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A Comparative Analysis of the United
States's Response to Extradition
Requests from China

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Note

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I. INTRODUCTION

Since the late 1970s, China has undertaken a process of opening up to the world and engaging in economic reform.¹ This process has brought increased opportunities for Western nations to cooperate with China.² Predictably, efforts to cooperate also have given rise to new challenges, as Chinese and Western cultures³ and systems often conflict.

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1. CTR. FOR STRATEGIC & INT'L STUDIES & INST. FOR INT'L ECON., CHINA: THE BALANCE SHEET 17 (2006); Zheng Bijian, *China's "Peaceful Rise" to Great-Power Status*, FOREIGN AFF., Sept.-Oct. 2005, at 18.

2. See Guiguo Wang, *Economic Integration in Quest of Law: The Chinese Experience*, J. WORLD TRADE, Apr. 1995, at 5; Hanqin Xue, *China's Open Policy and International Law*, 4 CHINESE J. INT'L L. 133 (2005) (describing how China began participating in international law after opening up its economy).

3. The scope of the "Western world" is admittedly subjective. For the purposes of this Note, the "West" is defined as the countries of Western Europe, the United States, Canada, Australia, and New Zealand.

Extradition, which is an important component of transnational criminal law enforcement,⁴ presents one area in which cooperation with the Chinese was not previously available,⁵ but now can provide important benefits. The United States and its allies are dedicated to combating international terrorism, and they are negotiating mutual legal assistance and extradition treaties “at an increasingly vigorous pace” in order to facilitate the return of suspected terrorists for prosecution.⁶ Further, a nation that cooperates in criminal law enforcement can gain favor in China, which can translate into enhanced business ties in the rapidly developing Chinese economy.⁷ The Chinese are also keenly interested in cooperating on extradition matters in order to eliminate safe havens and bring to justice high-level corrupt officials who have fled with significant capital (and who have overwhelmingly sought refuge in developed Western nations).⁸ In early 2007, China officially called upon Western nations to sign extradition treaties with it.⁹ Based on their mutual interest in cooperation, one might expect Sino-Western extradition treaty negotiations to proceed effortlessly.

For the West, however, human rights concerns present a significant drawback to increased cooperation on extradition to China. Over the last several decades, the human rights movement has “turned its attention to extradition” to secure the rights of the individual sent to the requesting country, and “[t]reaties, executive acts and judicial decisions on extradition have all been affected.”¹⁰ Extraditions to China are particularly controversial because of the country’s human rights practices. China uses the death penalty

4. “International criminal law enforcement in the practice of States relies on six modalities of inter-State cooperation in criminal matters. These modalities are: extradition, legal assistance, transfer of sentenced persons, transfer of penal proceedings, seizure and forfeiture of illicit proceeds of crime, and recognition of foreign penal judgments.” M. Cherif Bassiouni, *Foreword to TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS*, at vii (Rodrigo Yepes-Enríquez & Lisa Tabassi eds., 2002).

5. Up until the early 1990s, China did not have extradition treaties with other states. Fu Hualing, *One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?*, H.K. LAWYER, Jan. 1999, available at <http://www.hk-lawyer.com/1999-1/Default.htm>.

6. Jonathan M. Winer, *Cops Across Borders: The Evolution of Transatlantic Law Enforcement and Judicial Cooperation*, in *TRANSATLANTIC HOMELAND SECURITY: PROTECTING SOCIETY IN THE AGE OF CATASTROPHIC TERRORISM* 106, 106 (Anja Dalgaard-Nielsen & Daniel S. Hamilton eds., 2006). Mutual legal assistance provides for the sharing of information and evidence related to criminal investigations and prosecutions, whereas extradition is the process by which one nation requests and obtains from another nation the surrender of a suspected or convicted criminal.

7. Monte Stewart, *Feds Look for Balance in Trade with China*, BUS. EDGE (Calgary, Alta.), Apr. 20, 2007, <http://www.businessedge.ca/article.cfm/newsID/15173.cfm>.

8. The fight against corruption is being carried out in the highest reaches of the central government. Feng Jianhua, *Clean Sweep: Employing Tougher Measures and Seeking International Cooperation, China Aims to Leave Little Space for Corruption*, BEIJING REV., Jan. 23, 2007, available at http://www.bjreview.com.cn/nation/txt/2007-01/23/content_53450.htm. There is still a long way to go in the battle against corruption in China. In part because of a lack of international cooperation, many fugitive corrupt officials remain out of China’s reach. *Chasing Escaped Corrupt Officials Remains Arduous Task*, CHINA DAILY, Nov. 4, 2003, available at http://www.chinadaily.com.cn/en/doc/2003-11/04/content_278159.htm; Raymond Zhou, *Capital Flight: Capture of Corrupt Officials a Long Drive*, CHINA DAILY, Aug. 8, 2003, available at http://www.chinadaily.com.cn/en/doc/2003-08/12/content_254169.htm.

9. David Lague, *China Urges Western Nations to Enter Extradition Treaties*, N.Y. TIMES, May 28, 2007, at A3.

10. John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT’L L. 187, 187 (1998).

frequently, including as punishment for nonviolent crimes.¹¹ It also is severely criticized for its poor record on torture; cruel, inhuman, or degrading treatment or punishment; prison sentences and conditions; harsh interrogation methods; discrimination based on ethnicity, gender, and disability; the right to a fair trial; and the right to privacy.¹²

Despite these concerns, in 2005 China and Spain agreed on a groundbreaking extradition treaty—the first such treaty China concluded with a developed nation.¹³ As reported in the media, the treaty indicates China's agreement “to respect in law the principle of no extradition of criminal suspects who would face death penalty upon repatriation,”¹⁴ a policy that enables foreign countries to make “conditional extraditions” to China.¹⁵ France and Portugal subsequently signed and ratified similar treaties,¹⁶ and in September 2007, Australia became the fourth Western nation to sign such a treaty with Beijing.¹⁷ Human rights organizations have criticized these

11. In China, the death penalty can be applied to sixty-eight offenses, including economic and nonviolent crimes like smuggling, counterfeiting currency, embezzlement, and bribery. Cliff Ip, Si-si Liu & Bonny Ling, *China's Death Penalty Reforms*, CHINA RTS. F., June 30, 2007, at 26, 26. While the exact number of executions in China is a state secret, David Whedbee, Comment, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 PAC. RIM L. & POL'Y J. 561, 589 n.214 (2003), China is widely reported to execute more individuals than the rest of the world combined. Amnesty Int'l, Executed “According to Law”? The Death Penalty in China, <http://web.amnesty.org/pages/chn-220304-feature-eng> (last visited Nov. 7, 2007). China's frequent use of the death penalty is anathema to Western Europe, Canada, and Australia. See *EU Lawmakers Hold Minute Silence for Death Penalty Victims*, EUBUSINESS, Oct. 10, 2007, http://www.eubusiness.com/news_live/1192029421.78/; Amnesty Int'l, The Death Penalty in Canada: Twenty Years of Abolition (2000), <http://www.amnesty.ca/deathpenalty/canada.php>; Australian Gov't Dep't of Foreign Affairs & Trade, Australia-China Human Rights Dialogue, http://www.dfat.gov.au/hr/achrd/aus_proc_dialogue.html (last visited Nov. 7, 2007). The United States, while unable to morally criticize the fact that China has the death penalty, joins its Western allies in condemning the use of the death penalty for economic crimes, the procedural deficiencies in sentencing an individual to death, and the inhumane conditions reported on death row. See, e.g., David Lague, *China Pressured on Death Penalty*, INT'L HERALD TRIB., Aug. 15, 2005, <http://www.iht.com/articles/2005/08/14/news/china.php>.

12. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2006: CHINA (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>; Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 317-18 (2002).

13. Sun Shangwu, *China Signs Extradition Deal with Spain*, CHINA DAILY, May 1, 2006, available at http://www.chinadaily.com.cn/china/2006-05/01/content_581658.htm.

14. *China Ratifies Extradition Treaty with Spain*, XINHUA NEWS AGENCY, Apr. 29, 2006, http://news.xinhuanet.com/english/2006-04/29/content_4491739_3.htm. See also Zhonghua renmin gongheguo he xibanya wangguo yindu tiaoyue [China-Spain Extradition Treaty], Nov. 14, 2005, P.R.C.-Spain, available at <http://www.npc.cn/zgrdw/common/zw.jsp?label=WXZLK&id=350141&pdmc=rdgb> (text of the treaty in Chinese from the National People's Congress website) (last visited Dec. 4, 2007) [hereinafter China-Spain Extradition Treaty].

15. A requested state can place conditions on how an extradited individual will be treated after returning to the requesting state. This approach is called “conditional extradition.” It is often controversial, but it “has not proved to be an impenetrable barrier to compromise.” Thomas Rose, Note, *A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada*, 27 YALE J. INT'L L. 193, 214-15 (2002).

16. *France Signs Extradition Treaty with China*, FRANCE24.COM, Mar. 20, 2007, <http://www.france24.com/france24Public/en/archives/news/2007/March/europe/20070320-china-extradition.html>.

17. Press Release, Philip Ruddock, Att'y Gen. of Austl., Australia-China International Crime Cooperation Strengthened (Sept. 6, 2007), <http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/RWPB8B9776D4A85534ECA25734E0021CF6D>. China and Australia already had in place a treaty on judicial cooperation. *China Ratifies Treaty on Judicial Cooperation with Australia*, PEOPLE'S

agreements for their supposed blindness to the totality of the human rights violations that occur in China,¹⁸ even though the signing of international agreements that restrict China's use of the death penalty is a positive human rights development. However, there may be another, broader human rights benefit to the "treaty-based approach"¹⁹ to extradition with China: these new treaties, and the prospect of concluding extradition treaties with other countries, appear to have accelerated a debate within China about whether to cease executions for economic crimes in order to bring more corrupt fugitives to justice.²⁰ Extradition negotiations have the potential to play an important role in the broad push to curb certain human rights abuses in China. They could give other nations a platform to request human rights reforms related not only to the death penalty, but also to torture, modes of interrogation, prison conditions, trial procedures, and other practices currently used by China.

Yet, because of these human rights concerns, Canada has resisted entering into an extradition treaty with China. Canada does have a mutual legal assistance treaty with China for cooperation in the exchange of evidence.²¹ However, in terms of its willingness to extradite to China, Canada appears to occupy the opposite end of the spectrum from the nations that have entered treaties.²² It employs a strategy of non-engagement. The Canadian Extradition Act does permit extradition to occur without a treaty through ad

DAILY, Nov. 1, 2006, available at http://english.peopledaily.com.cn/200611/01/eng20061101_317106.html.

18. Shar Adams, *Australia's Extradition Treaty with China Criticised*, EPOCH TIMES, Sept. 18, 2007, available at <https://www.theepochtimes.com/news/7-9-18/59899.html> (criticizing the Australian treaty because the Chinese legal system is "woefully inadequate"); *China and Spain Boost Trade Ties*, BBC NEWS, Nov. 14, 2005, <http://news.bbc.co.uk/2/hi/europe/4432694.stm> (noting criticisms of the Spanish treaty by Amnesty International Spain because "China is one of the world's most frequent violator [sic] of human rights"); *France Signs Extradition Treaty with China*, *supra* note 16 (noting that Amnesty International France has criticized the French treaty because of "continuing reports of serious violations in China").

19. This Note will refer to the approaches of the nations that have signed extradition treaties with China—Spain, France, Portugal, and Australia—as the "treaty-based approach."

20. See Lague, *supra* note 11 ("The Chinese government is under pressure to scrap the death penalty for nonviolent crimes so that corrupt officials fleeing abroad can be more easily extradited. Chinese legal scholars have called on the government to modify the law so that foreign courts can be confident that fugitives returned to China will not face execution . . ."); Liu Li, *Experts Call for Review of Sentencing*, CHINA DAILY, Aug. 13, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-08/13/content_468682.htm ("Law experts have called for the death penalty to be dropped as punishment for non-violent crimes to ease the extradition of some 4,000 suspected corrupt officials who have fled abroad."); Zhang Zhiping, *Should the Death Penalty Be Abolished for Corruption?*, BEIJING REV., Dec. 18, 2006, available at http://www.bjreview.com.cn/forum/txt/2006-12/18/content_51253.htm; see also *infra* notes 136-143.

21. Treaty Between The Government of Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, Can.-P.R.C., July 29, 1994, 1995 Can. T.S. No. 29; see also Vincent C. Yang, Dir., China Program, Int'l Ctr. for Criminal Law Reform and Criminal Justice Policy, Conference Paper at the International Symposium on the Prevention and Control of Financial Fraud, Cooperation in Combating Fraud: Beyond the Treaties and Conventions (Oct. 19-22, 1998) 4-7, available at http://www.icclr.law.ubc.ca/Publications/Reports/yang_pap.pdf (describing the Canada-China mutual legal assistance treaty).

22. See Geoffrey York, *Five Fugitives Hiding in Canada, China Says*, GLOBE & MAIL (Toronto), Feb. 3, 2007, at A22.

hoc agreements on a case-by-case basis,²³ as does the Extradition Law of the People's Republic of China,²⁴ but it has proven extremely difficult for China to gain approval from Canada for extraditions because of human rights concerns.²⁵

Like Canada, the U.S. government also appears to be resisting negotiation of a formal extradition treaty with China.²⁶ Nevertheless, despite the fact that ad hoc negotiations between the United States and China for the return of criminal suspects absent a treaty are time-consuming and rarely successful, the United States has still arranged for the return of more criminal suspects to China than Canada has done. U.S. law limits the scenarios in which extraditions can occur in the absence of a treaty,²⁷ but when extradition is not available, some criminal suspects may be returned through diplomatic negotiations for deportation under U.S. immigration law (a tactic that is also utilized by other countries and is sometimes referred to as "disguised extradition").²⁸ The contemporary U.S. approach to returning criminal suspects to China occupies a middle ground between the treaty-based approach and the non-engagement approach.

In light of the potentially positive human rights impact of the treaty-based approach to extradition with China, this Note considers whether the ad hoc, case-by-case approach to extradition with China remains a sound strategy for the United States. This question is highly relevant today given the disproportionately large number of Chinese officials who have fled to the United States,²⁹ and given that several cases are pending in U.S. courts

23. Extradition Act, 1999 S.C. ch. 18, § 10(1) (Can.) ("The Minister of Foreign Affairs may, with the agreement of the Minister, enter into a specific agreement with a State or entity for the purpose of giving effect to a request for extradition in a particular case.")

24. Zhonghua Renmin Gongheguo Yindu fa [Extradition Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2000, effective Dec. 28, 2000), art. 15, available at http://www.law-lib.com/law/law_view.asp?id=508 (Chinese text of law), and at http://english.gov.cn/laws/2005-09/22/content_68710.htm (English translation) ("Where there is no extradition treaty to go by, the Requesting State shall make a reciprocity assurance.") [hereinafter Extradition Law].

25. See, e.g., Shao Da, *No Early Resolution in Lai Extradition Case*, CHINA.ORG.CN, Sept. 27, 2004, <http://www.china.org.cn/english/2004/Sep/108155.htm> (describing problems and delays in Sino-Canadian individual extradition negotiations); Geoffrey York, *China Asks Canada to Deport Alleged Embezzler*, GLOBE & MAIL (Toronto), Jan. 29, 2007, at A1 ("Suspects can still be extradited to China without a treaty, but it is a more complicated and difficult process.")

26. PRESIDENT OF THE UNITED STATES, AGREEMENT WITH HONG KONG FOR THE SURRENDER OF FUGITIVE OFFENDERS, S. TREATY DOC. NO. 105-3, at iii (1997) (noting the absence of an extradition treaty between the United States and the People's Republic of China); Daniel M. Creekman, Note, *A Helpless America? An Examination of the Legal Options Available to the United States in Response to Varying Types of Cyber-Attacks from China*, 17 AM. U. INT'L L. REV. 641, 658 (2002); Erik Alexander Rapoport, Comment, *Extradition and the Hong Kong Special Administrative Region: Will Hong Kong Remain a Separate and Independent Jurisdiction After 1997?*, 4 ASIAN L.J. 135, 150 (1997); James D. Wilets, Case Commentary, *Lui v. United States*, 110 F.3d 103 (1st Cir. 1997), 91 AM. J. INT'L L. 537, 541 (1997).

27. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-15.100 (1997) (limiting U.S. extraditions without a treaty to instances when the requested individual committed a crime of violence against nationals of the United States in a foreign country).

28. For background information on disguised extradition, see M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 121-45 (1974).

29. Zhang Zhiping, *supra* note 20.

concerning allegedly corrupt Chinese nationals whom China would like the United States to extradite.³⁰

Part II of this Note introduces the literature on the nexus of extradition law and human rights law. Part III elaborates on the polar approaches to offer points of comparison before describing the U.S. approach of negotiating to return criminal suspects to China on a case-by-case basis. An analysis of the benefits and drawbacks of these three divergent approaches follows in Part IV. The analysis reveals that there are important policy benefits to the case-by-case approach to extradition. Benefits include the flexibility to pursue conditions not in a treaty and the ability to place greater pressure on China to pursue long-term human rights reforms. Part IV concludes by arguing that the United States should maintain the case-by-case approach. However, Part V argues that the United States should improve on its approach as currently administered. It should better protect the rights of potential extraditees, direct its efforts around influencing the Chinese human rights debate, and increase its cooperation with China outside the extradition-human rights dialogue.

II. THE INTERSECTION OF EXTRADITION LAW AND HUMAN RIGHTS LAW

Extradition law, which involves sovereign powers surrendering individuals accused or convicted of an offense outside their territory to a state requesting to prosecute for the offense, is an important mechanism for suppressing crime by preventing criminals from finding safe havens.³¹ It is “a blend of international and national law.”³² In the international law arena, treaties typically provide for the transfer of criminal fugitives between states. Bilateral extradition treaties are by far the most common type of agreement.³³ In 1990, the United Nations released a model extradition treaty,³⁴ providing a framework to assist its member states with negotiating bilateral extradition agreements. Bilateral treaties dominate extradition practice because they increase certainty and accountability in international crime control.³⁵ Multilateral extradition conventions also exist.³⁶ Further, some international conventions, which are not extradition conventions as such, nevertheless

30. *E.g.*, Press Release, U.S. Dep’t of Justice, Former Bank of China Managers and Their Wives Indicted for Stealing More than \$485 Million, Laundering Money Through Las Vegas Casinos (Jan. 31, 2006), <http://www.usdoj.gov/usao/nv/home/pressrelease/january2006/chaofan013106.htm>.

31. Ved P. Nanda, *Bases for Refusing International Extradition Requests: Capital Punishment and Torture*, 23 *FORDHAM INT’L L.J.* 1369, 1369 (2000).

32. Dugard & Van den Wyngaert, *supra* note 10, at 188.

33. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 24 (5th ed. 2007); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 250 (1995).

34. Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A/45/49 (Dec. 14, 1990), *amended by* G.A. Res. 52/88, arts. 3-4, U.N. Doc. A/52/49 (Dec. 12, 1997).

35. *See United States v. Alvarez-Machain*, 504 U.S. 655, 664 (1992) (“[E]xtradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures.”).

36. Multilateral extradition treaties include the European Convention on Extradition, the Commonwealth Scheme for the Rendition of Fugitive Offenders, the Arab League Extradition Convention, the Interamerican Extradition Convention, and the Economic Community of West African States Extradition Convention. Interpol, *Extradition: Some Benchmarks* (Mar. 18, 2003), <http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS11.asp>.

incorporate provisions relating to extradition law.³⁷ Additionally, a “disguised extradition”—the process of employing legal procedures other than extradition to transfer a fugitive from one state into the hands of another state’s authorities—can occur without a treaty, through diplomatic negotiations and deportation, if permissible under both states’ laws.³⁸ “Because entering into an extradition treaty,” or a disguised extradition agreement, “involves the sacrifice of some sovereign rights, these agreements are always reciprocal.”³⁹

Typically, a formal request for extradition is made through diplomatic channels accompanied by an arrest warrant, information about the identity of the accused, and the basic facts of the offense,⁴⁰ and then the municipal law of the requested state must determine whether the seizure and transfer of the fugitive would accord with the agreement.⁴¹ The content of national extradition laws varies, and such laws may take a purely administrative or purely judicial approach to this question, but most frequently they involve a combination of both judicial and administrative functions.⁴² Under this quasi-executive and quasi-judicial approach, a refusal on the part of the judicial authorities to grant extradition is binding on the administrative authorities. If the judicial authorities give their consent to extradition after a review of prima facie evidence from the requesting state, the executive authorities may—in addition to taking into account purely legal considerations—examine questions related to reciprocity and the desirability of the extradition.⁴³

A. *History of Individual Rights in Extradition*

Extradition has its roots in the idea of territorial jurisdiction. Historically, extradition was reserved for political or religious offenders who threatened the king, emperor, or religious hierarchy. The process of extradition derived from an international principle of comity among states. Each ruler would “respect the authority” of another government and return a

37. *Id.* For instance, in terms of human rights, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that each state is responsible for respecting and ensuring the civil and political rights of persons within its jurisdiction and territory, a clause that may affect extraditions. International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 2(1), U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

38. This avenue, which is not really extradition at all, is important in the American approach to responding to extradition requests. See Terry Richard Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT’L L. 294, 333 (1987); U.S. DEP’T OF JUSTICE, *supra* note 27, §§ 9-15.100, 9-15.610 (requiring an offer of reciprocity when extradition is granted without a treaty); McNabb Assocs., *Extradition from China to the United States—Danlei Chen*, International Extradition Blog, http://www.internationalextraditionblog.com/2006_06_11_archive.html (June 16, 2006, 09:35 EST) (describing how the mutual legal assistance treaty with China provides for extradition in the absence of an extradition treaty); *infra* Section III.C.

39. Mary-Rose Papandrea, Comment, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign*, 62 U. CHI. L. REV. 1187, 1187 (1995).

40. ANTHONY I. AUST, HANDBOOK OF INTERNATIONAL LAW 265 (2005).

41. Dugard & Van den Wyngaert, *supra* note 10, at 188.

42. Interpol, *supra* note 36.

43. MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 228 (2005).

suspect who was a subject of that government “no questions asked,” so the rights of the individual were not protected.⁴⁴

The idea of applying extradition to suppress criminality developed in the mid-nineteenth century. Since then, bilateral extradition treaties have traditionally included at least three clauses that safeguard individual rights. First, the political offense exception enables a state receiving an extradition request (the “requested state”) to refuse to extradite a person who had been involved in politically motivated crimes in the state seeking an extradition (the “requesting state”).⁴⁵ The political offense exception intersects with the political asylum doctrine, as once asylum is granted, it is well established that a request for extradition must be denied if related to the commission of political offenses.⁴⁶ Second, the rule of double criminality holds that a person may not be extradited unless the action that the person allegedly committed was illegal under the laws of both the requesting state and the requested state.⁴⁷ Finally, the principle of specialty guarantees that the extraditee will be tried only for the crime for which she was extradited.⁴⁸

These clauses provide some security for the rights of the individual, but they fall short of satisfying the modern concept of human rights protections.⁴⁹ The political offense exception excuses the requested state from having to consider human rights violations arising from a political dispute in the requesting state.⁵⁰ The double criminality requirement and the principle of specialty do not protect human rights but only “ensure that foreign states will not be allowed to punish fugitives for conduct considered contrary to the requested state’s own—often chauvinistic—notions of criminal justice.”⁵¹ Requested states may waive the specialty rule, demonstrating that it is not meant to protect the fugitive.⁵² The extradited individual lacks standing to

44. MICHAEL FOONER, INTERPOL: ISSUES IN WORLD CRIME AND INTERNATIONAL CRIMINAL JUSTICE 144 (1989).

45. “The Political Offense Exception [which originated to enable grants of political asylum] is an exception to a general treaty obligation to extradite to a requesting country.” IVOR STANBROOK & CLIVE STANBROOK, EXTRADITION: LAW AND PRACTICE 65 & n.1 (2d ed. 2000). This exception has attracted much attention and controversy, ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 419 (1993), but it is generally observed by states. STANBROOK & STANBROOK, *supra*, at 65. However, with the rise of international terrorism, some bilateral treaties have begun to exclude it. *See, e.g.*, Supplementary Treaty, U.S.-U.K., June 25, 1985, T.I.A.S. No. 12050.

46. CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 66 (2005).

47. STANBROOK & STANBROOK, *supra* note 45, at 20. The validity of the double criminality rule has never faced serious contention, “resting as it does in part on the basic principle of reciprocity which underlies the whole structure of extradition, and in part on the maxim *nulla poena sine lege*.” I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 137-38 (1971); *see also* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 47 (1991) (explicating the uncontroversial nature of the rule of double criminality).

48. The specialty rule is a feature of all extradition agreements. “It appears to be universally recognized and therefore merits the status of a general principle of international law.” STANBROOK & STANBROOK, *supra* note 45, at 47.

49. Dugard & Van den Wyngaert, *supra* note 10, at 188 (“[I]t would be incorrect to explain [the political offense exception, the rule of double criminality, and the principle of specialty] entirely in human rights terms.”).

50. *Id.*

51. *Id.*

52. BASSIOUNI, *supra* note 33, at 585-86.

challenge the violation of an extradition treaty.⁵³ Furthermore, courts in many jurisdictions have subscribed to a rule of non-inquiry, meaning that they refuse to inquire into the criminal justice standards in the requesting state “on the grounds that it is a matter best left to executive determination,”⁵⁴ although this rule is no longer absolute.⁵⁵ In light of these deficiencies, it was inevitable that the modern human rights movement would influence extradition policies.

B. *The Modern Human Rights Movement and Extradition*

The modern human rights movement was born after the creation of the United Nations and the adoption of the Universal Declaration of Human Rights;⁵⁶ human rights became an explicit concern of extradition law soon thereafter. Some nations were affected by feelings of guilt for their refusal to accommodate refugees fleeing from Nazi and Soviet terror, and they responded by “emphasizing traditions of asylum and hospitality to the oppressed.”⁵⁷ In the half century following the Second World War, extradition law became increasingly intertwined with human rights law.⁵⁸ Important developments for extradition included the Geneva Conventions of 1949,⁵⁹ the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,⁶⁰ the Refugee Convention of 1951, the 1967 Protocol Relating to the Status of Refugees,⁶¹ the U.N. “International Bill of Rights” of 1966,⁶² and the U.N. Convention against Torture and Other Cruel, Inhuman,

53. Dugard & Van den Wyngaert, *supra* note 10, at 188-89; *see also* *United States v. Noriega*, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) (“As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of protest by the sovereign involved.”).

54. Dugard & Van den Wyngaert, *supra* note 10, at 189.

55. For example, U.S. and Canadian courts have indicated that they will not follow the rule of non-inquiry when the likely treatment in the requesting state is “antipathetic to a federal court’s sense of decency,” *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960), “shocks the conscience,” *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 522 (Can.), or is “simply unacceptable,” *United States v. Allard*, [1987] 1 S.C.R. 564, 572 (Can.).

56. For a brief history of the birth of the modern human rights movement, see CAROL DEVINE, CAROL RAE HANSEN & RALPH WILDE, *HUMAN RIGHTS: THE ESSENTIAL REFERENCE* 119-21 (1999).

57. FOONER, *supra* note 44, at 145.

58. ARVINDER SAMBEI & JOHN R.W.D. JONES, *EXTRADITION LAW HANDBOOK* 95 (2005).

59. The “grave breaches” provisions of the Geneva Conventions of 1949 create a mandatory “try-or-extradite” regime for specified serious violations of the provisions of the conventions. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49-50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

60. The European Convention affords significant protections for persons subject to extradition. For a detailed discussion of this role of the Convention, see GILBERT, *supra* note 47, at 79-90.

61. The 1951 Refugee Convention, as amended by the 1967 Protocol, provides protection to any person “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country” Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150. This convention naturally has implications for extradition law. SAMBEI & JONES, *supra* note 58, at 97-98.

62. Along with the Universal Declaration of Human Rights, the two United Nations covenants—the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESC)—are sometimes referred to as the “International Bill of Rights.” SAMBEI & JONES, *supra* note 58, at 97. “The ICCPR guarantees a large number of rights and freedoms including the right to life, the right to be free from torture, the right to liberty and security of the person, freedom of expression, etc.” *Id.* China has signed the ICCPR. It has not ratified the treaty yet, but that does not detract from the fact

or Degrading Treatment or Punishment of 1984 (Convention Against Torture).⁶³

With these human rights accomplishments in place, the 1989 *Soering* case⁶⁴ of the European Court of Human Rights marked a dramatic “breakthrough” for the linking of extradition and human rights on the international scene and served as a “catalyst of scholarly writings” in support of this link.⁶⁵ Jens Soering, a West German national, murdered his girlfriend’s parents in Virginia and then fled to the United Kingdom. The United States requested his extradition, and the United Kingdom ordered his extradition in response to the request.⁶⁶ Soering petitioned the European Court of Human Rights for relief under Article 3 of the European Convention on Human Rights because, even though Article 3 does not include the death penalty per se in its definition of “inhuman or degrading treatment or punishment,” Soering would face “inhuman or degrading treatment or punishment” on death row in Virginia.⁶⁷ The Court agreed, holding that the United Kingdom was required by Article 3 not to extradite Soering to the United States, in part because 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.⁶⁸ As a result of this important holding, “the fact that the actual human rights violation would take place outside the territory of the requested State did not absolve it from responsibility for any foreseeable consequence of extradition suffered outside its jurisdiction.”⁶⁹

The *Soering* reasoning, while not universally accepted,⁷⁰ has gained considerable influence worldwide. Much Western scholarly literature supports its holding.⁷¹ States have sought to renegotiate extradition treaties to take into account more individual rights and to resolve some of the conflicts that arise when a binding extradition treaty contradicts a binding human rights treaty.⁷² The United Nations Human Rights Committee accepted the *Soering* case’s reasoning in *Ng v. Canada*.⁷³ Three premier nongovernmental international

that it is under an international legal obligation. See Sun Shiyan, *The Understanding and Interpretation of the ICCPR in the Context of China’s Possible Ratification*, 6 CHINESE J. INT’L L. 17 (2007).

63. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984), 1465 U.N.T.S. 85.

64. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

65. Roda Mushkat, “Fair Trial” As a Precondition to Rendition: An International Legal Perspective 1 (Univ. of H.K. Ctr. for Comparative & Pub. Law, Occasional Paper No. 5, 2002), available at <http://www.hku.hk/ccpl/pub/occasionalpapers/paper5/paper5.doc>.

66. Richard B. Lillich, *The Soering Case*, 85 AM. J. INT’L L. 128, 128-29 (1991).

67. *Id.* at 130-31.

68. *Id.* at 130-45.

69. Mushkat, *supra* note 65, at 1.

70. See Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 910 (2005).

71. See PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 489-710 (Albin Eser & Otto Lagodny eds., 1992); Lillich, *supra* note 66; John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT’L L. & COM. REG. 401 (1990); Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT’L L. 85 (1992); Christine Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora’s Box?*, 39 INT’L & COMP. L.Q. 757 (1990).

72. Valerie Epps, *The Development of the Conceptual Framework Supporting International Extradition*, 25 LOY. L.A. INT’L & COMP. L. REV. 369, 380 (2003).

73. *Ng v. Canada*, U.N. Human Rights Comm., No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991, reprinted in 98 I.L.R. 479 (1993).

law associations—the Institute of International Law, the International Law Association, and the International Association of Penal Law—quickly approved reports recommending that “both executive and judicial authorities should refuse extradition whenever there is a real risk that the fugitive’s human rights will be violated in the requesting state.”⁷⁴ As one commentator writes: “[I]n the affairs of man, extradition has come full circle, from a concern strictly between sovereigns in which the individual was merely a pawn, to a concern of governments in which the individual is . . . often the dominating force in particular cases”⁷⁵

C. *Which Human Rights?*

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. Assuming that certain human rights may take priority over bilateral extradition agreements and domestic extradition statutes, the question remains: which human rights may be invoked? After all, while states are interested in upholding human rights norms, extradition plays an important role in crime suppression, so surely there must be some limits on which rights can obstruct an extradition.

Some academic literature has sought to identify these limits. The literature focuses on several rights that have been invoked to obstruct extradition in the past, including freedom from torture; freedom from the death penalty; freedom from cruel, inhuman, or degrading treatment or punishment; right to a fair trial; right to privacy; and freedom from discrimination.⁷⁶

The overriding conclusion in the literature is that no rights violations obstruct extradition per se, but many *can* obstruct extradition depending on the parties involved and other circumstances.⁷⁷ Torture, which is outlawed under both customary international law and the Convention Against Torture, comes closest to being an absolute obstacle to extradition, but even then the “universally binding status of the norm may not exclude differences in interpretation over what constitutes torture.”⁷⁸ With respect to the death penalty, certainly the fact that a fugitive will be executed if returned to the requesting state cannot itself obstruct extradition, because international law does not prohibit the death penalty. However, some states are so opposed to the use of the death penalty that diplomatic assurances that execution will not take place are necessary (and not even always sufficient) to facilitate extradition.⁷⁹ Scholars have made arguments that a requesting state’s lack of

74. Mushkat, *supra* note 65, at 2.

75. FOONER, *supra* note 44, at 145.

76. See, e.g., Dugard & Van den Wyngaert, *supra* note 10, at 195-206; Mushkat, *supra* note 65, at 2-3.

77. Dugard & Van den Wyngaert, *supra* note 10, at 206.

78. *Id.* at 198.

79. *Id.* at 196-97; Mary K. Martin, *A One-Way Ticket Back to the United States: The Collision of International Extradition Law and the Death Penalty*, 11 CAP. DEF. J. 243, 253-57 (1999); Craig R. Roecks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a*

respect for various other human rights should absolutely obstruct extradition,⁸⁰ but the reality is that “there is no certainty about the content and scope of the rights that are most likely to block extradition.”⁸¹ There is not yet any international law that conclusively overrides bilateral extradition agreements, so whether or not any given human right will obstruct an extradition is solely a matter of bilateral diplomatic negotiations.

III. DIVERGENT APPROACHES TO EXTRADITIONS WITH CHINA

Western nations have long struggled with how to pursue bilateral extradition negotiations with the Chinese in light of their human rights record. China is often described as harboring some of the worst human rights abuses in the world. The U.S. Department of State laments the Chinese government’s record as “poor” and “deteriorated.”⁸² U.N. bodies are equally critical.⁸³ There have been eleven attempts to censure China before the U.N. Commission on Human Rights in Geneva since 1990.⁸⁴ Nongovernmental and watchdog organizations regularly release scorching critiques.⁸⁵ While some claim that these critiques are unfair and that China is being held to a higher standard than other countries,⁸⁶ an objective observer must concede that China has yet to halt its most significant human rights abuses.

Until the early 1990s, China had not entered into any extradition treaties with other states. But around this time, as corrupt officials began to flee the country in large numbers,⁸⁷ the Chinese government focused on increasing its international criminal cooperation.⁸⁸ In 1993, China signed its first extradition

Person Charged with a Capital Crime, 25 CAL. W. INT’L L.J. 189, 191-97 (1994). Diplomatic assurances are often unreliable when they come from countries that routinely abuse human rights. There has been much literature on the dangers associated with diplomatic assurances. *See, e.g.*, HUMAN RIGHTS WATCH, “EMPTY PROMISES”: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE (2004), <http://hrw.org/reports/2004/un0404/>; *see also infra* notes 221-223 and accompanying text (detailing dangers associated with relying on diplomatic assurances).

80. *See, e.g.*, Mushkat, *supra* note 65, at 3-6 (arguing that the likelihood that the fugitive would not receive a fair trial in the requesting state should obstruct extradition).

81. Dugard & Van den Wyngaert, *supra* note 10, at 205.

82. U.S. DEP’T OF STATE, *supra* note 12.

83. *See* U.N. Special Rapporteur of the Comm’n on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief*, Annex 1, delivered to the General Assembly, U.N. Doc. A/51/542 (Oct. 23, 1996); Philip P. Pan, *U.N. Official Criticizes Education in China*, WASH. POST, Sept. 19, 2003, at A20.

84. Each has failed, though. *Chronology of Defeats of Anti-China Human Rights Attempts*, CHINA.ORG.CN, Apr. 16, 2004, <http://www.china.org.cn/english/international/93203.htm>.

85. *See, e.g.*, AMNESTY INT’L, REPORT 2005: CHINA (2005), <http://web.amnesty.org/report2005/chn-summary-eng> (“There was progress towards reform in some areas, but this failed to have a significant impact on serious and widespread human rights violations perpetrated across the country.”); Human Rights First, *Human Rights Defenders in China*, http://www.humanrightsfirst.org/defenders/hrd_china/hrd_china.htm (last visited Nov. 7, 2007) (“The human rights situation in China continues to be grave.”).

86. *E.g.*, Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT’L L.J. 71 (2005).

87. This exodus resulted from a combination of China’s financial growth, which created opportunities for corruption and a subsequent crackdown against corrupt practices. *See* Zhou, *supra* note 8.

88. Ding Zhitao, *Fugitive Justice*, BEIJING REV., Feb. 9, 2006, available at <http://www.bjreview.cn/EN/06-06-e/w-3.htm>.

treaty, with Thailand.⁸⁹ Since 1993, it has ratified more than twenty bilateral treaties, but they have mostly been with developing countries, including Belarus, Bulgaria, Kazakhstan, Mongolia, Romania, and Russia.⁹⁰ It has been easier for China to negotiate with these countries, in part because they are all formerly socialist countries, have legal systems similar to that of China,⁹¹ and are generally less demanding about human rights issues. Indeed, although China's extradition treaties with developing countries generally comply with the principle of double criminality, the principle of specialty, and the principle of non-extradition for political offenses, they do not provide other protections for the individual.⁹² These treaties have benefited China, as developing countries in geographical proximity to China have attracted Chinese fugitives—especially low-level officials who fled with relatively small sums of money.⁹³ From 1993 until 2005, more than 230 Chinese criminal suspects were returned to China.⁹⁴

Despite obstacles posed by its human rights record, China has turned its attention to negotiating extradition agreements with developed Western countries. High-level officials wanted for large-scale, corruption-related crimes have fled to developed Western countries at high rates,⁹⁵ and China is interested in prosecuting these fugitives.⁹⁶ Sustainable economic growth is a primary focus of the Chinese government,⁹⁷ and corruption is a serious hindrance to responsible growth. The official Xinhua News Agency quoted sources from the Ministry of Public Security stating that “800 suspects at large abroad [are] wanted for economic crimes. They are accused of embezzling a total sum of almost 70 billion yuan (US\$8.75 billion).”⁹⁸ An earlier government tally estimated that at least four thousand suspected corrupt officials had pocketed US\$50 billion and were hiding from law enforcement.⁹⁹

The effort to bring corrupt officials to justice has reached the highest levels of Chinese government. In 2000, China promulgated its first national extradition law, “which provides for specific rules, conditions, and procedures for extradition cooperation with other countries.”¹⁰⁰ In January 2007,

89. Fu Hualing, *supra* note 5.

90. *Id.*

91. CHAU PAK-KWAN & STEPHEN LAM, RESEARCH STUDY ON THE AGREEMENT BETWEEN HONG KONG AND THE MAINLAND CONCERNING SURRENDER OF FUGITIVE OFFENDERS ¶ 1.7 (2001), <http://www.legco.gov.hk/yr00-01/english/library/erp05.pdf>.

92. *Id.* ¶ 1.14. In China, the most controversial of these principles is the political offense exception. The concept of “political offense” is often not included in the bilateral extradition treaties signed between China and other countries. Qian Hu & Qiang Chen, *China's Extradition Law of 2000*, 1 CHINESE J. INT'L LAW 647, 649-50 (2002).

93. Ding Zhitao, *supra* note 88.

94. Sun Shangwu, *supra* note 13.

95. See Ding Zhitao, *supra* note 88 (“[M]ost Chinese officials flee to Western countries, not vice versa.”).

96. See *supra* note 8 and accompanying text.

97. *China Working Towards Sustainable Economic Growth*, PEOPLE'S DAILY, May 9, 2002, available at http://english.peopledaily.com.cn/200205/09/eng20020509_95353.shtml; *China's Wen Pledges Fairer Growth*, BBC NEWS, Mar. 5, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6418225.stm>.

98. *China Asks Canada to Extradite Former Banker*, CHINA.ORG.CN, Jan. 27, 2007, <http://www.china.org.cn/english/news/197945.htm>.

99. Lague, *supra* note 9.

100. Huang Feng, *The Establishment and Characteristics of China's Extradition System*, 4 FRONTIERS L. CHINA 595, 595 (2006). In terms of procedure, China has codified the quasi-judicial,

President Hu Jintao called for a “sustained fight against corruption” at the Seventh Plenary Session of the Central Commission for Discipline Inspection held in Beijing.¹⁰¹ According to Professor Wang Guixiu of the Communist Party of China’s Central Party School, “[t]he intensifying anti-corruption punch reflects the fact that the top administration is coming to an awareness of the crisis and has reached a consensus on combating corruption.”¹⁰² Because corruption enables “the well-connected to line their pockets at the expense of the public,” the people of China as well as the government are interested in clamping down on it.¹⁰³ As one major component of this effort, the government is aggressively seeking to cooperate in transnational criminal law enforcement, especially with developed Western nations.¹⁰⁴

Western nations have taken divergent approaches in responding to Chinese entreaties for formal cooperation. Spain and France have led the way in reaching formal extradition agreements with China, under which they agree to extradite wanted Chinese fugitives to China as long as Beijing makes assurances that it will not execute them. Portugal and Australia also subscribe to this approach. Meanwhile, Canada embodies a virtual non-engagement approach with the Chinese on extradition; its system makes extraditions nearly impossible to realize unless China improves its human rights practices. The United States has chosen a case-by-case approach, earnestly evaluating extradition requests from China and choosing to extradite only when certain conditions are met. The remainder of this Part describes these three approaches in turn, highlighting key differences between them and setting the stage for an analysis of each approach’s relative strengths and weaknesses.

A. *Treaty-Based Approach to Extradition with China*

There is no obligation under international law to surrender an alleged criminal to a foreign state for prosecution. Nevertheless, many states desire the right to demand the transfer of criminals from other countries, and bilateral extradition treaties create this right. The “treaty-based approach” to extradition with China imposes on both parties relatively inflexible obligations to extradite, subject to whatever conditions are noted in the treaty’s text.

Between 1993, when China entered into its first extradition treaty, and 2005, when China and Spain signed their groundbreaking treaty, it seemed unlikely that China would be able to reach an agreement with a Western developed nation in the near future. “Negotiations with developed countries

quasi-executive approach. When requesting extradition, the Ministry of Foreign Affairs preliminarily examines the documents that China will provide to a foreign country. Then the Supreme People’s Court and authorized High Courts at the provincial level exercise their judicial powers to certify that the requirements set forth by the Extradition Law and extradition treaties are met. But the ultimate power to decide whether the person sought shall be prosecuted in China, and whether conditional extradition shall be granted, is held by the State Council. Extradition Law, *supra* note 24, art. 29. The law also provides procedures for making requests for extradition to foreign countries. *Id.* arts. 47-51.

101. Feng Jianhua, *supra* note 8.

102. *Id.*

103. Minxin Pei, *The Tide of Corruption Threatening China’s Prosperity*, FIN. TIMES, Sept. 27, 2006, at 13.

104. Zhou, *supra* note 8.

were moving slowly,” said Xu Hong, counselor in the Chinese Department of Treaty and Law, in April 2006.¹⁰⁵ The reason such negotiations were proceeding slowly was Western concerns over Chinese human rights practices, and especially China’s use of the death penalty. China is widely reported to execute more individuals than the rest of the world combined¹⁰⁶ and even uses the death penalty as punishment for nonviolent economic crimes.¹⁰⁷

Such widespread use of execution is abhorrent to several Western nations, but it is “a big problem particularly for the Europeans,” according to one commentator.¹⁰⁸ The European Union is “opposed to the death penalty in all cases” and has consistently advocated for its universal eradication.¹⁰⁹ It even makes abolition of the death penalty a requirement for nations seeking EU membership.¹¹⁰

Despite these views, European nations have successfully negotiated extradition treaties in the past with nations that impose the death penalty. The most prominent examples are negotiations that have taken place with the United States. A majority of U.S. states and the U.S. federal system employ capital punishment,¹¹¹ and the United States faces severe criticism from Europe because of this practice.¹¹² Yet, the United States and European nations have found a viable middle ground to facilitate extraditions. The United States has agreed to include assurance language in treaties with European nations. Pursuant to such treaties, the United States, as the requesting state, will promise the requested state that if the fugitive is extradited it will conform to the requested state’s desire that the death penalty not be applied.¹¹³ The European state will then extradite pursuant to this assurance. Western European states now regularly demand that all of their bilateral extradition treaties provide for such conditional extradition, and the

105. *China Widens Net for Fugitive Fraudsters*, CHINA DAILY, Apr. 29, 2006, available at http://www.chinadaily.com.cn/china/2006-04/29/content_580629.htm.

106. See *supra* note 11 and accompanying text.

107. See Press Release, Amnesty Int’l, China and the World Day 2006: Innocence, <http://www.amnestyusa.org/actioncenter/actions/action7574.pdf> (last visited Nov. 7, 2007).

108. Lague, *supra* note 11 (quoting Steve Vickers, president of the private investigation company International Risk).

109. Delegation of the Eur. Comm’n to the U.S., EU Policy & Action on the Death Penalty, <http://www.eurunion.org/legislat/deathpenalty/deathpenhome.htm> (last visited Nov. 7, 2007).

110. European Commission, The EU’s Human Rights and Democratisation Policy: Abolition of the Death Penalty, http://ec.europa.eu/comm/external_relations/human_rights/adp/index.htm (last visited Nov. 7, 2007).

111. Death Penalty Info. Ctr., Death Penalty Policy by State, <http://www.deathpenaltyinfo.org/firstpage.html> (last visited Nov. 7, 2007).

112. In 1990, the European Parliament called for a resolution on the abolition of the death penalty in the United States. See William A. Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT’L & COMP. L. 535, 558-59 (1998). Later, in December 1997, the European Parliament proposed another resolution, this one aimed at discouraging EU businesses from investing in the United States in an effort to persuade American abolition of the death penalty. Dorean Marguerite Koenig, *A Death Penalty Primer: Reviewing International Human Rights Development and the ABA Resolution for a Moratorium on Capital Punishment in Order to Inform Debates in U.S. State Legislatures*, 4 ILSA J. INT’L & COMP. L. 513, 522 (1998). Europe continues to protest U.S. death penalty practices today. See Harold Hongju Koh & Thomas R. Pickering, *American Diplomacy and the Death Penalty*, FOREIGN SERVICE J., Oct. 2003, at 19, 20-21.

113. Kyle M. Medley, Note, *The Widening of the Atlantic: Extradition Practices Between the United States and Europe*, 68 BROOK. L. REV. 1213, 1234 (2003).

treaties forbid extradition “where the requesting state retains the death penalty and is unwilling to provide assurances that this penalty will not be implemented if the fugitive is extradited.”¹¹⁴

The overwhelming size of China’s human rights problems was one major factor distinguishing Europe’s negotiations with China from its negotiations with the United States, however. The death penalty was only the foremost of many human rights concerns that seemed to be impeding China’s ability to reach treaties with European nations.¹¹⁵ Of course, it was also easier for the United States and Western European nations to reach extradition agreements because the parties had established diplomatic ties, intertwined histories, and cultural similarities that Europe does not have with China.

The common perception that China would not be able to enter an extradition treaty with a Western nation was shattered when, on November 14, 2005, Spain and China signed a treaty for conditional extradition, making Spain the first developed Western nation to sign an extradition treaty with China. The treaty stipulated that extraditions from Spain to China would be contingent upon China’s promise not to execute returned fugitives,¹¹⁶ but the treaty contains no other human rights protections. Chinese President Hu Jintao and Spanish Prime Minister Jose Luis Rodriguez Zapatero signed the treaty in Madrid as only one component of a comprehensive strategic partnership between the two nations that would “usher in a new phase of development in bilateral relations.”¹¹⁷ The extradition treaty was one of sixteen bilateral agreements that the two leaders signed on the same day. Other agreements included a trade accord, an agreement to cooperate on developing peaceful nuclear energy, an investment treaty, and an agreement on the establishment of cultural centers.¹¹⁸ Both sides expressed hope that their relationship would serve as a model for strengthening the broader China-EU relationship.¹¹⁹

The signing of the extradition treaty was not lost on public commentators among the flurry of official government announcements, which tended to focus on the economic and trade aspects of the deal. Chinese experts confirmed that their government had legally committed itself not to execute criminal suspects repatriated from Spain. The Chinese media described the “non-extradition for death penalty” provision as a “major shift in tactics” for bringing corrupt officials back to China to face prosecution,¹²⁰ and they lauded it as indicative of China’s respect for human rights.¹²¹ Western

114. Dugard & Van den Wyngaert, *supra* note 10, at 192. For example, see Extradition Treaty, U.S.-Fr., art. 7, Apr. 23, 1996, S. TREATY DOC. NO. 105-13 (1996).

115. See Lague, *supra* note 11.

116. Article 3 of the China-Spain Treaty on Extradition states that an extradition request will be rejected “[w]hen the offense for which extradition is sought is punishable by death under the laws in the Requesting State, unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.” Huang Feng, *supra* note 100, at 599. See also China-Spain Extradition Treaty, *supra* note 14.

117. Press Release, Embassy of the P.R.C. in the U.S., China, Spain Establish Strategic Partnership (Nov. 15, 2005), <http://www.china-embassy.org/eng/xw/t221563.htm>.

118. *China and Spain Boost Trade Ties*, *supra* note 18.

119. Press Release, Embassy of the P.R.C. in Austl., China, Spain Agree to Build Comprehensive Strategic Partnership (Nov. 16, 2005), <http://au.china-embassy.org/eng/xw/t221674.htm>.

120. *China Widens Net for Fugitive Fraudsters*, *supra* note 105; Sun Shangwu, *supra* note 13.

121. See Huang Feng, *supra* note 100, at 596; Sun Shangwu, *supra* note 13.

observers acknowledged that agreeing not to use the death penalty was a groundbreaking move by the Chinese, as they had never agreed to such a provision before,¹²² but they questioned nonetheless whether it was appropriate to enter into an extradition agreement with such a frequent violator of human rights. The Spanish branch of Amnesty International severely criticized Spanish leaders for entering into the agreement in light of China's human rights record. Protests followed in Madrid.¹²³

A little over a year later, in spite of human rights-based critiques of the Spanish approach, the French government entered into a similar treaty with China. President Hu and French President Jacques Chirac agreed on the treaty in Paris in January 2007, and French Justice Minister Pascal Clement and Chinese First Deputy Foreign Minister Dai Bingguo signed the treaty on March 20, 2007.¹²⁴ Like Spain, France insisted on terms that it will only extradite upon receipt of a guarantee that the Chinese will not employ capital punishment.¹²⁵ Both countries hailed the agreement as crucial for their bilateral relations and the suppression of safe havens for criminal suspects.¹²⁶ Chirac also touted benefits for French business as a result of the French government's engagement with Beijing.¹²⁷

A variety of actors in France assailed the treaty. Amnesty International France urged the French legislature not to ratify the text because of human rights concerns.¹²⁸ In response to the French Justice Ministry's dismissal of the criticism, Amnesty France stated that there would be "no certainty that a Chinese citizen extradited one day with the clearest guarantees will not be

122. While China had not previously entered an extradition treaty with a developed Western country, other countries with which China signed treaties between 1993 and 2005 did ask for "non-extradition for death penalty" clauses. Even some countries that continue to use the death penalty domestically prefer to have such a clause in a bilateral extradition agreement. CHAU & LAM, *supra* note 91, ¶ 1.49. Huang Feng, Director of the Research Institute of International Criminal Law at Beijing Normal University, has identified four ways that China previously avoided the direct expression of a "non-extradition for death penalty" provision in extradition treaties:

1) . . . [t]o persuade the other side not to include such a provision 2) to use more general phrases in order to avoid direct expression 3) to set the issue aside in the formal provisions of the treaty, but to make explanations in the minutes of the meetings between the parties to the treaty and 4) to make a general stipulation in the formal provisions of the treaty, as well as a supplementary explanation in the minutes of meetings.

China used the first option in treaties with Thailand and Kazakhstan, the second option with Russia, the third option with Belarus, and the fourth with Romania and Bulgaria. CHAU & LAM, *supra* note 91, ¶ 1.50.

123. *China and Spain Boost Trade Ties*, *supra* note 18.

124. *China, France Sign Agreement on Extradition*, XINHUA NEWS AGENCY, Mar. 21, 2007, http://news.xinhuanet.com/english/2007-03/21/content_5874162.htm.

125. *France Backs Extradition to China*, BBC NEWS, Mar. 20, 2007, <http://news.bbc.co.uk/2/hi/europe/6472679.stm>.

126. According to the article, Chinese diplomatic sources believed that "[t]he treaty provides a legal foundation for China-France cooperation in the fight against crime." French Justice Minister Pascal Clement said the agreement was of great importance, "particularly for bilateral relations," and that the agreement would "strengthen and deepen our judicial cooperation further." *China, France Sign Agreement on Extradition*, *supra* note 124.

127. See *Chirac Seeks China Business Ties*, BBC NEWS, Oct. 25, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/6083408.stm>; *France Backs Extradition to China*, *supra* note 125.

128. *France Signs Extradition Treaty with China*, *supra* note 18 (referencing "continuing reports of serious violations in China, including the use of the death penalty and abusive forms of arbitrary detention, torture and cruel, inhumane and degrading treatments").

sentenced to death at a later date on a different charge.”¹²⁹ Socialist French presidential candidate Ségolène Royal joined human rights groups in criticizing the extradition treaty with China.¹³⁰ Many critics focused on the perception that France was motivated mostly by its economic bottom line in agreeing to the treaty. In a joint statement, the Paris-based League of Human Rights (LDH) and the International Federation of Human Rights Leagues (FIDH) asserted: “the commercial interests of France do not justify the slightest leniency towards China.”¹³¹ Jean-Pierre Dubois, president of the French Human Rights League, proclaimed that he was “astonished that the French government could agree to deliver anyone up to a legal system that does not guarantee any individual liberty” and that “[i]t is clear that this treaty has been drawn up for economic reasons, which is totally unacceptable.”¹³²

Portugal and Australia also recently signed extradition treaties with China. Both treaties contain provisions that extradited individuals cannot face the death penalty. These nations’ motivations in entering into treaties with China seem to mirror those of Spain and France. Portuguese Prime Minister José Sócrates, accompanied by a delegation of businessmen, signed the extradition treaty at the same time he entered into a variety of other pacts with China regarding “the economy, finance, culture and taxation.”¹³³ Australia and China signed their treaty at an Asia-Pacific Economic Cooperation (APEC) forum. The treaty, which has yet to be ratified by the Australian Parliament, faces serious criticism from Australian human rights groups worried about Chinese abuses and its inadequate legal system.¹³⁴

Yet such criticisms overlook potentially positive human rights effects of such treaties. While there is no sign that the French, Spanish, Portuguese, and Australians intended to do so, their cooperation on extradition with China—coupled with the prospect of more such treaty negotiations—appears to have contributed to a movement in China to eliminate the death penalty for nonviolent crimes. The movement is largely based on the idea that abolition of the death penalty for economic crimes like corruption could facilitate the extradition of corrupt officials fleeing abroad.¹³⁵

Chinese legal scholars are leading the movement. For example, Huang Feng, director of the Research Institute of International Criminal Law at Beijing Normal University, is outspoken in his belief that abolition of the death penalty for nonviolent crimes “is pressing for China” precisely because the Chinese need to sign bilateral extradition treaties with Western nations.¹³⁶ Wang Minggao of Hunan University agrees:

129. *Id.*

130. Martin Arnold, *Royal Criticises French Extradition Treaty with China*, FIN. TIMES, Jan. 9, 2007, at 5.

131. *France Signs Extradition Treaty with China*, *supra* note 18.

132. Kim Willsher, *Don't Mention Human Rights, French Told*, SUNDAY TELEGRAPH (London), Jan. 7, 2007, at 31.

133. Press Release, Portal do Governo, PM Wants to Showcase “A Modern Portugal” (Jan. 31, 2007), http://www.missaochina.gov.pt/noticias_noticia_44.asp.

134. *See* Adams, *supra* note 18; Press Release, Philip Ruddock, *supra* note 17.

135. Lague, *supra* note 11; Liu Li, *supra* note 20; Zhang Zhiping, *supra* note 20.

136. Zhang Zhiping, *supra* note 20.

Abolishing the death penalty for corruption will help to track down fugitive corrupt officials. . . . Based on international practice . . . criminals who face a possible death sentence will not be repatriated. It has become an obstacle for China to chase and capture fugitive corrupt officials. . . . [I]t is better to take more practical measures to bring the fugitives back under China's own legal jurisdiction than to let them off under the shelter of "no repatriation of criminals under a death sentence. . . ." Abolishing the death penalty is helpful for punishing corrupt officials.¹³⁷

Government officials also appear to be taking this debate seriously. At the annual National People's Congress session in March 2006, some deputies suggested that the death penalty should be gradually abolished for most economic crimes, such as smuggling, theft, corruption, and bribery. The proposal attracted "much attention and controversy."¹³⁸ Various Chinese legal scholars and commentators responded that the death penalty must be maintained to deter individuals from committing crimes, including corruption, in the future.¹³⁹ Others maintain that the death penalty for nonviolent crimes is justifiable because it educates the general public about behavior that is off-limits¹⁴⁰ and because it has deep roots in traditional Chinese culture.¹⁴¹ Meanwhile, U.S.-based scholars of Chinese law doubt that the abolition of the death penalty for non-economic crimes would be enough for some countries to extradite individuals to China. "It will increase the probability that other countries will be willing to extradite suspects," said Donald Clarke, a China law expert at George Washington University Law School.¹⁴² "But [the Chinese] will still have to overcome the obstacle, certain to be raised by defense counsel, of significant torture in China in breach of the United Nations Convention Against Torture."¹⁴³

B. *Non-Engagement Approach to Extradition with China*

In contrast to the treaty-based approach, the "non-engagement approach" to extradition with China is characterized by an unwillingness to return Chinese nationals requested for criminal prosecution. This unwillingness might arise in the political or judicial branches of government. Its defining characteristics are a lack of serious negotiations for an extradition treaty and, additionally, the exceeding difficulty of returning a requested individual to China on a case-by-case basis. This approach hinges on a Western nation's serious commitment to upholding human rights and its grave distrust of assurances from Beijing and overall disdain for China's record on human rights.

137. *Id.*; see also *China Hunts Corrupt Officials Who Abscond Overseas*, PEOPLE'S DAILY, Mar. 24, 2004, available at http://english.peopledaily.com.cn/200403/24/eng20040324_138361.shtml (providing Wang's university affiliation).

138. Zhang Zhiping, *supra* note 20.

139. *Id.* (describing Chen Zhonglin's, Xie Wangyuan's, and Liu Tingji's stances against abolition).

140. Jeremy T. Monthly, Comment, *Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 33 TEX. INT'L L.J. 189, 208 (1998).

141. Lu Jianping & Guo Jian, *Death Penalty in People's Republic of China: Quo Vadis?*, 2006 ELECTRONIC REV. INT'L ASS'N PENAL L. A4, at 1-2, <http://www.penal.org/pdf/ReAIDP2006/DeathpenaltyChinaLU.pdf>.

142. Lague, *supra* note 11.

143. *Id.*

Canada is the most prominent nation to take such a non-engagement approach to extradition with China. The totality of human rights abuses in China, including torture, has made extraditions between China and Canada problematic. While in 1994 Canada became the first Western nation to reach a mutual legal assistance treaty with China,¹⁴⁴ further Sino-Canadian cooperation in the areas of criminal justice and crime prevention in the form of an extradition treaty appears unlikely in the near future.¹⁴⁵

Although a treaty appears unlikely, case-by-case extraditions without a treaty are permissible under both states' laws,¹⁴⁶ and Canada has been willing to engage China in ad hoc, case-by-case negotiations. "Disguised extraditions," in the form of a negotiated agreement and deportation, can also still take place in the absence of a treaty.¹⁴⁷ Individual negotiations potentially would allow Canada, as the requested country, to demand substantive human rights protections—such as protections against torture, interrogation, or detention in inhumane conditions—beyond assurances that the requested individual will not face execution. Yet when there are significant human rights and other political differences between the two countries, it is exceedingly difficult to achieve approval for individual extraditions from the judiciary and the executive.¹⁴⁸ Achieving approval for deportation is often no easier. Canada has returned only a few criminal suspects to other countries absent a treaty,¹⁴⁹ and Canada and China have had extreme difficulty in attempts to cooperate on individual extraditions.

Canada has good reason to be cautious when considering extradition with the Chinese. One criminal suspect that Canada did return to China was Yang Fong, a thirty-five-year-old Chinese citizen. China wanted Yang on charges stemming from a ten-year-old computer fraud case that involved US\$130,000. In January 2000, after a long negotiation, Canada received promises that Yang would receive less than a ten-year sentence, and the judiciary approved deportation based on this promise. Instead, Yang was promptly executed without any explanation.¹⁵⁰

144. Treaty on Mutual Legal Assistance in Criminal Matters, Can.-P.R.C., July 29, 1994, 33 CAN. Y.B. INT'L L. 411 (1995). The mutual legal assistance treaty provides for cooperation in gathering and exchanging information to enforce criminal laws.

145. See Comment, *Canadian Court Doesn't Buy into Lai's Lies*, CHINA DAILY, Feb. 9, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-02/09/content_304375.htm; Maggie Farley, *Alleged Boss of China Smuggling Ring Presents Canada with a Conundrum Law*, L.A. TIMES, Dec. 6, 2000, at A6; Yang, *supra* note 21, at 4.

146. Extradition Act, 1999 S.C. ch. 18, § 10(1) (Can.) ("The Minister of Foreign Affairs may, with the agreement of the Minister, enter into a specific agreement with a State or entity for the purpose of giving effect to a request for extradition in a particular case."); Extradition Law, *supra* note 24, art. 15, ("Where there is no extradition treaty to go by, the Requesting State shall make a reciprocity assurance.").

147. See *supra* note 28 and accompanying text.

148. See York, *supra* note 22. Li Juqian, associate professor at the China University of Political Science and Law, said that when there is no treaty, "only diplomatic means can be counted on. If ties between the two countries are not close enough, the procedure can drag out." Ding Zhitao, *supra* note 88.

149. James Brooke, *Canada's Haven: For Notorious Fugitives, Too?*, N.Y. TIMES, Dec. 29, 2000, at A14.

150. See DOUGLAS STEWART, *THE BRUTAL SEAS: ORGANIZED CRIME AT WORK* 246-47 (2006); Brooke, *supra* note 149; Farley, *supra* note 145. Except for the case of Yang, prior to 2007 China and Canada had never reached an agreement to extradite a suspected economic criminal. See *Will Gao Shan*

Even as it betrayed the Canadian government by executing Yang, China was pursuing the arrest and extradition from Canada of Lai Changxing, dubbed the “biggest tiger” of all corrupt Chinese fugitives and China’s “public enemy number one.”¹⁵¹ Chinese prosecutors claim that Lai, working from the southeastern Chinese port city of Xiamen, was the leader of an operation to smuggle shiploads of oil, rubber, cars, cigarettes, cellular telephones, and other electronic equipment. Lai allegedly paid millions of dollars in bribes so that Chinese navy boats would escort the ships carrying the illicit goods into harbor.¹⁵² In the summer of 1999, the Chinese government cracked down on Lai’s smuggling ring.¹⁵³

Lai fled to Vancouver, Canada with his family in August 1999. Initially, he was able to live luxuriously in Canada, and he filed an application for political asylum. However, in November 1999, Lai was arrested by Canadian officials for immigration violations. He has been in Canadian legal proceedings ever since. In the meantime, the Chinese government has obtained over eighty convictions, including fourteen death sentences, against individuals who worked with Lai on the alleged scheme; so far, the government has carried out eight of the executions.¹⁵⁴ Lai claims that he would certainly face the death penalty like his colleagues if returned to China.¹⁵⁵ As the *New York Times* outlined, the Lai case has created a conundrum for Canada: “Deport him to China for trial on economic charges, an almost certain guarantee that he would be executed? Or grant China’s most-wanted man asylum and unwillingly tell the world that Canada is a sunny place for shady people, a haven for international suspects facing excessive punishment at home?”¹⁵⁶

Indeed, the Lai case has put Canada in a difficult position. Canada has emerged over the last several decades as a world leader in human rights.¹⁵⁷ Upon receiving an extradition request, the Canadian executive branch considers the rights of the requested individual,¹⁵⁸ and if the executive approves an extradition, the Canadian Supreme Court will consider several factors to determine whether it should intervene to protect individual rights.¹⁵⁹ The Canadian public’s strong support for upholding human rights plays a prominent role in these considerations.¹⁶⁰ Yet, Canadian businesses have

Be the First Chinese Fugitive Extradited by Canada?, Chinese in Vancouver Blog, (Feb. 28, 2007), <http://chineseinvancouver.blogspot.com/2007/02/will-gao-shan-be-first-chinese.html> (referencing statement of David Matas, lawyer of Lai Changxing, in a recent hearing).

151. STEWART, *supra* note 150; Brooke, *supra* note 149; Farley, *supra* note 145.

152. Farley, *supra* note 145.

153. *Id.*

154. Doug Struck, *Canada’s Extradition Laws Help Make Vancouver a Grifter’s Haven*, WASH. POST, Mar. 22, 2007, at A15.

155. STEWART, *supra* note 150 (“Lai’s fears that he will face the death penalty are justified.”).

156. Brooke, *supra* note 149.

157. See Koren L. Bell, Note, *From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties*, 5 YALE HUM. RTS. & DEV. L.J. 255 (2002).

158. See Joanna Harrington, *The Role for Human Rights Obligations in Canadian Extradition Law*, 43 CAN. Y.B. INT’L L. 45, 52 (2005).

159. See Paul Michell, *Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter*, 23 YALE J. INT’L L. 141, 176-81 (1998).

160. Seventy-two percent of Canadians believe that promoting human rights in Asia should be a priority for the Canadian government. Paul Evans, Chairman of the Exec. Comm., Asia Pac. Found. of

much at stake in the Sino-Canadian relationship, and Canada's unwillingness to extradite Lai and others to China damages trade and tourism revenue.¹⁶¹ Moreover, "the political relationship between Canada and China is [purportedly] on unusually shaky ground,"¹⁶² and the Lai case threatens to further undermine diplomatic relations.¹⁶³

Wary of the nation's growing reputation as a safe haven and the consequences this reputation can have on economic and political relations, the Canadian executive branch reached a deal with China to extradite Lai.¹⁶⁴ Immigration authorities have rejected all of Lai's attempts to gain refugee or asylum status,¹⁶⁵ but the Canadian judiciary has characteristically emphasized consciousness for individual rights. After numerous procedural delays, China's Supreme People's Court sent diplomatic assurances to the Canadian Federal Court that Lai would not be executed if returned (as the Canadian government demanded). The Chinese claimed that making this promise was "the only correct option to punish crimes and safeguard the interests of the nation."¹⁶⁶ Based on this assurance, a Canadian official approved Lai's removal order, but a federal court judge overturned this approval on April 5, 2007. The judge ruled that the official's opinion violated Canadian law because it failed to determine if the assurances on torture were "meaningful and reliable." According to the ruling, Canada must do more than just accept another country's promise that it will not execute prisoners; it must prove the reliability of the assurance.¹⁶⁷ Pursuant to the ruling, the Canadian Citizenship and Immigration division is now undertaking the lengthy process of repeating its review of the risks Lai faces in China.¹⁶⁸ Lai's proceedings are likely to be drawn out for several more years, illustrating the difficulty for China of achieving an individual extradition with Canada.

Can., Human Rights and Canada-China Relations, Presentation to the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, House of Commons 2 (Feb. 20, 2007), http://www.asiapacific.ca/analysis/pubs/speeches/Paul_Evans_20feb07.pdf.

161. See Brooke, *supra* note 149; Satish G., *Canada's Tourism Industry Continues to Suffer Due to Diplomatic Rift with China*, ETN ASIA, <http://www.travelwirenews.com/cgi-script/csArticles/articles/000094/009426-p.htm> (last visited Nov. 7, 2007); Struck, *supra* note 154 ("Lai's continued presence has been uncomfortable for the Canadian government, which wants improved trading relations with China.").

162. Evans, *supra* note 160, at 1.

163. Rod Mickleburgh, *Risk of Torture Has Ottawa Reconsidering Move to Deport Chinese Fugitive*, GLOBE & MAIL (Toronto), Sept. 19, 2007, at A10 ("Mr. Lai's status is an irritant at the highest level of Canada-China relations . . .").

164. Lague, *supra* note 9. Some have suggested that the Canadian government's desire to extradite Lai is related to the goal of improving trade relations with China. See Struck, *supra* note 154.

165. Zhang Lihao, *Court Hears Last Appeal for Fugitive Lai*, CHINA DAILY, May 31, 2006, available at http://www.chinadaily.com.cn/china/2006-05/31/content_604460.htm.

166. *China Pledges No Death to Get Back Fugitive Lai*, CHINA DAILY, Mar. 14, 2007, available at http://www.chinadaily.com.cn/china/2007-03/14/content_827211.htm.

167. *Sing v. Minister of Citizenship and Immigration* [2007] F.C. 361 (Can.). The opinion held that an analysis of reliability of the assurance must encompass the question of whether it is "appropriate to rely on diplomatic assurances at all from the Government of China." *Id.*

168. *Fugitive Billionaire from China Tired After Ongoing Extradition Battle*, CBC NEWS, Sept. 18, 2007, <http://www.cbc.ca/canada/british-columbia/story/2007/09/18/bc-lai.html>.

In addition to Lai, China reportedly is seeking the extradition of five other individuals from Canada.¹⁶⁹ One of the five is Gao Shan, a branch manager with the Bank of China in Harbin who allegedly embezzled one billion yuan (US\$130 million). The Canadian judiciary has been consistent in its refusal to extradite these individuals.¹⁷⁰ Meanwhile, China's handling of the case of Huseyin Celil—a Uighur imam of Chinese and Canadian citizenship who was arrested in Uzbekistan, extradited to China against the objections of the Canadian government, and sentenced to life in prison on charges of terrorism—has angered Canada severely and increased tensions between the two nations.¹⁷¹ Canada's approach to Celil, Lai, Gao, and the other fugitives has escalated criticisms that it is a premier safe haven for the world's criminals.¹⁷² But Canada's actions have also elicited praise for their leading protection of individual rights.¹⁷³

C. *Case-by-Case Approach to Extradition with China*

In search of middle ground between a treaty-based approach with binding terms and a non-engagement approach, a “case-by-case approach” to extradition with China is characterized by unwillingness to negotiate for an extradition treaty, at least in the near term, but by willingness to return individuals to China on an ad hoc basis. By negotiating for individual extraditions or disguised extraditions on a case-by-case basis, parties have flexibility and can exercise more control over the terms of the extradition and the assurances for treatment of the individual upon return.

The United States currently employs such a case-by-case approach. The United States does not have an extradition treaty with China,¹⁷⁴ because (while it cannot criticize the fact that China maintains the death penalty) it is wary of China's use of the death penalty for nonviolent crimes and its lack of procedural due process in death penalty cases.¹⁷⁵ The United States is also critical of China's poor human rights record in general and is concerned about the overall differences in legal values between mainland China and the United States.¹⁷⁶ As Jerome Cohen, a New York University law professor who specializes in the Chinese legal system, points out, “There are important

169. York, *supra* note 22, at A22 (“The existence of [five] other criminal suspects on the list is the latest development in a growing controversy over whether Canada is sheltering Chinese fugitives.”).

170. Vivian Wai-yin Kwok, *China May Cry ‘Woe, Canada’ in Embezzlement Case*, FORBES.COM, Feb. 22, 2007, http://www.forbes.com/facesinthenews/2007/02/22/canada-china-embezzle-facecx_vk_0222autofacescan3.html.

171. *Canadian in China Sentenced to Life in Prison: Report*, CBC NEWS, Apr. 19, 2007, <http://www.cbc.ca/canada/toronto/story/2007/04/19/celil-sentence.html>; *Harper Warns China as Rights Dispute Threatens to Expand*, TAIPEI TIMES, Feb. 11, 2007, available at <http://www.taipeitimes.com/News/front/archives/2007/02/11/2003348505>.

172. *Canada, Haven for China's Escaped Grafters, No Schedule for Extradition of Lai Changxing*, PEOPLE'S DAILY, Sept. 15, 2004, available at http://english.people.com.cn/200409/15/eng20040915_157148.html; Doug Struck, *Fugitive from Other Places Go to Canada to Escape the Heat*, WASH. POST, Oct. 29, 2005, at A14; Struck, *supra* note 154.

173. See Deborah Jones, *Canada Deportation to China of Alleged Kingpin Stalled by Court*, AFP, Apr. 5, 2007, available at http://findarticles.com/p/articles/mi_kmaf/is_200704/ai_n18793594.

174. PRESIDENT OF THE UNITED STATES, *supra* note 26, at iii.

175. U.S. DEP'T OF STATE, *supra* note 12.

176. Creekman, *supra* note 26, at 658; Rapoport, *supra* note 26, at 150.

differences in principles and practices that make law-enforcement cooperation between us and the Chinese difficult. I'm in favor of cooperation, but it has to be consistent with our system and values."¹⁷⁷

Ad hoc, case-by-case extraditions have the potential to attenuate some of the problems associated with Sino-U.S. extradition attempts because the countries would be able to negotiate new terms for each individual extradition. The procedure for responding to extradition requests is for the foreign embassy (in this case the Chinese Embassy in the United States) to make a request to the Department of State, which reviews and forwards the request to the Office of International Affairs in the Criminal Division of the Department of Justice. This office assigns an Assistant U.S. Attorney to the case, and he or she obtains a warrant to arrest the fugitive. The arrested fugitive is then brought before a federal magistrate or district court judge for a hearing, during which the judge will determine whether the fugitive is extraditable.¹⁷⁸ There is only a very narrow avenue within U.S. law for formally extraditing an individual to a requesting state absent a treaty. In 1996, the U.S. Congress amended federal law to provide for extradition from the United States, even in the absence of a treaty, of foreign nationals who have committed crimes of violence against U.S. nationals outside the United States.¹⁷⁹ If the court finds the fugitive to be extraditable to China under this law, it will enter an order of extraditability and certify the record to the Secretary of State, who then must decide whether to surrender the fugitive to the requesting government. The Secretary of State may take human rights or any other considerations into account in making this decision.¹⁸⁰

Because U.S. law limits extradition absent a treaty to this one narrow circumstance, the United States usually refuses to extradite a suspect to China.¹⁸¹ Beyond this narrow window for formal extradition absent a treaty, though, in some circumstances, U.S. immigration laws permit the removal of individuals sought by other countries when extradition by treaty is not available.¹⁸² The U.S. government 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

177. David S. Cloud, *FBI Aims to Build Goodwill with Chinese by Cooperating on Cases*, WALL ST. J., Sept. 4, 2001, at A24.

178. U.S. DEP'T OF JUSTICE, *supra* note 27, § 9-15.700.

179. 18 U.S.C. § 3181(b) (2006); *see also* U.S. DEP'T OF JUSTICE, *supra* note 27, § 9-15.100 (containing information about the amendment).

180. Rapoport, *supra* note 26, at 164.

181. *See, e.g.*, HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (2003), available at <http://hrw.org/un/chr59/counter-terrorism-bck4.htm> (stating that the United States is holding as many as thirty Uighur nationals at Guantánamo Bay, Cuba and has refused all Chinese requests for extradition); *Sect Leader's Arrest Warrant Rejected*, BBC NEWS, July 30, 1999, <http://news.bbc.co.uk/1/hi/world/asia-pacific/407599.stm> (describing U.S. dismissal of China's request for the arrest and extradition of Li Hongzhi, the leader of the Falun Gong religious movement).

182. U.S. DEP'T OF JUSTICE, *supra* note 27, § 9-15.610; U.S. DEP'T OF STATE, REPORT ON INTERNATIONAL EXTRADITION (2001), available at <http://www.state.gov/documents/organization/6545.doc> ("[N]on U.S.-nationals located in the United States and sought by other countries might in some circumstances be removable from U.S. territory under our immigration laws.").

available.”¹⁸³ In response to Chinese requests, the United States has used alternative methods to return criminal suspects to China when extradition was not feasible.¹⁸⁴

The case of Qin Hong is one example of the United States returning a Chinese national to China indirectly. Qin allegedly cheated Shanghai investors out of hundreds of millions of dollars. Chinese authorities had supplied documentary evidence demonstrating that Qin had entered the United States years earlier using a false identity, which made him subject to arrest and deportation under U.S. immigration laws. However, because Qin had been carrying a Panamanian passport at the time of arrest, a U.S. immigration judge removed him to Panama. Then, according to senior officials, the United States informally urged Panama to send Qin back to China, which a Panamanian court did.¹⁸⁵

The prominent case of Yu Zhendong represents another example of the use of immigration law to return criminal suspects to China. Yu was the head of a Bank of China branch in Guangdong province. He was accused of embezzling US\$485 million with several co-conspirators as part of a scheme to “launder the stolen money through Hong Kong, Canada, and the United States, among other countries, and then to immigrate to the United States from China with their wives by obtaining a false identity and entering into a sham marriage with a naturalized U.S. citizen.”¹⁸⁶ The United States charged Yu with racketeering under U.S. law (after receiving significant evidence from the Chinese), and he pleaded guilty in U.S. federal court in Las Vegas in 2004.¹⁸⁷ After pleading guilty, Yu stipulated to a judicial order of removal enabling the United States to return him to China, which gave assurances to the United States that he would not be executed or tortured and that he would not be sentenced to more than twelve years in prison.¹⁸⁸ Yu’s co-conspirators have not pleaded guilty, were indicted by a Las Vegas federal grand jury on charges of racketeering, money laundering, and fraud, and are awaiting trial.¹⁸⁹ While cooperation in the return of criminal suspects to China does not have the same benefits for U.S. trade interests as it would for businesses in other nations because of the already enormous flow of goods and capital between the two countries,¹⁹⁰ the extradition or deportation of criminal suspects to China can generate goodwill for the U.S.-China relationship. The

183. NAT’L SEC. COUNCIL, INTERNATIONAL CRIME CONTROL STRATEGY 41-42 (1998), available at <http://clinton4.nara.gov/media/pdf/iccs.pdf>.

184. McNabb Assocs., *supra* note 38 (“There have been a number of instances in which individuals have been sent from China to the United States to face charges, or vice versa.”).

185. Cloud, *supra* note 177.

186. Mark L. Clifford & Petti Fong, *The Bank of China’s Black Hole*, BUS. WEEK, Feb. 4, 2002, available at http://www.businessweek.com/magazine/content/02_05/b3768065.htm; see also Cloud, *supra* note 177.

187. Press Release, U.S. Dep’t of Justice, *supra* note 30.

188. Press Release, Embassy of the U.S. in the P.R.C., Chinese National Sentenced on Racketeering Charges Returned to China (April 20, 2004), <http://www.usembassy-china.org.cn/press/release/2004/042004yzd.html>.

189. Press Release, U.S. Dep’t of Justice, *supra* note 30.

190. See Thomas J. Christensen, Deputy Assistant Sec’y for E. Asian and Pac. Affairs, U.S.-China Relations, Statement Before the House Committee on Foreign Affairs, Subcommittee on Asia, the Pacific, and the Global Environment (Mar. 27, 2007), <http://www.state.gov/p/eap/rls/rm/2007/82276.htm> (discussing the growth and importance of U.S.-China trade relations).

Chinese saw the United States's willingness to return Yu to China in response to his consent and their diplomatic assurances as "setting an example of sound China-U.S. judicial cooperation."¹⁹¹

IV. ANALYZING THE U.S. CASE-BY-CASE APPROACH CONTRA THE OTHER APPROACHES

In contrast to Spain, France, Portugal, and Australia, it still is unlikely that the United States will enter into an extradition treaty with China because of U.S. reservations about the lack of due process provided by the criminal justice system and the generally poor human rights record in China.¹⁹² Yet, as the above Section described, the United States occupies a nebulous middle ground between the treaty-based and the non-engagement approaches. It is too concerned about human rights to enter into a treaty, but it is willing to cooperate with China on an ad hoc basis so as not to be labeled a "safe haven" for fugitives. This Part evaluates the U.S. approach vis-à-vis the two extremes.¹⁹³ The first Section defines the interests that are important to the United States when it considers extradition with China. The following three Sections analyze whether the current U.S. approach is well-designed to realize these interests.

A. *Defining Interests in U.S. Extradition Policy*

States take a variety of interests into account when formulating extradition policy. While the general interest in controlling international crime is near-universal, other interests are country-specific. For example, China's primary interest in improving extradition practices is to clamp down on corruption.¹⁹⁴ Meanwhile, the nations that have adopted the treaty-based approach seem particularly interested in cooperating on international crime suppression as a way to enhance business ties.¹⁹⁵ As Canada forms its policy for extradition with China, it is particularly interested in maintaining its position as a preeminent protector of human rights.¹⁹⁶

A threshold question for analyzing the effectiveness of the U.S. approach, then, is: what interests are important to the United States as it forms its policy for extradition with China? The United States has made clear that its primary reason for increasing cooperation with other states in extradition is to build goodwill in order to gain international judicial assistance in prosecuting

191. *Smuggler Lai Can't Escape Law Punishment*, CHINA DAILY, Mar. 4, 2006, available at http://www.chinadaily.com.cn/english/doc/2006-03/04/content_526581.htm.

192. Creekman, *supra* note 26, at 658; Rapoport, *supra* note 26, at 150.

193. It is important to note that an overall analysis of the different approaches is made more difficult by the fact that there has been no complete empirical study of what has happened to the individuals that have been returned to China.

194. *See supra* notes 97-104 and accompanying text; Lague, *supra* note 9; Press Release, Embassy of the P.R.C. in the U.S., China Vows to Deepen Int'l Co-op in Fight Corruption [sic] (June 14, 2006), available at <http://www.china-embassy.org/eng/gyzg/t257928.htm>.

195. *See supra* Section III.A; Willsher, *supra* note 132.

196. *See supra* Section III.B.

the war on terror.¹⁹⁷ Indeed, extradition and other forms of judicial cooperation can be important tools for bringing terrorists to justice and maintaining social order.¹⁹⁸

U.S. officials also purport to be very concerned with the rights of individuals facing extradition proceedings.¹⁹⁹ Indeed, the United States has long subscribed to the idea that a requested state should make a determination of whether a requesting state will protect the individual rights of a fugitive before deciding whether to extradite.²⁰⁰ However, the United States's overall human rights record in the context of international crime cooperation has been mixed. Alleged U.S. participation in extraordinary renditions,²⁰¹ for example, suggests a divide between U.S. rhetoric and practice in the protection of individual rights. Still, taking the U.S. government at its word, it is interested in protecting individual rights in extradition.

The ability of the United States (as the requested state) to consider the domestic human rights practices of a requesting state like China coupled with the ongoing debate in China about whether to abolish the death penalty for nonviolent crimes gives rise to a third U.S. interest: the interest in pressuring China to reform its human rights practices. Despite criticisms that it is meddling²⁰² or being hypocritical,²⁰³ the United States has long been interested in pressuring China to reform its human rights practices and has pursued this strategy in a variety of ways.²⁰⁴ Insofar as the experience of

197. Medley, *supra* note 113, at 1215 (“The American government now prioritizes the improvement of extradition practices in an effort to find the parties responsible for 9/11 and to prevent future attacks.”).

198. Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT’L & COMP. L. REV. 493, 494-507 (2003).

199. See, e.g., Press Release, U.S. Dep’t of State, The United States’ Response to the Questions Asked by the Committee Against Torture (May 8, 2006), available at <http://www.state.gov/g/drl/rls/68562.htm>.

200. See *supra* Section III.C. A broad review of a requesting state’s domestic human rights practices can serve as a sufficient proxy for the requested state to make a determination to extradite in an individual case. Dugard & Van den Wyngaert, *supra* note 10, at 191.

201. An “extraordinary rendition” is an intelligence-gathering program involving the transfer of foreign nationals suspected of involvement in terrorism to detention and interrogation to countries, typically in the Middle East, with records of using torture. Suspects are detained and interrogated either by U.S. personnel at U.S.-run detention facilities or, alternatively, are handed over to the custody of foreign agents for interrogation. LIONEL BEEHNER, COUNCIL ON FOREIGN RELATIONS, TORTURE, THE UNITED STATES, AND LAWS OF WAR (Nov. 11, 2005), http://www.cfr.org/publication/9209/torture_the_united_states_and_laws_of_war.html.

202. China often speaks out about meddling from Western nations concerned about human rights. See Amy Hampton, *Population Control in China: Sacrificing Human Rights for the Greater Good? Birth Control Surgeries: 1971-1986*, 11 TULSA J. COMP. & INT’L L. 321, 343 (2003); Jeremy Brooks Rosen, Note, *China, Emerging Economies, and the World Trade Order*, 46 DUKE L.J. 1519, 1534 n.105 (1997); U.S., *Japan Meddling in China’s Internal Affairs*, PEOPLE’S DAILY, Feb. 22, 2005, available at http://english.peopledaily.com.cn/200502/22/eng20050222_174238.html.

203. China also has long accused the United States of being hypocritical in criticizing human rights abuses in China while it violates human rights. See, e.g., Press Release, Consulate-General of the P.R.C. in Houston, U.S. Is Hypocritical over Human Rights Jibes: Commentary, available at <http://houston.china-consulate.org/eng/zt/zmgx/t80750.htm> (last visited Nov. 7, 2007). China’s Information Office of the State Council annually publishes a report criticizing U.S. human rights abuses. E.g., INFO. OFFICE OF THE STATE COUNCIL, THE HUMAN RIGHTS RECORD OF THE UNITED STATES IN 2006, Mar. 8, 2007, available at http://www.gov.cn/misc/2007-03/08/content_545466.htm.

204. See, e.g., Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule Of Law’ Reform Projects in the People’s Republic of China*, 18

Spain, France, Portugal, and Australia has demonstrated that extradition can influence the human rights debate in China because the Chinese are so intent on stamping out corruption, the United States will be interested in shaping its extradition policy in a way that will increase, rather than alleviate, the pressure on China to enact human rights reforms. The United States can justify including a push for broad-based human rights reform through extradition as one of its main interests, along with its interest in prosecuting terrorism and its interest in protecting the rights of the requested individual. These interests are not in tension with one another; the United States can pursue all three through one coherent strategy.

B. *The U.S. Approach and Cooperation in the Pursuit of Terrorists*

In the aftermath of the September 11, 2001 terrorist attacks, the U.S. government quickly sought to obtain the support and cooperation of foreign states.²⁰⁵ While China may not be the most likely safe haven for terrorists that the United States desires, the United States saw important benefits to enlisting the full support of China in the counterterrorism effort post-September 11th. These benefits included support in United Nations Security Council deliberations;²⁰⁶ gaining information related to terrorism from Beijing²⁰⁷ and ensuring that the Chinese government would refrain from protesting bombings in Afghanistan; the assignment of U.S. forces to the area; and “discussions of nation-building for postwar Afghanistan.”²⁰⁸ Such actions would typically invite significant criticism from China,²⁰⁹ but the U.S. approach of deciding whether to extradite or deport criminal suspects requested by China on an ad hoc, case-by-case basis—backed up by a willingness to follow through with returning suspects as demonstrated by the Yu Zhendong case—proved sufficient to gain cooperation from the Chinese. The Sino-U.S. bilateral relationship improved as a result of U.S. cooperation,²¹⁰ and China set aside traditional security considerations and supported the United States’s call for a global campaign against terrorism.²¹¹

UCLA PAC. BASIN L.J. 64, 69-72 (2000) (describing U.S. efforts to use most-favored nation status and rule-of-law initiatives to pressure China to improve its human rights performance).

205. See, e.g., ‘You Are Either with Us or Against Us’, CNN.COM, Nov. 6, 2001, <http://archives.cnn.com/2001/US/11/06/gen.attack.on.terror/>.

206. See DAVID M. LAMPTON & RICHARD DANIEL EWING, THE NIXON CTR., THE U.S.-CHINA RELATIONSHIP FACING INTERNATIONAL SECURITY CRISES 32 (2003), available at <http://www.nixoncenter.org/publications/monographs/USChinaRelations2003.pdf>.

207. See, e.g., Barry Schweid, *China Agrees to Give U.S. Information on Terrorists*, MILWAUKEE J. SENTINEL, Sept. 22, 2001, at A7.

208. Elizabeth Economy & Adam Segal, *U.S. and China Open a Door*, NEWSDAY, Oct. 26, 2001, available at http://www.cfr.org/publication/4111/us_and_china_open_a_door.html.

209. *Id.*

210. See Press Release, Embassy of the P.R.C. in the U.S., China Supports U.S. Indictment Against Corrupt Bank Managers (Feb. 9, 2006), <http://www.china-embassy.org/eng/gyzg/t234558.htm> (quoting Gong Xiaobing, head of the Judicial Aid and Foreign Affairs Department of China’s Justice Ministry, who commented on “an important cooperation-operation between law enforcement departments of the two countries”).

211. SHIRLEY KAN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, U.S.-CHINA COUNTER-TERRORISM COOPERATION: ISSUES FOR U.S. POLICY 1-2 (2005); Jing-dong Yuan, Ctr. for Non-Proliferation Studies, *The War on Terrorism: China’s Opportunities and Dilemmas* (Sept. 25, 2001), <http://cns.miis.edu/research/wtc01/china.htm>.

Certainly, China's assistance in the global war on terror is not just a quid pro quo for the United States's cooperation in returning corrupt officials to China. For example, the Bush administration's controversial decision to add the Muslim Uighur separatists to its official terrorist list at the urging of Beijing was also an important concession to the Chinese that may have contributed to their cooperation in the global war on terror.²¹² However, if the U.S. government was as unwilling as the Canadians to return criminal suspects, it is unlikely that the Chinese would have lent cooperation in combating terrorism regardless of other concessions that the United States made. They would find the U.S. approach to extradition with China too inequitable.²¹³ The United States's ad hoc approach to returning criminal suspects to China, which is relatively cooperative, proved sufficient to satisfy the important interest of gaining cooperation in bringing suspected terrorists to justice.

C. *The U.S. Approach and the Protection of Individual Rights*

Generally, the United States emphasizes the importance of protecting human rights, and it is exemplary in extending rights and protections to its own citizens. The United States joins the Western world in speaking out against human rights abuses in extradition.²¹⁴ The U.S. interest in protecting individual rights often conflicts with its interest in combating terrorism, though, and when it does, there is a need to balance these rights. While this Note will address some areas in which the contemporary approach to extradition with China can better protect individual rights,²¹⁵ overall the U.S. case-by-case approach is well-designed to protect human rights.

Indeed, the most important benefit to the ad hoc, case-by-case approach in terms of the protection of individual rights is that the ad hoc approach provides the United States with flexibility.²¹⁶ As one commentator has acknowledged, "the party with the stronger bargaining power"—which, in the

212. The Uighur separatists are based in the Xinjiang Uighur Autonomous Region in the People's Republic of China and are calling for an independent state of Eastern Turkestan. Beijing does not recognize their independence. Many human rights officials and Western diplomats criticized the Bush administration's decision to label Uighur groups as terrorists, claiming that the administration had no evidence of terrorist activity by Uighur groups and adopted this label solely to pander to the Chinese government. See Erik Eckholm, *U.S. Labeling of Group in China as Terrorist Is Criticized*, N.Y. TIMES, Sept. 13, 2002, at A6; Philip P. Pan, *Separatist Group in China Added to Terrorist List*, WASH. POST, Aug. 27, 2002, at A9.

213. Indeed, in stark contrast to the rhetoric of "success" and "progress" in response to the U.S. approach, the Chinese have accused Canada of acting as a "haven for China's escaped grafters," *Canada, Haven for China's Escaped Grafters, No Schedule for Extradition of Lai Changxing*, *supra* note 172, and "a haven for some of the most wanted fugitives in the world," Struck, *supra* note 154.

214. See *supra* Section II.B.

215. See *infra* Section V.A.

216. The advantages of flexibility in extradition negotiations are apparent when considering the analogous U.S. practice of threatening to sponsor an anti-China resolution at the U.N. Human Rights Committee. In the past, China has won the United States's forbearance in exchange for acceding to various demands. Official visits to China by high-level U.S. dignitaries—as well as state visits to Washington by Chinese officials—have also been held out as carrots. See Elizabeth Olson, *U.N. Human Rights Panel Faults Russia and Others, but Not China*, N.Y. TIMES, Apr. 30, 2000, at A12. Like the case-by-case approach to extradition, these practices enable the United States to pursue different human rights goals at different times and to choose whether to cooperate at one point without binding itself in the future.

case of U.S.-China negotiations, is likely the United States because of China's desperation to clamp down on corruption—"prefers a flexible approach The weaker party, on the other hand, tends to prefer a carefully written agreement with its terms 'cast in stone'" ²¹⁷ Without a treaty, the United States is bound by its own legislation only, and a state that need only follow its domestic legislation in deciding whether to extradite "has no international obligation to assist a foreign state." ²¹⁸ Following a case-by-case approach, then, provides the United States with the advantage of being able to refuse to return individuals more easily if the human rights situation on the ground in China worsens, or if the United States does not trust a Chinese diplomatic assurance enough to follow through on a conditional extradition. ²¹⁹ It also enables the United States to negotiate for different human rights assurances at different times. Many human rights—including freedom from torture; freedom from the death penalty; freedom from cruel, inhuman, or degrading treatment or punishment; right to a fair trial; right to privacy; and freedom from discrimination—can obstruct extradition depending on the circumstances of the case. ²²⁰ By pursuing a case-by-case approach, the United States has the flexibility to seek greater protections if torture or a fair trial or another human right seems to be particularly relevant to the requested individual.

This flexibility is particularly important when one considers the well-documented historic unreliability of diplomatic assurances. Some governments routinely deny that torture or other human rights abuses are practiced when they are in fact systematic. ²²¹ China is one of the states that has often violated assurances in the past. As mentioned, Chinese authorities executed Yang Fong after assuring Canada that they would not do so. ²²² Suspects extradited to China from East Asian and Southeast Asian countries without the assistance of treaties have been sentenced to death despite diplomatic assurances that they would not be charged with the death penalty. ²²³ At this point, there is no way to know whether China will uphold its assurances. Because the United States has the ability in the case-by-case approach to refuse to extradite in the future if China violates an assurance, it creates an incentive for China to uphold its assurances.

The ability to cease extradition if China violates a human right is not readily available to Spain, France, and Portugal now that they have ratified treaties with China. When an extradition treaty is in force between two states,

217. Fu Hualing, *supra* note 5.

218. ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PAC., MUTUAL LEGAL ASSISTANCE, EXTRADITION, AND RECOVERY OF PROCEEDS OF CORRUPTION IN ASIA AND THE PACIFIC 18 (2007).

219. As mentioned, the United States has been criticized for soliciting "diplomatic assurances" of humane treatment in the context of extraordinary renditions from developing countries. Many human rights organizations allege that these promises have been broken. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 590, 611-25 (2006); see also *supra* note 201 and accompanying text. Despite these critiques, no one has suggested that the controversy over extraordinary renditions has influenced the willingness of the United States to accept diplomatic assurances from China.

220. See *supra* Section II.C.

221. HUMAN RIGHTS WATCH, *supra* note 79.

222. See *supra* note 150 and accompanying text.

223. Fu Hualing, *supra* note 5.

the provisions of the treaty are followed as a matter of international law.²²⁴ Moreover, even when states have included a provision in the treaty allowing one party to obstruct an extradition, the states tend to interpret extradition laws and treaties in favor of enforcement because this course is “perceived to serve the interests both of justice and of friendly international relations.”²²⁵ While the existing extradition treaties between China and Western nations provide for strong protections against capital punishment, they downplay the importance of other human rights.²²⁶ Therefore, the treaty-based approach is significantly inferior to the U.S. approach in its ability to protect human rights.

Admittedly, based on the nefarious history of diplomatic assurances, the U.S. approach to extradition with China takes more human rights risks than the Canadian non-engagement approach simply because the United States returns more criminal suspects to China than the Canadians do. While the United States proceeds deliberately in negotiations with China, no state can be certain that China will uphold its promises not to execute, torture, or violate other human rights of the requested individual. Yet, China is far from unusual in this regard; other countries, including developed ones, have historically violated their word. More to the point, Canada's virtual refusal to return any desired suspects to China despite substantial concessions on the part of the Chinese is compromising Canada's ability to pursue other important state interests, including broad-based human rights reform in China.²²⁷ With its case-by-case approach, the United States is able to protect individual rights, reciprocate enough to pursue other important state interests with the Chinese, and, as the next Section will demonstrate, push for broad human rights reforms.

D. *The U.S. Approach and Human Rights Reform in China*

Beyond protecting the rights of the individual extraditee, any approach to extradition with China can consider pushing for broad, systemic human rights reform. Because of China's determination to root out corruption by eliminating safe havens abroad, creating extradition relationships with Western nations may now be so important to the Chinese that they will consider reforming some policies and practices that obstruct these relationships because they violate international norms. This idea is new, and nothing in the Spanish, French, Portuguese, or Australian discourse surrounding the announcements of the treaties suggests that anyone foresaw this possibility. But the recent debates in China about whether to eliminate the death penalty for nonviolent crimes to realize more treaties with Western nations suggests that this is a real possibility.²²⁸ Human rights scholar Errol Mendes claims: “It is not beyond the imagination that the evil of corruption

224. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 474 (1990).

225. Dugard & Van den Wyngaert, *supra* note 10, at 189.

226. *See supra* Section III.A.

227. *See infra* Section V.B.

228. *See supra* notes 136-143 and accompanying text.

and the global fight against it could be the ironic catalyst to completely bridge the global divide between China and the West on human rights.”²²⁹

If extradition (along with other cooperative anticorruption initiatives) really is to play a role in the effort of Western nations to push for human rights reforms in China where other angles have failed,²³⁰ countries like the United States must maximize their ability to pressure China, and a case-by-case approach seems well-designed to do so. The reason the case-by-case approach has potential to affect human rights reform is its flexibility. Spain, France, Portugal, and Australia deserve credit for accelerating the debate surrounding the death penalty. However, there is a need for a country that is currently pursuing a case-by-case approach with China—and with which China still desires a treaty—to add additional human rights issues to the debate, such as increased mechanisms for realizing fair trials or improvement of prison conditions. The United States is positioned to assume this role, and, because China is seeking the return of individuals currently in the United States, the United States has leverage to request these changes. Unlike the nations that have adopted the treaty-based approach, the United States is not locked into extraditing when the provisions in a treaty are met. Rather, it can request conditions and assurances in each particular case while also working on long-term reform in order to realize a bilateral treaty, thereby constantly putting pressure on China to change its practices. Given that other nations always have the ability to decline a request from Beijing to return a suspect based on human rights (and sometimes nations do obstruct an extradition for human rights reasons), the Chinese government might come to realize that only long-term, systemic changes to its systems and processes will eliminate these obstructions and clear the way for extradition treaties.

V. SUGGESTIONS FOR THE U.S. APPROACH TO EXTRADITION WITH CHINA

As the above analysis demonstrates, there are real benefits to maintaining the case-by-case approach. It provides flexibility so that the United States can obtain different diplomatic assurances depending on the human rights issues that an individual case implicates. To the contrary, bilateral treaty commitments under international law create relatively inflexible obligations. Further, the case-by-case approach enables the United States to constantly pressure China to reform its practices that violate human rights norms. The U.S. case-by-case approach also has proven to be sufficiently cooperative to garner Chinese support of U.S. international crime suppression efforts, including those invoked in the war on terror. The United Nations best practice recommendations for extradition are that, when a lack of trust about the “integrity” of another state’s justice system inhibits the realization of an extradition treaty, states should give effect to extradition

229. Errol P. Mendes, *Introduction to BRIDGING THE GLOBAL DIVIDE ON HUMAN RIGHTS: A CANADA-CHINA DIALOGUE* 10 (Errol P. Mendes & Anik Lalonde-Roussy eds., 2003).

230. For example, in 1994 the United States abandoned linking China’s overall human rights situation to its most-favored nation status. VLADIMIR N. PREGELJ, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, MOST-FAVORED-NATION STATUS OF THE PEOPLE’S REPUBLIC OF CHINA 5 (2001), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl30225.pdf>.

requests on a discretionary, case-by-case basis.²³¹ The United States fits into this category in its approach toward extradition requests from China, and it should maintain its case-by-case approach.²³²

However, there are three significant drawbacks to the U.S. approach as currently fashioned: 1) while the approach is generally well-designed to protect human rights, U.S. practices do not always match U.S. rhetoric in carrying out these protections; 2) the United States can better guide China and its public as to what reforms it needs to undertake to increase the number of its extradition requests that the United States honors; and 3) the United States can build trust better by cooperating with China on anticorruption measures outside the extradition-human rights dialogue. This Part presents suggestions for how the United States can improve its practices in response to extradition requests from China without compromising the benefits inherent in a case-by-case approach.

A. *Enhance Protections for Individuals Through Domestic Legislation*

The United States should increase protections for individuals in its extradition proceedings so that it will have credibility in calling for more human rights protections from the Chinese. Currently, there are few protections for the requested individual in U.S. domestic legislation permitting the formal extradition of foreign nationals who have committed crimes of violence against U.S. nationals outside the United States, and there are even fewer protections available to persons subject to “disguised extradition” to China through immigration laws, aspects of U.S. law that are especially striking when compared to Canada’s extreme reluctance to return requested individuals to countries (like China) with poor human rights records. To comply with international and domestic individual rights norms, the U.S. Congress (in legislation), the Secretary of Homeland Security (in immigration regulations), and, to the extent possible, U.S. courts (in the course of individual proceedings) should address the lack of protections for individuals in formal extradition without a treaty and in “disguised extradition” through deportation.

The ad hoc, case-by-case approach is the correct approach for pursuing this goal. The case-by-case approach does not contain a detailed, binding agreement between the requesting and requested state on what pieces of evidence the requesting state must furnish to the requested state in order for the requested state’s judiciary to approve the formal extradition. Extradition treaties typically include significant detail about what documents are

231. See U.N. OFFICE OF DRUGS AND CRIME, REPORT: INFORMAL EXPERT WORKING GROUP ON EFFECTIVE EXTRADITION CASEWORK PRACTICE 7, 8 (2004), available at http://www.unodc.org/pdf/ewg_report_extraditions_2004.pdf.

232. This proposal for the United States to maintain the case-by-case approach is consistent with a broader strategy of “constructive engagement” with China (as opposed to strategies that favor an isolationist avoidance of political dialogue or strategies that advocate for more confrontational policies). Mainstream U.S. policymakers have adopted such a strategy for engagement with China. See, e.g., Press Release, U.S. Dep’t of State, United States Urges China to Be Responsible World Citizen (Sept. 22, 2005), <http://usinfo.state.gov/eap/Archive/2005/Sep/22-290478.html> (containing former Deputy Secretary of State Robert Zoellick’s conception of a “responsible stakeholder” strategy for dealing with China).

necessary to approve an extradition.²³³ Yet the U.S. domestic legislation that permits extradition of foreign nationals who have committed crimes of violence against U.S. nationals outside the United States on a case-by-case basis includes no evidentiary requirements to protect the requested individual.²³⁴ When the U.S. Congress amended 18 U.S.C. § 3181 and § 3184 to allow for the narrow avenue for extradition without a treaty, it could have included language ensuring that the protections individuals are typically afforded when there is a treaty would be available to individuals extradited without a treaty, but it did not.

It is certainly possible to update legislation to enhance protection of individual rights without significantly compromising other important state interests. Some foreign jurisdictions have included significant protections in legislation creating non-treaty schemes for extradition.²³⁵ Congress should include in domestic legislation parallel evidentiary requirements to those typically provided in bilateral extradition treaties, including requiring substantial evidence to prove the identity and location of the requested individual, the facts of the case, the governing law in the requesting country, the warrant for arrest, and all evidence necessary to justify committing the individual for trial if the offense had been committed in the requested state.²³⁶

The U.S. Congress also should amend domestic legislation to provide the accused with some avenue to challenge his or her extradition, including on humanitarian grounds. Even if Congress does not enact such legislation, courts should take it upon themselves to provide such an avenue. Currently, U.S. federal courts regard extradition as a prerogative of the executive, and absent specific treaty provisions, “the courts have traditionally declined to challenge the Executive by granting fugitives important procedural protections that could delay, complicate, or even thwart the extradition process.”²³⁷ Courts should not be permitted to allow extradition without providing the requested individual’s legal team an opportunity to view crucial evidence or diplomatic assurances relied upon or even require an explanation from the government for why it deems specific assurances sufficiently reliable.

A statute or a case law enabling the requested individual to challenge evidence presented by the government, including diplomatic assurances, would respect traditional due process norms and represent a significant improvement in the protection of human rights. The law should require that

233. Treaties typically require requesting states to furnish documentation demonstrating the identity and precise physical appearance of the requested individual, including fingerprints and photographs if possible; probable location of the person sought; the facts of the offense and the procedural history of the case; the text of the laws describing the essential elements of, and the applicable punishment for, the offense; proof that neither prosecution nor the penalty are barred by lapse of time; a copy of the warrant or order of arrest issued by an authority; a copy of the charging document; all evidence that would be sufficient to justify the committal for trial of the person if the offense had been committed in the requested state, etc. *See, e.g.*, Extradition Treaty, U.S.-Arg., art. 8, June 10, 1997, S. TREATY DOC. NO. 105-18, 2159 U.N.T.S. 129.

234. 18 U.S.C. § 3190 (2006).

235. *See, e.g.*, The Commonwealth, The London Scheme for Extradition Within the Commonwealth (2002), <http://www.thecommonwealth.org/Internal/38061/documents/> (under subheading “Schemes,” click “London Scheme for Extradition Within the Commonwealth”).

236. *See supra* note 233 and accompanying text.

237. Rose, *supra* note 15, at 208.

during the course of discovery the government furnish the evidence and assurances that it relied on in deciding to grant the extradition request. Then the court would permit the defendant to present evidence, including testimony, to contradict the determination in order to respect due process. At least in the context of extradition to China, a nation that has violated diplomatic assurances in the past, an avenue for the requested individual to challenge the government's evidence merits serious consideration.

Undoubtedly, this proposal for U.S. extradition policy with China is controversial and will elicit critiques. Some will likely argue that enhancing defendants' ability to thwart their own extraditions will compromise the United States's ability to return requested criminal suspects and will thwart the goal of suppressing international crime. However, the burden on the individual to challenge diplomatic communications could be high. For example, U.S. Representative Edward Markey (D-Mass.) introduced the Torture Outsourcing Prevention Act to the U.S. House of Representatives in 2005 (a bill that died in the House Subcommittee on Africa, Global Human Rights and International Relations), which granted a requested individual access to a U.S. court in order to challenge the extradition on the basis that there are "substantial grounds" that the prisoner would face torture or mistreatment, and explicitly provided that "diplomatic assurances" are insufficient.²³⁸ Creating a high burden would only halt extradition in cases where the evidence used by the government was quite unreliable. It would force Beijing to provide verifiable evidence and trustworthy assurances, thereby enhancing the U.S. ability to achieve its goals through the case-by-case method. With careful design, this proposal could restore a semblance of due process to extradition proceedings without seriously impinging on international crime control.

Another likely critique of this proposal is embodied by the political question doctrine in U.S. constitutional law, a judicially created rule by which courts decline jurisdiction, deferring to the political branches of government.²³⁹ Yet a recent federal case, *Khouzam v. Hogan*,²⁴⁰ suggests that procedural due process claims of a requested individual are not nonjusticiable political questions. The United States relied upon diplomatic assurances against torture from the Egyptian government in support of their claim that deportation was appropriate for Sameh Sami S. Khouzam, an Egyptian national. Khouzam was never given an opportunity to see the assurances or to challenge them on their reliability or sufficiency before an independent body.²⁴¹ The government claimed that the decision of whether diplomatic assurances are reliable is a nonjusticiable political question.²⁴² However, in *Khouzam*, U.S. District Court Judge Thomas Vanaskie held, inter alia, that "[b]ecause the government has not provided Khouzam with an opportunity to challenge the reliability of the diplomatic assurances and has not presented

238. H.R. 952, 109th Cong. § 3(d) (2005).

239. See *Baker v. Carr*, 369 U.S. 186, 210-19 (1961).

240. *Khouzam v. Hogan*, 497 F. Supp. 2d 615 (M.D. Pa. 2007).

241. *Id.* at 624.

242. *Id.*

any evidence to support its decision, the Court will not reject the due process claims as barred by the political question doctrine.”²⁴³

While *Khouzam* took place in the immigration setting, its holding is transferable to ad hoc extraditions. The logic in this holding supports courts or Congress providing requested individuals the opportunity to challenge evidence and diplomatic assurances that the government uses to support extradition without violating the political question doctrine. Moreover, rights protections should not be limited to those individuals in formal extradition proceedings; the result for an individual deported through a “disguised extradition” process is largely identical to that of an extradited individual, and protecting the human rights of a deported individual in China is no less valuable an endeavor.

In addition to providing more procedural due process to individuals subject to extradition proceedings in U.S. federal court, the United States might attempt to engage in more robust monitoring of the treatment of returned individuals. As a condition to agreeing to an extradition request, the requested state may require that its representatives be allowed to monitor any diplomatic assurances that are given. To be effective, any monitoring arrangement would have to include private meetings with detainees without advance notice and medical examinations by independent doctors.²⁴⁴ China should prefer a monitoring arrangement to a refusal to extradite. If it can be achieved with China, monitoring—coupled with increased due process protections for requested individuals—will go a long way toward ensuring that U.S. practices match U.S. rhetoric in protecting individual rights.

B. *Increase Public Guidance To Realize Desired Human Rights Reforms*

The goal for the United States and China alike is to reach a level of trust so that diplomatic assurances and conditional extradition are no longer controversial. In light of the intertwining of international extradition law with international human rights law and the uncompromising U.S. concerns with human rights abuses in China, the United States will only be able to trust China when it enacts significant human rights reforms. While one cannot know what type of guidance the United States is giving to Chinese authorities in private, as the United States pressures China to curb human rights abuses, it should provide clearer public guidance through its rhetoric for what reforms it expects in order to facilitate the return of criminal suspects.

The government and individuals involved in high profile cases have the ability to make statements putting pressure on the Chinese to reform their practices. So far, the individual lawyers have made public statements about what reforms are necessary to facilitate extraditions, while the government is

243. *Id.* at 625-26. In his memorandum opinion, Judge Vanaskie cited the importance of the individual interests at stake and the fact that courts routinely “assess the adequacy of process provided and the Executive branch’s adherence to normative standards” in support of his ruling. *Id.* at 625.

244. These safeguards are necessary because human rights organizations have shown that monitoring is not always effective to prevent torture. See AMNESTY INT’L, HUMAN RIGHTS WATCH & INT’L COMM’N OF JURISTS, REJECT RATHER THAN REGULATE 8-11 (2005), available at <http://hrw.org/backgrounder/eca/eu1205/eu1205.pdf>.

being silent. For example, Lai Changxing's Canadian lawyer, David Matas, said that Lai's case "will be read around the world and followed. If China wants its fugitives back that are at risk of torture . . . it has to stop torturing its dissidents."²⁴⁵

Public guidance should be an important part of any strategy to pressure the Chinese government because this guidance can reach the Chinese public, which recently has exhibited both the willingness and the ability to protest government policies and push for reform.²⁴⁶ Corruption, as well as being embarrassing to the government and damaging to state coffers, affects the public. Indeed, the Chinese public has been outspoken in its disdain for corrupt officials, blaming everything from soaring housing prices to low pensions on corruption. Members of the public have gone so far as to state that corruption "might jeopardize the Party or even the country."²⁴⁷ In light of its strong views about corruption, the Chinese people undoubtedly will be interested in receiving information related to increasing the number of fugitives returned to China and may very well pressure their government to comply with reasonable requests. For its part, the Chinese government is more likely to respond to large-scale pressure from within China than it is to be affected by external pressure from abroad.²⁴⁸ In order to maximize public pressure on the Chinese government to curb human rights abuses, the public needs to have a clearer picture of which human rights issues precisely are obstructing extradition. Therefore, the U.S. approach to extradition with China should include pressure-placing rhetoric that is public, clearly includes what reforms the Chinese must undertake to facilitate extraditions, and signals what the results will be if they undertake these reforms.

C. *Increase Cooperation Outside of the Extradition-Human Rights Dialogue*

Because the ultimate goal of the United States is to reach a point in its relations with China where it can trust the Chinese enough that it can respond favorably and unconditionally to its extradition requests, the United States should nurture and enhance its relationship with the Chinese by cooperating with them on what they really care about: eliminating corruption. After President Clinton visited China in 1997, the United States and China concluded a memorandum of understanding to establish a law enforcement liaison group to combat narcotics trafficking, alien smuggling, counterfeiting, and organized crime.²⁴⁹ In 2006, the United States cosponsored with China a

245. *China's Most-Wanted Man Granted Another Reprieve in Canada*, INT'L HERALD TRIB., Apr. 5, 2007, <http://www.iht.com/articles/ap/2007/04/05/america/NA-GEN-Canada-Chinese-Fugitive.php>.

246. See, e.g., *The Cauldron Boils; Protests in China*, ECONOMIST, Oct. 1, 2005, at 38.

247. Minxin Pei, *supra* note 103; Press Release, Consulate-General of the P.R.C. in N.Y., *Anti-Corruption Storm Rages Through China*, available at <http://www.nyconsulate.prchina.org/eng/xw/t274156.htm> (last visited Nov. 7, 2007) ("The new corruption fight has won the support of the Chinese public . . .").

248. See Dingding Chen, *Explaining China's Changing Discourse on Human Rights, 1978-2004*, 29 ASIAN PERSP. 155 (2005).

249. Press Release, The White House, Fact Sheet: Achievements of U.S.-China Summit (June 27, 1998), available at <http://www.fas.org/news/china/1998/prcfact1.htm>.

major anticorruption and denial of safe haven conference to increase international understanding and cooperation on these issues.²⁵⁰ The U.S. government should continue to expand on these efforts to cooperate with China in law enforcement matters. Finally, nongovernmental U.S. legal and financial institutions should increase their own anticorruption cooperation with their Chinese counterparts to improve knowledge of and responses to incidents of international financial fraud; the U.S. government should encourage and support such efforts.

VI. CONCLUSION

Human rights law is now inextricably tied to extradition law. Therefore, if China is intent on realizing bilateral extradition treaties or other extradition arrangements with Western nations, it will have to engage the West on human rights and placate Western criticisms. Many Chinese are already realizing this fact in their debates about capital punishment. But, by maintaining a case-by-case approach to responding to extradition requests from China, the United States signals that China's human rights record to date is not acceptable. The United States does have its own interests to consider, of which cooperation on international suppression of terrorism is paramount. Moreover, if it is going to preach human rights in its rhetoric, the United States should improve its own procedures for protecting requested individuals so as to avoid charges of hypocrisy that complicate its ability to pursue reforms elsewhere. Thus, the United States, in its extradition relationship with China, faces the challenge of cooperating on one hand and of trying to protect individual rights on the other. Realizing this challenge is to find a middle ground between the treaty and the non-engagement extremes. However, in finding this middle ground, the United States should also realize that extradition now presents an avenue for curbing Chinese human rights policies that do not meet international standards. It should engage the Chinese to capitalize on this opportunity.

250. See AM. BAR ASS'N, SUMMARY OF THE EXPERT PAPERS PRESENTED AT THE APEC WORKSHOP CONCERNING THE DENIAL OF SAFE HAVEN, ASSET RECOVERY AND EXTRADITION TOGETHER WITH THE RESULTING RECOMMENDATIONS OF THE DISCUSSION GROUP (2006), available at http://www.abanet.org/rol/publications/asia_raca_summary_expert_papers.pdf.