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# Understanding PRC Criminal Justice Process: Anatomy of the “Big Spender” Case

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**Understanding PRC Criminal Justice Process:  
Anatomy of the “Big Spender” Case**

by

**Kam C. Wong**<sup>1</sup>

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## Abstract

On October 20, 1998 Cheung Tse-keung, also known as the “Big Spender,” and 35 others accomplices went on trial in China for a host of criminal charges, ranging from murder to kidnapping to smuggling of explosives committed in Hong Kong and China from 1991 to 1997. The “Big Spender” case made legal history in Hong Kong and China. It is the first time a Hong Kong legal resident (Cheung Tse-keung) was prosecuted, tried and executed in China under the PRC Criminal Law for criminal conduct largely perpetrated in Hong Kong. As such, it tests for the first time the criminal jurisdiction boundary between PRC and Hong Kong under “one country two-systems.” The “Trial of the Century” ended on November 12, 1998 with the court of the first instance, Guangzhou Intermediary People’s Court, finding Cheung (and all other defendants) guilty as charged. The court of the second instance, Guangzhou Higher People’s Court, rejected Cheung's appeal and confirmed his verdict on December 5, 1998. This article provides a general overview of the PRC criminal justice process as it conducts an in-depth anatomy of the “Big Spender” case, from case initiation (*li an*) by the public security to public prosecution (*qisu*) by the procuracy to final judgment (*panju*) by the court of the first instance and appeal (*shang su*) by the court of the second instance to final sentence execution (*jixing*). In the process, the article will discuss some of the more salient PRC criminal law and procedure issues raised by the “Big Spender” case. The legal process of the case is reconstructed from the Bill of Prosecution (Qixushu), the Criminal Judgment (Xingshi panshu) and the Appellate Decision made available by the PRC authority.

## Understanding PRC Criminal Justice Process: Anatomy of the “Big Spender” Case

### I: Introduction

On October 20, 1998 Cheung Tse-keung,<sup>2</sup> also known as the “Big Spender,”<sup>3</sup> and 35 others accomplices went on trial in China for a host of criminal charges,<sup>4</sup> ranging from murder to kidnapping to smuggling of explosives committed in Hong Kong and China<sup>5</sup> from 1991 to 1997. The case attracted worldwide attention<sup>6</sup> and aroused Hong Kong general public’s imagination as a result of the flamboyancy of the legendary gang boss “Big Spender” and also because of the unprecedented amount of ransom money

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<sup>2</sup> Cheung Tse-keung can also be translated into Cheung Chi-keung in Cantonese or Zhang Zi-qiang in mandarin (*Pinyin*). I have used Cheung Tse-keung throughout this article since this is the name most often used in the media and with the public. I have used “Big Spender” to reference the case and Cheung Tse-keung or sometimes Cheung to reference the person.

<sup>3</sup> “Big Spender” is an alias of Cheung Tse-keung. It is a translation of “da fu hao” or more literally “big boss.” For the lifetime exploits of the legendary Cheung Tse-keung, the “king of thieves,” see *Next Magazine*, November 6, 1998, pp. 38-58. See also the highly acclaimed TV documentary on the life and criminal career of Cheung on November 19, 1998, 8.30 p.m.: “Looking Closer Today” (an investigative report program), Asian Television (ATV), Chinese channel, Hong Kong. See also the documentary “King of Thieves of the Century: the Final Chapter” produced by PRC Phoenix Station, and “King of Thieves of the Century – Cheung Tse-keung” (Shiji Ze-wang), VCD produced by People’s Liberation Army Television Broadcast Centre, ISRCCN-A57-98-0126-0/V.E7 (two disc.).

<sup>4</sup> Tommy Lewis “Trial of Big Spender to start next week” *South China Morning Post*, Internet Edition (*SCMP*), October 17, 1998; Ng Kang-chung, “Troops on alert for start of ‘Big Spender’ trial” *SCMP*, October 20, 1998. For a summary of the prosecutor’s case, see “The prosecutor’s case” *SCMP*, November 6, 1998. For a list of defendants and specification of charges, see Part II, *infra*.

<sup>5</sup> For the purpose of this paper and ease of reference, I have used PRC or China to refer to the PRC government as a distinct legal qua political entity, excluding Hong Kong. I have used Hong Kong Special Administrative Region (hereinafter HKSAR or SAR) to refer to Hong Kong as a distinct legal qua political entity. I have used Mainland to refer to the territorial limits of PRC excluding Hong Kong. I have used Hong Kong to refer to the territorial limits of HKSAR. For a superlative discussion on the geo-political boundary of PRC vs. HKSAR see, Roda Mushkat, *One Country Two International Legal Personalities* (Hong Kong: Hong Kong University Press, 1997), esp. Chapter 2, pp. 44-84, esp. 44-45.

<sup>6</sup> For a sample of international news coverage, see Martin Lee interview with Michelle Han, “Cheung Tse-keung’s case” 9.45 to 10.00 p.m., December 9, 1998, CNN, Hong Kong; “Crook left final letter, not treasure map” *Yazhu Zhoukan* (Asian Week), December 14, 1998, pp. 38-39. See also “Crook left final letter, not treasure map” *Yazhu Zhoukan* (The International Chinese Newsweekly), December 14, 1998, pp. 38-39. *Yazhou Zhoukan*, *Next Magazine* and *Ming Bao Daily News* all have international circulation in overseas Chinese communities.

involved.<sup>7</sup> Cheung Tse-keung, wired with explosives, demanded and obtained HK\$1.38 billion for kidnapping Cheung Kong Company's deputy chairman Victor Li Tzar kuoi on May 23, 1996. Later Cheung obtained another HK\$0.6 billion from Sun Hung Kai Company's chairman Walter Kwok Ping-sheung on September 29, 1997.<sup>8</sup>

The "Big Spender" case made legal history in Hong Kong and China. It is the first time a Hong Kong legal resident was prosecuted, tried and executed in China under the PRC Criminal Law<sup>9</sup> for criminal acts largely perpetrated in Hong Kong. As such, it tests for the first time the criminal jurisdiction boundary between PRC and Hong Kong under "one country two-systems."<sup>10</sup> Mr. Ivan Tang, the Hong Kong defense lawyer for "Big Spender" has openly challenged the "legal basis for holding the trial of a Hong Kong resident on the mainland when most of the alleged crimes were said to have been committed in the SAR."<sup>11</sup>

The "Trial of the Century" ended on November 12, 1998 with the court of the first instance, Guangzhou Intermediary People's Court, finding Cheung (and all other defendants) guilty as charged.<sup>12</sup> The court of the second instance, Guangzhou Higher

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<sup>7</sup> Anthony Spaeth, *Time*, November 9, 1998 (The payoffs - \$70 millions for Kwok - \$134 million for Li - are destined to be in the record book).

<sup>8</sup> See *Next Magazine*, November 6, 1998, cover story on the "Big Spender," p. 51. A local prominent newspaper, *Ming Bao*, headlined the case as the "Trial of the Century" (*Shiji Shenpan*) in its daily reporting of the case. *Wen Hui Bao* reported Cheung Tse-Keung's final appellate verdict in full under the caption "The 'Biggest crook of the century' to be executed" (" 'Shiji dadao' fufa"), December 6, 1998, A4. No sooner had the Cheung Tse-keung been convicted and executed, two movies of his exploits were released. "Operation Billionaires" (CD released by Universal Laser & Video Co. Ltd. (Hong Kong) and "Big Spender" (Glenlord Limited).

<sup>9</sup> Criminal Law of the People's Republic of China (Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997 was promulgated by Order of the President of the People's Republic of China, No. 83 and entered into forces as of date of promulgation, No.). (Beijing: China Procuratorial Press, 1998). (Hereinafter PRC Criminal Law).

<sup>10</sup> Editorial: "Slippery slope." ("even more than the Big Spender case, the decision to try Li in Shantou represents the start of a slippery slope that could erode Hong Kong's legal autonomy.") *SCMP*, October 20, 1998.

<sup>11</sup> Ceri Williams, "Fresh attempt to move case" *SCMP*, October 27, 1998; Ng Kang-chung, Ceri Williams and Stella Lee "Mainland law doesn't apply, lawyers argue" *SCMP*, October 27, 1998. (The lawyers for the defense argued in their closing arguments to the Guangzhou Intermediate People's Court that PRC's law are supposed to protect mainland citizens, not non-mainlanders outside the mainland.) Personal conversation with Ivan Tang, October 27, 1998, Radio Television Hong Kong.

<sup>12</sup> "Guangdong Sheng, Guangzhou Shi, Zhongji Renmin Fayuan, Xingshi Panshu (1998) Wei Zhong Fa Xing Chu Di 468". (Guangdong Province, Guangzhou Municipality, Intermediary

People's Court, rejected Cheung's appeal and confirmed his verdict on December 5, 1998 proclaiming: "We have sufficient witnesses and evidence to show Cheung Tze-keung took a mastermind role in the crime ... And it did not appear the offences only took place in Hong Kong."<sup>13</sup> Cheung Tse-keung was immediately executed.<sup>14</sup>

The case ended as momentous and controversial as it had began.<sup>15</sup> Cheung's defense lawyer in Hong Kong, Ivan Mr. Tang, claimed, "this is not only a death sentence for Cheung Tse-keung but also a death sentence for "one country two systems."<sup>16</sup> The PRC official newspaper in Hong Kong insisted, "justice has been done and people are satisfied."<sup>17</sup> The Chief Executive of the HKSAR Mr. Tung called for an immediate review of the judicial cooperation between PRC and SAR.<sup>18</sup>

This article provides a general overview of the PRC criminal justice process as it conducts an in-depth anatomy of the "Big Spender" case. Such an overview and anatomy is conducted for three reasons. First, to inform on how the PRC criminal system and process operates in principle, e.g. what were the pertinent PRC Criminal Law and PRC Criminal Procedure Law provisions governing various substantive and procedural aspects in the "Big Spender" case? Second, to inform on how the PRC criminal justice system works in practice; particularly as it relates to the processing and disposition of the "Big Spender" case, e.g. what were some of more salient legal obstacles standing in the way of Cheung in challenging the jurisdiction of the PRC courts? Third, to provide a methodical, comprehensive and detail presentation of the facts, circumstances, law and

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People's Court, Criminal Verdict (1998) Guangzhou, Intermediary, Legal, Criminal, Initial, No. 468.) Published in full in *Ta Kung Po* on November 13, 1998.

<sup>13</sup> See Billy Wong Wai-yuk and Clifford Lo, "Abundant evidence to reject appeal" *SCMP*, December 6, 1998, p. 2.

<sup>14</sup> See Wong Wai-yuk, "Big Spender shot after plea barred" *SCMP*, November 6, 1998 (Ministry of Public Security official Zhu Entao announced Cheung Tze-keung's death at 11.15 while Xinhua News Agency officially announced the carrying out of the execution at 11.48 am., p. 1).

<sup>15</sup> The battle line was drawn. Cheung's lawyer wanted to appeal to the international community for justice. "Cheung's wife decided to appeal" *Ming Bao*, November 13, 1998. The PRC thought that justice had been done and Hong Kong people were happy. "The public said: "most satisfying to the people" *Ta Kung Po*, November 13, 1998. *Hong Kong Economic Journal* editorial called for reforming and improving upon the PRC-SAR judicial cooperation system and process – "Plug judicial cooperation loophole, prevent criminals from using the gaps."

<sup>16</sup> "Big Spender case legal dispute" *Apple Daily*, November 13, 1998, A4.

<sup>17</sup> *Ta Kung Po*, November 13, 1998. A9.

process of the case in order to facilitate informed discussion, sound analysis, enlightened debate and balanced resolution over many of the legal and policy issues raised in the case, e.g. whether the PRC court has over-reached in prosecuting the “Big Spender” case in China?<sup>19</sup>

Ultimately, the greatest contribution of this article lies in providing concerned readers and discerning scholars with a rare glimpse into how the PRC criminal justice system work in practice, albeit with an atypical “test case” and orchestrated “show trial”. The importance of the case to the political-legal leaders in the PRC- from demonstrating PRC’s commitment to rule of law and clarifying the principle of “one country two system” – assured that everyone involved in the case will be conducting themselves by the book and in an exemplary manner. It is in this limited sense, that we can say that the case provide an opportunity to see how the PRC criminal justice work in practice.

In light of the above, this article provides a summary account of the legal process attending the “Big Spender” case; from case initiation (*li an*) by the public security to public prosecution (*qisu*) by the procuracy to final judgment (*panju*) by the court of the first instance and appeal (*shang su*) by the court of the second instance to finally sentence execution (*jixing*). In the process, the article will discuss some of the more salient PRC criminal law and procedure issues raised by the “Big Spender” case.

The legal process of the case is reconstructed from the Bill of Prosecution (Qixushu),<sup>20</sup> the Criminal Judgment (Xingshi panshu)<sup>21</sup> and the Appellate Decision.<sup>22</sup>

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<sup>18</sup> “Judicial cooperation between the two places, the Chief Executive urged prompt actions” *Ming Bao*, November 13, 1998. See also “Pledge to speed up extradition talks” *SCMP*, November 12, 1998.

<sup>19</sup> Kam C. Wong, “Testing the Limits of “One Country Two Systems” :Untangling Legal and Policy Issues in Cross-Border Crime Disputes.” *China Perspective*. June 1999.

<sup>20</sup> Guangdong Province, Guangzhou Municipality People’s Procuracy: Indictment – Guangzhou Procuracy First Prosecution – No. 888) (Guangdong Sheng, Guangzhou Renmin Jiancha Yuan: Qixushu – Su Jian Qi Yi Xu – 888 hao). (“The Bill of Prosecution”) Those parts pertinent to Cheung Tse-keung was translated in full.” (On file at Chinese Law Program, Chinese University of Hong Kong).

<sup>21</sup> “Guangdong Sheng Guangzhou Shi, Zhongji Renmin Fayuan, Xingshi Panshu (1998) Wei Zhong Fa Xing Chu Di 468”. (Guangdong Province, Guangzhou Municipality, Intermediary People’s Court, Criminal Verdict (1998) Guangzhou, Intermediary, Legal, Criminal, Initial, No. 468). (Hereinafter Criminal Judgment). Published in full in *Ta Kung Po* on November 13, 1998. The facts revealed by the investigative report of *Next Magazine* (November 6, 1998) “ ‘Big Spender’ road to thieftdom” pp. 38-70) agreed with the findings of facts by the PRC Guangzhou Intermediate People’s Court in material details.

## II: Anatomy of the “Big Spender” case

### 1. The finding of facts in the case

The “facts of the case” were extracted from the final verdict in the case:<sup>23</sup>

*On organizing and directing the trading and transportation of explosives*

“The case is clearly established after hearing and investigation (*jing shenli chaming*). In October of 1997, the defendant Cheung Tse-keung proposed to Qian Han-shou to purchase explosives. He further directed Lau Ding-fun to coordinate with Qian Han-shou. Lau paid Qian HK\$150,000 for the purchase of explosives. In November the same year, Qian Han-shou returned to his place of origin at Guangzhou province, Shan Wei municipality, and found defendant Jiang Chaigu to purchase illegal explosives. Jiang Chaigu introduced Qian Han-shou to his brother Jiang Ronchang. Jiang Ronchang collected HK\$10,000 from Qian Han-hou and illegally purchased 818.43 Kg of explosives, 2000 detonators and 750 meters of fuse line. He helped Jiang Chaigu to

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<sup>22</sup> “Guangdong Sheng Gaoji Renmin Fayuan, Xingshi Panjue Shu (1998) Yue Gao Fa Xing Zhong Zi Di 1139 Hao. Yuan Gaoxu Jiuan Guangdong Sheng, Guangzhou Shi, Remin Jiangcha Yuan.” (The Higher People’s Court of Guangdong Province, Criminal Judgement (1998) Guangzhou High Law (Court) Final No. 1139. Original Public Prosecution Organ Guangdong Municipality People’s Procuracy of the Guangzhou Province). (Hereinafter Appellate Decision). Reprinted in full in *Wen Hui Bao* A4, A6.

<sup>23</sup> “Guangdong Sheng Guangzhou Shi, Zhongji Renmin Fayuan, Xingshi Panshu (1998) Wei Zhong Fa Xing Chu Di 468”. (Guangdong Province, Guangzhou Municipality, Intermediary People’s Court, Criminal Verdict (1998) Guangzhou, Intermediary, Legal, Criminal, Initial, No. 468). Published in full in *Ta Kung Po* on November 13, 1998. The facts revealed by the investigative report of *Next Magazine* (November 6, 1998) “ ‘Big Spender’ road to thieftom” pp. 38-70) agreed with the findings of facts by the PRC Guangzhou Intermediate People’s Court in material details. In the PRC Criminal case judgement of the hearing of the first instance (*yishen xingshi panjue shu*), i.e. Criminal Judgment, should provide the following kind of data by law:

- (1) Initial part – Background information: (a) case title; (b) case number; (c) litigating parties, including legal representatives; (d) brief summary of legal proceeding in the case;
- (2) Factual part – Relevant facts to be included: (a) summary account of facts from the prosecution and defense; (b) the findings of facts of the court, including what facts are substantiated or unfounded; (c) discussion of key factual issues in dispute;
- (3) Reasoning part – Determination of the kinds of criminal responsibility (guilty of what crime) and extent of culpability (deserving of how much punishment) of the accused, having considered the applicable law and policy, finding of facts, and relevant criminal law and criminology theory;
- (4) Judgment part – Whether the accused is found guilty or not guilty. If guilty, what crime and punishment to be imposed;
- (5) Concluding part – Declaring defendant’s right to and time period for appeal. Judgment to be signed and sealed by the court.

transport the purchased illegal explosives to Qian's home. Qian Han-shou placed the explosives in 40 foam boxes, disguising them as seafood. On January 1, 1998, Qian instructed defendant Wang Wenxiong to transport them to Ding Ling Yang near Zhu Hai municipality, to be further transported to Hong Kong on an pre-arranged fish boat belonging to Qian Hanye: "Zhu Dan 5144". The next morning Qian Hanshou allowed the aforementioned explosives to be transported by Qian Hanye's vehicle and his staff. Lau Ding-fun further directed Lau Kwok-wah to transport the explosives to Liu Shui Xiang, Da Wo village No. 95. Cheung Tse-keung and ... (others handled offenders separately in another case) ... together removed the explosives inside the house. At noon the same day, Cheung Tse-keung together with Lau Ding-fun and others removed the explosives to Ma Cao village. On 17<sup>th</sup> of the same month, the explosives were uncovered."

*On organizing, directing and financing the kidnapping of Li XX in China*

"From the end of 1995 to the beginning of 1996, defendants Cheung Tse-keung ... (and others) ... made multiple visits to Shenzhen, staying in Ming Du Hotel, Ri Sun Hostel ... secretly plotted to kidnap Li XX<sup>24</sup> and divided the work ...later persuaded ... (other defendants) ... to join in the criminal activities. Cheung Tse-keung put up HK\$1.4 millions for the purchase of equipment and renting of premises for the locking up of the hostage.... (other defendants) ... were responsible for purchasing a vehicle, fake license plate and walkie-talkies...

*On smuggling of arms (weapons), ammunition and explosives*

"Yip Kai-fun used the money supplied by Cheung Tse-keung to purchase two AK47 automatic rifles, one miniature machine gun, six pistols, nine packages of explosives (weighting 1.887 Kg) and bullets from mainland. Cheung Tse-keung made arrangements and provided for facilitation .... (with a number of defendants) ... On May 12, 1996 ... (with other defendants, Cheung) ... smuggled the weapons to Hong Kong

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<sup>24</sup> The procuratorate officials is allowed to avoid putting the victims name in the record if it is going to harm the victim's reputation. See Editorial Committee, *Prosecutor Manual* (Jianchaguan Shouce) Shanxi Renmin Chubanshe, 1995), p. 82.

when Yip was arrested immediately upon landing in Hong Kong by the Hong Kong police with the weapons confiscated...

*On kidnapping of Li XX in Hong Kong*

“At 6 p.m. on May 23, 1996 ... (after being informed of Li XX’s where-about) ... Cheung ... (and other defendants) ... kidnapped Li XX and his driver near No. 80 Hong Kong Deep Bay Road. After Cheung ... went to Li’s home and collected a ransom of HK\$1.3 billion, the victim was released. Cheung Tse-keung received HK\$ .362 billion .... (with other defendants dividing the rest)...”

*On organizing, directing and financing the kidnapping of Kwok XX in China*

“In April of 1997, defendant Cheung Tse-keung decided to kidnap Kwok XX, a Hong Kong resident. He grouped together ... (a number of defendants) ... in Guangzhou, Shenzhen, Dongguan to secretly plan and divide the work. Cheung and Wu ... put up HK\$ 2.2 millions as expenses....

*On the kidnapping of Kwok XX in Hong Kong*

“At 6 p.m. on December 29, 1977 .... (after being informed of Kwok’s where about) ...Cheung ... (and other defendants) ... kidnapped Kwok XX neared Hong Kong Beach Road and transported him to No. 200 Hong Kong Ma On Kong ... After Cheung Tse-keung asked and obtained HK\$ 0.6 billion from the Kwok’s family, the victim was released. After the crime, Cheung Tse-keung got HK\$ .3 billion .....”

**2. The making of a criminal case**

The initiation of the criminal justice process

*Reporting of crime.* In the PRC, a criminal case starts with the discovery of a crime. Article 83 of the PRC Criminal Procedure Law provides in pertinent part: “The public security organs upon discovering facts of crimes or criminal suspects, file the cases for investigation within the scope of their jurisdiction.” In most cases, this means

the filing of a crime report with the public security organ by the citizen.<sup>25</sup> In this regard, Article 84 of the PRC Criminal Procedure Law requires the citizens to report all crimes: “Any unit or individual, upon discovering facts of a crime or criminal suspect, shall have the right and duty to report the case or provide information to a public security organ, a People’s Procuratorate or a People’s Court.”<sup>26</sup>

*Recording of a crime.* After a crime is reported, the public security organ has to open a case file, a process known as *lian*,<sup>27</sup> if the report is substantiated. Article 86 of the Criminal Procedure Law requires the public security to open a criminal case file: “If it believes that there are facts of a crime and criminal responsibility should be investigated.”

*Investigation of a crime.* After a case file is open, the public security organ “shall carry out investigation, collecting and obtaining evidence to prove the criminal suspect guilty or innocent or to prove the crime to be minor or grave.”<sup>28</sup> After the investigation is completed, a preliminary inquiry will be conducted to determine whether a crime has been committed, whether the suspect has committed the crime, and whether a criminal charge is warranted. Thus, Article 90 of the PRC Criminal Procedure Law provides that: “the public security organ shall start preliminary inquiry into a case for which there is evidence that supports the facts of the crime, in order to verify the evidence which has been collected and obtained.” After an Article 90 preliminary inquiry (“yusheng”<sup>29</sup>) a

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<sup>25</sup> The public security organs do not have the exclusive responsibility to investigate crime. The people’s procuracy and the people’s court is also charged with the responsibility to investigate crimes, e.g. economic crime and official wrongdoings.

<sup>26</sup> Traditionally and especially during Mao’s era, the Communists preached that a crime is only a crime if the “mass” think so. *Selected Works of Mao Tse-Tung* Vol. 1 (Beijing: Foreign Languages Press, 1977), p. 28 (“The peasants are clear sighted. Who is bad and who is not quite vicious, who deserves severe punishment and who deserves to be let off lightly -- the peasants keep clear accounts and very seldom has the punishment exceeded the crime.”) More recently, the PRC police subscribed to the view that criminals cannot long evade the watchful eyes of the community. In the uncovering of crime, the police play only a supplementary role. “Renmin Jinchu he Zhian Baoweyuan Ying Jubi de Wuge Tedia” (Five Characteristics Possessed by People’s Police and Security Committee Member” (April 6-14, 1956. National meeting to recognize representative models of people’s police and security committee members) (April 14, 1956), *Lun Renmin Gongan Gongzuo* 288-297, 292. For a discussion, see Kam C. Wong, “The Philosophy of Community Policing in China” *Police Quarterly* (2001).

<sup>27</sup> Literally speaking, “li” is to establish, and “an” is a case. “Lian” is thus to have a case established.

<sup>28</sup> Article 89 of the PRC Criminal Procedure Law.

<sup>29</sup> Literally speaking, “yu” is to make preparation for and “sheng” is to adjudicate.

Preliminary-inquiry Report (“yusheng zhongjie baogao shu”) is prepared which forms the basis of recommendation for prosecution.

*Referral for prosecution of a criminal case.* The Preliminary-inquiry Report should include: (1) personal background and conditions of the defendant; (2) whether coercive measures have been used and the reasons supporting such measures; (3) verified facts and circumstances of the case; (4) verified facts and circumstances on defendant’s confession; (5) verified facts and circumstances pointing to the absence of crime or lack of criminality; (6) verified facts and circumstances suggesting lack of or insufficient evidence; (7) the defendant’s confession attitude,<sup>30</sup> (8) recommendation on how to dispose of the case based on articulated facts and particularized PRC Criminal Law and PRC Criminal Procedure Law; (8) in cases of joint criminality, the role and responsibilities of each and every joint-defendants should be separately listed; (9) in cases of alternate disposition of related parties in the case, their alternate dispositions should be made clear; (8) the disposition of seized property should be accounted for.<sup>31</sup> If the public security organ concludes that a crime has been committed and certain offenders are responsible, it has to make a recommendation for prosecution. Article 129 of the PRC Criminal Procedure Law provides:

“After a public security organ has concluded its investigation of a case, the facts should be clear and the evidence reliable and sufficient and, in addition, it shall make a written recommendation for prosecution, which shall be transferred, together with the case file and evidence, to the People’s Procuratorate at the same level for examination and decision.”

In terms of procedure, the transfer of the case file is accompanied by a “written recommendation” i.e. the “qixu<sup>32</sup> yijianshu” (Recommendation for Bill of Prosecution). The recommendation should contain: (1) title and case no. (2) the defendant’s background information; (3) facts and circumstances of the case; (4) reasons and basis for prosecution, including nature of criminal conduct, motive, purpose, danger and legal

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<sup>30</sup> It is interesting to note that attitude of the defendant is of key importance in the investigation, prosecution, adjudication and correction process.

<sup>31</sup> Zhen Yuegan and Guan Shuguang *Gongan Neiqin Gongzuo Shouce* (Public Security Internal Working Manual) (Jingguan Jiaoyu Chubanshe, 1994), pp. 216-222. See “Qixu yijianshu” on page 218.

basis; (5) concluding part, i.e. transfer to identified people's procuracy, date and time, detention place, seal.<sup>33</sup>

The transfer of case file with written recommendation for prosecution marks the conclusion of the police investigative phase of a criminal case. The people's procuracy has to review the case for prosecution. Article 136 of the PRC Criminal Procedural Law provides that: "All cases requiring initiation of public prosecution shall be examined for decision by the People's Procuratorates."

#### Discussion: Case initiation in Cheung's case

On May 23, 1997 Cheung kidnapped Victor Li. On September 29, 1997 Cheung kidnapped Walter Kwong. In January 1997, Cheung transported substantial amount of explosives into Hong Kong. Cheung's major criminality – kidnappings and transportation of explosives – was not officially reported to the Hong Kong or PRC police. The Hong Kong police was made aware of the Cheung's kidnappings unofficially and after the fact.<sup>34</sup> The police discovered Li's kidnapping after his car was discovered with window broken in the middle of the road. They discovered the illegal transportation and storage of explosives in Hong Kong through undercover investigation.<sup>35</sup>

Cheung escaped to China on January 15, 1998. Before Cheung made good his escape, he was under surveillance of the Hong Kong Police. In fact, Hong Kong Police was on the lookout when Cheung was caught on video transporting the boxes (of explosives) into the storage area in Hong Kong. Hong Kong Police was aware of Cheung crossing the border into China but did not have sufficient evidence to arrest him at that point. Subsequently, Hong Kong Police searched and discovered the explosives in Cheung's hide out on January 17, 1998. Cheung was then put on the INTERPOL wanted list with the PRC police being informed.<sup>36</sup>

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<sup>32</sup> "Literally, "qi" is to begin and "xu" is to prosecute.

<sup>33</sup> Zhen Yuegan and Guan Shuguang *Gongan Neiqin Gongzuo Shouce* (Public Security Internal Working Manual) (Jingguan Jiaoyu Chubanshe, 1994), pp. 216-222. See "Qixu yijianshu" on page 218.

<sup>34</sup> " 'Big Spender' road to thieftom" *Next Magazine*, November 6, 1998, pp. 38-70.

<sup>35</sup> "TNT trio ran risk of accidental detonation" *SCMP*, February 12, 1999, p. 3.

<sup>36</sup> " 'Big Spender' road to thieftom" *Next Magazine*, November 6, 1998, pp. 38-70. See a copy of the Confidential" memo in *Shida Chao* 1988, Issue 15, p. 37 (Cheung was forced to be on the

Cheung's criminality in China and Hong Kong was not reported to the PRC police. According to one unconfirmed investigative report, Cheung came to the attention of the PRC police as a result of Li Kar Shing's personal relationship with PRC's President Jiang Tse-min. Upon Cheung's report, President Jiang instructed the PRC Ministry of State Security to arrest Cheng. An "Operation catching tiger" was launched in Guangdong for the arrest of Cheung, with the PRC Ministry of State Security in charge and assisted by Guangdong public security.<sup>37</sup>

How the kidnapping came to the attention of the Hong Kong Police was and still is a hotly debated factual question bearing upon the "proper" disposition of the case. As reported above, the two kidnapped victims' families did not report to the Hong Kong Police before or after the incident. Some of the unresolved factual questions in the "Big Spender" case include: (1) How and when did the Hong Kong Police come to know about the kidnappings? (2) Did the Hong Kong Police possessed sufficient evidence to arrest Cheung for kidnapping or explosive charges before he left for China on January 15, 1998? (3) Could the kidnapping victims be legally compelled to cooperate in the investigation of a crime? (4) How and when did the PRC Police come to know about the kidnappings? (5) Why did the Hong Kong Police not take the initiative to follow up with the investigation and prosecution of Cheung? The answers to the first three questions are determinative of the question whether Cheung could have been brought to justice in Hong Kong, thus side stepping the jurisdictional dispute with China. The last two questions inform upon the issue whether Li Kar Shing had used undue personal influence to have Cheung "properly" dealt with in China, thus raising an equal justice under the law concerns in Hong Kong.<sup>38</sup>

It is interesting to observe that under the "one country two systems" political settlement, Hong Kong Police and PRC Public Security differ in material ways on how they handle suspected or alleged criminality. The divergent of approach reflect the

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run with the Hong Kong Police issued the memo for his arrest. The article did not say when the memo was issued.)

<sup>37</sup> *Id.* p. 54.

<sup>38</sup> Lao Tang, *Cheung Tse-keung Zhuan* (Biography of Cheung Tse-kung) (Guangzhou: Huaren Wenhua Chubanshe, 1998) pp. 259 (The news story about Li Kar Shing complaining to Jiang came from Singapore. According to the story, reliable source in Beijing informed that Li had

fundamental and material differences in political ideology and criminal justice philosophy separating the two regimes. First, in Hong Kong, which is fashioned after a liberal democracy,<sup>39</sup> the citizens do not have a legal obligation to report a crime, although they cannot affirmatively assist criminals in covering a serious offense. In the PRC every citizen has a legal “right and duty” to report a crime. Second, the Hong Kong Police play a much more reactionary role in the uncovering and investigation of a crime than their counterparts in the PRC who is much more aggressive and proactive in uncovering criminality on their own initiative. Hong Kong Police crime investigation and prosecution is subjected to the outstanding policy of not opening a criminal investigation without the cooperation and supporting of a willing victim who will assist in the investigation of a crime and prosecution of a criminal. Though theoretically, Hong Kong Police can take proactive action to uncover crime, e.g. vice, or investigate crime, e.g. murder, they rarely do so with routine crimes, e.g. wife abuse.

The differences can be explained in ideological and philosophical terms. In a communist regime and socialist state, there is a strong sense of community spirit and collective interest in fighting established crime and suppressing incipient criminality. In a communist state, which is a closed society, there is much shared idea of what is right and wrong. With socialist citizens, their commitment towards an ideal state is much stronger. Conversely, the communist state has a strong sense of purpose and overriding sense of mission to achieve a utopia state. A crime is not only a private wrong, but also a challenge to the state in achieving its ideal. The socialist government, of and by the people, is obliged to take affirmative action to protect the people, in furthering the common interests of the collective. What harms the individual is, ipso facto, a challenge to the collective.

Whatever observed differences between the “two systems” in criminal justice philosophy, one should be prepared to ask the question whether such and other noted differences between the two systems translate itself into observable sociological

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complained to Jiang about the kidnapping. Li’s case was discussed in the resulting to the Communist Party Central Polibureau. The story cannot be verified.)

<sup>39</sup> I say “fashioned after” because Hong Kong has never been given the right to enjoy full democracy even now. However, first under the British colonial rule and now with the SAR government, Hong Kong people enjoy a high degree of personal freedom and right to participate in government affairs.

differences. More pointedly how might such differences in political ideology and legal philosophy manifested in law enforcement policy and practice in the street, i.e. asking the question how does the law “behave”.<sup>40</sup> If we should pose this question, we will find that there are more similarities than differences between the “two systems” in terms of organizational behavior of the police and cultural mentality of the people.

Organizationally and bureaucratically, law enforcement officers (everywhere) are not given to assertively searching out for crime because of a number of reasons. There are more crimes than the limited law enforcement resources that are made available. Law enforcement officers as pragmatists are not inclined to make-work for themselves. Second, the law enforcement officers will not search out for crimes because they know from experience that most of them cannot be easily solved. Lastly, culturally, people from different countries, particularly Chinese of common heritage (PRC Chinese and Hong Kong Chinese), are not interested in reporting crime to the police. They find it too troubles, i.e. in terms of time and effort, and not worth their while to do so, i.e. loss is too little (pickpocket) or irreversible (rape) or police can do nothing (unidentified criminal, such as burglary) about crime.

### **3. Handling of criminal defendants in the “Big Spender” case<sup>41</sup>**

#### Criminal defendants being investigated and prosecuted

All told there were 36 defendants in this case. There were other people who were involved, e.g. supplier of explosives, but were never investigated, much less prosecuted.

The defendants include:

- (1) Cheung Tse-keung, 43, Hong Kong; kidnapping, illegal trading of explosives, smuggling of arms and ammunition;
- (2) Chan Chi Ho, 36, Hong Kong; kidnapping, illegal trading of explosives, smuggling of arms and ammunition, murder and robbery;
- (3) Ma Shan-chung, 33, Hong Kong; illegal trading of explosives, smuggling of arms and ammunition, murder and robbery;

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<sup>40</sup> Black, *Behavior of Law* (1976)

<sup>41</sup> For a summary specification of charges, see *Ta Kung Po*, November 13, 1998, A9. See also “Big Spender Case: The rest of the gang” *SCMP* November 13, 1998.

- (4) Liang Fei, 32, mainland; kidnapping, illegal trading of explosives, smuggling of arms and ammunition, murder and robbery;
- (5) Qian Han-shou, 42, mainland; illegal trading of explosives;
- (6) Chuk Yuk-sing, 42, Hong Kong; robbery, kidnapping, smuggling of arms and ammunition;
- (7) Li Wan, 41, Hong Kong; robbery, kidnapping, smuggling of arms and ammunition;
- (8) Yu Honjian, 33, Lufeng; robbery;
- (9) Cai Zhijie, 34, mainland; robbery;
- (10) Lau Ding-fun, 47, Hong Kong; illegal trading and transport of explosives;
- (11) Luo Ji-ping, 30, Xiaoguan, kidnapping and smuggling of arms and ammunition;
- (12) Zhang Huaqun, 23, Haifeng; kidnapping and smuggling of arms and ammunition;
- (13) Wu Chai-shu, 47, Hong Kong; kidnapping; Cheung Chi-fung;
- (14) Wong Wah-sang, 36, Hong Kong; robbery;
- (15) Or Yin-ting, 47, Hong Kong; kidnapping;
- (16) Ye Xinyu (female), 29, Shantou; robbery;
- (17) Chin Hon-yip, 43, Hong Kong; illegal transport of explosives;
- (18) Kam Wing-keung, 47, Hong Kong; kidnapping;
- (19) Tang Lai-hin, 47, Hong Kong; kidnapping;
- (20) Chen Lixin, 30, Shantou; illegal trading and arms and ammunition;
- (21) Wang Yinde, 52, Heifei; illegal trading of ammunition;
- (22) Ho Chi-cheung, 54, Hong Kong, kidnapping;
- (23) Yu Chuan, 46, Shantou; illegal trading of explosives;
- (24) Wang Wenxiong, 27, Shantou; illegal trading of explosives;
- (25) Lau Kwok-wah, 29, Hong Kong, illegal trading of explosives;
- (26) Cheung Chi-fung 53, Hong Kong; kidnapping;
- (27) Wang Yi, 26, Hunan, robbery;
- (28) Jiang Yongchang, 46, Shantou; illegal trading of explosives;
- (29) Chan Shue-hon, 47, Hong Kong; kidnapping;
- (30) Hon Fa, 24, Hong Kong; illegal trading and transporting of arms and ammunition; smuggling of weapons and ammunition;
- (31) Jiang Chaigu, 20, Shantou; illegal trading of explosives;

- (32) Chen Huiguang, 28, Shantou; illegal transport and hiding of arms and ammunition;
- (33) Luo Yue-ying (female), 26, Xiaoquan; illegal transport and storing of arms and ammunition;
- (34) Yip Kai-chung, 30, Haifeng; hiding stolen property;
- (35) Yip Kai-yuk, 30, Hong Kong; hiding stolen property;
- (36) Liu Ganyong, 27, Haifeng; hiding of arms and ammunition.

#### Discussion: the issue with missing criminal defendants

There were repeated questions being asked in Hong Kong as to why some and not all the defendants implicated in the “Big Spender” case were being prosecuted.’ Particularly, why the suppliers of arms, weapons, ammunitions and explosives were not investigated and prosecuted? The suppliers of such lethal goods were guilty of as serious, if not more serious, criminality as Cheung and other offenders being charged in the “Big Spender” case. The failure to investigate and prosecute such yet to be identified fugitives at large raises troubling questions about the efficacy of the PRC criminal justice system in preserving the rule of law and securing equal justice. It otherwise fueled continued mistrust of the integrity of the PRC criminal justice system. For example, conspiracy theorists have suggested that China did not want Hong Kong to investigate and try the “Big Spender” case because she did not want the identity, background and criminality of the people who were responsible for supplying the arms, ammunitions and explosives in China revealed in public. The open investigation and public prosecution of the “Big Spender” case in Hong Kong might prove to be embarrassing to the PRC as they might reveal corruption in high places and criminality involving the military.

On a larger compass, it is precisely such lack of trust by the Hong Kong people in the PRC criminal justice system which underscored the jurisdiction dispute in the “Big Spender” case<sup>42</sup> and accounted for the lack of a PRC-HKSAR rendition agreement in spite of its demonstrated necessity and urgency, and which if existed could have served to short circuit the brewing dispute.<sup>43</sup>

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<sup>42</sup> “In the mainland, how many Hong Kong people were convicted?” *Jiuxinianda* July, 1987

<sup>43</sup> Grenville Cross S.C. (Director of Public Prosecution) “Letter: Criticism over the Big Spender case unfair.” *SCMP* November 4, 1998. (It is a matter of regret that there has been no formal

### Criminal defendants being detained for investigation

*Custodial detention.* In the PRC, most criminal investigations can be conducted without the suspect being ever placed under investigative custody. Custodial investigation is the exception rather than the norm. Custodian investigation is only reserved for the more serious offenders deserving punishment or dangerous criminal posing potential risks for the community. Criminal suspects are usually subjected to community surveillance, i.e. allowed to reside at home to be closely watched by their neighbors in the community and co-workers at the workplace.<sup>44</sup> Community surveillance is possible because in pre-reformed China and still with most backwater areas in China, the population is relatively stable and community close knitted. Local people are all meticulously registered<sup>45</sup> and placed under stringent administrative control. Outsiders and strangers are being kept under close scrutiny by the public security with the help of the people.<sup>46</sup> In effect, there is little need for police detention.

*Investigative detention.* Investigative detention, if allowed, is to be used under limited and well-defined situations. Article 61 of the PRC Criminal Procedure Law provides the following grounds for detention before investigation:

Public Security Organ may initially detain an active criminal or a major suspect under any of the following conditions:

- (1) if he is preparing to commit a crime, is in the process of committing a crime or is discovered immediately after committing a crime;
- (2) if he is identified as having committed a crime by a victim or an eyewitness;
- (3) if criminal evidence is found on his body or at his resident;
- (4) if he attempts to escape after committing a crime, or he is a fugitive;
- (5) if there is likelihood of his destroying or falsifying evidence or tallying confessions;

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rendition agreement between Hong Kong and the mainland over the transfer of fugitives or criminal cases.)

<sup>44</sup> Article 51 of the Criminal Procedural Law. For a theoretical treatment, see “V. Community Prosecution and Sanction.” Pp. 253-372. David R. Karp (ed.), *Community Justice* (Rowman & Littlefield Publishers, 1998), pp. 3-31.

<sup>45</sup> M.R. Dutton, *Policing and Punishment in China*. (Cambridge: Cambridge University Press, 1991)

<sup>46</sup> Victor Shaw, *Social Control in China* (Westport, Conn.: Praeger, 1996)

- (6) if he does not tell his true name and address and his identity is unknown; and
- (7) if he is strongly suspected of committing crimes from one place to another, repeatedly, or in a gang.”

Furthermore, investigative detention is subjected to stringent time limitations. Article 57 of the PRC Criminal Procedure Law provides that:

“If the public security organ deems it necessary to arrest a detainee, it shall, within three days after the detention, submit a request to the People’s Procuratorate for examination and approval. Under special circumstances, the time limit for submitting a request for examination and approval may be extended by one to four days. As to the arrest of a major suspect involved in crimes committed from one place to another, repeatedly, or in a gang, the time limit for submitting a request for examination and approval may be extended to 30 days. The People’s Procuratorate shall decide either to approve or disapprove the arrest within seven days from the date of receiving the written request for approval submitted by a public security organ...”

Discussion: how Cheung and accomplices were handled before trial?

It is not clear from the court record why Cheung was detained in the first place, instead of being subjected to other lesser compulsory measures, e.g. residential surveillance (Article 57 of the PRC Criminal Procedure Law.) Applying Article 61 to the facts of this case, Cheung could have been detained for the following legitimate reasons. First, he was a dangerous criminal. Second, he has committed serious crimes. Third, he was a principle offender to a major criminal gang. Fourth, he was without a permanent resident. Fifth, he was a fugitive from justice from the Hong Kong Police. Sixth, there were good reasons to suspect that Cheung would try to escape or otherwise destroy evidence.

It is also not clear from the court record why Cheung was first detained on January 26, 1998, but the approval for his formal arrest was only sought belatedly, some five months and 25 days later, i.e. on July 21, 1998.<sup>47</sup> The prolonged

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<sup>47</sup> The formal arrest of Cheung signified the ending of the police investigative phase and beginning of the prosecution stage. On July 21, 1998, the official PRC news agency, the Xinhua News Agency broke the news that the “Big Spender” gang has been arrested and Cheung has confessed. *Tian Di* (Heaven-Earth), No. 48, Jan. 1999, p. 90.

detention was over and above the legal limit of 30 days when arrest approval must be sought from the people's procuratorate for criminals under detention for investigation by the PRC public security.

A plausible explanation for such an over-extended detention, as offered by the investigating PRC officials, concerned the fact that when Cheung was arrested he tried to disguise his true identity, claiming himself to be "Chen Xing-wei" instead.<sup>48</sup> In this regard, Article 128 of the PRC Criminal Procedure Law allows for the "indefinite" investigative detention of a criminal if his/her true identity cannot be ascertained: "If the criminal suspect refuses to disclose his true name, address, and identity, the period under which he can be held in custody starts from the date the identity is clarified."<sup>49</sup>

If this has been the proffered explanation, two more questions can be asked of the relevancy and propriety applying such a rule to this case? First, whether Article 128 is applicable to the facts and circumstances in this case. By all account the PRC police knew, very early on the investigation, that the person they arrested (Chen Xing-wai) was in fact Cheung Tse-keung, notwithstanding his facial denial. In fact, the PRC police were just waiting Cheung to confess (or own up) to the details of his crime.<sup>50</sup> Even if the PRC police did not know the true identity of Cheung when arrested, the police could have ascertained his identity through DNA/fingerprint matching<sup>51</sup> and or eyewitness identification, in a very

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<sup>48</sup> For an account of the police interrogation of Cheung, see *Tian Di* (Heaven-Earth), No. 48, Jan. 1999, pp. Chapter 11, pp. 85-90. (Cheung was arrested on Jan. 25, 1998 and interrogated on Jan. 26, 1998. He did not disclose his true name or address until the middle of June 1998.)

<sup>49</sup> For a discussion of PRC investigative detention power, see Kam C. Wong, "Sheltering for Examination (Shoushen) in the People's Republic of China: Law, Policy, and Practices" *Occasional Papers/Reprints Series in Contemporary Asian Studies* (School of Law, University of Maryland), Number 3 – 1997 (140), esp. pp. 26-30.

<sup>50</sup> Cheung was not a common criminal. He was the target of an investigation (secret case file coded '9810") coordinated by the Ministry of Public Security from Beijing. Cheung's identity and characteristics were known in advance to the inter-agency work group consisting of Ministry of Public Security, Ministry of State Security and Guangdong Province Public Security Bureau. *Tian Di* (Heaven-Earth), No. 48, Jan. 1999, p. 65. More significantly, it was clear that the PRC interrogators were certain of Cheung's identity, notwithstanding his less than effective denial, as early as Jan. 26, 1998. *Id.* p. 86.

<sup>51</sup> At the time of the arrest, the PRC police have accumulated a substantial amount of information bearing upon Cheung and his gang's personal background and criminal activities. In fact there was a war room dedicated to the "Big Spender" case investigation with a lady officer in charge

short period of time.<sup>52</sup> In essence this is not a case whereby the PRC police have no clue as to the suspect’s identity. Nor could they have been fooled by Cheung’s faked identity. Second, even if Article 128 applied, there is still a factual-legal question as to why Cheung was not formally approved for arrest when he has confessed to his true identity in the middle of June 1998.

Cheung was not the only to be detained beyond the legal time limit. In fact, almost all the criminal defendants in the “Big Spender” case were detained beyond the statutory limits. If we take one month as the optimal period of investigative detention before an approval must be sought, 26 out of the 36 defendants were detained over 30 days without an approval for arrest. The average detention for all 35 criminals was 2 months 9 days. This ranged from the maximum of 5 months 25 days to 2 days.

**Table I: PRC Public Security Investigative Detention of the “Big “Spender”**

<b>Defendant</b>	<b>Detained</b>	<b>Arrest Approval</b>	<b>Approved Arrested</b>	<b>Time Detained</b>
Cheung Tse-keung	Jan. 26, 1998	July 21, 1998	July 22, 1998	5 months 25 days
Chan Chi Ho	April 27, 1998	July 21, 1998	July 22, 1998	2 months 24 days
Ma Shan-chung	Imprisoned for other offense			
Lian Fei	June 19, 1998	July 21, 1998	July 22, 1998	1 month 10 days
Qian Han-shou	July 6, 1998	July 21, 1998	July 22, 1998	15 days
Chu Yuk-sing	May 2, 1998	July 21, 1998	July 22, 1998	2 months 19 days
Li Wan	May 7, 1998	July 21, 1998	July 21, 1998	2 months 14 days
Lau Ding-fun	April 11, 1998	July 21, 1998	July 21, 1998	3 months 10 days
Ye Xin-yu	June 26, 1998	July 28, 1998	July 30, 1998	1 month 2 days
Wong Wah-sang	May 1, 1998	July 28, 1998	July 29, 1998	2 months 27 days
Qian Han-ye	May 3, 1998	July 21, 1998	July 22, 1998	2 months 20 days
Or Ying-ting	May 29, 1998	July 21, 1998	July 22, 1998	1 months 23

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records and documentations of the “Big Spender” gang. There were 80 volumes of files, 2 meters high. *Id.* p. 70.

<sup>52</sup> On April 10, 1998 one of the gang member, Cheung Chi-fung, started to talk and identified Cheung as to leader of the criminal gang. *Id.* 87.

				days
Luo Ji-ping	June 2, 1998	July 21, 1998	July 22, 1998	1 month 19 days
Zhang Huan-qun	June 17, 1998	July 21, 1998	July 22, 1998	1 month 4 days
Wu Chai-shu	Jan. 26, 1998	July 21, 1998	July 22, 1998	5 months 25 days
Wang Ying-de	July 21, 1998	July 29, 1998	July 29, 1998	8 days
+	Jan. 27, 1998	July 21, 1998	July 22, 1998	5 months 25 days
Kam Wing-keung	May 9, 1998	July 21, 1998	July 22, 1998	2 months 20 days
Tang Li-hin	May 10, 1998	July 21, 1998	July 22, 1998	2 months 19 days
Ho Chi-cheung	June 6, 1998	July 21, 1998	July 22, 1998	1 month 15 days
Yu Chuan	July 14, 1998	July 28, 1998	July 29, 1998	1 month 14 days
Jiang Yongchang	July 10, 1998	July 28, 1998	July 29, 1998	18 days
Jiang Chai-gu	July 10, 1998	July 28, 1998	July 29, 1998	18 days
Wang Wenxiong	August 20, 1998	August 22, 1998	August 26, 1998	2 days
Lau Kwok-wah	April 10, 1998	July 21, 1998	July 21, 1998	3 months 11 days
Yu Hong-jian	July 14, 1998	July 28, 1998	July 29, 1998	14 days
Wang Yi	July 9, 1998	July 28, 1998	July 29, 1998	19 days
Chan Shue-hon	April 12, 1998	July 21, 1998	July 22, 1998	3 months 9 days
Chen Hui-guang	May 4, 1998	July 28, 1998	July 30, 1998	2 months 24 days
Luo Yue-ying	June 2, 1998	July 28, 1998	July 29, 1998	1 month 26 days
Chen Lixin	June 25, 1998	July 28, 1998	July 30, 1998	1 month 3 days
Liu Ganyong	May 30, 1998	July 28, 1998	July 30, 1998	2 months 29 days
Yip Kai-chung	June 24, 1998	July 28, 1998	July 30, 1998	1 month 4 days
Yi Kai-yuk	May 1, 1998	July 28, 1998	July 29, 1998	2 months 27 days
<b>Total</b>				80 months 6 days
<b>Average</b>				2 months 6 days

Source: Extracted from Bill of Prosecution, pp. 1 to 9.

The prolonged and over-extended detention of criminal suspects in the Cheung's case reflects and comports with national trend. According to PRC official data, over-extended investigative detention is the norm, not exception. More generally, illegal detention – illegal detention, over-extended detention – is not new, nor is it a small problem in China. For example, in 1986 Chinese official data showed that of the many thousands of “detention for investigation” cases nationwide only 36.3% met all legal requirements, with some provinces falling below 10%. The illegal detention problem is more prominent in the southern part of China than in the north, e.g. official self-reported data showed that in 1990 5.7% of all arrests in Beijing ended up as illegal/over-extended detention while 23.8% of arrests in Guangdong ended up being illegal. Illegal arrest and detention variously been has been used as retribution (“yiquan dai fa”), summary punishment (“dai xing”), in aid of investigation (“dai cha”) and settlement of commercial disputes.<sup>53</sup>

#### **4. The criminal prosecution of the defendants**

##### The decision to prosecute

Article 137 of the PRC Procedure Law instructs the people's procuracy to examine a criminal case transferred to it by the public security with a view towards public prosecution:

“In examining a case, a People's Procuratorate shall ascertain: (1) whether the facts and circumstances of the crime are clear; whether the evidence is reliable and sufficient and whether the charge and the nature of the crime has been correctly determined; (2) whether there are any crimes that have been omitted or other persons whose criminal responsibility should be investigated; (3) whether it is a case in which criminal responsibility should be investigated; (4) whether the case has an incidental civil action; and (5) whether the investigation of the case is being lawful conducted.”<sup>54</sup>

Article 141 of the PRC Criminal Procedure Law further provides that the People's Procuratorate should initiate a criminal prosecution if the facts and evidence warrant it.

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<sup>53</sup> Kam C. Wong, “Police Powers and Control in the PRC: A Reflection of the Lok Yuk Sing's Case” (November 1, 1999) (Unpublished paper. On file with Chinese Law Program, CUHK.)

<sup>54</sup> See also Article 97 of PRC Criminal Procedure Law (1979) If a crime has been committed and the evidence is found to be sufficient, a public prosecution will be started under Article 143 of the PRC Criminal Procedure Law (1979) with a Bill of prosecution.

“After a People’s Procuratorate considers that the facts of a criminal suspect’s crime has been ascertained, that the evidence is reliable and sufficient and that criminal responsibility should be investigated according to law, it shall make a decision to initiate a prosecution and shall, in accordance with the provisions for trial jurisdiction, initiate a public prosecution in a People’s Court.”

### The filing of criminal charges

The “Qixushu” (Bill of Prosecution) starts the public prosecution of a crime in the PRC courts. Substantively, the Bill of Prosecution is made up of three essential parts:

- (1) Introduction part: This part provides information on the nature of the case and particulars of the parties to the case - name of procuratorate office; title of document; case number; the background information of the accused (name, sex, age, nationality, ethnicity, place of birth, cultural level, profession [work unit, job], address, prior record, coercive measure status); origin of case.
- (2) Main part: This part details the facts and circumstances, law and legal provisions, and criminal charges, including investigated and verified facts and circumstances of the case; confirmed criminal evidence against the accused; legal basis and reasons supporting prosecution (including summary of facts on the criminal, brief statement of the danger and punishment for the crime, a clear description of criminal conduct, applicable laws for prosecution and punishment); any associated civil proceedings.
- (3) Concluding part: This part provides information in legal status and process of the case - “This is forward to XX People’s Court”, procuratorial official capacity, name, date/time, seal.<sup>55</sup>

### The Bill of Prosecution against Cheung<sup>56</sup>

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<sup>55</sup> See Editorial Committee, *Prosecutor Manual* (Jianchaguan Shouce) Shanxi Renmin Chubanshe, 1995), pp. 79-80.

<sup>56</sup> The data is extracted and translated from the Bill of Prosecution. Only those portions related to Cheung’s criminality is reported.

*Initial part of Bill of Particulars.*.. “Defendant Cheung Tse-keung, alias Chen Xing-wei, alias “Big Spender” (*da fu hao*), “abnormal guy” (*biantai lao*), male, 43 years old, Guangxi, Zhuang Autonomous Region person, senior middle school cultural (education) status, resided in 10 Nanwan Rd, Flat 1(H), Ya Jing House, Hong Kong. Hong Kong I.D. Card No.: D123744 (7). Detained on January 26, 1998, arrest approved sought on July 21, 1998 to the Guangdong Province People’s Procuracy office, arrest approved on July 22, the same year.”

“This is a case of defendant Cheung Tse-keung ... (and other co-defendants) .... engaging in illegal trading of explosives, smuggling of arms and ammunition, kidnappings, murder, robbery, illegal trading of arms and ammunition, illegal concealment of arms, and concealment of loots.<sup>57</sup> The case was uncovered by the Guangdong Province Public Security Bureau and transferred to Guangdong Province People’s Procuracy office,<sup>58</sup> the said office petitioned this Court for prosecution and adjudication...”

*Main part Bill of Particulars.* Specifically, Cheung Tse-keung was charged with the following offenses.

“This office is of the opinion: Defendant Cheung Tse-keung disregarded state law and illegally traded, transported, and stored explosives. His conduct violated Article 125, paragraph one of the PRC Criminal Law and thus guilty of the crime of illegally trading, transporting, storing of explosives under serious circumstances and should be punished severely; (Cheung) avoided custom control in the smuggling of arms, ammunition and explosives, his conduct already violated Article One to the Standing Committee of National People’s Congress “Supplemental Regulations Regarding Severe Punishment of Smuggling Offenses”<sup>59</sup> made applicable by Article 12 of PRC Criminal Law<sup>60</sup> and is

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<sup>57</sup> Cheung was charged with some and not all the offences appearing it. The Bill of Prosecution details all charges applicable to every defendant in the “Big Spender” case.

<sup>58</sup> The Bill of Prosecution, p. 9.

<sup>59</sup> Quanguo Renmin Dahui Changwu Weiyuanhui “Guangyu Chengzhi Zousi Zui de Baochong Guiding” (Adopted on January 21, 1998 at the 26<sup>th</sup> Meeting of the Sixth NPC Standing Committee. Promulgated on January 21, 1998 by order No. 62 of the President of the PRC). Article 1 of the said regulations provides in pertinent part: “Whoever smuggles in opium and drugs, weapons and ammunition, or counterfeit currency shall be punished to fixed – term imprisonment of not less than seven years and shall also be fined or sentenced to confiscation of

guilty of smuggling of weapons and ammunition under specially serious circumstances, and thus should be severely punished in accordance with the above applicable regulations; (Cheung) in kidnapping people for the purpose of extorting money, his conduct has violated the Article 2(3) to the Standing Committee of National People's Congress "Decision Regarding Severe Punishment of Criminals Abduct to Traffic and Kidnapping of Female and Young Children"<sup>61</sup> and Article 239 of the PRC Criminal Law.<sup>62</sup> In accordance with Article 12 of the PRC Criminal Law, Article 239 of the PRC Criminal Law is the applicable law, (Cheung) is guilty of kidnapping under serious circumstances and should be punished severely. According to Article 64 of the PRC Criminal Law before revision and Article 69 of the (current) PRC Criminal Law, defendant Cheung Tse-keung should be punished separately for different offences.<sup>63</sup> Cheung Tse-keung conspired with others and assumed a principal role in organizing and directing many joint offences,<sup>64</sup> and was a principal offender according to Article 23 of the PRC Criminal Law

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property; if circumstances are particular serious shall be sentenced to imprisonment for life or death; if circumstances are minor, he shall be sentenced to fixed term imprisonment of not more than seven years and fined."

<sup>60</sup> Article 12 of PRC Criminal Law provides: "If an act committed after the after the founding of the People's Republic of China and before the entry into force of this law was not deemed a crime under the laws at the time, those laws shall apply...However, if according to this Law the act is not deemed a crime or is subject to lighter punishment, this Law shall apply."

<sup>61</sup> Quanguo Renmin Dahui Changwu Weiyuanhui "Guangyu Yancheng Guaimai, Banjia Funu, Ertong de Fanzui Fenzi de Jueding" de Baochong Guiding" (Adopted on September 4, 1991 at the 21<sup>th</sup> Meeting of the Seventh NPC Standing Committee). Article 2(3) provides: "Whoever kidnap others for the purpose of extorting money, shall be punished in accordance with item 1." Item 1 to Article 2 provides: "Whoever (kidnap) for the purpose of selling ... shall be sentenced to fixed term imprisonment of not less than 10 years to life imprisonment, and also fine of not more than \$10,000 or confiscation of property; if circumstances are particular serious shall be sentenced to death and confiscation of property."

<sup>62</sup> Article 239 of the PRC Criminal Law provides: "Whoever kidnaps another person for the purpose of extorting money or property or kidnaps another person as a hostage shall be sentenced to fixed – term imprisonment of not less than 10 years or life imprisonment and also to a fine or confiscation of property; if he causes death to the kidnapped person or kills the kidnapped person, he shall be sentenced to death and also to confiscation of property."

<sup>63</sup> Article 69 of the PRC Criminal Law: "For a criminal who commits several crimes before a judgment is pronounced, unless he is sentenced to death or life imprisonment, his term of punishment shall be not more than the total of the terms of all the crimes but not less than the longest of the terms for the crimes, depending on the circumstances of the crimes. However, ... the term of criminal detention may not exceed the maximum of one year, and fixed – term imprisonment may not exceed the maximum of 20 years..." Article 69 is identical to Article 64 of the PRC Criminal Law (1979).

<sup>64</sup> Article 25 of the PRC Criminal Law provides: "A joint crime refers to an intentional crime committed by two or more persons joint." There are three elements to the offense: (1) Subject

before revision and Article 26 of the (current) PRC Criminal Law,<sup>65</sup> and should be punished more severely for all the crimes he organized and directed.”<sup>66</sup>

### Discussion: Taking issues with the Bill of Particulars

The pleading and criminal charges raised a number of interesting questions and perplexing issues in the “Big Spender” case:

#### (1) *The issue of conflicting PRC vs. HKSAR jurisdiction*

*Criminal jurisdiction dispute.* The most controversial aspect of the case is that of whether PRC or HKSAR should exercise jurisdiction over the investigation, prosecution and adjudication in this case.<sup>67</sup>

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(*zhuti*) – must be committed by two or more person with criminal responsibility (Article 17-age, Article 18 –mental capacity); (2) Subjective intent (*zhuguan*) – knowingly and purposively (Article 12); (3) Objective conditions (*keguan*) – joint offenders working separately but towards an agreed upon common goal. See Legal Policy Research of the Supreme People’s Procuracy, ***Practical Interpretation to Amended Criminal Law Provisions*** (Xiuding Xingfa Tiaowen Shiyong Jiesuo) (Beijing: Zhongguo Jiancha Chubanshe, 1997), p. 198. (Interpretative note to Article 151), p. 30. See also exposition on Editorial Committee, ***Judges Manual*** (Faguan Shouce) Shanxi Renmin Chubanshe, 1995) (Judicial officials must determine whether evidence bear logical relationship to alleged facts in the case.) p. 63.

<sup>65</sup> Article 26 (para. 1) of the PRC Criminal Law provides: “A principle criminal refers to any person who organizes and leads a criminal group in carrying out criminal activities or plays a principal role in a joint crime.” Historically, PRC justice officials have looked upon “principal offender” with grave concern. For a policy statement over the treatment of principal criminal, see Supreme People’s Court, Supreme People’s Procuracy, Ministry of Public Security: “Clarification on actual legal application issues regarding the current handling of criminal gang cases” (Zui Gao Renmin Fayuan, Zui Gao Renmin Jianchayuan, Gongan Bao, “Guanyu danqian chuli jituan fanzui anjian zhong de juti yingyong falu de rugan wenti de jieda” (June 15, 1984). (Question 4: In dealing with criminal gangs and major case and joint offenders to major crimes, how to implement Party policy and provide for differential treatment? “In handling the above two kinds of cases, should handle them differently, based on the status of the criminal in the criminal activities, his role and degree of harm, and in accordance with party policy, criminal law, and related NPC Standing Committee’s rules and decisions. Ringleader to criminal gang and principal offender to regular joint serious crime should be severely punished according to law. In cases of special seriousness, they should be executed to pacific the public emotion.) See Editorial Committee, ***Compendium of PRC Public Security Law*** (Jinlin: Jilin Renmin Chubanshe, 1995), p. 712

<sup>66</sup> Article 26 (para. 4) of the PRC Criminal Law provides: “Any principal criminal not included in Paragraph 3 (ring leader of permanent criminal group) shall be punished on the basis of all the crimes that he participates in or that he organizes or directs.”

<sup>67</sup> There are many books and articles written about the Basic Law, very few of them on conflict of law issues, still less on cross-border crimes legal problems. See “THE BASIC LAW: A Bibliography of the Hong Kong Transition” in (1997) ***HKLJ*** Vol. 27 (2), pp. 251-260. In 1988

*The criminal jurisdiction issues being raised.* Prof. Chen, Dean of the Hong Kong University Law School, was the first to raise the issue of possible conflict of criminal

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*The Journal of Chinese Law* devoted the whole issue to a “Symposium on the Hong Kong Basic Law.” *The Journal of Chinese Law* Vol. 2(1), Spring (1988), but none of the articles specifically addressed the issue of conflict of criminal law. For English language articles on legal issues in cross-border crime, see H.L. Fu, “The Relevance of Chinese Criminal Law in Hong Kong and its Residents” (1997) *HKLJ* Vol. 27 (2), Zhao Bingzhi, “Issues in Criminal Law Across the Taiwan Strait” (1983) *Journal of Chinese Law* 229 and Roda Mushkat, “Jurisdictional Issues in a “Highly Autonomous Region” – the Case of Hong Kong” (1993) *International and Comparative Law Quarterly* 11-47. For Chinese articles, see Liu Guoxiang, “Legal Problems in Handling Criminal Cases Involving Hong Kong by Mainland Public Security Organs and Post-1997 Strategies” (1995) 51 *Gongan Yanjiu* (Public Security Studies) 32; Zhang Tao and Chen Weidong, “Discussion of jurisdiction authority over criminal cases involving Hong Kong” (“Lun xiekang xingshi anjian de guanxia quan”) *Studies in Law* (Faxue Yanjiu) 1992 (3) pp. 35-41; Li Xinjiang, “Legal issue on basic law of Hong Kong and crime involving Hong Kong” (“Shang-Kang jiben fa yu xiekang xingshi falu wenti”) *Politics and Law* (Zhenfa Luntan) 1990 (6), pp. 65 –69; Chen Hongyi, “Principles of handling conflicts of law between Hong Kong Special Administrative Region and mainland China” *Wide Angle Monthly* Dec. 16, 1986; Nan Tian, *One Country Two Systems: Legal Issues* (1997), Chapter 5, “The conflicts and resolution of Hong Kong criminal law and national criminal law”; Huang Jing, *Research on inter-regional conflict of law* (Quji Congtufa Yanjiu (Xuelin chubanshe, 1991); Liu Guoxiang, “Current legal issues in handling criminal cases involving Hong Kong by mainland public security organs and post 1997 strategies” (“Dangqian yu neidi gongan jiguan banli xie kang xingshi anjian zhong cunzai de falu wenti ji 1997 hou de duice”) *Public Security Studies* (Gongan Yinjiu), Vol. 51, 1997; Zhao Bingzhi and He Xingwang, “Research on judicial cooperation issues between Mainland China and Hong Kong and Macau Special Administrative Region” (“Zhongguo neidi yu Kang-Ao tebian xingzhengqu de xingshi xiezuo wenti yanjiu”) *Legal Scholars* (Faxuejia) 95(2) [Professor H.L. Fu has cited this article in his article, “The Relevance of Chinese Criminal Law in Hong Kong and its Residents” (1997) *HKLJ* Vol. 27 (2) at footnote 16, p. 232. He translated the second author - “He Xingwang” - as “Hao Xingwang” and the title to the article as “Legal Co-operation between Mainland China and Hong Kong and Macau Special Administrative Regions”], Zhao Bingzhi and Sun Li, “Research into legal issues implicating HKSAR and mainland” (“Shang-Kang tebian xingzhengqu yu naidi jiang huxie xingshi falu wenti yanjiu”) *Chinese Legal Science* (Zhongguo Faxue) 1993 (4), pp. 123; Zhu Seng-yuan, “A discussion on repatriation of criminals under “one country two systems” (“Lun “yiguo lianzhi” tiaojian xia song tufan de zhidu”) *Guangdong Legal Science* (Guangdong Faxue) 93(4), pp. 132; Liao Zeng yun, “Study of criminal judicial assistance across the strait” (“Lian-an xingshi sifa xiezuo yanjiu”) *Studies in Law* (Faxue Yanjiu); Zhao Bingzhi and Qian Yi, “Discussion of cross-border and cross-region crime and punishment principles” (“Lun kuauo kya diqu fanzui ji qi zhengzhi yuangzhi”) *Legal Scholars* (Faxuejia) 93(3), pp. 139; “Mainland court adjudicating Hong Kong resident’s cross-border crime, legal scholar suggested the using of Hong Kong criminal law” *Hong Kong Economic Journal*. November 17, 1998; Qu Fu, “One country two systems” and Chinese Legal System” *Wide Angle Monthly* November 1996, pp. 39-45; Fan Zhongxing, “The judicial relationship between the Central government and Special Administrative Region” *Wide Angle Monthly* July 1997, pp. 84-89. *Wide Angle Monthly* June 1997, pp. 85-91; Albert Chen, “The Conflict of Law Between Mainland China and Hong Kong” in Albert Chen and Johannes Chan *Renchuan Yu Fazhi* (Human Rights and the Rule of Law) (Hong Kong: Wide Angle Press, 1987); Zhao Yongchen, *Guojia Xingfa Yu Sifa Herzuo* (International Criminal Law and Judicial Co-operation) (Beijing: Beijing Law Press, 1994).

jurisdiction and laws between PRC and HKSAR.<sup>68</sup> In his article he raised the issue by citing Hong Kong people's concern with reported cases of a criminal being arrested and executed in China for his robbing and murder in Macau and a Hong Kong residents being fined for selling a boat stolen in Hong and later punished again by the Hong Kong authority. He suggested amending the PRC Criminal Law to make provisions for five kinds of possible of conflict of law situations: (1) a person has committed an act in HKSAR which is a crime in Hong Kong SAR as well as a crime in mainland China; (2) a person has committed an act in HKSAR which is a crime in Hong Kong SAR but is a not crime in mainland China; (3) a person has committed an act in HKSAR which is not a crime in Hong Kong SAR but is a crime in mainland China; (4) a person has committed a crime in mainland China and escaped to Hong Kong; (5) a person has committed an act which can be deemed as happened in Hong Kong and violated Hong Kong law as well as deemed happened in mainland violating mainland law. He was of the opinion that the PRC Criminal Law (Art. 3 (on territorial jurisdiction), Art. 4 & 5 (on national jurisdiction) should have no application in Hong Kong, except in situations where the consequence or effect of the Hong Kong criminal acts impacted PRC. He pointed out that whether PRC Criminal Law Article 5, criminal jurisdiction over PRC citizens overseas should apply to Hong Kong should be carefully studied. With concurrent jurisdiction cases (number 5), both HK and PRC have the right to prosecute and try and the case. He thought that Article 7 of PRC Criminal Law dealing with foreign conviction should applied. Instead, he suggested that the HKSAR should not retry the PRC case. He implored the PRC legal authority to respect and accept the of the Hong Kong court. He did not address who should have the right to try the case first. Prof. Chen's article, albeit short and not fully argued legally, was insightful in anticipating the kinds of cross-border kinds of crime we have to confront today, e.g. cross-border crime implicating concurrent jurisdictions. It provided a useful framework for future discussion, though not agreed solution.

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<sup>68</sup> Chen Hongyi, "Principles of handling conflicts of law between Hong Kong Special Administrative Region and Mainland China" *Wide Angle Monthly* Dec. 16, 1986. ("A more complex problem, regards crimes concerning Hong Kong and mainland, how to coordinate the courts' jurisdiction and criminal law from the two places.")

Recently, Prof. Mushkat<sup>69</sup> and Fu wrote articles<sup>70</sup> discussing jurisdictional issues raised in cross-border crime cases, making them authorities in this emerging field of legal scholarship.

Mushkat wrote her article in 1993 when there was no in-depth legal analysis on the jurisdictional reach of Hong Kong criminal law. One of the questions she posed anticipated the Cheng Chi-keung's case "To what extent is Hong Kong guaranteed a right to exercise jurisdiction over its territory free from interference? Could Chinese criminal jurisdiction be extended to acts committed in Hong Kong?"<sup>71</sup>

Professor Mushkat started by observing that the PRC exercised criminal jurisdiction consistent with international law practice, i.e. criminal jurisdiction based on "territorial principle" (PRC Criminal Law (1979), Art. 3 (1) (2))<sup>72</sup>; "active personality principle" (PRC Criminal Law (1979), Art. 4,<sup>73</sup>;<sup>74</sup> "protective principle" (PRC Criminal Law (1979), Art.6), and "passive personality principle" (PRC Criminal Law (1979), Art.6; and "universality principle" (PRC Criminal Law (1979), Art.). Nevertheless she wanted

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<sup>69</sup> Roda Mushkat, *One Country Two International Legal Personalities* (Hong Kong University, 1997), esp. Chapter 2, pp. 44-84. Chapter 2 originally appeared as "Jurisdictional Issues in a "Highly Autonomous Region" – the Case of Hong Kong" (1993) *International and Comparative Law Quarterly* 11-47.

<sup>70</sup> H.L. Fu, "The Relevance of Chinese Criminal Law in Hong Kong and its Residents" (1997) *HKLJ* Vol. 27 (2); H.L. Fu, "Comment: The Battle of Criminal Jurisdictions" in (1998) *HKLJ* 276.

<sup>71</sup> Roda Mushkat, *One Country Two International Legal Personalities* (Hong Kong University, 1997), p. 44.

<sup>72</sup> See English translation in *Criminal Law and the Criminal Procedure Law of the People's Republic of China* (Beijing: Foreign Language Press, 1984), pp. 5-49. Article 3 (1) (2) of PRC Criminal Law (1979) provides in pertinent part: "[t]he law is applicable to all who commit crimes within the territory [including 'abroad a ship or airplane'] of the People's Republic of China. PRC lawmakers further extended her criminal jurisdiction to covers extra-territorial matters by adopting the "objective territorial principle" in Article 3(3) that deemed a crime to have been committed in China when "either the act or consequences of a crime takes place within the territory of the People's Republic of China."

<sup>73</sup> Article 4 of the PRC Criminal Law is applicable to PRC citizens who have committed the following crimes inside or outside of PRC territory: (1) counter-revolutionary crime; (2) counterfeiting national currency and valuable securities crime; (3) corruption; (4) accepting bribe; (5) disclosing state secrets; and (5) posing as state personnel to deceive, and forging officials documents, certificates and seals." In this regard, A PRC Supreme People's Procuratorate has asserted the "power to prosecute officials working for mainland enterprises in Hong Kong [and Macau]" for corruption in Hong Kong. Connie Law, "Mainland "Can Prosecute Chinese Officials in HK" *SCMP*, September 27, 1994, p. 6.

<sup>74</sup> Article 5 of the PRC Criminal Law is applicable to PRC citizens who have committed crimes outside of PRC territory that is punishable by a minimum of three years.

to circumscribe and restrict the exercise of PRC jurisdiction to the narrowest territorial ambit, i.e. Chinese criminal only apply to criminal conduct and consequence within China. She made four observations in support of her contention.

First, Professor Mushkat feared that PRC might allow “ideological considerations” to come into play in exercising (extra-territorial) criminal jurisdiction thereby violation of “international norms.” “Specifically, an assertion of Chinese criminal jurisdiction over acts committed in Hong Kong based on such construction of the territorial principle would transgress the proscription of non-intervention...self-determination of national entities.”<sup>75</sup> Professor Mushkat did not clarify what constituted “ideological considerations”<sup>76</sup> nor how any such “ideological considerations” might come to contaminate Chinese criminal jurisdiction, otherwise properly exercised. She also did not explain why issues of transgression of non-intervention are not implicated anytime any country exercises an extra-territorial jurisdiction. A fair reading of her article suggested that Prof. Mushkat was not concerned with the “proper” excise of extra-territorial jurisdiction, which after-all is well accepted as an international norm. What she disapproved of is the legitimate legal authority (e.g. the extra-territoriality reach of domestic criminal law) to achieve impermissible political ends, e.g. punishing political dissidents. If that should be Prof. Mushkat’s objection, she did not address the issue of why certain ideological (liberal) use of extra-territorial criminal jurisdiction is proper, e.g. criminalizing Vietnam war protesters overseas, while others are not, e.g. punishing people overseas for assisting June 4 students.

Second, Prof. Mushkat feared that liberal exercise of PRC criminal jurisdiction might encroach upon, if not in time destroy the “high-degree of autonomy pledged by China under the Sino-British Declaration.... (and) ... formal constitutional document (e.g. the Basic Law).” While Prof. Mushkat’s fear and concern are real, her conclusion that the Joint-Declaration and later the Basic Law “implied” or otherwise “intended” the categorical exclusion or displacement of PRC criminal jurisdiction in cases of concurrent

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<sup>75</sup> Roda Mushkat, *One Country Two International Legal Personalities* (Hong Kong University, 1997), p. 44.

<sup>76</sup> Depending on definition, most, if not all, criminal sanctions are ideological in nature and content. See generally, Robert Paul Wolff, *The Rule of Law* (N.Y.: Simon & Schuster, 1971), esp. Richard Barnett, “The Twilight of the Nation-State: A Crisis of Legitimacy”, pp. 221-243. (National leaders use ideology to maintain power and secure control.)

jurisdiction is not warranted by a fair reading of the language of the Basic Law (Art. 18) nor a detail analysis of the legislative history to the Basic Law; simply put, the issue of criminal jurisdiction, in particular concurrent jurisdiction and conflict of law were discussed but never resolved.

The detailed examination of the legislative historical account (May 1986 to December 1987)<sup>77</sup> leading up to the drafting of Article 18 showed that the issue on conflict over criminal jurisdiction was not discussed.<sup>78</sup>

The clearest statement of PRC vs. SAR criminal jurisdiction in broad terms dealing with conflict of law arising out of concurrent jurisdiction cases, is to be found in the FINAL REPORT ON CONFLICT OF LAWS, EXTRADITION, AND OTHER RELATED ISSUES prepared by the Special Group on Law to the Basic Law Consultative Committee.<sup>79</sup> The Report proposed that, in dealing with criminal cases involving Hong Kong and China, the principle should be based on place of commission of offense.<sup>80</sup>

This means when a person, whether a Hong Kong inhabitant or an inhabitant of mainland China, who has committed an offense in Hong Kong should be prosecuted and tried according to the law of Hong Kong; whereas a person, whether a Hong Kong inhabitant or an inhabitant of

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<sup>77</sup> HKSAR court jurisdictional matters were taken up at the joint meeting of the legal experts on March 15, 1987.

<sup>78</sup> Martin C. M. Lee, "A Tale of Two Articles" in Peter Wesley-Smith and Albert H.Y. Chen, *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988), pp. 309-324. At the 13<sup>th</sup> meeting of the third sub-group (October 31, 1987 to November 2, 1987) in Guangzhou, a proposal touching upon conflict of law was raised but drop: "Proposal 3 sought to exclude from the jurisdiction of the courts of the SAR relating to" ... (5) the basic responsibilities of Chinese nationals towards the state (such as cases of treason and the like)." This indicated some desire to maintain extra-territorial jurisdiction by the PRC in subversive conducts affecting the state. *Id.* 321.

<sup>79</sup> Special Group on Law to the Basic Law Consultative Committee. FINAL REPORT ON CONFLICT OF LAWS, EXTRADITION, AND OTHER RELATED ISSUES (passed by the Executive Committee of the Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region on 12 June 1987).

<sup>80</sup> The proposal was in reaction to the following question: "What coordinating arrangements should be made concerning the criminal jurisdictions of the courts of the HKSAR and mainland China in order to safeguard double jeopardy in cases where both Hong Kong and a mainland Chinese court might claim jurisdiction?"

mainland China, who has committed an offense in China should be prosecuted and tried according to the law of mainland.<sup>81</sup>

A careful reading of the Consultation Report on the draft Basic Law reveals the following “Issues to be clarified”<sup>82</sup> under Article 18:<sup>83</sup>

If a resident of the HKSAR is suspected of having committed in other parts of China a crime which may or may not relate to defense or foreign affairs, and has returned to Hong Kong, what will the Central People’s Government or the Hong Kong Government do? Will the suspect stand trial in the HKSAR, or in the place where his alleged crime was committed? If a resident of the China is suspected of having committed in the HKSAR a crime which may or may not relate to defense or foreign affairs, and has returned to his original domicile, what will the Central People’s Government do? Will the suspect stand trial in his original domicile, or in Hong Kong the HKSAR?

Finally and most emphatically, the Consultation Report on the draft Basic Law Article 94 (which provided for judicial assistance over cross-border crime issues) clearly articulated the problem facing the drafters of the Basic Law in dealing with cross-border crime – there are issues searching for answers in the Basic Law:

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<sup>81</sup> Id. p. 2. The Report also raised issue of criminal jurisdiction based on “protective principle” as in the case of National Security Law and Anti-Subversion Law. See report on “Jurisdiction of the HKSAR courts and Applicability of National Laws of Hong Kong.” (Unless otherwise specified in the Basic Law, PRC Criminal Law does not apply to Hong Kong.

<sup>82</sup> THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA, CONSULTATION REPORT (Vol. 5) – - General Report on the Articles - (THE CONSULTATIVE COMMITTEE FOR THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA (October 1988) (Passed by the Twenty-second Meeting of the Executive Committee of the Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.), p. 174.

<sup>83</sup> The draft Basic Law, Article 18 provided in pertinent part: “The Hong Kong Special Administrative Region is vested with independent judicial power, including that of final adjudication. ... Courts of the Hong Kong Special Administrative Region shall have jurisdiction overall cases in the Region, except that the restrictions on their jurisdiction imposed by Hong Kong’s previous legal system shall be maintained... Courts of the Hong Kong Special Administrative Region shall have no jurisdiction over cases relating to defense and foreign affairs, which are the responsibility of the executive acts of the Central People’s Government...” The final Article 18 provides in pertinent part: “The laws in force in the Hong Kong Special Administrative Region shall be this law, the laws previously in force in Hong Kong as provided for in Article 8 of this law, and laws enacted by the legislature of the Region.. National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annexed III to this law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.”

This article fails to address the question of cross-border crimes. If the purpose of holding consultation is to find an answer to this question, there will no need for a basic law since such a practice is against the principle of rulings cases in accordance with law.

There are no extradition arrangements between China and Hong Kong at present. Special provisions should be made in the Basic Law on how such matters will be dealt with in the year subsequent to 1997.

In all, one gets the distinct impression from reading the legislative history to the Basic Law that the drafters were keenly aware of the legal issues, especially jurisdictional ones, implicated in cross-border crimes but chose to deal with other more pressing issues, e.g. how Basic Law is to be interpreted, and allow such other issues to be dealt with on a case by case basis.

Eager to reach a result protective of Hong Kong's "autonomy" Professor Mushkart overstated her case.

My problem with Prof. Mushkat in this regard is that her construction of international law practice in general, and PRC's legal obligations in particular, under the Basic Law, is more informed by expressed liberal values (human rights) and unarticulated conservative fear (Communist ideology) than a balanced reading and considered judgment of the requirements of the law. In sum, Prof. Mushkart has weighted in and taken side, good intention notwithstanding!

Professor H.L. Fu has provided us with a more comprehensive and balanced assessment of the "relevance of Chinese Criminal Law to Hong Kong and its Residents."<sup>84</sup>

The Chinese (PRC) literature in the subject – cross-border crime, concurrent criminal jurisdiction and judicial assistant - is much more substantial, though, as can be expected, much less analytical and critical. However, there are still some discernible differences of views;<sup>85</sup> reflecting a lack of consensus and closure over the "one country

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<sup>84</sup> H.L. Fu, "The Relevance of Chinese Criminal Law in Hong Kong and its Residents" (1997) *HKLJ* Vol. 27 (2).

<sup>85</sup> Differences of views on such an important and sensible subject - how to structure PRC-Hong Kong-Taiwan-Macau relationship - is uncharacteristic of PRC legal scholarship, which up until now have all been orchestrated to express Party line. Uniformity of view is maintained and justified partly because the Party speaks the ultimate historical-scientific truth and partly because Party solidarity must be maintained to foster control and education of the mass. The lack of

two systems” subject matter, e.g. what is the legal status of Hong Kong – Taiwan – Macau as an administration division of the PRC?

The PRC scholars have long been interested in and perplexed by legal problems raised by the “one country four legal districts” problems, e.g. how PRC’s legal system accommodate three kinds of distinctly different - Hong Kong, Macau and Taiwan - if not even completely different legal systems. All conceded that conflicts over jurisdiction are inevitable and should be catered for. There is a common characterization of the problems and mutual identification of the problems and issues involved. There is less of an agreement of how such conflicts could be satisfactorily resolved.

Professor Zhao Bingshi of the Law Department of the People's University is an eminent PRC authority on cross-border crime legal issues, particularly on issues involving PRC-HKSAR-Taiwan-Macau. He has written a couple of influential articles in Chinese as well as English on the subject matter of crimes involving.<sup>86</sup> His work is representative of the PRC official viewpoints.

*The legal position of HKSAR government.* The HKSAR Government’s legal position is most clearly stated in a public statement issued by the Government Information Centre on November 11, 1998<sup>87</sup> entitled: “Government clarify court’s jurisdictional authority over Zheng Tse-keung and Li Yuk-fai” The public statement stressed the following points with respect to the Cheung Tse-keung’s case: (1) According to Article 18 of the Basic Law, the only national laws applicable to Hong Kong were those specified in Annex III and “PRC Criminal Law” is not one of the national law mentioned. (2) Although Cheung Tse-keung is a Hong Kong resident, he was suspected of violating criminal acts provided for under Article 6 of the “PRC Criminal Law” while

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consensus might reflect a more liberal and enlightened view about academic scholarship, i.e. within limits academics are allowed to openly debate legal and policy issues.

<sup>86</sup> Zhao Bingshi, (“Zhongguo neidi yu Kang-Ao tebian xingzhengqu de xingshi xiezuo wenti yanjiu”) *Legal Scholars* (Faxuejia) 95(2), pp. 47-56. Zhao Bingzhi and Sun Li, “Research into legal issues implicating HKSAR and mainland” (“Shang-Kang tebian xingzhengqu yu naidi jiang huxie singshi falu wenti yanjiu”) *Chinese Legal Science* (Zhongguo faxue) 1993 (4), pp. 123; Zhao Bingzhi, “Issues in Criminal Law Across the Taiwan Straits” *Journal of Chinese Law* Vol. 3(2), Fall, 1989, pp. 227-250, 227. For a more general discussion, see Zhao Bingzhi and Qian Yi, “Discussion of cross-border and cross-region crime and punishment principles” (“Lun kuauo kya diqu fanzui ji qi zhengzhi yuangzhi”) *Legal Scholars* (Faxuejia) 93(3), pp. 139.

<sup>87</sup> <http://www.info.gov.hk/chinfo/cheung-c.htm>.

he was in the mainland. Thus “PRC Criminal Law” is applicable to Cheung’s case. Article 6 provides that if any of the “conduct or consequence” of a criminal act happened within Chinese territories, PRC will have jurisdiction over the case. (3) According to Article 19 of the Basic Law; “The courts of Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region.” But Article not does not give HKSAR court exclusive jurisdiction over cross-border crime cases implicated PRC as well as HKSAR jurisdictions.

The Government’s position summaries the opinions more elaborately discussed in three articles by three prominent SAR Government serving justice officials<sup>88</sup> and at a closed-door briefing to the legislators on the case. Together they raised three pertinent questions:

(1) Whether Secretary of Justice’s decision not to prosecute Cheung Tse-keung in Hong Kong is legally justifiable? More specifically, whether, by PRC law, the PRC courts have jurisdiction to hear the case?<sup>89</sup> This is a question of proper exercise of criminal jurisdiction over the prosecution and adjudication of the case. “Jurisdiction concerns the powers of the state to affect people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.”<sup>90</sup> (2) Collaterally, whether Secretary of Justice’s not to seek extradition/

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<sup>88</sup> Grenville Cross S.C. (Director of Public Prosecution) “Letter: Criticism over the Big Spender case unfair.” *SCMP* November 4, 1998. Li Shaoqiang ( former Chairman, Local Prosecutors’ Association) “Balancing Law and circumstances in cross-border crime cases.” *Hong Kong Economic Law Journal*. P. 12. Stephen Wong (Acting Solicitor General) “SAR should not interfere with mainland judicial process” *Id*. The publishing of two articles on the same day might not be co-incidental. They might be a concerted effort of the justice officials to “weight in” the public debate over the propriety of their actions and opinions over the “Big Boss” case. A bit of context for the readers is in order. Before this time, Hong Kong public officials, particularly those from justice, rarely felt the need to defend their position in public for two reasons. First, before the hand over on July 1, 1997 the government officials were accountable to the people as much as they were accountable professionally (to their administrative boss) and politically (to their political boss). Second, public administration was beyond the understanding of the public. Policy (legal) issues were a matter of discussion and debate between experts and amongst professionals. Third, legal and justice officials were bound by law and not driven by public opinion or popularity contests.

<sup>89</sup> Another question can be raised concerning the propriety of any claim of jurisdiction by the PRC, i.e. by international law standard whether the PRC criminal law jurisdiction (PRC Criminal Law, Article 6) is over-reaching?

<sup>90</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> ed. (Cambridge University press, 1997) p. 452.

rendition is legally justifiable?<sup>91</sup> (3) Lastly, as a policy matter, how should the Secretary of Justice balance the rights and expectations of Hong Kong people vs. PRC people in trying the case?<sup>92</sup>

In response to the first question, the Acting Solicitor General and former Chairman of Local Prosecutors' Association are agree – if part of the kidnapping case happened in China, China acquired and retained undisputed jurisdiction, Hong Kong's claim of jurisdiction notwithstanding.<sup>93</sup> In sum, the official position is that both Hong Kong and PRC has concurrent jurisdiction over the case.<sup>94</sup> Their argument is based on commonly accepted international law "territorial" jurisdiction principle.<sup>95</sup> More specifically, PRC Criminal Law, Article 6 (3) provides that: "If either the commission of an offense or its effect takes place within the territory of the PRC, the offense shall be considered to be an offense committed within the territory of the PRC." There is very little debate that in this case, the act of conspiracy to commit a crime, being kidnapping, happened in China, i.e. hotels in Shenzhen. This gives the PRC undisputed territorial jurisdiction over the case.<sup>96</sup> HKSAR's legal position was best captured by the Secretary of Security 's closed-door briefing for the legislators on November 3, 1998:

Mr. Cheung and his gang are being tried in the mainland for offences committed in the mainland against the mainland criminal codes... Article Six (of PRC Criminal Law) ... provides that if an act or part of the crime or a consequence of the crime is committed in the mainland, mainland

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<sup>91</sup> "Whether the position of the Secretary of Justice with respect to the Cheung Tse-keung's case is based on sufficient legal grounds and was carried out dutifully according to the law?" *Id.* Wong

<sup>92</sup> "What kinds of principle should we adopt to balance the conflicting expectations between the people from Hong Kong and mainland over judicial jurisdiction?" *Id.* Wong

<sup>93</sup> The Chief Executive of SAR has taken up this position: "Legally, they can be tried in China because they have violated Chinese laws... we in Hong Kong 'one country, two systems' must respect legal procedures inside China. Our legal system is not at all under threat." *SCMP* November 12, 1998.

<sup>94</sup> Professor Chen Hung-ye, Dean of Hong Kong University Faculty of Law adopts this position. Jimmy Cheung, "Grey areas over first legal move." *SCMP* November 9, 1998.

<sup>95</sup> International law sanctioned "the territorial principle" as "one aspect of sovereignty exercisable by a state in its territorial home." D.P. O'Connell, *INTERNATIONAL LAW* (1979), pp. 823-31.

<sup>96</sup> There appears to be little disagreement over this legal issue, i.e. China has "territorial" jurisdiction over that part of the offense committed in China. The debate at this point is which part of the many offenses should be tried in China. Simply put, should China be able to try all offenses just because she has jurisdiction to try some. Chris Yeung, "The case that threatens our autonomy" *SCMP* November 14, 1998. (Representative from the bar, Rooney Chan suggested that putting aside the kidnapping charge, the Hong Kong people who were charged with robbery or firearms should be returned.)

authorities have every right to prosecute the people concerned ...this case, although the act of kidnapping may have occurred in Hong Kong, the mainland authorities are trying Cheung and his gang for conspiracy and the very detailed planning which took place in mainland, and the conspiracy ... and illegal procurement of ammunitions and explosives – all of which occurred on the mainland.<sup>97</sup>

In response to the second question – on returning of Cheung Tse-keung to Hong Kong to stand trial,<sup>98</sup> the SAR Government the official ruled out any attempt to ask for the return of Cheung Tse-keung at any time, either for prosecution or for serving of sentence.<sup>99</sup> The position was based on three reasons. There was not enough evidence for prosecution. There was no rendition no judicial assistance agreement between PRC and Hong Kong. Hong Kong should respect PRC's legitimate exercise of jurisdiction. As to why there was not enough evidence to warrant prosecution, the Secretary for Security Mrs. Regina Ip made clear that since the kidnap victim did not reported to the police, there was insufficient evidence to prosecute.<sup>100</sup> The Secretary for Security did she explain why there was not sufficient evidence, particularly why other evidence was not used to build a case against Cheung.<sup>101</sup> On the issue of evidence, Li Shaoqiang, former Chairman to

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<sup>97</sup> Charlotte Parsons and Angela Li, "Big Spender's family wins" *SCMP* November 14, 1998. The Secretary of Justice also concurred with this assessment. "First of all we have to examine whether mainland courts have jurisdiction to try this case and we fell that mainland courts have jurisdiction to do so." *Id.*

<sup>98</sup> Moving the "big Spender" case to be tried in Hong Kong was the major issue, both for the defendant's lawyers and Hong Kong opinion leaders. Ceri Williams, "Fresh attempt to move case" *SCMP*, October 27, 1998. (Mr. Ivan Tang, Hong Kong lawyer for the Cheung Tse-keung, questioned the legal basis for conducting the trial of a Hong Kong resident on the mainland when most the alleged crimes were said to have been committed in the SAR.)

<sup>99</sup> There was a noticeable sight of position in this regard. Before the verdict, both the Security of Justice and Secretary of Security were adamant against the return of Cheung Tse-keung to Hong Kong for whatever reasons – prosecution or sentencing. After the verdict, the Secretary of Security soften the stance to one of will consider returning the 18 Hong Kong residents to stand trial in Hong Kong if they serve their sentence in Hong Kong and if it is not too late, e.g. no death or life sentence being imposed.

<sup>100</sup> *Apple Daily*, A2, A4, October 25, 1998.

<sup>101</sup> On November 3, 1998, the Legco Security Committee held a closed door meeting with the Security of Security, Security of Justice, Deputy Commissioner of Police Wong Chan Kwong, Senior Assistant Solicitor General Wong Hong Hing and Senior Assistant Counsel, DPP, Li Ding Kwok. The Chairperson James To was satisfied that (1) there was not enough evidence to charge Cheung Tse-keung in Hong Kong and (2) the police have done what they can in investigating the case. The main reason given for lack of evidence was a lack of cooperation from the victim. The Secretary of Security decided not to prosecute the victim for not cooperating because of compassionate reasons. Coerced testimony was also considered not reliable. "Legco members

Local Prosecutors' Association, made clear that the evidentiary standard applied to criminal cases in Hong Kong courts, i.e. beyond a reasonable doubt and not to be compromised to satisfy public needs for summary justice or retribution.<sup>102</sup> However, notwithstanding the lack of evidence to arrest and prosecute Cheung Tse-keung, the police nevertheless assisted the PRC in the prosecution of the case and planned to seize the ill gotten gains of Cheung under the Organized and Serious Crimes Ordinance<sup>103</sup> on August 19, 1998, long before the case came to trial in China.<sup>104</sup> Though ultimately, the Court of First Instance sided with the SAR Government: "The courts have concluded that the offences specified in the affidavit have not been satisfactorily established because the victims have not provided the information."<sup>105</sup>

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agreed with officials' explanation, Hong Kong government lack sufficient evidence to prosecute Cheung Tse-keung" *Hong Kong Economic Journal*, Nov. 11, 98.

However, it is also clear that the "Big Spender" case was brought to the attention of the police and thoroughly investigated. Chris Yeung, "1996 kidnap rumor led to police inquiry: Pattern" *SCMP* October 20, 1998. (The last Governor of Hong Kong, Christ Pattern, confirmed that he asked the Secretary of Security to make an inquiry of a kidnap "rumor" around town only to be informed that "they (police) couldn't establish whether or anything happened." This is a slightly different version of the "Big Spender" investigation than admitted to by the Secretary of Security or the police. The Secretary of Security did not say that she could not establish a crime, only that she has not sufficient evidence to arrest and prosecute. Government officials further confirmed that they approached Mr. Li Kar Shing and Mr. Walter Kwok in May 1997 for information but they denied discussing the case. The Security of Security did not make clear when she has information about a possible crime being committed which Christ Patten denied ever having confirmed knowledge.) The police felt they have done what they could in gathering evidence. *SCMP* November 9, 1998. Audrey Parwani, "Police morale 'hit by lack of SAR hearing'" ("Of course we are angry. We have been following this guy for ages and gathered so much evidence.")

<sup>102</sup> Li Shaoqiang (former Chairman, Local Prosecutors' Association) "Balancing Law and circumstances in cross-border crime cases." *Hong Kong Economic Law Journal*. P. 12.

<sup>103</sup> It is an offense under Organized and Serious Crimes Ordinance to deal with property which he or she knows, or reasonable grounds to believe, to be proceeds from an indictable offence. Parsons and Angela Li, "Big Spender's family wins" *SCMP* November 14, 1998. (The police sought a restraining order from the court to confiscate \$160 millions in property, bank accounts and vehicles. They seized \$400,000 in cash and \$2 million worth of valuables. The relatives were allowed to spend no more than \$3000 per week and restricted their legal bills to \$50,000 (later raised to \$5,000) each (later raised to \$120,000).

<sup>104</sup> The Commissioner of Hong Kong Police made his intention known on August 18, 1998. Stella Lee, "Police plan to seize assets of 'Big Spender'" *SCMP* August 19, 1998. Cheung's relatives were arrested on money laundering in September 1988 and went to court on October 9, 1998. 160 millions in property, bank accounts, and vehicles were seized. Charlotte Parsons, "Big Spender family fights clamp on purse strings." *SCMP* October 10, 1998

<sup>105</sup> The police were asked to seek new restraining order if and when they have more evidence. Charlotte Parsons and Angela Li, "Big Spender's family wins" *SCMP* November 14, 1998.

In response to question number three, the official position was that as a matter of legal principle and justice administration policy, Hong Kong have to respect PRC's legal rights before we can expect Hong Kong legal autonomy is to be respected. "One country two systems" must be built upon a foundation of mutual respect and spirit of equality."<sup>106</sup> "Central to the formula (of "one country two systems") is mutual understanding. While the mainland authorities do not interfere with the judicial system of the SAR, so also must the SAR respect the legal processes of the mainland."<sup>107</sup> Particularly, in cases of concurring jurisdiction, if our justice officials were to insist on our legal autonomy, so can the PRC. If, as one of our legislator suggested, Hong Kong should demand an explanation from PRC on their rightful assumption of jurisdiction or exclusion of Hong Kong's jurisdiction in cross-border crime cases, should not the PRC authority be able to do the same? The ultimate issue is whether the PRC can hold legitimate rights and expectations over the autonomy of their own legal system. Our own confidence in Hong Kong's legal system does not provide legitimate grounds for us to interfere with the operations of the China's legal system, however much we dislike its application in Hong Kong.

*The legal position of PRC.*<sup>108</sup> In a press conference held in Guanzhou, the presiding judge in the case, Shi Anqi, made clear that the Guanzhou had jurisdiction in trying he case since all of the defendants, including Cheung Tse-keung, had either committed a crime in China, e.g. or had engaged in cross-border crime, e.g. smuggling of firearms. In sum either the conduct (*zingwei*) or the consequence (*houguo*) of crimes

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<sup>106</sup> Li Shaoqiang (former Chairman, Local Prosecutors' Association) "Balancing Law and circumstances in cross-border crime cases." *Hong Kong Economic Law Journal*. P. 12

<sup>107</sup> Grenville Cross S.C. (Director of Public Prosecution) "Letter: Criticism over the Big Spender case unfair." *SCMP* November 4, 1998.

<sup>108</sup> Throughout the public debate over the "Big Spender" case, the PRC authority has been unusually quiet. The clear impression one gets is that she did not want to be a part of the debate and let the record speaks for itself. One PRC observer observed that this was a result of PRC's deliberate policy of not to interfere with Hong Kong's internal affairs. Qiang Xuejun, "The grey area between China and Hong Kong gradually appears" *Hong Kong Economic Journal*, Nov. 18, 1998.

happened in China.<sup>109</sup> More specifically, in answer to Cheng Chi-keung and other defendants' jurisdiction argument, the Guangzhou Intermediary People's Court state:

Besides, defendants Cheung Tse-keung, Lau Ding-fun has raised objections over jurisdiction in regard to illegal trading, transportation of explosives, kidnapping and robbing of Hong Kong gold shops. After investigation, for people who were involved in the above crimes, some of the defendants are Hong Kong residents, some of the defendants are mainland residents; the kidnapping and robbing of gold shops were conducted in Hong Kong, but the conspiracy, planning, and preparatory conduct, all happened in the mainland; the explosives and instrumentality of crimes were all illegally procured in the mainland and transported to Hong Kong; defendants were all arrested in the mainland;<sup>110</sup> a lot of proceeds of crime, loots, and evidence were all recovered in the mainland.<sup>111</sup> Thus according to PRC Criminal Procedure Law, Article 24, the judicial organization in mainland possessed jurisdiction over the case.

*A Balanced Legal analysis.* The issue of criminal jurisdiction raised by “one country two system” was much anticipated, but never resolved. The issue was publicized in the press,<sup>112</sup> analyzed by scholars,<sup>113</sup> discussed by the Basic Law drafters,<sup>114</sup>

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<sup>109</sup> Guangzhou Intermediary Court (the Court) conducted a lengthy press conference – “Guangzhiu municipality intermediary court situation briefing session” (“Guangzhoushi zhongju renmin fayuan qingkuan jieshaohui”) – to explain to the public and the press its decision in the “Big Spender” case. The press conference was attended by the Court President, Li Go, Deputy President, Huang Min, Presiding judge Shi Anqi and judicial officer Wu Chan. The symbolic significance of this event should not be underestimated. The PRC Court felt the need to explain their action. This was a sure sign of legal maturity. “Presiding judge asserted once again that mainland has judicial authority.” *Ming Bao Daily News* November 13, 1998, A4.

<sup>110</sup> It is not clear why being arrested in the mainland in of itself provide the necessary jurisdiction to try the case. It is certainly true that given a case of concurrent jurisdiction, the place where the criminal is first found become important.

<sup>111</sup> It is not clear why the uncovering of criminal evidence, e.g. proceeds of crime, contributed to the claim of jurisdiction.

<sup>112</sup> Special topic: Hong Kong people under the legal net of dictatorship” *Jiuxi Nian Dai Monthly* July 1986, pp. 42-56. (“In the mainland, how many Hong Kong people were executed?” From 1981 to September, 1983 105 Hong Kong offenders were arrested for smuggling of goods, drugs, and people. Within the ranks were 14K members and fugitive from justice in Hong Kong. From January 1983 to November 1983, the Shenzhen police uncovered 4,900 cases of smuggling by Hong Kong people with 70 people arrested. In January of 1983, the Shenzhen court sentenced three Hong Kong people (one to death, one death suspended, one for 15 years) for conspiring with 10 mainland criminals to smuggle watches, electronic calculators, silver, nylon bags, and female underwear. The problem was with the uneven quality of justice, i.e. corruption, arbitrariness and harshness.)

commented upon during consultation process.<sup>115</sup> For example, the Special Group on Law to the Basic Law Consultative Committee raised the question of conflicting criminal jurisdictions:

What coordinating arrangements should be made concerning the criminal jurisdictions of the courts of the HKSAR and Mainland China in order to safeguard double jeopardy in cases where both Hong Kong and a Mainland Chinese court might claim jurisdiction?<sup>116</sup>

With respect to jurisdiction, there are the following issues to be raised. First, was there a proper exercise of jurisdiction by PRC judicial authority? This is a legal-factual question to determine whether the judicial authority in China has acted extra-legally. Second, was the exercise of jurisdiction by the PRC, even if legal by domestic law, can be considered to be encroaching upon or usurping of other legal system's proper exercise of jurisdiction over the same case? This again is a legal-factual question to determine whether judicial authority has acted extra-territorially or extra-jurisdictionally? Third, in cases of concurrent jurisdiction or conflict of jurisdiction how should such conflicts of jurisdiction be resolved?

Article 6 of the PRC Criminal Law provides in pertinent part:

“This Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the PRC, except as otherwise specifically provided by law... If a criminal act or its consequence take places within the territory or territorial waters or space of the PRC, the crime shall be deemed to have been committed within the territory and territorial waters and space of the PRC.”

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<sup>113</sup> Chen Hongyi, “Principles of handling conflicts of law between Hong Kong Special Administrative Region and Mainland China” *Wide Angle Monthly* Dec. 16, 1986.

<sup>114</sup> The drafting committee was much concerned with conflict of law issues, including whether National Security Law or Anti-subversion law apply to HKSAR; whether PRC officials, such as soldiers will be subjected to Hong Kong law, and lastly how criminal cases implicating concurrent jurisdictions are to be settled. FINAL REPORT ON CONFLICT OF LAWS, EXTRADITION, AND OTHER RELATED ISSUES (passed by the Executive Committee on 12 June 1987 to the Basic Law Drafting Committee). (The committee adopted a clear line rule. Criminal cases involving both Hong Kong and China should be settled on territorial principle, i.e. where the crime occurred.)

<sup>115</sup> PRC and Hong Kong SAR Basic Law (Draft) Consultation Document. Fifth Consultation Report (5<sup>th</sup> Volume )(PRC and SAR Basic Law Consultative Committee, October 1988.) (Article 94 cannot settle cross-border crime issues. Extradition agreement to be negotiated.)

<sup>116</sup> *Id.*

According to the facts of the Cheung Tse-keung's case as found by the Guangzhou Intermediary People's Court and as independently verified by Hong Kong investigative report, Cheung Chi-keung had committed the following criminal acts in China:

1. In October 1997, the defendant Cheung Tse-keung supplied HK\$150,000 and directed others to purchase 818.43 Kg of explosives, 2000 detonators, 750 meters of fuse line from mainland China.
2. From the end of 1995 to the beginning of 1996, defendants Cheung Tse-keung and others made multiple visits to Shenzhen, staying in Ming Du Hotel and Ri Sun Hostel to secretly plotted the kidnapping of Li XX. Cheung Tse-keung put up HK\$1.4 millions for the purchasing of equipment and renting of premises for locking up the hostage, including 2 AK47 automatic rifles, one miniature machine gun, 6 pistols, 9 packages of explosives (Weighting 1.887 Kg). Cheung also helped to smuggle the arms and ammunitions to Hong Kong.
3. At 6 pm on May 23, 1996, Cheung kidnapped Li XX and his driver and asked and obtained a ransom of HK\$1030,000,000.
4. In April of 1977, defendant Cheung Tse-keung and others planned for the kidnapping of Mr. Kwok in China - Guangzhou, Shenzhen, Dongguan. Cheung and Wu put up HK\$ 2.2 millions as expenses. At 6 pm on September 29, 1977 Cheung and other defendants kidnapped Kwok. After Cheung Tse-keung asked and obtained HK\$6,000,000,000 from the Kwok's family, the victim was released.

Given these facts in the case, there is very little question that Cheung has committed criminal offenses in China and the PRC court has properly assumed jurisdiction in the case. Specifically, Article 24 of the PRC Criminal Procedure law provides:

A criminal case shall be under the jurisdiction of the people's Court in the place where the crime was committed. If it is more appropriate for the case to be tried by the People's Court in the place where the defendant resides, then that court may have jurisdiction over the case.

However, the question remains whether the PRC court has not over-reached its jurisdiction in taking over the adjudication of a case where both the conduct and consequence of a criminal act, being kidnapping, happened in Hong Kong. More

particularly, whether the PRC court has breached the spirit of the Basic Law of Hong Kong – allowing Hong Kong to be an autonomous and independent legal entity<sup>117</sup> – in its haste to assume jurisdiction of a case, which happened in the main in Hong Kong. In support of this argument one would readily observed all crimes are not treated equally for jurisdiction purpose. Conspiracy to kidnap, smuggling of arms and ammunitions, and illegal trading of explosives are all preparatory offenses to the main and completed offense of kidnapping. Thus, though it is provided under Article 22 of the PRC Criminal Procedure Law that: “Preparation for a crime refers to the preparation of the instruments or the conditions for a crime” is a crime in the PRC, it should be noted that the NPC has intended the “preparatory offense’ is a much lesser offense than the completed offense, should be “given a lighter or mitigated punishment or be exempted from punishment.” Viewed in this light, it can argue that cross-border crime cases, the likes of Cheung Tse-keung’s case, should be tried in where the “conduct” of the crime occurred and where the “consequence” is felt, and not where the preparation is done.<sup>118</sup> This is buttress by PRC’s position in the allowing cross-districts (*kuan qu*) crimes to be tried where the place where the major crime occurred.<sup>119</sup> This is particularly so when the NPC did not intent for the PRC Court Hong Kong to pre-empt the Hong Kong courts’ criminal jurisdiction with the promulgation of the Basic Laws of Hong Kong.<sup>120</sup>

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<sup>117</sup> See THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA, CONSULTATION REPORT (Vol. 2) – Special reports. The reports on “The Relationship between the Basic Law and the Chinese Constitution and the Relationship between the Basic Law and the Sino-British Joint Declaration” and “One Country Two Systems” and “A High Degree of Autonomy”(THE CONSULTATIVE COMMITTEE FOR THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA (October 1998) The report made clear that the return of Hong Kong resolved “the question of the sovereignty of Hong Kong” in “territorial sovereignty” terms, i.e., HKSAR is an inalienable part of the PRC. However, HKSAR is to delegated with much powers to govern herself under the principle of “zero sum game,” i.e. power given to HKSAR will not be available to the PRC.

<sup>118</sup> This is basically Ms. Audrie Yu, Chairman, Hong Kong Bar Association’s argument at the PRC – HK Law Seminar on “Legal Issues in Cross-border Crimes: Looking into the Future” on November 27, 1998, co-sponsored by Chinese Law Program, Chinese University of Hong Kong and French Centre for Research on Contemporary China in Hong Kong.

<sup>119</sup> PRC Crminal Procedure Law (1979), Article 20.

<sup>120</sup> *SCMP* November 6, 1998. Margaret Ng “Right to autonomous law. (“To give real assurance, it must be made clear r a person can only be prosecuted in Hong Kong for what he has allegedly done in Hong Kong ... Article 18 provides that PRC law shall not apply in Hong Kong unless included in Annex III. Article 19 provides that Hong Kong courts have jurisdiction over all cases

This position, compelling argued by Hong Kong advocates, must ultimately be judged against international practices as applied to PRC context.<sup>121</sup> According to well-established international law position penal jurisdiction of a country can be established based on five general principles:

“first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offense; fourth the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured.<sup>122</sup>

The common law’s position is that crimes are local in effect and punishment. Each sovereign has undisputed jurisdiction over crime committed within its territory.<sup>123</sup> Collaterally, it has no interest to control and otherwise competent jurisdiction to prosecute extra-territorial crimes.<sup>124</sup> In this regard, Lord Macmillan opined:

It is an essential attribute of sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and

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in Hong Kong. Article 22 precludes mainland authorities from interfering with matters which the SAR has power to deal with on its own.”) Her argument though persuasive ignored PRC’s central argument, i.e. PRC court is following PRC law as informed by international practices.

<sup>121</sup> The application of international law to domestic problem is strongly resisted by the PRC. The Five Principles of Peaceful Coexistence entrenched in the PRC Constitution (1982) included a provision of “non-intervention” into nation-state’s domestic affairs. But the PRC does not object to looking at foreign experience as a building block for her own legal principles. H.L. Fu, “The Relevance of Chinese Criminal Law in Hong Kong and its Residents” (1997) *HKLJ* Vol. 27 (2) (International law and practice on criminal jurisdiction is considered to be relevant and persuasive authority, even in the Hong Kong context.), p. 232. In the case of Hong Kong, its own legal system incorporates British features and international standards. The thesis is, if PRC position is acceptable by common or international law standard, it should be accepted.

<sup>122</sup> “Harvard Research on International Law: Jurisdiction with Respect to Crime” 29 *Am. J. Int. L.*, Supp. 1, 435, 445 (1935).

<sup>123</sup> *R. v. Governor of Belmarsh Prison, ex parte Martin* [1885] 2 All ER 548, Court of Appeal (All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed...)

<sup>124</sup> Francis Wharton, *A Treatise on the Conflict of Laws* (Littleton, Colorado, 1991, ori. 1872) Chapter XQ Criminal Law. The territorial principle if pushed to the limit will allow if not invite criminals to commit crime in one country and seek heaven in the next.

things within its territorial limits and all causes civil and criminal arising within these limits. This jurisdiction is exercised through the instrumentality of the duly constituted tribunals of the land.<sup>125</sup>

The territorial principle not only allows a state to prosecute and punish criminal acts within a state but also criminal conduct part of which occurred outside the state in any jurisdiction.

The territorial principle and its collateral are well-established principles in international law as well as criminal code in many jurisdictions. In international law, American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987) provides in Section 403: Basis of Jurisdiction to Prescribe:<sup>126</sup> “Subject to Section 403, a state jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory...”<sup>127</sup> In domestic penal code, the American Law Institute, *Model Penal Code*, Section 103, Territorial Applicability: “(1) Except as otherwise provided in this Section, a person may be convicted under this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable, if: (a) either the conduct which is an element of the offense or the result which is such an element occurs within the state; or .... (d) conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which is also an offense under the law of this State.”

The British view on extra-territorial reach of State court is that the State can assert jurisdiction over persons or event where any element of an event takes place within its territory<sup>128</sup> The “objective territorial principle allows a State to punish criminal activities within the territorial limit of a State, even though some elements of the crime took place

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<sup>125</sup> *Compania Naviera Vascongado v Steamship ‘Cristina’* [1938] AC 485, House of Lord.

<sup>126</sup> According to Section 401 of the Restatement, jurisdiction to prescribe means “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.”

<sup>127</sup> In imposing “external limitations” on a country’s jurisdiction to prescribe, the ALI sought accommodation: “Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria embracing reasonableness and fairness to accommodate overlapping or conflicting interests of states...”

elsewhere.<sup>129</sup> The “subject” territorial principle allows a State to punish criminal activities commencing in this territory, even though the final element might have occurred abroad.<sup>130</sup>

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. *It is susceptible of no limitation not imposed by itself.* Any restriction upon its, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction ... All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.”<sup>131</sup>

## (2) *The issue of proper venue*

Under normal circumstances, Article 19 of the PRC Criminal Procedure Law provides that: “The Primary People’s Courts shall have jurisdiction as courts of first instance over ordinary criminal cases....” However, according to the Bill of Prosecution, the “Big Spender” case was initiated in the Intermediary People’s Courts (p. 34). The Bill of Prosecution did not explain why there is a need to prosecute the case in the Guangzhou Intermediary People’s Court.

The Guangzhou Intermediary People’s Court and not the Primary People’s Court, assumed initial jurisdiction as the court of the first instance over this case because this is not an “ordinary criminal case.” Rather, it is a major, complex and serious case, i.e. a capital crime involving multiple defendants and different jurisdiction (PRC-HKSAR). According to Article 20 of the PRC Criminal Procedure, the Guangzhou Intermediary People’s Court is the proper court to initiate the prosecution. Article 20 provides for mandatory removal of serious case:

“The Intermediary People’s Courts shall have jurisdiction as courts of first instance over the following cases: ...(2) ordinary criminal cases punishable by life imprisonment or the death penalty...”

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<sup>128</sup> Lord Diplock in *Tracey v. Director of Public Prosecutions* [1971] AC 537.

<sup>129</sup> *R. v. Sansom* [1991] 2 All ER 145 and *Liangsiriprasert v. US Government* [1990] 2 All ER 866.

<sup>130</sup> Martin Dixon & Robert Mccrqudale, *International Law*, 2<sup>nd</sup>. Ed. (London: Blackstone Press Limited, 1991)

<sup>131</sup> Marshall, C.J., in *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812)

In this case, since Cheung was charged with life and capital offenses – smuggling of arms and ammunition, being a principal criminal in kidnapping and transportation of explosives – his case must be tried in the Intermediary People’s Courts.

Alternatively, if the case had been initiated in the Primary People’s Court, it would have been removed by that court to the higher court as allowed by Article 23 of the PRC Criminal Procedure that provides for the discretionary removal of major or complicated cases to a higher level:

“When necessary, People’s Courts at higher levels may try criminal cases over which People’s Courts at lower levels have jurisdiction as courts of first instance; If a People’s Court at a lower level considers the circumstances of a criminal case in the first instance to be major or complex and to necessitate a trial by a People’s Court at a higher level, it may request that the case be transferred to the People’s Court at a higher level for trial.”

The PRC Criminal Procedural Law does not make clear what a “major and complex” allowing for discretionary removal of a case on petition of the lower people’s court.

Lastly, an interesting legal-policy issue can be raised as to whether Cheung could or should be tried in the Intermediary People’s Courts as a “foreigner” because he was a Hong Kong citizen, enjoying special legal protection under the Basic Law. Article 20 of the PRC Criminal Law which provide for the mandatory removal of a foreigner’s case: “The Intermediary People’s Courts shall have jurisdiction as courts of first instance over the following cases: ...(2) criminal cases in which the offenders are foreigners.” The PRC judicial authorities however have taken the view that Hong Kong residents are PRC nationals, not “foreigners.”

A case can be made for the discretionary removal of a Hong Kong resident’s case from a Primary People’s Court to an Intermediary People’s Court on two grounds: (1) Substantively, criminal cases involving Hong Kong residents potentially raise conflict of law and jurisdiction issues which the a lower people’s court is ill equipped to deal with. (2) Symbolically, a Hong Kong resident case, as with a foreigner’s case, raises sensitive political (“one country two system”) if not international (treaty obligations under the

Joint Declaration<sup>132</sup>) (3) In terms of judicial administration, the lower court, being more close to local interest and concerns, cannot be trusted to fully protect the rights of the Hong Kong residents, e.g. a Shenzhen People's Court trying a Hong Kong criminals.

(2) *The issue with the specificity of the pleadings*

The Bill of Prosecution on Cheung's case is structured in such a way that the facts and circumstances in the case were recited in detail (pp. 9-19) before the specific criminal charges were specified. It is not clear on the face of the Bill of Prosecution as to how each respective charge and corresponding elements of offences were supported by particularized facts and material evidence. Correspondently, it is not apparent which factual events relates to which charge or element of an offense.<sup>133</sup>

In the "Big Spender" case, for example, the first charge in the Bill of Prosecution was for illegal trading, storing and transportation of explosives (p. 19). The charge could have referred to the October 1997 incident when Cheung Tse-keung asked Qian Han-shou to orchestrate the purchase of explosives in China. It could also refer to the Spring of 1997 incident when Cheung and Chen Zhihao directed and assisted others to smuggle arms, ammunition and explosives to Hong Kong (p. 11). Likewise, the third charge summarily concluded that Cheung was guilty of kidnapping(s) (p. 20) without further specifying whether Cheung was guilty of one or more kidnapping and what facts alleged in the case supported which kidnappings; i.e. Mr. Li's kidnap (p. 12) or Mr. Kwok's kidnap (p. 13). Finally, the last charge alleged that Cheung was a principal criminal to a number of joint-offenses (p. 20). It was not clear what alleged facts were used to support which joint-offenses.

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<sup>132</sup> PRC has repeatedly claimed that how she treated her nationals, including Hong Kong residents, are domestic and internal affairs. However, this does not obviate the fact that the Joint Declaration is an international treaty, the breach of which attracts international condemnation if not even sanction. See for example, the "right of abode" case. Simon Macklin, "Britain Defend Right to Comment" *SCMP*, February 13, 1999. (A spokesman for British Prime Minister Tony Blair has hit back at a statement from the Chinese Foreign Ministry that suggested Britain had no right to comment on the Court of Final Appeal ruling. He insisted Britain had a right to comment on developments in Hong Kong because of its role in the Joint Declaration.)

<sup>133</sup> See Editorial Committee, *Prosecutor Manual* (Jianchaguan Shouce) Shanxi Renmin Chubanshe, 1995), p. 79.

The lack of specification of what charges related to what facts and the inadequate identification of what facts were used to support which charges raised substantial due process concerns. For example, it creates notice problems for the defense to adequately preparing for the defense. It also forecloses successfully appeal against the judgment, e.g. challenging the adequacy proof of facts as to each and every element of the crimes charged.<sup>134</sup>

It is best to compare the PRC criminal charge practice with that of the U.S. In the U.S., as a fundamental due process requirement, the U.S. Constitution provides that the defendant must to be put on timely and adequate notice about the criminal charge so that he can defend himself. Federal Rules of Criminal Procedure, Rule 3 provides that: “The complaint is a written statement of the essential facts constituting the offense charged...” Rule 7 (1) provides that: “The court for cause may direct the filing of a bill of particulars...”

### (3) *The issue with appropriateness of charges*

*Charge of Kidnapping.* Cheung was charged under “Decision Regarding Severe Punishment of Criminals Abduct to Traffic and Kidnapping of Female and Young Children”<sup>135</sup> and Article 239 of the PRC Criminal Law,<sup>136</sup> not kidnapping alone. The reason is a historical one. There was no kidnapping offence *per se* in the old PRC

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<sup>134</sup> Cui Min and Zhang Wen-qing, *The Theory and Practice of Criminal Evidence* (Xingshi Zhengju de Lilun yu Shijina) (Beijing: Zhongguo renmin gongan daxue chubanshe, 1992), p. 42. (Evidence establishing the defendant’s guilt must bear a necessary relationship with alleged criminal facts in the case.) See Editorial Committee, *Judges Manual* (Faguan Shouce) Shanxi Renmin Chubanshe, 1995) (Judicial officials must determine whether evidence bear logical relationship to alleged facts in the case.) p. 244.

<sup>135</sup> Quanguo Renmin Dahui Changwu Weiyuanhui “Guangyu Yancheng Guaimai, Banjia Funu, Ertong de Fanzui Fenzi de Jueding” de Baochong Guiding” (Adopted on September 4, 1991 at the 21<sup>th</sup> Meeting of the Seventh NPC Standing Committee). Article 2(3) provides: “Whoever kidnap others for the purpose of extorting money, shall be punished in accordance with item 1.” Item 1 to Article 2 provides: “Whoever (kidnap) for the purpose of selling ... shall be sentenced to fixed term imprisonment of not less than 10 years to life imprisonment, and also fine of not more than \$10,000 or confiscation of property; if circumstances are particular serious shall be sentenced to death and confiscation of property.”

<sup>136</sup> Article 239 of the PRC Criminal Law provides: “Whoever kidnaps another person for the purpose of extorting money or property or kidnaps another person as a hostage shall be sentenced to fixed – term imprisonment of not less than 10 years or life imprisonment and also to a fine or confiscation of property; if he causes death to the kidnapped person or kills the kidnapped person, he shall be sentenced to death and also to confiscation of property.”

Criminal Law (1979). The only kidnapping related provision is that of Article 141: “Whoever *abducted people for sale* should be sentenced to fixed term imprisonment of not more than five years; if the circumstances were serious, should be sentenced to fixed term imprisonment of more than five years.” (*Emphasis supplied.*) This provision is to be read in conjunction with and supplemental to the “Decision Regarding Severe Punishment of Criminals Abduct to Traffic and Kidnapping of Female and Young Children” which was the first kidnapping charge to appear. The “Decision” was an incidental provision appended to a larger broader punitive scheme, i.e. deterring the abduction of people for sale. Until then, China was pre-occupied with the abduction of female and kids for sales, not kidnapping for reamsom in general.<sup>137</sup> Later, in the 1980s and 1990s, the pre-occupation was with kidnapping as hostage to resolve commercial disputes, again not kidnapping for ransom.<sup>138</sup> Kidnapping for ransom is a very recent phenomenon.

*Charge of Smuggling.* With regard to the smuggling of weapons and ammunitions, Cheung was not charged under the new Article 151 of the PRC Criminal Law (1997) that provides in pertinent part:

“Whoever *smuggles weapons, ammunition, nuclear materials* or counterfeit currency shall be sentenced to fixed-term imprisonment of not less than seven years and shall also be fined or sentenced to confiscation of property; if circumstances are minor, he shall be sentenced to fixed term imprisonment of not less than three years but not more than seven years and shall also be fined.... Whoever commits the crime as mentioned in the first and second paragraph, if the circumstances are specially serious, shall be sentenced to life imprisonment or death and also the confiscation of property.” (*Emphasis supplied.*)

This is because Cheung committed the smuggling of weapons, ammunitions *and explosive* offense on May 12, 1996 and before the new PRC Criminal Law (1997)

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<sup>137</sup> Cui Nam-san (Editor in Chief), *Xingshi Fanzui Anli Congshu: Guaimai Renkou Zui* (Series on Criminal Cases: Regarding Abduction for Sales Crime) (Beijing: Zhongguo jiangcha chubanshe, 1991), p. 12 (Between 1980 and first half of 1983 abduction for sales of people was a major concern, e.g. abduction grew 500% between 1992 and 1984.)

<sup>138</sup> See Legal Policy Research of the Supreme People’s Procuracy, *Practical Interpretation to Amended Criminal Law Provisions* (Xiuding Xingfa Tiaowen Shiyong Jiesuo) (Beijing: Zhongguo Jiancha Chubanshe, 1997), p. 317 (Interpretative note to Article 239).

(Article 151) came into effect. Cheung was properly charged under Article 1 of “Supplemental Regulations Regarding Severe Punishment of Smuggling Offenses” instead. The said “Supplemental Regulations” was the relevant and appropriate legal provision governing the smuggling of weapons and ammunitions then in effect. The “Supplemental Regulations” was made applicable in accordance with Article 12 of PRC Criminal Law (1997) that gives the PRC Criminal Law only prospective, not retroactive, effect. However, since the “Supplemental Regulations” did not provide for the punishment of *smuggling of explosives*, Cheung was not so charged.

The more interesting legal question is how is the smuggling of explosives made punishable under the old and new PRC Criminal Law? Particularly, whether and in what way should Cheung be punished for the smuggling of explosives?

Examining the old law, Article 116 of the PRC Criminal Law (1979) provided for the punishment of smuggling generally. Smuggling of explosives was punished like any other smuggling and not otherwise specifically provided for, i.e. all smuggling is punished with a fixed term of three years, public surveillance and also confiscation of property, without any distinction. The other related provision, Article 112 provided punishment for illegal manufacturing, trading and transportation of arms and ammunition, again does not provide punishment for smuggling of explosives. Article 1 of “Supplemental Regulations Regarding Severe Punishment of Smuggling Offenses” outlawed the smuggling of weapon and ammunition, but gain not explosives.

The only applicable provision against explosives was found in Article 1(4) to "NPC Standing Committee Decision Regarding the Severe Punishing of Criminals Seriously Endangering Public Security" which provided for death penalty for the manufacturing, trading, transportation, and stealing of arms, ammunition, and explosives.

Turning to the new law, as observed, Article 151 PRC Criminal Law (1997) does not provide for the punishment for smuggling of explosives, though ironically smuggling of nuclear materials is outlawed. Smuggling of explosives is made punishable under Article 125 as trading, mailing, transporting and storing of explosives; i.e. all conduct likely to be implicated in smuggling. This is in fact what Cheung was found guilty of and sentenced to death for, but *not actually charged with*. There is an official interpretation that “ammunition” under Article 151 actually includes some kinds of explosives:

“ ‘Ammunition’ refers to all kinds of weaponry related bullets and explosives.” However, this still does not include outlawing legal explosives, e.g. commercial explosives.<sup>139</sup>

Ultimately, the question needs to be resolved, why the “smuggling” of explosives is not provided for in the PRC Criminal Law (1997)?

Article 125 of the PRC Criminal Law provides in pertinent part: “Whoever illegally manufactures, trades in, transports, mails or stores any guns, ammunition or explosives shall be sentenced to fixed – term imprisonment of not less than three years but not more than 10 years; if the circumstances are serious, he shall be sentenced to fixed –term imprisonment of not less than 10 years, life imprisonment or death.” In regard to the “ammunition and explosives” charge, Article 125 revised Article 112 of the original PRC Criminal Law (1979) in the following respects. First, Article 125 penalized the “illegally ... mails or stores ... explosives” while Article 112 did not deal with explosives at all. Second, Article 125 enhanced the penalty by providing for a minimum of not less than three years and not more than ten years for a regular offense and ten years to life or death penalty for serious offense. Article 112 only provided for a maximum of seven years for a regular offense with no minimum and seven years to life for a serious offense.

The facts of the case show that during 1995-1996 Cheung paid Yip Kai-fun to purchase arms, ammunition and explosives in China. Yip purchased two AK47, one automatic assault rifle, five guns, 9 packages of explosives, four bulletproof vests and an assortment of ammunitions. (Bill of Prosecutions, p. 11). In the Bill of Prosecution, the procuratorate office alleged that Cheung had smuggled “arms and ammunition” (p. 20, Line 1) but he was nevertheless charged with violating Article 1 of “Supplemental Regulations Regarding Severe Punishment of Smuggling Offenses” for smuggling of “weapons and ammunition.” (p. 20, Line 4). According to official interpretation, “weapons” refer to heavy, not small arms.<sup>140</sup>

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<sup>139</sup> See Legal Policy Research of the Supreme People’s Procuracy, *Practical Interpretation to Amended Criminal Law Provisions* (Xiuding Xingfa Tiaowen Shiyong Jiesuo) (Beijing: Zhongguo Jiancha Chubanshe, 1997), p. 198 (Interpretative note to Article 151), p. 182.

<sup>140</sup> See Legal Policy Research of the Supreme People’s Procuracy, *Practical Interpretation to Amended Criminal Law Provisions* (Xiuding Xingfa Tiaowen Shiyong Jiesuo) (Beijing: Zhongguo Jiancha Chubanshe, 1997), p. 181. (Interpretative note to Article 151. “Weapon” means various kinds of guns and cannons with great destructive powers.)

Two legal issues are raised here: (1) Since AK47 and assault automatic rifles are considered to be quite lethal, i.e. not small arms, why did the Bill of Prosecution only charged Cheung with concluded only (less lethal small) “arms” offense? (2) If in fact the Bill of Prosecution alleged that Cheung only smuggled in arms, why was he charged under Article 1 of “Supplemental Regulations Regarding Severe Punishment of Smuggling Offenses” for smuggling of “weapons and ammunition”?

The questions raised here is not only one of hair splitting on words. It poses larger issue of fidelity to law, i.e. due process of law in terms of notice and proof. In this case, given the factual context (smuggling of AK47), the legal difference may be small or even not discernible to law enforcement officials who intent on trying to put a dangerous criminal behind bar. However, a sound system of “rule of law” (instead of rule by law) requires that the law be applied with exactitude and consistency. The admonition that “tough case made bad law” still rings true.

#### *(4) The issue with appropriateness of punishment*

Before the revision, "NPC Standing Committee Decision Regarding the Severe Punishing of Criminals Seriously Endangering Public Security"<sup>141</sup> imposed death penalty for the manufacturing, trading, transportation, and stealing of arms, ammunition, and explosives:"1. With respect to the following kinds of criminals seriously endangering public security, it is possible to add more sentences to the highest sentence to those provided in the criminal law, including capital punishment.... Four, illegal manufacturing, trading, transportation or stealing of arms, ammunition, and explosives, where circumstances are particularly serious, or where consequences are serious..." Since "NPC Standing Committee Decision Regarding the Severe Punishing of Criminals Seriously Endangering Public Security" Article 1(4) provides for the enhancement of punishment, up to and including death, for stealing of explosives and Article 112 does not provide for the crime of stealing explosives, how should criminals who have stolen explosive under non-serious circumstances and without serious consequences be dealt

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<sup>141</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guangyu Yancheng Yanzhong Weihai Shehui Zhian de Ganzui Fenzi de Jueding) (approved on September 2, 1983.

with?<sup>142</sup> Then Supreme People's Court was of the opinion that in effect Article 112 should be construed as if it had incorporated the provision under "NPC Standing Committee Decision Regarding the Severe Punishing of Criminals Seriously Endangering Public Security" Article 1(4).<sup>143</sup>

(5) *The issue with legal interpretation: the meaning of special serious circumstances*

Cheung was charged with smuggling of weapons and ammunition under especially serious circumstances. What constituted serious circumstances are not clearly defined in the general PRC Criminal Procedure Law or more specific "Supplemental Regulations Regarding Severe Punishment of Smuggling Offenses" upon which Cheung's charge is based.

Official Chinese legal authorities have interpreted "minor circumstances" with respect to Article 151 as small quantity, relatively less dangerous and not causing serious consequences. By natural implication and logical extension, degree of "serious circumstances" can be ascertained by looking at the number of weapons, the lethality of the weapons and any intended use made of the weapon.<sup>144</sup>

More generally, "qingjie yanzhong" ("serious circumstances") allows for aggravated punishment to the primary offense. Article 125 of the PRC Criminal Law allows for "imprisonment of not less than 10 years, life imprisonment or death" for "serious circumstances" in illegal trading of explosives. Article 112 also provided for such aggravating circumstances. Judging from practical experience, "serious circumstances" when applied to Article 112 included: (1) being a principal or soliciting criminals to criminal gangs, reformed labor escapees, and re-offending criminals; (2) illegally manufacturing, trading, and stealing of arms, ammunition, and explosives in

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<sup>142</sup> For a judicial interpretation, see the Supreme People's Court "Responding to Certain Questions (3) Regarding Applicable Law in People's Courts Adjudication of Serious Criminal Cases" (Zuigao Renmin Fayuan "Guanyu Renmin Fayuan Shenpan Yanzhong Xingshi Fanzui Zhong Juti Yingyong Falu de Ruyan Wenti de Tafu) (issued on August 21, 1985) (Question no. 29 raised by Sichuan, Liaoning:

<sup>143</sup> Ju Yong-chun (Editor in Chief), *Xingshi Fanzui Anli Congshu: Youguan Qiangzhi, Tanyao, Baozhawu de Fanzui* (Series on Criminal Cases: Regarding crimes of arms, ammunition, explosives) (Beijing: Zhongguo jiangcha chubanshe, 1992), p. 1-2.

<sup>144</sup> See Legal Policy Research of the Supreme People's Procuracy, *Practical Interpretation to Amended Criminal Law Provisions* (Xiuding Xingfa Tiaowen Shiyong Jiesuo) (Beijing: Zhongguo Jiancha Chubanshe, 1997), p. 193. (Interpretative note to Article 151).

large volume; (3) robbing arms, ammunition from armories, explosives storage, vital departments, and armed guards; (4) illegally trading, stealing and robbing arms, ammunition and explosives for the purpose of committing robbery, murder or serious crimes; and (5) the manner of the crime was particularly heinous. <sup>145</sup>"Especially serious circumstances" when applied to Article 112 included: (1) illegally manufacturing, trading, and stealing of arms, ammunition, and explosives for the purpose of hijacking planes, boats, cars, causing harm to transportation facilities and robbing banks, gold depositories, armed smuggling of drugs thereby causing serious consequences; (2) the use of violence and coercion to obtain arms, ammunition and explosives or kidnapping, harming or killing of arm guards or arms possessors, thereby causing serious injuries or death; (3) stealing and robbing of arms to be used as criminals from place to place or resisting arrest, thereby causing grave consequences.

## 5. The defense of the case<sup>146</sup>

*Right to defense under PRC Criminal Procedure Law.* The defendants in China are entitled to rights of defense by law. In order to defend himself effectively, the accuse has a right to be represented by a lawyer (Article 32(1) of the PRC Criminal Procedure Law), to consult and extract information from the case file (Article 36), to testify (Article 155), to present statements in court (Article 155), to gather evidence (Article 37), to summon witness (Article 37), to confront witness (Article 46), to request new witness, evidence or expert evaluation (Article 159) and finally to have his guilt adjudicated by a court (Article 12).

Specifically, Article 35 of the PRC Criminal Procedure Law provides:

The responsibility of a defender shall be to present, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant, the pettiness of his crime and the need for a

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<sup>145</sup> Ju Yong-chun (Editor in Chief), *Xingshi Fanzui Anli Congshu: Youguan Qiangzhi, Tanyao, Baozhawu de Fanzui* (Series on Criminal Cases: Regarding crimes of arms, ammunition, explosives) (Beijing: Zhongguo jiangcha chubanshe, 1992), p. 25.

<sup>146</sup> See "Defense in Criminal litigation" (Xingshi xusong zhong de bianhu) in Editorial Committee, *Judges Manual* (Faguan Shouce) Shanxi Renmin Chubanshe, 1995) (The accused and his defender is allowed to present material and viewpoint to show that the accuse is not guilty or deserve to be punished less. Particularly, he has a right to: [1] participate in court investigation and hearing, including confronting witness, [2] participate in court argument; [3] appeal the case) p. 243.

mitigated punishment or exemption from criminal responsibility, thus safeguarding the lawful rights and interests of the criminal suspect or the defendant.

*Cheung's defense on the record.* “Defendant Cheung Tse-keung confessed to the crime of kidnapping with no reservation, but in his defense he said he did not know about the origin of the explosives, denied that he paid for the purchase of the explosives, and raised the issue of alternate jurisdiction.<sup>147</sup> His defense agent is of the opinion that Cheung Tse-keung should not be responsible for the illegal trading and transportation of explosives in the mainland; also the charge of smuggling of weapons and ammunition was not appropriate; the evidences in support of the two kidnapping charges were not sufficient...”

#### Discussion: The legal basis and defense strategy of Cheung's defenses.

##### (1) *Confession*

First, by being forthcoming with his criminality in confessing to kidnapping without reservation, Cheung hoped to be afforded leniency for showing remorse and repentance. The long-standing PRC criminal justice principle being: “leniency to those who confess their crimes and severity to those who refuse to” (“tan bai cong huan, kang ju cong yan”).<sup>148</sup>

In order for the principle of “tan bai cong huan, kang ju cong yan,” to apply, Cheung must be considered by the public security to have shown sufficient contrition. This in turn raised two questions; one factual the other judgmental. First, what was Cheung's true

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<sup>147</sup> The defense challenged the Guangzhou Intermediary People's Court's jurisdiction under Article 6 of the PRC Criminal Law: “This Law shall be applicable to anyone who commits a crime within the territory ...of the People's Republic of China, except as otherwise specially provided by law...If a criminal act or its consequence takes place within the territory .... of the People's Republic of China, the crime shall be deemed to have been committed within the territory .... of the People's Republic of China.” The defense argued that the Article 18 of the Basic Law precluded PRC Criminal Law from being applied to HKSAR, i.e. reaching Cheung's criminal acts in Hong Kong.

<sup>148</sup> Jerome Alan Cohen, *The Criminal Process in the PRC 1949-1968* (Harvard University press, 1968), p. 30. For a practical application of such a principle, see Bao Ruo-Wang & Rudolph Chelminski, *Prisoner of Mao* (N.Y.: Coward, McCann & Geoghegan, 1973) p. 33. In every police *yushen* interrogation room, the sign “tan bai cong huan, kang ju cong yan” is prominent displayed. See Margaret Ng, “Endangered by lack of action on suspect law” *SCMP*, November 20, 1998. (Xinhua photo interrogation room.).

motivation in confessing to the police? Did he confess to the police out of (external) fear or did he confess to the police out of (internal) remorse? Second, did Cheung demonstrate sufficient remorsefulness by confessing to some (kidnapping) and not all offenses (trading in explosives within China)?

This “tan bai cong huan, kang ju cong yan” principle poses a dilemma for any criminal caught in a PRC criminal justice system. If “tan bai” is used by the police as a measuring rod to measure any outward manifestation of repentance, any real or perceived lack of “tan bai” reflects a lack of sincerity in owing up to one’s criminal and moral responsibilities. This necessarily inhibits, if not totally precludes, the criminal from asserting any defense he might be legally entitled to. Any aggressive assertion of such a defense, even legitimate, might be conceived of as an obstruction to the search for truth and justice. Worse yet, the criminal might be compelled to tell the police what they want to hear, even if untrue, in trying to earn credit for being “tan bai”

The ultimate issue seems to be, as a matter of criminal law and justice policy, whether the application and availability of “tan bai cong huan, kang ju cong yan” as a mitigating principle is based on confession to criminal act per se, i.e. the more confession the less punishment, or whether confession and surrendering is used as a manifestation and evidence of a change of heart deserving of special consideration, thus only total, complete and voluntary cooperation with the police demonstrates a change of heart.<sup>149</sup> The Supreme People’s Court in conjunction with the Supreme People’s Procuracy and the Ministry of Public Security has issued an opinion on how to apply the principle”:

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<sup>149</sup> *Prisoner of Mao* p. 73. In the PRC context, the attitude of the offender is closely observed and meticulously recorded. Zhen Yuegan and Guan Shuguang *Gongan Neiqin Gongzuo Shouce* (Public Security Internal Working Manual) (Jinguan Jiaoyu Chubanshe, 1994), pp. 218 (During the preliminary examination, the officer should pay attention and record the offender’s confession attitude (*yingzui biaoxian*). Attitude of an offender has always made a difference on how aggrieved victim or harmed society reacts to a transgression. A regretful and apologetic offender is viewed differently than a non-remorseful and resentful one. The former is a repentant offender, ready to be re-integrated. A repentant offender pacifies the victim (fulfilling retribution needs) and assures the society (serving deterrence functions). The latter is a defiant offender, ready to strike again. A defiant offender aggravates the victim (exciting revenge) and challenges the society (calling for defensive measures). Erving Goffman’s extensive study of the interaction in public place suggested that when expectations and norms were broken in the public place the rule breaker and victim was forced to confront each other in a series of negotiation over how to fix the problem for the purpose of reestablishing social control, a process Goffman called “remedial

“Tan bai cong huan” refers to the situation whereby after the relevant judicial organs are suspicious and decide to question, summon, or otherwise adopt coercive measures with respect to the criminal element, the criminal element voluntarily confesses to his crime.

If the criminal is actually able to voluntarily confess, depending on the degree of honest confession and in accordance with Article 57 (of PRC Criminal Law),<sup>150</sup> he should be treated lightly.<sup>151</sup>

The principle is now codified in Article 67 of the PRC Criminal Law that provides in pertinent part:

Voluntary surrender refers to the act of voluntarily delivering oneself up to justice and truthfully confessing one’s crime after one has been committed the crime. Any criminal who voluntarily surrenders may be given a lighter or mitigated punishment. The ones whose crimes are relatively minor may be exempted. If a criminal suspect or a defendant under compulsory measures or a criminal serving a sentence truthfully confesses his other crimes that the judicial organ does not know, his act shall be regarded as voluntary surrender.

In light of Article 67, there was a factual-legal issue whether Cheung qualified for such an affirmative defense. While Cheung confessed to the police, he did not surrender voluntarily. While Cheung did confess to kidnapping, the crime might have already been known to the police all-long.<sup>152</sup> There was also a legal issue of whether Cheung would still be treated with leniency under the broad principle of “tan bai cong huan, kang ju cong yan,” notwithstanding the fact that he did not qualify under Article 67.

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exchanges.” See Erwin Goffman, *Relations in Public* (N.Y.: Harpers, 1971). There are two parts to remedial exchanges for a public wrong: accounting and apology by the offender, pp. 108-118.

<sup>150</sup> Article 57 of the Criminal Law (1979) provides: “In determining punishment for the criminal, (the court) should consider the nature and circumstances of the crime and the degree of harm to the society in accordance with this law.”

<sup>151</sup> Zui Gao Renmin Fayuan, Zui Gao Renmin Jianchayuan, Gongan Bao, “Guanyu danqian chuli zishou he youguan wenti juti yingyong falu jieshi” (April 16, 1984) (Interpretation to related issues regarding current treatment of surrendering” (Question 5: How to apply “leniency to those who confess”?) See Editorial Committee, *Compendium of PRC Public Security Law* (Jinlin: Jilin Renmin Chubanshe, 1995), p. 71.

<sup>152</sup> Zui Gao Renmin Fayuan, Zui Gao Renmin Jianchayuan, Gongan Bao, “Guanyu danqian chuli zishou he youguan wenti juti yingyong falu jieshi” (April 16, 1984) (Interpretation to related issues regarding current treatment of surrendering” (Question 1: What is surrendering? It must be voluntary. He must confess to all his crime. He must inform upon the co-defendants.) See Editorial Committee, *Compendium of PRC Public Security Law* (Jinlin: Jilin Renmin Chubanshe, 1995), p. 71.

The more interesting question in this case, is whether Cheung could claim leniency by virtue of Article 67, i.e. having confessed to crime not known to the police (assuming that to be so), for crimes without the criminal “jurisdiction “ of the PRC but nevertheless happened within the “territory” of China, i.e. crime happened in Hong Kong. The answer to the question should turn on whether as a matter of statutory interpretation or justice policy, leniency provided under Article 67 or afforded by “tan bai cong huan, kang ju cong yan” is based on cooperative acts of confession or reformation of character. If it is the later, it matters not whether the confession to crime happens within PRC criminal jurisdiction, if it can be shown that the confession is sufficient to demonstrate true remorse of a reformed person. If it is the former, an intriguing legal question is now raised, i.e. whether the confession of a criminal act, otherwise sufficing for the reduction of punishment under Article 67, is nevertheless denied because it is not the kind of criminal act contemplated under Article 67, i.e. not actionable crime within PRC criminal jurisdiction.<sup>153</sup> Simply put, Article 67 asks for the confession of a “prosecutable” criminal act, not one that is without the criminal jurisdiction of the police.

Thus far, the prescription under the “one country two systems” formula is that the PRC Criminal Law cannot reach criminal conduct in Hong Kong. There is however a broader question of under what circumstances, if at all, criminal conduct as material facts and circumstances to a criminal case can ever be used in a PRC court.<sup>154</sup> For example, can facts and circumstances in Hong Kong be used to support a prosecution in PRC courts, either “directly” as material elements of crime, e.g. double-marriages, or “indirectly” as circumstantial evidence to support a prosecution in China? In the present context, whether the Basic Law precludes the positive or benevolent use of legal act in HKSAR to offset criminal punishment in the PRC, or negative or punitive use of

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<sup>153</sup> This is separate from the evidentiary question of whether the act of confessing, especially to a non-actionable crime, is probative of voluntariness and thus reform mindedness. There is some indication that only certain acts qualified under Article 67, for example, a new crime not known to the police, suffice under Article 67.

<sup>154</sup> In their haste to assert HKSAR’s judicial autonomy, the defenders of Hong Kong’s legal and criminal justice system failed to address this most critical issue and insisted that all criminal activities in Hong Kong are within the exclusive jurisdiction of the Hong Kong courts. Likewise, in the rush to demonstrate the reliability of the “one country two systems” framework, the PRC judicial authority has been quick to give off the impression that nothing that happened in Hong Kong is ever of interest to the PRC. Both sides neglect that crime as a social activity has little respect for state boundary, either in its causation and/or effect.

criminal act, e.g. criminal record in Hong Kong as basis of determining habitual criminality in China.<sup>155</sup>

(2) *Deny paying for the explosives*

By denying paying for the explosives, Cheung tried to distant himself from the "trading of explosives" charge. If it was proven that Cheung paid for the explosives, this made him ipso facto an accomplice if not even a principal offender. This gave PRC courts the jurisdiction over the case and allowed the court to impose capital punishment was one of the most serious offenses. In effect Cheung was denying that he played a leadership role or otherwise was an accomplice to the crime of "trading of explosives" in order to avoid being found guilty and punished in China.

(3) *Lack of personal knowledge or intent*

Cheung insisted that he "did not know about the origin of the explosives" because his co-defendants carried out the purchase, transportation and smuggling of the explosives from China. In so doing, Cheung refused to accept criminal responsibility for the crime of "trading in explosives" which happened in China. His defense was based on law, i.e. he lacked *mens rea* that being he lacked knowledge for the crime of "trading of explosives" in China. Article 14 of the PRC Criminal Law provides that:

An intentional crime refers to an act committed by a person who clearly knows that his act will entail harmful consequences to society but who wishes or allows such consequences to occur, thus constituting a crime. Criminal responsibility shall be borne for intentional crimes.

The strategy of the defense was to deny "knowingly" purchasing explosives in China, which was the most serious charge he faced. In so doing, Cheung was hoping to distance

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<sup>155</sup> The issue turns on how to construe "autonomy" and "interference." Does "autonomy" preclude benevolent assistant? Is benevolent assistant, interference? This recalls debate about punishment debate in the United States, namely, is paternalistic rehabilitation of prisoners a kind of punishment. Ultimate from whose perspective are we to understand the term "interference"? See discussion to "Introduction" to Part III "The Socialized Juvenile Court" in Frederic L. Faust and Paul J. Brantingham, *Juvenile Justice Philosophy*, 2<sup>nd</sup> ed. (St. Paul: West Publishing Co., 1979) pp. 139-146. (Socialization of juvenile court deprived the juveniles their constitutional rights).

himself from other mainland criminals and defeat the jurisdiction of the PRC Criminal Law.

(4) *Insufficiency of evidence*

Cheung's lawyer challenged the sufficiency of evidence to support the kidnapping charge because the victims did not testify in the case.<sup>156</sup> The problem encountered by Cheung's defense was that the legal standard of proof or "proof requirement" was not clearly articulated in PRC Criminal Law and PRC Criminal Procedure Law.

The standard of proof<sup>157</sup> describes the quality (credibility) and quantity (sufficiency) of evidence required to persuade the trier of fact to convict in a criminal case. In the PRC this issue is called "zhengming yaoqiu" (proof requirement) and is not settled. For the determination of guilt or innocence, Article 162 of the PRC Criminal Procedure Law provides that in order to find a defendant guilty, a PRC court must find that "the facts of a case are clear, the evidence is reliable and adequate" (*anjian shishi qingchu, keshi, chongfen*). Whereas "keshi" (reliable) deals with the quality of evidence, "chongfen" deals with the quantity of evidence needed to convict. (Article 162) However, how much evidence is deemed adequate, i.e. the degree of standard of proof, is not clearly stated. In layman's term, how convinced or persuaded must the judicial official sitting in judgement be before a conviction is warranted? absolute certainty? various degrees of probability?

According to one leading PRC author, "keshi" and "chongfen" evidence means: (1) evidence verified to be objectively true; (2) there is logical relationship between evidence and facts of the case; (3) there is no contradictions between evidence vs. evidence and evidence vs. case circumstances; (4) the facts and circumstances of the case that are supported by evidence lead to conclusion in the case; (4) the evidence viewed as an integrated and comprehensive whole is not assailable; (5) the facts and evidence in the

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<sup>156</sup> Personal conversation with Ivan Tang, October 27, 1998, Radio Television Hong Kong.

<sup>157</sup> "The burden of proof required in a particular type of case, as in a criminal case where the prosecution has the standard (i.e. burden) of proof beyond a reasonable double..." Henry Campbell Black, *Black's Law Dictionary* (St. Paul, Minn.: West Publishing Co., 1983) p. 30R.

case point to inevitable conclusion or there is no other plausible explanation given the facts and evidence on hand.<sup>158</sup>

More generally, the “proof requirement” is interspersed within various PRC Criminal Procedure Law. For example:

- (a) Article 61 of the PRC Criminal Procedure Law provides for investigative detention: “Public security organs may initially detain an active criminal or a major suspect under any of the following conditions: (1) if he is preparing to commit a crime, is the process of committing a crime or is discovered immediately after committing a crime; (2) if he is identified as having committed a crime by a victim or an eyewitness; (3) if criminal evidence is found on his body or at his residence ... (7) if he is strongly suspected of committing crimes from place to place.” (See also Article 63 for grounds allowing for immediate seizure of criminals by citizens.)
- (b) Article 68 of the Criminal Procedure Law provides for arrest pending trial: “After a People’s Procuratorate has examined a case with respect to which a public security organ has submitted a request for approval of arrest, it shall decide according to the circumstances of the case either to approve the arrest or disapprove of the arrest.”
- (c) Article 86 of the Criminal Procedure Law provides that for the opening of a criminal case file by the public security: “If it believes that there are facts of a crime and criminal responsibility should be investigated...”
- (d) Article 90 of the PRC Criminal Procedure Law provides for the starting of a preliminary inquiry into a case: “After investigation, the public security organ shall start preliminary inquiry into a case for which there is evidence that supports the facts of the crime, in order to verify the evidence which has been collected and obtained.”
- (e) Article 129 of the PRC Criminal Procedure Law provides for a recommendation for public prosecution: “After a public security organ has concluded its investigation of a case, the facts should be clear and the evidence reliable and sufficient and, in addition, it shall make a written recommendation for prosecution.”
- (f) Article 137 of the PRC Procedure Law provides for a Procuratorate to examine a case for a prosecution: “In examining a case, a People’s Procuratorate shall ascertain: (1)

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<sup>158</sup> Cui Min and Zhang Wen-qing, *The Theory and Practice of Criminal Evidence* (Xingshi Zhengju de Lilun yu Shijina) (Beijing: Zhongguo renmin gongan daxue chubanshe, 1992), p. 90.

whether the facts and circumstances of the crime are clear; whether the evidence is reliable and sufficient...”

- (g) Article 141 of the PRC Criminal Procedure Law provides for a public prosecution: “After a People’s Procuratorate considers that the facts of a criminal suspect’s crime has been ascertained, that the evidence is reliable and sufficient and that criminal responsibility should be investigated according to law, it shall make a decision to initiate a prosecution and shall, in accordance with the provisions for trial jurisdiction, initial a public prosecution in a People’s Court.”
- (h) Article 162 of the PRC Criminal Procedure Law provides for the determination of guilty: : “If the facts of a case are clear, the evidence is reliable and sufficient ... he shall be pronounced guilty accordingly.” (*anjian shishi qingchu, keshi, chongfen*).
- (i) Article 46 of the PRC Criminal Law provides for evidentiary proof: “In the decision of all cases, stress shall be laid on evidence....the defendant may be found guilty and sentenced to a criminal punishment if evidence is sufficient and reliable, even without his statement.”
- (j) Article 61 of the Criminal Law provides for sentencing: “When sentencing a criminal, a punishment shall be meted out on the basis of facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provision of the Law.”
- (k) Article 204 of the Criminal Procedure Law provides for the retry of a case on petition: “If a petition presented by a party or his legal representative or his near relative conforms to any of the following on conditions ... (2) The evidence upon which the condemnation was made and the punishment meted out is unreliable and insufficient...”

A comprehensive review and in-depth analysis of evidentiary requirements of the evidentiary requirement in the PRC criminal process above reveals that: (1) facts and circumstances are critical in every stage of the criminal justice process, with law and legal requirements playing a less important role, e.g. there is a lack of identification and particularization of the quantity or quality of proof required for certain legal discretion to be. For example, Article 69 provides for the People’s Procuratorate to approve of an

arrest by the public security, the procuratorate “shall decide according to circumstances of the case.” However, what are those circumstances justifying an arrest is not detailed in the said provision; (2) the “proof requirement” has a large range – from near certainty (e.g. caught red-handed) or “strongly suspected” (Article 61) to some “believe” (Article 86) to some “evidence” (Article 90) to “reliable and sufficient” evidence (Article 137, Article 147, Article 162, Article 204) – depending on the kind of process involved, e.g. for investigative detention it is “strongly suspected” and in cases of conviction it is “reliable and sufficient” evidence;<sup>159</sup>(3) the PRC legal framework governing the exercise of police, prosecution and court discretion allows for subjective, case by case, *ad hoc* decision making with few effective legislative regulation or administrative oversight. For example, Article 61(5) of the PRC Criminal Procedure Law allows the police to detain an “active criminal” or “major suspect” “If there is likelihood of his destroying or falsifying evidence or tallying confessions:” How convinced the public security officials have to be (proof requirement) or how likely must the risk of destroying evidence needs to be (legal requirement) before the police can act is an open question for the police to decide.<sup>160</sup>

The “proof requirement” in the PRC Civil Procedure Law and process is equally unclear. The over approach is the objective facts speak for truth. Evidence must be: (1) objectively true (*keguan*); (2) related to facts of the case (*lianxi*); (3) no contradiction between evidence vs. evidence and evidence vs. facts of the case; (*paxue moudun*) (4) no other plausible explanation or explanation (*paxue qita jieshi*)<sup>161</sup>.

## **(6) The disposition of the case: The verdict**

The process

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<sup>159</sup> Cui Min and Zhang Wen-qing, *The Theory and Practice of Criminal Evidence* (Xingshi Zhengju de Lilun yu Shijina) (Beijing: Zhongguo renmin gongan daxue chubanshe, 1992), p. 86 (Evidentiary requirement is made depending on stages of criminal justice process as reflecting the incremental accumulation of evidence and correspondently increase certainty of guilty.);

<sup>160</sup> Cui Min and Zhang Wen-qing, *The Theory and Practice of Criminal Evidence* (Xingshi Zhengju de Lilun yu Shijina) (Beijing: Zhongguo renmin gongan daxue chubanshe, 1992), p. 85 (There degree of “proof requirement” is elastic and depending on kinds of case and circumstances.)

<sup>161</sup> See PRC Criminal Procedure Law, Chapter 6, esp. Article 55. See also Wang Fa-rong et. Al., *Chinese Civil Litigation Study* (Zhongguo Minshi Shenpan Xue) (Beijing: Falu Chubanshe, 1991), Chapter 15 “Burden of proof in People’s Courts” (Renmin Fayuan de zhengming zeren), pp. 182ff.

Article 162 of the Criminal Procedure Law provides: “After a defendant makes his final statement, the presiding judge shall ... render one of the following judgments: (a) If the facts of a case are clear, the evidence is reliable, and the defendant is found guilty in accordance with law, he shall be pronounced guilty accordingly...” Article 163 of PRC Criminal procedure Law further provides that: “In all cases, judgments shall be pronounced publicly.”

The responsibility of the People’s Court of first instance in the first hearing include determining: (1) whether it has jurisdiction to hear the case; (2) whether the facts and circumstances of the case are clearly established – crime date, place, means, motive, purpose, harm and consequence; (3) whether facts and circumstances are supported by are sufficient and adequately evidence; (4) whether the nature of crime committed corresponded to the charge; (5) whether there are any criminal conduct or responsibility not properly listed in the Bill of Prosecution; (6) whether there is any civil proceeding to be attached; (6) whether are any instances whereby the defendant should not be held criminally responsible; (7) whether the legal proceeding or documentation in the Bill of Prosecution is complete.<sup>162</sup> “The above (alleged) facts were proven by the statements of victims (*chenxu*), testimony of witnesses (*zheng yan*), the recovery of stolen money (*zhuan kuan*), stolen goods (*zhuanwu*) and instrumentality of crime as evidence, public security organ forensic examination reports, search and seizure property listed as evidence, all defendants confessions are in file.<sup>163</sup> The evidence is reliable and sufficient to support the case.<sup>164</sup>

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<sup>162</sup> See “Hearing on public prosecution case”\_Editorial Committee, *Judges Manual* (Faguan Shouce) Shanxi Renmin Chubanshe, 1995) p. 258-9.

<sup>163</sup> Article 42 of PRC Criminal Procedure Law provides: “All facts that prove the true circumstances of a case shall be evidence. There shall be the following seven categories of evidence: (1) material evidence and documentary evidence; (2) testimony of witnesses; (3) statements of victims; (4) statements and exculpation of criminal suspects or defendants; (5) expert conclusion; (6) records of inquests and examination; and (7) audio – visual materials...” Evidence to be admissible must be objective (*keguan*), i.e. corresponding to objective reality, relevant (*guanlian*), i.e. evidence bearing some relationship to the facts of the case, and legal (*hefa*), i.e. evidence must be obtained by legal process. Cui Min and Zhang Wen-qing, *The Theory and Practice of Criminal Evidence* (Xingshi Zhengju de Lilun yu Shijina) (Beijing: Zhongguo renmin gongan daxue chubanshe, 1992), pp. 36-41, 41-60. 60-67.

<sup>164</sup> In China, there is no specific burden of proof [(Latin. *Onus probandi*.) In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue ...” Henry Campbell Black, *Black’s Law Dictionary* (St. Paul, Minn.: West Publishing Co., 1983) p. 102R.]

The verdict

Guilty of illegal trading in explosives as a principal to joint crime

“It is the opinion of this court: defendant Cheung Tse-keung ... (and other defendants) ... illegally purchased explosives. Their conduct constituted illegal trading in explosives. The circumstances were serious. In terms of joint criminality, Cheung Tse-keung performed organization and planning functions ...(was one of the) ... principal criminals and should be punished for all the crimes (that he) organized, directed, and participated in....”

Guilty of smuggling of arms and ammunition a principal to joint crime

“Defendants Cheung Tse-keung ... (and other defendants). ...avoided custom control, transported and carried arms and ammunition across the border. Those acts constituted the smuggling of arms and ammunitions. The facts and circumstances of the case were particularly serious. Amongst the joint criminals, Cheung Tse-keung ... (and one other) ... assumed organization and command functions. All the principal criminals should be punished for all crimes associated with the joint crime.”

Proof of illegal trading and transportation of explosives

“Regarding the crimes of illegal trading and transportation of explosives, after investigating defendant Cheung Tse-keung’s ... (and other defendants) ... defense and their defense lawyers’ viewpoints: it is found that Cheung Tse-keung financed the illegal purchase of explosives in the mainland. There were testimonies from Qian Hanshou regarding his conspiracy with Cheung, and Lau Ding-fun, who, after having received \$150,000 from Cheung by way of Lau, went to purchase explosives in the mainland illegally and transported them back to Hong Kong. Lau Ding-fun also testified that he was instructed by Cheung to pay Qian Hanshou HK\$150,000 to purchase explosives. During the court hearing Cheung did not deny directing Qian Hanshou to purchase

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provision in the PRC Criminal Procedure Law. Article 43 of the PRC Criminal Procedure Law provides: “Judges, procurators and investigator must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the criminal suspect’s or defendant’s guilt or innocence and the gravity of his crime...” This is identical to Article 32 of the PRC Criminal Procedure Law (1979).

explosives and received the shipment of explosives afterward. Therefore, Cheung Tse-keung should be held fully responsible for organizing, planning, and directing the trading of explosives.”

#### Proof of kidnapping

“Regarding the crimes of kidnapping, after investigating defendant Cheung Tse-keung’s ... (and other defendants’) ... defense and their defense agents’ views: it is found that the two kidnaps were supported by oral testimonies from respective defendants<sup>165</sup> ... (and also) hand written testimonies, signed bank drafts and checks issued by the victims’ families for ransom, defendants’ signed identification of victims’ photographs, each other’s photographs and confessions, defendants’ signed identification of photographs of kidnapping conspiracy sites, kidnapping sites, hostage custody sites, obtaining ransom sites and photographs of some of the instrumentality of crime and confessions ... As a result, the above defendants’ and defense agents’ defenses are considered not substantiated and not accepted.

#### Proof of smuggling of arms and ammunition

“Regarding the crime of smuggling of arms and ammunition .... Defendants Cheung Tse-keung’s ... (and other defendants’) ... defense agents’ defenses have been investigated: it is concluded that Cheung Tse-keung ...(and others have) ... engaged in the smuggling of arms and ammunition ... the above defendants have confessed to knowingly smuggled arms and ammunition, portion of the arms and ammunition were uncovered as evidence... Respective defendants are guilty of intentionally smuggling arms and ammunition, their conduct cannot be subsumed under other crimes and should be punished independently. As a result, the defendants’ defenses are not substantiated and not accepted.”

#### Discussion: The burden of proof

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<sup>165</sup> Article 46 of the PRC Criminal Procedure Law provides that: “In the decision of all cases, stress shall be laid on evidence, investigation and study; credence shall not be readily given to oral statements. A defendant cannot be found guilty and sentenced to a criminal punishment if there is only his statement but no evidence...”

PRC criminal codes (PRC Criminal Law and PRC Criminal Procedure Law) does not provide for who bears the burden of proof with clarity and certitude. About all we are sure is that *both* the state and the accused have to work together to discover the truth in a case. Thus while Article 43 of the PRC Criminal Procedure Law provides: “Judges, procurators and investigator must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the criminal suspect’s or defendant’s guilt or innocence and the gravity of his crime...” This is identical to Article 32 of the PRC Criminal Procedure Law (1979). The proving process in PRC courts thus follows closely Article 20 of the Soviet Criminal Procedure Code. Specifically: (1) The prosecution has the burden of proof (*zhengming zheren*) to establish the facts pointing to guilt; more appropriately to establish the truth of the matter. (2) The public security, procuratorate and judicial officials have an affirmative duty to collect evidence both for and against the defendant’s innocence, i.e. uncovering the whole truth. (2) The defense has no burden of proof as to his innocence. (3) The defense has a right to assert and proof his innocence or entitlement to lesser punishment.<sup>166</sup>

Unlike in the west (e.g. U.K. and U.S.), The defense has a duty to cooperate with a criminal investigation, including the volunteering of information, production of evidence, answering of pertinent questions, and submitting to examination. In this regard, Article 48 of the PRC Criminal Procedure Law provides in pertinent part: “All those who have information about a case shall have the duty to testify...” The command to cooperate with investigation of a crime does not draw a distinction between criminal defendants or regular citizens. PRC judicial authorities consider it more important to seek the truth than protecting the rights of defendants. Article 6 of the PRC Criminal Procedure Law provides that: “In concluding criminal proceedings, the People’s Courts, the People’s Procuratorates and the public security ... base themselves on facts and take law as the criteria...” The PRC judicial authorities further believe that facts are paramount in reflecting the truth. Simply put, it is a basic principle in criminal

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<sup>166</sup> Cui Min and Zhang Wen-qing, *The Theory and Practice of Criminal Evidence* (Xingshi Zhengju de Lilun yu Shijina) (Beijing: Zhongguo renmin gongan daxue chubanshe, 1992), pp. 15, 95-6. See Harold J. Berman, *Justice in the U.S.S.R.* (N.Y.: Random House, 193), p. 366. (Soviet court process was paternalistic in nature and designed to protect the citizens. Pre-trial and trial procedure was designed to uncovering the whole history of the situation.)

investigation to ‘shishi quishi’ (“seek truth from facts”). Given this mentality, it is odd to allow anyone with information to crime, including the defendant, to withhold such information in obstructing the search for truth and justice. Article 45 of the Criminal Procedure Law thus provides in pertinent part: “The People’s Courts, the People’s Procuratorates and the public security organs shall have the authority to collect or obtain evidence from the units or individuals concerned. The units or individuals concerned shall provide truthful evidence....” Conversely, there is no right to remain silent for a criminal defendant, as in the U.S. U.S. Constitution, Amendment V: “No person ... shall be compelled in any criminal case to be a witness against himself.”<sup>167</sup> Article 93 of the PRC Criminal Procedure Law provides that in pertinent part: “The criminal suspect shall answer the investigators’ questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.” Nor, is there a right to refuse answering questions based on fear of self-incrimination. *Id.*p.34.

### The punishment

#### The legal process

Punishments are governed by Chapter III of the PRC Criminal Law. Article 32 provides that punishments are divided into two broad types, i.e. principal punishments and supplementary punishments. Article 33 provides that: “The principal punishment are as follows: (1) public surveillance; criminal detention; fixed – term imprisonment; life imprisonment; and (5) the death penalty. Article 34 provides that: “The supplementary punishments are as follows: (1) fine; (2) deprivation of political rights; and (3) confiscation of property. Supplementary punishments may be imposed independently.” How much punishment to be imposed is to be imposed is governed by Article 61: “When sentencing a criminal, a punishment shall be meted out on the basis of facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provision of the Law.”

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<sup>167</sup> See “Self-Incrimination” in John Kaplan, Jerome H. Skolnick, Malcolm M. Feeley, *Criminal Justice* (N.Y.: The Foundation Press, 1991), pp. 217-255. (The privilege against self-incrimination in American law dates from the Massachusetts Body of Liberties of 1641 and the Connecticut Code of 1650).

## The sentence

“Defendant Cheung Tse-keung is guilty of illegal trading of explosives and is sentenced to death; is guilty of kidnappings and is sentenced to imprisonment for life, deprivation of political rights for life and confiscation of RMB 662,000,000; is guilty of smuggling of arms and ammunition and is sentenced to imprisonment for life, deprivation of political rights for life and confiscation of RMB 100,000. It is the decision (of this court) to impose capital punishment, deprivation of political rights for life and confiscation of RMB 662,100,000.”

## The appeal

### The legal process

Article 180 of the PRC Criminal Procedure Law provides that: “If the defendant ... or their legal representatives refuse to accept a judgement or order of the first instance made by a local People’s Court at any level, they shall have a right to appeal in writing or orally to the People’s Court at the next higher level...” Article 183 further provides: “The time limit for an appeal or a protest against a judgment shall be 10 days ... the time limit shall be counted from the day after the written judgement or order is received.”

Article 189 of the PRC Criminal Procedure Law provides:

“After hearing a case of appeal or protest against a judgment of first instance, the People’s Court of second instance shall handle it in one of the following manners in light of the different situations: (1) if the original judgment was correct in the determination of facts and the application of law and appropriate in the meting out of punishment, the People’s Court shall order rejection of the appeal or protest and affirm the original judgment...”

### Grounds of appeal

Cheung Tse-keung’s lawyer (mainland lawyer Tong Jianhuan) appealed on a number of grounds, including: (1) The case should have been tried in Hong Kong courts which had proper jurisdiction; (2) Cheung Tse-keung was not the principal defendant in the trading of explosives; (3) there were not enough evidence to support the kidnapping charges; (4) Cheung has rendered meritorious services in the appeal by reporting other people’s offenses and providing for supporting evidence.

**Table II: A Summary of Grounds for Appeal and Higher People’s Court’s Judgement**<sup>168</sup>

<b>Grounds for Appeal</b>	<b>Higher People’s Court’s Judgement</b>
Hong Kong courts should have jurisdiction	Rejected
Cheung Tse-keung was not the principal offender in the illegal trading of explosives	Rejected
Insufficient evidence to support kidnapping charges	Rejected
Reporting and supplying evidence on others’ criminality on appeal	Rejected

Cheung was immediately executed on the same day.

### **III. Conclusion**

The Cheung case is one of a kind “show trial.”<sup>169</sup> As a “show” case, it allows discerning readers to have a rare glimpse inside the PRC criminal justice process, and in so doing, probe the associated criminal justice philosophy and mentality of China.

The anatomy of the Cheung’s case gives us a first hand account of how the PRC criminal justice process works in practice as distinguish from one in principle and on paper. However, just like “O.J. Simpson” trial is not typical and thus not be likely to reflect the routine day-to-day operation of the U.S. criminal justice system, the Cheung’s case suffers from like distorting effects. Furthermore, as a “show trial” manufactured for public consumption, particularly foreign (from Hong Kong to the world) audience, the case is “too ‘good’ to be true.” However, as a research site, the “show” case is most revealing of PRC’s political and legal officials’ attitude and disposition towards the spirit and letter of law.

First, in allowing the case to be reported in full in the local newspapers, the PRC authority hopes to convince the world of her commitment to the rule of law as she tries to demonstrate to Hong Kong people of her respect for “one country two systems” principle.

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<sup>168</sup> Guangdong Province, Higher People’s Court reached a final verdict was reprinted in full in *Wen Hui Bao* A4, A6. “Guangdong Sheng Gaoji Renmin Fayuan, Xingshi Panjue Shu (1998) Yue Gao Fa Xing Zhong Zi Di 1139 Hao.Yuan Gaoxu Jiuan Guangdong Sheng Guanshou Shi Remin Jiangcha Yuan.” (The Higher People’s Court of Guangdong Province, Criminal Judgement (1998) Guangzhou High Law (Court) Final No. 1139. Original Public Prosecution Organ Guangdong Municipality People’s Procuracy of the Guanzhou Province). For a translation of the The Appellate Judgment, see Appendix One, *infra*.

Viewed in this light, the case attests to PRC's increasing confidence and growing sophistication with the law. In this regard, the anatomy of the Cheung's case clearly show a PRC authority bent on proving to the world that the conviction of Cheung and others is "based on facts and controlled by law." This is a far cry from those early days when cases are summarily disposed by the mass and people are executed without legal justification.

Second, on closer inspection and deeper reflection, the opinion of the court, notwithstanding its meticulous recitation of law and detail presentation of facts, failed to inspire the degree of confidence the PRC authority had hoped for. Particularly, the Cheung's court lacks a degree of objectivity and criticalness that we come to associate with the law regime; a process that is marked by continuous debate over the proper application of law to facts or correct interpretation of facts with reference to law. In this regard, the Cheung's court is more concerned with justifying their decision than debating the issues raised by the law and facts in the case.

Lastly and more fundamentally, as this anatomy of Cheung's case clearly revealed, the PRC judicial authority is less concerned with "technical application" of the rule of law, i.e. achieving procedural due process, than the "correct realization" of the purposes behind law, i.e. attaining substantive justice. In this way, it can be argued that the PRC authority is more interested in the "spirit" of the law (punishing the guilty) than the "letter" of the law (following the rules), e.g. over-extended investigative detention to get at the truth. This "substantive" and "moralistic" approach to the rule of law requires the officials to focus *exclusively* on the moral character and just desert of Cheung, than anything he can say or do in his defense, legally. In this regard, a co-operative, submissive and repentant attitude is in fact a much better "defense" strategy than a sophisticated and aggressive legal advocacy program. Viewed in this light and notwithstanding the "show" case quality of Cheung's Trial Court Decision and Appellate Court Judgment, Cheung's fate was sealed, long before he was arrested and tried. The trial and appeal was conducted to show the public (and the world) that Cheung indeed deserves what is coming, instead of as an open process to determine guilt or open forum to debate over law.

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<sup>169</sup> The other one happened in 1979 when Jiang Qing was put on trial.

## **Appendix One**

### **The Appellate Court Judgment<sup>170</sup>**

This morning, the Higher People's Court of the Guangdong Province reached a final verdict on the appeals of Cheung Tse-keung and 36 other defendants with respect to their cases of illegal trading and transportation of explosives; illegal trading and transportation of arms and ammunition; concealment of arms and ammunition; smuggling of weapons and ammunition; kidnapping, robbery, and concealment of loots. The defendants' appeals are hereby rejected. With the authority vested in the Higher People's Court, (this Court found that) the sentence of Cheung Tse-keung, Chan Chi Ho, Ma Shan-chung, Liang Fei and Qian Han-shou to death and deprivation of political rights for life was in accordance with the law; to be executed immediately after the announcement of this verdict.<sup>171</sup> Below, I am going to announce to the press the relevant circumstances about the appeal.

#### 1. The circumstances of defendant's appeal and defense's viewpoints

On November 12 [1998] Guangzhou Intermediary People's Court rendered a hearing of first instance judgment in a criminal case against Cheung Tse-keung and other defendants. Cheung Tse-keung and 29 defendants appealed to the Higher People's Court of Guangdong Province. 29 of the appellants appointed 44 lawyers for their defense. The appellants and defense agents submitted their written defense viewpoints to the appeal's

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<sup>170</sup> See "Public Statement of Higher People's Court of Guangdong Province" by the Director of Court (*Ting Zhang*) - Lu Botao, reprinted in full *Wen Hui Bao* Nov. 13, 1998. A4,

<sup>171</sup> Article 199 of the PRC Criminal Procedure Law provides: "Death sentences shall be subject to approval by the Supreme People's Court." The PRC Supreme People's Court has approved of the death sentence. *Id.*

court. Those who had not appointed defense agent have also submitted their written defense viewpoints to the appeal's court.

The major reasons and defense viewpoints raised by respective appellants and defense agents are: (1) raised a different opinion about the jurisdiction in this case; (2) the first trial judgment confirmed that certain facts were not clear and there were not enough evidence; (3) the first trial judgment confirmed that there was a lack of distinction drawn between the relationship between principals (offender) and followers; (4) the determination of the first trial was not accurate; (5) the penalty imposed by the first trial was too severe; (6) the first trial overlooked the defendants' surrendering and rendering of meritorious services. Respective appellants and defense agents asked the appeals court to reduce their sentences and treat them with leniency.

## 2. Regarding the appeal's process

After the defendants submit their appeals, the Guangzhou Intermediary People's Court removed the case to this court in accordance with Article 184 of the "PRC Criminal Procedure Code."<sup>172</sup> This court formed a collegial bench (*he yi ting*) to hear the case in accordance with Article 187 of "PRC Criminal Procedure Code," with the No. 1 Criminal Court, Court President Yang Rencai as the chief judge (*shenpan zhang*), Zhao Jun as the deputy judge, Xie Wenlian and Huang Fu-zhao as judges, and Chen Xiao-fei as an acting judge.<sup>173</sup>

Article 186 of our country's "Criminal Procedure Code" provides: "A People's Court of second instance shall conduct a complete review of the facts determined and the application of law in the judgment of first instance and shall not be limited by the scope of appeal or protest. If an appeal is filed by only some of the defendants in a case of joint crime, the case shall still be reviewed and handled as a whole." In this case some of the defendants appealed and some of the defendants did not appeal, the collegial court hear the whole case in accordance with the law. The collegial court read all the case materials

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<sup>172</sup> Article 184 of the PRC Criminal Law provides: "If a defendant...files an appeal through the People's Court which originally tried the case, the people's Court shall within three days transfer the petition of appeal together with the case file and the evidence to the People's Court at the next level..."

<sup>173</sup> Article 187 of the PRC Criminal Procedure Law provides: "A People's Court of second instance shall form a collegial panel ..."

and questioned the 79 appellants and Zhu Yu-cheng and the seven other [non-appealing] original defendants individually; listening to their reasons and viewpoints. The lawyers read the materials and submitted to the collegial court their defense briefs. The collegial court, based on the defense viewpoints of the appellants and the original trial defendants and their lawyers, conducted a comprehensive review of the case. After confirming the facts and applicable law in the first trial, the court found the facts to be clear and decided not to (re)try this case in open court in accordance with Article 187 of the “Criminal Procedure Code.”<sup>174</sup> Building on the foundation of a full review of the confirmed facts and circumstances in the case, the court issued the appellate decision after the collegial court having appraised and discussed (*pingyi*) the case and the court’s judicial committee having discussed and passed on the judgment. Three days before this appellate court announced the judgment, it placed public notices within this court and judgment pronouncement activities bureau (*xuan pan huodong suo*) with the lawyers and relatives of the appellants and relatives being notified accordingly. During the whole appeal, the court has conduct itself strictly in accordance with the relevant provisions of the “Criminal procedure Code” and have protected the criminal procedure rights of the appellants and original trial defendants.

### 3. Regarding the review and affirmation of the criminal facts of the appellants and original trial defendants

The Higher People’s Court of the Guangdong Province adjudicated the case without further trial (*bu kai ting shenli*). After carefully listening to the defense viewpoints of respective appellants, original trial defendants and their lawyers and having completely verified and confirmed the material evidence, documentary evidence, witness testimonies,

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<sup>174</sup> Article 187 of the Criminal Procedure Law provides: “A People’s Court of second instance shall form a collegial panel and open a court session to hear a case of appeal. However, if after consulting the case file, interrogating the defendant and heeding the opinions of the other parties, defenders and agent ad litem, the collegial panel things the criminal facts are clear, it may open no court session.”

Procedurally, there are three ways the People’s Court of the second instance can conduct the hearing on appeal: (1) review on record (*shumian shenli*); (2) questioning the defendant (*tishen bigao ren*); (3) hearing in open court (*kaiting shenli*). Cheung’s case was disposed of in the second way that is also the most popular one. “Criminal case hearing of the second instance procedure” (*xingshi dier shen chengxu*). Editorial Committee, *Judges Manual* (Faguan Shouce) Shanxi Renmin Chubanshe, 1995)

forensic evidence of the trial of the first instance, the court affirmed the verdict of the court of the first instance that defendant Cheung Tse-keung and the other 29 appellants, and Zhu Yucheng and the other seven original trial defendants' criminal facts are apparent and supported by valid and sufficient evidence.

Regarding the issue of court jurisdiction. Cheung Tse-keung has submitted on appeal that this case should be within the jurisdiction of the Hong Kong courts, and the mainland courts have no jurisdictional authority. On appeal, the Higher People's Court the Guangdong Province again confirmed: Cheung Tse-keung and other defendants committed crimes of illegal trading of explosives, smuggling of arms and ammunition, and part of robbery inside the mainland. The crimes of kidnapping and robbery of gold jewelry shops, though happened in Hong Kong, were conspired, planned, prepared in the mainland, that is to say the preparatory conducts to crimes committed in Hong Kong happened in the mainland. According to Article 6(1) of the "Criminal Code": "This Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the PRC, except as otherwise specifically provided by law." and Article 24 of the "Criminal procedure Code": "A criminal case shall be under the jurisdiction of the people's Court in the place where the crime was committed," the mainland courts should have jurisdiction over the case. The Hong Kong courts also have jurisdiction. With this kind of cases where different regional courts (*bu tung diqu fayuan*) have concurrent jurisdictions, it should be dealt with by the first trial court in according with Article 25 of the "Criminal Procedure Law" Article 25. After committing their crimes, Cheung Tse-keung and others were arrested by mainland public security organs and a large amount of witness testimony, material evidences were obtained and located within the mainland. Under this kind of circumstances and according to the above-cited legal provisions, mainland judicial organs possessed jurisdiction. This is very obvious, definite, and is grounded on law.

Regarding the crime of illegal trading and transportation of explosives. Appellant Cheung Tse-keung was the owner of the illegally purchases explosives and the planner and leader of the crime. He furnished the money and asked appellant Qian Han-shou to purchase the explosives, directed defendant Lau Ding-fun as the point of contact in the purchase of explosives, transported the illegally purchased explosives shipped to Hong

Kong from 95 Da Huo Kuo village at Liu Shui Xiang in Hong Kong to Ma Cao village in collusion with Lau Ding-fun and others: Qian Han-shou, Lau Ding-fun, Liu Guo-hua, Qian Han-ye, Jiang Ron-chang, Jiang Cai-gu, Yu Chuan, Huagn Wen-xiong, Luo Yue-ying and Chen Hui-guang participated in the illegal trading or transportation of explosives, all were supported by valid and sufficient evidence. Cheung Tse-keung illegally trade in large amount of explosives, seriously affecting public safety, circumstances were serious, was the principle offender, should be punished by law as organizing, directing the whole crime, appellant Cheung Tse-keung and his defense agent is of the opinion that Cheung Tse-keung should be responsible for the entire crime, does not have any factual support. During the process of illegal trading and transportation of explosive, Qian Han-shou participated in the conspiracy and was responsible for the purchasing and transportation, he performed a key role in the crime, the criminal circumstances were serious, the appellant and his defense agents is of the opinion that Qian Han-shou's criminal circumstances were lighter, this is not supported by facts.

Regarding the crime of robbery .....

Regarding the crime of kidnapping. Appellant Cheung Tse-keung suggested the idea for the kidnapping and provided the funds for the purchase of instrumentality of crime, performed organizing and directing functions in the entire crime, shared in large amount of ransom money, is the principal offender, there were confessions and identifications of conspiracy sites, photos of kidnapping sites, instrumentality of crime, victims' cashier's check and power of attorney by (Cheung) himself and others involved in the crime, the evidence were valid, sufficient. Appellant Cheung Tse-keung's appeal based on insufficient evidence is not established.

With regard to appellant Chen Shu-han ...

Regarding the smuggling of arms and ammunition. Appellant Cheung Tse-keung colluded with others to smuggled arms and ammunition to Hong Kong from the mainland, seriously endangering public safety, the circumstances were serious, guilty of smuggling of arms and ammunition according to law. Appellant Cheung Tse-keung and his defense agent suggested that the smuggling of arms and ammunition charges merged with the kidnapping crime should not be punished separately, was not based on law and is not accepted.

Regarding the illegal trading, concealment of arms and ammunition crimes and concealment of loots. The first trial judgment confirmed that the facts were clear. Evidence was valid, adequate, and fully established. The appellants' viewpoints are not accepted.

Also, the appellant Cheung Tse-keung's defense lawyer has petitioned the court for new evidence regarding the kidnapping, smuggling of arms and ammunition, the appellate collegial court after review is of the opinion, Cheung Tse-keung committed kidnapping, smuggling of arms and ammunition crimes were supported by adequate evidence, should be affirmed, and his petition is rejected. Although appellant Cheung Tse-keung has provide evidentiary leads to prosecute Hong Kong residents' crime committed in Hong Kong during the appeal proceeding, the Guangzhou Public Security Bureau confirm that such evidentiary leaders were not able to confirm through investigation, thus not consider as meritorious service (*ligong*).

Appellants Chen Zhihou, Liang Fei, Qiang Han-hou ... (confession not considered as meritorious service )...

Also ... Qiang Han-hou used ... fishboat for the commission of crime ... decision not correct ... corrected.

#### 4. Regarding the basis of law for the appellate court decision

Guangdong Province, Higher People's Court having heard the case, made appellate decision in accordance with "Criminal Procedure Law, Article 189 (1) and (2):...In accordance with regulations in "Notice regarding the Supreme People's Court authorizing Intermediary People's Court to check and approve certain death punishment cases," ratify the death sentences of five defendants Cheung Tse-keung, Chan Chi-ho, Ma Shan-chong, Liang Fei, Qiang Han-shou. This judgment, fully realized the principle of conviction and punishment according to law, crime and punishment proportionality principle.

Guangdong Province, Higher People's Court decision in the case with respect to Cheung Tse-keung and other 36 defendants, whether its is with hearing procedural or with substantive decision, has been conducted strictly in accordance with the law, has

actualized (the principles of ) following the law when existed. enforcing the law with due diligence, holding accountable for law violations, and protect the dignity of the law.