner transfer is a complicated and time-consuming process because of differences in political and legal systems, diplomatic considerations, and very often language differences between the two countries or jurisdictions involved in the transfer.<sup>36</sup> The government authorities of the sentencing state and the receiving state need sufficient time to process a transfer application. Second, the rehabilitation objective of prisoner transfer “can usefully be pursued only where the length of the sentence still to be served is sufficiently long.”<sup>37</sup> Third, given the financial implications of a prisoner transfer for both the sentencing state and the receiving state (and the latter in particular), at least according to the Explanatory Report to the CTSP, a prisoner transfer is worth implementing only if the expense incurred is “proportionate to the purpose to be achieved” on the ground of cost-effectiveness.<sup>38</sup>

*5. Tripartite Consent.* This condition embodies the humanitarian principle underlying prisoner transfers in that, in general, a transfer can only be conducted with the consent of the sentencing state, the receiving state, and the prisoner concerned.<sup>39</sup> A transfer without the consent of the prisoner may only be carried out in very limited circumstances. For example, if, due to the age, physical condition, or mental health of the prisoner, either the sentencing state or the receiving state considers the prisoner unfit to consent, a legal representative may give consent on his behalf.<sup>40</sup>

With the adoption of the Additional Protocol to the CTSP (“Additional Protocol”) by the Committee of Ministers of the Council of Europe on December 18, 1997,<sup>41</sup> transfer in the absence of a prisoner’s consent may

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36. See Explanatory Notes on the Model Agreement, *supra* note 30, para. 22.

37. Explanatory Report to the CTSP, *supra* note 2, para. 22. However, in practice many prisoners are given parole after being transferred back to the receiving state. For example, almost one-third of the first group of Americans to be transferred from Mexico to the United States in December 1977 under the Mexican-American PTA were eligible for parole as soon as they returned to the United States. Abraham Abramovsky & Steven J. Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275, 275 (1979).

38. Explanatory Report to the CTSP, *supra* note 2, para. 22.

39. CTSP, *supra* note 25, art. 3(1)(d), (f); Model Agreement, *supra* note 30, para. 5.

40. See CTSP, *supra* note 25, art. 3(1)(d); Explanatory Report to the CTSP, *supra* note 2, para. 23; Model Agreement, *supra* note 30, para. 9; Explanatory Notes on the Model Agreement, *supra* note 30, para. 19.

41. Council of Europe Additional Protocol to the Convention on the Transfer of Sentenced Persons, Dec. 18, 1997, 37 I.L.M. 560 [hereinafter Additional Protocol to the CTSP]. See also Council of Europe, Explanatory Report to the Additional Protocol to the Convention on the Transfer of Sentenced Persons, available at <http://conventions.coe>.

be conducted in two more circumstances: 1) when a prisoner has fled the sentencing state for his home country before fully serving the prison term in the sentencing state<sup>42</sup> and 2) when the conviction results in an expulsion or deportation order that precludes the prisoner from remaining in the territory of the sentencing state following release from prison.<sup>43</sup> Notwithstanding that each of the three parties has an interest in a prisoner transfer, the ultimate aim of a prisoner transfer is to benefit the prisoner, and a prisoner's consent should have greater weight than that of the other two parties. Unfortunately, as will be demonstrated in subsequent sections of this Article, the issue of prisoner consent can easily be disregarded by the sentencing state, the receiving state, or both.<sup>44</sup>

### *B. Bilateral PTAs*

#### 1. China's Bilateral PTAs with Other Countries

Concluding a PTA is a relatively new experience for the PRC. According to the Ministry of Foreign Affairs, the first PTA the PRC entered into was with Ukraine in July 2001.<sup>45</sup> As of July 2006, the PRC had signed only three bilateral PTAs. In addition to the one with Ukraine, two others were signed with Russia and Spain in December 2002 and November 2005, respectively.<sup>46</sup>

While the PRC has not signed the CTSP, the contents of the bilateral PTAs it has signed are largely consistent with the CTSP and the Model

int/Treaty/EN/Reports/HTML/167.htm [hereinafter Explanatory Report to the Additional Protocol to the CTSP].

42. Additional Protocol to the CTSP, *supra* note 41, art. 2. *See also* Explanatory Report to the Additional Protocol to the CTSP, *supra* note 41, paras. 10–20.

43. Additional Protocol to the CTSP, *supra* note 41, art. 3. *See also* Explanatory Report to the Additional Protocol to the CTSP, *supra* note 41, paras. 21–36.

44. *See infra* Parts II.B.1, IV.A.

45. Zhonghua Renmin Gongheguo he Wukelan guanyu yi guan bei pan xing ren de tiaoyue [Treaty on the Transfer of Sentenced Persons, P.R.C.-Ukr.], July 21, 2001, 3 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 205 (2002), *available at* <http://210.82.31.30/zgrdw/common/zw.jsp?label=WXZLK&id=295150&pdmc=rdgb> [hereinafter P.R.C.-Ukr. PTA].

46. Zhonghua Renmin Gongheguo he Eluosi guanyu yi guan bei pan xing ren de tiaoyue [Treaty on the Transfer of Sentenced Persons, P.R.C.-Russ.], Dec. 2, 2002, 1 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 48 (2004), *available at* <http://210.82.31.30/zgrdw/common/zw.jsp?label=WXZLK&id=327812&pdmc=rdgb> [hereinafter P.R.C.-Russ. PTA]; Zhonghua Renmin Gongheguo he Xibanya guanyu yi guan bei pan xing ren de tiaoyue [Treaty on the Transfer of Sentenced Persons, P.R.C.-Spain], Apr. 18, 2005, 5 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 48 (2006), *available at* <http://210.82.31.30/zgrdw/common/zw.jsp?label=WXZLK&id=350141&pdmc=rdgb> [hereinafter P.R.C.-Spain PTA].

Agreement, with three exceptions. First, instead of six months, the minimum duration of remaining sentence in all three of the PRC's bilateral PTAs is one year.<sup>47</sup> Second, express provisions in the PTAs with Ukraine and Russia prohibit the transfer of prisoners in the following circumstances: 1) when one party to the agreement considers that the transfer will harm its sovereignty, security, and public order, or violate fundamental principles of its domestic law;<sup>48</sup> 2) the sentenced person has not cleared his debt in the sentencing state or he is a party to lawsuits pending in the sentencing state;<sup>49</sup> 3) the sentenced person was convicted for the crime of endangering national security;<sup>50</sup> and 4) the sentenced person received a death sentence or life imprisonment.<sup>51</sup> Third, the PTAs with Ukraine and Russia grant the signatories considerable discretion, providing that each state has "the autonomy to decide on its own whether to consent to a transfer requested by the other party."<sup>52</sup>

## 2. Hong Kong's Bilateral PTAs with Other Countries

The United Kingdom ratified the CTSP on April 30, 1985.<sup>53</sup> The CTSP was given legal effect in the United Kingdom by virtue of the Repatriation of Prisoners Act 1984 ("RPA"), which was passed after the United Kingdom signed the CTSP.<sup>54</sup> As with other international agreements that the United Kingdom had signed, the CTSP (or to be more precise, the RPA) was extended to some of the colonies of the United Kingdom in the form of two Orders-in-Council, namely the Repatriation of Prisoners (Overseas Territories) Order 1986 and the Repatriation of Prisoners (Overseas Territories) (Amendment) Order 1987.<sup>55</sup> These two Orders-in-

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47. P.R.C.-Ukr. PTA, *supra* note 45, art. 4.3; P.R.C.-Russ. PTA, *supra* note 46, art. 5.3; P.R.C.-Spain PTA, *supra* note 46, art. 2.1.1.

48. P.R.C.-Ukr. PTA, *supra* note 45, art. 5.1.1; P.R.C.-Russ. PTA, *supra* note 46, art. 6.1.1.

49. P.R.C.-Ukr. PTA, *supra* note 45, art. 5.1.2; P.R.C.-Russ. PTA, *supra* note 46, art. 6.1.3.

50. P.R.C.-Russ. PTA, *supra* note 46, art. 6.1.2. This clause only appears in the PTA between the PRC and Russia.

51. P.R.C.-Russ. PTA, *supra* note 46, art. 6.1.4. Transfer of prisoners sentenced to life imprisonment is possible under the PTAs the PRC has signed with Ukraine and Spain. See P.R.C.-Ukr. PTA, *supra* note 45, art. 1.4; P.R.C.-Spain PTA, *supra* note 46, art. 7.3.

52. P.R.C.-Ukr. PTA, *supra* note 45, art. 5.2; P.R.C.-Russ. PTA, *supra* note 46, art. 6.2.

53. CTSP Status, *supra* note 29.

54. See HONG KONG HANSARD, Sept. 3, 1997, available at <http://www.legco.gov.hk/yr97-98/english/counmtg/hansard/970903fe.htm>.

55. Re Yung Kwan Lee & Others, [1999] 2 H.K.C.F.A.R. 245, 245 (C.F.A.); HONG KONG HANSARD, Sept. 3, 1997, *supra* note 54; Janice Brabyn, *Inter-Jurisdictional Co-*

Council were the basis for prisoner transfer between Hong Kong and twenty-five countries (including the United Kingdom) until its reunification with the PRC on July 1, 1997.<sup>56</sup>

After the sovereignty of Hong Kong reverted to the PRC, the two Orders-in-Council were no longer binding legal authority in Hong Kong. However, before the handover, the then Colonial Government had begun to negotiate PTAs with other countries in its own capacity in order to prevent a legal vacuum.<sup>57</sup> At the same time, the Colonial Government also prepared local legislation to give effect to the PTAs it concluded.<sup>58</sup> On April 9, 1997, the Bill on the Transfer of Sentenced Persons Ordinance (“TSPO”) was tabled in the Legislative Council (“LegCo”).<sup>59</sup> As the Secretary for Security explained, the aim of the bill was “to enable Hong Kong to implement our new [transfer of sentenced persons] agreements with other jurisdictions.”<sup>60</sup> On May 21, 1997, the bill finally passed, with only minor technical amendments.<sup>61</sup> The TSPO entered into force on June 6, 1997 and survived the handover.<sup>62</sup> The TSPO is merely a local recreation of the RPA, and four of the major conditions for transfer under the CTSP, namely the nationality/residency requirement, double criminality, finality of judgment, and tripartite consent, were included in it.<sup>63</sup>

The TSPO is simply the enabling legislation that gives effect to the bilateral PTAs signed by Hong Kong and other countries. It can only operate pursuant to the bilateral arrangements. The TSPO is silent on the nature of the bilateral arrangements to which it gives effect. However, the Secretary for Security has emphasized that they can be in the form of

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*Operation in Criminal Matters: Extradition, Mutual Legal Assistance, Prisoner Transfer to and from the HKSAR*, in *THE NEW LEGAL ORDER IN HONG KONG* 139 (Raymond Wacks ed., 1999).

56. *Re Yung Kwan Lee & Others*, [1999] 2 H.K.C.F.A.R. at 245; HONG KONG HANSARD, Sept. 3, 1997, *supra* note 54; HONG KONG HANSARD, Apr. 9, 1997, at 59–60, available at [http://www.legco.gov.hk/yr96-97/english/lc\\_sitg/hansard/970409fa.doc](http://www.legco.gov.hk/yr96-97/english/lc_sitg/hansard/970409fa.doc); Brabyn, *supra* note 55, at 139–40.

57. Hong Kong signed a PTA with the United States on April 15, 1997. SECURITY BUREAU, TRANSFER OF PRISONERS, *supra* note 24.

58. See HONG KONG HANSARD, Apr. 9, 1997, *supra* note 56, at 59–60.

59. *Id.* at 59.

60. *Id.* at 60.

61. HONG KONG HANSARD, May 21, 1997, at 159, 162, available at [http://www.legco.gov.hk/yr96-97/english/lc\\_sitg/hansard/970521fe.doc](http://www.legco.gov.hk/yr96-97/english/lc_sitg/hansard/970521fe.doc).

62. SECURITY BUREAU, TRANSFER OF PRISONERS, *supra* note 24.

63. Transfer of Sentenced Persons Ordinance, (1997) Cap. 513, § 4, translated in <http://www.legislation.gov.hk/eng/home.htm> (last visited Apr. 21, 2008) (H.K.).

standing agreements or arrangements on an ad hoc basis.<sup>64</sup> As of April 2006, Hong Kong had signed bilateral agreements with nine jurisdictions, namely Australia, Italy, the Philippines, Portugal, Sri Lanka, Thailand, the United Kingdom, the United States, and Macau.<sup>65</sup> As with the TSPO, all of these PTAs were largely based on the CTSP and the Model Agreement.

The PTA with Macau is significant because it is the first regional PTA Hong Kong has signed with another part of the PRC. The Hong Kong-Macau PTA was signed on May 20, 2005<sup>66</sup> pursuant to article 95 of the Basic Law of the Hong Kong Special Administrative Region ("HKSAR") and article 93 of the Basic Law of the Macau Special Administrative Region ("Macau SAR").<sup>67</sup> Because section 2(a)(ii) of the TSPO expressly limited the prisoner transfers it would govern to those between Hong Kong and "place[s] outside the People's Republic of China,"<sup>68</sup> LegCo passed the Transfer of Sentenced Persons (Amendment) (Macau) on June 29, 2005, which expanded the scope of application of the TSPO to Macau<sup>69</sup> and allowed the TSPO to serve as a basis for implementing a PTA between Hong Kong and Macau.<sup>70</sup>

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64. Press Release, Hong Kong Government Information Centre, LCQ8: Transfer of Sentenced Persons (Mar. 13, 2002), *available at* <http://www.info.gov.hk/gia/general/200203/13/0313286.htm> [hereinafter LCQ8: Transfer of Sentenced Persons].

65. See Department of Justice of the HKSAR, Treaties and International Agreements, <http://www.legislation.gov.hk/table5ti.htm> (follow hyperlinks for each of the agreements); Arrangement on the Transfer of Sentenced Persons, H.K.-Mac., May 25, 2005, *translated in* <http://www.legislation.gov.hk/intracountry/eng/pdf/macao/tsp.pdf> [hereinafter Hong Kong-Macau PTA].

66. See Hong Kong-Macau PTA, *supra* note 65.

67. Article 95 of the Basic Law of the HKSAR provides that "[t]he Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other." XIANGGANG JI BEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION] art. 95, *translated in* [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Apr. 21, 2008). Article 93 of the Basic Law of the Macau Special Administrative Region ("Macau SAR") provides that "[t]he Macao Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other." Basic Law of the Macau Special Administrative Region art. 93, *translated in* LAWINFOCHINA (last visited Apr. 16, 2008).

68. Transfer of Sentenced Persons Ordinance, (1997) Cap. 513, § 2(a)(ii).

69. HONG KONG HANSARD, June 29, 2005, at 9128-39, *available at* <http://www.legco.gov.hk/yr04-05/english/counmtg/hansard/cm0629ti-translate-e.pdf>.

70. *Id.* at 9128-39. Because this amendment was limited by its terms to transfers between Macau and Hong Kong, it does not encompass transfers between Hong Kong and any other areas of the PRC. To effectuate a PTA between Hong Kong and the rest of the PRC, the Legislative Council would be required to amend the TSPO accordingly.

### III. CHALLENGES FOR A FUTURE HONG KONG-MAINLAND PTA

Negotiation of a PTA between Hong Kong and the Mainland commenced in March 2000.<sup>71</sup> Although the details of the discussions have not been announced, it is generally believed that a future Hong Kong-Mainland PTA will be consistent with international practice and will include more or less the same provisions as the international PTAs.<sup>72</sup> The substance of the negotiations has been concerned mainly with the major principles and provisions underlying the TSPO and the bilateral PTAs Hong Kong has signed with other countries.<sup>73</sup> Under the principle of One Country, Two Systems, Hong Kong's jurisdiction is not subordinate to the PRC or to any other state,<sup>74</sup> and consequently it has been perfectly appropriate for negotiators to examine these preexisting agreements with a view to adopting international prisoner transfer principles and practice in any future Hong Kong-Mainland PTA.

However, even if international principles and practices are followed, one can anticipate many problems that would arise regarding prisoner transfer between Hong Kong and the Mainland, given the great legal, political, economic, and social differences between the two jurisdictions. Focusing on the aforementioned five major conditions for prisoner transfer, the following sections examine issues arising from their inclusion in a Hong Kong-Mainland PTA and some practical problems in their implementation.

#### *A. Nationality/Residency Status*

Consistent with international practice, the nationality requirement was adopted in all PTAs Hong Kong has signed, excluding the one with Macau.<sup>75</sup> Because Hong Kong and Macau are special administrative re-

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71. Press Release, Hong Kong Government Information Centre, LCQ20: Work on Transfer of Sentenced Persons Arrangements with the Mainland in Progress (Nov. 16, 2005), available at <http://www.info.gov.hk/gia/general/200511/16/P200511160203.htm>.

72. See *id.*

73. Press Release, Hong Kong Government Information Centre, LCQ6: Transfer of Sentenced Persons (June 30, 2004), available at <http://www.info.gov.hk/gia/general/200406/30/0630280.htm> [hereinafter LCQ6: Transfer of Sentenced Persons]; Press Release, Hong Kong Government Information Centre, LCQ7: Discussions with Mainland Authorities on Transfer of Sentenced Persons Continue (Dec. 1, 2004), available at <http://www.info.gov.hk/gia/general/200412/01/1201166.htm>.

74. See *supra* note 4 and accompanying text.

75. See, e.g., Agreement on the Transfer of Sentenced Persons, H.K.-Fr., art. 3(a), May 1, 2008, translated in <http://www.legislation.gov.hk/table5ti.htm> (follow "English(pdf)" hyperlink in "France" row) [hereinafter Hong Kong-France PTA]. For additional examples, see Department of Justice of the HKSAR, Treaties and International Agreements, *supra* note 65. See also Hong Kong-Macau PTA, *supra* note 65.

gions within the PRC and most people in these two jurisdictions are nationals of the PRC, the determining factor for transfer eligibility is whether the prisoner concerned is a “permanent resident” of the receiving jurisdiction.<sup>76</sup> The term permanent resident is defined in the relevant parts of the Basic Law of the HKSAR and the Basic Law of the Macau SAR.<sup>77</sup>

In addition to the nationality requirement, under some bilateral PTAs between Hong Kong and other countries, a prisoner who can prove that he has “close ties” with the receiving state may also be eligible for transfer.<sup>78</sup> The close ties requirement is also included in the PTA between Hong Kong and Macau.<sup>79</sup> However, unlike the permanent resident requirement, the term “close ties” has not been defined in the relevant agreements or any law of Hong Kong.<sup>80</sup> The Hong Kong Security Bureau (“Security Bureau”) has said that the term will be given its ordinary meaning, and in determining whether a prisoner has close ties with the receiving state, the individual circumstances of each case will be taken into account.<sup>81</sup> Additionally, the Security Bureau has announced that guidelines for what constitutes close ties will be synthesized after the accumulation of a significant number of precedents.<sup>82</sup> However, the close

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76. See Hong Kong-Macau PTA, *supra* note 65, art. 4(2).

77. XIANGGANG JI BEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION] art. 24, *translated in* [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Apr. 21, 2008); Basic Law of the Macau Special Administrative Region art. 24, *translated in* LAWINFOCHINA (last visited Apr. 16, 2008).

78. For example, the “close ties” requirement is included in the PTAs Hong Kong signed with Australia, the Philippines, Portugal, and the United Kingdom. See Agreement on the Transfer of Sentenced Persons, H.K.-Austl., art. 4(b)–(c), Nov. 25, 2005, *translated in* <http://www.legislation.gov.hk/table5ti.htm> (follow “English(pdf)” hyperlink in “Australia” row) [hereinafter Hong Kong-Australia PTA]; Agreement on the Transfer of Sentenced Persons, H.K.-Phil., art. 4(b), Apr. 28, 2002, *translated in* <http://www.legislation.gov.hk/table5ti.htm> (follow “English(pdf)” hyperlink in “Philippines” row) [hereinafter Hong Kong-Philippines PTA]; Agreement on the Transfer of Sentenced Persons, H.K.-Port., art. 4(b)–(c), May 24, 2001, *translated in* <http://www.legislation.gov.hk/table5ti.htm> (follow “English(pdf)” hyperlink in “Portugal” row); Agreement on the Transfer of Sentenced Persons, H.K.-U.K., art. 4(b)–(c), Nov. 5, 1997, *translated in* <http://www.legislation.gov.hk/table5ti.htm> (follow “English(pdf)” hyperlink in “United Kingdom” row) [hereinafter Hong Kong-United Kingdom PTA].

79. Hong Kong-Macau PTA, *supra* note 65, art. 4(2).

80. HKSAR LEGISLATIVE COUNCIL SECRETARIAT, REP. OF THE BILLS COMM. ON TRANSFER OF SENTENCED PERSONS (AMENDMENT) (MACAU) BILL, LC PAPER NO. CB(2)2018/04-05, at 4–5 (2005), *available at* <http://www.legco.gov.hk/yr04-05/english/bc/bc53/reports/bc53cb2-rpt-e.pdf> [hereinafter LC PAPER NO. CB(2)2018/04-05].

81. *Id.* at 4.

82. *Id.* at 5.

relationship between Hong Kong and Macau may complicate the application of the close ties requirement. For example, does a convicted Hong Kong resident who travels and works in both jurisdictions and who has family members living in Macau have the right kind and degree of contact with Macau to satisfy the test?

As mentioned above, the PTA between Hong Kong and Macau is the first regional PTA in “Greater China.”<sup>83</sup> Therefore, certain aspects of this agreement are likely to be used as a blueprint for a future Hong Kong-Mainland PTA. The residency status of prisoners eligible for transfer is certain to be one of the aspects considered. Although there is no concept of permanent resident in the Mainland, according to the Law of the PRC on Resident Identity Cards, every citizen who resides in the Mainland and is over the age of sixteen should apply for an identity card.<sup>84</sup> Ascertaining Mainland prisoners’ eligibility for transfer from Hong Kong may therefore turn on possession of a PRC identity card, rather than on the concept of permanent residency.

The uncertainties that accompany the close ties test in the Hong Kong-Macau PTA are likely to be even more problematic in that test’s application under a future Hong Kong-Mainland PTA. Compared with Macau residents, the number of Mainland residents traveling to Hong Kong has been much higher.<sup>85</sup> Since the handover, many policies of the governments of Hong Kong and the Mainland, such as the Mainland’s opening of more business sectors to Hong Kong residents and preferential treatment for Hong Kong business in the Mainland under the Closer Economic Partnership Arrangement (“CEPA”) on the one hand,<sup>86</sup> and Hong Kong’s recruitment of elite professionals and laborers from the Mainland

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83. See *supra* notes 65–70 and accompanying text. The term “Greater China” includes Mainland PRC, the HKSAR, the Macau SAR, and Taiwan.

84. The Law on Resident Identity Cards provides that “[a]ny Chinese citizens who are 16 years old or older, and who reside within the People’s Republic of China shall apply for the identity card; those under 16 years old may apply for it in accordance with the present Law.” Law on Resident Identity Cards art. 2, June 28, 2003 (effective Jan. 1, 2004), translated in LAWINFOCHINA (last visited Feb. 20, 2008) (P.R.C.).

85. For example, between 2006 and 2007, while 13,777,735 Mainland residents had visited Hong Kong, the number of visitors from Macau was only 594,450. IMMIGRATION DEP’T OF THE HKSAR, ANNUAL REPORT 2006–2007 apps., Statistics on Incoming Visitors by County/Territory of Residence, available at [http://www.immd.gov.hk/a\\_report\\_06-07/west/appendices/appendices08.htm](http://www.immd.gov.hk/a_report_06-07/west/appendices/appendices08.htm).

86. For details on the Closer Economic Partnership Arrangement (“CEPA”), see Trade and Industry Department of the HKSAR, Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), [http://www.tid.gov.hk/english/cepa/legaltext/cepa\\_legaltext.html](http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html) (last visited Apr. 8, 2008).



on the other,<sup>87</sup> have resulted in a large number of people (primarily the working population) with ties to both jurisdictions. Most of these people temporarily reside in one jurisdiction for work purposes and ultimately spend more time in that jurisdiction than the jurisdiction from which they originally came.<sup>88</sup> Such ties to the new jurisdiction are sometimes cemented by marriage or purchases of property.<sup>89</sup> Under these circumstances, how does one determine with which jurisdiction a person has closer ties? Apart from these cross-border working populations, the close ties test may also cause controversy with respect to Mainland one-way permit holders who have just arrived in Hong Kong. Although these one-way permit holders are new to Hong Kong, because close family ties to Hong Kong residents is a condition of the permit, the one-way permit is arguably *prima facie* evidence of close ties with Hong Kong.<sup>90</sup> Despite having close ties to Hong Kong, however, in practice, given the poor prison conditions in the Mainland, residency status eligibility requirements may largely be utilized to prevent Mainlanders serving sentences in Mainland prisons from taking advantage of a future PTA to request transfer to Hong Kong.

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87. Hong Kong implemented the Admission Scheme for Mainland Talents and Professionals in 2003, and from 2004 to 2005, 4320 applicants were admitted to work in Hong Kong. IMMIGRATION DEP'T OF THE HKSAR, ANNUAL REPORT 2004–2005, at 31 (2005) (on file with author).

88. See, e.g., CENSUS AND STATISTICS DEP'T OF THE HKSAR, GENERAL HOUSEHOLD SURVEY: SUMMARY OF SURVEY FINDINGS: HONG KONG RESIDENTS WORKING IN THE MAINLAND OF CHINA (2005). According to a survey of the Census and Statistics Department of the HKSAR, about 237,500 Hong Kong residents worked in the Mainland in 2004. *Id.*

89. See *Jin nian Gang ren zai neidi zhi ye qingkuang* [The Situation of Hong Kong Residents Purchasing Property in the Mainland in Recent Years], XINXI SHIBAO [INFORMATION TIMES], June 15, 2007, available at <http://www.hkcnr.com/doc/2007/2007-06-15/14978.shtml>; Zhang Ming, *Gang ren bei shang ying qu zhe zhong; liang di kua jing hunyin qunian da 1.1 wan zong* [Many Hong Kong Men Head to the Mainland to Find a Wife, Cross-Border Marriages Last Year Reached 11,000], ZHONGGUO XINWEN WANG [CHINA NEWS NET], Oct. 14, 2004, available at <http://www.cns.hk:89/news/2004/2004-10-14/26/494236.shtml>.

90. According to the immigration policy of Hong Kong, a Mainlander who wants to settle in Hong Kong must obtain approval from the relevant Public Security Bureau Office in the Mainland. XIANGGANG JI BEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION] art. 22, translated in [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Apr. 21, 2008); Immigration Department of the HKSAR, Arrangement for Entry to Hong Kong from Mainland China, [http://www.immd.gov.hk/ehhtml/hkvisas\\_9.htm](http://www.immd.gov.hk/ehhtml/hkvisas_9.htm) (last visited Feb. 21, 2008). The document issued by the office approving a Mainlander's stay in Hong Kong is commonly known as a "One-way Permit," and only children, spouses, elderly relatives, and heirs of Hong Kong residents are granted One-way Permits. Immigration Department of the HKSAR, *supra*.

*B. Double Criminality*

The Basic Law of the HKSAR guarantees that, except for those laws listed in its annex III, national laws of the PRC are not applicable in Hong Kong so that Hong Kong is allowed to continue to enforce its own bodies of law.<sup>91</sup> Because the Criminal Law of the People's Republic of China ("Criminal Law") is not listed in annex III, it cannot be enforced in Hong Kong.<sup>92</sup> As a result, within the sovereign territory of the PRC, Hong Kong and the Mainland have distinct criminal laws. Given the different political, social, and economic conditions in Hong Kong and the Mainland, there are some notable differences in the two bodies of criminal law. Certain acts are crimes only in one jurisdiction and not in the other. Due to such differences, the principle of double criminality will limit prisoner transfer between Hong Kong and the Mainland. The offense involved in Li Guangqiang's case illustrates this point.

On January 28, 2002, Li, a Hong Kong resident, was sentenced to two years' imprisonment and a fine of ¥150,000 by the Fuqing City People's Court in Fuzhou for an "illegal business operation" (engaging in the unauthorized trading of overseas publications)<sup>93</sup> under article 225(1) of the Criminal Law.<sup>94</sup> The publications involved in this case were 16,280 Bi-

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91. XIANGGANG JI BEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION] arts. 8, 18, *translated in* [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Apr. 21, 2008).

92. H.L. Fu, Comment, *The Battle of Criminal Jurisdictions*, 28 H.K. L.J. 273, 275 (1998).

93. *Hong Kong Businessman Li Guangqiang Obtains Medical Parole*, BBC ONLINE, Feb. 9, 2002, available at <http://www.chinaaffairs.org/gb/detail.asp?id=11623>.

94. Article 225 of the Criminal Law of the People's Republic of China ("Criminal Law") provides that:

Whoever, in violation of state stipulations, has one of the following illegal business acts, which disrupts the market order and when the circumstances are serious, is to be sentenced to not more five years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine not less than 100 percent and not more than 500 percent of his illegal income and, where the circumstances are particularly serious, be sentenced to not less than five years of fixed-term imprisonment and a fine not less than 100 percent and not more than 500 percent of his illegal income or the confiscation of his property:

- (1) engage in the monopoly business or monopolized commodities stipulated in laws and administrative regulations, or other commodities whose purchase and sale are controlled, without permission;
- (2) purchase and sell import-export licenses, certificates of origin, and operation permits or approved documents stipulated by other laws and administrative regulations;

bles, and they were alleged to have been shipped to a Mainland underground Christian sect considered by the Chinese government to be an illegal cult.<sup>95</sup>

Even if there were a PTA between Hong Kong and the Mainland, given the double criminality condition, Li would not have qualified for transfer because the act he was imprisoned for (i.e., transporting Bibles) is not a crime under the laws of Hong Kong. Similarly, Mainland prisoners imprisoned in Hong Kong for offenses like cruelty to non-endangered animals (such as dogs and cats)<sup>96</sup> or claiming to be triad members,<sup>97</sup> which are not offenses under Chinese criminal law, will not benefit from any future prisoner transfer arrangement because there are no analogous offenses in the Mainland. Li's case highlights the fact that in certain circumstances the application of the double criminality requirement may lead to absurd results and injustice.<sup>98</sup>

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(3) conduct other illegal business activities that seriously disrupt the market order.

Criminal Law art. 225, translated in LAWINFOCHINA (last visited Apr. 16, 2008) (P.R.C.).

95. *Hong Kong Businessman Li Guangqiang Obtains Medical Parole*, supra note 93. Li's conviction was much more lenient than was expected, for he was originally charged with using superstitious societies to undermine the implementation of laws and regulations under article 300(1) of the Criminal Law, a more serious offense punishable by more than seven years' imprisonment. *Id.* Li returned to Hong Kong on February 9, 2002 (within two weeks of his conviction) on medical grounds because he was infected with hepatitis B. *Id.*

96. Currently, China only has legislation to protect rare and endangered animals, namely the Law on the Protection of Wildlife. See Law on the Protection of Wildlife, translated in LAWINFOCHINA (last visited Apr. 16, 2008) (P.R.C.); *Guan ai dong wu you zhu ti sheng cheng shi wen ming chengdu* [Compassion for Animals Helps Promote the City's Level of Culture], NANFANG DUSHI BAO [SOUTH METROPOLITAN DAILY], Jan. 18, 2008, available at <http://www.nanfangdaily.com.cn/southnews/dd/dsb/sz36/200801180518.asp>. In Hong Kong, the maximum penalty for cruelty to animals under the Prevention of Cruelty to Animals Ordinance is a fine of HK\$200,000 and imprisonment for three years. Prevention of Cruelty to Animals Ordinance, (2006) Cap. 169, § 3, translated in <http://www.legislation.gov.hk/eng/home.htm> (last visited Apr. 21, 2008) (H.K.).

97. The term "triad societies" refers to crime syndicates, similar to mafia, in Hong Kong. Under section 20 of the Societies Ordinance, the maximum penalty for any person who claims to be a member of a triad society is HK\$100,000 and imprisonment for three years in the case of a first conviction for that offense, and HK\$250,000 and imprisonment for seven years in the case of a second or subsequent conviction for that offense. Societies Ordinance, (1997) Cap. 151, § 20(2), translated in <http://www.legislation.gov.hk/eng/home.htm> (last visited Apr. 21, 2008) (H.K.).

98. A similar argument has been made by Justice J. Dowd of Australia. See KAREN SAMPFORD, THE PRISONERS INTERNATIONAL TRANSFER (QUEENSLAND) BILL 1997, LEGIS. BULL. NO 11/97, at 12-13 (1997), available at <http://www.parliament.qld.gov.au/view/publications/documents/research/legislationBulletins/1997/lb1197ks.pdf>.

The transfer of political offenders presents an even more controversial situation. There is much less tolerance for political speeches and acts in the Mainland than in Hong Kong.<sup>99</sup> The same acts and speeches that are totally lawful when made in Hong Kong might be regarded as criminal in the Mainland.<sup>100</sup> This poses a dilemma for the authorities in Hong Kong: to adopt the double criminality condition would lead to the absurd results described above; to forego the condition may give rise to constitutional issues when a returned Hong Kong resident is jailed in a Hong Kong prison for an act that is not a crime under Hong Kong law.

### C. Finality of Judgment

Finality of judgment is one of the essential conditions for prisoner transfer under both the CTSP and the Model Agreement, but it can also provide an excuse to reject a transfer request. The ordeal of two American teenage girls who were imprisoned in Peru is the best illustration of the detrimental effect of the requirement.<sup>101</sup>

On September 25, 1996, two teenage American girls were arrested for drug trafficking in Peru.<sup>102</sup> Soon after their arrest, the two girls were detained without charge in a deplorable Peru prison for one and a half years.<sup>103</sup> Although the PTA between the United States and Peru entered into force in 1980,<sup>104</sup> the agreement failed to offer any help to the two girls at that stage because they had not been sentenced and thus failed to satisfy the condition of finality of judgment as provided for in the agree-

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99. China's low tolerance for political speech is clearly reflected in its persistent persecution of political dissidents. *See, e.g.*, CONG.-EXEC. COMM'N ON CHINA, 109TH CONG., ANNUAL REPORT 2006, at 25-42, available at <http://www.cecc.gov/pages/annualRpt/annualRpt06/CECCannRpt2006.pdf> [hereinafter CONG.-EXEC. COMM'N ON CHINA, ANNUAL REPORT 2006]. Hong Kong's law provides for broad freedoms of speech and association. *See* XIANGGANG JI BEN FA [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION] art. 27, translated in [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm) (last visited Apr. 21, 2008).

100. Because transfer of political offenders between Hong Kong and the Mainland is anticipated to be a very complicated and controversial issue, the Author considers that it should be discussed in detail in a separate paper.

101. For a detailed discussion of this case, see Ralph Ruebner & Lisa Carroll, *The Finality of Judgment and Sentence Prerequisite in the United States-Peru Bilateral Prisoner Transfer Treaty: Calling Congress and the President to Reform and Justifying Jurisdiction of the Inter-American Human Rights Commission and Court*, 15 AM. U. INT'L L. REV. 1071, 1072-78 (2000).

102. *Id.* at 1073.

103. *Id.* at 1074.

104. Treaty on the Execution of Penal Sentences, U.S.-Peru, July 6, 1979, 32 U.S.T. 1471, available at [http://untreaty.un.org/unts/60001\\_120000/6/27/00011307.pdf](http://untreaty.un.org/unts/60001_120000/6/27/00011307.pdf).

ment.<sup>105</sup> Consequently, no transfer could be arranged. Within a month after the girls filed a complaint with the Inter-American Commission on Human Rights (“IACHR”), a trial was finally held and the two girls were convicted and sentenced.<sup>106</sup> The conviction and sentence rendered the two girls eligible to apply for a transfer back to the United States to serve the remainder of their sentences. Unfortunately, however, the relevant judgment was subsequently overruled by the Peruvian Supreme Court and the case was remanded for reinvestigation and retrial.<sup>107</sup> This turn-around arose because some Peruvian co-defendants in the case appealed.<sup>108</sup> Peruvian law required the two American girls to join the appeal,<sup>109</sup> which caused the original judgment to lose its finality. Failing to satisfy the condition of finality, the two girls were again ineligible for transfer. They were forced to undergo a retrial, and both were sentenced to six years’ imprisonment.<sup>110</sup> After serving about two months of their sentences in a Peruvian prison, the two girls were released on parole; about four months later they finally secured a transfer back to the United States to complete their parole.<sup>111</sup> By the time they were transferred back to the United States, they had been subject to the control of the Peruvian criminal justice system for three years and two months.<sup>112</sup>

The repeated failure of the U.S.-Peru PTA to address the extended detention of the two American girls in Peru was due to the Peruvian authorities’ non-compliance with the universally recognized human rights principle of due process—they failed to charge, try, and sentence the defendants promptly.<sup>113</sup> Perversely, however, this deprivation of due process also resulted in a failure to satisfy the condition of finality of judg-

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105. Ruebner & Carroll, *supra* note 101, at 1076–77.

106. *Id.* at 1074–75.

107. *Id.* at 1075.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.* at 1073–75.

113. For example, paragraph 3 of article 9 of the International Covenant on Civil and Political Rights (“ICCPR”) provides that:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

International Covenant on Civil and Political Rights art. 9(3), Dec. 16, 1966, 999 U.N.T.S. 171.

ment. If the finality of judgment condition is included in a future PTA between Hong Kong and the Mainland, bearing in mind the deep-rooted problem of extended and arbitrary detention in the Mainland, predicaments similar to that of the two American girls may arise for Hong Kong residents charged with crimes in the Mainland.<sup>114</sup>

Although China claims to espouse the principle that the second trial is final,<sup>115</sup> China's system of judicial supervision makes this principle illusory in practice. In China, judicial supervision is a procedure that aims to uncover and rectify irregularities in the trial process.<sup>116</sup> Under this system, a judgment that is final in effect may nonetheless be challenged as defective.<sup>117</sup> This procedure may be invoked by various parties. Parties to the case, including the defendant, a near relative of the defendant, the prosecution, and the victim (if there is one), may petition the People's Court or the People's Procuratorate.<sup>118</sup> The president of the court in which the judgment was made, higher level People's Courts, and the Supreme People's Court ("SPC") may exercise their respective horizontal and vertical supervisory functions to challenge a judgment.<sup>119</sup> The Supreme People's Procuratorate and higher level People's Procuratorates may also challenge a judgment in accordance with the judicial supervision system.<sup>120</sup> The consequence of an exercise of judicial supervision is a retrial of the case concerned.<sup>121</sup>

Given that so many parties have the power to request a retrial, judgments of the Chinese courts, even those pronounced by the second instance courts, are subject to challenge and thus not final. The case of Liu Yong is one such example. This triad ringleader was sentenced to death by an intermediate court, given a suspended death sentence by a higher court on appeal, and finally given the death penalty by the SPC in a retrial.<sup>122</sup>

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114. See CONG.-EXEC. COMM'N ON CHINA, ANNUAL REPORT 2006, *supra* note 99, at 49–51 (discussing the pattern of extended and arbitrary detention in China).

115. See Criminal Procedure Law art. 10, *translated in* LAWINFOCHINA (last visited Apr. 16, 2008) (P.R.C.) ("In trying cases, the People's Courts shall apply the system whereby the second instance is final.").

116. For details on judicial supervision, see, for example, CHENG RONGBIN, XING SHI SU SONG FA [CRIMINAL PROCEDURE LAW] 361–76 (2000).

117. *Id.*

118. See Criminal Procedure Law arts. 203–204, *translated in* LAWINFOCHINA (last visited Apr. 16, 2008) (P.R.C.).

119. *Id.* art. 205.

120. *Id.*

121. *Id.* arts. 204–205.

122. For the details of Liu Yong's case, see Zhongguo Fayuan Wang [China Court Net], Criminal Judgment of the Supreme People's Court on the Retrial of Liu Yong's

The complexity of the finality of judgment requirement also hindered the conclusion of an agreement on mutual recognition and enforcement of civil and commercial judgments (“Reciprocal Recognition Agreement”) between Hong Kong and the Mainland.<sup>123</sup> Both jurisdictions’ experiences resolving the finality of judgment issue in concluding the Reciprocal Recognition Agreement provide insight as to how the same issue could be resolved for a Hong Kong-Mainland PTA. Under the Reciprocal Recognition Agreement, the uncertain finality of Mainland judgments is controlled by two methods. First, recognizing that only certain courts can make an “enforceable final judgment,” the party who requests enforcement of a Mainland judgment in Hong Kong is required to produce a certificate issued by the Mainland court that made the final decision certifying that the decision was final.<sup>124</sup> Second, if a case is to be retried after an application for enforcement of judgment in the same case is filed, the retrial should be conducted by the court at the next highest level rather than the court that made the judgment in question.<sup>125</sup>

#### *D. Minimum Remaining Sentence*

The minimum remaining sentence requirement commonly appears in PTAs in one of the following two ways. In the first method, the PTA specifies the minimum duration of sentence that must be served in the sentencing state before a prisoner is transferred back to the receiving state (“the first method”).<sup>126</sup> In the second method, the PTA specifies the minimum duration of remaining sentence to be served by the prisoner

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Case, <http://www.chinacourt.org/public/detail.php?id=96393> (last visited Jan. 21, 2008); Liu, *Yong gai pan si huan neimu diaocha* [Investigation into the Inside Story of Liu Yong’s Commuted Death Sentence], BEIJING QINGNIAN BAO [BEIJING YOUTH POST], Aug. 28, 2003, available at [http://news.xinhuanet.com/legal/2003-08/28/content\\_1049028.htm](http://news.xinhuanet.com/legal/2003-08/28/content_1049028.htm).

123. For details on the “finality of judgment” condition in the recently concluded Agreement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between Hong Kong and the Mainland, see *Twin Concessions Clinch Judicial Deal*, SOUTH CHINA MORNING POST, Apr. 15, 2006; Graeme Johnston, China Cross-Border Litigation E-Bulletin, Cross-Border Enforcement of Judgments (July 17, 2006), <http://www.herbertsmith.com/NR/rdonlyres/2D4DE729-E18F-4B48-9CC7-E18D8A381F78/2316/Chinacrossborderlitigationebulletin170706.htm> (last visited Feb. 20, 2008); Patrick Bourke & Jim James, *Law in Business: China: New Deal*, LEGALWEEK.COM, June 29, 2006 (on file with author). The issue was finally solved and an agreement was concluded in July 2006. Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, P.R.C.-H.K., July 14, 2006, translated in <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandrej20060719e.pdf> [hereinafter Reciprocal Recognition Agreement].

124. Reciprocal Recognition Agreement, *supra* note 123, arts. 2, 6.

125. *Id.* art. 2.

126. PLACHTA, *supra* note 3, at 334.

concerned at the time of application for transfer (“the second method”).<sup>127</sup>

The first method has been used rarely, but has been adopted in PTAs to which Thailand is a party.<sup>128</sup> For example, in the bilateral PTAs Thailand has signed with Australia, Canada, Hong Kong, and the United Kingdom, in addition to a one-year minimum remaining sentence requirement in accordance with the second method noted above, there is a prohibitive clause stating that “an offender may not be transferred unless he has served in the transferring State any minimum period of imprisonment, confinement or deprivation of liberty stipulated by the law of the transferring State.”<sup>129</sup> According to Michal Plachta, the Thai government’s insistence on the inclusion of such a provision is due to “historic sensitivity regarding interference by foreign courts in Thai judicial decisions.”<sup>130</sup> Similarly, Japan has mandated that a U.S. prisoner must serve at least one-third of his sentence in Japan before applying to be transferred back to the United States under the CTSP.<sup>131</sup>

The second method is the most commonly adopted method for implementing a minimum remaining sentence condition in international practice, and the minimum sentence duration required is normally six months

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127. *Id.*

128. *Id.*

129. See Agreement on the Transfer of Offenders and on Cooperation in the Enforcement of Penal Sentences art. 3, U.K.-Thail., Jan. 22, 1990, 1656 U.N.T.S. 133; Agreement between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Cooperation in the Enforcement of Penal Sentences art. 3, Aust.-Thail., July 26, 2001, available at <http://frli.law.gov.au/s97.vts?action=View&VdkVgwKey=2002B00241&Collection=FRLI&ViewTemplate=frlview.htm>. The exact wording of the limiting clause in the PTA with Canada differs slightly: “[I]n the case of imprisonment, confinement or other form of deprivation of liberty, the offender shall, at the time of transfer, have served in the Transferring State any minimum period of the sentence stipulated by the law of the Transferring State.” Treaty on Cooperation in the Execution of Penal Sentences art. 2, Can.-Thail., Jan. 5, 1983, 1851 U.N.T.S. 245, available at [http://untreaty.un.org/unts/120001\\_144071/27/7/00022667.pdf](http://untreaty.un.org/unts/120001_144071/27/7/00022667.pdf). The language is also slightly different in the PTA with Hong Kong. Agreement on the Transfer of Offenders and on Co-operation in the Enforcement of Penal Sentences, H.K.-Thail., art. 3, Apr. 25, 2000, translated in <http://www.legislation.gov.hk/table5ti.htm> (follow “English(pdf)” hyperlink in “Thailand” row) (“an offender may not be transferred unless he has served in the jurisdiction of the transferring Party any minimum period of imprisonment, confinement or any other form of deprivation of liberty stipulated by the law of the transferring Party”).

130. PLACHTA, *supra* note 3, at 243.

131. Embassy of the United States in Japan, U.S. Citizen Services, Prisoner Transfer, <http://japan.usembassy.gov/e/acs/tacs-transfer.html> (last visited Feb. 22, 2008). Japan, which ratified the CTSP in February 2003, is one of the non-member states of the Council of Europe that has ratified the CTSP. CTSP Status, *supra* note 29.



to one year. Both the CTSP and the Model Agreement set the minimum duration of remaining sentence at six months.<sup>132</sup> However, insofar as the requirement is intended to ensure authorities have adequate time to process applications, a six-month minimum remaining sentence requirement has already proved to be unrealistic in light of prisoners' experiences with the United Kingdom. As reported by Prisoners Abroad, an international prisoner transfer conducted by the United Kingdom normally takes twelve to eighteen months to complete,<sup>133</sup> but in certain circumstances, it may take two years or longer. For example, two prisoners in Spain waited for two years before being transferred back to the United Kingdom, and one prisoner from Portugal waited two and a half years for a similar transfer.<sup>134</sup> Delays in transfer are also common among other signatories of the CTSP,<sup>135</sup> and as a survey by the Irish Commission for Prisoners Overseas revealed, prisoner transfers in those countries surveyed generally take one year to two and a half years to complete.<sup>136</sup> Factors leading to delays are numerous, including the huge amount of documentation required, the government bureaucracies involved, certain uncooperative interactions between the sentencing state and the receiving state, and the inability of the sentencing state and the receiving state to agree on how the remaining sentence should be enforced.<sup>137</sup>

Unlike the CTSP and the Model Agreement, eight out of nine PTAs Hong Kong has signed with other jurisdictions (including the one with Thailand) and all three PTAs China has signed stipulate that at the time of application, a prisoner should have at least one year of his sentence

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132. CTSP, *supra* note 25, art. 3(1)(c); Model Agreement, *supra* note 30, para. 11.

133. Prisoners Abroad, Factsheet: Prisoner Transfer to the U.K., [http://www.prisonersabroad.org.uk/Downloads/Factsheets/Prison\\_transfer.pdf](http://www.prisonersabroad.org.uk/Downloads/Factsheets/Prison_transfer.pdf) (last visited Nov. 5, 2007).

134. GINNY GREENLAW & DIANA PARKINSON, BRINGING PRISONERS HOME: INTERNATIONAL PRISONER TRANSFER IN THE 21ST CENTURY 45 (2002), available at [http://www.prisonersabroad.org.uk/Downloads/Research/Bringing\\_prisoners\\_home.pdf](http://www.prisonersabroad.org.uk/Downloads/Research/Bringing_prisoners_home.pdf).

135. Eur. Parl. Ass., *Operation of the Council of Europe Convention on the Transfer of Sentenced Persons—Critical Analysis and Recommendations: Report of the Comm. on Legal Affairs and Human Rights*, Doc. 9117 (June 1, 2001), available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc01/edoc9117.htm> [hereinafter Council of Europe, Doc. 9117]. The average length of time needed to process a transfer application in some CTSP signatory countries are as follows: one year in both the United Kingdom and the Netherlands, eighteen months in both Spain and Germany, and two years in Ireland. *Id.* n.13.

136. *Id.* nn.11–13.

137. *Id.* The combined effect of these factors caused one Spanish national with serious health problems to wait two years before being transferred from the United Kingdom back to Spain. *Id.* app. I. Although humanitarian grounds (based on the prisoner's illness) could have provided a basis for expedited transfer, no such effort was made. *Id.*

remaining.<sup>138</sup> The only exception is the PTA between Hong Kong and Macau. In that agreement, the minimum remaining sentence is set at six months.<sup>139</sup> The Hong Kong government explained that due to the geographical proximity between Hong Kong and Macau, the procedures for handling an application for transfer could be completed within a shorter period of time.<sup>140</sup> The prisoner transfer arrangement between Hong Kong and Macau went into effect on December 1, 2005.<sup>141</sup> During the first six days of its operation, the Macau prison authority received over fifty transfer applications.<sup>142</sup> As of June 2006, however, only one Hong Kong resident had been successfully transferred from Macau back to Hong Kong.<sup>143</sup> This suggests that, notwithstanding the geographical proximity, setting the remaining sentence at six months is inappropriate, even in the context of prisoner transfers between Hong Kong and Macau. Similarly,

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138. Hong Kong's PTAs with Australia, Italy, the Philippines, Portugal, Sri Lanka, Thailand, the United States, and the United Kingdom all include a one year requirement. For the text of these treaties, see Department of Justice of the HKSAR, *Treaties and International Agreements*, *supra* note 65. The PTA with France is the exception; it includes a six month remaining sentence requirement. Hong Kong-France PTA, *supra* note 75, art. 3(1)(c). The PTA between Hong Kong and the Philippines, in addition to the one-year remaining sentence requirement, also limits eligibility to prisoners sentenced to a minimum of three years' imprisonment. Hong Kong-Philippines PTA, *supra* note 78, art. 4(d). With respect to the China PTAs, see P.R.C.-Ukr. PTA, *supra* note 45, art. 4.1.3; P.R.C.-Russ. PTA, *supra* note 46, art. 5.1.3; P.R.C.-Spain PTA, *supra* note 46, art. 2.1.1.

139. Hong Kong-Macau PTA, *supra* note 65, art. 4(4)(i).

140. LC PAPER NO. CB(2)2018/04-05, *supra* note 80, at 3.

141. *50 Aomen qiu qiu fan Gang fuxing [Fifty Prisoners in Macau Request to Return to Hong Kong to Serve Their Sentences]*, SINGTAO RIBAO [SINGTAO DAILY], Dec. 6, 2005, at A18.

142. *Id.* As of March 29, 2006, sixty-nine out of the 107 Hong Kong residents who were serving sentences in Macau had applied for transfer. *69 Aomen zai qiu Gang ren shenqing fan Gang fuxing [Sixty-nine Hong Kong Prisoners in Macau Have Applied to Return to Hong Kong to Serve Their Sentences]*, DAGONG BAO [DA KUNG PAO NEWS], Mar. 30, 2006.

143. *Liangdi dacheng xieyi shuhuan Aomen jianyu jipo; Aomen shou ming Gang qiu ziyuan hui Gang fuxing [Agreement Reached to Alleviate Overcrowding in Macau Prisons; First Hong Kong Prisoner in Macau Was Voluntarily Sent Back to Hong Kong to Serve His Sentence]*, PINGGUO RIBAO [APPLE DAILY], June 8, 2006, at A24. The prisoner was a twenty-three-year-old Hong Kong resident who was sentenced to eight and a half years' imprisonment by a Macau court in December 2004 for drug trafficking. *Aomen shou du yijiao qiufan hui Gang [Macau Transferred Prisoner Back to Hong Kong for the First Time]*, MING BAO [MING PAO DAILY NEWS], June 8, 2006, at A24. The prisoner consented to the transfer and the transfer application was approved by the Chief Executive of Macau on April 9, 2006. *Agreement Reached to Alleviate Overcrowding in Macau Prisons*, *supra*. The prisoner had already served one and a half years of his sentence in Macau when the transfer was completed. *Id.* He was still required to serve his remaining seven years in Hong Kong. *Id.*

geographical proximity failed to facilitate the process of prisoner transfer between the United Kingdom and Ireland. In one case, a prisoner was transferred back to Ireland from England after forty-two months had passed since he had applied for transfer.<sup>144</sup>

As discussed above, performing the “close ties” analysis with respect to the nationality/residency condition is a potentially complicated and time consuming exercise in prisoner transfer between Hong Kong and the Mainland. In addition, the different political and legal considerations of Hong Kong and the Mainland (as revealed by the numerous political and legal controversies between the two jurisdictions since the handover),<sup>145</sup> the relative lack of mutual trust between Hong Kong and the Mainland,<sup>146</sup> and the significant lack of respect for law in the Mainland<sup>147</sup> may further lengthen the transfer process. Therefore, setting the minimum remaining sentence at six months will be equally impracticable in the context of prisoner transfers between Hong Kong and the Mainland. The fact that the Security Bureau estimates that the procedure to handle a prisoner transfer between Hong Kong and the Mainland would take about ten months to one year to complete reinforces this argument.<sup>148</sup>

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144. Council of Europe, Doc. 9117, *supra* note 135, app. I.

145. Two of the most controversial political/legal issues between Hong Kong and the Mainland after the handover were the right of abode of children born to Hong Kong residents in the Mainland and the HKSAR government's proposed enactment of national security legislation to implement article 23 of the Basic Law of the HKSAR. For the details of these two issues, see, for example, JOHANNES M.M. CHAN, H.L. FU & YASH GHAI, *HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION* (2000); FU HUALING, CAROLE J. PETERSEN & SIMON N.M. YOUNG, *NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY* (2005).

146. The lack of mutual trust between Hong Kong and the Mainland was reflected in the controversy over the national security legislation mentioned *supra* note 145. While the HKSAR government emphasized the need to enact the relevant legislation, many Hong Kong residents worried that the government would make use of the legislation to undermine the rights and freedoms they had enjoyed. FU HUALING, PETERSEN & YOUNG, *supra* note 145.

147. China has been severely criticized by the international community for its lack of respect for law, and this situation is particularly apparent and acute with respect to human rights. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to China*, E/CN.4/2006/6/Add.6 (Mar. 10, 2006) (prepared by Manfred Nowak) [hereinafter *Mission to China*].

148. See *Zhong-Gang hu huan qiufan nan shuhuan jianyu ji po* [China-Hong Kong Prisoner Transfer Unlikely to Alleviate Prison Overcrowding], CHENG BAO [SING PAO DAILY NEWS], Nov. 26, 2004, at A8; *Yijiao neidi qiufan miandui san nanti* [Three Difficulties in Transferring Mainland Prisoners], TAIYANG BAO [THE SUN], Nov. 26, 2004, at A8.

If a six month requirement is inappropriate, why not adopt the one year minimum remaining sentence requirement reflected in the other Hong Kong PTAs? Although such a proposal obviates the problem of administrative delay in application processing, it raises yet another issue: such a requirement would substantially reduce the number of prisoners qualified to apply for a transfer. According to the Security Bureau, as of November 2005, 48.9% of the Mainlanders serving sentences in Hong Kong had a remaining sentence term of less than one year.<sup>149</sup> These Mainland prisoners would automatically be excluded from a prisoner transfer arrangement if the minimum remaining sentence was set at one year. In fact, even the Security Bureau has candidly noted that: “In overall terms, we envisage that the long-term effect of the two-way transfer of sentenced persons between Hong Kong and the Mainland on our total penal population would be insignificant.”<sup>150</sup>

While setting the minimum duration of remaining sentence at six months or one year would have a substantial impact on the number of eligible Mainland prisoners in Hong Kong prisons, the same issue would not be as significant for Hong Kong residents serving sentences in Mainland prisons. As of November 2005, there were about 600 Hong Kong residents serving sentences in Guangdong Province in the Mainland.<sup>151</sup> Although individual prisoner sentencing data is not available, the Hong Kong and Mainland news media report that the crimes committed by these Hong Kong residents are often serious and punishable by a relatively long period of imprisonment.<sup>152</sup> This suggests that a

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149. LC PAPER NO. CB(2)755/05-06, *supra* note 9, at 5. In January 2002, it was even reported that ninety percent of the Mainlanders serving sentences in Hong Kong had a remaining sentence term of less than one year. LC PAPER NO. CB(2)1023/01-02(03), *supra* note 15, annex A.

150. LC PAPER NO. CB(2)1023/01-02(03), *supra* note 15, annex A.

151. LC PAPER NO. CB(2)755/05-06, *supra* note 9, at 5.

152. Between 1998 and 2006, 120 Hong Kong residents received a death sentence or a suspended death sentence in the Mainland. Liu Yaoling, *Gang ren zai dalu bei pan sixing yinqi guanzhu* [Hong Kong Residents Sentenced to Death in the Mainland Arouses Concerns], VOICE OF AMERICA NEWS, Mar. 3, 2006, available at <http://www.voanews.com/chinese/archive/2006-03/w2006-03-03-voa57.cfm>. According to the Director of Public Prosecutions of Hong Kong, the crimes most frequently committed by Hong Kong residents in the Mainland are “financial crimes perpetrated in the guise of legitimate businesses, and which often involve an element of corruption.” Press Release, Hong Kong Government Information Centre, Speech by Director of Public Prosecutions (Apr. 30, 2002), available at <http://www.info.gov.hk/gia/general/200204/30/0430103.htm>. Similarly, the Director of the Office of HKSAR Government in Beijing said that “fraud, misappropriation of funds and falsely making out invoices for value-added tax” were the crimes most frequently committed by Hong Kong people in the Mainland. *Gang ren neidi qiuzhu zeng yu san cheng* [Requests from Hong Kong Residents in the Mainland for As-

PTA between Hong Kong and the Mainland would likely be more beneficial to Hong Kong residents serving sentences in the Mainland than it would be for Mainland residents serving sentences in Hong Kong.

It is clear that the relevant authorities would not have sufficient time to process a transfer application if the minimum remaining sentence requirement is too short. However, the number of eligible prisoners would be substantially reduced and the original intent of prisoner transfer would be undermined if the minimum remaining sentence requirement is too long. How should the authorities in Hong Kong and the Mainland solve this problem?

To give both jurisdictions some flexibility in handling this minimum remaining sentence requirement, a Hong Kong-Mainland PTA should incorporate a clause that allows the remaining sentence requirement to be waived upon mutual consent of both jurisdictions. If both jurisdictions agree to a waiver, even if a prisoner's remaining sentence is less than the duration set in the agreement at the time when he applies for a transfer, his application may still be processed. In fact, many agreements already incorporate such a waiver clause, including the CTSP,<sup>153</sup> four of Hong Kong's bilateral PTAs,<sup>154</sup> and at least two of China's PTAs.<sup>155</sup>

Undoubtedly, giving the relevant authorities of both jurisdictions the discretion to invoke the waiver when in their judgment the special circumstances of an individual prisoner require it complies with the humanitarian principle behind prisoner transfer. However, given that prisoners who benefit from this clause may only need to serve a very short sentence remainder in their home jurisdictions after transfer, the extent to which the objective of rehabilitation can be achieved is in serious doubt. This highlights the importance for the relevant authorities of Hong Kong and the Mainland to use restraint in exercising any discretion to waive the minimum remaining sentence requirement provided in a future Hong

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*sistance Increased by Thirty Percent*], TAIYANG BAO [THE SUN], Apr. 13, 2005, at A11. Moreover, drug offenses, such as drug trafficking and drug manufacturing, are another category of offenses commonly committed by Hong Kong residents in the Mainland, and these offenses often carry the death penalty. *See id*; Liu Yaoling, *supra*.

153. CTSP, *supra* note 25, art. 3(2).

154. Hong Kong incorporated waiver clauses in its PTAs with Australia, the United Kingdom, the United States, and Macau. Hong Kong-Australia PTA, *supra* note 78, art. 4(d)(iii); Hong Kong-United Kingdom PTA, *supra* note 78, art. 4(d)(iii); Agreement on the Transfer of Sentenced Persons, H.K.-U.S., art. 4(2), Apr. 15, 1997, *translated in* <http://www.legislation.gov.hk/table5ti.htm> (follow "English(pdf)" hyperlink in "United States" row); Hong Kong-Macau PTA, *supra* note 65, art. 4(4)(i).

155. P.R.C.-Ukr. PTA, *supra* note 45, art. 4.2; P.R.C.-Russ. PTA, *supra* note 46, art. 5.2.

Kong-Mainland PTA, so as to ensure the proper balance between human rights protection and rehabilitation.

### *E. Tripartite Consent*

One practical issue concerning tripartite consent is the willingness of Mainland prisoners to be transferred from Hong Kong back to the Mainland. China's prison conditions are notorious.<sup>156</sup> Chinese prisons are overcrowded,<sup>157</sup> as are most prisons in other countries,<sup>158</sup> and suffer from low hygienic standards.<sup>159</sup> In addition, the abuse of power by prison guards and the brutality of some inmates (who are often backed by the prison guards) are well known.<sup>160</sup> Cases of severe injury or death of prisoners are reported by the media from time to time.<sup>161</sup> China has also been denounced by human rights advocates for inhumane prison labor programs.<sup>162</sup> Such poor conditions in Mainland prisons (when compared to

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156. For a detailed description of the prison conditions in the Mainland, see generally *Mission to China*, *supra* note 147.

157. The state of Guangdong's prisons sheds light on the seriousness of overcrowding in Chinese prisons. According to one report in 2003, almost thirty percent of the prisons in Guangdong Province were overcrowded. *Yue san cheng kanshou suo baoman; yi fan zhan; shui sheshi buzu yi sheng oudou* [Thirty Percent of the Detention Centers in Guangdong Are Overcrowded; Suspects Keep Standing While Sleeping; Insufficient Facilities Easily Lead to Fighting], MING BAO [MING PAO DAILY NEWS], Nov. 5, 2003, at A24. The prison population in the Baoan District Detention Center in Shenzhen was three times greater than its available capacity. *Id.* As a result, seventy to eighty prisoners were housed in one cell that was intended to house only twenty people. *Id.* Due to the lack of space, every night prisoners were divided into three groups in order to take turns lying down to sleep; while one-third slept, another one-third sat, and the remaining one-third stood. *Id.*

158. See Penal Reform International, Prison Overcrowding, <http://www.penalreform.org/prison-overcrowding.html> (last visited Feb. 21, 2008).

159. See Philip P. Pan, *China's Prison Laborers Pay Price for Market Reforms*, WASH. POST, June 14, 2001, at A1.

160. See *id.*; *Mission to China*, *supra* note 147, ¶¶ 44–45.

161. See, e.g., *Sichuan jianyu ye nue qiu: yu jing yong jing gun dianxian huohuo dasi qiufan* [Sichuan Prison also Mistreats Prisoners: Prison Guard Beats a Prisoner to Death with a Baton], SICHUAN XINWEN WANG [SICHUAN NEWS NET], Nov. 4, 2004, available at <http://prison.com.cn/Press/2004-11-4/35F4E62D-2937-4925-A5F9-93AC2362A5EF.html>; Qin Zuoquan, *Fuxing renyuan yu zhong bei da can; huo pei jin 6 wan yuan* [Inmate Who Becomes Disabled After Being Beaten Is Awarded Nearly 60,000 RMB Compensation], FUZHOU RIBAO [FUZHOU DAILY], Aug. 24, 2007, available at <http://www.chinalawedu.com/news/1000/2/2007/8/li395026349428700220160-0.htm>; Ren Feilin, *Jilin fuxing fan bei jingcha ouda zhi guzhe; jiancha jiguan jie ru diaocha* [Jilin Inmate Suffered from Bone Fracture After Being Beaten by the Police; Procurator Intervenes in the Investigation], ZHONGGUO JILIN WANG [CHINA JILIN NET], Oct. 27, 2006, available at <http://news.1488.com/news/legal/2006/10-27/9-47-42-1.shtml>.

162. See Pan, *supra* note 159.

those in Hong Kong prisons) are likely to be a major factor affecting whether many Mainland prisoners in Hong Kong prisons even apply for a transfer.

Moreover, many Mainland prisoners may not want their families, friends, neighbors, and other fellow citizens to know that they engaged in criminal activities in Hong Kong. This is particularly true for Mainland women imprisoned for prostitution in Hong Kong. A transfer home under such circumstances not only brings shame on oneself, but also embarrasses one's family. In consideration of both the conditions in Mainland prisons and the shame that can accompany a prisoner's transfer back home, a PTA between Hong Kong and the Mainland is unlikely to be an attractive mechanism for most, if not all, Mainland prisoners in Hong Kong.

#### IV. ALTERNATIVES TO TRANSFER ON THE BASIS OF A STANDING PTA

##### *A. The Need for Alternatives to a Hong Kong-Mainland PTA*

Notwithstanding that the purpose of a PTA is to facilitate prisoner transfer, the above discussions reveal that instead of safeguarding the interests of foreign prisoners, many conditions in PTAs often present obstacles for prisoner transfer. In practice, many prisoner transfer applications are rejected because of failure to fulfill those conditions, and even more are delayed because of the lengthy verification process that ensures the conditions are fulfilled.<sup>163</sup>

For example, between 1986 and 1990, among the 270 requests for transfer to which the United Kingdom was a party (either as a sentencing state or a receiving state), only sixty-three (23.3%) were successful.<sup>164</sup> For the other 207 requests, fifty-one (18.9%) were rejected while 156 were either withdrawn or the prisoners were released before the transfers were carried out.<sup>165</sup> Similarly, between 1988 and 1990, only 101 (37.5%) of the 269 requests for transfer to which the Netherlands was a party were successful.<sup>166</sup> Sixty-six (24.5%) were rejected and 102 (37.9%) were either withdrawn or the prisoners were released before the transfers were carried out.<sup>167</sup>

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163. See Council of Europe, Doc. 9117, *supra* note 135.

164. See Désirée Paridaens & Christopher Harding, *The Transfer of Prisoners with Special Reference to the Netherlands and the UK*, in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY* 375 (Phil Fennell, Christopher Harding, Nico Jörg & Bert Swart eds., 1995).

165. See *id.*

166. See *id.* at 376.

167. See *id.*

Hong Kong's record on prisoner transfer is even bleaker. Between June 1997 and March 2002, among the eighty-eight prisoner transfer applications in which Hong Kong was the sentencing state, seventeen (19.3%) were rejected because the Hong Kong government was "[u]nable to conclude satisfactory ad hoc arrangements or reach consensus on transfer" with the receiving state and thirty-three (37.5%) were unsuccessful because the applications were not processed before the prisoners were discharged.<sup>168</sup> Only five (5.7%) applications were successful.<sup>169</sup>

The low success rate of international prisoner transfer raises questions about the operational effectiveness of a prospective PTA between Hong Kong and the Mainland. It is also worth noting that China has included a clause in its PTAs with Ukraine and Russia that empowers the signatories to refuse a prisoner transfer even if all other requirements are satisfied. The clause states: "Except in the situations stated in the preceding paragraph [which includes cases implicating national security, life imprisonment, and the death penalty], any party has the autonomy to decide on its own whether to consent to a transfer requested by the other party."<sup>170</sup> Whether China will insist on adding the same clause to a future PTA with Hong Kong is uncertain. The inclusion of such a discretionary clause would effectively render all other conditions for transfer meaningless, as the ultimate decision will depend on the subjective views of the signatories.

In light of the foregoing, even if Hong Kong and the Mainland successfully conclude a PTA according to international practice, it does not necessarily mean that non-resident prisoners serving sentences in either jurisdiction will actually benefit from, or voluntarily make use of, such an agreement. This calls into question the necessity of a Hong Kong-Mainland PTA. While negotiations for such an agreement are still underway, and in light of reservations as to the practicability of a Hong Kong-Mainland PTA drafted according to international practice, it is prudent to consider other methods to facilitate prisoner transfer between the two jurisdictions.

#### *B. Ad Hoc Transfer: Another Form of Prisoner Transfer*

The Hong Kong government has claimed that, at present, prisoner transfer between Hong Kong and the Mainland is impossible because of

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168. See LCQ8: Transfer of Sentenced Persons, *supra* note 64, annex.

169. See *id.* The remaining thirty-three applications received between June 1997 and March 2002 were still being processed as of March 2002. See *id.*

170. P.R.C.-Ukr. PTA, *supra* note 45, art. 5.2; P.R.C.-Russ. PTA, *supra* note 46, art. 6.2.



the lack of a PTA between the two jurisdictions.<sup>171</sup> However, the absence of a PTA does not in fact preclude prisoner transfers.

Ad hoc prisoner transfer is commonly used in circumstances in which there is no standing PTA between the sentencing state and the receiving state.<sup>172</sup> Due to the lack of an established mechanism in such cases, the parties involved must determine eligibility for transfer, the procedure for transfer, and the execution of the remaining sentence on a case-by-case basis. This ad hoc method of prisoner transfer has already been used by both the Hong Kong government and the Chinese government.

According to information provided by the Security Bureau in March 2002, Hong Kong had received eighty-eight prisoner transfer applications since the handover.<sup>173</sup> Among these eighty-eight applications, only thirty-two involved prisoners from countries that had a PTA with Hong Kong at that time.<sup>174</sup> Only five out of the eighty-eight applications were successful, and of these five prisoner transfers, while four were transfers under standing agreement with the United Kingdom, one was an ad hoc transfer to Nigeria.<sup>175</sup>

The ad hoc transfer to Nigeria aroused some controversy.<sup>176</sup> This is because the prisoner involved in that case was the son of the Consul General of Nigeria in Hong Kong. The twenty-two-year-old man was convicted of assaulting police in September 2001 and was sentenced to two years' imprisonment.<sup>177</sup> After serving two and a half months of his prison term in Hong Kong, he was transferred back to Nigeria to serve his remaining sentence.<sup>178</sup> The quick transfer aroused suspicions that his father had exercised his consular privileges to pressure the Hong Kong government to release him.<sup>179</sup> There was also speculation that the so-called

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171. See LCQ6: Transfer of Sentenced Persons, *supra* note 73.

172. See LCQ8: Transfer of Sentenced Persons, *supra* note 64.

173. See *id.*

174. See *id.*

175. *Id.*

176. For the details of this ad hoc prisoner transfer, see *Ni lingshi zi bei pan liangnian; fixing liangyue hou li Gang* [Son of Nigerian Consul General Sentenced to Two Years' Imprisonment Left Hong Kong After Having Served Two Months of Sentence], TAIYANG BAO [THE SUN], Feb. 11, 2002, at A2 [hereinafter *Son of Nigerian Consul General*, THE SUN]; *Ni Guo lingshi zi huo tizao chuyu* [Son of Nigerian Consul General Being Granted Early Release], CHENG BAO [SING PAO DAILY NEWS], Feb. 11, 2002, at A11 [hereinafter *Early Release*, CHENG BAO].

177. *Son of Nigerian Consul General*, THE SUN, *supra* note 176; *Early Release*, CHENG BAO, *supra* note 176.

178. *Son of Nigerian Consul General*, THE SUN, *supra* note 176; *Early Release*, CHENG BAO, *supra* note 176.

179. According to the Prisoners' Friends' Association, a prisoner transfer application normally takes at least a few months to process. See *Early Release*, CHENG BAO, *supra*

“transfer” was actually an early release, because whether he would be required to serve his remaining sentence after being transferred back to Nigeria was unknown.<sup>180</sup>

China signed its first PTA in July 2001, but it had in fact conducted ad hoc prisoner transfers with other countries some years before. The first prisoner transfer with China was conducted with Ukraine in 1997.<sup>181</sup> Bearing in mind both the humanitarian interests (in allowing foreign prisoners to serve their sentences in their home jurisdictions) and in consideration of the administrative inconvenience of incarcerating foreign prisoners,<sup>182</sup> China transferred, at the request of the Ukraine government and with the consent of the prisoners, two Ukrainians sentenced to ten years’ imprisonment for theft by a Mainland court in 1994.<sup>183</sup> The transfer was initiated by the Embassy of Ukraine, which issued an express request to the Chinese government.<sup>184</sup> The two prisoners were transferred to the custody of the relevant Ukraine officials at Beijing Capital Airport and sent home by plane.<sup>185</sup> The transfer process took about six months to complete.<sup>186</sup>

China’s most recent prisoner transfer took place on February 22, 2004 when the Ministry of Justice in China transferred a Cameroonian pris-

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note 176. The lengthy processing time is in fact one of the factors that may cause a transfer application to be unsuccessful. For example, between June 1997 and March 2002, thirty-three out of eighty-eight prisoner transfer applications were unsuccessful because of “insufficient time to complete the processing of the applications or the negotiation of ad hoc arrangements before discharge . . . of the prisoners concerned.” See LCQ8: Transfer of Sentenced Persons, *supra* note 64. The transfer of this Nigerian prisoner, which only took two and a half months to process, was conducted much faster than other applications. See *Early Release*, CHENG BAO, *supra* note 176.

180. *Ni Lingshi zi mimi huoshi re zhengyi* [*The Secret Release of the Son of Nigerian Consul General Arouses Controversy*], DONGFANG RIBAO [ORIENTAL DAILY], Feb. 11, 2002, at A22.

181. For the details of this transfer, see BEIPANXINGREN YIGUAN GUOJI JI OUYU HEZUO [INTERNATIONAL AND INTER-TERRITORIAL COOPERATION ON THE TRANSFER OF SENTENCED PERSONS] 567 (Zhao Bingzhi & Huang Feng eds., 2004) [hereinafter Zhao Bingzhi & Huang Feng].

182. See *id.* at 568. The Harbin Prison Administration (where the Ukrainians were imprisoned) specifically designed prison cells with advanced administrative and living facilities for the foreign prisoners. *Id.* Special arrangements were also made to accommodate the foreign prisoners’ habits and dietary requirements. *Id.* However, problems such as the language barrier remained unsolved. The language difference made it difficult for the foreign prisoners to participate in group activities with local inmates. *Id.*

183. *Id.* at 568–69.

184. *Id.* at 570–71.

185. *Id.* at 570, 576–77.

186. *Id.* at 569–70.

oner to the Cameroonian government at Beijing Capital Airport.<sup>187</sup> The prisoner had been sentenced to twelve years' imprisonment for theft in 1999 and was serving his sentence in the Qingdao Prison in Shandong Province.<sup>188</sup> This transfer, which took about eight months to complete starting in June 2003, was made at the request of the Cameroonian government because of the health problems of the prisoner concerned.<sup>189</sup>

While ad hoc transfer may be an alternative to transfers under a standing agreement, based on the outcomes of the eighty-eight applications handled by Hong Kong between the handover and March 2002, it is clear that the likelihood of success is even less than transfer based on a standing agreement. This is a natural consequence because ad hoc transfers require the negotiation of a new arrangement for every application. Given the different political, legal, and other considerations in each case, negotiating the conditions for transfer, the procedure for transfer, and the method of enforcement for the remaining sentence between the two jurisdictions is certain to be tedious. The lengthy negotiations may render an application unsuccessful, as the parties may not be able to reach an agreement before the prisoner concerned is discharged, or they may be unable to reach an agreement at all.

Although there are many uncertainties when a transfer is conducted on the basis of a standing agreement, a PTA at least ensures both parties have negotiated the principal issues, have some understanding of each other's concerns, and have reached agreement on certain issues. From this point of view, prisoners' rights are likely to be better protected if there is a PTA. As Michal Plachta remarks:

While it would seem a sensible precaution to make provisions in the domestic legislation for *ad hoc* agreements, they should be regarded as a second-best when compared with regular treaties. Provided that there is some expectation that regular use will be made of it, a treaty is much

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187. For the details of this transfer, see *id.* at 580. In addition to this transfer and the transfer of Ukrainian prisoners mentioned above, the Department of Judicial Assistance and Foreign Affairs of the Ministry of Justice disclosed that the PRC has conducted prisoner transfers with Russia and the Republic of Mali. Zhonghua Renmin Gongheguo Sifa Bu [Department of Judicial Assistance and Foreign Affairs, Ministry of Justice of the PRC], Renzhen guanche dang de 16 jie 4 zhong quanhui jingshen, jinyibu tigao sifa xiezhu wai shi gongzuo shuiping [Seriously Implementing the Spirit of the Fourth Plenum of the Sixteenth Party Congress of the Chinese Communist Party, Further Raising the Standard of the Work of Judicial Assistance and Foreign Affairs], [http://www.legalinfo.gov.cn/moj/moj/2004-12/13/content\\_167329.htm](http://www.legalinfo.gov.cn/moj/moj/2004-12/13/content_167329.htm) (last visited Jan. 21, 2008). However, details of these two transfers are not available.

188. Zhao Bingzhi & Huang Feng, *supra* note 181, at 580.

189. *Id.*

the more economical approach; it gives certainty and stability to both (or all) parties; and it settles the question of reciprocity.<sup>190</sup>

However, because both Hong Kong and the Mainland have experience with ad hoc prisoner transfers and the two parties have not yet concluded a PTA (and in fact, it is uncertain when or if an agreement could be concluded), Hong Kong and the Mainland should accommodate the needs of prisoners requesting transfers home to serve their sentences by using an ad hoc transfer system. Nevertheless, given the relatively large number of potential applications (when compared to the applications from prisoners who are residents of jurisdictions other than the Mainland), ad hoc transfer from Hong Kong prisons may only be a short term solution. In the long term, a PTA between Hong Kong and the Mainland may well be indispensable because it will save time and resources and provide predictability.

*C. Immediate Repatriation/Deportation After Sentencing: Another Option for the Sentencing State?*

Given that the proportion of Mainland prisoners in Hong Kong who have a remaining sentence term of less than one year has been close to fifty percent,<sup>191</sup> a PTA, regardless of whether the minimum remaining sentence requirement is set at six months or one year, is unlikely to benefit this group of prisoners (especially from the rehabilitative perspective). Because a majority of these Mainland prisoners were imprisoned for immigration offenses (mainly illegal entry, breach of conditions of stay, and entering Hong Kong with forged travel documents),<sup>192</sup> repatriation, which does not require the consent of the prisoner, is likely to be a more effective method to transfer them back to the Mainland.

Under the current immigration policy of Hong Kong, once a Mainland illegal immigrant is arrested by the police, depending on the duration of his illegal stay in Hong Kong, the Immigration Department may employ one of two possible procedures. Under the first option, an illegal immigrant who has been in Hong Kong for less than two months will be interrogated shortly after his arrest to determine whether his entry into Hong Kong was illegal and, if so, whether he should be allowed to remain in

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190. PLACHTA, *supra* note 3, at 258.

191. *See supra* note 149 and accompanying text.

192. As of September 19, 2003, 1812 out of 3473 Mainlanders serving sentences in Hong Kong were imprisoned for immigration offenses. Out of these 1812 persons, almost eighty percent (1433) had a sentence term of less than one year. Press Release, Hong Kong Government Information Centre, LCQ18: Mainlanders Serving Sentences in Hong Kong (Oct. 8, 2003), available at <http://www.info.gov.hk/gia/general/200310/08/1008173.htm>.

Hong Kong on humanitarian grounds.<sup>193</sup> After making these determinations, if the Immigration Department decides to remove him, a "Refusal Notice" will be issued against him, and he will be detained until repatriation.<sup>194</sup> The repatriation is normally carried out within one week.<sup>195</sup> Under the second option, an illegal immigrant who, at the time he is arrested, has been in Hong Kong for more than two months will be placed in detention shortly after his arrest.<sup>196</sup> A "Notice of Removal Order" will be issued against him either before or after his detention.<sup>197</sup> If the detained immigrant intends to challenge the removal order, he has to give written notice to the Immigration Department within twenty-four hours of his receipt of the Notice of Removal Order; if he accepts the removal order, he will be repatriated.<sup>198</sup>

The two aforementioned repatriation methods only apply to Mainlanders who have illegally entered (or stayed in) Hong Kong and have committed no other offense.<sup>199</sup> Mainlanders who have committed any other offense (other than illegal entry or stay), regardless of whether they also entered or stayed in Hong Kong illegally, must go through the formal judicial process in Hong Kong courts. Given the lack of any prisoner transfer arrangement between Hong Kong and the Mainland, normally these Mainland offenders would have to complete their sentences before being sent home. However, in certain circumstances the Chief Executive of the HKSAR does have the power to deport a non-Hong Kong prisoner after sentencing.<sup>200</sup>

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193. SECURITY BUREAU OF THE HKSAR, POLICY AND PRACTICE ON REMOVAL AND DEPORTATION, LC PAPER NO. CB(2)848/99-00(03), at 2 (2000), available at <http://www.legco.gov.hk/yr99-00/english/panels/ajls/papers/b848e03.pdf> [hereinafter LC PAPER NO. CB(2)848/99-00(03)].

194. *Id.* at 3, annex D.

195. Xinwen gongbao [Press Release], Xianggang Tequ Zhengfu [Hong Kong Government Information Centre], Lifahui san ti: denghou dijie huo qiansong li jing ren shi de liu shiyi [LCQ3: Matters Regarding the Detention of People Subject to Repatriation and Deportation] (Mar. 29, 2000), available at <http://www.info.gov.hk/gia/general/200003/29/0329153.htm>.

196. LC PAPER NO. CB(2)848/99-00(03), *supra* note 193, at 3–4.

197. *Id.* at 3–4, annex F.

198. *Id.* at 5.

199. *See id.*

200. Immigration Ordinance, (1997) Cap. 115, § 20, translated in <http://www.legislation.gov.hk/eng/home.htm> (last visited Apr. 21, 2008) (H.K.) ("The Governor may make a deportation order against an immigrant if . . . (a) the immigrant has been found guilty in Hong Kong of an offence punishable with imprisonment for not less than 2 years; or (b) the Governor deems it to be conducive to the public good."); *see also* LC PAPER NO. CB(2)848/99-00(03), *supra* note 193, at 5.

While deportation of foreign criminals is an administrative measure in Hong Kong, it may constitute criminal punishment in the Mainland. Article 35 of the Criminal Law provides that “Deportation may be applied in an independent or supplementary manner to a foreigner who commits a crime.”<sup>201</sup> The Chinese government commonly subjects foreigners who committed crimes in the Mainland to deportation.<sup>202</sup>

The term “deportation” (*quzhu chujing*) in Chinese refers to expelling someone from the territory of a country.<sup>203</sup> The term “territory” under the Criminal Law should be read as jurisdictional territory, not the sovereign territory of the PRC, because the Criminal Law is not applicable to the HKSAR<sup>204</sup> by virtue of the principle of One Country, Two Systems.<sup>205</sup> Also, because Hong Kong residents are “foreigners” with regard to the jurisdictional territory of the Mainland, the term “foreigner” under article 35 of the Criminal Law should include Hong Kong residents.<sup>206</sup> Thus, it naturally follows that a Hong Kong resident may be expelled by the Mainland authorities from the jurisdictional territory of the Mainland to the jurisdictional territory of Hong Kong. In other words, the criminal punishment of deportation under article 35 of the Criminal Law may be applied to Hong Kong residents.<sup>207</sup>

Thus, repatriation/deportation of prisoners in Hong Kong and the Mainland is possible under the laws of both jurisdictions and it is likely to be a more effective and expedient method for Hong Kong to transfer many Mainland prisoners back to the Mainland. The only problem with this method is that it fails to serve the deterrent purpose of punishment

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201. Criminal Law art. 35, *translated in* LAWINFOCHINA (last visited Apr. 16, 2008) (P.R.C.).

202. *See, e.g., Foreign Swindlers Convicted in Beijing*, PEOPLE'S DAILY, Feb. 1, 2002, available at [http://english.peopledaily.com.cn/200202/01/print20020201\\_89748.html](http://english.peopledaily.com.cn/200202/01/print20020201_89748.html); Jiang Zhuqing, *Japanese Snakehead Deported from China*, CHINA DAILY, Aug. 18, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-08/18/content\\_366424.htm](http://www.chinadaily.com.cn/english/doc/2004-08/18/content_366424.htm); Wang Zhuoqiong, *American DVD Piracy Convict Deported Home*, CHINA DAILY, Sept. 30, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-09/30/content\\_482005.htm](http://www.chinadaily.com.cn/english/doc/2005-09/30/content_482005.htm).

203. The term “*quzhu*” is defined as “expelling” and the term “*chujing*” is defined as “leaving the territory of a country.” *See* ZHONGGUO SHE HUI KE XUE YUAN YU YAN YAN JIU SUO CI DIAN, XIAN DAI HAN YU CI DIAN [MODERN CHINESE DICTIONARY: CHINA SOCIAL SCIENCE INSTITUTE LINGUISTIC DEPARTMENT EDITION] 197, 1125 (2005).

204. *See supra* note 4 and authorities cited therein.

205. For a discussion of the definition of the word “territory” under the Criminal Procedure Law, see, for example, H.L. Fu, Comment, *The Battle of Criminal Jurisdictions*, *supra* note 92.

206. *See* Criminal Law art. 35, *translated in* LAWINFOCHINA (last visited Apr. 16, 2008) (P.R.C.).

207. *Id.*

because the repatriated/deported criminal would be sent back to his home country soon after sentencing, and there is no guarantee that any (administrative or criminal) punishment would be imposed by his home jurisdiction after his return.

Because the rehabilitation and deterrent purposes are unlikely to be achieved (especially without the cooperation of the receiving state) when a prisoner is repatriated or deported immediately after sentencing, this transfer method is unsuitable for most prisoners. However, from the perspective of criminal justice policy, such measures may be justified in cases in which Mainlanders have been convicted for the crimes of prostitution or working without permission in Hong Kong. Both of these offenses are really victimless crimes; however, they may result in a maximum punishment of three years' imprisonment.<sup>208</sup> Mere repatriation/deportation may be sufficient punishment. Moreover, imprisonment has already proved to be an ineffective deterrent (especially for those who come to Hong Kong for prostitution)—many come back to Hong Kong and commit the same crime again. The Hong Kong Police have acknowledged that some Mainland prostitutes they arrest have been arrested in and repatriated from Hong Kong many times.<sup>209</sup>

#### CONCLUSION

This Article has demonstrated that concluding a PTA between Hong Kong and the Mainland that is practical in the context of prisoner transfer

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208. For Mainland women who travel to Hong Kong with valid travel documents but are arrested for engaging in prostitution in Hong Kong, the most common charge is "soliciting for an immoral purpose," an offense under the Crimes Ordinance with a maximum punishment of a fine of HK\$10,000 and six months' imprisonment. Press Release, Hong Kong Government Information Centre, LCQ1: Women from Mainland Engage in Prostitution (Dec. 20, 2000), available at <http://www.info.gov.hk/gia/general/200012/20/1220187.htm>. An alternative charge against Mainlanders who come on valid travel documents but are arrested for prostitution is "breach of conditions of stay," an offense under the Immigration Ordinance with a maximum punishment of a fine of HK\$50,000 and two years' imprisonment. *Id.* On the other hand, if the Mainland prostitutes are found to be illegal immigrants, they may be charged with "illegal remaining," an offense under the Immigration Ordinance with a maximum punishment of a fine of HK\$25,000 and three years' imprisonment. *Id.* The charges of "breach of conditions of stay" and "illegal remaining" are also applicable to Mainlanders arrested for working illegally in Hong Kong. See Press Release, Hong Kong Government Information Centre, LCQ4: Guangdong Province Residents to Visit Hong Kong in Personal Capacity (Apr. 30, 2003), available at <http://www.info.gov.hk/gia/general/200304/30/0430292.htm>.

209. *Dalu lan fa shuang cheng zheng, Xianggang ji nü sao bu wan* [Mainland Arbitrarily Issues "Two-way Permits," Prostitutes in Hong Kong Can Never Be Cleared], LIANHE ZAOBAO WANG [ZAOBAO.COM], Aug. 1, 2006, available at <http://www.zaobao.com.sg/special/newspapers/2006/08/others060801c.html>.

between the two jurisdictions is not an easy task. It is anticipated that the relevant authorities of the two jurisdictions will encounter many problems in concluding a Hong Kong-Mainland PTA and implementing such an agreement in the future, even if the internationally recognized prisoner transfer conditions are adopted. The negotiation process is therefore bound to be tedious.

Prisoners serving sentences in foreign jurisdictions should not be deprived of the right to transfer to their home jurisdictions simply because of the lack of a standing PTA. While negotiations are still underway between Hong Kong and the Mainland, alternative methods of prisoner transfer should be employed. Ad hoc transfer, a method that has been utilized by Hong Kong and the Mainland in facilitating prisoner transfers with other countries, is a viable solution for the short term. Even if a Hong Kong-Mainland PTA is concluded, ad hoc transfer should be a fallback method to conduct prisoner transfer on humanitarian grounds in cases where the normal conditions of prisoner transfer are not satisfied.

Repatriation and deportation should also be considered as more practical methods for Hong Kong to transfer the large number of Mainland prisoners with short sentence terms (particularly those imprisoned for immigration offenses and engaging in prostitution) back to the Mainland. This does not mean a PTA between Hong Kong and the Mainland is unnecessary. Rather, a Hong Kong-Mainland PTA remains important for Mainland prisoners in Hong Kong who have longer sentence terms and for Hong Kong residents who are serving sentences in Mainland prisons.