

THE UNITED STATES, CHINA, AND EXTRADITION: READY FOR THE NEXT STEP?

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INTRODUCTION

The United States and the People's Republic of China (PRC or China) have developed a working relationship on criminal matters in the last two decades. The formal culmination of this has been the U.S.-PRC Mutual Legal Assistance Agreement (MLAA), but most cooperation between the two countries has been carried out on an informal, case-by-case basis. In contrast, several Western countries have recently signed extradition treaties with China, and the Chinese government has made clear its desire for an extradition treaty with the United States.

While China actively seeks to add to the number of its extradition partners—and the European nations are growing more comfortable with such partnerships—the United States has maintained an ad hoc approach towards extradition with China. This Note will discuss why the United States' position regarding an extradition treaty with China is unlikely to change in the near future and why the question of whether the United States ought to have an extradition treaty with China is likely to remain pertinent. Given the two countries' increasingly close law enforcement relationship, the steady alignment of their law enforcement goals, and an increase in criminal activity occurring in and affecting both countries, the benefits of a formal extradition treaty between the United States and China may someday outweigh the drawbacks that presently preclude a treaty. Yet only through improvement in China's human rights record, by addressing issues of public corruption and the rule of law, will the United States find its interests best served by entering into an extradition treaty with China. Were such an obstacle significantly lessened or overcome, a treaty would offer the advantages of regularity, clarity, and predictability in the process of transferring persons between the countries for law en-

forcement purposes, qualities often absent from the current case-by-case approach.

After a brief survey of the main aspects of extradition treaties, this Note will review law enforcement cooperation between the United States and China, including the United States' relationship with Hong Kong and the U.S.-PRC MLAA. It will then discuss the possibility of a U.S.-PRC extradition treaty, covering both the barriers and incentives for a treaty, and predict the likely structure of a future treaty based on the extradition treaty between the United States and Hong Kong and China's Extradition Law. Finally, this Note will delineate the benefits to the United States of an extradition treaty that would make it a superior option in the future.

I.

EXTRADITION DEFINED: PROCEDURE AND CHARACTERISTICS

Before considering the possibility of a U.S.-PRC extradition treaty, it is important to examine the features and procedure of extradition because these terms and practices define the relationship between the treaty's signatories on the issue of extradition. Extradition treaties are formal and formulaic documents—knowing what to expect and where there is room in their provisions for modification gives variation between treaties meaning. That is, the gloss each signatory puts on an extradition treaty reveals its concerns and priorities, as well as the politics of the bilateral relationship.

Extradition is a long-standing practice involving and implicating criminal justice, foreign relations, and a nation's sovereignty. The U.S. Supreme Court's definition of extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."¹ It is a hoary procedure in which one sovereign surrenders an individual to another sovereign on the basis of a treaty, agreement, or comity, in contrast to general practice of hospitality and asylum granted such sojourners.²

1. *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

2. M. CHERIF BASSIUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 29–31 (4th ed. 2002). Prior to the nineteenth century, there was no general obligation of countries to surrender fugitives to other countries. Such action was undertaken only based on the principle of comity and at the discretion of the country in which the accused person was located. Treaties were therefore entered into to create a regular obligation to surrender requested persons. See *United States v. Rauscher*, 119 U.S. 407, 411–12 (1886); Jacques Semmelman, *The Doctrine of Spe-*

Beyond the immediate objective of “immobilizing” a suspected criminal who is located in another country,³ extradition necessarily is a political process that depends on the relationship between two nations.⁴ Within a country, it may cause tension between criminal justice and foreign policy agendas. A country’s extradition practice and procedure relates directly to its external relations and the development thereof,⁵ leading one scholar to observe that, as the political relationship of two countries grows closer, formal extradition practice may be supplanted by more informal methods of rendition.⁶ In the case of the United States and China, however, the opposite is true: informal relations have preceded formal relations.⁷

Extradition is a hybrid procedure, with both judicial and executive involvement. Unique to extradition are several well-developed characteristics—the principle of specialty, dual criminality, the political offense exception, and the rule of non-inquiry—which reflect considerations of comity and equity that are of paramount importance in the extradition process, as discussed below.

A. *Extradition Procedure in the United States*

Though much of the extradition process involves the judicial branch, the decision to extradite ultimately lies entirely with the executive since extradition “is a creature of treaty” and “the power to extradite derives from the President’s power to conduct foreign affairs.”⁸ In extradition, the executive branch is represented by the Secretary of State, who has the final say in every extradition and latitude to limit or condition extradition.

cialty in the Federal Courts: Making Sense of United States v. Rauscher, 34 VA. J. INT’L L. 71, 80 (1993).

3. Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT’L L. & POL. 813, 813 (1993).

4. See BASSIOUNI, *supra* note 2, at 31.

5. Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT’L L.J. 277, 278 (2002).

6. BASSIOUNI, *supra* note 2, at 31. An alternative explanation, illustrated by the current state of U.S.-Chinese relations, is that informal methods of rendition may precede formal extradition practice, or even obviate the need for formal procedures.

7. See *infra* Section II-C.

8. *Ordinola v. Hackman*, 478 F.3d 588, 606 (4th Cir. 2007) (Traxler, J., concurring) (internal quotation marks omitted); see also *In re Metzger*, 46 U.S. 176, 188 (1847) (stating that “the treaty provides for a surrender by the executive only, and not through the instrumentality of the judicial power”); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997) (finding the decision to extradite is “entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function”).

Extradition procedure, derived largely from the 1842 Webster-Ashburton Treaty, was codified in federal statutes in 1848 and has remained largely unchanged since.⁹ Today, these procedures are set forth in 18 U.S.C. §§ 3181–96, which establish a three-step process for extradition. First, extradition requests are conveyed to the State Department,¹⁰ which reviews the request to ensure that it includes sufficient evidence regarding the requested individual and alleged wrongdoing.¹¹ Second, the request is passed to the U.S. Attorney’s Office in the jurisdiction where the person sought is believed to be, and the Office files a complaint in federal district court;¹² a judicial officer¹³ may then issue the arrest warrant for the person sought.¹⁴ The final step occurs once the extraditee is apprehended and the judge conducts a hearing to determine whether: (1) there is a valid treaty in operation; (2) the crime is extraditable under the treaty; and (3) probable cause exists to sustain the charge(s).¹⁵

The extradition hearing—which does not determine the guilt or innocence of the accused individual—has some very specific features. The Federal Rules of Criminal Procedure and the Federal Rules of Evidence are not applicable,¹⁶ meaning that hearsay is admissible.¹⁷

9. See Benjamin N. Bedrick, Comment, *United States Extradition Process: Changes in Law to Address Constitutional Infirmity*, 15 DICK. J. INT’L L. 385, 389–90 (1997).

10. *Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006).

11. See *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir. 1981); Powers, *supra* note 5, at 283 n.40.

12. See *Vo*, 447 F.3d at 1237; *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1207 (9th Cir. 2003); *Eain*, 641 F.2d at 508; see also BASSIOUNI, *supra* note 2, at 763–65 (describing the complaint as “akin to an indictment or information,” and listing the facts usually included in a complaint).

13. Federal judges and magistrates, as well as state judges, possess authority to hear extradition cases. See Powers, *supra* note 5, at 284 nn. 48–49 (stating that the presiding judicial official at an extradition hearing is generally referred to as an “extradition magistrate,” and observing that state judges do not commonly hear extradition cases, despite their authority to do so).

14. 18 U.S.C. § 3184 (2006).

15. *Id.* While probable cause is required by statute and included in treaties, it has not been held as derived from the Fourth Amendment. As a result, its “meaning, content, and application have acquired a dimension separate from the constitutional probable cause standard applicable to arrests.” In reality, it appears difficult to distinguish the two. BASSIOUNI, *supra* note 2, at 826–27. In the extradition context, probable cause has been defined as sufficient evidence that the requested individual committed the offense named in the extradition request. See *Collins v. Loisel*, 259 U.S. 309, 316 (1922); *McNamara v. Henkel*, 226 U.S. 520, 523 (1913); *Correll v. Stewart*, 1991 WL 157246 at *1 (6th Cir. Aug. 16, 1991).

16. See FED. R. CRIM. P. 1(a)(5)(A); FED. R. EVID. 1101(d)(3).

17. For more detailed information on the admissibility of testimonial and non-testimonial statements in an extradition hearing, see MICHAEL ABBELL, *EXTRADITION TO AND FROM THE UNITED STATES* § 2-2(16) (Release #4 2008).

There is no Fourth Amendment exclusionary rule¹⁸ and no inherent right to cross-examine or confront witnesses under the Sixth Amendment.¹⁹ The requesting country may present properly authenticated documents,²⁰ but an individual has few options to combat the extradition request: he is limited to showing evidence that informs or further explains the government's evidence. He may not offer evidence of a different theory of the case or contradict probable cause;²¹ may not present a defense, such as insanity;²² is barred from submitting the kinds of *ex parte* evidence allowed to the government; and may not submit evidence of an alibi or that the statute of limitations has run, among other things.²³

If the extradition conditions are met, the judge certifies his determination to the Secretary of State,²⁴ who has sole discretion to decide whether to grant or deny the extradition request.²⁵ The Secretary may²⁶ review conclusions of law and findings of fact *de novo*, reverse the judge's decision to certify extradition, or decline to grant extradition based on, for example, humanitarian concerns and foreign policy.²⁷ Notably, the Secretary alone has the power to attach conditions to extradition.²⁸ It is at this last stage that foreign policy and bilateral relations are most significant, since the Secretary, who may negotiate

18. *See Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980).

19. *Id.* at 637 (citing *Bingham v. Bradley*, 241 U.S. 511, 517 (1916)).

20. 18 U.S.C. § 3190 (2006).

21. *See Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978) (stating that a fugitive "is not permitted to introduce evidence on the issue of guilt or innocence but can only offer evidence that tends to explain the government's case of probable cause").

22. *In re Shapiro*, 352 F. Supp. 641, 645 (S.D.N.Y. 1973).

23. John T. Parry, *The Long History of International Extradition Litigation*, 43 V.A. J. INT'L L. 93, 95 (2002).

24. 18 U.S.C. § 3184 (2006) ("If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he *shall* certify the same . . . to the Secretary of State, that a warrant may issue . . . for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.") (emphasis added).

25. 18 U.S.C. § 3186 (2006) ("The Secretary of State *may* order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be charged for the offense of which charged.") (emphasis added).

26. *See EXTRADITION TO AND FROM THE UNITED STATES*, *supra* note 17, §§ 2-2(22) (Release #2 2004), 4-8(1)-(5) (Release #4 2008).

27. *Id.* § 4(3).

28. *See, e.g., Jimenez v. U.S. District Court*, 84 S. Ct. 14, 19 (1963) (Goldberg, J., chambers opinion) (denying stay and describing commitments by the Venezuelan government to the Department of State as a condition of the extraditee's surrender).

with the requesting country, can send important messages with her decision to grant, deny, or condition an extradition request.

An extradition order is not a final judgment, and is therefore unreviewable on direct appeal,²⁹ so an individual's only avenue for challenging an extradition order is through a petition for a writ of habeas corpus in a circuit court.³⁰ An individual's appeal will generally involve claims based on one or more of the following: the principles of specialty³¹ and dual criminality; whether offense was extraditable or should be exempted under the political offense exception; and whether the request should be denied on humanitarian grounds. Any new U.S. extradition treaty would most likely include provisions addressing each of these factors and their absence or substantial modification in a treaty would signal a departure from customary practice. It would also raise serious questions about the motivations of the treaty's parties, the respective bargaining power of each side, and the rationale justifying the surrender of these time-tested principles. At the same time, these are not inflexible requirements; they may be adapted and

29. See 28 U.S.C. § 1291 (2006).

30. See 28 U.S.C. § 2241 (2006); *Terlinden v. Ames*, 184 U.S. 270, 278 (1902); *Mainero v. Gregg*, 164 F.3d 1199, 1201–02 (9th Cir. 1999). One of the bases for the habeas corpus claim of the individual who is detained for extradition is that he is held unlawfully in custody in violation of the Constitution or the laws or treaties of the United States. 28 U.S.C. § 2241(c)(3) (2006). Neither the U.S. government nor requesting country may file habeas petitions, as it is only available to those challenging the lawfulness of their custody or someone acting on their behalf. *Id.* In its review of an individual's habeas petition, the court cannot review the extradition judge's decision and is limited to considering whether: "(1) the extradition judge had jurisdiction to conduct proceedings; (2) the extradition court had jurisdiction over the fugitive; (3) the extradition treaty was in full effect; (4) the crime fell within the terms of the treaty; and (5) there was competent legal evidence to support a finding of extraditability." *Manta v. Chertoff*, 518 F.3d 1134, 1140 (9th Cir. 2008); see also *BASSIOUNI*, *supra* note 2, at 864–65.

31. See *United States v. Rauscher*, 119 U.S. 407, 430–31 (1886) ("[We] are in favor of the proposition that a person who has been brought within the jurisdiction of the court . . . under an extradition treaty . . . can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged . . ."); *EXTRADITION TO AND FROM THE UNITED STATES*, *supra* note 17, § 8-2 (Release #4 2008) (listing cases from seven circuits holding that defendants in extradition proceedings may raise specialty violation challenges). There is a question as to whether an individual has standing to raise specialty arguments. *United States v. Sensi*, 879 F.2d 888, 892 n.1 (D.C. Cir. 1989). The majority of courts follow *Rauscher's* holding that an individual in an extradition hearing does have standing to challenge his extradition on grounds of specialty. Other courts reason that the principle of specialty is meant to protect the surrendering country against a violation of the terms of an extradition treaty, meaning an individual lacks standing to lodge such a challenge. Compare *United States v. Baez*, 349 F.3d 90, 92 (2d Cir. 2003), with *United States v. Burke*, 425 F.3d 400, 408 (7th Cir. 2005), and *United States v. Saroop*, 109 F.3d 165, 167–68 (3d Cir. 1997).

modified to fit the modern needs of the United States and its treaty partners.

1. *The Principle of Specialty*

The principle of specialty requires that an extradited individual be tried only for the offense, or offenses, specified in the extradition request, absent consent of the surrendering country or waiver by the extradited individual.³² All U.S. extradition treaties contain specialty provisions³³ and the principle is reflected in 18 U.S.C. §§ 3184,³⁴ 3186,³⁵ and 3192.³⁶ If the accused person is not tried for the offenses he was extradited for, or if he is tried and acquitted, he will be provided with a reasonable opportunity to return to the country he was extradited from.³⁷

32. For an example of such consent see *United States v. Tse*, 135 F.3d 200, 204–06 (1st Cir. 1998), in which the First Circuit held that the government could proceed against the defendant on charges other than the charge for which he had been extradited because the government of Hong Kong, where he had been extradited from, consented to the additional charges. The court observed, “[b]ecause the doctrine of specialty is concerned with comity rather than the rights of the defendant, the protection [of specialty] exists only to the extent that the surrendering country wishes.” *Id.* at 205 (internal quotation marks omitted) (second alteration in original).

33. While the principle of specialty was not included in early U.S. extradition treaties, *Rauscher*, 119 U.S. at 419–20, made clear its view that specialty was required in extradition treaties. See ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* 414 (1993) [hereinafter NADELMANN, *COPS ACROSS BORDERS*].

34. This section provides that a judge or magistrate judge will at a hearing evaluate evidence to determine if it is “sufficient to sustain *the charge* under the provisions of the proper treaty or convention” 18 U.S.C. § 3184 (2006) (emphasis added).

35. 18 U.S.C. § 3186 (2006) (“The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be *tried for the offense of which charged*.” (emphasis added)).

36. Section 3192, which addresses individuals brought to the United States for trial, says that “the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person . . . until the final conclusion of his *trial for the offenses specified in the warrant of extradition*” 18 U.S.C. § 3192 (2006) (emphasis added).

37. *Rauscher*, 119 U.S. at 424; see also EXTRADITION TO AND FROM THE UNITED STATES, *supra* note 17, § 5-2(3) (Release #1 2002) (“[W]hen a person is extradited to the United States, ‘he shall not be arrested or tried for any other offense than that which he was charged . . . until he shall have had a reasonable time to return unmolested to the country from which he was brought.’” (quoting *Rauscher*, 119 U.S. at 423–24)); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 477(2) (1986) (“A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from that state.”).

2. Dual Criminality and Extraditable Offenses

Two related aspects of extradition that illustrate the mutuality aspect of extradition are dual criminality and the listing of extraditable offenses. Dual criminality requires that a person be extradited only for conduct that is criminalized by the laws of both the surrendering and requesting countries,³⁸ and is “intended to ensure . . . that no state shall use its processes to surrender a person for conduct which it does not characterize as criminal.”³⁹ It is essentially a magnitude requirement: the conduct must be serious enough for both countries to criminalize.⁴⁰ Yet the criminal laws do not need to be exact replicas of one another: the requirement is satisfied if the laws of two countries are “substantially analogous,” meaning that they “punish conduct falling within the broad scope of the same generally recognized crime.”⁴¹ A court determines dual criminality by looking at the conduct at issue, not only the statutory text,⁴² and it must defer to the reasonable judicial determination of the surrendering nation that the offense is in fact extraditable.⁴³ Only when the laws differ substantially may a court deny an extradition request on this basis.⁴⁴

A more explicit requirement found in extradition treaties is the enumeration of extraditable offenses, either by listing them or defining such offenses according to a formula contained in the treaty.⁴⁵ This is a less popular approach, however: because of the hindrance of updating lists of extraditable offenses with new crimes, since the 1980s the

38. See *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995) (“The principle of dual criminality dictates that, as a general rule, an extraditable offense must be a serious crime (rather than a mere peccadillo) punishable under the criminal laws of both the surrendering and the requesting state.”); see also *In re Extradition of Russell*, 789 F.2d 801, 803 (9th Cir. 1986) (“Under the principle of ‘dual criminality,’ no offense is extraditable unless it is criminal in both countries.”).

39. BASSIOUNI, *supra* note 2, at 467.

40. See *United States v. Kin-Hong*, 110 F.3d 103, 114 (1st Cir. 1997).

41. *Peters v. Egnor*, 888 F.2d 713, 719 (10th Cir. 1989) (internal quotation marks omitted); see also *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1404 (9th Cir. 1988).

42. *Lo Duca v. United States*, 93 F.3d 1100, 1111–12 (2d Cir. 1992); see BASSIOUNI, *supra* note 2, at 471.

43. See *Saccoccia*, 58 F.3d at 766; see also *United States v. Van Cauwenberghe*, 827 F.2d 424, 429 (9th Cir. 1987).

44. See, e.g., *United States v. Khan*, 993 F.2d 1368, 1372–73 (9th Cir. 1993) (holding that where the defendant had been extradited from Pakistan, dual criminality was not satisfied, since no analogous Pakistani law existed); *United States v. Sai-Wah*, 270 F. Supp. 2d 748, 750–51 (W.D.N.C. 2003) (finding that the government failed to establish dual criminality as to the offense charged in Hong Kong because no analogous state or federal law could be found).

45. See *In re Extradition of Chan Hon-Ming*, 2006 WL 3518239, at *4 (E.D.N.Y. 2006); *Spatola v. United States*, 741 F. Supp. 362, 371 (E.D.N.Y. 1990), *aff’d*, 925 F.2d 615 (2d Cir. 1991); BASSIOUNI, *supra* note 2, at 473.

United States has preferred a broader and simpler dual criminality provision in its treaties.⁴⁶

3. *The Political Offense Exception*

The political offense exception is frequently characterized as the most controversial and complicated aspect of extradition. When a treaty's signatories have significant differences on what conduct should be criminalized and the uses of judicial and political power, as the United States and China do, the operation of the political offense exception has great potential to exacerbate these differences, stressing bilateral relations in and beyond the extradition context. Like other extradition components, the exception evolved to protect the integrity of a surrendering country's laws against misuse or manipulation by a requesting state. It is also meant to avoid politicizing the extradition process by functioning as a guarantee that the "legal processes of the requested state will not be used to achieve certain political ends of the requesting state with respect to prosecuting an individual for his political beliefs or politically motivated conduct."⁴⁷

Simply put, the political offense exception prohibits extradition for offenses that are "political."⁴⁸ The exception's purpose is to "protect acts that are directed at the State itself, and not to protect every criminal act that in some sense contributes to the political goal of those committing it."⁴⁹ Though U.S. extradition treaties have long included a political offense exception provision,⁵⁰ what constitutes a political offense is usually left undefined and contributes to the difficulty of parsing this exception. An example of a political exception provision is as follows: "(1) Extradition shall not be granted when: (a) the offense for which extradition is sought is a political offense; or (b) it is established that extradition is requested for political purposes" ⁵¹ More recently, treaties and amending protocols have listed certain of-

46. NADELMANN, *COPS ACROSS BORDERS*, *supra* note 33, at 411.

47. BASSIOUNI, *supra* note 2, at 603.

48. *See* *Ordinola v. Hackman*, 478 F.3d 588, 595 (4th Cir. 2007).

49. *Barapind v. Enomoto*, 360 F.3d 1061, 1074 (9th Cir. 2004) (quoting *McMullen v. INS*, 788 F.2d 591, 597 (9th Cir. 1986)) (internal quotation marks omitted).

50. *See* NADELMANN, *COPS ACROSS BORDERS*, *supra* note 33, at 420 (noting that following the U.S.-France treaty of 1843, other than the treaty with "Prussia and other German states, all subsequent U.S. extradition treaties made reference to the 'political offense' exception").

51. Treaty Between the Government of the United States of America and the Government of the Kingdom of Thailand Relating to Extradition, U.S.-Thail., art. 3, Dec. 14, 1983, S. TREATY DOC. NO. 98-16.

fenses excluded from the political offense exception.⁵² These typically include crimes against Heads of State and their families, especially violent crimes (for example, murder, manslaughter, and kidnapping or hostage-taking), and crimes that obligate both countries to extradite under multilateral treaties.⁵³

Courts, however, remain the main arbiters of whether the political offense exception applies in an extradition case. Some of the most difficult extradition cases involve claims that the alleged criminal conduct was actually conduct undertaken for political emancipation or as part of a fight for democracy, presenting the courts with difficult legal and political decisions. Were there a U.S.-PRC extradition treaty, claims raised by individuals sought by Chinese authorities under the exception would likely prove difficult, since the Chinese government is often accused of exactly the kind of conduct that the political offense exception is meant to protect against.⁵⁴

52. The shift from an open-ended political offense exception to a list removing specific offenses stems in large part from the U.S. experience with requests for extradition for Irish Republican Army fighters during the late 1970s and 1980s. Four such extradition requests by Britain were refused by the United States during this time on the basis of the political offense exception; after appeal, only one resulted in extradition. The four cases were decided under the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., June 8, 1972, 28 U.S.T. 227. They are: *In re McMullen*, Magis. No. 3-78-1099 MG (N.D. Cal. May 11, 1979), reprinted in 132 Cong. Rec. 16585-86 (1986); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re Quinn*, 783 F.2d 776 (9th Cir. 1986); *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986). Quinn was ultimately extradited. NADELMANN, COPS ACROSS BORDERS, *supra* note 33, at 421. Deportation proceedings were brought against the other three. See BASSIOUNI, *supra* note 2, at 640. This caused some hostility between the United States and the United Kingdom, prompting a supplemental extradition treaty that limited the political offense exception. *Id.* See generally Supplementary Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., June 25, 1985, T.I.A.S. No. 12,050. The Supplemental Treaty limited the political offense exception and sanctioned judicial inquiry into the motives of an extradition request and allowed challenges to British extradition requests on the basis of probable cause and dual criminality. See CHARLES DOYLE, CONG. RESEARCH SERV., EXTRADITION BETWEEN THE UNITED STATES AND GREAT BRITAIN: THE 2003 TREATY 1 (2006), <http://www.fas.org/sgp/crs/misc/RL32096.pdf>. Both the 1977 Treaty and the 1986 Supplemental Treaty applied to British territories, including Hong Kong, established either through the exchange of diplomatic notes or by the terms of the treaty itself. See *United States v. Kin-Hong*, 110 F.3d 103, 108 (1st Cir. 1997).

53. See, e.g., Protocol Amending Extradition Convention with Israel, U.S.-Isr., art. 3, July 6, 2005, S. TREATY DOC. NO. 109-3 (amending Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel, U.S.-Isr., art. VI, Dec. 10, 1962, 14 U.S.T. 1707 (1963)).

54. See *infra* Section III.A.

There is considerable jurisprudence on this politically fraught provision,⁵⁵ and it is clear that the successful application of the political offense exception can strain relations between the United States and a treaty partner, as was the case with Irish Republican Army fighters that the United Kingdom sought to extradite in the late 1970s and 1980s.⁵⁶ Nevertheless, the political offense exception can protect extraditees who are involved in legitimate political struggles against a government or occupying power, a function which may prove especially appropriate for certain cases arising under a potential U.S.-PRC extradition treaty. At the same time, individuals challenging extradition may attempt to obfuscate their criminal behavior and complicate the extradition process by raising spurious claims under this exception. At least one court has admonished that the exception “should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.”⁵⁷

4. *The Rule of Non-Inquiry*

Pursuant to the rule of non-inquiry, courts do not inquire into the conditions—including the motive for an extradition request, the judicial processes of the requesting country, and the potential punishment an extradited individual may receive—of a requesting country.⁵⁸ Based in comity, the rule embodies a great reluctance to evaluate another country’s criminal justice system.⁵⁹ Essentially, an individual sought for extradition may not complain because the process he will receive in the requesting country does not meet U.S. constitutional guarantees.⁶⁰

55. See, e.g., *Ornelas v. Ruiz*, 161 U.S. 502 (1896); *United States v. Rauscher*, 119 U.S. 407 (1886); *Ordinola v. Hackman*, 478 F.3d 588 (4th Cir. 2007); *Vo v. Benov*, 447 F.3d 1235 (9th Cir. 2006); *Barapind v. Enomoto*, 360 F.3d 1061 (9th Cir. 2004); *Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir. 1990); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981); see also *BASSIOUNI*, *supra* note 2, at 603–04 (discussing two major U.S. cases involving heads of state claiming political motivation).

56. See *supra* note 52 and the cases discussed therein.

57. *Eain*, 641 F.2d at 520.

58. See *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997); *Yapp v. Reno*, 26 F.3d 1562, 1568 (11th Cir. 1994).

59. See *Ramirez v. Chertoff*, 2008 WL 467779 at *1 (9th Cir. Feb. 22, 2008) (mem.) (stating that although humanitarian exceptions were possible, it is a longstanding principle that the courts do not parse out the differences in criminal law between countries when comity is involved); *Spatola v. United States*, 741 F. Supp. 362, 371 (E.D.N.Y. 1990) (refusing to inquire into the fairness of the conviction because “supervising the integrity of the judicial system of another sovereign nation . . . would directly conflict with the principle of comity”).

60. See *Neely v. Henkel*, 180 U.S. 109, 122–23 (1901).

Under the rule, the Executive Branch's exclusive power to conduct foreign affairs and its role as the ultimate arbiter of an extradition request oblige courts to refuse consideration of the treatment and procedures of a requesting country in deference to considerations of institutional competence and separation of powers. The rule does not deny that real concerns may exist about the requesting country's processes, but considers them political and foreign policy matters for the executive branch—that is, the Secretary of State—to consider.⁶¹

Claims that an extradited individual may raise under Article III of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment,⁶² including claims that the individual will face torture in violation of the Convention upon return to the requesting country, are similarly considered beyond the purview of an extradition court. Under the rule of non-inquiry, such claims are also regarded as outside the purview of the courts and left to the Secretary of State.⁶³

61. See *Mironescu v. Costner*, 480 F.3d 664, 668–69 (4th Cir. 2007); *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006); *Barapind v. Enomoto*, 360 F.3d 1061, 1077 (9th Cir. 2004).

There is, however, a latent possibility that a court may decline to follow the rule of non-inquiry. The Second Circuit in *Gallina v. Fraser* confessed “some disquiet” at the exclusive power of the executive branch to attach conditions to the surrender of an extradited individual. 278 F.2d 77, 79 (2d Cir. 1960) (“We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court’s sense of decency as to require reexamination of the principle set out above.”).

Numerous individuals fighting extradition have argued to courts for such a humanitarian basis for refusing extradition. See, e.g., *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005); *Kin-Hong*, 110 F.3d at 110–11 (1st Cir. 1997); *Martin v. Warden, Atlanta Penitentiary*, 993 F.2d 824, 829–30 (11th Cir. 1993); *Escobedo v. United States*, 623 F.2d 1098, 1107 (5th Cir. 1980); *In re Extradition of Cheung*, 968 F. Supp. 791, 802–03 (D. Conn. 1997).

Nevertheless, no court has ruled in favor of such a claim, and the Second Circuit itself subsequently rejected its *Gallina* dicta. See *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) (“The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.” (citation omitted)).

62. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 112 Stat. 2681–822, 1465 U.N.T.S. 85.

63. See *Hoxha*, 371 F. Supp. 2d at 660; *Barapind v. Reno*, 225 F.3d 1100, 1105–06 (9th Cir. 2000); *In re Stern*, 2007 WL 3171362 at *4 n.5 (S.D. Fla. 2007).

II.

RELATIONS BETWEEN THE UNITED STATES AND CHINA

Despite a legacy of tense relations, the last three decades have ushered in a number of changes that reveal an increasingly cooperative relationship between the United States and China. This section will briefly consider the history of the U.S.-Chinese diplomatic relationship, as well as the United States' relationship with Hong Kong, which evolved differently on matters of extradition and criminal cooperation. This section will also look at more recent U.S.-Chinese relations, including formal legal cooperation as enumerated in the 2001 Mutual Legal Assistance Agreement (MLAA). Finally, some high-profile examples of cooperation between China and the United States in criminal cases will be examined as examples of how cooperation is currently being worked out between the two countries.

A. *U.S.-Chinese Relations, 1844–1979*

Like many Western nations, the United States, driven by economic interests, had agreements with the Chinese Empire during the mid-nineteenth century to protect its trading position.⁶⁴ Early interactions between Americans and Chinese on matters of criminal justice were the opposite of cooperative: for nearly a century, the two countries maintained separate systems of justice in China. Strong extraterritoriality policies were included in treaties between China and Western nations, including the United States,⁶⁵ and from the 1860s

64. Prompted by concerns about British dominance in China, the United States in 1844 signed the Treaty of Wanghia with the Qing Empire. *See generally* Treaty of Peace, Amity, and Commerce Between the United States of America and the Chinese Empire, July 3, 1844, 8 Stat. 592. In 1858 the United States, like the United Kingdom, France, and Russia, signed a treaty with China (the Treaty of Tianjin) that forced even more concessions from the Empire. *See* HARRY G. GELBER, *THE DRAGON AND THE FOREIGN DEVILS: CHINA AND THE WORLD, 1100 BC TO THE PRESENT* 198–200 (2007); EILEEN P. SCULLY, *BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA 1844–1942* 65–68 (2001). *See generally* Treaty Between the United States of America and the Chinese Empire, June 18, 1858, 12 Stat. 1023.

65. *See* Treaty of Peace, Amity, and Commerce Between the United States of America and the Chinese Empire, *supra* note 64, art. 21 (“[C]itizens of the United States, who may commit any crime in China, shall be subject to be tried and punished *only* by the consul, or other public functionary of the United States, thereto authorized according to the laws of the United States.” (emphasis added)); Treaty Between the United States of America and the Chinese Empire, *supra* note 64, art. 21 (maintaining extraterritoriality for U.S. citizens in China). Extraterritoriality, an “instrument of imperialism,” was “an extreme form of diplomatic protection”—an “extension of sovereign authority” into the occupied country (China) by Western nations. SCULLY, *supra* note 64, at 2–3.

through the end of World War II, the United States exercised exclusive criminal, civil, and administrative jurisdiction for U.S. citizens in China, rendering them immune from Chinese law and punishment.⁶⁶ Following the end of extraterritoriality in 1943, the two countries entered a long period where little or no contact on such matters existed. The legacy of extraterritoriality points to the United States' deep reluctance to cede jurisdiction over Americans and American affairs to the Chinese,⁶⁷ and foreshadowed difficulty in establishing law enforcement cooperation.

After the establishment of the People's Republic of China in 1949, U.S.-Chinese relations took a turn for the worse following the passage of the Sino-Soviet Treaty of Friendship Alliance and Mutual Assistance, hostilities arising from the Korean War, American efforts to impose a trade quarantine on China, and, perhaps most importantly, clashes over Taiwan.⁶⁸ Notwithstanding the symbolic importance of ping-pong, it was President Nixon's visit to China in 1972 which began the process of formally normalizing relations with the PRC.⁶⁹ The Shanghai Communiqué, which resulted from President Nixon's trip, recognized the differences between the two countries in terms of social system and foreign policies but concluded that "countries, regardless of their social systems, should conduct their relations on the principles of respect for the sovereignty and territorial integrity of all states, non-aggression against other states, non-interference in the in-

66. See SCULLY, *supra* note 64, at 5–6. In 1906, the United States Court for China, sitting in Shanghai, was created. *Id.* at 105–06. The court was considered the functional equivalent of a federal district court; appellate jurisdiction rested with the Ninth Circuit. Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFF. L. REV. 923, 944 (2004). In recognition of China's partnership against Japan during World War II, and as a boost to the Nationalist government, the United States ended extraterritoriality in 1943. FISHEL, THE END OF EXTRATERRITORIALITY IN CHINA 209–13 (1952) (describing the events leading up to the Treaty Between the United States and China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, Jan. 11, 1943, 57 Stat. 767).

67. See, e.g., Letter from Caleb Cushing to Forbes, U.S. consul at Canton (June 22, 1844), in FISHEL, *supra* note 66, at 4 (discussing the difference between the "nations of Europe and America [which] form a family of states, associated together by community of civilization and religion, by treaties, and by the law of nations" and China, concluding that "Americans are entitled to the protection and subject to the jurisdiction of the officers of their Government").

68. GOLUM W. CHOUDHURY, CHINA IN WORLD AFFAIRS: THE FOREIGN POLICY OF THE PRC SINCE 1970 18–20, 39–40 (1982). For example, the United States blocked China's entrance into the United Nations from 1950 through 1971; during that time, the China seat was occupied by the Nationalist government in Taiwan. *Id.* at 19–20.

69. See GELBER, *supra* note 64, at 371. It is also noteworthy that trade restrictions were relaxed in 1969, and later the United States ended its trade embargo against the PRC. *Id.*

ternal affairs of other states, equality and mutual benefit, and peaceful coexistence.”⁷⁰ The United States’ policy of diplomatically isolating China, which began in 1949, ended when China was granted a seat in the United Nations in 1971 through the expulsion of Taiwan from the organization.⁷¹ Full diplomatic relations between the United States and the PRC were established in 1979.⁷²

B. *The United States and Hong Kong*

Hong Kong is a part of China, but has a unique Western heritage and structure of governance, and is treated by the United States as a sovereign in treaties. Hong Kong’s history is distinct from China’s in many ways, but its singular relationship with the United States has been incorporated into U.S.-Chinese relations. Importantly, the U.S.-Hong Kong Extradition Agreement is the most likely model for a future U.S.-PRC extradition treaty.⁷³

The U.S.-Hong Kong Extradition Agreement (the Agreement) contains several provisions “specially designed in light of the particular status of Hong Kong,”⁷⁴ but its contents and adoption prefigure, more than anything else, the path a future U.S.-PRC extradition treaty would take. The Agreement and its unique provisions represent the United States’ desire to continue cooperation with Hong Kong on extradition, while acknowledging the added dimension of China’s ultimate control over Hong Kong. Concerns about the potential effect that China would have in this new arrangement were pointedly stated by then-Senator John Ashcroft during the Senate’s ratification of the agreement:

In considering this extradition treaty, we need to be honest. We are not signing this treaty with Hong Kong alone, but with Beijing. . .

70. Joint Communiqué of the United States of America and the People’s Republic of China (Shanghai Communiqué) (Feb. 28, 1972), <http://www.china.org.cn/english/china-us/26012.htm>.

71. CHOUDHURY, *supra* note 68, at 63.

72. *See id.* at 121; GELBER, *supra* note 64, at 380.

73. The Basic Law, a framework of governance for Hong Kong, grants the Hong Kong Special Administrative Region (HKSAR) a “high degree of autonomy,” but gives the PRC’s central government power over Hong Kong to amend the Basic Law, as well as responsibility for the defense and foreign affairs of Hong Kong. *See* Basic Law of the Hong Kong Special Administrative Region, arts. 12–14, *available at* [http://www.legislation.gov.hk/blis_pdf.nsf/CurAllEngDoc/E2D193584811E9B0482575EF002886F2/\\$FILE/CAP_2101_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/CurAllEngDoc/E2D193584811E9B0482575EF002886F2/$FILE/CAP_2101_e_b5.pdf). The Basic Law also provides that Hong Kong may “maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields,” *id.* art. 151, and “may make appropriate arrangements with foreign states for reciprocal juridical assistance.” *Id.* art. 96.

74. 143 CONG. REC. 2976 (1997) (message from President William J. Clinton).

The United States has never before signed a treaty to extradite human beings to a totalitarian Communist regime, and I hope this treaty will not turn into the first example of such policy.⁷⁵

However, as evidenced by their ultimate ratification of the Amendment, the Senate concluded the benefits to law enforcement outweighed the risks of Chinese interference or manipulation.⁷⁶ This indicated a willingness by the United States to work vicariously with China on extradition and law enforcement cooperation, opening the door to direct cooperation at a later time.

An extradition treaty with China would undoubtedly occasion even greater debate in the Senate and elsewhere about the wisdom and desirability of formal extradition relations with a non-democratic world power that the United States consistently criticizes for its poor human rights practices. While it is impossible to predict how that debate will unfold or how the relative negotiating positions of the United States and China will change, the prior experience of enacting an extradition treaty with Hong Kong may improve the process and function as a starting point for negotiations.

C. *Modern U.S.-Chinese Relations on Criminal Matters*

As China has emerged as a world power and increased its international involvement, the thaw in its relations with the United States has grown to include criminal matters. Not only have U.S.-Chinese relations grown more congenial, it seems that they now share similar goals and policies in the criminal justice context, culminating in the 2001 U.S.-PRC Mutual Legal Assistance Agreement.

1. *The Goldfish Case and Early Efforts at Cooperation*

Modern criminal cooperation between China and the United States had a disastrous start in the early 1990s with the “Goldfish” case, a narcotics operation that caused immense diplomatic fallout, retarding the U.S.-PRC relationship and leaving both sides extremely cautious in future relations.

The Goldfish case involved an international narcotics conspiracy that began when Chinese authorities intercepted a shipment of heroin bound for San Francisco in March 1988 and alerted U.S. law enforcement.⁷⁷ One of those arrested in China as a result was Zong Xiao

75. 143 CONG. REC. 22,794 (1997) (statement of Sen. Ashcroft).

76. *See id.* at 22,795 (1997) (statement of Sen. Biden).

77. The drugs were hidden in the bodies of dead goldfish, hence the moniker. *Xiao v. Reno (Wang I)*, 837 F. Supp. 1506, 1514 (N.D. Cal. 1993), *aff'd sub nom, Wang v. Reno* 81 F.3d 808, 811 (9th Cir. 1996).

Wang, who was forcefully taken into custody.⁷⁸ While in Chinese custody, Wang was interrogated numerous times, tortured physically and verbally, and coerced into changing his responses to make it appear the heroin came from Hong Kong, not China.⁷⁹

U.S. prosecutors and law enforcement officials, after learning that Wang had confessed, brought him to the United States to testify against the “mastermind” of the conspiracy.⁸⁰ He revealed on the witness stand that his confession and testimony had been coerced through torture while in Chinese custody.⁸¹ He then fought his return to China by filing a claim for asylum.⁸² The district court found that the U.S. prosecution team was aware that human rights abuses occurred in China,⁸³ ignored evidence that Wang was tortured into confessing,⁸⁴ and withheld exculpatory information from the defense, violating Wang’s due process rights⁸⁵ and breaching its duty to protect its witnesses.⁸⁶ The court entered a permanent injunction against the government prohibiting it from “taking any action in furtherance of removing Wang from the jurisdiction of the United States or of returning him to the custody of the PRC or any of its representatives.”⁸⁷ The Ninth Circuit affirmed this ruling on appeal.⁸⁸

Originally a landmark in informal criminal cooperation between the two countries, the Goldfish case became a “diplomatic debacle,” resulting in the exposure of coercive practices employed in the Chinese criminal justice system,⁸⁹ an embarrassing revelation for a country “extremely sensitive about foreign criticism of its internal legal system.”⁹⁰ The fallout from this case lingered for a long time and

78. *Wang v. Reno (Wang II)*, 81 F.3d 808, 811 (9th Cir. 1996) (describing how Wang was kicked, dragged along the street, and blindfolded during his arrest by PRC police officials).

79. *Id.* (describing how Wang was beaten, shocked with a cattle prod, forced to stand for long periods of time, denied food, drink, and sleep, and verbally abused during his interrogations).

80. *See Wang I*, 837 F. Supp. at 1513–18.

81. *See Wang II*, 81 F.3d at 811.

82. *See id.* at 812; *Wang I*, 837 F. Supp. at 1542.

83. *See Wang I*, 837 F. Supp. at 1557–58.

84. *See id.* at 1551–53.

85. *See id.* at 1550–51.

86. *See id.* at 1559–60.

87. *Wang I*, 837 F. Supp. at 1564.

88. *Wang II*, 81 F.3d at 821.

89. David Whedbee, *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, 562 (2003).

90. *Wang I*, 837 F. Supp. at 1542. The district court, relying on the testimony of three experts and evidence submitted in the case, found the following:

shaped subsequent efforts at cooperation. American law enforcement grew incredibly cautious about accessing witnesses and defendants in China. In at least one later case, U.S. agents were unable and unwilling to apprehend an individual sought for crimes in the United States while that person remained in China; they did not seek Chinese assistance in the matter and it took five years to take that defendant into custody.⁹¹

2. *The 1990s Thaw: China's Expanding International Presence*

The chill in relations following the Goldfish case interrupted formal and informal cooperation between the United States and China.⁹² In 1997, however, Chinese President Jiang Zemin paid a state visit to the United States and held formal talks with President Bill Clinton in Washington,⁹³ which hinted that the relationship was on the mend. A Joint Statement was issued that said while there was both agreement and disagreement between the countries—most conspicuously on the question of human rights—there were significant areas of common interest, and the Presidents agreed that “a sound and stable relationship between the United States and China serves the fundamental interests of both the American and Chinese peoples and is important to fulfilling their common responsibility to work for peace and prosperity in the 21st century.”⁹⁴ The Statement pledged to create a joint liaison group for law enforcement cooperation and to begin consultations on a mutual legal assistance agreement.⁹⁵

3. *The U.S.-PRC Mutual Legal Assistance Agreement*

Cooperation between the United States and China grew significantly in 2000 with the signing of a Mutual Legal Assistance Agree-

The fact that Wang has talked openly in an American court of law about the harsh treatment he has experienced has generated tremendous feelings of ill will and dishonor on the part of those who run the Chinese criminal justice system. That Wang has spoken of the Chinese criminal justice system while on foreign soil has only multiplied his prospects for being treated severely if he returns.

Id.

91. See *infra* Section III.A's discussion of the Sister Ping case.

92. See Bruce Zagaris, *U.S. and P.R.C. Strengthen Enforcement Cooperation and FBI Opens Beijing Office*, 18 INT'L ENFORCEMENT L. REP. 506, 506 (2002) (“Since the ‘goldfish case’ in the 1980s, U.S.-P.R.C. law enforcement relations have suffered.”).

93. KERRY DUMBAUGH, CONG. RESEARCH SERV., CHINA-U.S. RELATIONS, 2 (2002), <http://fpc.state.gov/documents/organization/9062.pdf>.

94. Press Release, Office of the Press Secretary, Joint U.S.-China Statement (Oct. 29, 1997), <http://clinton6.nara.gov/1997/10/1997-10-29-joint-us-china-statement.html>.

95. *Id.*

ment (MLAA).⁹⁶ Efforts in the late 1990s to bolster U.S.-PRC law enforcement relations culminated in the MLAA, which included concrete developments such as the formation of the U.S.-China Joint Liaison Group, as well as rhetorical commitments like the 1997 Joint Statement.

The stated purpose of the U.S.-PRC MLAA is “to improve the effectiveness of cooperation between the two countries in respect of mutual legal assistance in criminal matters.”⁹⁷ Though it provides a legal structure for obtaining evidence from the other country, it does not preclude or limit the informal, case-by-case assistance that predated the MLAA. In fact, it expressly allows for “assistance pursuant to any other arrangement, agreement, or practice which may be applicable,” as well as assistance granted through other international agreements or provisions in a Party’s national laws.⁹⁸ Under the Agreement, the Parties are obliged to give assistance in investigations, prosecutions, and proceedings related to criminal matters, and the agreement encompasses most evidentiary tasks arising in criminal litigation.⁹⁹ The bulk of the MLAA relates to the procedures and requirements of assistance, such as the form and content of requests,¹⁰⁰ the language requirements,¹⁰¹ the execution and postponement of requests,¹⁰² and the service of documents.¹⁰³ This is standard for U.S.

96. A mutual legal assistance treaty or agreement (MLAT or MLAA) is a bilateral agreement between two countries to provide judicial assistance. An MLAT creates a framework for countries to “facilitate the exchange of relevant evidence and information,” enabling countries to pursue criminal prosecutions that might otherwise provide difficult or impossible because of differences in their criminal justice systems. *See* Whedbee, *supra* note 89, at 571. MLATs contain provisions that obligate signatories to provide prosecutorial, as well as civil and administrative, assistance.

97. Agreement Between the Government of the People’s Republic of China and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, U.S.-P.R.C., June 19, 2000 (on file with the Journal of Legislation and Public Policy) [hereinafter U.S.-P.R.C. MLAA].

98. *Id.* art. 21. This provision is included in most MLATs, which often allow, in addition to the formal assistance enumerated in the treaty and required under other agreements, other assistance as may be appropriate for the situation. *See, e.g.*, Treaty with Sweden on Mutual Legal Assistance in Criminal Matters, U.S.-Swed., art. 20, Dec. 17, 2001, S. TREATY DOC. NO. 107-12; Treaty with Ireland on Mutual Legal Assistance in Criminal Matters, U.S.-Ir., art. 17, Jan. 18, 2001 S. TREATY DOC. NO. 107-9; S. TREATY DOC. NO. 107-9; Treaty with Brazil on Mutual Legal Assistance in Criminal Matters, U.S.-Braz., art. 17, Oct. 14, 1997, S. TREATY DOC. NO. 105-42.

99. *See* U.S.-P.R.C. MLAA, art. 1(2) (internal sections removed).

100. *Id.* art. 4.

101. *Id.* art. 5.

102. *Id.* art. 6.

103. *Id.* art. 8.

MLATs.¹⁰⁴ The MLAA is strictly for bilateral government cooperation; private parties may not obtain, suppress, or exclude evidence gathered pursuant to the MLAA.¹⁰⁵

The MLAA's limitations on assistance parallel the bases for denial found in extradition treaties. There is a dual criminality provision, but it allows greater accommodation: parties may "agree to provide assistance for a particular offense, or category of offenses, irrespective of whether the conduct would constitute an offense under the laws in the territory of both Parties."¹⁰⁶ This also indicates the importance assigned to case-by-case assistance by the United States and China. Assistance may be refused if the request relates to purely military offenses or would "prejudice the sovereignty, security, public order . . . important public policy or other essential interests of the Requested Party,"¹⁰⁷ a limitation echoing the U.S.-Hong Kong Extradition Agreement and other MLATs.¹⁰⁸ This broad provision gives the parties ample grounds to deny requests, lessening the compulsion required by the Agreement.

The MLAA has a more expansive political offense exception compared to other MLATs,¹⁰⁹ and, like the U.S.-Hong Kong Extradition

104. See, e.g., Treaty with Ireland on Mutual Legal Assistance in Criminal Matters, *supra* note 98, art. 1(2); Treaty with Czech Republic on Mutual Legal Assistance in Criminal Matters, U.S.-Czech Rep., art. 1(2), Feb. 4, 1998, S. TREATY DOC. NO. 105-47; Treaty with Hungary on Mutual Legal Assistance in Criminal Matters, U.S.-Hung., art. 1(2), Dec. 1, 1994, S. TREATY DOC. NO. 104-20.

105. Compare U.S.-P.R.C. MLAA, *supra* note 97, art. 1(3), with Mutual Legal Assistance Treaty with Japan, U.S.-Japan, art. 1(5), Aug. 5, 2003, S. TREATY DOC. NO. 108-12; Treaty with Ireland on Mutual Legal Assistance in Criminal Matters, *supra* note 98, art. 1(4); Treaty with Brazil on Mutual Legal Assistance in Criminal Matters, *supra* note 98, art. 1(5).

106. U.S.-P.R.C. MLAA, *supra* note 97, art. 3(1)(a).

107. *Id.* arts. 3(1)(b)-(c).

108. See, e.g., Treaty with Ireland on Mutual Legal Assistance in Criminal Matters, *supra* note 98, art. 3(1)(a) (providing that assistance may be denied if "the Requested Party is of the opinion that the request, if granted, would impair its sovereignty, security, or other essential interests, or would be contrary to important public policy"); Treaty with Brazil on Mutual Legal Assistance in Criminal Matters, *supra* note 98, art. 3 (providing that assistance may be denied if "the execution of the request would prejudice the security or similar essential interests of the Requested State . . .").

109. The term political offense is defined in MLATs based on its usage in extradition treaties. Letter of Submittal from Madeline K. Albright, U.S. Secretary of State, to William J. Clinton, U.S. President (Apr. 14, 1998), in Treaty with Czech Republic on Mutual Legal Assistance in Criminal Matters, *supra* note 104 at vi. Compare U.S.-P.R.C. MLAA, *supra* note 97, art. 3(1)(d) (providing that assistance may be denied if "the request relates to a political offense or the request is politically motivated or there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing, or otherwise proceeding against a person on account of the person's race, religion, nationality, or political opinions . . ."), with Mutual Legal Assistance Treaty with Japan, *supra* note 105, art. 3(1)(1) ("The Central

tion Agreement and the U.N. Model Extradition Treaty, permits denial of requests based on protected characteristics.¹¹⁰ The MLAA also allows a party to decline assistance when it is contrary to a party's Constitution, relates to a matter or suspect a party already rendered a final decision on, or when a request is essentially a fishing expedition.¹¹¹

If a request is denied, the MLAA requires that the parties consult to determine whether assistance may be given subject to certain conditions considered necessary by the requested party.¹¹² The ability to impose conditions on requests is another method for the countries to shape and restrict requests, diminishing the obligation imposed by the Agreement.

The commonalities between the MLAA and the U.S.-Hong Kong Extradition Agreement, which were negotiated directly and indirectly with the PRC, reveal what matters are particularly sensitive for both the United States and China: (1) those that touch upon core sovereignty interests, such as the involvement of nationals; (2) matters that are of a political character or could be viewed as "politically motivated"; and (3) more generally, the scope and extent of cooperation. The limits placed on cooperation (such as through the list of extraditable offenses included in the Extradition Agreement and the MLAA's grounds for denying assistance) and the enormous flexibility included in each are indicative of wariness on both sides and a perceived need to rather zealously protect each country's own interests, notwithstanding the legal obligations of the Agreements. The MLAA in particular gives great latitude to each side to refuse requests on any one of sev-

Authority of the requested Party may deny assistance if the requested Party considers that . . . a request pertains to a political offense"); Treaty with Ireland on Mutual Legal Assistance in Criminal Matters, *supra* note 98, art. (3)(1)(c) (providing that assistance may be denied if the central authority of the Requested Party regards the request as relating to "an offense of political character"); Treaty with Hungary on Mutual Legal Assistance in Criminal Matters, *supra* note 104, art. 3(1)(a) ("The Central Authority of the Requested Party may deny assistance if: (a) the request relates to a political offense").

110. Such characteristics include race, religion, nationality, or political opinions. U.S.-P.R.C. MLAA, *supra* note 97, art. 3(1)(d).

111. *See id.* arts. 3(1)(e)-(g).

112. *Id.* art. 3(2). The MLAA identifies as the central authority for making and receiving requests the Attorney General or person designated by the Attorney General for the United States and the Ministry of Justice for the PRC. This designation is typical for MLATs (or MLAAs). *See, e.g.*, Agreement with Hong Kong on Mutual Legal Assistance in Criminal Matters, with Annex, U.S.-H.K., art. 2, Apr. 15, 1997, S. TREATY DOC. NO. 105-6. In practice, MLATs are handled in the United States through the Office of International Affairs in the Department of Justice. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE OFFICE OF INTERNATIONAL AFFAIRS' ROLE IN THE INTERNATIONAL EXTRADITION OF FUGITIVES 2 (2002), <http://www.usdoj.gov/oig/reports/OBD/e0208/extradition.pdf>.

eral broad grounds (“prejudicing” sovereignty, security, public order, important public policy, or “other essential interests”), in addition to leaving intact the co-existing system of informal, ad hoc cooperation between the nations.

4. *Post-MLAA Cooperation*

After signing MLAA, U.S.-Chinese law enforcement cooperation continued to grow, albeit in fits and starts. In 2004, FBI Director Robert Mueller visited China, which, in addition to a previous visit by President Bush, signified greater outreach efforts on the part of the United States.¹¹³ Mueller’s visit to Beijing, the first by an FBI Director, marked the opening of a permanent legal attaché office.¹¹⁴ During his trip, Mueller identified terrorism, organized crime, cyber crime, trafficking in persons, and narcotics trafficking as priorities that required cooperation between law enforcement agencies,¹¹⁵ and stated there had been “very substantial informal ties and cooperation” between the United States and China.¹¹⁶ Most interestingly, in response to an inquiry about the possibility of a future U.S.-PRC extradition treaty, Mueller expressed hopes of continuing discussions about an extradition treaty, but characterized, somewhat implausibly, the “sticking points” as often being related to tax issues.¹¹⁷ Although this statement implies that there had been discussions previously about a possible U.S.-PRC extradition treaty, no other mention of such talks has been made publicly, before or since, by officials of either government.

Several high-profile cases indicate that the United States and China, as well as Hong Kong, have increased cooperation on law enforcement matters. A significant instance of U.S.-Chinese cooperation

113. Significantly, between the signing of the MLAA and Director Mueller’s trip, the September 11th attacks occurred. Combating terrorism became the United States’ top priority, and the United States began more actively pursuing cooperation on criminal matters. See, e.g., Press Release, U.S. Dep’t of State, Crime Requires Global Law Enforcement Cooperation, Mueller Says, (Apr. 22, 2004), <http://usinfo.org/wf-archive/2004/040422/epf406.htm> (“The emerging threats we face from Al Qaeda and others require a new kind of strategy from the FBI, and from our law enforcement and business partners overseas.”).

114. Bruce Zagaris, *U.S. and P.R.C. Strengthen Enforcement Cooperation and FBI Opens Beijing Office*, 18 INT’L ENFORCEMENT L. REP. 501, 502 (2002).

115. Press Release, U.S. Dep’t of State, FBI Director Looks Forward to Building Stronger Ties With Beijing (Apr. 22, 2004), <http://usinfo.state.gov/eap/Archive/2004/Jul/02-685788.html>.

116. *Id.* Mueller also mentioned that Chinese NPS officers had been invited to go through the FBI’s National Academy. *Id.* It is likely he was referring to officers from China’s Ministry of Public Security, the MPS.

117. *Id.*

was the Bank of China case, which also exemplifies how informal extradition between the two countries operates. The case involved the embezzlement of \$485 million from the Kaiping City branch of the Bank of China by three of its managers.¹¹⁸ Beginning in 1991, the managers created several shell corporations in Hong Kong and funneled money into these companies, as well as into many personal bank and investment accounts; with the help of others, including their wives, the money was then laundered into the United States and Canada, including through Las Vegas casino accounts.¹¹⁹ This scheme did not last, however, and one manager, Yu Zhendong, pled guilty to engaging in a racketeering enterprise and cooperated with law enforcement officials, with the indictment of the other two managers, their wives, and another relative following in September.¹²⁰ Yu was sentenced in Nevada to twelve years and returned to China in April 2004. Upon his return to China, Yu was tried again and sentenced to twelve years by a court in Jiangmen City.¹²¹

This case involved a great deal of cross-border cooperation, both pursuant the U.S.-PRC MLAA and other informal means. Each side needed something from the other:

China needs help from the U.S. in order to recover the suspects and proceeds of the crime. In turn, the U.S. needs China's assistance to obtain evidence and witness testimony that is available only in China. China's work to recover suspects has been done outside the framework of the U.S.-P.R.C. MLAA, but the U.S.-P.R.C. MLAA does address cooperation with respect to the recovery of proceeds and instrumentalities of crime (Art. 16).¹²²

To its chagrin, China has not thus far seen much of the stolen funds returned; the money seems to have disappeared.¹²³ Still, coop-

118. Jonathan Fenby & Frank Kane, *The Chips are Down for China's Banks*, THE OBSERVER, Mar. 26, 2006, at 4.

119. Press Release, 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/opa/pr/2006/January/06_crm_052.html.

120. They were indicted for racketeering, money laundering, and fraud. *Id.*

121. *Banker in Guangdong Sentenced to 12 years in Prison*, NEWS GUANGDONG, Apr. 3, 2006, <http://www.newsgd.com/citiesandtowns/jiangmen/news/200604030074.htm>.

122. Margaret K. Lewis, *Mutual Legal Assistance and Extradition: Human Rights Implications*, CHINA RIGHTS FORUM, Feb.-Apr. 2007, at 83, 87-88 (2007), available at http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Extradition.pdf.

123. See Fenby & Kane, *supra* note 118. The United States returned \$3.5 million in 2004, and while the defendants face forfeiture allegations, the asset value is far less than the alleged \$485 million stolen. Lewis, *supra* note 122, at 88. Adding further intrigue to the saga of the missing money, one manager was working as a cook in a

eration under the MLAA resulted in the procurement of more evidence than would otherwise have been available. The United States' requests for various documents from China were satisfied, and testimony from witnesses was taken by video from China.¹²⁴

The return of Yu to China was outside of the MLAA framework, however. His return was the result of the operation of U.S. immigration laws, another method for the removal of persons from a country.¹²⁵ The conditions attached to his return—removing the possibility of the death penalty and torture, and limiting his sentence to that which he would have received in the United States—illustrates greater trust and a willingness on both sides to compromise. The comparative success of this operation may also be chalked up to China's anti-corruption focus, a driving force in its quest to increase international law enforcement cooperation.

Another example of U.S.-PRC cooperation in an area the United States is particularly concerned with—copyright infringement and intellectual property piracy¹²⁶—was on display with the investigation, arrest, and conviction of Randolph Hobson Guthrie, III. Guthrie was the “kingpin of a massive international DVD piracy ring” and the main target of “Operation Spring,” the first joint U.S.-Chinese counterfeiting investigation.¹²⁷ The investigation eventually involved the efforts of various U.S. Immigration and Customs Enforcement offices, the Economic Crime Investigation Department of the Chinese Ministry of Public Security, and the Motion Picture Association of America

Chinese restaurant when he was arrested, hardly the lifestyle of a multi-million dollar embezzler. Fenby & Kane, *supra* note 118.

124. See Press Release, FBI, Former Bank of China Managers and Their Wives Convicted for Stealing (Sept. 2, 2008), <http://lasvegas.fbi.gov/dojpressrel/pressrel08/bankchina090208.htm>.

125. Immigration laws are an alternative method of removal that has periodically been utilized when extradition treaties are unavailable for any number of reasons. In some cases, “disguised extradition” is preferable because immigrations laws are flexible and have extremely limited judicial review. BASSIOUNI, *supra* note 2, at 207. An examination of the use of immigration laws to affect rendition is beyond the scope of this paper.

126. The recent conviction of eleven people in China for copyright infringement and running a counterfeiting ring that manufactured and distributed pirated Microsoft software throughout the world indicates that this has risen as a priority for China after years of U.S. and international pressure to crack down on intellectual property infringement. The case was especially noteworthy as the first instance of cooperation between the FBI and the Chinese Ministry of Public Security. See David Barboza, *Chinese Court Convicts 11 in Microsoft Piracy Case*, N.Y. TIMES, Jan. 1, 2009, at B7.

127. Joshua Davis, *The Decline & Fall of Randolph Hobson Guthrie III*, WIRED, Oct. 2005, at 139, 140, available at <http://www.wired.com/wired/archive/13.10/guthrie.html>.

(MPAA).¹²⁸ Guthrie was arrested in Shanghai on July 2, 2004. Guthrie and a co-conspirator were both tried and found guilty in China, and, after serving five months in China, Guthrie was expelled and sent to the United States,¹²⁹ where he was re-arrested and pled guilty. Guthrie forfeited \$823,333 and faces up to five years in jail and a fine of \$250,000.¹³⁰

In the Guthrie case and the Bank of China case, cooperation was possible and to the advantage of the United States and China. In both cases, defendants arrested and sentenced in one country were later transferred to the other country, where the criminal harm was more acutely felt (Yu Zhendong to China, and Randy Guthrie to the United States). Arguably, the success of these prosecutions derived from the fact that both involved straightforward crimes—embezzlement and counterfeiting—that were easy for the United States and China to see eye-to-eye on. Both countries had criminalized the conduct at issue and there were no real political, religious, or human rights issues involved. In such “neutral” cases, where both countries want the defendants prosecuted and convicted, cooperation shows signs of flourishing.

However, not all cases are so straightforward: in Lewis’s words, “[c]ooperation is inevitably trickier when religious (e.g., Falun Gong followers) or political (e.g., democracy advocates) factors are in play.”¹³¹ It remains to be seen whether cooperation efforts will be limited to “traditional” criminal conduct, or whether the U.S.-Chinese relationship will mature enough to encompass cooperation on criminal matters where there is a political, religious, or social element to a case that makes cooperation trickier. The Bank of China and Guthrie cases will be typical cases for U.S.-Chinese cooperation in the foreseeable future precisely because they are so uncontroversial. This is especially true while the legacy of the Goldfish case lingers as a warning about attempting collaboration when the parties involved have different methodologies and goals for resolution.

128. The MPAA, which estimates its losses to piracy at more than \$3.5 billion annually, provided “crucial assistance and information to U.S. and Chinese law enforcement agencies” in this case. *Unprecedented ICE, Chinese IPR Investigation Dismantles Worldwide Counterfeit Network*, INSIDE ICE, Aug. 16, 2004, at 3 (on file with the Journal of Legislation and Public Policy). Indeed, it was the MPAA that discovered Mr. Guthrie’s location. Peter Wonacott & Sarah McBride, *To Catch Film Pirate, U.S., China Follow Spy Flick to Shanghai*, WALL ST. J., Mar. 7, 2005, at A1.

129. *Pirated DVD Seller Faces U.S. Charges*, N.Y. TIMES, Oct. 4, 2005, at C2.

130. *Man Pleads Guilty in Piracy Case*, WALL ST. J., Jan. 5, 2006, at 1.

131. Lewis, *supra* note 122, at 89.

III.

LOOKING AHEAD: A POSSIBLE U.S.-PRC
EXTRADITION TREATY

Law enforcement relations between the United States and China encompassing both formal and informal cooperation have improved over the last decade. Though the MLAA was a significant step, cooperation up to and including the rendition of individuals is still mostly dealt with on a case-by-case basis, leaving the law enforcement relationship rather unfixed. As the economies of the United States and China become more intermingled¹³² and transnational crime continues to grow,¹³³ there will be more opportunities for the countries to work together on law enforcement matters, raising several questions. Should cooperation continue on a predominantly ad hoc basis? Will assistance outside the MLAA's scope be limited to only those situations where conduct involved is "neutral" and uncontroversial? Or will the countries' relationship evolve to a point where assistance is offered up regularly, extends to all applicable cases, and the disagreements that inevitably arise are not fatal to future cooperation?

The problems for the United States in formalizing cooperation with China in an extradition treaty are rooted in China's abysmal human rights record, rampant public corruption, weak rule of law, and, most crucially, criminal justice system. Together, they form a political barrier: the United States cannot muster the political consensus domestically for a treaty, nor can it sustain the opposition that a

132. In recent years, China has "burst" onto the U.S. trading scene, becoming the third largest trading partner with the United States (after Canada and Mexico); the United States is China's second-largest trading partner (after the European Union). See THOMAS LUM & DICK K. NANTO, CONG. RESEARCH SERV., CHINA'S TRADE WITH THE UNITED STATES AND THE WORLD 6 (2007), <http://www.fas.org/sgp/crs/row/RL31403.pdf>. Furthermore, China has surpassed Japan as the largest foreign U.S. creditor, owning nearly \$1 out of every \$10 of U.S. public debt. Anthony Faiola & Zachary A. Goldfarb, *China Tops Japan in U.S. Debt Holdings*, WASH. POST, Nov. 19, 2008, at D1.

133. The "growing phenomenon of globalized crime" has many dimensions ranging from drug manufacture and distribution to cybercrime, money laundering, and more; "[t]he extent of such illegal activity has increased enormously in the wake of globalization." Paula Dobriansky, *The Explosive Growth of Globalized Crime*, 6 GLOBAL ISSUES, at 5, 5 (Aug. 2001), available at <http://www.italy.usembassy.gov/pdf/ej/ijge0801.pdf>. Following the fall of the Soviet Union and the start of globalization in the 1990s, transnational crime has expanded and globalized, as "[c]rime networks have exploited expanding trade and financial markets, while benefitting from rapidly advancing technology, broadened international travel, and improved global communications." JOHN R. WAGLEY, CONG. RESEARCH SERV., TRANSNATIONAL ORGANIZED CRIME: PRINCIPAL THREATS AND U.S. RESPONSES 1 (2006), <http://www.fas.org/sgp/crs/natsec/RL33335.pdf>.

treaty would provoke internationally. The problems with China's criminal justice system and the treatment of persons in that system, compounded by public corruption and the unsteady rule of law also form a practical barrier, in that the United States cannot as yet have the assurances and the level of trust necessary for a functioning extradition relationship. On the other hand, a carefully drafted treaty would have benefits. These include capitalizing on China's interest in a treaty to obtain agreements and promises in the very areas that are of concern for the United States, enabling the United States to pursue criminals who flee to China, and abandoning the current nebulous arrangement for one that is governed by law, is predictable, and is subject to judicial review. While there is some present consensus that the ad hoc approach is in the best interests of the United States, an extradition treaty's advantages may come to outweigh its disadvantages in the future.

A. *Greater Cooperation: Obstacles and Problems*

The rhetoric and actions of the United States and China have painted an increasingly rosy picture, but the relationship is still under development. The United States remains unwilling and often unable to partner with China on law enforcement, while China has grown increasingly vocal about its desire for extradition treaties with Western countries, including the United States.¹³⁴ Though the United States is willing to partner or share information on a case-by-case basis, it has not committed to taking its relationship with China to the next level. This stands in contrast to American enthusiasm for new extradition treaties following September 11th.¹³⁵

Though the MLAA, the Bank of China case, and the prosecution of Randy Guthrie seem to demonstrate that collaboration is the norm, other cases reveal that the United States sometimes prefers not to seek Chinese assistance or that assistance is precluded because of the absence of an extradition treaty.¹³⁶ As for a U.S.-China extradition treaty, the United States remains reluctant, held back by its concerns about China's human rights practices, public corruption, and problems within the criminal justice system. For now, these issues are signifi-

134. See David Lague, *China Urges Western Nations to Enter Extradition Treaties*, N.Y. TIMES, May 29, 2007, at A3; Zhu Zhe, *Extradition Treaties with France, Australia Set*, CHINA DAILY, Apr. 25, 2008, http://www.chinadaily.com.cn/china/2008-04/25/content_6642396.htm.

135. See *infra* note 178 and accompanying text.

136. See, e.g., the discussion below of the Sister Ping case.

cant enough to give good reason for continuing the current case-by-case approach.

The experience of the Goldfish case has prevented the United States on at least one occasion from seeking Chinese involvement. That was the case of Chui Ping Cheng, better known as Sister Ping. Cheng developed a global human smuggling network from her base in New York's Chinatown, which grew in the late 1980s and early 1990s.¹³⁷ Cheng was indicted in New York in 1994¹³⁸ for alien smuggling, kidnapping, hostage taking, and money laundering, but she had already fled the country.¹³⁹ U.S. officials knew she had returned to her hometown Shengmei in Fujian and from there continued to run her smuggling business.¹⁴⁰ Chinese assistance in bringing Cheng to the United States was not sought, nor could it be in the absence of an extradition treaty, and it took five years for officials to catch a break: they received a tip that Cheng's son's name appeared on a flight manifest for a Korean Air flight from Hong Kong, and she was finally arrested at the airport by the Hong Kong police.¹⁴¹ Cheng vigorously contested extradition to the United States and only after exhausting her appeals in Hong Kong did she finally arrive in New York to face charges in 2003.¹⁴²

In the Sister Ping case, the United States both preferred and was obliged to wait out its target until they could take her into custody in a location (here, Hong Kong) from where extradition was possible. The

137. See *The Mother of All Snakeheads*, THE ASIAN PAC. POST, July 10, 2003, <http://classifieds.southasianpost.com/portal2/402881910674ebab010674f4ae3a12db.do.html>. Changes in U.S. immigration law during the 1980s sparked a boom in Chinese immigration to America, the largest in U.S. history, from 1988 to 1993. A study by the United Nations estimated that the "snakehead trade" was a \$3.5 billion industry in the mid-nineties. Patrick Radden Keefe, *The Snakehead*, THE NEW YORKER, Apr. 24, 2006, at 68, 73, available at http://www.newyorker.com/archive/2006/04/24/060424fa_fact6.

138. Cheng had previously been arrested and convicted in 1989 for conspiring to smuggle aliens into the United States, but after serving her sentence she returned to her growing smuggling business. Andrew Sein, *The Prosecution of Chinese Organized Crime Groups: The Sister Ping Case and Its Lessons*, 11 TRENDS ORGAN. CRIME 157, 162–63 (2008); Keefe, *supra* note 137, at 76. Cheng cooperated with officials during this time, providing information on her rival snakeheads. *Id.*

139. Cheng entered Hong Kong in September 1994, the last time that she traveled under her own name. See Keefe, *supra* note 137, at 82; *The Mother of All Snakeheads*, *supra* note 137.

140. Keefe, *supra* note 137, at 82.

141. Sein, *supra* note 138, at 164.

142. Press Release, U.S. Attorney's Office, S.D.N.Y., Queen "Snakehead" Sister Ping is Extradited From Hong Kong to New York to Face Alien Smuggling and Hostage Taking Charges (July 1, 2003), <http://www.usdoj.gov/usao/nys/pressreleases/July03/ping222extradite.pdf>.

United States, it appears, had learned that trying to work with Chinese law enforcement could be too risky when custody of the defendant was a primary objective. Acting alone avoided the problems of the Goldfish case, since if a target is not taken into Chinese custody, the case cannot be tainted or scuttled by Chinese actions.

The Sister Ping case illustrates another serious obstacle for the United States when working with China: public corruption. Cheng had actually been arrested upon her return to China in 1993 or 1994 but managed to bribe her way out of custody.¹⁴³ She also appears to have had paid off high-ranking Chinese officials while operating her smuggling business from Shengmei.¹⁴⁴ Such unbridled public corruption is evident in other cases in China such as the Bank of China case.¹⁴⁵ Corruption is “endemic”—rife in the courts, law enforcement agencies, and other government entities.¹⁴⁶ Though “rampant corruption and abuse of power” has prompted the Chinese procuracy to issue broad-ranging provisions to combat such problems, the effectiveness of these measures remains to be seen.¹⁴⁷ A corrupted criminal justice system is hardly a selling point for a potential extradition partner, and makes it difficult to trust or depend on China in law enforcement matters.

Yet the main obstacle to a possible U.S.-PRC extradition treaty is the issue of human rights in China. According to the State Department’s 2008 Human Rights Report, China is an authoritarian state whose human rights record “remained poor and worsened in some areas.”¹⁴⁸ This assessment was based on findings that in China there were restrictions on freedom of speech and the media, intense scrutiny and limitation of local and international nongovernmental organiza-

143. *The Mother of All Snakeheads*, *supra* note 137.

144. Ping worked with a high ranking official in Fujian, who was indicted by the U.S. government for running passports out of his office, and is thought to have been associated with the former Public Security Bureau chief in Fujian, who was executed for corruption. *See id.*

145. *See supra* notes 118 through 125 and accompanying text discussing the Bank of China case.

146. U.S. DEP’T OF STATE, *China (includes Tibet, Hong Kong, and Macau)*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2007 746 (Joint Comm. Print 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm> [hereinafter U.S. DEP’T OF STATE, 2007 CHINA COUNTRY REPORT].

147. CONG.-EXECUTIVE COMM’N ON CHINA, 110TH CONG., ANNUAL REPORT 5 (2007), available at <http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCannRpt2007.pdf>.

148. *See* U.S. DEP’T OF STATE, *China (includes Tibet, Hong Kong, and Macau)*, in 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Joint Comm. Print 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm>.

tions, and increased repression of minorities and their religious practices.¹⁴⁹ The report continues:

Other serious human rights abuses included extrajudicial killings, torture and coerced confessions of prisoners, and the use of forced labor, including prison labor. . . . The government continued to monitor, harass, detain, arrest, and imprison journalists, writers, activists, and defense lawyers and their families, many of whom were seeking to exercise their rights under the law. A lack of due process and restrictions on lawyers further limited progress toward rule of law, with serious consequences for defendants who were imprisoned or executed following proceedings that fell far short of international standards. The party and state exercised strict political control of courts and judges, conducted closed trials, and carried out administrative detention. Individuals and groups, especially those deemed politically sensitive by the government, continued to face tight restrictions on their freedom to assemble, their freedom to practice religion, and their freedom to travel. . . . Serious social conditions that affected human rights included endemic corruption, trafficking in persons, and discrimination against women, minorities, and persons with disabilities.¹⁵⁰

Other reports from human rights monitors have made similar findings,¹⁵¹ and taken together, they share several conclusions: the rule of law is not firmly established in China; corruption is prevalent; torture

149. *Id.*

150. *Id.*

151. *See, e.g.,* U.N. ECON. & SOC. COUNCIL, COMM'N ON HUMAN RIGHTS, Civil and Political Rights, Including the Question of Torture and Detention, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to China 2*, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006), available at <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm> (concluding that “torture remains widespread in China,” owing to “incentives for interrogators to obtain confessions through torture, the excessive length of time that criminal suspects are held in police custody without judicial control, the absence of a legal culture based on the presumption of innocence (including the absence of an effective right to remain silent), and restricted rights and access of defense counsel”); HUMAN RIGHTS WATCH, WALKING ON THIN ICE: CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA 2–6 (2008), available at <http://www.hrw.org/reports/2008/china0408/china0408web.pdf> (documenting the obstacles and even persecution faced by lawyers in China); HUMAN RIGHTS WATCH, YOU WILL BE HARASSED AND DETAINED: MEDIA FREEDOMS UNDER ASSAULT IN CHINA AHEAD OF THE 2008 BEIJING OLYMPIC GAMES (Aug. 2007), available at <http://hrw.org/reports/2007/china0807/china0807web.pdf> (reporting on China’s failure to abide by its commitments to respect the freedom of foreign journalists, resulting in their “detention, harassment, and intimidation,” in addition to the “stranglehold” of the government on domestic Chinese media); Human Rights in China, Brief, *China’s Growing Prominence in the Multilateral Human Rights System*, Nov. 2006–Feb. 2007, CHINA RIGHTS FORUM at 22, 22, available at http://hrichina.org/public/PDFs/CRF.1.2007/CRF-2007-1_Multilateral.pdf (noting that while China is now a member of the U.N.

regularly occurs; political and religious repression exists; and there is little respect for civil liberties, including freedom of speech and of the press. This short list is not exhaustive, nor does it adequately capture the breadth and extent of these problems, but more detailed consideration of the issue is beyond the scope of this Note.

Particularly relevant for a possible extradition treaty is the weakness of the rule of law in China. The government has acknowledged the use of torture and other cruel, inhuman, or degrading treatment or punishment in local judicial practice throughout the country despite prohibition by Chinese law.¹⁵² Further, perpetrators of these acts “generally do so with impunity,” even as China’s accession to international conventions and new domestic laws prohibit such conduct.¹⁵³ China has attempted to bring its practices into compliance with international standards but “significant gaps remain within Chinese laws and regulations, and between law on the books and law in action.”¹⁵⁴ The Goldfish case itself is a potent example of these problems, indicating the near-absence of due process in the criminal system.¹⁵⁵

These problems are a source of active and constant disagreement between the United States and China, and they will not disappear overnight. Relations between the two countries are both sensitive and

Human Rights Council, it “lags behind in actual implementation of human rights within its borders”).

152. See U.S. DEP’T OF STATE, 2007 CHINA COUNTRY REPORT, *supra* note 146, § 1.c (“[I]n November 2006 the Supreme People’s Procurate (SPP) Deputy Secretary Wang Zhenchuan acknowledged that illegal interrogation by ‘atrocious torture’” was widespread, and that “almost all mishandled criminal cases in the previous year involved the ‘shadow of illegal interrogation.’”).

153. CONG.-EXECUTIVE COMM’N ON CHINA, 110TH CONG., ANNUAL REPORT 6 (2007), available at <http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCannRpt2007.pdf>. China has acceded to several human rights treaties, including the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social, and Cultural Rights. See Human Rights in China, *supra* note 151, at 1 tbl.

154. CONG.-EXECUTIVE COMM’N ON CHINA, 110TH CONG., ANNUAL REPORT 34 (2007), available at <http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCannRpt2007.pdf>.

155. While the Chinese Criminal Procedure Law ostensibly includes many constitutional guarantees “seemingly close” to those in the U.S. Constitution, “the actual implementation of these provisions is different,” owing to the “small number of well-trained and disciplined police officers, prosecutors, judges and Party officials concerned with law, the limited availability of legal education, the inadequacy of communications in a vast, largely rural nation, and the lack of legal awareness among the masses that would all impose objective restraints on implementation of the codes.” Gu Minkang, *Criminal Procedure Law*, in CHINESE LAW 644–45, 645 n.14 (Wang Guiguo & John Mo, eds., 1999) (citing Jerome A. Cohen, *Toward China Criminal Codes*, 73 J. CRIM. L. & CRIMINOLOGY 136 (1982)).

complex, particularly on the human rights issue. For instance, the 2007 State Department's Human Rights Report roundly condemned China's human rights practices. China responded by denouncing the report as "quite mistaken," claiming it "again ignored basic facts," and amounted to groundless criticism of China's ethnic, religious, and legal systems.¹⁵⁶ Still, China cautioned the United States and others that it was "willing to have exchanges and interactions with the United States and other countries on human rights on a basis of mutual respect, equality and noninterference in internal affairs."¹⁵⁷

There are many specific human rights disagreements between the two countries, ranging from the U.S. detention of Chinese Uighurs in Guantanamo Bay,¹⁵⁸ to China's conduct in the Tibetan Autonomous region,¹⁵⁹ to its treatment of human rights activists and those critical of the government,¹⁶⁰ to absence of freedoms of speech and the me-

156. *China Slams U.S. Human Rights Report, Voicing Strong Opposition*, XINHUA NEWS AGENCY, Mar. 13, 2008, http://news.xinhuanet.com/english/2008-03/13/content_7777255.htm.

157. Edward Cody, *China Set to Resume Human Rights Dialogue*, WASH. POST, Feb. 26, 2008, at A8. The talks were suspended after the United States sponsored a resolution at the U.N. Human Rights Commission in 2004 condemning China's human rights record. *Id.* While Chinese President Hu Jintao told U.S. President George W. Bush in 2006 that he was "willing in principle" to resume talks, "in practice, Chinese officials evaded U.S. attempts to get the discussions started again." *Id.*

158. Uighurs are a minority Muslim population concentrated in the Xinjiang Uighur Autonomous Region in western China. The United States seized nearly two dozen Uighurs after the invasion of Afghanistan in 2001 and held them at the U.S. detention facility in Guantanamo Bay. Tim Golden & Raymond Bonner, *Chinese Leave Guantanamo for Albanian Limbo*, N.Y. TIMES, June 10, 2007, at 1.1. In 2003, it decided that fifteen of the Uighurs could be released, since they either posed no threat or were low-risk detainees, but was unwilling to return them to China, fearing that if returned, the men would be imprisoned, persecuted, or tortured, as the United States believes has happened to other members of the Uighur community in China. See Robin Wright, *Chinese Detainees Are Men Without a Country*, WASH. POST, Aug. 24, 2005, at A1. Five of the men were ultimately relocated to Albania, angering China, which has characterized the men as separatists and terrorists with ties to Al Qaeda and the Taliban, and has accused the United States of double standards on the question of the Uighur detainees. See *China Requests Extradition of Uighur Muslims in Albania*, VOA NEWS, May 9, 2006, <http://www.voanews.com/english/archive/2006-05/2006-05-09-voa14.cfm?CFID=286425025&CFTOKEN=48103967&jsessionid=00304d163bb33c0a2565162c6c16a755c372>; Press Conference, Foreign Ministry Spokesperson Kong Quan's Press Conference on 9 September 2004 (Sept. 10, 2004), <http://bd.china-embassy.org/eng/fyrth/t156696.htm>.

159. See Steven L. Myers & Katrin Bennhold, *Europe and U.S. Press China Over Tibet*, N.Y. TIMES, Mar. 27, 2008, at A14.

160. See, e.g., U.S. DEP'T OF STATE, 2007 CHINA COUNTRY REPORT, *supra* note 146, § 2.b (describing the government's treatment of protestors even though the law providing for freedom of peaceful assembly); Jim Yardley, *Chinese Rights Advocate Gets Prison*, N.Y. TIMES, Apr. 4, 2008, at A13 (report that Secretary of State Condoleezza

dia,¹⁶¹ among other things. The U.S.-China relationship involves not only genuine disagreement on substantive matters—the human rights conditions of both countries and the presumptions inherent in criticizing the other on such matters—but also constant diplomatic back-and-forth as major and minor slights are received and inflicted.

The steady stream of criticism from various parts of the U.S. government on human rights in China¹⁶² reveals real concerns on the part of the United States and continues to rile China.¹⁶³ This tension may prove to be an insurmountable barrier to further cooperation. Having spent so much time and effort documenting and drawing attention to this issue, the United States has effectively precluded more extensive law enforcement cooperation unless and until China makes significant, well-documented progress on human rights. This is especially true because of the United States' tarnished credibility on the international stage, stemming from its conduct after September 11th¹⁶⁴ and in the

Rice criticized the conviction of human rights advocate Hu Jia as “deeply disturbing”).

161. See U.S. DEP'T OF STATE, 2007 CHINA COUNTRY REPORT, *supra* note 146, § 2.a.

162. See, e.g., Press Release, Office of Senator Brownback, Brownback Condemns China Human Rights Violations (May 1, 2008), <http://brownback.senate.gov/pressapp/record.cfm?id=297122> (reporting on a press conference held by several Senators and Congressmen, as well as outside organizations, to call attention to “the numerous human rights violations directly and indirectly enabled by the Chinese government”); CONG.-EXECUTIVE COMM'N ON CHINA, 110TH CONG., ANNUAL REPORT 2 (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf (stating that “China’s record on human rights and the development of the rule of law over the last year continued to reflect the following troubling trends: (1) heightened intolerance of citizen activism and suppression of information on matters of public concern; (2) ongoing instrumental use of law for political purposes; (3) stepped up efforts to insulate the central leadership from the backlash of national policy failures; and (4) heightened reliance on emergency measures as instruments of social control”).

163. See, e.g., Press Release, Foreign Ministry Spokesman’s Press Conference on March 5, 2002 (Sept. 24, 2004), <http://www.fmprc.gov.cn/ce/cetur/eng/xwtd/t161520.htm> (describing the U.S. State Department’s 2001 Human Rights Report as “just another US attempt to interfere with China’s internal affairs under the pretext of human rights issues” and “making up stories and confounding right and wrong”).

164. See, e.g., U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶¶ 10–16, CCPR/C/USA/CO/3 (Sept. 15, 2006), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/0d83f7fe89d83ed6c12571fb00411eb5/\\$FILE/G0644318.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/0d83f7fe89d83ed6c12571fb00411eb5/$FILE/G0644318.pdf) (expressing concerns regarding, *inter alia*, the potentially overbroad reach of the definitions of terrorism under domestic law; secret detentions; use of enhanced interrogation techniques; deficient investigations in to allegations of torture and cruel, inhuman, and degrading treatment at facilities in Guantanamo Bay, Afghanistan, Iraq, and other overseas locations; and the United States’ restrictive reading of provisions of the International Covenant on Political and Human Rights); HUMAN RIGHTS WATCH, WORLD REPORT 2008: UNITED STATES (2008), available at <http://hrw.org/englishwr>

Iraq and Afghanistan wars, which has rendered it more vulnerable to criticism on human rights practices. Entering into an extradition treaty with China would correctly be viewed as an endorsement of China and its criminal justice system and would surely invite disapproval.¹⁶⁵ Improvement in human rights practices, including strengthening the rule of law and rooting out rampant corruption, will necessarily take some time, but until then, the United States is likely to be unreceptive to talk of formal rendition cooperation.

B. Greater Cooperation: Benefits and Motivation

Law enforcement cooperation between the United States and China, encompassing both formal and informal methods, will continue for the foreseeable future. Among those familiar with this situation, there is consensus that the best course of action regarding formal cooperation with China is for the United States to go no further than the MLAA because of the current state of human rights and the rule of law in China.¹⁶⁶ This Note joins that position to the extent that it pertains to the present U.S.-Chinese relationship and the circumstances in China today.

The existing arrangement between the two countries was reached after years of gradually expanding a once-narrow relationship. Cooperation is on the rise because there are now more opportunities and more reasons to cooperate: the Chinese and American economies have become extremely interdependent,¹⁶⁷ advances in technology and communication make international interaction easier and faster, and criminal activity has flourished with globalization. These developments are likely to continue, producing an increasing need for extraditions as criminal conduct occurring in and affecting both countries grows. Given these changes, a U.S.-PRC extradition treaty may some day become an attractive option.

2k8/docs/2008/01/31/usdom17770.htm#gitmo (criticizing the Bush Administration's treatment of enemy combatants); Barbara Slavin, *Annan to Blast U.S. in Farewell*, USA TODAY, Dec. 11, 2006, at A1 (discussing United Nations Secretary-General Kofi Annan's plans to criticize President Bush's commission of "human rights abuses and taking military action without broad international support").

165. This situation is analogous to the State Department's decision to remove China from its list of top human rights offenders in 2007. This move provoked the anger from human rights groups, such as Amnesty International USA and the press freedom group Reporters Without Borders. See Helene Cooper, *U.S. Drops China From List of Top 10 Violators of Rights*, N.Y. TIMES, Mar. 12, 2008, at A12.

166. See Lewis, *supra* note 122, at 94.

167. See *supra* note 132, and accompanying text.

I. Current Chinese and U.S. Motivation for a Treaty

Even though the United States and China do not see eye-to-eye on many issues, especially human rights, China has made clear its desire for an extradition treaty with the United States. In the spring of 2007, China called for more extradition partners, stating that “political bias and ideological differences” should be put aside in order to help “bring criminals to justice”¹⁶⁸ Soon after, a PRC foreign ministry spokesman stated that China was “actively exploring the possibility of signing judicial treaties with relevant countries, including the U.S.”¹⁶⁹

The criminals that China is most concerned with bringing to justice are those Chinese public officials who have fled with the proceeds of their economic crimes. Public corruption is the chief reason China cites for seeking more extradition treaties.¹⁷⁰ According to statistics from the Ministry of Public Security, “more than 800 suspects wanted for economic crimes remain at large,” mostly in Western countries, and these fugitives are suspected of embezzling 70 billion yuan, the equivalent of \$9 billion.¹⁷¹ China’s anti-corruption drive has reached to the highest levels of government, prompting the promulgation of a national extradition law in 2000, and has even become a priority for the Chinese public.¹⁷² Foreign Ministry spokesman Qin Gang specifically mentioned “corrupt Chinese officials absconding to the U.S.” as a specific Chinese concern and the reason it wants an extradition treaty with the United States.¹⁷³

China’s actions also suggest that it has called for more extradition treaties because it wants to play a larger and more involved role in international relations. The scores of treaties and conventions China has joined in the past decade paint the picture of a country intent on solidifying its position as an international heavyweight. As of October 2007, China had signed ninety-eight bilateral treaties and agreements on judicial cooperation with fifty-three countries, and has joined more

168. Xie Chuanjiao, *Beijing Calls for More Extradition Treaties*, CHINA DAILY, May 28, 2007, at 1, available at http://www.chinadaily.com.cn/china/2007-05/28/content_881134.htm.

169. Press Briefing, FM Press Briefing on June 14 (June 18, 2007), available at http://www.gov.cn/english/2007-06/18/content_651971.htm [hereinafter Press Briefing, FM Press Briefing on June 14].

170. See Lague, *supra* note 134.

171. Comment, *Extradite Criminals*, CHINA DAILY, May 28, 2007, at 4, available at http://www.chinadaily.com.cn/china/2007-05/28/content_881166.htm.

172. See Matthew Bloom, *A Comparative Analysis of the United State’s Response to Extradition Requests from China*, 33 YALE J. INT’L L. 177, 189–90 (2008).

173. Press Briefing, FM Press Briefing on June 14, *supra* note 169.

than twenty multilateral conventions which included provisions for judicial cooperation.¹⁷⁴ China has signed extradition treaties with thirty-one countries since the 1990s, mostly with developing nations.¹⁷⁵ Notable exceptions to this are the extradition treaties it has signed with France, Spain, Portugal, Australia, and Mexico.¹⁷⁶ Most significantly, these new treaties have produced impressive results: 413 criminal suspects from over 20 countries were brought back to China since 1998, including more than 300 officials who had fled with illegal earnings.¹⁷⁷ For a country that has prioritized the return of stolen funds and corrupt officials, that level of return is powerful motivation.

For its part, the United States has also been on a treaty spree over the last few years. In furtherance of its war on terror, the United States has negotiated and entered into mutual legal assistance treaties and extradition treaties at a rapid pace.¹⁷⁸ Nevertheless, China presents a unique situation: while the United States is happy to sign treaties with many countries, China is not one of them.¹⁷⁹ Still, the United States' willingness to enter treaties with other countries, not all of which are upstanding democracies, shows that external events and new U.S. policies and priorities have the potential to reverse or strongly influence the United States' position.

China's keen interest in an extradition treaty with the United States is itself a possible motivating factor, since it may make China a more willing negotiating partner. This alone is insufficient to bring the United States to the table, but it can be an important bargaining

174. Feng Tao, Information Office of the State Council of the People's Republic of China, *China's Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. OF INT'L L. 513, 543 (2008), available at http://english.gov.cn/2008-02/28/content_904901.htm.

175. Zhu Zhe, *supra* note 134.

176. Lague, *supra* note 134; Shar Adams, *Australia's Extradition Treaty With China Criticised*, EPOCH TIMES, Sept. 18, 2007, <http://en.epochtimes.com/tools/printer.asp?id=59899>; *China Ratifies Treaty on Extradition with Mexico*, PEOPLE'S DAILY ONLINE, Mar. 1, 2009, <http://english.peopledaily.com.cn/90001/90776/90883/6603272.html>.

177. *Over 400 Fugitive Criminal Suspects Repatriated*, GOV.CN, July 31, 2007, http://www.gov.cn/english/2007-07/31/content_702448.htm.

178. New extradition treaties and mutual legal assistance treaties for criminal matters have been signed with many countries since 2001: Romania, Bulgaria, Malta, Estonia, Latvia, the European Union, the United Kingdom, Canada, Peru, Lithuania, Japan, Liechtenstein, Belize, Sweden, Ireland, and India. See THOMAS, *Treaties*, <http://thomas.loc.gov/home/treaties/treaties.htm> (search "Word/Phrase" for "extradition").

179. This is not to say that China was not approached by the United States for assistance on its war on terror. To the contrary, the United States did enlist China's help in a variety of ways, and rewarded this assistance not only with the return of Yu Zhendong in the Bank of China case, but also with the addition of Uighur separatists to the official U.S. list of terrorists. See Bloom, *supra* note 172, at 204–05.

chip. So long as it enjoys this advantage, the United States may press for greater concessions and assurances in a future treaty and in current cooperation efforts. Importantly, the United States can capitalize on China's desire for a treaty by demanding improvements in the very areas that are preventing it from entering into a treaty, namely China's human rights practices. As stated by Matthew Bloom, "the United States has leverage to request these changes. . . . [I]t 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."¹⁸⁰

2. *The Probable Structure of a U.S.-PRC Treaty*

If these motivating factors were to ultimately bring about an extradition treaty, what would it look like? As seen in Section I, all extradition treaties contain several distinct features and accordingly resemble each other in large part. An extradition treaty with China would not be a reinvention of the wheel, despite the novelty of the parties. It is possible to make a reasonable prediction about what a U.S.-PRC would look like based on the U.S.-Hong Kong Extradition Agreement, the negotiation of which involved not only the United States, the United Kingdom, and Hong Kong, but also—indirectly through its approval of the Sino-British Joint Liaison Group—China.¹⁸¹ In light of the particular U.S. concerns relating to law enforcement cooperation with China, both sides would want a treaty to have particular terms to protect their interests, and a close review of some of the U.S.-Hong Kong Extradition Agreement's provisions—those relating to extraditable offenses, the surrender of nationals, political offenses, and specialty—reveals what these critical sections are likely to look at in a future U.S.-PRC extradition treaty.

a. *Extraditable Offenses*

The U.S.-Hong Kong Extradition Agreement enumerates extraditable offenses, and requires that the offense is one punishable by laws of both parties for at least one year.¹⁸² It then lists thirty-six descriptions of extraditable offenses, ranging from murder to

180. *Id.* at 208.

181. See Letter of Submittal from Madeline K. Albright, U.S. Secretary of State, to William J. Clinton, U.S. President (Feb. 4, 1997), in Agreement with Hong Kong for the Surrender of Fugitive Offenders, U.S.-H.K., at v, Dec. 20, 1996, S. TREATY DOC. No. 105-3 [hereinafter U.S.-H.K. Extradition Agreement].

182. *Id.* art. 2(1).

piracy,¹⁸³ and including a broad aiding and abetting provision.¹⁸⁴ There is also a dual criminality provision, which states “any other offense” punishable by the laws of both parties to the Agreement by imprisonment or detention of more than one year is extraditable.¹⁸⁵ Secretary of State Albright described this provision as following the modern dual criminality model, reducing the need to “renegotiate or supplement the Agreement as offenses become punishable under the laws of both Parties.”¹⁸⁶

This extensive list of extraditable offenses stands in contrast to contemporaneous and subsequent extradition treaties, as well as the Extradition Law of China (PRC Extradition Law), which requires dual criminality.¹⁸⁷ A dual criminality provision has become the rule, not the exception, in extradition treaties, regardless of the treaty partner or the presidential administration negotiating the treaty.¹⁸⁸ Moreover, the inclusion of a list of extraditable offenses in the Extradition Agreement is arguably surplusage, given the dual criminality provision, but it indicates U.S. concern about the scope of extraditable offenses. By cabining extraditable offenses with the list, the United States acknowledged a degree of uncertainty in the laws of its treaty partner. A benign view is that using both a list and the provision was in recognition of the changes Hong Kong, previously a non-communist, capitalist territory, would experience after reverting to communist and authoritarian China. A more cynical take is that the list indicates the United States did not trust its treaty partner, prompting an *ex ante* attempt to make explicit the offenses considered worthy of extradition, lest

183. *Id.* art. 2(1)(i)(xxix).

184. *Id.* art. 2(1)(xxv) (rendering extraditable the “[a]iding, abetting, counseling or procuring the commission of, inciting, being an accessory before or after the fact, or attempting or conspiring to commit any offense for which surrender may be granted under this Agreement . . .”).

185. *Id.* art. 2(1)(i)(xxxvi).

186. Letter of Submittal from Madeline K. Albright, U.S. Secretary of State, to William J. Clinton, U.S. President, in U.S.-H.K. Extradition Agreement, *supra* note 181, at vi.

187. Extradition Law (P.R.C.) (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 28, 2000, effective Dec. 28, 2000), art. 7(1), available at http://www.gov.cn/english/laws/2005-09/22/content_68710.htm [hereinafter PRC Extradition Law] (“Request for extradition made by a foreign state to the People’s Republic of China may be granted only when . . . the conduct indicated in the request for extradition constitutes an offence according to the laws of both the People’s Republic of China and the Requesting State . . .”).

188. *See, e.g.*, Extradition Treaty with Latvia, U.S.-Lat., art. 2, Dec. 7, 2005, S. TREATY DOC. NO. 109-15; Extradition Treaty with Cyprus, U.S.-Cyprus, art. 2, June 17, 1996, S. TREATY DOC. NO. 105-16.

China's new administrative region make requests for offenses the United States would consider non-extraditable.

b. Surrender of Nationals

Article 3 of the U.S.-Hong Kong Extradition Agreement provides that the surrender of an individual "shall not be refused on grounds relating to the nationality of the person sought."¹⁸⁹ This is in line with the United States' position that nationality should not be a basis for refusal to surrender, its preference for treaties that permit extradition of a country's nationals,¹⁹⁰ and is consistent with 18 U.S.C. § 3196, which provides that even if a treaty or agreement does not obligate the United States to surrender a U.S. citizen, the Secretary of State has the discretion to order the surrender of a U.S. citizen to a requesting country.¹⁹¹ This is not a universally accepted position: the PRC Extradition Law, for example, requires that an extradition request be rejected if the person sought is a Chinese national.¹⁹²

The Agreement limits this nationality provision in its next two paragraphs, which reserve to both the United States and Hong Kong the ability to refuse surrender in certain situations. Paragraph 2 states that the executive authority of the United States may refuse the surrender of a U.S. national when the "requested surrender relates to the defense, foreign affairs or essential public interest or policy of the United States of America."¹⁹³ This, in effect, enables the United States to do exactly what is prohibited by Paragraph 1 and 18 U.S.C. § 3196—deny extradition of a U.S. citizen on the basis of nationality, since "relating to" the enumerated areas, particularly "essential public interest or policy," is a vague standard easily met. Such a reservation of rights is unusual, given U.S. preferences and statutes.¹⁹⁴

189. U.S.-H.K. Extradition Agreement, *supra* note 181, art. 3(1).

190. *See, e.g.*, Letter of Submittal from Colin L. Powell, Secretary of State, to George W. Bush, U.S. President, in Extradition Treaty with United Kingdom, U.S.-U.K., at vi, Mar. 31, 2003, S. TREATY DOC. NO. 108-23 ("Extradition shall not be refused based on the nationality of the person sought."); Extradition Treaty with Peru, U.S.-Peru, art. 3, July 26, 2001, S. TREATY DOC. NO. 107-6 ("Extradition shall not be refused on the ground that the person sought is a national of the Requested State.").

191. 18 U.S.C. § 3196 (2006).

192. PRC Extradition Law, *supra* note 187, art. 8(1).

193. U.S.-H.K. Extradition Agreement, *supra* note 181, art. 3(2).

194. While it has been the policy of the United States that all nations should extradite their own nationals, in practice many countries reject this proposition and many treaties negotiated with the United States exempted a country's nationals from the obligation to surrender. *See* EXTRADITION TO AND FROM THE UNITED STATES, *supra* note 17, § 2-2(18) (Release #4 2008); BASSIOUNI, *supra* note 2, at 682, 682 n.298 (noting that in extradition treaties where nationals are exempted from extradition, the requested country has a duty to prosecute such individuals). Nevertheless, modern U.S.

Paragraph 3 similarly deals with the question of extraditing Chinese nationals, obliquely termed “nationals of the State whose government is responsible for the foreign affairs relating to Hong Kong.” This provision does not mandate denial of a request when a Chinese national is involved, as does the PRC’s Extradition Law. Rather, it reserves to Hong Kong’s executive authority the right to refuse the surrender of Chinese nationals where the requested surrender “relates to the defense, foreign affairs or essential public interest or policy” of China.¹⁹⁵ Surrender may also be refused when the person sought is not a resident of Hong Kong, China has jurisdiction over the offense relating to the surrender request, and China has begun or completed prosecution of that person.¹⁹⁶ This basis for denial is also found in the PRC Extradition Law.¹⁹⁷ Thus China, through Hong Kong, reserves the same expansive right to deny extradition of its nationals as the United States. This gives further assurance that the Agreement will not interfere with Chinese prosecutorial decisions regarding its own nationals¹⁹⁸ and reveals China’s desire to avoid U.S. involvement or influence in its own judicial system.

c. Political Offenses and a Humanitarian Exception

The political offense exception included in the Agreement is characteristic of U.S. extradition treaties.¹⁹⁹ Article 6 prohibits extradition when a person is sought for an offense “of a political character,”²⁰⁰ with limited exceptions.²⁰¹ This provision is the same or

extradition treaties allow the extradition of U.S. nationals even where the treaty partner excludes extradition of its own nationals, although the Secretary of State has discretion to make this extradition decision. 18 U.S.C. § 3196; EXTRADITION TO AND FROM THE UNITED STATES, *supra* note 17, § 2-2(18) (Release #4 2008); BASSIOUNI, *supra* note 2, at 689.

195. U.S.-H.K. Extradition Agreement, *supra* note 181, art. 3(3)(a).

196. *Id.* art. 3(3)(b).

197. See PRC Extradition Law, *supra* note 187, arts. 8(2), 9(1).

198. Chinese nationals include those persons of Chinese descent born in Hong Kong, persons satisfying the criteria laid down in the Nationality Law of the PRC for having Chinese nationality, and those who are “Hong Kong Chinese compatriots.” Explanations of Some Questions by the Standing Committee of the National People’s Congress Concerning the Implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administrative Region, ¶¶ 1–2, http://www.immd.gov.hk/ehtml/chnnationality_2.htm (last updated Dec. 15, 2008).

199. The Letter of Submittal describes the political offense exception as “similar to provisions contained in U.S. extradition treaties concluded in recent years with a number of other countries.” Letter of Submittal from Madeline K. Albright, U.S. Secretary of State, to William J. Clinton, U.S. President, *in* U.S.-H.K. Extradition Agreement, *supra* note 181, at vii (1997).

200. *Id.* art. 6(1).

201. *Id.* art. 6(2).

substantially the same as those found in contemporary U.S. extradition treaties,²⁰² but it is more detailed than the political offense exception in the PRC Extradition Law, which simply provides that an extradition request shall be denied if “the request for extradition is made for a political offence, or the People’s Republic of China has granted asylum to the person sought”;²⁰³ no further explanation or definition of “political offense” is given. This is perhaps not surprising, given that there is a general understanding of what it means in the context of an extradition treaty, but the lack of enumeration could also be interpreted as an indication of China’s low regard for this treaty feature.

Slightly less conventional is the Agreement’s mandate requiring denial of surrender if the relevant authority of the requested party determines that (1) the extradition request is politically motivated; (2) the request is pretextual, that is, “made for the primary purpose of prosecuting or punishing the person sought on account of his race, religion, nationality or political opinions”; or (3) that the person is “likely to be denied a fair trial or punished on account of his race, religion, nationality, or political opinions.”²⁰⁴ In her Letter of Submittal, Secretary Albright noted that only in a few other modern treaties has the United States agreed to such a “comprehensive provision.”²⁰⁵ Despite this disclaimer, a similar provision for denying pretextual requests can be found in the roughly contemporaneous U.S.-France and U.S.-Korean treaties.²⁰⁶ What is more, prohibitions on politically mo-

202. See, e.g., Extradition Treaty with Cyprus, *supra* note 188, arts. 4(1), (2); Extradition Treaty with Belize, U.S.-Belize, art. 4(1), (2), Mar. 30, 2000, S. TREATY DOC. NO. 106-38. Many extradition treaties, particularly those relying on a simple dual criminality provision, include additional categories of crimes excluded from the political offense exception in addition to the three identified in the U.S.-Hong Kong Extradition Treaty. See, e.g., Extradition Treaty with Bulgaria and an Agreement on Certain Aspects of Mutual Legal Assistance in Criminal Matters with Bulgaria, U.S.-Bulg., art. 4(2), Jan. 22, 2008, S. TREATY DOC. NO. 110-12 [hereinafter Extradition Treaty with Bulgaria]; Extradition Treaty with Latvia, U.S.-Lat., *supra* note 188, art. 4(2).

203. PRC Extradition Law, *supra* note 187, art. 8(3).

204. U.S.-H.K. Extradition Agreement, *supra* note 181, art. 6(3).

205. Letter of Submittal from Madeline K. Albright, U.S. Secretary of State, to William J. Clinton, U.S. President, *supra* note 181, at vii.

206. Extradition Treaty with the Republic of Korea, U.S.-S. Korea, art. 4(3)(a), June 9, 1998, S. TREATY DOC. NO. 106-2 (providing that surrender shall not be granted if the requested state determines that the request, “though purporting to be made on account of an offense for which surrender may be granted, was in fact made for the primary purpose of prosecuting or punishing the person sought on account of race, religion, nationality or political opinion”); Extradition Treaty Between the United States of America and France, U.S.-Fr., art. 4(4), Apr. 23, 1996, S. TREATY DOC. NO. 105-13 (providing that either party to the treaty may refuse extradition if the appropriate authority has “substantial grounds for believing that the request was for the pur-

tivated extradition requests are nearly always included in modern extradition treaties.²⁰⁷ It reflects language from the U.N. Model Treaty on Extradition, which states that it is a mandatory basis for refusal if the requested party has “substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person’s position may be prejudiced for any of those reasons”²⁰⁸ A similar provision is included in the PRC Extradition Law.²⁰⁹

Finally, the Agreement includes a humanitarian exception in Article 7, which states that a request may be refused when “such surrender is likely to entail exceptionally serious consequences related to age or health.”²¹⁰ Since the United States has so far refused to read a humanitarian exception into the text of other extradition treaties,²¹¹ it is not surprising that Secretary Albright diminished the possibility of this Article by stating it “would apply only in the most unusual and extraordinary circumstances.”²¹² Similar provisions exist in the PRC Extradition Law.²¹³

It is notable that Hong Kong and, more importantly, China, agreed to these limitations on extradition, and can be seen as a sign that China is willing to address U.S. concerns about the possible utilization of an extradition treaty to further political or prohibited purposes. The broad political offense exception and the humanitarian exception are more expansive than those found in most U.S. extradi-

pose of prosecuting or punishing a person on account of that person’s race, religion, nationality or political opinions”).

207. See Extradition Treaty with Bulgaria, *supra* note 202, art. 4(3); Extradition Treaty with Latvia, *supra* note 188, art. 4(3); Extradition Treaty with United Kingdom, *supra* note 190, art. 4(3); Extradition Treaty with Belize, *supra* note 202, art. 4(3); Extradition Treaty with the Philippines, U.S.-Phil., art. 3(3), Nov. 13, 1994, S. TREATY DOC. NO. 104-016 (1995).

208. U.N. Model Treaty on Extradition, G.A. Res. 45/116, ¶ 3(b), U.N. GAOR 45th Sess., 68th Plen. Mtg., U.N. Doc. A/Res/45/116 (Dec. 14, 1990), available at <http://www.un.org/documents/ga/res/45/a45r116.htm>.

209. The PRC Extradition law prohibits extradition when a person is sought “for reasons of that person’s race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings” PRC Extradition Law, *supra* note 187, art. 8(4).

210. U.S.-H.K. Extradition Agreement, *supra* note 181, art. 7.

211. See, e.g., *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990).

212. Letter of Submittal from Madeline K. Albright, U.S. Secretary of State, to William J. Clinton, U.S. President, in U.S.-H.K. Extradition Agreement, *supra* note 181, at viii (1997).

213. See PRC Extradition Law, *supra* note 187, art. 9(2) (stating that extradition shall be refused if it is “incompatible with humanitarian considerations in view of the age, health or other conditions of the person sought”).

tion treaties and provide more protection for individuals sought under the Agreement, as well as another way for a Party to the Agreement to limit or refuse extradition. They also echo the Agreement's list of extraditable offenses. Taken together, these sections indicate the United States and Hong Kong will confine their cooperation to conventional criminal matters. Steering clear of potential areas of conflict—such as political crimes or requests considered improperly motivated—by giving greater liberty to refuse extradition reflects the underlying uneasiness of both countries with the other's judicial system. Keeping the focus on unobjectionable criminal offenses also means that differences between the two will be minimized, a tactic that has proven successful in the informal law enforcement cooperation between the United States and China.

d. Specialty

Article 16, entitled “Specialty,” is yet another way the United States and China sought to protect their interests. It is typical of specialty provisions found in extradition treaties.²¹⁴ There is also a prohibition on re-extradition—the surrender or transfer of the person beyond the requesting party's jurisdiction—without the consent of the requested party.²¹⁵ For Hong Kong, this bars “any proposed surrender or transfer outside of Hong Kong.”²¹⁶

The Agreement's specialty provisions are entirely standard,²¹⁷ notable only because of the ban on re-extradition. Although this is not unusual, and though it echoes both Section 5 of the Fugitive Offenders Ordinance of Hong Kong²¹⁸ and the PRC Extradition Law,²¹⁹ the issue of re-extradition to China, either literally or constructively, was frequently raised by individuals fighting extradition to Hong Kong

214. See *supra* Section I.A.1; U.S.-H.K. Extradition Agreement, *supra* note 181, art. 16(1).

215. U.S.-H.K. Extradition Agreement, *supra* note 181, art. 16(2).

216. Letter of Submittal from Madeline K. Albright, U.S. Secretary of State, to William J. Clinton, U.S. President, in U.S.-H.K. Extradition Agreement, *supra* note 181, at ix.

217. See, e.g., Extradition Treaty with Latvia, *supra* note 188, art. 15; Extradition Treaty with France, *supra* note 206, art. 19; Extradition Treaty with Cyprus, *supra* note 188, art.16.

218. CHAU PAK KWAN, LEGISLATIVE COUNCIL SECRETARIAT, RESEARCH STUDY ON THE AGREEMENT BETWEEN HONG KONG AND THE MAINLAND CONCERNING SURRENDER OF FUGITIVE OFFENDERS: THE ISSUE OF RE-EXTRADITION ¶ 3.16 (2001), <http://www.legco.gov.hk/yr01-02/english/sec/library/0102in02e.pdf>.

219. PRC Extradition Law, *supra* note 187, art. 14(1).

prior to and following reversion.²²⁰ U.S. courts rejected these challenges, finding them too speculative, remote, and tenuous,²²¹ as well as beyond the scope of the court's role in the extradition proceeding.²²² Indeed, following reversion, Hong Kong's ban on re-extradition to a third state has been found to not apply to China.²²³

e. Additional Provisions in the PRC Extradition Law

In addition to these factors in the U.S.-Hong Kong Extradition Agreement, there are several other provisions in the PRC Extradition Law that merit attention. The first such provision is contained in Articles 8(7) and mirrored in 9(2). Article 8(7) provides that an extradition request shall be denied if a person "has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State . . ."²²⁴ This language reflects the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²²⁵ Article 9(2) similarly allows for rejection of extradition where it is "incompatible with humanitarian considerations in view of the age, health or other conditions of the person sought."²²⁶ The substance of these provisions is difficult to accept, given China's poor human rights record and its ongoing human rights violations. Indeed, the Goldfish case made it abundantly clear that rendition agreements with China should be approached with great trepidation. In light of well-documented human rights violations

220. The argument for constructive extradition to the PRC was that extradition to Hong Kong resulting in criminal proceedings after the date of reversion would amount to the individual having been constructively or effectively extradited to the PRC. See *United States v. Kin-Hong*, 110 F.3d 103, 115–16 (1st Cir. 1997); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1403–04 (9th Cir. 1988); *Cheng Na-Yuet v. Hueston*, 734 F. Supp. 988, 992–93 (S.D. Fla. 1990); *In re Extradition of Tang Yee-Chun*, 674 F. Supp. 1058, 1068 (S.D.N.Y. 1987).

221. *Hueston*, 734 F. Supp. at 993; *In re Extradition of Tang Yee-Chun*, 674 F. Supp. at 1068 (finding petitioner's claims "too speculative and too remote to justify action by this Court").

222. See *Kin-Hong*, 110 F.3d at 115–16 (explaining that the petitioner may express his "concerns about the post-reversion enforceability of specialty to the Secretary of State," since "[i]t is not the role of the judiciary to speculate about the future ability of the United States to enforce treaty obligations").

223. See KWAN, *supra* note 218, ¶ 5.4 ("[T]he *Fugitive Offenders Ordinance* of Hong Kong does not apply to mainland China. For instance, it does not prohibit the re-surrender of a fugitive offender to mainland China who has been extradited to Hong Kong from a foreign country.')

224. PRC Extradition Law, *supra* note 187, art. 8(7).

225. See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, Annex, art. 3, U.N. Doc. A/RES/39/46/Annex (Dec. 10, 1984).

226. PRC Extradition Law, *supra* note 187, art. 9(2).

in China, these provisions indicate the gulf between what Chinese laws say and how they are (or are not) implemented, suggesting the PRC Extradition Law may only be aspirational.

Another provision illustrating the gap between the law's lofty goals and China's actual situation is Article 34, which provides that a "person against whom a compulsory measure for extradition is taken may, beginning from the date the compulsory measure is taken, employ Chinese lawyers for legal assistance," and that the public security organ carrying out this detention "shall inform that person" of his right to employ an attorney.²²⁷ Legal representation for defendants in China is irregular at best, and the challenges facing lawyers and those seeking legal representation in China are significant.²²⁸ There are significant obstacles in the Chinese criminal justice system, including the "repeated harassment, detention, and imprisonment" of lawyers and the unbound discretion found in Chinese law, which manifests itself in many ways, "including the deliberate omission of fundamental procedural protections (such as access to a lawyer or a public trial)" for certain defendants.²²⁹ In short, a Chinese lawyer is cold comfort for many detainees.

Lastly, Article 50, which addresses conditional extradition grants, can actually find some support in recent Chinese actions. It provides that when a Requested State grants a conditional extradition of an individual to China, the Ministry of Foreign Affairs may make "assurances on condition that the sovereignty, national interests and public interests of the People's Republic of China are not impaired."²³⁰ Such assurances were indeed made and carried out in the Bank of China case, where the return of Yu Zhendong was conditioned on the prohibition of torture or the death penalty and a maximum prison sentence of twelve years.²³¹ While this experience gives hope that Chinese diplomatic assurances can be trusted, another indicates the opposite: in January 2000, Canada returned a suspect in a decade-old computer fraud case after receiving assurances from China that he would at most receive a ten-year sentence; the suspect was summarily executed upon

227. *Id.* art. 34.

228. CONG.-EXECUTIVE COMM'N ON CHINA, 110TH CONG., ANNUAL REPORT 8, 38-39 (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf.

229. CONG.-EXECUTIVE COMM'N ON CHINA, 110TH CONG., ANNUAL REPORT 3, 36 (2007), available at <http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCannRpt2007.pdf>.

230. PRC Extradition Law, *supra* note 187, art. 50.

231. See *Ex-BOC bankers indicted in US*, CHINA VIEW (XINHUA), Feb. 8, 2006, http://news.xinhuanet.com/english/2006-02/08/content_4151433.htm.

his return.²³² Whether China will uphold conditions attached to extradition is clearly an open question,²³³ lessening the comfort that such conditions may provide a country considering extradition or rendition to China.

If included in a future U.S.-PRC Extradition Treaty, these provisions on torture, humanitarian concerns, conformity with law, and conditional extradition grants would, in theory, provide greater protection to the requested individual than is normally granted under a U.S. extradition treaty. However, China's present circumstances point to uneven implementation of such provisions, and without real progress on the problems and abuses that so clearly undermine these protections, they are at best empty promises. Still, China's Extradition Law reveals that it has at least established goals for itself, and the inclusion of these provisions in a future treaty could help rebut any charges that the treaty did not protect human rights.

3. *Benefits of a Future Extradition Treaty*

Currently, the potential downsides to an extradition treaty far outweigh the possible benefits. The U.S.-Chinese relationship is dynamic, however, and some day this estimation may change. There are major benefits that can be identified and which may attain sufficient import so that the United States finds itself in favor of a treaty.

A significant benefit of an extradition treaty would be improved investigation, prosecution, and punishment of criminals. An extradition treaty prevents the de facto creation of fugitive safe havens and lessens the temptation for criminals to flee. This is especially true given China's size, in both population and geography. The United States may find that China is too big to tolerate the absence of an extradition relationship, particularly if there is an increase in cross-border crime and flight.

Conversely, the lack of an extradition treaty means that fugitives who flee to China cannot be arrested unless they have committed some wrong there. The United States must therefore wait until the targeted individual leaves China and can be arrested in a jurisdiction somewhere that has an extradition treaty with the United States. An example of this is the case of Kenneth John Freeman, who was charged with producing and transporting child pornography, rape of a

232. See Bloom, *supra* note 172, at 196.

233. *Id.* at 206 ("At this point, there is no way to know whether China will uphold its assurances.").

child, and bail jumping in 2006.²³⁴ Instead of appearing for his arraignment, Freeman fled the United States, becoming one of the U.S. Marshals' most wanted fugitives and the subject of a worldwide manhunt.²³⁵ Various investigative agencies tracked him to the city of Suzhou in China.²³⁶ Chinese officials, once notified of his presence, agreed to help,²³⁷ but were unable to arrest Freeman because he possessed a valid visa.²³⁸ Still, they tracked his movements and alerted U.S. officials after learning he intended to travel to Hong Kong, where he was ultimately arrested.²³⁹ After he consented to extradition, Freeman was returned to the United States to face charges.²⁴⁰ A treaty, while not promising that a fugitive will be found, does enable a requesting country that has located the suspect to take action instead of waiting until the fugitive leaves his safe haven.

An important advantage of a treaty, particularly when compared to the informal case-by-case approach currently in place, is the benefit gained from the addition of process. The Goldfish case was, in many ways, a worst-case scenario, revealing the many problems that can arise when cooperation is unsystematic, improvised, and decentralized: there are no minimum standards to be met and no system to check that a country is abiding by its own laws (to say nothing of its international commitments). The case and its fallout revealed how an informal relationship can quickly sour where there is no real guide or framework for how cooperation can be achieved to the benefit of both sides. The centralized framework specified in a treaty for each party can be beneficial not only to administer requests, but also to communicate and mediate such disagreements, or work to improve the extradition process itself.²⁴¹ A treaty delineates the requirements and

234. Press Release, U.S. Marshals Service, Former Lawman—Accused Child Rapist—Earns Return Trip Ticket From Hong Kong to Spokane, Courtesy of U.S. Marshals and ICE Agents (Oct. 18, 2007), <http://www.usmarshals.gov/news/chron/2007/101807.htm> [hereinafter Press Release, U.S. Marshals Service, Former Lawman].

235. Press Release, U.S. Attorney's Office, E.D. Wa., Accused Child Rapist Returned From Hong Kong to Spokane (Oct. 18, 2007), http://www.usdoj.gov/usao/wae/press_releases/2007/docs/101807_Freeman_Arraignment.pdf [hereinafter Press Release, U.S. Attorney's Office, E.D. Wa.].

236. Press Release, U.S. Marshals Service, Former Lawman, *supra* note 234.

237. Press Release, U.S. Marshals Service, U.S. Marshals and ICE Announce Capture of Nation's Most Wanted Accused Child Pornographer/Rapist (May 2, 2007), <http://www.usmarshals.gov/readingroom/news/chron/2007/050207.htm>.

238. Press Release, U.S. Attorney's Office, E.D. Wa., *supra* note 235.

239. *Id.*

240. Press Release, U.S. Marshals Service, Former Lawman, *supra* note 234.

241. *See, e.g.*, Extradition Treaty with Peru, *supra* note 190, art. 17 ("The United State Department of Justice and the Ministry of Justice of the Republic of Peru may

expectations of cooperation; such “procedural mechanisms . . . streamline the exchange of evidence and witnesses between the two sovereign nations,”²⁴² enabling enhanced efforts by both countries to combat international crime. The default regime created by a treaty enables both sides to know what is expected from the relationship. Treaties may also be drafted to require certain procedures, like submission of extradition requests through the diplomatic channel,²⁴³ which functions to standardize the process and prevent uneven implementation of rendition.

An extradition treaty is also an improvement for the extraditee, since an extradition request must be accompanied by a showing of proof (the probable cause to extradite)²⁴⁴ and compliance with documentation requirements.²⁴⁵ In the United States, a requested individual gains the significant benefit of judicial review through the habeas appeals process, a more thorough review than is available if he is returned to China by other means (most particularly, through the operation of immigration laws).

In addition to the improvements that extradition procedure can bring, the formalization of the process introduces a measure of transparency and accountability that does not exist in the informal rendition system. The courts found that a significant reason the cooperating witness’s constitutional rights were violated in the Goldfish case related to the government’s failure to seek out and verify certain kinds

consult with each other directly in connection with the processing of individual cases and in furtherance of maintaining and improving procedures for the implementation of this Treaty.”); U.S.-H.K. Extradition Agreement, *supra* note 186, art. 14(2) (“The requested Party shall promptly notify the requesting Party of its decision on the request to surrender. If the request is denied in whole or in part, the requested Party, to the extent permitted under its law, shall provide an explanation of the reasons for denial. The requested Party shall provide copies of the pertinent judicial decisions upon request.”).

242. Whedbee, *supra* note 89, at 579.

243. See Extradition Treaty with United Kingdom, *supra* note 190, art. 13.

244. See, e.g., Extradition Treaty with Belize, *supra* note 202, art. 10 (“Extradition shall be granted only if the evidence is found sufficient according to the law of the Requested State either to justify the commitment for trial of the person sought if the offence of which the person is accused has been committed in the territory of the Requested State or to prove that the requested person is the identical person convicted by the courts of the Requesting State.”); U.S.-H.K. Extradition Agreement, *supra* note 186, art. 13 (“A fugitive offender shall be surrendered only if the evidence be found sufficient according to the law of the requested Party either to justify the commitment for trial of the person sought if the offence of which he is accused has been committed in the territory of the requested Party or to establish that he is the person found guilty, convicted or sentenced by the courts of the requesting Party.”).

245. See, e.g., Extradition Treaty with Bulgaria, *supra* note 202, art. 8; U.S.-H.K. Extradition Agreement, *supra* note 186, art. 8.

of information that would have unmistakably revealed that the witness had been tortured and his confession coerced.²⁴⁶ This situation may have been avoided if both sides knew their conduct and the treatment of the defendant needed to meet the standards established by an extradition treaty, such as the standard of proof required for surrender.

Even so-called positive examples of extradition, such as the Yu Zhendong rendition, which had no allegations of abuse, still happen under a veil of secrecy. While that case received an exceptional amount of media attention, the negotiations governing his return to China were not conducted according to any formal procedures, nor were they required to meet any particular standard. Requiring that rendition take place according to known, fixed procedures that demand certain minimum showings adds a measure of due process that does not currently exist in the U.S.-PRC rendition relationship.

Extradition treaties also offer an important avenue for one country to pressure the other for change. For the United States, this could be another method for encouraging change in China; it is a powerful rebuke to a requesting country to deny a request for a much-wanted fugitive. Rather than “decrying Chinese abuses from the outside,” an extradition treaty—like the MLAA—“regularizes the content of criminality between the two nations,” allowing the United States to both voice condemnation and block cooperation with China when deemed appropriate or necessary.²⁴⁷ Still, it is important to note refusal is not without its own political risks: as summarized by Margaret Lewis, “one cannot overlook the tit-for-tat implications of denying assistance. Governments are sensitive to the fact that if one party repeatedly or readily denies assistance, chances are that it will encounter greater push-back when the tables are turned.”²⁴⁸

246. While the courts found that members of the prosecution team suspected that torture or other “unconventional” methods had been utilized and had failed to take steps to confirm or deny their suspicions, see *Wang Xiao v. Reno* (*Wang I*), 837 F. Supp. 1506, 1514 (N.D. Cal. 1993), *aff’d sub nom. Wang v. Reno* 81 F.3d 808, 811 (9th Cir. 1996), there was also a failure of communication between Chinese and U.S. officials about the evidentiary standards that were required for the American trial and a lack of standardized procedure to verify that evidence was properly taken. The ad hoc nature of the case’s evolution vis-à-vis Chinese cooperation indicates that the prosecution’s “don’t ask, don’t tell” tactic regarding the infirmities of the witness’s testimony was at least in part calculated on the assumption that Chinese cooperation would evaporate if a closer look was taken at their methods of procuring such evidence, and more importantly, that there would be not be any way that such weaknesses would be exposed in the case, a tactic that in hindsight was bound to backfire given the adversarial nature of the U.S. criminal justice system. *Wang v. Reno* (*Wang II*), 81 F.3d 808, 820–21 (9th Cir. 1996).

247. Whedbee, *supra* note 89, at 579.

248. Lewis, *supra* note 122, at 87.

Additionally, it is important to appreciate that, while extradition treaties impose obligations on countries and are thus incursions into the parties' sovereignty, modern extradition treaties generally provide several provisions for limiting, conditioning, or refusing assistance. The dual criminality requirements, list of extraditable offenses, specialty requirement, and political offense exception are all grounds for denying an extradition request that are delineated within a treaty itself. The political offense exception would also be crucial to any future U.S.-PRC treaty, particularly given China's dismal record on and continuing practice of political and religious persecution.²⁴⁹ As discussed above²⁵⁰ and with respect to the U.S.-Hong Kong Extradition Agreement, a robust reading of these provisions provides ample opportunity for a country to condition or refuse assistance. Given the vagueness and great discretion of some Chinese criminal laws—for example, “endangering state security” is a crime²⁵¹—and their possible utilization for political or religious persecution,²⁵² such a construction can provide protection against Chinese abuse of discretion and attempts to extradite individuals for prohibited reasons.

Punishment may also be expressly limited by the terms of the treaty, and U.S. extradition treaties usually contain a provision imposing a requirement similar to dual criminality on the imposition of the death penalty;²⁵³ given the limited use of the death penalty in many countries, this effectively prohibits its application in most extradition

249. See U.S. DEP'T OF STATE, 2007 CHINA COUNTRY REPORT, *supra* note 146, § 1.d; CONG.-EXECUTIVE COMM'N ON CHINA, 110TH CONG., ANNUAL REPORT 5 (2007), available at <http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCanRpt2007.pdf>; Jerome A. Cohen & Eva Pils, *Hu Jia in China's Legal Labyrinth*, FAR E. ECON. R., 2008 WLNR 8940911 (2008).

250. See *supra* Section I.

251. See *Statistics Show Chinese Political Arrests Rose Again in 2007*, DUI HUA NEWS, Mar. 16, 2008, <http://www.duihua.org/2008/03/statistics-show-chinese-political.html> (“Under Chinese law, the ‘endangering state security’ crimes include prohibitions against subversion and ‘splittism’ (including the incitement thereof), as well as espionage and ‘illegally providing state secrets to overseas entities’ [T]he ESS provisions are primarily aimed at suppressing political dissent in the name of protecting the ‘security and interests of the [Chinese] state.’” (second alteration in original)).

252. See CONG.-EXECUTIVE COMM'N ON CHINA, 110TH CONG., ANNUAL REPORT 3 (2007), available at <http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCanRpt2007.pdf> (“An increasing number of provisions concerning national unity, internal security, social order, and the promotion of a ‘harmonious society’ crept into laws and regulations during 2006–2007, carving out for public officials an ever-widening realm for official discretion. . . . Against persons the Party deems to pose a threat to its supremacy, officials wield the legal system as a harsh, and deliberately unpredictable, weapon.”).

253. See, e.g., Extradition with Cyprus, *supra* note 188, art. 6(1) (“When the offense for which extradition is sought is punishable by death under the laws in the Requesting State, and is not punishable by death under the laws in the Requested State, the

situations. While both the United States and China have the death penalty, China imposes the death penalty far more frequently and for more crimes, including nonviolent ones.²⁵⁴ Still, China's recent treaties with France, Portugal, Spain, Australia, and Mexico all included "conditional extradition" provisions that prohibited the imposition of the death penalty on returned individuals.²⁵⁵ This indicates that for the sake of an extradition treaty, China is willing to modify and limit its stance on the death penalty, and any future U.S.-PRC treaty should carefully limit and/or prohibit the use of the death penalty in extradition cases.

Finally, while most of the attention paid to extradition focuses on the judiciary's involvement, extradition is ultimately a decision in the hands of the Executive Branch.²⁵⁶ While the courts are obliged to certify an extradition request that meets the applicable requirements,²⁵⁷ the Secretary of State alone possesses the power to review a request *de novo*, attach conditions to extradition, or deny a request for any number of reasons.²⁵⁸ The Secretary also has an advantage over courts in that political and policy considerations are meant to inform her evaluation of an extradition request; unlike the courts, she may take into account all the circumstances surrounding a given extradition case when making her decision. Because of her discretionary power, the Secretary is in the best position to shape the extradition relationship, not only to protect U.S. interests, but also to influence U.S.-Chinese relations. A treaty presents a new framework for the two countries to work within at a high level on both specific cases and the bilateral law enforcement relationship, whereas the current ad hoc relationship does not have such a channel of communication and cooperation. Further diplomatic relations occasioned by an extradition treaty may even extend to new areas, such as post-extradition monitoring, as has been suggested by Bloom.²⁵⁹ A Secretary who exercises

Request State may refuse extradition unless the Requesting State, if so requested, provides assurances that the death penalty, if imposed, will not be carried out.").

254. The number of executions in China is a state secret, Whedbee, *supra* note 89, at 589 n.214, but it is estimated that China carries out the most executions in the world. China is believed to have carried out 80% of all executions in 2005. Lawrence G. Albrecht et al., *International Human Rights*, 41 INT'L L. 643, 658-59 (2007). Sixty-eight offenses, including smuggling, counterfeiting currency, embezzlement, and bribery, are punishable by death in China. Bloom, *supra* note 172, at 179 n.11.

255. See Bloom, *supra* note 172, at 179; Lague, *supra* note 134; *China Ratifies Treaty on Extradition With Mexico*, *supra* note 176.

256. See 28 U.S.C. § 3186 (2006).

257. 28 U.S.C. § 3184 (2006).

258. See *supra* Section I.A.

259. Bloom, *supra* note 172, at 212.

the authority that he or she is vested with by the extradition scheme can ensure that the United States does not forfeit its integrity or compromise its interests, and even uses the treaty as leverage for improvements in its partner.

CONCLUSION

The United States and China's relationship on criminal matters has shown significant progress over the last few years. The negotiation and implementation of the MLAA and cooperation on a number of cases indicate that despite their differences, the countries can and will work together on law enforcement. Still, there are real barriers to greater cooperation, and these are significant enough to foreclose for now the possibility of an extradition treaty between the United States and China. In time, and with real change in China's practices, the United States may find a treaty's benefits outweigh its problems. China has professed its desire for an extradition treaty with the United States, but this depends on its ability to respond to the considerable concerns of the United States on a number of fronts. Today, the ball is in China's court; it remains to be seen whether it can live up to its promises and realize its goals.

