

CIRCUMVENTING THE CHINA EXTRADITION
CONUNDRUM: RELYING ON DEPORTATION
TO RETURN CHINESE FUGITIVES

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I. INTRODUCTION

Corruption in China has grown over the past three decades in tandem with the implementation of market liberalization reforms to open up its economy.¹ In recognition of the pernicious effect that wide-spread corruption has on China's sustained economic growth, and the threat that official corruption poses to the credibility and legitimacy of the Chinese

1. See Jon S.T. Quah, *Hunting the Corrupt "Tigers" and "Flies" in China: An Evaluation of Xi Jinping's Anti-Corruption Campaign (November 2012 to March 2015)*, MD. SERIES CONTEMP. ASIAN STUD., no. 1, 2015, at 11 (describing the exponential increase in number and size of corruption cases in the post-Mao era, and attributing them in part to Deng Xiaoping's "open door" policy).

Communist Party (CCP), the Chinese leadership has carried out multiple anti-corruption campaigns throughout the Mao and post-Mao periods in efforts to stamp out rampant corruption.² However the anti-corruption campaign launched by President Xi Jinping when he became General Secretary of the CCP and Chairman of the Central Military Commission in 2012 is unparalleled in its intensity,³ durability, and scope.⁴ At the Nineteenth National Congress of the CCP on October 18, 2017, Xi pledged to continue his anti-corruption campaign⁵, exhorting party cadres to “remain as firm as a rock”⁶ and warning that “[w]e must . . . rid ourselves of any virus that erodes the Party’s health.”⁷ By prominently featuring his anti-corruption campaign in his keynote speech, Xi inextricably linked his political brand with anti-corruption. Moving ahead, there will be increasing pressure on the Chinese authorities to demonstrate tangible results.

Despite the high-profile nature of the campaign, the Chinese authorities continue to face obstacles tracking down and prosecuting corrupt Chinese officials who have fled to all corners of the globe. Even as China actively seeks extradition treaties with Western countries such as the United States, Canada, Australia, and the United Kingdom—jurisdictions where Chinese fugitives have fled—it has found its efforts rebuffed

2. See Ye Feng, *The Chinese Procuratorate and the Anti-Corruption Campaigns in the People’s Republic of China*, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA 113, 113–117 (Jianfu Chen et al. eds., 2002) (providing an historical overview of Chinese campaigns against corruption).

3. See Shai Oster, *President Xi’s Anti-Corruption Campaign Biggest Since Mao*, BLOOMBERG (Mar. 4, 2014, 5:41 AM), <https://www.bloomberg.com/news/articles/2014-03-03/china-s-xi-broadens-graft-crackdown-to-boost-influence> (describing Xi’s anti-corruption campaign as the most sustained drive against high-level corruption following the economic reforms of the early 1980s).

4. See Quah, *supra* note 1, at 41 (“Xi Jinping’s anti-corruption campaign is wider in scope since it targets both senior and junior officials . . .”).

5. Xi Jinping, Remarks to the 19th National Congress of the Communist Party of China: Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era 7 (Oct. 18, 2017), http://www.xinhuanet.com/english/download/Xi_Jinping’s_report_at_19th_CPC_National_Congress.pdf (noting the anti-corruption campaign was being consolidated and developed).

6. *Id.* at 61.

7. *Id.* at 14.

due to concerns about the lack of human rights safeguards in China for the treatment of such fugitives upon their return. To address this, the Chinese authorities are employing other means for procuring the return of fugitives. These include publishing lists of the names and addresses of “most wanted fugitives,”⁸ issuing Interpol Red Notices,⁹ sending law enforcement agents to persuade fugitives to voluntarily return to China,¹⁰ and urging countries with whom it lacks an extradition treaty to repatriate Chinese fugitives to China through the use of that country’s national immigration laws.

This Note turns a critical eye to this last practice—namely, how in the absence of an extradition treaty, some countries are employing national immigration laws as an alternative

8. Christian Shepherd, *No Hiding Place: China Releases Street Names of Fugitives Holed Up Abroad*, REUTERS, Apr. 27, 2017, <https://www.reuters.com/article/us-china-corruption/no-hiding-place-china-releases-street-names-of-fugitives-holed-up-abroad-idUSKBN17T1VO> (citing examples of images, suspected crimes, addresses and locations for twenty-two fugitives released by the Chinese authorities in a publicly available list); see also Ian Young, *China Reveals Foreign Addresses of Corruption Suspects Living in Canada, US and Beyond*, S. CHINA MORNING POST, <http://www.scmp.com/news/world/united-states-canada/article/2091356/china-reveals-foreign-addresses-corruption-suspects> (last updated May 3, 2017, 10:14 AM) (giving examples of five graft suspects that were revealed to be living in Canada as a result of publication of a list of the suspects’ foreign addresses).

9. See Mimi Lau, *China Involved in 3,000 Interpol Investigations, State Media Says*, S. CHINA MORNING POST, <http://www.scmp.com/news/china/policies-politics/article/2112773/china-involved-3000-interpol-investigations-state-media> (last updated Sept. 25, 2017, 10:38 PM) (connecting the investigations with Xi Jinping’s campaign to repatriate Chinese citizens suspected of corruption and terrorism offenses).

10. See Mark Mazzetti & Dan Levin, *Obama Administration Warns Beijing About Covert Agents Operating in U.S.*, N.Y. TIMES (Aug. 16, 2015), https://www.nytimes.com/2015/08/17/us/politics/obama-administration-warns-beijing-about-agents-operating-in-us.html?_r=1 (reporting that American officials had evidence that Chinese law enforcement officials entered the country on tourist or trade visas and used various strong-arm tactics to get fugitives to return); see also Rick Wallace, *Don’t Help China with Fugitives of President Xi, Australia Warned*, AUSTRALIAN (Jan. 7, 2016, 12:00 AM), <https://www.theaustralian.com.au/national-affairs/foreign-affairs/dont-help-china-with-fugitives-of-president-xi-australia-warned/news-story/52c691df91a4c72dab9158bef4eb1e73> (describing how Chinese security agents secretly traced a Chinese fugitive to Australia and tried to convince him to return to Beijing to face charges).

means to extradition when repatriating fugitives to China.¹¹ Part I elaborates on some of the features and characteristics of extradition. Part II examines the obstacles and problems preventing countries from entering into an extradition relationship with China. Part III explains how this has led some countries to use national immigration laws to repatriate fugitives to China in lieu of extradition, and surveys recent cases in which countries have done so. Part IV discusses the comparative advantages and disadvantages of relying on the immigration regime to repatriate fugitives instead of the extradition regime. Part V concludes with a set of policy recommendations for strengthening the current practice of deportation of fugitives to China in the absence of an extradition treaty.

II. FEATURES AND CHARACTERISTICS OF EXTRADITION

Before considering the relative merits and risks of relying on the immigration regime to deport fugitives in lieu of extradition, it is important to understand some of the features and characteristics of extradition. Extradition remains the “preferred method” by which States cooperate to transfer an individual accused or convicted of an offence from one State to another.¹²

“Extradition” is described as “the formal surrender of a person by a State to another State for prosecution or punishment.”¹³ In order to effect extradition, States enter into bilateral or multilateral arrangements—set up either permanently or on an ad-hoc basis—enabling transfer of alleged fugitive

11. See Philip Wen, *China Hails First Fugitive Extradition from U.S. Under Trump*, REUTERS, June 1, 2017, <https://www.reuters.com/article/us-china-usa-crime/china-hails-first-fugitive-extradition-from-u-s-under-trump-idUSKBN18S4L6> (describing the first case under the Trump Administration in which a fugitive wanted by Chinese authorities was deported back to China from the United States.).

12. DAVID A. SADOFF, *BRINGING INTERNATIONAL FUGITIVES TO JUSTICE: EXTRADITION AND ITS ALTERNATIVES* 129 (2016) (“The extradition process between States represents not only the most legally and politically preferred method of rendering fugitives, but also the most ancient and popular law enforcement cooperation modality.”).

13. Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties*, in *EXTRADITION AND REN-DITION: BACKGROUND AND ISSUES* 1, 1 (2011) (Brenden M. Zimmer ed., 2011).

criminals between themselves.¹⁴ Once two or more States have entered into an extradition treaty, the obligation created is implemented through domestic legislation¹⁵ or self-executing treaties.¹⁶ Extradition decisions implicate both domestic and international law. In *Harksen v. President of the Republic of South Africa and Others*,¹⁷ the Constitutional Court of the Republic of South Africa articulated the dynamic between international and domestic law in extradition as follows:

An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each State is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite.¹⁸

In other words, while the question of how an extradition process is to be carried out is determined by a State's domestic law, the antecedent issue of whether an individual ought to be extradited operates on the international plane, engaging both

14. See generally GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 20–26 (1991).

15. *Id.* Dualist states may require extensive legislation to implement extradition treaties. For such countries, an international obligation does not automatically form part of their domestic laws until it is translated into national legislation.

16. *Id.* Some States will not require implementing legislation because they follow the monist tradition of international law, by which international treaties to which States are parties automatically become a part of their internal law without the need for additional legislation.

17. *Harksen v. President of the Republic of South Africa and Others*, 2000 (2) SA 825 (CC) at para. 4 (S. Afr.).

18. *Id.*

international law and political and foreign policy considerations.

Although different countries' extradition practices and procedures do vary, there are a number of "substantive requirements, defences, and procedures" that have found common expression in extradition treaties.¹⁹ Despite the differing cultural heritages, political structures, and legal traditions of the United States and China, there are certain principles that exist in both countries' national legislation. This Note draws attention to some of these similarities to illustrate the ubiquity of such principles.

These principles, some of which are discussed below, derive from considerations of comity and reciprocity.²⁰ They flow from the understanding of extradition as a "contractual relationship"²¹ between governments for the provision of legal assistance in facilitating the prosecution and punishment of persons accused or convicted of offences. In addition to considerations of comity, human rights protections also influence extradition rules significantly.²² This is because although the primary function of the extradition regime is facilitating the smooth transfer of fugitives from one State to another, States recognize that extradition has far-reaching consequences for the human rights and individual freedoms of the person

19. See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 495–496 (6th ed. 2014) ("The practice of extradition. . . developed before treaties superseded custom as its most importance source. As the practice evolved over the centuries it settled on a number of similar substantive requirements, exclusions, defenses, and procedures. These similarities were later reflected in treaties, national legislation, jurisprudence and doctrine.").

20. *Id.* at 4 ("Because extradition is between states, it is clear that there is a nexus between the interests of the respective states and the granting or denial of extradition. In fact, the whole history of extradition is a reflection of the political relations between the states requesting and granting extradition.").

21. *Id.* at 497.

22. See *id.* at 496 - 497 ("The increased concerns for human rights protection expressed through international conventions, national constitutions, and national laws, as well as in multilateral and bilateral extradition treaties, have modified the contractual concept of extradition that prevailed in the nineteenth century."). See generally GILBERT, *supra* note 14, at 79–90 (describing how certain human rights protections from regional human rights conventions are applicable to extradition).

sought.²³ Extradition is a serious action, which, out of respect for individual freedoms, must be subject to strict substantive and procedural safeguards. Thus, inherent in the rules of fugitive transfer is the tension of balancing the human rights of the fugitive on one hand, and the efficient and timely transfer of fugitives for the objectives of suppression of transnational crime on the other.

A. *Principle of Specialty*

The principle of specialty stipulates that an extradited individual can be tried only for the offence, or offences, specified in the extradition request, unless (i) the surrendering country has given consent; or (ii) the extradited individual has waived the restriction.²⁴ The specialty rule serves as one of the safeguards against prosecution for political offences and violations of other substantive rules of extradition law. Other safeguards include the requirement that an extraditable offence be proscribed in both states and the principle of *non bis in idem* (protection from being tried twice for the same crime).²⁵ Some scholars assert that the principle of specialty is a rule of customary international law,²⁶ applicable even in respect to extraditions that take place on the basis of comity in the absence of a treaty. However, given that many treaties stipulate that the specialty rule can be waived with the consent of the requesting

23. At the same time, there are some that say that such clauses fall short of satisfying the modern concept of human rights protections. See, e.g., John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 188 (1998) (“[I]t would be incorrect to explain [the political offence exception, the rule of double criminality, and the principle of specialty] entirely in human rights terms.”).

24. See generally M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 352–60 (1974) (describing the principle of specialty).

25. See, e.g., BASSIOUNI, *supra* note 19, at 538 (describing the principle of specialty and reproducing the language of extradition treaties concerning specialty).

26. See ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 300 (3rd ed. 2007) (“The specialty principle is so broadly recognized in international law and practice that it has customary international law status”); see also BASSIOUNI, *supra* note 19, at 538 (“Specialty is frequently referred to as a principle because it is so broadly recognized in international law and practice that it has become a rule of [Customary International Law].”).

State, the rule's status in international law remains debatable.²⁷

All U.S. extradition treaties contain the principle of specialty and the principle is also reflected in 18 U.S.C. §§3184,²⁸ 3185,²⁹ and 3192.³⁰ The principle of specialty is incorporated into all recent extradition treaties ratified by China,³¹ and is reflected in Article 14(1) of the 2000 Extradition Law of China (Chinese Extradition Law).³²

27. See Carolyn Forstein, Note, *Challenging Extradition: The Doctrine of Specialty in Customary International Law*, 53 COLUM. J. TRANSNAT'L L. 363 (2015) (examining jurisprudence in the United States, foreign courts, and international tribunals, and purporting to demonstrate that specialty is not applied consistently as a norm of customary international law).

28. 18 U.S.C. § 3184 (2011) (providing that a judge or magistrate judge will evaluate evidence against a fugitive from a foreign country at a hearing, to determine if it is sufficient to sustain the charge under the provisions of the property treaty or convention).

29. 18 U.S.C. § 3186 (2011) (providing that “[t]he Secretary of State may order the person committed under sections 3184 or 3185 . . . to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged. Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.”).

30. 18 U.S.C. § 3192 (2011) (providing that “[w]henver any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person . . . until the final conclusion of his trial for the offenses specified in the warrant of extradition”)

31. See Hu Qian & Chen Qiang, *China's Extradition Law of 2000*, 1 CHINESE J. INT'L L. 647, 648 (2002) (“The rule of specialty, which is incorporated into all the extradition treaties ratified by China as a separate article providing that persons who are extradited cannot be detained, tried, or punished in the requesting state for an offence which is not one of the offences for which the person is extradited.”).

32. Article 14(1) of the Chinese Extradition Law provides that the requesting State shall make the assurance that “no criminal responsibility shall be investigated against the person in respect of the offences committed before his surrender except for which extradition is granted, nor shall that person be re-extradited to a third state, unless consented by the People's Republic of China” Extradition Law of the People's Republic of China (promulgated by the Stand. Comm. Nat'l People's Cong., Dec. 28, 2000), art. 14(1), 2000 P.R.C. LAWS, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf>.

B. *Dual Criminality*

The principle of dual criminality requires that the offence for which the fugitive is extradited must be an offence in both the requesting and requested State. It is “a deeply ingrained principle of extradition law,”³³ and is intended to ensure that no State “uses its processes to surrender a person for conduct which it does not characterize as criminal.”³⁴ Today, some form of the dual criminality requirement is found in nearly all bilateral and multilateral extradition treaties. Its near universal recognition has made it a part of customary international law.³⁵ All recent U.S. extradition treaties incorporate the requirement of dual criminality,³⁶ and it is a principle articulated explicitly in U.S. cases.³⁷ This principle is also incorporated in numerous extradition treaties involving China³⁸ and is reflected at Article 7(1) of the Chinese Extradition Law.³⁹

33. U. N. Office on Drugs & Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, at 10 (2002) https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf.

34. BASSIOUNI, *supra* note 19, at 467.

35. *See id.* at 326–27 (providing background on the Universal Declaration of Human Rights and Customary International Law).

36. 7 U.S. DEP’T. OF STATE, FOREIGN AFFAIRS MANUAL § 1613.3(c), <https://fam.state.gov/FAM/07FAM/07FAM1610.html>; *see also* Garcia & Doyle, *supra* note 13, at 7 (“[T]he more recent [U.S. extradition treaties] feature a dual criminality approach and . . . make all felonies extraditable (subject to other limitations found elsewhere in their various provisions).”).

37. *See, e.g.*, *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995) (elaborating on the principle of dual criminality and distinguishing it from specialty).

38. These are the extradition treaties that China has entered into with Thailand, Bulgaria, Romania, Mongolia, Cambodia, Uzbekistan, Russia, Belarus, Kirghizia, Ukraine, Kazakhstan respectively; *see* Hu & Chen, *supra* note 31, at 648.

39. Article 7(1) of the Chinese Extradition Law provides that one of the conditions for the request for extradition made by a foreign State to China is that “the conduct indicated in the request for extradition constitutes an offence according to the laws of both . . . China and the requesting State.” Extradition Law of the People’s Republic of China (promulgated by the Stand. Comm. Nat’l People’s Cong., Dec. 28, 2000), art. 7(1), 2000 P.R.C. LAWS, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf>.

C. *Political Offence Exception*

A typical political offence exception provision allows a host State to refuse to grant extradition if the offence for which extradition is sought is regarded by the host State to be an offence of a “political nature.”⁴⁰ The rationale for the rule is to protect against extradition for “pure” political offences, which might “embroil the requested State in the domestic politics of the State requesting extradition.”⁴¹ Some scholars also assert that a core rationale for the exception is “humanitarian concern for the fugitive.”⁴² While the political offence exception is a principle of comity of nations, it likely does not constitute a rule of customary international law—which requires settled practice that is accepted as law⁴³—since the rule can be tacitly excluded by legislation or international arrangements.⁴⁴

There are varying opinions on what constitutes a “political offence.”⁴⁵ Generally, U.S. courts require that a fugitive must “demonstrat[e] that the alleged crimes were ‘committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion.’”⁴⁶ U.S. extradition treat-

40. See G.A. Res. 45/116, annex, Model Treaty on Extradition, art. 3(a), (Dec. 14, 1990) (amended by G.A. Res. 52/88 (Dec. 12, 1997)) (“Extradition shall not be granted . . . if the offence for which extradition is requested is regarded by the requested State as an offence of a political nature. Reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any offence that the Parties have agreed is not an offence of a political character for the purposes of extradition.”).

41. U. N. Office on Drugs & Crime, *supra* note 33, at 16.

42. GILBERT, *supra* note 14, at 113.

43. JAMES R. CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 23–24 (8th ed. 2012).

44. GILBERT, *supra* note 14, at 117 (“The extradition treaties concluded by states in Eastern Europe, *inter se*, in the late Sixties and Seventies . . . did not contain any protection for political offenders.”).

45. *Id.* at 125 (“As it stands, the United States approach [on the political offence exception] is both too wide and too narrow.”). See BASSIOUNI, *supra* note 19, at 738 (describing the need for a more consistent approach to the application of the political offence exception in the U.S. courts.).

46. *Koskotas v. Roche*, 931 F.2d 169, 171 (1st Cir. 1991) (quoting *Eain v. Wilkes*, 641 F.2d 504, 518 (7th Cir. 1981)); see also *Ordinola v. Hackman*, 478 F.3d 588, 596–97 (4th Cir. 2007) (“Traditionally, there have been two categories of political offenses: ‘pure’ and ‘relative.’ The core ‘pure’ political of-

ties before 1986 contained political offence exceptions that protected offenders from extradition if the alleged crimes of the accused were “regarded by the Requested State as a political offense, an offense of a political character or as an offense connected with such an offense.”⁴⁷ This historical test for determining what constitutes a political offence leaves the decision solely to the requested State. The U.S.-Denmark extradition treaty of 1972 sets out a more expansive version of this exception, specifying that extradition not be granted “if the requested State has *reason to assume* that the requisition for [the offender’s] surrender has, in fact, been made with a view to try or punish him for a political offense or an offense connected with a political offense. If any question arises as to whether a case comes within [this provision], it shall be decided by the authorities of the requested State.”⁴⁸

In China, the political offence exception is encapsulated in Article 8(3) of the Chinese Extradition Law—which provides that a request for extradition to China shall be rejected if the request for extradition is for a “political offence.”⁴⁹ However, the term “political offence” is not defined in the Extradition Law, the Chinese Constitution, or the Chinese Criminal Code. There are also no standards clarifying what the elements of a political offence may be.⁵⁰ What actually constitutes a political offence in China is thus an open question.

fenses are treason, sedition and espionage . . . ‘Relative’ political offenses . . . are common crimes that are so intertwined with a political act that the offense itself becomes a political one . . . American courts addressing ‘relative’ political offenses have developed a two-prong test to determine whether an offense is sufficiently political . . . ‘the incidence test’ . . . asks whether (1) there was a violent political disturbance or uprising in the requesting country at the time of the alleged offense, and if so (2) whether the alleged offense was incidental to or in the furtherance of the uprising.”).

47. Extradition Treaty, Ger.–U.S., June 20, 1978, 32 U.S.T. 1485.

48. Extradition Treaty, Den.–U.S., art. 7.4, June 22, 1972, 25 U.S.T. 1293 (emphasis added).

49. Extradition Law of the People’s Republic of China (promulgated by the Stand. Comm. Nat’l People’s Cong., Dec. 28, 2000), art. 8(3), 2000 P.R.C. LAWS, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf>.

50. Huang Feng, *The Establishment and Characteristics of China’s Extradition System*, 4 FRONTIERS L. CHINA 595, 597 (2006) (“[E]very country is entitled to define ‘political offense’ in accordance with its own legal system and value so as to properly use this ‘safety valve.’”).

D. *Non-discrimination with Respect to Race, Religion, Nationality*

The non-discrimination principle enables the requesting State to refuse extradition if it determines that the extradition request is made for prejudicial purposes, such as prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, among others.⁵¹ It is a non-controversial provision that has its roots in the principle of *non-refoulement* contained in the 1951 U.N. Convention Relating to the Status of Refugees.⁵² Non-refoulement prohibits a party from returning a refugee or an asylum seeker to a country where they would likely be in danger of persecution based on "race, religion, nationality, membership of a particular social group or political opinion."⁵³ This is set out as a ground of refusal in Article 8(4) of the Chinese Extradition Law, which prohibits an extradition request instituted "for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or if that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings."⁵⁴

III. OBSTACLES TO AN EXTRADITION TREATY WITH CHINA

Despite commonalities in the procedural safeguards surrounding extradition in China and many other countries,

51. See M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT* 353 (3rd ed., 2008) ("A limited number of principles of extradition law have met with such wide acceptance that they should be viewed as part of customary international law. . . Principles falling into the [jus cogens] category would appear to be. . . the rule of non-discrimination: extradition must be denied where the requested party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or where that person's position may be prejudiced for any of these reasons.").

52. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*], <http://www.unhcr.org/en-us/3b66c2aa10>.

53. *Id.* art. 33 ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

54. Extradition Law of the People's Republic of China (promulgated by the Stand. Comm. Nat'l People's Cong., Dec. 28, 2000), art. 8(4), 2000 P.R.C. LAWS, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf>.

China continues to face resistance formalizing extradition arrangements with many Western countries.

A. *An Unpopular Prospect*

Discussions of entering into an extradition relationship with China tend to be deeply unpopular in Western countries. This is linked to the fact that there are legitimate human rights concerns when it comes to formalizing cooperation with China on the extradition of fugitives.⁵⁵ There is broad consensus that human rights conditions in China have deteriorated in recent years, since General Secretary Xi took power in 2012.⁵⁶ In 2015, the Chinese Government notoriously detained more than 300 human rights lawyers and legal associates in what is known as the 709 round up. In 2017, the accounts of those arrested under the 709 round up became public. They detailed “months of torture and mental abuse at the hands of a rotating cast of police officers, prosecutors, and detention-center officials.”⁵⁷ According to the 2016 U.S. Department of State Country Reports on Human Rights Practices, serious human rights abuses took place in China, including “arbitrary or unlawful deprivation of life, executions without due process, illegal detentions at unofficial holding facilities known as ‘black jails,’ torture and coerced confessions of pris-

55. Anna MacCormack, *The United States, China, and Extradition: Ready for the Next Step?*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 445, 471 (2009) (“The problems for the United States in formalizing cooperation with China in an extradition treaty are rooted in China’s abysmal human rights record, rampant public corruption, weak rule of law, and, most crucially, criminal justice system.”).

56. See *Human Rights in China Under Xi Jinping ‘Worst Since Tiananmen Crackdown’*: Amnesty, S. CHINA MORNING POST (Nov. 17, 2017, 11:23 PM), <http://www.scmp.com/news/china/policies-politics/article/2120318/human-rights-china-under-xi-jinping-worst-tiananmen> (describing the escape of Chinese human rights lawyer, Gao Zhisheng, and his subsequent re-capture by Chinese authorities)).

57. Alex W. Palmer, *Flee at Once’: China’s Besieged Human Rights Lawyers*, N.Y. TIMES MAG. (July 25, 2017), <https://www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html>; see also Xie Yang, Chen Jiangang & Liu Zhengqing, *Transcript of Interviews with Lawyer Xie Yang (1) – Arrest, Questions About Chinese Human Rights Lawyers Group*, CHINA CHANGE (Jan. 19, 2017), <https://chinachange.org/2017/01/19/transcript-of-interviews-with-lawyer-xie-yang-1/>.

oners.”⁵⁸ The U.S. Congressional-Executive Commission⁵⁹ 2017 Annual Report on China (2017 CECC Annual Report) further noted the undermining of the independence of the Chinese courts by the Communist Party,⁶⁰ and observed that “authorities continued to use the law as an instrument of repression to expand control over Chinese society, while outwardly providing the veneer of a system guided by the rule of law.”⁶¹

As a result of these systemic issues, talks of extradition treaties between China and Western countries, such as the United States, Australia, and Canada, have stalled. In the United States, scholars widely agree that the prospect of entering into an extradition relationship with China at this point is low. U.S. commentators suggest that, in light of the human rights abuses ongoing in China, no democratic government should negotiate an extradition treaty with China.⁶² Australia, which signed an extradition treaty with China in 2007, cancelled a vote in the Australian Parliament in 2017 that sought to ratify the treaty after it became clear that there were not enough votes supporting it. Opposition to the treaty arose due to China’s humanitarian record—with human rights groups

58. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP’T OF STATE, CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 2016 HUMAN RIGHTS REPORT 1 (2016), <https://www.state.gov/documents/organization/265540.pdf>.

59. Created by the U.S. Congress in October 2000, the mandate of the Congressional-Executive Commission on China (“CECC”) is to monitor human rights and the development of the rule of law in China. In line with this, the Commission submits an annual report to the President and Congress on issues pertaining to China and U.S. relations. *See About, CONG.–EXEC. COMM’N ON CHINA*, <https://www.cecc.gov/about>.

60. CONG.–EXEC. COMM’N ON CHINA, 115TH CONG., ANNUAL REP. 235 (2017), https://www.cecc.gov/sites/chinacommission.house.gov/files/2017%20Annual%20Report%20_2.pdf.

61. *Id.* at 5.

62. *See* Jerome A. Cohen & Zha Daojiong, *Should the United States Extradite Chinese Fugitives?*, FOREIGN POLICY (Aug. 7, 2015, 9:48 AM), <http://foreignpolicy.com/2015/08/07/us-china-fugitive-economic-corruption-law-ling/> (“In these circumstances, how can any democratic government negotiate an extradition treaty with China? The most that the U.S. government can do is to look carefully into each case presented by China, see whether the suspect appears to have violated American immigration, financial or other laws and then open discussion with the suspect and his counsel as well as with Chinese officials to seek a solution to the specific case.”).

accusing Beijing of obtaining confessions through torture or under duress.⁶³ In September 2016, Canada and China established a High-Level National Security and Rule of Law Dialogue, under which one of the short-term objectives was to begin discussions on a Canada-China Extradition Treaty and a Transfer of Offenders Treaty.⁶⁴ Once again, human rights groups such as Amnesty International and Human Rights Watch decried the deal due to China's abysmal human rights record. They cited China's widespread use of the death penalty and torture⁶⁵ and concerns with monitoring what happens to the fugitive once he or she is extradited back to China.⁶⁶

63. See Commonwealth, *Joint Standing Committee on Treaties Report 167: Nuclear Cooperation-Ukraine; Extradition-China* (2016) [hereinafter Joint Standing Report] ¶ 3.10, http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024024/toc_pdf/Report167.pdf;fileType=application%2Fpdf. (Austl.) (acknowledging that serious concerns had been raised over the proposed Australia-China treaty, including whether there were adequate safeguards for among others, (a) the right to a fair trial; (b) the possible imposition of the death penalty; (c) evidential standards; (d) protection from torture, cruel, inhuman, humiliating treatment or punishment; (e) extradition of minors); see also Colin Packham, Philip Wen & Ben Blanchard, *Australia Cancels Vote on Extradition Treaty with China*, REUTERS, March 27, 2017, <http://www.reuters.com/article/us-australia-china-extradition/australia-cancels-vote-on-extradition-treaty-with-china-idUSKBN16Z03Y> (describing how political opposition, arising from concerns over China's humanitarian record, led to a cancellation of a parliamentary vote to ratify the extradition treaty); Elisa Nesossi, *The Stalled Australia-China Extradition Treaty*, E. ASIA FORUM (Apr. 27, 2017), www.eastasiaforum.org/2017/04/21-the-failed-australia-china-extradition-treaty/ (explaining that the differences between China and Australia's political and legal systems makes ratifying the extradition treaty a challenge for Australia).

64. Joint Communiqué, Daniel Jean, Nat'l Sec. Advisor to the Prime Minister of Can. & Wang Yongqing, Sec'y Gen. of the Cent. Political & Legal Affairs Comm'n of the Communist Party of China, 1st Canada-China High-Level National Security and Rule of Law Dialogue (Sept. 13, 2016), <https://pm.gc.ca/eng/news/2016/09/13/1st-canada-china-high-level-national-security-and-rule-law-dialogue>.

65. See Andrew Russell, *Canada-China Extradition Treaty: Here's What You Need to Know*, GLOB. NEWS (Sept. 22, 2016, 10:17 AM), <https://globalnews.ca/news/2953881/canada-china-extradition-treaty-heres-what-you-need-to-know/> ("It's impossible to imagine how you would have an extradition treaty that would line up with Canada's obligations to not send people to face the death penalty," Amnesty International secretary general Alex Neve told The Canadian Press.).

66. See Dan Levin, *Canada Agrees to Talks on Extradition Treaty with China*, N.Y. TIMES (Sept. 20, 2016), <https://www.nytimes.com/2016/09/21/world/americas/canada-agrees-to-talks-with-china-on-extradition.html> ("The ex-

Despite initial optimism about a possible Canada–China extradition treaty, in May 2017, Canada’s ambassador to Beijing announced that Canada was a “long, long way from negotiating an extradition treaty with China.”⁶⁷

Due to general unpopularity, any decision to enter into extradition negotiations with China entails a degree of political risk. This political risk exposure and the moral imperative argument advanced by human rights groups are powerful factors inhibiting Western governments from negotiating an extradition treaty with China.

B. Possible Legal Implications

Apart from the unpopularity of entering into an extradition treaty with China, States also have to consider that such an extradition arrangement, where there is a real risk that the fugitive’s human rights may be violated, can potentially breach their own human rights treaty obligations. The European Court of Human Rights (ECtHR) case of *Soering v. United Kingdom (Soering)*⁶⁸ establishes the legal basis for the link between human rights and extradition.⁶⁹ Although the a case was decided in the ECtHR, the approach adopted by the court has been accepted elsewhere⁷⁰ and bears consideration.

In *Soering*, Jens Soering, a national of West Germany, murdered his girlfriend’s parents in the U.S. state of Virginia and then fled to the United Kingdom. The United States requested his extradition and the United Kingdom acted on the request, extraditing Soering back to the United States. Soering then

traordinary weaknesses in China’s due process and fair trial rights are well documented,’ said Sophie Richardson, China director for Human Rights Watch.”).

67. *Id.*

68. *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) (1989).

69. See generally Dugard & Van den Wyngaert, *supra* note 23 (explaining the link between human rights and extradition); see also Matthew Bloom, Note, *A Comparative Analysis of the United States’s Response to Extradition Requests from China*, 33 YALE J. INT’L L. 177 (2008) (examining the connection between human rights concerns in China and the West’s cooperation with China on extradition).

70. Outside of the ECHR, the United Nations Human Rights Committee has accepted the *Soering* case’s reasoning in U.N. Human Rights Committee [UNHRC], *Ng v. Canada*, Comm. No. 469/1991, para. 11.8, U.N. Doc. A/49/40 (Nov. 5, 1993).

lodged a petition at the ECtHR under Article 3 of the European Convention on Human Rights (ECHR) on the basis that the United Kingdom was in violation of the prohibition of “inhuman or degrading treatment or punishment”⁷¹ by acting on the request. Soering argued that he would face “inhuman or degrading treatment or punishment,” as he faced the death penalty in Virginia. The ECtHR held that the United Kingdom was required by Article 3 of the ECHR not to extradite Soering to the United States as there was a real risk that he would be subjected to inhuman or degrading treatment by being kept on death row for a prolonged period.⁷²

The effect of *Soering* is that a State may breach the ECHR if it is foreseeable that an extradited individual could face ill treatment or punishment in the requesting State, even though such consequences would be outside the extraditing State’s jurisdiction. In the wake of *Soering*, it is now common practice for a host State to take into account the human rights practices of the requesting State, as well as its own obligations under international human rights law, when deciding whether to extradite an individual, to avoid a possible breach under the ECHR.⁷³

One may argue that an appropriate response to address the legal risks of a breach is to negotiate for stringent safeguards within the agreement itself. Government officials who advocate for, or defend, entering into an extradition treaty with China assert that that it is possible to negotiate an extradition treaty with China that is consistent with international human rights standards and conforms to the criminal justice standards of the host country.⁷⁴ However, while some coun-

71. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 30.

72. *Id.*

73. See Bloom, *supra* note 69, at 187 (“The legacy of the *Soering* case is that a requested state should take into account the human rights practices of the requesting state, as well as its own obligations under international human rights law, when deciding whether to extradite.”).

74. See Packham, *supra* note 63 (discussing Australia’s Foreign Minister Julie Bishop’s statement, “It has been in our national interest to have this agreement with China . . .” citing safeguards in place in the treaty that would prevent a prisoner from facing the death penalty upon his or her return to China). See also Joint Standing Report, *supra* note 63, ¶ 3.15 (“The AGD is satisfied that the process of negotiating each extradition decision on a case-by-case basis mitigates the risk: ‘it is open to the Australian government to have a conversation with the Chinese government to say, ‘In relation to this

tries, such as Spain and France have entered into extradition treaties with China,⁷⁵ it is apparent that this argument has thus far failed to hold sway in countries such as Australia, Canada, and the United States.

C. *The Way Forward?*

The absence of a Chinese extradition treaty does not mean that no fugitives are returned. There are several reasons why there remains significant pressure on States to explore alternative means to return Chinese fugitives, in the absence of a treaty.

The first is that States wish to avoid the reputational effects of being labelled a “safe haven” for Chinese fugitives.⁷⁶ Countries wish to demonstrate their commitment to the suppression of transnational crime and avoid an influx of Chinese fugitives arriving at that country’s shores. Second, an inability—or, from China’s perspective—the deliberate scuttling of China’s interests in securing a particular fugitive can potentially become an irritant and recurring point of tension in a

person that you want to have to go back to your country, we might need to have a set of assurances’ . . . The thing about extradition is that it is about what you can arrange for that particular person, so the minister has to be satisfied of the circumstances for that person going back into a country.”); Russell, *supra* note 65 (reporting Canadian Prime Minister Justin Trudeau’s statements on the putative Canada-China extradition treaty, implying it would not impugn on the values of Canadians.).

75. France and China signed an extradition treaty in March 2007. In the treaty, France will only extradite someone accused of a crime punishable by death if China guarantees that the person will not be executed. Extradition Treaty between the People’s Republic of China and the French Republic, , China–Fr., Mar. 20, 2007, http://www.npc.gov.cn/wxzl/gongbao/2008-06/03/content_1463233.htm. Spain and China signed an extradition treaty in 2005. See *China Ratifies Extradition Treaty with Spain*, XINHUA (Apr. 29, 2006), <http://www.china.org.cn/english/2006/Apr/167279.htm> . Portugal and China also signed and ratified an extradition treaty in 2008. Treaty between the Portuguese Republic and the People’s Republic of China on Extradition, China-Port., Jan. 31, 2007.

76. See, e.g., *Western Countries have Promised not to be Haven for Corrupt Chinese Fugitives, Says Beijing*, S. CHINA MORNING POST (Oct. 25, 2016, 11:03 PM), <http://www.scmp.com/news/china/policies-politics/article/2039843/western-countries-have-promised-not-be-haven-corrupt> (“Certain Western countries have clearly stressed that they do not want to become a haven for corrupt elements.”).

country's relationship with China.⁷⁷ In serious cases, it may potentially stymie other foreign policy objectives or hinder international cooperation on other matters between the host country and China.⁷⁸ Cooperating and returning certain fugitives to China through alternative means shows a country's willingness to meet China's interests—thereby winning China's appreciation and possible reciprocity in other matters.⁷⁹ It could also alleviate the significant diplomatic pressure brought to bear by China on the host country. Third, the host country may legitimately want to expel non-desirable Chinese fugitives for national security or other related reasons.⁸⁰ Such pressures

77. See, e.g., Tom Mitchell, Leslie Hook, Geoff Dyer & Jamil Anderlini, *Extradition Battle Looms over US-China Relations*, FIN. TIMES (Mar. 13, 2016), <https://www.ft.com/content/0830a420-e77a-11e5-bc31-138df2ae9ee6> (“The Chinese government has threatened to halt judicial co-operation with the US if a federal prosecutor does not agree to return one of Beijing’s most wanted men . . .”).

78. See, e.g., Kate O’Keeffe, Aruna Viswanatha & Cezary Podkul, *China’s Pursuit of Fugitive Businessman Guo Wengui Kicks Off Manhattan Caper Worthy of Spy Thriller*, WALL ST. J. (Oct. 22, 2017, 8:28 PM), <https://www.wsj.com/articles/chinas-hunt-for-guo-wengui-a-fugitive-businessman-kicks-off-manhattan-caper-worthy-of-spy-thriller-1508717977> (recounting the Chinese government’s efforts to extradite Guo Wengui, a Chinese businessman for allegations of corruption, and how the U.S. government’s refusal to hand Guo over has led to some diplomatic skirmishes); accord Nathan Vardi, *The Chinese Fugitive Living in a \$67 Million Manhattan Apartment*, FORBES (May 19, 2017), <https://www.forbes.com/sites/nathanvardi/2017/05/19/the-chinese-fugitive-living-in-a-67-million-manhattan-apartment/#3177eb36332c>.

79. See Seth Mydans, *20 Uighurs are Deported to China*, N.Y. TIMES (Dec. 19, 2009) [hereinafter Mydans, *20 Uighurs are Deported to China*], <http://www.nytimes.com/2009/12/20/world/asia/20uighur.html> (recounting Cambodia’s deportation of Uighurs to China ahead of a state visit to Cambodia by Xi Jinping, and noting the deportation was made under pressure from China, Cambodia’s biggest investor); Seth Mydans, *After Expelling Uighurs, Cambodia Approves Chinese Investments*, N.Y. TIMES (Dec. 21, 2009) [hereinafter Mydans, *After Expelling Uighurs, Cambodia Approves Chinese Investments*], <http://www.nytimes.com/2009/12/22/world/asia/22cambodia.html> (drawing a causal connection between the deportation of Uighurs and \$1 billion in new Chinese investment in Cambodia).

80. NAT’L SEC. COUNCIL, INTERNATIONAL CRIME CONTROL STRATEGY 41–42 (May 1997), <http://clinton4.nara.gov/media/pdf/iccs.pdf> (“Our international obligations and the protection of our citizens demand that we rid our nation of dangerous foreign criminals.”).

have led to countries' relying on deportation measures to return fugitives⁸¹ to China—a practice explored below.

IV. THE DEPORTATION OF FUGITIVES TO CHINA

A. *Reliance on National Immigration Laws*

There are two ways by which States employ national immigration laws to return a fugitive to a requesting State. The first—exclusion—prevents a known fugitive from entering the State. This is defined as the “ejection of [a non-national] by a State on account of security or other significant concerns when he is seeking admission or asylum at a border or other port of entry.”⁸²

The second—deportation—is the expulsion of a fugitive already within the borders of the host State by way of that State's immigration laws.⁸³ Deportation is executed by means of an expulsion or deportation order issued by the State requiring the alien to leave its sovereign territory “on the ground that he violated its immigration laws upon entering the territory, is otherwise illegally within the territory, or while present has proven to be a public menace or security threat.”⁸⁴ Unlike extradition procedures, which are usually laid down in treaties, exclusion and deportation procedures are based on national legislation. The effect, however, is the same as extradition. All procedures expel the fugitive to the pursuing state. This similarity is why the use of immigration law to repatriate fugitives is also described as *de facto* extradition.⁸⁵ This use of deportation

81. Discussion of the various divergent approaches taken by states is beyond the scope of this Note. For a detailed discussion of various other approaches, see Bloom, *supra* note 69.

82. SADOFF, *supra* note 12, at 397.

83. See generally *id.* at 391–453 (describing immigration-law approaches as a “full-scale alternative” method to extradition).

84. *Id.* at 398.

85. A note on the use of terminology here. Some authors have suggested that there is a distinction between the terms “disguised extradition” and “*de facto* extradition.” The expression “disguised extradition” has been said to carry a negative connotation since it implies an ulterior motive which may indicate an abuse of right or bad faith. In contrast, the term “*de facto* extradition” has a neutral connotation since it implies the recognition of an additional consequence of the expulsion of an alien as a factual matter. While it is a worthwhile study to examine whether a case constitutes a “disguised extradition” or a “*de facto* extradition,” doing so is beyond the ambit of this Note. As such, this Note uses the neutral term “*de facto* extradition” in all its

as a means of *de facto* extradition to return Chinese fugitives is the subject of interest here.

B. *Case Studies*

It is important to move the discussion from concept to practice to fully understand the context in which *de facto* extradition of Chinese fugitives takes place, and to appreciate the issues that may arise. This Note draws examples from Singapore, the United States, Canada, and Australia—all of which do not have an extradition treaty with China but have deported fugitives to China under various circumstances. In reality, it is difficult to know the frequency with which deportation amounting to *de facto* extradition actually takes place because deportation is ordinarily treated as a routine administrative procedure by the State. As such, it may not attract media attention—unless “the deportee is a well-known figure or has been associated with activities of an extraordinary nature.”⁸⁶ Indeed, this was the case for most, if not all, of the examples cited below.

1. *Singapore*

The principal legislation in Singapore governing the extradition of fugitives to and from foreign countries is the Singaporean Extradition Act.⁸⁷ Under this Act, the extradition of a fugitive who is suspected of being in, or on the way to, Singapore is possible if there is an extradition treaty or arrangement between the requesting State and Singapore and the requirement of dual criminality is met.⁸⁸ As with most commonwealth

references as it is deliberately refraining from making a value judgment about the true nature and purpose of each case.

86. IVAN ANTHONY SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 87 (1971).

87. Extradition Act of 1968 (rev. 2000), c. 103 (Sing.), <https://sso.agc.gov.sg/Act/EA1968>.

88. *Id.* § 2(1)(b) (restricting extraditable crimes to those that would violate the laws of Singapore); *id.* § 7(2) (restricting extradition to circumstances where provision is made by a law of that state or through an extradition treaty with Singapore). Singapore has extradition treaties with the United States, Hong Kong, and Germany, and extradition arrangements with 40 declared Commonwealth countries, including Canada, under the London Scheme for extradition within the Commonwealth. Singapore also has special extradition arrangements with Malaysia and Brunei based on the endorsement of arrest warrants. CITE.

countries, extradition in Singapore entails a mix of judicial and executive discretion.⁸⁹

The Immigration Act (IA)⁹⁰ contains Singapore's immigration laws and the relevant regulations thereunder. Immigration laws and policies, including border controls, are administered by the Ministry for Home Affairs and its specialized agency, the Immigration and Checkpoints Authority.⁹¹ The provisions in the Immigration Act and its regulations enable the immigration authorities to deport individuals classified as a "prohibited immigrant,"⁹² or otherwise undesirable or prejudicial to public security in Singapore.⁹³

a. *Li Huabo*

Li Huabo (Li) was accused of embezzling more than RMB 90 million (equivalent to USD 14.5 million) from the Chinese Government.⁹⁴ Li was a section director at Poyang County Fi-

89. SATYADEVA BEDI, *EXTRADITION: A TREATISE ON THE LAWS RELEVANT TO THE FUGITIVE OFFENDERS WITHIN AND WITH THE COMMONWEALTH COUNTRIES* 141 (2002).

90. Immigration Act of 1959 (rev. 2008), c. 133 (Sing.), <https://sso.agc.gov.sg/Act/IA1959>.

91. See *Mission, Vision and Values*, IMMIGRATION & CHECKPOINTS AUTH., https://www.ica.gov.sg/aboutus/aboutus_mission (last visited July 14, 2018) ("The Immigration & Checkpoints Authority is responsible for securing Singapore's borders against the entry of undesirable people and cargo through land, air and sea checkpoints.").

92. See Immigration Act of 1959 (rev. 2008), c. 133, § 8(2) (Sing.) (decreeing that no prohibited immigrants may enter the country).

93. See Immigration Regulations, c. 133, § 17(a)–(b) (2009) (Sing.) (stating that the Controller of Immigration has grounds to cancel a pass ordinarily entitling an immigrant to legally stay in Singapore, if the Controller is satisfied that the holder of the pass is a prohibited immigrant, or his presence is undesirable or would be prejudicial to the public security in Singapore).

94. See Mimi Lau, *China Repatriates No 2 'Sky Net' Fugitive Official who Fled to Singapore After Alleged 94m Yuan Fraud*, S. CHINA MORNING POST (May 10, 2015, 5:23 AM), <http://www.scmp.com/news/china/policies-politics/article/1791773/china-repatriates-no-2-sky-net-fugitive-official-who>; see also *Wanted Economic Fugitive Returned to China*, XINHUA (May 9, 2015, 5:39 PM), http://news.xinhuanet.com/english/2015-05/09/c_134224509.htm (describing the allegations against Li and Li's return from Singapore to China through the carrying out of "cooperative law enforcement."); Sha Oster & Andrea Tan, *Stealing Away: A Former Bureaucrat in One of China's Poorest Regions is Accused of Embezzling Millions and Fleeing the Country. Is He a Symbol of Chinese Corruption—or a Victim of it?*, BLOOMBERG BUSINESSWEEK, Apr. 1, 2013, at

nance Bureau (PCFB) in Jiangxi, China, reportedly earning about RMB 3000 a month.⁹⁵ In his capacity as Section Director, Li controlled bank accounts belonging to PCFB.⁹⁶ Sometime in 2010, Li began the process of moving to Singapore and applying for Singaporean permanent residency (PR) through the Contact Singapore Global Investor Programme,⁹⁷ which conferred PR status on high net-worth individuals that invested large sums in Singapore. Li subsequently invested some SGD 1.5 million (equivalent to RMB 7.5 million and USD 2.2 million at the time) in an approved fund, resigned from his job, and moved from China to Singapore with his family in January 2011 after obtaining his PR. In February 2011, a police report was filed based on confidential information received from the Singapore Suspicious Transaction Reporting Office,⁹⁸ as well as an Interpol Red Notice, stating that Li had illegally moved the benefits of criminal conduct from China to Singapore.⁹⁹

Li was subsequently charged in the Singaporean Subordinate Court¹⁰⁰ for dishonestly receiving stolen prop-

71–73 (detailing the allegations against Li and the process he undertook to leave China for Singapore).

95. See Lau, *supra* note 96.

96. Public Prosecutor v. Li Huabo [2013] SGDC 242, [4]–[6] (Sing.).

97. *Global Investor Programme*, CONTACT SING., <https://www.contactsingapore.sg/gip> (last visited July 14, 2018).

98. The Suspicious Transaction Reporting Office (STRO) is established pursuant to section 3A of the Singapore Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act, (rev. 2000) c. 65A. STRO is the central agency in Singapore for receiving, analysing and disseminating reports of suspicious transactions, known as Suspicious Transaction Reports (STRs). *Suspicious Transaction Reporting Office (STRO)*, COMMERCIAL AFFAIRS DEP'T, SING. POLICE FORCE, <https://www.police.gov.sg/about-us/organisational-structure/specialist-staff-departments/commercial-affairs-department/aml-cft/suspicious-transaction-reporting-office> (last visited July 14, 2018). STRO turns raw data contained in STRs into financial intelligence that could be used to detect money laundering, terrorism financing and other criminal offences. It also disseminates financial intelligence to relevant enforcement and regulatory agencies.

99. Public Prosecutor v Li Huabo [2013] SGDC 242, [15] (Sing.).

100. The Singapore Subordinate Court (now known as the Singapore State Court as of 2014) is one of two tiers of the Court system in Singapore. It functions as the lower Court, while the Supreme Court of Singapore (comprising the High Court and the Court of Appeal) is the superior Court. See *Singapore Judicial System*, SUPREME COURT SING., <https://www.supremecourt.gov.sg/about-us/the-supreme-court/singapore-judicial-system> (last visited

erty.¹⁰¹ During the Singaporean police investigations, Li admitted that he had misappropriated funds from the PCFB accounts and transferred them through a series of accounts to a bank account in Singapore.¹⁰² The prosecution called an investigator from China as a witness who gave evidence that his investigations showed that Li had embezzled funds in China and had recruited another accomplice to transfer his stolen property.¹⁰³ In 2013 the trial court convicted Li on these offences and he was sentenced to fifteen months' imprisonment.¹⁰⁴ The High Court upheld this conviction.¹⁰⁵ After serv-

July 14, 2018). In relation to criminal cases, the State Courts can try offences where the maximum imprisonment term does not exceed 10 years or are punishable with a fine only. It has powers to pass any of the following sentences: (a) imprisonment for a term not exceeding 10 years; (b) fine not exceeding S\$30,000; (c) impose up to 12 strokes of the cane; or (d) any lawful sentence combining any of the sentences which it is authorised by law to pass. Except where expressly provided for by law, any offences which may result in sentences in excess of the above limits must be tried in the High Court. See *Overview of Criminal Justice Process*, STATE COURTS SING., <https://www.statecourts.gov.sg/CriminalCase/Pages/Profile.aspx> (last visited July 14, 2018); Criminal Procedure Code (rev. 2012), c. 68, § 8 (Sing.), <https://sso.agc.gov.sg/Act/CPC2010>. See, e.g., Mavis Chionh, *The Development of the Court System*, in *ESSAYS IN SINGAPORE LEGAL HISTORY* 93–137 (Kevin Y.L. Tan ed., 2005) (describing the history and development of the Singapore Court system from 1819 to 2005).

101. The offence of “dishonestly receiving stolen property” is set out at section 411(1) of the Singapore Penal Code (rev. 2008), c. 224. It states that “[w]hoever dishonestly receives or retains any stolen property, knowing or having reason to believe the property to be stolen property, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.” The elements of the offence are as follows: (a) the offender must have dishonestly received or retained the property; (b) the offender must have had knowledge, or reason to believe, that the property was stolen; and (c) the property must be “stolen property” within the meaning of section 410 of the Penal Code. In turn, section 410 of the Penal Code defines “stolen property” as “[p]roperty the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which criminal breach of trust or cheating has been committed.”

102. See *Public Prosecutor v Li Huabo* [2013] SGDC 242, [17]–[29] (Sing.) (addressing the “voluntariness” of the admission in the police statement and concluding that it had been given voluntarily, despite Li saying he had been threatened into giving the inculpatory statement by the recording officer).

103. *Id.* at [33].

104. *Id.* at [2].

105. *Li Huabo v. Public Prosecutor* [2014] SGHC 133, [22] (Sing.).

ing his term of imprisonment in Singapore, Li was deported back to China on May 9, 2015.¹⁰⁶ In January 2017, media reports revealed that Li had been sentenced to life imprisonment in China for charges of corruption.¹⁰⁷ Subsequent media reports also noted that Li's assets in Singapore totaling RMB 12 million (SGD 1.73 million) had been confiscated and returned to China.¹⁰⁸

There was extensive bilateral cooperation on the part of the Singaporean and Chinese authorities in three respects. First, a Chinese investigator appeared as a prosecution witness in the Singaporean criminal proceedings and testified that the Chinese investigations revealed that Li had committed the offence of embezzlement in China.¹⁰⁹ The fact that the Chinese authorities consented to have an investigator attend the criminal proceedings and testify under oath underscores the seriousness with which the Chinese regarded Li's prosecution in the Singaporean courts. Second, Singapore assisted in the forfeiture and eventual return of Li's assets in Singapore to China. Under Singapore's Mutual Assistance in Criminal Matters Act,¹¹⁰ a country can request assistance for the enforcement of a foreign confiscation order against property that is reasonably believed to be located in Singapore.¹¹¹ Third, there was cooperation between the state authorities to facilitate Li's physical return.

106. *Former Chinese Govt Official Li Huabo Sent Back to China*, CHANNEL NEWSASIA (May 10, 2015).

107. *Ex-Chinese Govt Official who Fled to Singapore Sentenced to Life Imprisonment*, TODAY (Jan. 23, 2017), <http://www.todayonline.com/china/india/china/ex-chinese-govt-official-who-fled-singapore-sentenced-life-imprisonment>.

108. Zhang Yan, *Singapore Returns Confiscated Assets*, CHINA DAILY (Mar. 11, 2017, 6:57 AM), http://www.chinadaily.com.cn/china/2017-03/11/content_28515883.htm.

109. *Public Prosecutor v. Li Huabo* [2013] SGDC 242, [33] (Sing.).

110. *See* Mutual Assistance in Criminal Matters Act (rev. 2001), c. 190A, § 16(2) (Sing.), <https://sso.agc.gov.sg/Act/MACMA2000>. (Unlike extraditions, Singapore can provide mutual legal assistance even in the absence of a mutual legal assistance treaty (MLAT). If there is no MLAT between the requesting country and Singapore, the requesting country can receive assistance if it provides an undertaking of reciprocity.)

111. *Id.* § 29.

2. *United States*

The U.S. government openly acknowledges that immigration laws can be used to “rid [the] country of dangerous criminal aliens and fugitives from foreign justice in certain circumstances where formal extradition is not available.”¹¹² In 1999, then-Deputy Legal Adviser to the U.S. Department of State, Jamison S. Borek, said “[e]xtradition is the only formal and organized way to seek the return of people for trial. In some cases, deportation can achieve the same effect, but it is more an ad-hoc and occasional process, although sometimes very effective.”¹¹³ In the U.S. Attorneys’ Manual chapter on International Extradition and Related Matters, deportation is recognized as an alternative method to extradition if the fugitive is not extraditable for a number of reasons—including that the crime is not extraditable or that the extradition request has been denied.¹¹⁴

With respect to United States and Chinese law enforcement cooperation, the United States and China signed a Mutual Legal Assistance Agreement (MLAA) in 2000 which allows for “assistance pursuant to any other arrangement, agreement, or practice which may be applicable.”¹¹⁵ More recently, on

112. NAT’L SEC. COUNCIL, *supra* note 802; *see also* Letter from James J. Foster, Deputy Chief, U.S. Mission to the European Union, to Romano Prodi, President, Comm’n of the European Comtys. (Oct. 16, 2001), www.statewatch.org/news/2001/nov/06Ausalet.htm (conveying proposals for cooperation between the United States and the European Union on immigration policies and anti-terrorism efforts, and requesting that the EU explore expulsion and deportation as alternatives to extradition).

113. *International Law: The Importance of Extradition: Hearing before the Subcomm. on Criminal Justice, Drug Policy & Human Res.*, 106th Cong. (1999), <https://www.gpo.gov/fdsys/pkg/CHRG-106hhrg63238/html/CHRG-106hhrg63238.htm> (The statement made by Jamison S. Borek was made in the context of a sub-committee hearing on the importance of extradition to win the war on drugs. While acknowledging that extradition was an essential tool to suppress violent crime, terrorism, drug trafficking and laundering of the proceeds of crime, she noted that deportation would achieve the same effect.).

114. *See* U.S. DEP’T OF JUSTICE, U. S. ATTORNEYS’ MANUAL § 9-15.650 (2018), <https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters#9-15.650> (The U.S. Attorney’s Manual provides internal Department of Justice guidelines on matters falling under the DOJ’s purview, such as extradition.).

115. Agreement Between the Government of the United States of America and the Government of the People’s Republic of China on Mutual Legal

April 9, 2015, the State Councilor and Minister of Public Security of China, Guo Shengkun, and then-U.S. Secretary of Homeland Security, Jeh Johnson, agreed to increase cooperation on repatriation and fugitive cases to facilitate such fugitives' return.¹¹⁶ On October 4, 2017, Guo met with U.S. Attorney General, Jefferson B. Sessions, together with acting Secretary of Homeland Security, Elaine Duke, in the first U.S.-China Law Enforcement and Cybersecurity Dialogue (LE&CD).¹¹⁷ Under the Summary of Outcomes of the LE&CD, both sides agreed to "cooperate to prevent each country from becoming a safe haven for fugitives and [to] identify viable fugitive cases for cooperation."¹¹⁸ As the 1996 amendments to 18 U.S.C. § 3181 and § 3184 permit the United States to extradite, in the absence of a treaty, only in one narrow exception,¹¹⁹ there is a real possibility that deportation is the choice method of cooperation for returning the majority of fugitives to China.¹²⁰

In the United States, immigration law and policies are overseen by the Department of Homeland Security (DHS)¹²¹

Assistance in Criminal Matters, China-U.S., June 19, 2000, T.I.A.S. No. 13,102.

116. Press Release, U.S. Dep't of Homeland Sec., Fact Sheet: Meeting between U.S. Secretary of Homeland Security Jeh Johnson and China's Minister of Public Security Guo Shengkun (Apr. 12, 2015), <https://www.dhs.gov/news/2015/04/12/fact-sheet-meeting-between-us-secretary-homeland-security-jeh-johnson-and-chinas>.

117. Press Release, U.S. Dep't of Justice, First U.S.-China Law Enforcement and Cybersecurity Dialogue: Summary of Outcomes (Oct. 6, 2017), <https://www.justice.gov/opa/pr/first-us-china-law-enforcement-and-cybersecurity-dialogue>.

118. *Id.*

119. The narrow exception allows extradition in the absence of a treaty if a foreign national has committed crimes of violence against nationals of the United States in a foreign country. 18 U.S.C. §§ 3181, 3184 (1996).

120. The basis for this is that it is this author's view that as most of the high-profile fugitives wanted by China stand accused or convicted of economic crimes such as bribery or money-laundering etc., such crimes are not likely to fit into the criteria of a crime of violence against nationals of the United States to fall within the exception allowing for extradition in the absence of a treaty.

121. One of the objectives of the DHS is the "smart and effective enforcement of U.S. immigration laws." *Mission*, HOMELAND SEC., <https://www.dhs.gov/mission> (last visited July 14, 2018).

and its specialized immigration organ, the Citizenship and Immigration Services (USCIS).¹²²

a. *Kuang Wanfang & Seven Others*

In September 2015, there were media reports that the U.S. authorities deported a criminal suspect to China.¹²³ Kuang Wanfang (Kuang) was convicted by the U.S. courts in August 2008 on charges of racketeering, money laundering, and international transportation of stolen property, among others.¹²⁴ Kuang was involved with co-conspirators in an “elaborate scheme to defraud the Bank of China of at least \$485 million.”¹²⁵ Kuang and her associates facilitated a scheme to steal and launder money from the Bank of China through Hong Kong, Canada, and the United States.¹²⁶ They also “violated U.S. immigration laws by entering [the United States] illegally and then securing U.S. citizenship and passports through fraudulent means.”¹²⁷ At the trial, the Chinese Ministry of Justice and Public Security provided assistance by producing evidence and making witnesses available for testimony, both at the trial and via videotaped depositions.¹²⁸ Kuang was stripped of her U.S. citizenship through denaturalization proceedings and deported to China at the end of her eight-year imprisonment sentence.¹²⁹ Media reports revealed that Kuang would face investigation by Chinese authorities for graft and

122. According to the mission statement of the USCIS, it administers the United States’ immigration system and is the government agency that oversees lawful immigration to the United States. See *About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/aboutus> (last visited July 14, 2018).

123. See, e.g., *Another ‘Sky Net’ Success: US Returns Woman Fugitive to Face Graft, Fraud Charges in China*, S. CHINA MORNING POST (Sept. 24, 2015, 7:04 PM), <http://www.scmp.com/news/china/policies-politics/article/1861115/another-sky-net-success-us-returns-woman-fugitive-face>.

124. Press Release, U.S. Dep’t of Justice, *Former Bank of China Managers and Their Wives Sentenced for Stealing More than \$485 Million, Laundering Money Through Las Vegas Casinos* (May 6, 2009), <https://www.justice.gov/opa/pr/former-bank-china-managers-and-their-wives-sentenced-stealing-more-485-million-laundering>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

bribery charges upon her return.¹³⁰ However, as the Chinese authorities have not made any official statements on this case, such second-hand speculations cannot be verified.

Seven other Chinese nationals were deported together with Kuang.¹³¹ The U.S. authorities did not release their names but said that “these individuals are among ICE’s [Immigration and Customs Enforcement] priorities for immigration enforcement due to their serious criminal histories.”¹³² The Chinese authorities also declined to answer questions about the other seven suspects.¹³³ In all likelihood, these suspects were listed under ICE’s Priority Enforcement Program as individuals targeted for removal as a result of being convicted of certain listed offences.¹³⁴

b. *Yang Xiuzhu*

Yang Xiuzhu was deputy mayor in Wenzhou, China, until she fled China in 2003 after the Chinese authorities began investigating her alleged criminal activities. The Chinese Central Commission for Discipline Inspection accused her of embezzling USD 39 million.¹³⁵ After she was charged, Yang fled to various countries including Hong Kong, Singapore, France, the Netherlands, Italy, and the United States to evade the Chinese authorities.¹³⁶ In 2014, Yang was detained by U.S. immi-

130. See James T. Areddy, *U.S. Deports More Criminal Suspects to China*, WALL ST. J. (Sep. 24, 2015, 5:00 PM), <https://www.wsj.com/articles/another-chinese-fugitive-deported-by-u-s-1443087121>.

131. *Id.*

132. *Id.*

133. *Id.*

134. The Priority Enforcement Program (PEP) was a program run by the U.S. Immigration and Customs Enforcement from 2015 to 2017. Under the PEP, persons such as aliens who have attempted to illegally enter the United States are prioritized for removal from the United States. *Priority Enforcement Program*, U.S. IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., <https://www.ice.gov/pep> (last visited July 14, 2018).

135. See Sue-Lin Wong, *China’s Most-Wanted Corruption Suspect Surrenders After 13 Years Abroad*, REUTERS, Nov. 16, 2016, <https://www.reuters.com/article/us-china-corruption-usa/chinas-most-wanted-corruption-suspect-surrenders-after-13-years-abroad-idUSKBN13B0UX>.

136. See Laurie Chen, *After 13 Years on the Run, China’s Most-Wanted Fugitive Jailed for Graft*, S. CHINA MORNING POST (Oct. 13, 2017, 7:03 PM), <http://www.scmp.com/news/china/policies-politics/article/2115279/after-13-years-run-chinas-most-wanted-fugitive-jailed> (detailing the crimes and flight of Yang Xiuzhu).

gration officers for violating immigration regulations.¹³⁷ Although Yang initially applied for asylum in the United States, she eventually withdrew her application and agreed to surrender to the Chinese authorities.¹³⁸ On November 16, 2016, Yang was deported to Beijing.¹³⁹ She was later sentenced to eight years' imprisonment by the Chinese courts.¹⁴⁰

c. *Zhao Shilan*

Zhao Shilan (Zhao) is the ex-wife of a former Chinese official, Qiao Jianjun (Qiao).¹⁴¹ Sometime in 2009, Zhao and Qiao applied for U.S. immigrant visas under the EB-5 program, which allows foreigners to obtain green cards for themselves and their families if they invest at least USD 500,000 in job-creating ventures in the United States.¹⁴² For purposes of the application, Zhao submitted "a false marriage certificate and documents that purportedly showed the source of money used for her investment."¹⁴³ U.S. authorities alleged that Qiao

137. See Shannon Tiezzi, *China's 'Most Wanted' Fugitive Nears Deportation From US*, DIPLOMAT (June 12, 2015), <https://thediplomat.com/2015/06/chinas-most-wanted-fugitive-nears-deportation-from-us/> (describing the allegations against Yang and the difficulties China faces in repatriating fugitives from the United States to China).

138. See Chen, *supra* note 139.

139. See Simon Denyer, *China's Most-Wanted Corruption Suspect Repatriated from U.S. After 13 Years on the Run*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/world/chinas-most-wanted-corruption-suspect-repatriated-from-us-after-13-years-on-the-run/2016/11/16/b0f58b0a-abfd-11e6-8410-7613f8c1dae8_story.html?utm_term=.B52c3a5c338a (indicating that Yang Xiuzhu arrived at the Beijing Capital International Airport on Nov. 16, 2016).

140. See Chen, *supra* note 139; see also *China's Most-Wanted Fugitive Jailed for Eight Years for Graft*, REUTERS, Oct. 13, 2017, <https://www.reuters.com/article/us-china-corruption/chinas-most-wanted-fugitive-jailed-for-eight-years-for-graft-idUSKBN1CI0RK> (reporting that the People's Intermediate Court in Hangzhou had sentenced Yang to eight years' imprisonment and a fine of 800,000 yuan (\$121,500)).

141. Press Release, U.S. Dep't of Justice, *Fugitive Chinese Official and Former Wife Named in Grand Jury Indictment Charging Immigration Fraud and Money Laundering* (Mar. 17, 2015), <https://www.justice.gov/usao-cdca/pr/fugitive-chinese-official-and-former-wife-named-grand-jury-indictment-charging>.

142. *Id.*

143. Press Release, U.S. Immigration & Customs Enf't, *Former Wife of Fugitive Chinese Official Pleads Guilty to Conspiring to Commit Immigration Fraud Related to EB-5 Investor Visa* (Jan. 10, 2017), <https://www.ice.gov/>

had embezzled the monies used for the U.S. investments from a state-owned grain reserve.¹⁴⁴ They also alleged that Zhao and Qiao “caused criminal theft proceeds to be transferred from China through a money trail leading to Hong Kong, then to Canada, and finally to the U.S. for the purchase of a residence in Newcastle, Washington.”¹⁴⁵ On March 17, 2015, Zhao and Qiao were arrested by the U.S. authorities and indicted on charges of immigration fraud and money laundering.¹⁴⁶ At the time of writing, Qiao is at large and is wanted by federal authorities.¹⁴⁷ Zhao pled guilty on January 10, 2017 to one count of conspiracy to commit immigration fraud by submitting false documents to federal authorities, and, “[a]s part of a plea agreement with prosecutors . . . agreed to cooperate with the government’s investigation into [the] matter.”¹⁴⁸ She also agreed to the forfeiture of property.¹⁴⁹

The Chinese Supreme People’s Procuratorate and Ministry of Public Security also aided with the U.S. investigation. According to the head of China’s Central Commission for Discipline Inspection, Fu Kui, “[t]he reason the U.S. was able to indict [Zhao] is because China provided information and evidence . . . The indictment in itself is a support to China’s effort to hunt down fugitives overseas.”¹⁵⁰ Professor Margaret Lewis

news/releases/former-wife-fugitive-chinese-official-pleads-guilty-conspiring-commit-immigration.

144. See Ron Cheng, *The EB-5 Program and China’s Fugitives*, FORBES (May 30, 2017, 1:39 PM), <https://www.forbes.com/sites/roncheng/2017/05/30/the-eb-5-program-and-chinas-fugitives/#1944016512c7> (“Zhao obtained derivative immigration status for Jianjun Qiao, whom Chinese authorities alleged had embezzled funds from the state-owned grain reserve”).

145. *Id.*

146. Press Release, U.S. Dep’t of Justice, *supra* note 144.

147. Press Release, U.S. Immigration & Customs Enft, *supra* note 143.

148. *Id.*

149. See Frank Shyong, *Ex-Wife of Fugitive Chinese Official will Forfeit Millions of Dollars Worth of San Gabriel Valley Property in Visa Fraud Case*, L.A. TIMES (Jan. 11, 2017, 3:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-wife-fugitive-chinese-20170110-story.html> (“The ex-wife of China’s third-most-wanted government official will forfeit an estimated \$28 million in San Gabriel Valley property after pleading guilty. . .to defrauding immigration officials as part of a scheme to escape to the U.S. with stolen Chinese public funds. . .”).

150. *A Secretive Agency Hunts for China’s Crooked Officials Worldwide*, MAC. DAILY TIMES (Sept. 2, 2015), <https://macaudailytimes.com.mo/a-secretive-agency-hunts-for-crooked-officials-worldwide.html>.

writes, “[t]he Chinese government’s receptivity to sharing evidence, conducting joint investigations and engaging in other forms of legal cooperation is often linked to an ultimate goal of securing the return of Chinese criminal suspects that have fled abroad.”¹⁵¹ Although Zhao’s sentence is still pending at the time of the writing of this Note, she will also likely be deported back to China at the end of her U.S. sentence.¹⁵²

d. *Zhu*¹⁵³

In June 2017—in a case hailed as the “first fugitive extradition from [the United States]” under the Trump Administration—a suspect identified only by his surname Zhu was deported back to China for overstaying his visa.¹⁵⁴ He is wanted by China for offences which the Chinese Ministry of Public Security describes as a “violation of personal rights.”¹⁵⁵ Video footage showed a hooded Zhu stepping off a United Airlines flight at the Beijing airport, “flanked by two Chinese police officers.”¹⁵⁶ At the time of writing, there were no known further media reports on criminal proceedings against Zhu in China.

e. *Zhou Ziming*

On August 16, 2017 ICE reported that it had deported a Chinese fugitive, Zhou Ziming (Zhou), to China to face charges of “contractual fraud and defrauding of banks or other monetary institutions of loans.”¹⁵⁷ He allegedly participated in fraud, embezzlement, misappropriation of funds,

151. Margaret K. Lewis, *Mutual Legal Assistance and Extradition: Human Rights Implications*, CHINA RIGHTS FORUM, no. 2, 2007, at 83, 89.

152. See Tim Reid, *U.S. May Deport to China Indicted Ex-Wife of Fugitive Chinese Official*, REUTERS, Mar. 19, 2015, <https://www.reuters.com/article/us-usa-china-deportation/u-s-may-deport-to-china-indicted-ex-wife-of-fugitive-chinese-official-idUSKBN0ME2M320150319> (discussing an Assistant U.S. Attorney’s statement that she could be deported for violating immigration laws).

153. Full name unknown.

154. Wen, *supra* note 11.

155. *Id.*

156. *Id.*

157. Press Release, U.S. Immigration & Customs Enft, ICE Deports Chinese Man Wanted for Multimillion Dollar Loans Scam (Aug. 18, 2017), <https://www.ice.gov/news/releases/ice-deports-chinese-man-wanted-multi-million-dollar-loans-scam>.

among other crimes, in Hubei, China, before fleeing to the United States.¹⁵⁸ Zhou entered the United States lawfully but subsequently remained in the United States past the expiration of his visa.¹⁵⁹ It bears noting that ICE's Enforcement and Removal Operations (ERO) expressly stated that it deport Zhou to enable him to face criminal charges in China.¹⁶⁰ In other words—this is an acknowledged case of *de facto* extradition. According to the public statement issued by an ERO official on August 18, 2017, the authorities affirmed their “commit[ment] to removing foreign fugitives from the United States who are being sought in their native countries for serious crimes The return of Mr. Zhou to face criminal charges in China is the result of ongoing cooperation between ICE and China. Foreign fugitives should be put on notice—they will find no refuge here.”¹⁶¹

3. *Canada*

Canada's Extradition Act stipulates the legal bases on which persons located in Canada can be extradited.¹⁶² Canada only extradites persons to countries that are “extradition partner[s]” within the definition of the Extradition Act.¹⁶³ Such extradition partners include countries with which Canada has an extradition treaty, as well as countries with which Canada has entered into a case-specific agreement.¹⁶⁴ Canada's extradition process entails a mix of executive and judicial discretion, involving three key stages. First, the Minister of Justice must determine whether to authorize the commencement of extradition proceedings.¹⁶⁵ Second, the Canadian courts will determine whether there is sufficient evidence to justify the person's extradition.¹⁶⁶ Third, once committed for extradi-

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Extradition Act, S.C. 1999, c 18 (Can.).

163. *Id.* § 3 (“A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner”).

164. *Id.* § 2.

165. The Minister must first issue an authority to the Attorney General to proceed in seeking a court order for the extradition of the concerned fugitive. *Id.* § 15.

166. *Id.* § 29.

tion, the Minister for Justice would then decide whether to order the person's surrender.¹⁶⁷ Canada's Immigration and Refugee Protection Act¹⁶⁸ and its regulations¹⁶⁹ contain its primary legislation pertaining to deportation. This legislation sets out the procedures by which a removal order is carried out.¹⁷⁰

Although Canada does not have an extradition treaty with China—it has a bilateral agreement with China to cooperate in the sharing of evidence related to criminal matters known as the Treaty Between Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters (Canada-China MLA Treaty).¹⁷¹ The Canada-China MLA Treaty provides reciprocal arrangements for Canada and China to share evidence to assist in criminal investigations and prosecutions.¹⁷²

a. *Lai Changxin*

Lai Changxin (Lai) was a multi-billionaire accused of one of China's biggest corruption scandals.¹⁷³ He fled to Canada in 1999 and sought asylum status there.¹⁷⁴ His deportation order was eventually upheld, and Lai was deported to China in 2011 after China provided diplomatic reassurances to Canada that Lai would not be tortured or executed upon his return.¹⁷⁵ The assurances provided by the Chinese government were ex-

167. *Id.* § 40. In particular, § 40(3) empowers the Minister to “seek any assurances that the Minister considers appropriate from the extradition partner” before he issues the order of surrender. § 44 also sets out the grounds on which the Minister must refuse to issue the order of surrender.

168. Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.).

169. Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.).

170. Immigration and Refugee Protection Act, S.C. 2001, c 27, §§ 48(1)–50 (Can.).

171. Treaty Between Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, Can.–China, July 29, 1994, 1995 Can. T.S. No. 29.

172. *Id.* art. 2.

173. See Edward Wong, *Former Insider Indicted in Chinese Corruption Scandal*, N.Y. TIMES (Dec. 30, 2011), <https://www.nytimes.com/2011/12/31/world/asia/lai-changxing-indicted-in-china.html> (describing the Chinese authorities accusations against Lai).

174. *Id.*

175. Sui-Lee Wee, *China Hails Canada Decision to Extradite Fugitive*, REUTERS, July 21, 2011, <https://www.reuters.com/article/us-china-canada-lai-idUSTRE76L0FL20110722>.

amined by the Federal Court of Canada, which found that the assurances obtained were strict, clear, and unequivocal,¹⁷⁶ and were therefore sufficient to ensure that Lai's deportation would not "shock the conscience of Canadians."¹⁷⁷

In an interesting addendum to this case—in 2017, six years after Lai was deported to China, Lai's family accused Canada of failing to ensure that China would deal with Lai's case fairly.¹⁷⁸ In response, the Canadian government countered that Beijing only gave Canadian officials the right to monitor Lai before he went to trial, and that Canadian obligations ended when Lai was sentenced in 2012.¹⁷⁹

C. *Lessons Learnt*

The cases demonstrate that there are be variations in the way deportation takes place—voluntary deportation (Yang) in which the fugitive-deportee voluntarily agrees to be repatriated back to China; deportation following criminal prosecution (Li, Zhao, Kuang) whereby the host State prosecutes the fugitive for offences committed within its jurisdiction, and reports the offender to China at the expiration of the sentence; deportation for violation of immigration offences in the host State (Zhu); or deportation following the provision of diplomatic assurances by China (Lai). Given that most information on these cases is only available through media reports or public statements issued by national authorities, there tends to be a paucity of details. For instance, in most cases it is unclear the extent, if any, of active or tacit cooperation between the host country and Chinese authorities on issues such as whether there was a prior tip-off regarding the fugitives' whereabouts or illegal immigration status, or the furnishing of immigration

176. *Lai v. Canada (Citizenship and Immigration)*, [2011] F.C. 915, para. 41 (Can.).

177. *Id.*, at para. 44.

178. See Nathan Vanderklippe, *Family of Imprisoned Smuggler Wants Ottawa to Pressure Beijing for Medical Care*, GLOBE & MAIL (Feb. 20, 2017), <https://www.theglobeandmail.com/news/world/family-of-imprisoned-smuggler-wants-ottawa-to-pressure-beijing-for-medical-care/article34093958/> ("Now, [Lai's] family is accusing Canada of failing to keep its side of the bargain and threatening to drag the federal government back into court. . . Ottawa should 'carry out what it promised, which was to guarantee China deals with my father's case fairly', said his son, Kenny Lai, in an interview.").

179. *Id.*

documents such as passports for the transfer of the fugitive. These issues are relevant as they may shed light on the true nature and purpose of the deportation.

V. COMPARATIVE MERITS OF RELYING ON DEPORTATION
MEASURES TO RETURN CHINESE FUGITIVES
VERSUS EXTRADITION

It is clear that deporting a fugitive from a host country can effectively achieve the same result as facilitating his transfer through an extradition arrangement. Yet, despite its effectiveness, scholars criticize this method. Given the aggressiveness with which Chinese authorities are pursuing their anti-corruption campaign and the unlikelihood of China and Western countries completing extradition treaties in the near term—it is possible that there will be an increase in the use of deportation measures to return Chinese fugitives. It seems apposite to re-visit both (i) the criticisms of the use of deportation measures in lieu of extradition and (ii) the advantages of this approach.

A. *Criticisms of the Use of Deportation in Lieu of Extradition*

The extradition regime ensures certain safeguards for the fugitive—such as the principles of specialty and non-discrimination. When the system is properly used to effect the return of a fugitive criminal, it “guarant[ees] that fugitive’s rights because extradition is the specific means designed by states for that purpose.”¹⁸⁰ One commonly cited criticism of the use of deportation to deliver a fugitive is that doing so potentially circumvents some of the built-in safeguards of extradition arrangements—allowing the fugitive’s rights to be ignored.¹⁸¹ Subject to international law obligations on the treatment of aliens, which may be binding on the State as a result of treaty or custom, the safeguards for the deportee in national immigration laws may be less substantive than in extradition laws. Although this necessarily differs from jurisdiction to jurisdiction, some examples bear noting. For instance, in the United States, INA’s proceedings are administrative in nature and ac-

180. GILBERT, *supra* note 14, at 4.

181. For a detailed discussion of the relevant immigration laws pertaining to deportation contained in the U.S. Immigration and Naturalization Act and the deportation process, see BASSIOUNI, *supra* note 19, at 231-44.

cordingly confer on the U.S. government greater discretion¹⁸² compared to extradition proceedings—which entail a mix of judicial and executive discretion. The U.S. judiciary is often deferential to the executive branch in immigration matters.¹⁸³ In Singapore, although the discretion of the Controller of Immigration to cancel a pass entitling an immigrant to be in Singapore can be challenged on judicial review, the grounds for such review are narrow.¹⁸⁴ In comparison, the safeguards in Singapore’s Extradition Act require the requesting country to give undertakings that it will abide by the principle of specialty, dual criminality and the political offense exception, or the request would be refused.¹⁸⁵

In the landmark English case of *Regina v. Secretary of State of Home Affairs*, ex parte *Duke of Chateau Thierry*,¹⁸⁶ the Duke brought a legal challenge against the use of the power of deportation to secure his return to France for charges of military desertion. The Duke argued that he was, in fact, a political refugee and would be punished for a political offence in France.¹⁸⁷ Although the English Court of Appeal found that the Duke failed to establish that he was a political refugee, it also held that the fact that an “alien is a political refugee or is likely to be punished for a political offence in the country to which it is intended that he should . . . be deported, does not invalidate a deportation order made against him.”¹⁸⁸ Military desertion was not included in the list of extraditable offences

182. *Id.* at 244 (“Because extradition proceedings are judicial and INA’s proceedings are administrative, the latter gives the government greater discretion.”).

183. For a critical position of U.S. practice, see Alona E. Evans, *Extradition and Rendition: Problems of Choice*, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY (Richard B. Lillich ed., 1981); Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT’L L. 77 (1964).

184. See Daniel Tan, *An Analysis of Substantive Review in Singaporean Administrative Law*, 25 SING. ACAD. L.J. 296, 297 (2013) (discussing how generally, the Singapore Courts do not see it as their place to review an administrative decision for its substance, thereby according the administrator more leeway in his decision-making process.).

185. *Supra* note 87, § 2, § 7, and § 21.

186. *R v. Secretary of State of Home Affairs*, ex parte *Duke of Chateau Thierry* [1916-17] KB 922, All ER 523 (UK).

187. *Id.* at 524.

188. *Id.* at 525.

in the English Extradition Act at the time.¹⁸⁹ It was therefore possible that the transfer could have been avoided through the application of the political offence exception in extradition proceedings.

While extradition and immigration legislation and policies vary from State to State, the use of deportation in lieu of extradition may deprive deportees of rights to which they would otherwise have been entitled under extradition—most notably, in relation to the political offence exception and the principle of specialty.¹⁹⁰ As Ivan Shearer, a widely respected scholar on the law of extradition, noted:

Deportation . . . deprives the deportee of the rights to which he would be entitled if he were an extraditee. The more important of these are his right not to be returned to a demanding State for a political offence, and his right to be tried after surrender only in respect of the offence or offences for which his return was demanded (the principle of specialty). The deported alien finds himself in a singularly unprotected situation . . . This objection can be appreciated most keenly in the instance of the national of a third State being deported from one State to another in circumstances that would be violative of common principles of extradition law.¹⁹¹

The rights of the deportee comes under further risk when one considers that deportation may be a negotiating chip to secure a reciprocal benefit to the host State. For example, while China pushes the United States for the return of fugitives for prosecution—the United States has consistently pressured the Chinese government to provide documentation for nearly 39,000 Chinese nationals awaiting deportation for violating U.S. immigration laws.¹⁹² The ease and flexibility with

189. The Extradition Acts, 1870 to 1935, 33 & 34 Vic. c. 52 (Eng.).

190. See SHEARER, *supra* note 86, at 88.

191. *Id.* at 88–89.

192. See Mark Hosenball & Tim Reid, *Exclusive – U.S. to China: Take Back Your Undocumented Immigrants*, REUTERS, Sept. 11, 2015, <https://www.reuters.com/article/us-usa-china-deportations-exclusive/exclusive-u-s-to-china-take-back-your-undocumented-immigrants-idUSKCN0RB0D020150911> (describing how there are nearly 39,000 Chinese nationals awaiting deportation from the U.S. because China has failed to provide the necessary documents for their deportation.).

which immigration laws can be used to deliver a fugitive is conducive for such quid pro quo diplomacy, in which States deport a fugitive to obtain a desired end from China. A variant of this is deportation of individuals as a swap for economic or trade benefits from China. For example, in December 2009, two days after Cambodia deported twenty ethnic Uighur asylum seekers to China, China extended fourteen commercial deals to Cambodia valued in the aggregate at USD 1 billion.¹⁹³ This attracted speculation in the media that China extended the deals to Cambodia in exchange for the return of the fugitives.¹⁹⁴

Another criticism is that using deportation as a substitute for extradition results in the theoretical confusion of two regimes which are, in fact, “distinct in purpose.”¹⁹⁵ The object of extradition is to restore a fugitive criminal to the jurisdiction of a State that has a lawful claim to prosecute him. Deportation, on the other hand, is the means by which a State rids itself of an undesired alien in order to protect its own citizens. As Ivan Shearer explains, “[i]ts purpose is achieved as soon as the alien has departed from its territory; the ultimate destination of a deportee is of no significance in this respect.”¹⁹⁶ Although the two procedures may result in the same outcome, they frequently differ in many respects in both their substantive and procedural requirements—because the objectives of the two regimes are essentially distinct. In this regard, Professor John Murphy notes:

Deportation . . . [is] not designed for the purpose of cooperation in furthering the international criminal justice system. Rather . . . deportation [is a] civil process[], designed for immigration control and dominated by the executive. As a consequence . . . deportation proceedings utilized for rendition purposes do not apply criminal justice standards, either with re-

193. Mydans, *20 Uighurs are Deported to China*, *supra* note 79; Mydans, *After Expelling Uighurs, Cambodia Approves Chinese Investments*, *supra* note 79. The Uighur separatists are based in the Xinjiang Uighur Autonomous Region in China and are calling for an independent state of Eastern Turkestan. *Id.* Beijing does not recognize their independence. *Id.*

194. Mydans, *After Expelling Uighurs, Cambodia Approves Chinese Investments*, *supra* note 79.

195. SHEARER, *supra* note 86, at 76.

196. *Id.* at 76-77.

spect to the interests of the states involved or to the protection of the accused.¹⁹⁷

The distortion of the immigration regime is most clearly illustrated in the way States ensure that the fugitive ends up in the hands of the requesting State. Given that the purpose of deportation is expulsion of an undesired person, in principle, the host State should have little or no interest in the deportee's destination.¹⁹⁸ Nonetheless, where deportation is used to deliver a fugitive to a requesting State, the requesting State is normally notified, and the relevant law enforcement authorities cooperate to ensure his smooth transfer.¹⁹⁹ In the cases illustrated in Part III, the fugitive-deportee was often in the physical custody of China's law enforcement officials upon arrival in the requesting state.

Third, the use of deportation can potentially undermine the goal of leveraging an extradition treaty for improved human rights and criminal justice standards in China. This is especially true if there is increased normalization of the use of deportation, in lieu of extradition, to return Chinese fugitives. If deportation becomes a widely acceptable alternative, this may disincentivize China from providing safeguards or reassurances on the treatment of fugitives upon their return. Moreover, although this Note adopts the frame of deportation of fugitives back to China in the absence of an extradition treaty, the effects discussed could potentially spill-over and be felt in other contexts. The normalization of deportation in lieu of extradition could very well influence the way that the transfer of fugitives is carried out with countries other than China.

197. JOHN F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES 81-82 (1985).

198. SADOFF, *supra* note 12, at 404. *See also* U.N. Secretariat, Expulsion of Aliens, Memorandum by the Secretariat, ¶ 494, Int'l Law Comm'n, U.N. Doc. A/CN.4/565 (Jul. 10, 2006), http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf ("The view has been expressed that the right of a State to expel an alien does not necessarily include the right to determine the destination of the alien.").

199. SHEARER, *supra* note 88, at 88 ("[T]he immigration authorities of intermediate States are normally forewarned of the passage of the deportee through their territory. Deportation accompanied by the swift telegraphic liaison between national immigration authorities which is now common practice, resembles a pipe-line in which all the intermediate faucets are tightly closed.").

B. *Arguments In Support of the Use of Deportation to Return Fugitives*

An argument often raised in support of the use of deportation to return a fugitive is that it is the sovereign right of the host State to control the admission of aliens into their territory and to expel them as desired, subject to any limiting treaty obligations undertaken by the State²⁰⁰ and principles of customary international law.²⁰¹ It follows that under this theory, *de facto* extraditions are justified as it would be spurious to require extradition to be invoked, when a State has already decided, as a matter of immigration policy, that the alien will not be allowed to remain. Deportations also tend to be a more expedient and convenient²⁰² alternative to extradition, and may be perceived as an easy method of removing a thorn in foreign relations with China. Additionally, even if the utilization of immigration procedures to return fugitives is criticized for diluting standards of protection, it bears emphasis that there are nonetheless human rights safeguards available to the deportee. He is still entitled to the benefits of national legal processes, such as an appeal or judicial review of a deportation order, subject to the vagaries of national immigration laws and policies.

There may be cases where there are coincidental occurrences of extradition and deportation. The most obvious example in the context of China is where fugitives enter the host country illegally, as in the case of Li and Kuang. The illegal entry of a person is the paradigmatic reason for a host country to invoke its immigration laws. The problem arises when such a person, for whom a legitimate ground for deportation exists, is also wanted by China for the prosecution of offences upon his return. From the States' perspective, excluding deportation as an option due to its overlapping extradition purpose

200. See GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN THE STATES* 201 (1978) (noting that States have the 'right', or 'power' or 'competence' to expel aliens, which is frequently justified by reference to the public interests of the State and as an incident of sovereignty).

201. See *infra* Part V(C).

202. See Bassiouni, *supra* note 19, at 220 (noting the apparent ease and convenience of deportation).

could unduly constrain national agencies from acting where legitimate causes for deportation may also exist.

C. *Lawfulness of the Approach*

Another important consideration is the lawfulness of using deportation to return a fugitive to a requesting State. There are two aspects of the legality analysis. The first is the approach taken by national courts, and the second is the lawfulness of such conduct under international law.

First, national courts have different stands on whether the use of deportation is illegal when it is employed in lieu of extradition. In *Barton v Commonwealth*,²⁰³ the Australian government requested the extradition of two Australian nationals from Brazil. Australia has no extradition treaty with Brazil, but Brazilian law allows extradition in the absence of a treaty if a reciprocal undertaking is furnished by the requesting State.²⁰⁴ The Australian government offered reciprocity to the Brazilian Government by stating that “there are deportation procedures under the [Australian] Migration Act which, with the approval of Ministers, could be applied in the event of a fugitive being sought by Brazil from Australia.”²⁰⁵ However, with respect to the reciprocal undertaking furnished, Chief Justice Barwick observed:

At times, questions may arise as to whether the actual purpose of the expulsion is impermissible and whether in truth an unauthorized, or what a writer has called “disguised extradition” is on foot. Clearly, a power of expulsion, as for example under migration or immigration laws, is no equivalent of a power to extradite . . . an executive being bound by statute as to the occasions for and purposes of expulsion, cannot validly agree to employ that power as a general equivalent to a power to extradite, however much on occasions the expulsion may serve as an extradition in an individual case because of its circumstances. There are obvious objections to the use of

203. *Barton v Commonwealth* (1974) 131 CLR 477 (Austl.).

204. *Id.* at 481.

205. *Id.* at 482.

immigration or expulsive powers as a substitute for extradition.²⁰⁶

In the South African case of *Mohamed v. President of the Republic of South Africa*,²⁰⁷ the plaintiff was accused of bombing the U.S. embassy in Dar es Salaam, Tanzania in August 1998.²⁰⁸ He was handed over by South African authorities to FBI agents and removed to the United States.²⁰⁹ Mohamed, the plaintiff, contended that his deportation was in breach of South Africa's relevant immigration laws and regulations and constituted a disguised extradition.²¹⁰ He argued that if the government's conduct was in substance an extradition, then it was unlawful because the correct procedures were not followed.²¹¹ The South African government countered that Mohamed was an illegal immigrant whom the immigration authorities had properly decided to deport, and the collaboration between the South African officials and the FBI agents made no difference to his liability to be deported.²¹² The Constitutional Court held that Mohamed's removal was unlawful—whether characterized as a deportation or an extradition.²¹³

On the other hand, in the Indian Supreme Court case of *Hans Muller of Nuremburg v Superintendent*,²¹⁴ the Court recognized the prerogative of the Indian government in determining whether the process of extradition or deportation was more appropriate. The Court held that even if there was a good case for extradition, the government was not bound to accede to the request.²¹⁵

Second, the position under international law is not clear-cut. There is no treaty which explicitly prohibits this practice, and international case law on this issue is sparse and di-

206. *Id.* at 484 (citations omitted).

207. *Mohamed v. President of the Republic of South Africa* 2001 (3) SA 893 (CC) (S. Afr.).

208. *Id.* ¶ 8–9.

209. *Id.* ¶ 26.

210. *Id.* ¶ 3.

211. *Id.* ¶ 41.

212. *Id.* ¶ 6.

213. *Id.* ¶ 68.

214. *Hans Muller of Nuremburg v Superintendent*, (1955) 1 SCR 1284 (India).

215. *Id.* (“the fact that a request [for extradition] has been made does not fetter the discretion of the Government to choose the less cumbersome procedure . . .”).

vided.²¹⁶ In 2004, the International Law Commission (ILC) appointed a Special Rapporteur to study the topic of “expulsion of aliens.”²¹⁷ The issue of the legality of using immigration laws to deport a fugitive under international law was given thorough treatment in the Sixth Report of the Special Rapporteur.²¹⁸ After considering State practice and decisions emanating from national courts on the issue, the Special Rapporteur codified a draft rule as part of the progressive development of international law that states:

Article 12

Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure

A State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure.²¹⁹

The rule in its present form is only a draft, and its status as a rule of customary international law is arguable. The draft rule only applies in circumstances where there is an “ongoing extradition procedure” and does not address a situation where there is an absence of an extradition treaty between the two States. Even if the rule attained customary international law status, the practice of deporting a fugitive in the absence of an extradition treaty would not violate it.

216. *Compare* *Bozano v. France*, App. No. 9990/82, 111 Eur. Ct. H.R. (ser. A) at 22 (1986) (deciding that the deportation of the plaintiff deprived him of his liberty in a way which amounted to a disguised form of extradition and was thus a breach of the European Convention of Human Rights), *with Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R. (2003) (observing that the fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful and does not therefore give rise to any problem under Article 5 of the ECHR on deprivation of liberty).

217. *Report of the Commission to the General Assembly on the Work of its Fifty-Sixth Session*, U.N. Doc. A/59/10 (2004), *reprinted in* [2004] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2004/Add.1 (Part 2).

218. Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Sixth Rep. on the Expulsion of Aliens*, ¶ 13–26, U.N. Doc. A/CN.4/625 (March 19, 2010).

219. *See* Int'l Law Comm'n, *Draft Articles on the Expulsion of Aliens, with Commentaries*, U.N. Doc. A/69/10 (2014), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf.

VI. POLICY RECOMMENDATIONS TO STRENGTHEN THE CURRENT PRACTICE

On one hand, a principled view would be that countries objecting to entering into an extradition treaty with China—due to its poor human rights record and weak rule of law—should not use deportation measures to repatriate fugitives to China. Indeed, the 2017 CECC Annual Report recommended that the United States “*should not agree* to any additional repatriations until the Chinese government can demonstrate that they are meeting the standards set forth in the International Covenant on Civil and Political Rights and other international human rights instruments regarding the treatment of criminal suspects.”²²⁰

On the other hand, it may not be feasible or practical to unequivocally state that the deportation of fugitives cannot take place, unless and until China’s criminal justice system is reformed to meet international human rights standards. This is because in *realpolitik* terms, China’s growing diplomatic and economic power on the global stage means that it would be extremely difficult for countries to tolerate both the absence of an extradition treaty *and* calls to deport Chinese fugitives.

Therefore, it must fall on individual States—in particular, state immigration and judicial authorities—to ensure that removal processes meet the ends of natural justice and protect the rights of the fugitive-deportees. In particular, where it relates to the deportation of fugitives back to China, it is of especial importance to determine what is a balanced approach to take, which accounts for operational realities on one hand and ensures the protection of the human rights of such fugitive-deportees on the other.

Complicating matters, there may be certain foreign policy considerations at work even within the confines of a single case. Accordingly, there is a need for a framework to evaluate each individual case for factors, such as the likelihood of a fugitive being wanted for political purposes, or of facing the death penalty or cruel, inhuman, or degrading treatment upon his return, among others. Such a framework would help

220. CONG.-EXEC. COMMISSION ON CHINA, *supra* note 60, at 11 (emphasis added).

the national authority determine whether to cooperate and deport the person back to China and, where appropriate, to take steps to mitigate risks.

Drawing from the cases in Part III of this Note and the ILC Draft Articles on the Expulsion of Aliens,²²¹ outlined below is a set of seven policy recommendations for States and immigration authorities to consider in order to strengthen the present practice of ad-hoc cooperation with China on the deportation of fugitives.

A. *Rescind Any Policy Decision that Expressly Offers the Deportation of Fugitives as an Alternative Method to Extradition*

Although China has encouraged States to revoke the visas and passports of fugitives in order to create grounds for deportation, States should nonetheless emphasize extradition as the *primary means* by which fugitives should be returned. If legitimate grounds for deportation exist, then it may be employed. However, if there is no extradition treaty between the host State and China, the host State should not then offer to *actively explore* the use of deportation to return such fugitives. In this regard, it is concerning that ICE EROS has explicitly connected the deportation of Zhou to China's request to prosecute him for offences.²²² Such action is linked to the criticism highlighted above that it sends the message to China, and other countries, that the deportation regime is of equal primacy as extradition in delivering fugitives.

B. *Consider Whether to Prosecute the Fugitive-Deportee for an Underlying Offence Committed in the Host State*

There are frequently ancillary criminal offences associated with corruption, such as money-laundering or use of dishonest proceeds of crimes, committed in the host State.²²³

221. Int'l Law Comm'n, *supra* note 219.

222. For instance, ICE EROS could have placed greater emphasis on the legal grounds on which Zhou was deported, as opposed to highlighting the fact that it was done in pursuance of China's interests to prosecute him upon his return.

223. Examples of related offences in the U.S. include the prohibition on Interstate and Foreign Travel or Transportation In Aid of Racketeering Enterprises under 18 U.S.C. § 1952(a) ("Whoever travels in interstate or for-

The host State could consider whether to launch its own criminal investigation into such offences committed within its jurisdiction. This will deflect criticism that the host State is harboring a criminal and reflect a commitment by the host State to suppress transnational crime. It would also be consistent with the principle of *aut dedere aut judicare* (the obligation to extradite or prosecute)—which is contained in a number of multilateral treaties aimed at the suppression of specific kinds of criminal conduct.²²⁴ Moreover, as most countries' immigration laws provide for deportation at the expiration of an imprisonment sentence, this would amount to the legitimate employment of deportation to expel the fugitive-deportee.

Further extrapolating from the cases of Li and Kuang, the Chinese authorities are often eager to cooperate in providing evidence when host States are willing to prosecute. This may be facilitated through mutual legal assistance treaties that China and the host State have entered into or on the basis of reciprocity and international comity. Such collaborative efforts, which can include mutual visits by law enforcement officials to each other's countries, would enable law enforcement authorities to interact with each other's legal systems and would help improve confidence and trust in police-to-police cooperation. Such interactions may help both sides iron out

eign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to – (1) distribute the proceeds of any unlawful activity; or . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity . . . shall be fined under this title, imprisoned . . . or both”); the prohibition on laundering monetary instruments under 18 U.S.C. § 1956(a) (“(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of unspecified unlawful activity (A) (i) with the intent to promote the carrying on of specified unlawful activity; or . . . (B) knowing that the transaction is designed in whole or in part– (i) to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity . . . shall be sentenced to a fine . . . or imprisonment . . . or both.”).

224. See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (setting out a collection of international criminal law conventions, which establish a duty to extradite or prosecute, and exploring whether the obligation under those treaties can be said to have become customary law and bind even non-parties.).

any complications in the relationship as a pre-cursor to formalizing the relationship in the form of an extradition treaty.

C. *Bear in Mind Relevant International Obligations*

Even if the host State's immigration laws are silent on human rights protections for deportees, the host State should consider any international law obligations that may be binding on it as a result of treaty or custom. For instance, as the principle of *non-refoulement* is a rule of customary international law, the host State must satisfy itself that, if deported to China, the fugitive-deportee would not face persecution based on race, religion, nationality, membership of a particular social group, or political opinion. If the fugitive-deportee makes a claim that he faces such a risk, then such claim must be investigated thoroughly to determine its veracity. The host State should also bear in mind the fugitive-deportee's right to family life, which is concerned with family integrity and the right of spouses, as well as parents and their children, to live together and associate as a family unit.²²⁵ If a fugitive-deportee's family is present in the host State, the host State must consider whether deportation would result in disproportionate interference with the

225. Article 16(3) of the Universal Declaration of Human Rights (UDHR) provides "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." G.A. Res. 217 (III) A (Dec. 10, 1948). Although the UDHR is not a treaty, its provisions broadly have been accorded customary international law status. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) adds that family interference must also not be "unlawful." G.A. Res. 2200A (XXI) (Dec. 16, 1966). Article 9(4) of the Convention of the Rights of the Child provides that "[w]here such separation results from any action initiated by a State Party, such as . . . deportation . . . of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned." G.A. Res. 44/25 (Nov. 20, 1989). The Committee on the Elimination of Racial Discrimination has advised that States parties to the Convention on the Elimination of Racial Discrimination must "[a]void expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life." *General Recommendation No. 30*, UN Doc. HRI/GEN/1/Rev.7/Add.1 at ¶ 28.

fugitive-deportee's right to family life, even where there are legitimate grounds to deport the fugitive-deportee.

A State ought to review its international obligations before taking action. This is particularly relevant in the context of deportation for two reasons: first, the expediency with which deportation can take place may potentially result in hasty decision-making without thorough consideration of a State's legal obligations; second, there may be a tendency for line ministries, such as immigration authorities, to focus on adherence to and implementation of laws under their primary legal responsibilities only. They may omit taking into account broader foreign policy considerations. This can be addressed by improved coordination between such line ministries and ministries with whole-of-Government responsibilities.²²⁶

226. An example of line ministries administering immigration rules would be ICE, in the U.S. context, or the Immigrations Checkpoints Authority, in Singapore's context. Examples of ministries with whole-of-government responsibilities could include the Department of Justice, for the U.S. in terms of overall oversight of extradition policy of the United States, and the Department of State, in terms of overall oversight of foreign policy and diplomatic considerations. See *Office of International Affairs*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal-oia> (last visited July 15, 2018) (stating that one of the missions of the Office of International Affairs under the U.S. Department of Justice is the return of fugitives to face justice); *About the U.S. Department of State*, U.S. DEP'T OF STATE, <https://www.state.gov/aboutstate/> (last visited July 15, 2018) (stating that the mission of the Department of State is to "lead America's foreign policy.") (last visited July 15, 2018). In Singapore's context, ministries with whole-of-government responsibilities may include the Singapore Ministry of Law, in terms of extradition policy, and the Singapore Ministry of Foreign Affairs, in terms of foreign policy considerations. See *Legal Group*, MINISTRY OF LAW, <https://www.mlaw.gov.sg/content/minlaw/en/our-work/legal-group.html> (last visited July 15, 2018) (stating that the Singapore Ministry for Law is responsible for the policy on extradition); see also *About MFA*, MINISTRY OF FOREIGN AFFAIRS, <https://www1.mfa.gov.sg/About-MFA> (last visited July 15, 2018) (stating that the Singapore Ministry of Foreign Affairs is responsible for conducting and managing diplomatic relations between Singapore and other countries and regions). See also John P. Carlin, *Detect, Disrupt, Deter: A Whole-of-Government Approach to National Security Cyber Threats*, 7 HARV. NAT'L SEC. J. 391 (2016) (advocating a "whole-of-government" approach to disrupting national security cyber threats, including coordinating the application of different capabilities from various U.S. agencies such as the Treasury Department, Defense Department and Department of Homeland Security, to collectively address such threats.).

D. *Obtain Diplomatic Assurances from China to Ensure that Traditional Extradition Protections are Preserved*

Even though the fugitive-deportee is returned through immigration laws, the host State can insist on traditional extradition protections by obtaining diplomatic assurances from China. A diplomatic assurance is a representation secured from one State to another with respect to a certain issue that is of concern to the requesting State.²²⁷ The assurance allows the requesting State to “assuage a concern. . . in connection with the surrender of a [fugitive]”²²⁸ with the knowledge that it is issued and signed by a person possessing the requisite authority. Thus, depending on the facts of the case,²²⁹ a State may contemplate securing assurances that preserve the political offence exception,²³⁰ dual criminality, and non-

227. BASSIOUNI, *supra* note 19, at 611.

228. *Id.*

229. This brings to mind difficult questions such as the type of diplomatic assurances a host State can, or *ought* to procure from China. For instance, should the host State predicate the return of the fugitive-deportee on the assurance that he or she would face a fair trial on their return? Should the host State impose requirements as to the maximum sentence that the fugitive-deportee can face? This triggers ancillary questions as to the legal basis for imposing additional conditions where it relates to treatment of the fugitive-deportee once s/he is in the territory of the pursuing State. One possible response to this is that it would differ from State to State depending on its laws, but it is my view that the prospects for obtaining such assurances from China lies in extra-legal factors: the nature of the case (e.g. a high-profile case, type of offence committed etc.); the diplomatic, economic, political clout of the host State vis-a-vis China; their respective bargaining strengths (whether the host State has other desired ends it wishes to gain from China in exchange for the deportation of the fugitive). This question, which requires further analysis, lies beyond the scope of this Note. However, at the very minimum the author of this Note argues that the State should seek to secure diplomatic assurances that reflect the safeguards ordinarily prescribed for in extradition treaties, such as the principle of specialty and the political offence exception.

230. Of particular importance in China’s context but may potentially be diplomatically and legally trickier would be to secure an assurance similar to that of the political offence exception, namely, that the fugitive-deportee would not be prosecuted for political offences upon his return. Such an assurance may be difficult to justify: first, its status as a rule of customary international law is arguable. Second, as the objective of deportation is to eject the alien from the host State’s territory, strictly speaking, the host State has no basis to impose conditions on the requesting State regarding the treatment of the fugitive-deportee once he has left the host State. The counterpoint to this is that China has, in fact, agreed to similar political offence

discrimination.²³¹

Some critics may argue that even if China gives such diplomatic assurances there is no guarantee that China would not violate them. In January 2000, Canada deported a Chinese citizen, Yang Fong, on charges stemming from a 10-year-old computer fraud case. Canada received assurances from China that Yang would receive less than a ten-year sentence. Instead, after Yang was deported to China, he was promptly executed without any explanation.²³² Additionally, there is the inherent difficulty of monitoring and ensuring that China would comply with such assurances. An example of this would be the recent assertion by Lai's family that Canada has failed to ensure China has abided by its diplomatic assurances.²³³

Even if no legal repercussions flow from the violation of diplomatic assurances, China will still incur serious reputational consequences from such conduct. If China is serious about recovering its fugitives, it must know that following such a course of action again will result in a loss of its standing in the international community and deter countries from entering into extradition arrangements with it.

E. *Ensure that Procedural Safeguards and Due Process are Respected*

The fugitive-deportee must also be allowed to contest a removal decision before the host State's competent national authority. There should not be any action by the host State's authorities to prevent the fugitive-deportee from availing himself of any judicial remedies; nor should the host State take anticipatory steps to remove the fugitive-deportee to China before he has had a chance to challenge the decision regarding his status in accordance with law. This has legal basis in the

exemptions in the extradition treaties entered into with other countries, such as Spain, so it is difficult to see why it cannot provide a similar undertaking in the form of a diplomatic assurance.

231. As the principle of dual criminality and non-discrimination have basis in customary international law and are also contained in China's Extradition Law, there should arguably be no reason why China would not be willing to provide such assurances.

232. See James Brooke, *Canada's Haven: For Notorious Fugitives, Too?*, N.Y. TIMES (Dec. 29, 2000), <https://www.nytimes.com/2000/12/29/world/canada-s-haven-for-notorious-fugitives-too.html>.

233. Wee, *supra* note 178.

ICCPR, which provides that “[A]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”²³⁴

Accordingly, immigration and law-enforcement authorities should not pre-judge the fugitive-deportee’s case by cooperating with Chinese authorities to arrange for his transfer before the fugitive-deportee has had his opportunity in court.

F. *Allow the Fugitive to Choose his Desired Deportation Destination*

Except for serious offenses affecting national security or public order, a fugitive-deportee should be free, subject to a requirement of reasonableness, to select a destination of his own choice before deportation is ordered to a specific place. If no other State is willing to take the fugitive-deportee, then he should be returned to his country of citizenship—which is under an international obligation to receive him. In China’s case, this would ensure the return of the fugitive back to China in almost every instance. Conceivably, giving the fugitive-deportee the option of choosing which country he wishes to be deported to could potentially stymie the objective of this exercise, but this is a risk that must be taken in order to ensure the integrity of the immigration regime.

G. *Explore whether Extradition is an Option*

The United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC) allow States Parties to use the UNCAC or UNTOC as a legal basis for cooperation on extradition.²³⁵ China is party to both the UNCAC and UNTOC

234. G.A. Res. 2200A (XXI), *supra* note 225, art. 13.

235. The United Nations Convention Against Corruption provides “[i]f a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for ex-

and has confirmed in notifications to the Secretary-General of the United Nations that the Conventions may form a legal basis for cooperation on extradition between China and other States Parties.²³⁶ States which lack extradition treaties with China but are parties to the UNCAC and/or UNTOC—and have likewise made notifications that the UNCAC and/or UNTOC can be the legal basis for extradition, should consider whether to rely on these treaties. Alternatively, States may consider whether entering into ad-hoc extradition arrangements is a viable alternative within their respective legal frameworks, given that China's Extradition Law permits extradition without a treaty if a reciprocity assurance is given.²³⁷

VII. CONCLUSION

Much of the scholarly discussion concerning the extradition of fugitives to China focuses on the various implications of entering into an extradition treaty arrangement with China. While such debate is certainly important, what arguably needs greater scrutiny are the legal implications of resorting to deportation to serve the objectives of extradition and, in certain

tradition in respect of any offence to which this article applies." G.A. Res. 58/4, art. 44(5) (Oct. 31, 2003). The United Nations Convention against Transnational Organized Crime reads *in pari materia*. G.A. Res. 55/25, art. 16(4) (Nov. 15, 2000).

236. See *Country Profile: China*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=CHN> (last visited Apr. 3, 2018) (discussing how pursuant to Article 44(6) of the UNCAC, China takes the Convention as the legal basis for cooperation on extradition); see also Status of United Nations Convention Against Transnational Organized Crime, notification by China, June 8, 2008, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&lang=EN ("Regarding the question in paragraph 5 of Article 16 of the [UNTOC] that whether States Parties make extradition conditional on the existence of extradition treaty and take this Convention as the legal basis for cooperation on extradition, China may carry out cooperation on extradition with other State on the basis of reciprocity and doesn't make extradition conditional on the existence of extradition treaty. Furthermore, the UNTOC could be the legal basis for China to cooperate with other States Parties on extradition.").

237. Article 15 of the provides that "where there is no extradition treaty to go by, the Requesting State shall make a reciprocity assurance." Extradition Law of the People's Republic of China (promulgated by the Stand. Comm. Nat'l People's Cong., Dec. 28, 2000), art. 15, 2000 P.R.C. LAWS, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf>.

cases, to deliberately circumvent the absence of an extradition treaty with China. Deportation is a lawful procedure, but, as demonstrated above, it can and has been used to circumvent an otherwise accepted ground for denying the return of a fugitive to a requesting State.

In China's case, it further bears considering whether it is still meaningful to argue that an extradition treaty must be withheld because of China's poor human rights situation and lack of rule of law, if, in the absence of an extradition treaty, there is increasing resort to deportation to deliver Chinese fugitives.² Alternatively, if there are strong arguments to withhold an extradition treaty due to human rights concerns in China, perhaps it should then be incumbent on a State to secure undertakings or diplomatic assurances concerning the treatment of such fugitives, before they are deported to China to face prosecution. By highlighting certain case examples and outlining some policy recommendations, this Note hopes to bring awareness to these issues to inspire debate. With the potential of an increasing reliance on deportation measures to return fugitives—to China and elsewhere—these debates demand our attention.

