

The Idea of a China Arrest Warrant

Surrender of Fugitive Offenders between
Mainland China, Hong Kong, and Macau

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Preface

No agreement on the surrender of fugitive offenders between mainland China, Hong Kong, and Macau has been concluded, even though the two Special Administrative Regions (SARs) were returned to the People's Republic of China (PRC) more than twenty years ago. Numerous serious efforts have been made to help realize such a surrender arrangement, however no consensus has yet been reached. My study aims to investigate this problem in order to ascertain the basic principles with which the three regions should comply in reaching an arrangement. I do this mainly by referring to the legislation and practice of the European arrest warrant system which applies in the European Union (EU).

In addition to intensive bibliographical study, the research for this book relies on comparative analysis and cases studies. It undertakes comparisons between the EU and China along horizontal and vertical lines and from external and internal perspectives. These comparisons, both general and particular, are designed to provide background or context to the book's core research on the surrender system. Detailed analysis of the similarities and differences between the EU surrender system and the Chinese domestic surrender system runs through the entire narrative. The EU's development from old extradition system to the present-day European arrest warrant dates back to the 1950s and applies from the EU level to the Member States level. In China, I analyze the separate (joint) legislative domains and practices in mainland China, Hong Kong, and Macau in order to identify the common basis for, and possible obstacles to, the construction of a close surrender system. The cases studied come from the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), and the courts of mainland China, Hong Kong, and Macau.

This study concludes that mainland China, Hong Kong, and Macau need a new system for the surrender of fugitive offenders that is closer and more efficient than the current traditional form of international extradition, while also being based on the principle of human rights protection. Scrutinizing the European arrest warrant in practice, in light of the actual needs of a mainland, Hong Kong, and Macau surrender

system, the EU model does offer inspiration. This study shows that a China arrest warrant system inspired mainly by its EU counterpart could be established between mainland China, Hong Kong, and Macau. The mutual recognition principle that is the cornerstone of the European arrest warrant system could be applied to the three Chinese regions, as well as most of the system's other concrete surrender principles. At the same time, some adjustment should be made in line with the lessons learned and the political and legal situations in mainland China, Hong Kong, and Macau.

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Introduction

1 Identifying the topic and the problem

Historically, Hong Kong was a colonized territory of Britain while Macau was a colony of Portugal. In those times, the reciprocal extradition of fugitive offenders vis-à-vis the People's Republic of China (PRC) and as between Hong Kong and Macau were usually matters for international diplomacy and agreement.¹ Hong Kong and Macau were returned to the PRC in 1997 and 1999 respectively. They were constituted as special administrative regions (SARs) of the PRC governed by the “one country, two systems” policy.² The surrender of fugitive offenders would now become an internal matter of the PRC to be settled in accordance with the high degree of autonomy granted to the two SARs. However, at the time of the respective handovers, the issue of “extradition” between Hong Kong, Macau and mainland China was highly controversial given differences in the legal systems and concerns about the death penalty applied in mainland China. All that could be agreed was that the issue be deferred for consideration in the future. Indeed, when the Hong Kong SAR and Macau SAR passed local laws to provide for the surrender of fugitive offenders, both laws clearly stated they would not apply to other parts of the PRC.³

The change in terminology from “extradition” to “surrender” also reflects the evolution in the constitutional orders of Hong Kong and Macau. In substance, extradition and surrender have the same meaning, i.e. the legal transfer of a person from place A to place B to face a criminal charge (or serve a sentence). But as “extradition” connotes relations between two sovereign states while “surrender” does not, those

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1. Miguel Manero de Lemos and Simon N.M. Young, “Regional Judicial Cooperation in Criminal Matters: Mainland China, Hong Kong and Macau,” in *Elgar Encyclopedia of Crime and Criminal Justice*, ed. P Caeiro and others (Cheltenham: Edward Elgar, July 2023).
 2. See Basic Law of Hong Kong, Preamble; Basic Law of Macau, Preamble.
 3. See Hong Kong's Fugitive Offenders Ordinance (Cap 503), s 2(1) (definition of “arrangements for the surrender of fugitive offenders”) and Macau's Mutual Legal Assistance in Criminal Matters Law (No. 6/2006), art. 1(1).

overseeing the external relations of the SARs opted for the latter term to describe the SAR's arrangements with other states.

The surrender problem with the SARs can be contrasted with the established procedures for the interprovincial arrest and detention of fugitives in mainland China. A wanted order issued by a public prosecutor's office or a judgment given by a court is legally binding in the whole of the Mainland, and the arrest and detention of offenders is directly achieved through police cooperation in accordance with the Criminal Procedure Law of China.⁴ Essentially, the arrest and "surrender" of fugitive offenders in the Mainland interprovincial system is a system of police cooperation within a single jurisdiction. In contrast with this, under the "one country, two systems" policy, the surrender of fugitive offenders between the Mainland, Hong Kong, and Macau is conceived of as a form of judicial cooperation in criminal matters between three different jurisdictions. The judicial cooperation between these three jurisdictions should be based on legal arrangements consistent with the Basic Laws of the two SARs.⁵ In this regard, Article 95 of the Hong Kong Basic Law and Article 93 of the Macau Basic Law are significant; they provide that the SARs "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."

While agreements on judicial cooperation in civil matters have been concluded between the SARs and the Mainland, agreements in criminal matters remain underdeveloped. Negotiation on the surrender of fugitive offenders⁶ between the Mainland, Hong Kong, and Macau has been underway for some time,⁷ but little progress has been made to date. The three regions cannot reach consensus on the application of traditional extradition principles, including the non-surrender for offences subject to the death penalty, non-surrender of nationals (residents), non-surrender for political offences, and the double criminality principle.⁸

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4. See Criminal Procedure Law of the People's Republic of China (amended in 2018), arts. 83 and 155.
 5. See Hong Kong Basic Law, art. 95 and Macau Basic Law, art. 93.
 6. In this research, the scope of "fugitive offenders" includes both persons requested for prosecution and persons requested for imposition or enforcement of sentence or detention order. Regarding the idiomatic usage of "fugitive offenders," see Hong Kong Fugitive Offenders Ordinance; see also Macau Surrender Agreement with South Korea.
 7. See Wayne Walsh, *Cross-Border Crime in Hong Kong: Extradition, Mutual Assistance, Financial Sanctions* (Hong Kong: LexisNexis, 2020), 237.
 8. Zhao Guoqiang 赵国强, "Lun 'Yiguo liangzhi' xiade yijiao taofan jizhi" 论 "一国两制"下的移交逃犯机制 [Discussion on the surrender of fugitive offenders mechanism under "one country, two systems"], *Xingzheng* 行政 20, no. 78 (2007): 1050. See also Chau Pak-kwan and Stephen Lam, "Research Study on the Agreement between Hong Kong and Mainland Concerning Surrender of Fugitive Offenders" [March 2001], Legislative Council Secretariat, Research and Library Services Division and Legal Service Division, Hong Kong, <https://www.legco.gov.hk/yr00-01/english/library/erp05.pdf>.

Despite the inability to construct a complete domestic surrender system, mainland China, Hong Kong and Macau have signed extradition treaties and surrender agreements with foreign countries based on the traditional international extradition framework.⁹ The Extradition Law of the People's Republic of China was promulgated on 28 December 2000 but does not apply to Hong Kong and Macau. The constitutional bases for Hong Kong and Macau to have surrender agreements with other foreign jurisdictions are found in Basic Law articles, which provide that "with the assistance or authorization of the Central People's Government, the SAR may make appropriate arrangements with foreign states for reciprocal judicial assistance."¹⁰

In 2019, the Hong Kong government attempted to amend its Fugitive Offenders Ordinance (FOO) (Hong Kong's extradition law) so that it might apply to the case of Chan Tong-kai, a Hong Kong permanent resident who killed his girlfriend in Taiwan.¹¹ As Hong Kong did not have a surrender arrangement with Taiwan (nor could one be agreed and applied without amending the FOO), the government feared Chan could return to Hong Kong and escape any legal consequences for the homicide, which he did not deny.¹² If the FOO was amended as proposed, the surrender of fugitive offenders between Hong Kong, Macau and other parts of China (including Taiwan) could be practiced on a case-by-case basis.¹³ However, the proposal was aborted in the face of highly vocal and sustained public protests.¹⁴

The prolonged protest demonstrated the strong feelings of many Hong Kong people who were concerned about possible extradition of Hong Kong permanent residents to face trial in mainland China. However, as the protests escalated and became more violent, destructive, and disruptive, legal loopholes in protecting Hong Kong's social order and Chinese national security became exposed. This provoked the Central Government to enact The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative

9. The chapters that follow will successively detail the principles or techniques used in these extradition treaties or agreements.

10. See Hong Kong Basic Law, art. 96; Macau Basic Law, art. 94.

11. Duncan DeAeth, "Hong Kong Man Who Killed Girlfriend in Taiwan May Never Be Charged for Murder," *Taiwan News*, March 18, 2018, <https://www.taiwannews.com.tw/en/news/3384825>.

12. Zen Soo, "Hong Kong Murder Suspect Plans to Turn Himself to Taiwan," *AP News*, October 2, 2020, <https://apnews.com/general-news-5d1f55a53879bc34ec37fd2d7617804f>.

13. Jiachao Li, "Statement Given by Secretary of HK Security Bureau on the Amendment of Hong Kong Fugitive Offender Ordinance," May 30, 2019, <https://www.info.gov.hk/gia/general/201905/30/P2019053000811.htm>. The text of the amendment is available at <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>.

14. SCMP Reporters, "Hong Kong Leader Carrie Lam Announces Formal Withdrawal of the Extradition Bill and Sets Up a Platform to Look into Key Causes of Protest Crisis," *South China Morning Post*, September 4, 2019, <https://www.scmp.com/news/hong-kong/politics/article/3025641/hong-kong-leader-carrie-lam-announce-formal-withdrawal>.

Region, commonly known as the National Security Law (NSL), on 30 June 2020, promulgated in Hong Kong on the same day.¹⁵ The political and legal relations between the three regions have actually strengthened since the law's enactment.¹⁶ The new law defines categories of offences, including secession, subversion, terrorist activities, and collusion with foreign forces to endanger national security. Even though the legislation does not address the surrender of fugitive offenders between mainland China and Hong Kong, it does provide for an exceptional power where the Mainland authorities could apply Mainland law in Hong Kong to assume direct jurisdiction over a case.¹⁷ It does not alter existing rules contained in agreements signed between Hong Kong and Western countries restricting the re-surrender of offenders to the Mainland, e.g. the specialty rule, the double criminality principle and other principles. The Hong Kong NSL will likely affect the application of the political offence exception as well as other principles in the surrender system between the three regions, as will be discussed later in this book.¹⁸

After the enactment of the Hong Kong NSL, a number of Western countries suspended their surrender agreements with Hong Kong to demonstrate their opposition to the newly enacted law and concerns about the state of judicial independence and human rights in Hong Kong.¹⁹ However, the Western suspension of surrender agreements with Hong Kong should neither adversely affect nor raise concerns about the construction of a system of surrender of fugitive offenders between mainland China, Hong Kong, and Macau. International extradition is meant to cater to or limit the political interests of different sovereign states.²⁰ The surrender between mainland China, Hong Kong, and Macau occurs within one sovereign country, the PRC. It involves a domestic surrender system serving domestic interests. The

15. Hua Xia, "National Security Law Effective in Restoring Stability in Hong Kong: Official," *Xin Hua*, September 15, 2020, http://www.xinhuanet.com/english/2020-09/15/c_139370779.htm.

16. Under the National Security Law, both the Hong Kong government and the Hong Kong public have the obligation to protect the national security and national interest of People's Republic of China. For the text of the legislation, see <https://hongkongfp.com/2020/07/01/in-full-english-translation-of-the-hong-kong-national-security-law/>.

17. Under Article 55 of the NSL, suspects can be investigated, prosecuted, and tried by Mainland authorities, but that is direct implementation of governance power from the Central Government to Hong Kong on just four categories of offences relating to national security. It is not a surrender arrangement by nature.

18. The details appear in the following chapters.

19. William James and Andy Bruce, "UK Suspends Hong Kong Extradition Treaty, Stoking China Tensions," *Reuters*, July 19, 2020, <https://www.reuters.com/article/uk-britain-china-diplomacy-idUKKCN24K0AS>.

20. See M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 6th ed. (Oxford: Oxford University Press, 2014), 2–3.

three regions share a common national political interest,²¹ and a common legal obligation,²² under the umbrella of one country. This marks an essential difference between China domestic surrender system and the international extradition system, politically and legally. So long as the re-surrender restrictions remain in place, the systems of international extradition and domestic surrender can be kept separate in terms of their design and application.

Against this background, it is debatable whether all the traditional extradition principles should be applied to the China domestic surrender system.²³ For instance, the political offence exception in the traditional extradition process is a double-edged sword: while it is intended to protect individual rights and personal freedom, it imposes national standards and values on other states.²⁴ Under the one country policy, Hong Kong and Macau must accept political and legal responsibilities that maintain the territorial unity of China and uphold the leadership and governance of the Central Government.²⁵ They also bear the legal obligation to tackle secession, subversion, espionage, and other traditional political offences which hamper national security and state integrity.²⁶ Thus, it is doubtful whether, in the future, Hong Kong should implement the political offence exception that would allow refusal of a surrender request by mainland China.²⁷

Moreover, in the case of Hong Kong and Macau, after their handover in the 1990s, all their residents have been classified as either permanent or non-permanent residents subject to provisions of the respective Basic Law. It remains in question

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21. The Hong Kong Special Administrative Region is charged with upholding national unity and territorial integrity while maintaining the prosperity and stability of the region. See Hong Kong Basic Law, Preamble. Similar political goals appear in the Macau Basic Law.
 22. Hong Kong is an inalienable part of the People's Republic of China. Thus, the Hong Kong SAR has the obligation to safeguard national security and territorial integrity. See Hong Kong Basic Law, art. 1 and art. 23; see also the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region 2020. A similar legal position is evident in the Macau Basic Law and Macau Safeguarding National Security Law 2009.
 23. See Zhao, "Lun Yiguo," n 8.
 24. See Bassiouni, *International Extradition*, 672 (n 20); see also Miguel João Costa, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond* (Leiden: Brill Nijhoff, 2019), 501.
 25. Hong Kong, as a Special Administrative Region enjoying a high degree of autonomy, remains a local region under the control of the Central Government; see Hong Kong Basic Law, art. 12. The high degree of autonomy is neither automatic nor naturally inherent; instead, it is laid down by the National People's Congress. See Basic Law, art 2. Similar stipulations appear in Macau and the Macau Basic Law.
 26. These have been regulated in the Hong Kong (Macau) Basic Law as well as the Hong Kong (Macau) Safeguarding National Security Law.
 27. Yanhong Yin and Irene Wiczorek, "What Model for Extradition between Hong Kong and Mainland China? A Comparison between the 2019 (withdrawn) Amendment to Hong Kong Extradition Law and the European Arrest Warrant," *New Journal of European Criminal Law* 11, no. 4 (2020): 517.

whether and how the traditional nationality exception principle could be applied.²⁸ Additionally, the fact that the three regions belong to one country and that the two SAR governments are directly subordinated to the Central Government may challenge the roles of the executive and judicial authorities in the surrender procedure.²⁹

The China domestic surrender system is also limited by the “two systems” reality. According to the Basic Law, Hong Kong (Macau) enjoys a high degree of autonomy, practices the common law (Macau law) system, and the Hong Kong (Macau) Court of Final Appeal has supreme judicial power.³⁰ Accordingly, the direct and simple interprovincial arrest cooperation practised among the provinces of mainland China cannot be applied to China domestic surrender system. In other words, traditional extradition principles still have some role to play. For instance, the double criminality principle and the non-surrender of death penalty offenders or life imprisonment offenders may still function in the surrender system, though the precise terms of the rules and their implementation may have to accord with the overarching reality of “one country.”

Also of critical importance is the level of human rights protection in this China domestic surrender system. In traditional extradition, most bilateral or multilateral treaties will treat certain human rights risks as mandatory ground to refuse the extradition.³¹ Under the “one country, two systems” policy, mainland China, Hong Kong, and Macau should find a constructive solution, perhaps more so than the traditional extradition grounds protecting certain interests of the requested person, while strengthening cooperation. The “human rights check” in the surrender mechanism can also be used to help promote the human rights cause in the whole of China. It is clear that the China domestic surrender issue has a background of increasing political, economic, societal, and cultural integration, which generally does not exist

28. See Yin and Wieczorek, “What Model,” 519, n 27.

29. In fact, the role of the Chief Executive and the Hong Kong courts was questioned by the Hong Kong public when amending the Hong Kong Fugitive Offenders Ordinance in 2019. The Chief Executive is required to cooperate with the Central Government, and the courts are concerned about being in a disadvantageous position and unable to refuse surrender.

30. Hong Kong Basic Law, art. 2 and art. 8. See also Macau Basic Law.

31. E.g., the UN Model Treaty on Extradition specifies that extradition shall not be granted if there are grounds to believe that the request has been made to prosecute or punish a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that the person’s position may be prejudiced for any of these reasons or if the person would be subjected to torture or cruel, inhuman treatment or degrading punishment or if that person has not or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights: Model Treaty on Extradition, art. 3(b)(f).

in traditional forms of extradition.³² Nevertheless, the divergence between the three regions over human rights protection cannot be overlooked.

In brief, the China domestic surrender system must rest on the fact of “one country,” be responsive to its divergent legal systems, and provide sufficient human rights protection. Traditional extradition principles did not originate under these conditions and thus would need to be re-considered and possibly adapted before being applied to the surrender of fugitives within the PRC.

To gain more insights into how this domestic surrender problem could be addressed, this book has adopted a comparative approach to find possible inspiration from other countries and regions. However, finding a close comparator is difficult as few countries have chosen to employ one system of rendition in one part of the country and a different one in another part. Though the United States of America (US) has one federal jurisdiction and 50 state jurisdictions, each with their own set of criminal laws, its interstate rendition system, in which states transfer fugitive offenders to petitioning sister states, is too dissimilar to be useful. Adopting a uniform domestic surrender system, the US interstate rendition process bears little resemblance to international extradition. Having grown more heavily subject to executive control and less to traditional extradition principles, it is an efficient system of transferring wanted persons for trial based on mutual credit.³³ It is similar to the mainland China interprovincial cooperative model but does not have to address the challenging issue of surrender of fugitives to and from more autonomous regions of the country.

The system of extradition adopted for the European Union, however, does have greater potential to inspire solutions to the problem for the PRC. The European arrest warrant, as an advanced regional “extradition system” combining efficiency and human rights protection, can be the basis for theorizing a China arrest warrant that would apply to mainland China, Hong Kong and Macau. Mutual recognition is the cornerstone principle of the European arrest warrant. The principle was proposed by the United Kingdom (UK) as an alternative to harmonization, aiming to enhance judicial cooperation within the European Union while maintaining the diversity of legal systems. The purpose behind the principle resonates with the “one country, two systems” policy and can suitably underpin surrender cooperation between mainland China, Hong Kong, and Macau. Though the European Union and the PRC lie at different ends of Eurasia, the two regions are similar to each other

32. Hong Kong and Macau have been returned to China for more than 20 years, and so the integration with mainland China in politics, economy, and culture should be assumed, although, in practice, the degree varies.

33. Yanhong Yin, “The Surrender of Fugitive Offenders between Mainland China and Hong Kong: European Arrest Warrant,” *Utrecht Journal of International and European Law* 37, no. 1 (June 6, 2022): 1.

in many ways.³⁴ Such similarities offer the possibility that they can teach each other how to achieve better regional cooperation and development, including in the area of surrender of fugitive offenders.³⁵

2 Background and context of the China and EU analysis

2.1 Political similarities

The European Union (EU) consists of 27 Member States. All of the Member States transfer part of their sovereignty to the EU and no Member State enjoys full sovereignty.³⁶ After the Lisbon Treaty, the issue of judicial cooperation in criminal matters is also moved from the third pillar to the first pillar³⁷ and under the direct control of the EU.³⁸ The goal to establish an area of freedom, security, and justice was recognized, and the European arrest warrant was adopted as an important legal tool. The enforcement of judicial cooperation in criminal matters has been strengthened by the uniform political power of the EU; the accumulation of political power in criminal matters was done for the sake of the EU region as a whole.³⁹

The political relationship between mainland China, Hong Kong, and Macau bears some resemblance with that between EU Member States. Under the “one country, two systems” policy, both Hong Kong and Macau are inseparable parts of the PRC. At the same time, both Hong Kong and Macau enjoy a high degree of autonomy, which is stipulated in the respective Basic Laws enacted by the National People’s Congress. Each SAR has separate administrative and executive power, legislative power, independent judicial power, and final adjudication power.⁴⁰ This mixture is very similar to that which exists in the EU, where every Member State

34. See Eva Minarčíková, “EU-China Cooperation on Regional Policy,” *Perspectives in Science* 7 (2016): 30. See also Harry Harding, “The Concept of Greater China: Themes, Variations and Reservations,” *The China Quarterly* (1993): 668.

35. See Yin and Wiczorek “What Model,” 504, n 27.

36. See Jacek Czaputowicz, “Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal,” *Yearbook of Polish European Studies* 17 (2014): 18.

37. According to Maastricht Treaty 1992, the first pillar is the European Communities, the second pillar is the Common Foreign and Security Policy, the third pillar is Justice and Home Affairs. The first pillar has a supranational basis, and the latter two pillars operate on intergovernmental basis. The Treaty of Lisbon 2009 abolished the three-pillar structure entirely and the old pillar structure was subsumed into the overall European Union structure.

38. See Bahadr Yakut, “Post-Lisbon Criminal Law Competency of the European Union,” *Marmara Journal of European Studies* 17 (2009): 3.

39. See Mar Jimeno-Bulnes, “European Judicial Cooperation in Criminal Matters,” *European Law Journal* 9, no. 5 (2003): 614. See also Fabrini Federico, “Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary,” *Legal Issues of Economic Integration* 40, no. 3 (2013): 197.

40. See Basic Law of Hong Kong and Basic Law of Macau, art. 1 and art. 2.

belongs to the EU politically, while simultaneously retaining partial sovereignty, including judicial sovereignty.⁴¹

The design of a China domestic surrender system can go even further to demonstrating a close political relationship among the three regions than can the EU's European arrest warrant. It is possible to conceptualize a China arrest warrant system (CAW) similar to the European arrest warrant in which judicial authorities dominate the entire surrender procedure based on enforceable judicial decisions under the mutual recognition principle.

2.2 Economic integration

The EU developed from the European Economic Community.⁴² The relaxation of border controls between the EU Member States was originally done for the purpose of economic development.⁴³ The basic principles of mutual trust and mutual recognition are rooted in economic cooperation. In practice, the European arrest warrant has demonstrated that the border can be opened for both economic reasons and judicial purposes, and the principles applicable to the economic field can also be applied to the judicial field. The same is true for mainland China, Hong Kong, and Macau.

Since Hong Kong and Macau returned to China, cooperation between the three regions in the economic field has boomed. Dozens of economic arrangements have been signed to deepen and broaden cooperation, and the mutual recognition principle can be found in the concrete arrangements as well.⁴⁴ In recent years, there has been greater formal judicial cooperation in civil matters, including the mutual recognition of arbitration decisions and judicial decisions in civil proceedings.⁴⁵ Although judicial cooperation has its own developmental approach, from the experience of the EU and the reality in the mainland, Hong Kong, and Macau, it is clear that judicial cooperation can be advanced with increasing economic cooperation.⁴⁶

41. See Ion M. Anghel, "European Union's Member States Sovereignty," *Annals Constantin Brancusi U Targu Jiu Juridical Sci Series* (2010): 19.

42. European Union, "History of the EU," accessed October 29, 2022, https://european-union.europa.eu/principles-countries-history/history-eu_en.

43. See Kadir Basboga, "The Role of Open Borders and Cross-border Cooperation in Regional Growth across Europe," *Regional Studies, Regional Science* 7, no. 1 (2020): 532.

44. As to economic arrangements and the mutual recognition principle, which are used in economic cooperation, see chapter 1 on mutual recognition where this will be analyzed in detail.

45. See Department of Justice of Hong Kong, "Mainland and Macau SAR Related Topics," accessed October 29, 2022, https://www.doj.gov.hk/tc/mainland_and_macao/RRECCJ.html.

46. The situation in mainland China, Hong Kong, and Macau is that most of the judicial cooperation between the three jurisdictions relates to economic cooperation.

Therefore, the similar histories of economic integration and subsequent judicial cooperation in both the European Union and mainland China, Hong Kong, and Macau suggest that the judicial cooperation mechanisms in EU criminal law, such as the European arrest warrant, can offer useful experience to guide the establishment of a China arrest warrant system.

2.3 Geographical closeness

Mainland China, Hong Kong, and Macau lie geographically close to each other, in a similar way to the 27 Member States of the EU. The physical closeness means mainland China, Hong Kong, and Macau will share and be familiar with each other's social, political, and cultural context and be involved in each other's development. Cooperation in different fields, which naturally flows from this closeness, creates opportunities for cooperation in dealing with cross-border crime.⁴⁷ When compared to judicial cooperation with distant areas or countries, the three geographically proximate partners should enjoy an advantage in communication and co-ordination when coping with more frequent movement of criminal suspects.

2.4 Legal diversity

The diversity of legal systems and the problems resulting from diversity exist not only in the European Union but also in mainland China, Hong Kong, and Macau. Since their handovers, Hong Kong and Macau have maintained their original legal systems, based on common law and Portuguese law respectively. The legal system in mainland China is a special socialist legal system mainly influenced by Russian, German, and Japanese law.⁴⁸ Thus, the Mainland, Hong Kong, and Macau practice three different legal systems. This undoubtedly affects the design of any kind of surrender system, in areas such as conflict of criminal jurisdiction, double criminality, the death penalty, or life imprisonment.

Similar complications have arisen in developing and managing the European arrest warrant system. Among the EU's Member States, Ireland (and the United Kingdom before Brexit) belongs to the common law system, but most of the other EU countries apply civil law, which can differ in concrete legal rules between

47. See Sonny Shiu-Hing Lo, *The Politics of Cross-border Crime in Greater China: Case Studies of Mainland China, Hong Kong, and Macau* (New York: Routledge, 2009), 1–5.

48. See Albert H.Y. Chen, *The Changing Legal Orders in Hong Kong and Mainland China: Essays on "One Country, Two Systems"* (Hong Kong: City University of Hong Kong Press, 2021), 238–52.

countries.⁴⁹ For instance, Portugal has abolished life imprisonment, while most of the other civil law EU countries maintain it. The definition and regulation of rebellion also differ among different countries.⁵⁰ The EU is finding solutions to the problems that arise from the diversity of law as it affects the European arrest warrant mechanism. Thus, in addressing the legal diversity issue, which arises also in the design of a China domestic surrender system, the European Union can still offer inspiration to mainland China, Hong Kong, and Macau.

2.5 *The human rights situation*

Human rights protection matters in the surrender of fugitive offenders. Mainland China has been criticized for its bad record on human rights protection, and the gap between mainland China, Hong Kong, and Macau in human rights protection is clear.⁵¹ How to address this divergence in surrender cooperation becomes another crucial question. Here, too, instructive experiences of the European arrest warrant can be found. Generally, the European Union is regarded as a region in which human rights are better protected than in others. This is a true story, but not a complete one. In fact, citizens of the Member States do not share the same level of human rights protection, the impact of which challenges the implementation and development of the union's arrest warrant system.⁵² This complicated situation corresponds well to the one found today in the Mainland, Hong Kong, and Macau. Some meaningful experiences and lessons can be taken from it.

3 Research aim

The main aim of this book is to identify the specific type of surrender relationship that might be instituted between mainland China, Hong Kong, and Macau under the “one country, two systems” policy, and to articulate the basic principles and

49. See Julia Sievers, “Too Different to Trust? First Experiences with the Application of the European Arrest Warrant,” in *Security Versus Justice? Police and Judicial Cooperation*, ed. Elspeth Guild and Florian Geyer (London: Routledge, 2008), 102–6.

50. See Frauke Holmer, “Matter Carles Puigdemont: The Extradition for the Accusation of Embezzlement of Public Funds is Admissible: An Extradition for the Accusation of Rebellion is Inadmissible. Carles Puigdemont Remains Free,” The Press Department of the Oberlandesgericht for the State of Schleswig-Holstein, July 12, 2018, <https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201806Puigdemontenglich.html>.

51. See Marsha Wellknown Yee, “Hong Kong’s Legal Obligation to Require Fair Trial for Rendition,” *Columbia Law Review* 102, no. 5 (2002): 1373.

52. See Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Oxford: Hart, 2021), 111. As to the divergence of EU Member States in human rights protection, chapter 10 on human rights protection will offer a more comprehensive discussion.

rules for its establishment, while making reference to the European arrest warrant experience. Once accomplished, a blueprint for the establishment of a China arrest warrant system can be drawn.

Regarding the system's implementation, questions, for example, of whether there should be a Mainland–Hong Kong agreement, Macau–Hong Kong agreement, Mainland–Macau agreement, a three-way agreement, or something else are not a topic for discussion in this book. In general, whichever mode of implementation is adopted for the three China regions, the same or similar principles and procedures should be applied. These principles and procedures are decided by the nature of the China domestic surrender system, which will not be substantively influenced or challenged by the implementation mode(s) chosen. This book also does not discuss two other possible solutions to the problem. The first is to extend the interprovincial arrest and detention procedures applied in mainland China to Hong Kong and Macau. The second is to apply a Mainland direct enforcement mechanism, as seen in Hong Kong's NSL, to other crimes in Hong Kong and Macau. Both these solutions are not arrangements for the surrender of fugitive offenders and are at variance, if applied generally, with the “one country, two systems” policy, which respects the autonomy of the SARs and contemplates that cross-border juridical relations and mutual assistance will be based on consultations and be in accordance with the law.

4 Research questions and hypothesis

The book's main research questions ask: What should the China domestic surrender system be? To what extent can features of the European arrest warrant inform a China arrest warrant system applied to Hong Kong, Macau, and mainland China? Sub-research questions ask: Can the mutual recognition principle and the depoliticization of the surrender procedure be practiced in a surrender system designed for the three China regions, and if so, how? How can we best realize the settlement of criminal jurisdictional conflicts? How should traditional extradition principles—including the double criminality principle, non-surrender for political offences, the non-surrender of death penalty offenders and life imprisonment offenders, and human rights protection—be applied, if at all, in the China arrest warrant system, having regard to the European arrest warrant experience?

A fundamental claim of this book is that the China domestic surrender system, governed by the “one country, two systems” policy, is distinct from but not alien to traditional international extradition. The European arrest warrant, an efficient and advanced surrender system which functions well within the European Union, offers inspiration to policymakers and officials in mainland China, Hong Kong, and Macau to create a similarly capable China arrest warrant system. Of course, the extent of the

European Union's inspiration (and transplantation) should be compatible with the political and legal realities of the three China regions.

5 Research methodology

Intensive bibliographical work underpins this book. Efforts are made to survey a wide range of relevant official documents, including the EU extradition convention, its protocols and relevant explanatory reports, the European Arrest Warrant Framework Decision and its proposals, and other official documents from the UN as well as other regions such as the Inter-American region. Regarding mainland China, Hong Kong, and Macau, a comprehensive study is undertaken on the China Extradition Law, extradition treaties that China has signed, the Hong Kong Fugitive Offenders Ordinance, surrender agreements Hong Kong has signed, Macau surrender agreements with other countries, the Macau Law on Mutual Legal Assistance in Criminal Matters, and others. Moreover, studies are made of the criminal law and criminal procedure law in the three regions, the Basic Law in both Hong Kong and Macau, and China's Constitution in order to analyze the extradition or surrender law and practice in the three regions.

A comparative study between the region of the EU and the region of mainland China, Hong Kong, and Macau is conducted. The study considers if a comparison is appropriate on specific topics such as extradition to face the death penalty, life imprisonment, a political offence prosecution, and others. The comparative study also extends within the EU region, and within the mainland China, Hong Kong, and Macau region.

The horizontal comparison of the European Union focuses mainly on cooperation in the economic and judicial fields to demonstrate that some important principles like mutual trust and mutual recognition can be applied across different fields. At the same time, a vertical comparison within the EU also exists, which mainly refers to the comparison between the EU extradition system as it existed 50 years ago with its present-day arrest warrant mechanism. This comparison aims to detect the evolution of the European arrest warrant and its relevant advantages. For mainland China, Hong Kong, and Macau, the comparison is mainly horizontal. Understanding which kinds of extradition or surrender systems developed between mainland China, Hong Kong, or Macau with other countries helps one predict the construction of the China domestic surrender system.

The case study of the European arrest warrant system relies mainly on the analysis of cases from the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR). Cases from these courts discuss problems regarding the implementation of the European arrest warrant and how they are solved in practice through the CJEU and ECtHR. In the sections on mainland

China, Hong Kong, and Macau, relevant cases from the local courts of the three systems are analyzed to explore the application of certain concrete legal principles, like *ne bis in idem*, the settlement of conflict of criminal jurisdiction. This will offer the most direct legal basis for the design of a China arrest warrant system.

To obtain more original information about the implementation of the European arrest warrant, a judge of the CJEU was interviewed. In addition, interviews were done with senior officials in Beijing and Macau, as well as lawyers in Hong Kong familiar with surrender cases, to gain an understanding of the obstacles to constructing a China domestic surrender system.

6 Book structure

Chapter One addresses the application of the mutual recognition principle, which will form the basis of the proposed China arrest warrant system. Chapter Two examines the role of judicial authority in the surrender procedure. It explores the possibility of assigning judicial authority as the main authority in charge of the surrender issue. It also discusses the delimitation of judicial authority in the China arrest warrant system. Chapter Three looks at the settlement of conflicts of criminal jurisdiction. It explores how criminal jurisdiction can be determined, how conflict can be resolved in practice, and which organizations can be utilized. After a discussion of the above basic problems, the subsequent seven chapters address the applicability of principles which are generally written into extradition or surrender systems. These include the application of the *ne bis in idem* principle; the design of the double criminality principle; the surrender of nationals or residents; surrender for political offences; the surrender of death penalty offenders; the surrender of life imprisonment offenders; and the application of the human rights ground.

11

Conclusion

Figure 11.1 combines in the form of a diagram all of the principles and procedures which can be applied in a China arrest warrant system based on the European arrest warrant experience.

To comply with the “one country, two systems” policy and requirement for human rights protection, the design of the China domestic surrender system, for domestic surrender of fugitive offenders between mainland China, Hong Kong, and Macau, can be inspired by the European arrest warrant experience. The main characteristics of the China arrest warrant system include its basis in the mutual recognition principle and the direct control of judicial authorities. It should not apply the political offences exception, while the application of other principles including double criminality, the nationality exception, and the human rights

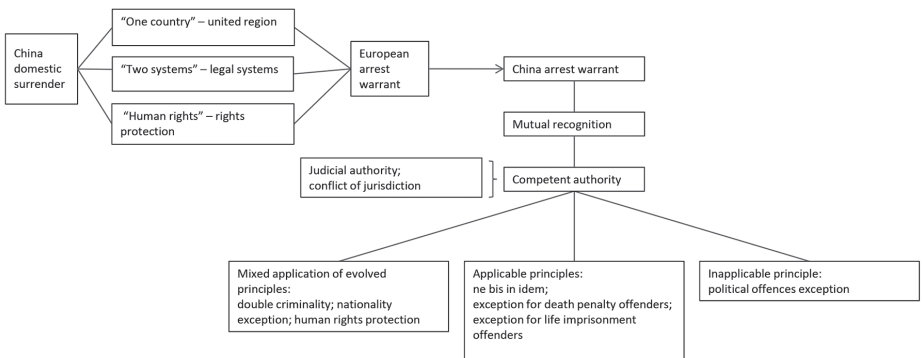


Figure 11.1: The China arrest warrant system

ground will echo the European arrest warrant model. The approach to *ne bis in idem*, death penalty offenders, and life imprisonment offenders will comply with international standards.

The mutual recognition principle, as the cornerstone of the European arrest warrant, was introduced from the EU internal market to the criminal field.¹ Mutual recognition should also function as the basic principle in the China arrest warrant system. The European experience shows that the mutual recognition principle can be flexible, non-automatic, functional, and resilient in hard situations.² These characteristics of mutual recognition are the basis for its application to the China domestic surrender system.

This research suggests that the judicial authorities should be in charge of the China arrest warrant system.³ From the European arrest warrant experience, depoliticizing surrender speeds up the surrender process and contributes to human rights protection. In the China arrest warrant system, under “one country, two systems,” mainland China, Hong Kong, and Macau are not foreign states. But the substantive involvement of executive authorities will lead to unnecessary political conflicts, as have occurred in international extradition. Additionally, a decisive role for executive authorities increases the risk of external intervention in the surrender process. Executive authorities will share the human rights scrutiny power which will be exercised primarily by the judicial authorities for the sake of human rights protection.⁴

The conflict of criminal jurisdiction between mainland China, Hong Kong, and Macau is an obstacle to surrender cooperation. An institution comparable to Eurojust can be established to take charge of conflict settlement.⁵ A legal document like the European Framework Decision on the Settlement of Criminal Jurisdiction can also be drafted for the China arrest warrant system. As to the criteria for settling conflicts of criminal jurisdiction, this research proposes that settlement should be based on the territorial principle, as in the European arrest warrant mechanism.⁶ If the preparation for a crime and the actual act occur in different regions, the region which suffers the majority of the loss should enjoy criminal jurisdiction. This

1. See S. Lavenex, “Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy,” *Journal of European Public Policy* 14 (2007): 764.

2. See chapter 1; see also Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: Oxford University Press, 2013).

3. See chapter 2.

4. See Case on Ramanjit Singh KCMP 139 of 2018, ¶237.

5. See chapter 3.

6. As to this see European Law Institute, “Report of the European Law Institute—Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union,” 18, accessed November 2, 2022, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf.

research also suggests if the loss of the regions does not vary widely, criminal jurisdiction should be designated to facilitate the availability of evidence and witnesses.

As to *ne bis in idem*, this principle is not only used to settle conflicts of criminal jurisdiction in the surrender procedure⁷ but also functions to protect the human rights of requested persons and to safeguard the authority of final judgments.⁸ The application of *ne bis in idem* has expanded from national domains to the international sphere. Although there is no international convention on this principle, its application is customary. Judging from both international and EU experience, combined with present practice in Hong Kong, Macau, and mainland China, *ne bis in idem* should be applied in the China arrest warrant system.⁹

The partial abolition of double criminality in the European arrest warrant system can be an inspiration to mainland China, Hong Kong, and Macau.¹⁰ The principle and techniques of the European arrest warrant can be used, taking into account the legal, cultural, and social situations in the three regions. The double criminality principle can be applied in the China arrest warrant system, but several categories of offences should be listed for waiver of the double criminality check. The proportionality principle should be formally recognized and applied in the requesting region when issuing the surrender request.

This research finds that the political offences exception is controversial, not functioning effectively to protect human rights as designed,¹¹ and declining in the extradition sphere. Although there have been concerns over the abolition of the exception in the European arrest warrant, based on the different levels of democracy and human rights protection in EU Member States, in practice the abolition is not so problematic. This inspires the China arrest warrant system, not only in the recommendation to abolish the political offences exception but also in the measures that can be taken to achieve this.¹²

The nationality exception is also a controversial principle in international extradition. It does not necessarily protect individual rights and sometimes lets offenders

7. See Su Caixia 苏彩霞, *Zhongguo xingfa guojihua yanjiu* 中国刑法国际化研究 [Study on the internationalization of criminal law in China] (Beijing: Beijing daxue chubanshe, 2007), 284.

8. See John A.E. Vervaele, "The transnational *ne bis in idem* principle in the EU mutual recognition and equivalent protection of human rights," *Utrecht Law Review* 1, no. 2 (2005): 100. See also chapter 4.

9. See chapter 4.

10. See chapter 5.

11. J. Reuben Clark Jr., Fredrick R. Coudert, and Julian Mack, "The Nature and a Definition of Political Offence in International Extradition Discussion" *Proceedings of American Society of International Law* 3 (1909): 140. See also M. Cherif Bassiouni, *Criminal Law and Its Processes: The Law of Public Order* (New York: Thomas Press, 1969), 234.

12. See chapter 6.

simply go free.¹³ The European arrest warrant has followed the international trend to limit the application of the exception, and mainland China, Hong Kong, and Macau can follow in turn. Under the reality of “one country, two systems,” the surrender of residents should be the default, with the exception that requested individuals may be sent back to the requested region to serve sentences for social integration purposes. When deeper integration is achieved, the surrender of residents can be an absolute rule for the three regions without the option for refusal or guarantees based on the resident’s identity.¹⁴

The European arrest warrant system is not concerned with the question of surrender of death penalty offenders because all Member States had abolished the death penalty when the EAW Framework Decision was enacted. Abolishing the death penalty has been the international trend and the non-extradition of death penalty offenders has been widely used as a method to protect human rights and to push for the abolition of the death penalty globally. Mainland China, Hong Kong, and Macau should follow this trend. Particularly for mainland China, the non-surrender of death penalty offenders in the China arrest warrant system not only reduces tensions with the latter two regions on the question of residents and political offences, but also pushes itself to further abolish death penalty offences.¹⁵

Life imprisonment is also an increasingly important topic in extradition. Although not so many countries have abolished life imprisonment, most countries which retain it provide for life imprisonment with parole. This trend in the domestic penalty setup has deeply influenced international extradition. Increasingly, countries ask for guarantees regarding life imprisonment in extradition, especially in the European arrest warrant system. Mainland China, Hong Kong, and Macau should follow the international trend and insert a life imprisonment guarantee clause into their surrender system. In fact, their own criminal laws on life imprisonment and their separate extradition or surrender practices with foreign countries also offer bases for this choice.¹⁶

The human rights protection in the China arrest warrant system also calls for a tailored approach. Under “one country, two systems” model, human rights protection not only functions to protect the rights of individuals but should also contribute to the improvement of human rights in the whole country. This research suggests that mainland China, Hong Kong, and Macau should not refuse surrender on the ground of human rights protection. Instead, both a systemic assessment and

13. See Rob Blekxtoon and Zsuzsanna Deen-Racsmány, “The Decline of the Nationality Exception in European Extradition?” *European Journal of Crime, Criminal Law and Criminal Justice* 13, no. 3 (2005): 318.

14. See chapter 7.

15. See chapter 8.

16. See chapter 9.

a specific assessment of the case should be carried out before a final refusal decision is made.¹⁷

Last but not least: this book has talked about the substantive principles, procedures, and competent authorities involved in the enforcement of the China arrest warrant system, but whether these bodies should be recognized in national legislation, by regional agreement, or otherwise also matters. Based on the fact that the China arrest warrant is a highly important “domestic extradition” system going beyond the autonomy of any of the three regions and impacting so many persons residing in the PRC, the the authority and democratic basis for its existence should be assured. Combining the example of the European arrest warrant Framework Decision functioning as one EU legal instrument, this book suggests that the China arrest warrant system can be written into the Hong Kong Basic Law and Macau Basic Law as protocol, and directly applied nationwide. This also corresponds to the fact that the Hong Kong Basic Law and Macau Basic Law are national legislation valid in all of Hong Kong, Macau, and mainland China; meanwhile, protocols to the Basic Law are of the same validity as the law per se. Considering the dilemma faced by the Hong Kong government in its unsuccessful 2019 amendment of extradition law, the establishment of the China arrest warrant system is better left to the national authorities rather than the regional authorities. In this way, the China arrest warrant as a system of “domestic extradition” will be clearly distinguished from international extradition, and mainland China, Hong Kong, and Macau’s separate extradition (surrender) arrangements with other countries will not be affected.

17. See C-216/18 PPU, *LM* [Judgment of the Court, 25 July 2018], ¶60–73.

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