

# Why Countries Diverge over Extradition Treaties with China: The Executive Power to Extradite in Common and Civil Law Countries

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*China has made a concerted effort for over a decade to conclude extradition treaties with developed countries that are popular “safe havens” for its fugitive officials and economic criminals. Chinese President Xi Jinping has placed these efforts at the forefront of Chinese foreign policy in recent years as part of his anticorruption campaign, invariably pressing the issue of extradition with these trade partners and their (largely) liberal democratic leaders. Nonetheless, China’s extradition drive has attained mixed results. A number of developed civil law states have concluded treaties with China while their common law counterparts almost universally refuse to follow suit. This Article analyzes this pattern of divergent behavior and is the first to offer a legal explanation for it. It argues that the nature of executive authority to extradite and other branches’ checks on that authority differ significantly in common and civil law systems. Differing policies regarding the extradition of nationals and evidentiary standards for extradition requests exacerbate these structural differences. These factors calibrate a state’s threshold to enter into an extradition treaty, particularly with a controversial state like China.*

*The geopolitically significant backdrop of China’s extradition drive teases out the differences between common and civil law systems, broadly shedding light on the collective impact of these legal dissimilarities on state extradition practice at a time when many states are in the process of streamlining their extradition schemes to boost international law enforcement cooperation. Independent of its novel arguments, this Article also comprehensively catalogues and elaborates on factors (legal and non-legal) relevant to any state’s decision to enter into an extradition treaty. This article will be of interest to scholars, governments, and others interested in how divergent extradition schemes influence state practice and, by extension, impact the efficacy of international extradition law, international legal cooperation, and individual rights protections.*

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## I. INTRODUCTION

There is no one-size-fits-all formula for extradition. A state's decision to enter into an extradition treaty implicates both foreign policy and legal considerations. These broad interests further unpack into a multitude of legal and non-legal factors such that the concrete terms for extraditions vary not just by state, but also across bilateral relationships with the same state. Extradition has international and domestic dimensions as well. Internationally, extradition law has evolved into an uneasy marriage of comity and human rights protections. Domestically, the ground rules set by a state's legal system influence its decision to extradite or conclude an extradition treaty. Nowhere are these complexities more evident than in extradition agreements with the People's Republic of China. China has been engaged in an ongoing hunt for economic fugitives and corrupt officials abroad since the 1990s. This hunt has reached a crescendo in recent years as Chinese President Xi Jinping has internationalized his prolonged anti-corruption campaign. A critical element of this hunt for fugitives abroad has been China's drive to conclude extradition treaties, particularly with the developed nations that are the most frequent destinations for fugitives seeking to elude China's grasp. Despite efforts across the board, China's roster of extradition treaties consists almost exclusively of civil law states, including a number of developed civil law states. At the same time, China has reached a treaty with only one common law jurisdiction.

This paper aims at a deeper understanding of extradition generally by accounting for the disparate legal postures of common law and civil law states regarding China. I have chosen China for two reasons. First, this case study involves a comparison of countries with disparate legal systems that otherwise enjoy a great deal of similarities. China's top target countries for extraditions are economically and legally developed, concerned with human rights, and enjoy a large degree of political and ideological overlap. The ample commonalities between these countries accentuate their legal differences. Second, China is controversial. It is a rising power brimming with economic promise and cooperative potential as well as strategic challenge and human rights controversy. The stakes are high, and these high stakes tease out the differences between common and civil

law states in a way not possible in dealings with countries where extradition arrangements are unanimously considered to be desirable, extremely problematic, or too unimportant to bother with in the first place.

The structure of this paper is as follows. After an introduction to international extradition law and background on China's pursuit of extradition treaties, I illustrate the common-law divide over extradition treaties with China. I then address a number of legal and non-legal factors that are relevant to any state's decision to conclude an extradition treaty. I argue that many of these obstacles—ambiguity of the political offense exception, human rights concerns, bilateral distrust, and the costs of treaty making—are shared concerns of the common and civil law states that comprise the greatest successes and failures of China's extradition push. Next, I address the areas of greatest disparity: the extradition of nationals, the nature of the executive power to extradite, judicial checks on this power, and evidentiary requirements for extradition. I argue that for common law systems the decision to conclude a treaty is itself a major protection of individual rights that represents a “point of no return” because there are fewer protections after a treaty is in place. Conversely, the absence of a treaty does not significantly protect individuals in civil law systems. This overarching difference explains common law states' greater aversion to extradition treaties with China than their civil law counterparts.

## II. INTERNATIONAL EXTRADITION LAW

International extradition is the practice of one country formally surrendering an alleged criminal to another country with jurisdiction over the crime charged.<sup>1</sup> States comply with the vast majority of extradition requests<sup>2</sup> and extradition remains an important mechanism for suppressing crime worldwide because it removes safe havens for criminals.<sup>3</sup> Extradition operates through a number of mechanisms. Although bilateral extradition treaties currently dominate state practice, multilateral extradition

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1. BLACK'S LAW DICTIONARY 655 (9th ed. 2009).

2. William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT'L L. 839, 845 (2012).

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

conventions exist as well.<sup>4</sup> Furthermore, international treaties not directed at extradition per se still govern its practice. For example, article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) charges states with respecting and ensuring the civil and political rights of persons within their jurisdiction and territory. Essentially, this obligates states not to knowingly repatriate individuals back into circumstances of civil and political rights violations.<sup>5</sup> Many countries employ “disguised extradition” in addition to formal extradition. Technically a form of repatriation distinct from extradition, “disguised extradition” describes the state practice of utilizing legal procedures other than formal extradition to transfer a suspect from one state to another.<sup>6</sup> Disguised extradition therefore achieves the same result as extradition, but circumvents many procedural and substantive hurdles to repatriation through extradition.<sup>7</sup> Such a process can take place through diplomatic negotiation or deportation, depending on the domestic laws of the states involved.

Extradition norms have evolved over the course of history to encompass concepts of comity and human rights. From as early as 1258 B.C.<sup>8</sup> up until the nineteenth century, rulers would repatriate suspects with no questions asked in a (reciprocal) gesture of naked comity.<sup>9</sup> By the mid-nineteenth century, countries began to recognize extradition as a tool for crime suppression as well as comity.<sup>10</sup> Treaties thus enumerated extraditable crimes.<sup>11</sup> Procedure was also formalized, and extradition began to operate through official requests that

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4. Matthew Bloom, *A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 YALE J. INT'L L. 177, 182 (2008). Examples of multilateral extradition treaties include the European Convention on Extradition, the Arab League Extradition Convention, the Interamerican Extradition Convention, and the Economic Community of West African States Extradition Convention.

5. International Covenant on Civil and Political Rights art. 13, Dec. 19, 1966, 999 U.N.T.S. 171. [hereinafter ICCPR].

6. Bloom, *supra* note 4, at 183.

7. *Id.*

8. See JAMES H. BREASTED, *A HISTORY OF EGYPT FROM THE EARLIEST TIMES TO THE PERSIAN CONQUEST* 438 (2d ed. 1916).

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

10. Bloom, *supra* note 4, at 184.

11. Magnuson, *supra* note 2, at 851. Treaties began to enumerate regular and private crimes while largely excluding political ones. This represented a break from the past, where the criminals sought for extradition were those who had committed a political crime against their government. *Id.*

justified the extradition under the relevant treaty by stating grounds for the request and proffering factual support.<sup>12</sup> National courts increasingly determined the legality of extraditions.<sup>13</sup>

The next wave of major developments emerged after World War II with the birth of international human rights norms.<sup>14</sup> These norms are codified in a number of treaties covering, for example, the obligation to extradite or prosecute for certain crimes,<sup>15</sup> refusal of extradition for victims of discrimination<sup>16</sup> or torture,<sup>17</sup> and rights to life, personal liberty, and a fair trial.<sup>18</sup> Human rights norms have not displaced comity's prominent role in extradition law, but they have introduced an important tension between the rights of states and the rights of individuals.<sup>19</sup>

This evolving interplay of comity and human rights is crystalized in the United Nations Model Treaty on Extradition (Model Treaty).<sup>20</sup> Adopted in 1990, the Model Treaty was amended in 1997 to incorporate the Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters.<sup>21</sup> While every bilateral extradition

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12. *Id.*

13. *Id.*

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

15. The Geneva Convention of 1949 obligates states to prosecute "grave breaches" of the Convention or else extradite individuals for prosecution. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49-50, Aug. 12, 1949, 75 U.N.T.S. 31.

16. The 1967 Protocol amended the 1951 Convention and protects against extradition any individual who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country..." Convention Relating to the Status of Refugees art. I(A)(2), July 28, 1951, 189 U.N.T.S. 150.

17. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. The CAT prohibits extradition where there are substantial grounds for believing that a suspect is in danger of being subjected to torture upon extradition. *Id.* art. 3.

18. ICCPR, *supra* note 5, art. 9. The ICCPR guarantees rights to, *inter alia*, life, freedom from torture, liberty and security of the person, freedom of expression, and a fair trial. *Id.* Note that China has signed but not ratified the ICCPR, meaning that it is under international obligation not to undercut the object and purpose of the covenant. Vienna Convention on the Law of Treaties art 18, May 23, 1969, 1155 U.N.T.S. 331; *see also* *China: Ratify Key International Human Rights Treaty*, HUMAN RIGHTS WATCH (Oct. 8, 2013), <https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty#>.

19. *See* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 188 (1998).

20. G.A. Res. 45/116 (Dec. 14, 1990) [hereinafter Model Treaty].

21. G. A. Res. 52/88 (Dec. 12, 1997).

treaty is a negotiated reflection of the idiosyncratic relationship between its parties, the Model Treaty faithfully reflects prevailing international standards. A non-exhaustive list of its basic principles is in Appendix B to this Article.

It is relevant to note that Chinese extradition law has not obstructed its pursuit of extradition treaties. The Extradition Law of 2000 (Extradition Law),<sup>22</sup> by and large comports with the standards set out in the Model Treaty. It incorporates generally accepted principles of international extradition law such as double criminality, specialty, nationality, as well as exceptions for political and military offenses.<sup>23</sup> It contains mandatory refusals for discrimination, torture, and immunity, as well as discretionary refusal for humanitarian considerations or where the individual sought is being prosecuted domestically. To the degree we are permitted a glimpse of bilateral treaty talks, countries generally do not take issue with the *text* of China's extradition law or treaties.<sup>24</sup> However, one related issue does surface in discussions with China.

Bilateral treaties operate in the shadow of the political offense exception. This exception is meant to protect the legal integrity of the surrendering country (rather than the rights of the requested individual) against manipulation for the political ends of the requesting country.<sup>25</sup> Accordingly, it allows the requested country to deny extradition where the offense is "political" in nature, and under some interpretations, where the charges are politically motivated.<sup>26</sup> Agreeing on what constitutes a political offense is a challenge common to most if not all treaties,<sup>27</sup> and although some have attempted greater precision through the open-ended listing of certain qualifying offenses, most treaties

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22. Extradition Law of the People's Republic of China (中华人民共和国引渡法) (promulgated by the National Ninth People's Congress, Dec. 28, 2000).

23. See ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *Mutual Legal Assistance, Extradition, and Recovery of Proceeds of Corruption in Asia and the Pacific*, Thematic Review: Final Report (2007), 117 [hereinafter ADB/OECD Thematic Review].

24. One notable exception is a report by Australia's Joint Standing Committee on Treaties, noting that the (now-abandoned) Sino-Australian treaty conspicuously omitted an option to refuse extradition where it would be "unjust or oppressive," which was contained in ten other extradition treaties and arrangements with 50 other commonwealth jurisdictions. See Parliament of the Commonwealth of Australia, *Parliamentary Debates*, Joint Standing Committee on Treaties, Nov 24, 2016, ch. 3.28 [hereinafter Australian JCST Report 167].

25. Anna MacCormack, Note, *The United States, China, and Extradition: Ready for the Next Step?* 12 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 454 (2009).

26. *Id.*

27. See ADB/OECD Thematic Review, *supra* note 23, at 51.

embrace the fact-intensive and generally ambiguous nature of the concept.<sup>28</sup> These differences exist even between allies. For example, United States courts relied on the political offense exception to deny a number of United Kingdom extradition requests for Irish Republican Army members during the 1970s and 80s.<sup>29</sup> This tension, manifested between coordinate branches of government as well as both governments on the whole, eventually led both states to revamp their treaty scheme.<sup>30</sup> If the political offense exception threatens treaty arrangements between longtime allies, it poses a greater threat to less stable relationships. Fundamental differences over the uses of judicial and political power between China and the developed states with which it seeks extradition treaties further amplify the friction caused by the political offense exception, as China is often accused of exactly the kind of conduct the exception is meant to protect against.<sup>31</sup> This kind of worry exemplifies the criticisms of China's domestic criminal justice system, its implementation, and the sufficiency of Chinese guarantees regarding the treatment of repatriated individuals. I address these issues at length below.

### III. CHINA'S EXTRADITION PUSH

Following the ravages of the Cultural Revolution, China's economic resurgence began in the late 1970s and 1980s with Deng Xiaoping's policy of "Reform and Opening" (改革开放).<sup>32</sup> This policy put China on a trajectory to the prosperity it enjoys today. Unfortunately, corruption was parasitic on China's economic growth.<sup>33</sup> An illustrative statistic from China's Ministry

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28. *Id.* at 44-45.

29. Magnuson, *supra* note 2, at 892.

30. The Supplementary Extradition Treaty Between The United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., June 25, 1985, S. Treaty Doc. No. 99-8.

31. See ADB/OECD Thematic Review, *supra* note 23, at 117; see also Chen Qinglai [陈清来], *Wang Qishan Arrives in America to Supervise "Foxhunt" as Difficulties Mount* [王岐山访美督战“猎狐”障碍重重], US-CHINA PERCEPTION MONITOR [中美印象] (Mar. 26, 2015), [www.uscnpm.com/model\\_item.html?action=view&table=article&id=2826](http://www.uscnpm.com/model_item.html?action=view&table=article&id=2826) (identifying the political offense exception as a major obstacle to a United States-China treaty and describing it as bound up with United States distrust of China's judicial system and human rights issues) [hereinafter Chen Qinglai].

32. See Dan Kopf and Tripti Lahiri, *The Charts that Show How Deng Xiaoping Unleashed China's Pent-Up Capitalist Energy in 1978*, QUARTZ (Dec. 17, 2018), <https://qz.com/1498654/the-astonishing-impact-of-chinas-1978-reforms-in-charts/>.

33. Raymond Zhou, *Capital Flight: Capture of Corrupt Officials: A Long Drive*, CHINA DAILY (HONG KONG EDITION) (Aug. 12, 2003), [http://www.chinadaily.com.cn/en/doc/2003-08/12/content\\_254169.htm](http://www.chinadaily.com.cn/en/doc/2003-08/12/content_254169.htm); see also Yukon



of Commerce reported that 4,000 corrupt officials fled China between 1978 and 2003, taking with them at least \$50 billion.<sup>34</sup> In particular, the early 1990s saw a growing exodus of corrupt Chinese officials and wealthy businessmen with ill-gotten gains absconding abroad with state assets.<sup>35</sup> It was no coincidence that China first began to seek extradition treaties with other nations around this time.<sup>36</sup> In fact, China's push for extradition treaties is, and has historically been, motivated by a desire to recover corrupt officials and other economic fugitives.<sup>37</sup> Understanding why China seeks to secure the return of these high-priority fugitives is critical to understanding why extradition treaties have become a focal point of Chinese foreign policy.

Bringing the corrupt to justice would be reason enough for China to seek their repatriation. However, there are instrumental considerations that amplify the focus on corruption. Namely, corrupt officials take state secrets and assets when they flee China. Consider the ongoing case of Guo Wengui (郭文贵). Guo, who also goes by Miles Kwok, is a Chinese property tycoon who has been living in "self-imposed exile" in New York.<sup>38</sup> While Guo himself was not a government official, he was a wealthy businessman with substantial assets and government access. At the height of his career (around 2014), Guo was China's seventy-fourth richest person with a net worth of \$2.6 billion.<sup>39</sup> He is

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Huang, *The Truth About Chinese Corruption*, DIPLOMAT (May 29, 2015), <https://thediplomat.com/2015/05/the-truth-about-chinese-corruption/> (arguing that the very structure of economic reforms was conducive to corruption).

34. XIE Yu, *Govt Wants A Better View of "Naked Officials,"* CHINA DAILY (Feb. 24, 2010), [http://www.chinadaily.com.cn/china/2010-02/24/content\\_9492278.htm](http://www.chinadaily.com.cn/china/2010-02/24/content_9492278.htm) [hereinafter *Govt Wants a Better View of 'Naked Officials'*].

35. Zhou, *supra* note 33.

36. Bloom, *supra* note 4, at 188.

37. See Shannon Tiezzi, *After Uyghur Controversy, China Praises Law Enforcement Co-op with Thailand*, THE DIPLOMAT (July 24, 2015), <https://thediplomat.com/2015/07/after-uyghur-controversy-china-praises-law-enforcement-co-op-with-thailand/>; see also David Lague, *China Wants Extradition Treaties with West*, N.Y. TIMES (May 28, 2007), <https://www.nytimes.com/2007/05/28/world/asia/28iht-china.1.5894393.html?mcubz=1>.

38. Michael Forsythe and Alexandra Stevenson, *The Billionaire Gadfly in Exile Who Stared Down Beijing*, N.Y. TIMES (May 30, 2017), <https://www.nytimes.com/2017/05/30/world/asia/china-guo-wengui.html> [hereinafter *Billionaire Gadfly*].

39. Huang Zheping, *China's Most Wanted Man Is in the United States*, QUARTZ (April 26, 2017), <https://qz.com/968941/what-you-need-to-know-about-chinas-most-wanted-man/> [hereinafter *China's Most Wanted Man*].

currently, according to some, China's most wanted fugitive abroad.<sup>40</sup>

A comprehensive investigative report by Chinese business magazine *Caixin* paints Guo as a “power hunter” (权力猎手) who accumulated wealth and influence by shrewdly navigating the murky in-between of Chinese business and elite politics.<sup>41</sup> For example, Guo secretly recorded a sex tape of Beijing Deputy Mayor Liu Zhihua (刘志华) with his mistress in 2006.<sup>42</sup> The tape found its way to the upper echelons of Chinese Communist Party (CCP) leadership and led to the investigation and subsequent downfall of Liu and several associates who stood in the way of Guo's Pangu development project near the site of the then-upcoming Beijing Olympics.<sup>43</sup>

Guo's fortunes changed in early 2015 when a former business partner and his patron, Ma Jian (马建), the Deputy Chief of China's Ministry of State Security, fell under CCP scrutiny for corruption.<sup>44</sup> Stripped of his powerful backer, Guo laid low abroad until early 2017, when he began making a series of inflammatory corruption allegations aimed at top CCP officials.<sup>45</sup> He has also painted a picture of disunity at the top of the CCP.<sup>46</sup> Guo has made (unverified) claims that he can obtain any official Chinese document he desires.<sup>47</sup> He has distributed a Chinese document purporting to authorize a network of spies in the United States, and claims to be preparing dossiers on a number of other hot-button issues for United States officials.<sup>48</sup>

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40. *Id.*

41. Cuixian Kang, *Special Report: Power Hunter Guo Wengui* (特别报道 权力猎手郭文贵)], CAIXIN (Mar. 27, 2015), [http://m.weekly.caixin.com/m/2015-03-27/100795235\\_all.html](http://m.weekly.caixin.com/m/2015-03-27/100795235_all.html).

42. *Id.*

43. *Id.*

44. *Id.*

45. *See, e.g.*, Lauren Hilgers, *The Mystery of the Exiled Billionaire Whistle Blower*, N. Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/magazine/the-mystery-of-the-exiled-billionaire-whistleblower.html> (noting that most of Guo's claims are unverifiable); *Prominent Communist Party Critic Guo Speaks with VOA China Service*, VOICE OF AMERICA (Apr. 20, 2017), <https://www.voanews.com/a/prominent-communist-party-critic-guo-speaks-with-voa-china-service/3818031.html> [hereinafter *Guo Speaks with VOA*].

46. *Guo Speaks with VOA, supra* note 45.

47. Cezary Podkul et al., *U.S. Confronts China over Suspected Cyberattack as Fugitive Guo Wengui Appears in Washington*, WALL STREET JOURNAL (Oct. 6, 2017, 6:24 PM), <https://www.wsj.com/articles/chinese-governments-battle-against-fugitive-guo-wengui-spills-into-washington-1507260255> [hereinafter *Suspected Cyberattack as Guo Wenhui Appears in Washington*].

48. *Id.*

Often described as a “showman,”<sup>49</sup> Guo has made ample use of social and traditional media. Guo had a twitter that has since been suspended<sup>50</sup> and a YouTube channel<sup>51</sup> to spread his allegations of corruption and disharmony at the heart of CCP leadership. He has even publicly criticized China before Congress.<sup>52</sup>

China’s response to Guo has been swift and strong. China issued an Interpol Red Notice seeking Guo’s arrest.<sup>53</sup> Red Notices are often informally referred to as “international arrest warrants.” At present, he stands accused of some 19 crimes, ranging from bribery, fraud, and money laundering<sup>54</sup> to kidnapping and rape.<sup>55</sup> He is being sued for defamation in United States courts by numerous Chinese companies and individuals.<sup>56</sup> Guo’s fallen patron Ma Jian has also appeared for the first time since his arrest—but before his trial—to make a video confession on YouTube (which is banned in China) that he had taken bribes from Guo and misused his power to further Guo’s business interests.<sup>57</sup> The Chinese embassy deemed the documents Guo distributed “fake news.”<sup>58</sup>

Guo has since applied for political asylum in the United States.<sup>59</sup> His law firm was the reported victim of a cyber-attack around that time.<sup>60</sup> In May 2017, officials from China’s Ministry of State Security (China’s equivalent to the Central Intelligence Agency) entered the United States on transit visas but in violation of these visas paid a visit to Guo in New York in an attempt to

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49. *Billionaire Gadfly*, *supra* note 38.

50. Guo Wengui (@KwokMiles), TWITTER, <https://twitter.com/KwokMiles> (last visited Oct. 28, 2019).

51. Guo Wengui, YOUTUBE, <https://www.youtube.com/channel/UCO3pO3ykAUybrjv3RBbXEHW> (last visited June 11, 2019).

52. *Suspected Cyberattack as Guo Wenhui Appears in Washington*, *supra* note 47.

53. *Guo Speaks with VOA*, *supra* note 45.

54. Kevin Liu, *Outspoken Chinese Billionaire Guo Wengui Is Seeking Asylum in the U.S.*, TIME.COM (Sep. 7, 2017), <http://time.com/4930960/guo-wengui-china-us-political-asylum/> [hereinafter *Guo Wengui Seeking Asylum in the U.S.*].

55. Associated Press, *Chinese Fugitive Tycoon Guo Wengui ‘Accused of Rape’: Sources*, SOUTH CHINA MORNING POST (Aug. 31, 2017), <http://www.scmp.com/news/china/policies-politics/article/2109161/chinese-fugitive-tycoon-guo-wengui-accused-rape-sources> [hereinafter *Guo Wengui Accused of Rape*].

56. *Guo Wengui Seeking Asylum in the U.S.*, *supra* note 54.

57. Nectar Gan, *How a Powerful Tycoon had a Chinese Spy Master in His Pocket*, SOUTH CHINA MORNING POST (Apr. 20, 2017), <http://www.scmp.com/news/china/policies-politics/article/2089192/how-powerful-tycoon-had-chinese-spy-master-his-pocket>.

58. *Suspected Cyberattack as Guo Wenhui Appears in Washington*, *supra* note 47.

59. *Guo Wengui Seeking Asylum in the U.S.*, *supra* note 54.

60. *Suspected Cyberattack as Guo Wenhui Appears in Washington*, *supra* note 47.

persuade him to stop inciting anti-CCP sentiment. The Federal Bureau of Investigation (FBI) got wind of this visit and apprehended the officials in Penn Station, where they were told to leave the country. Nonetheless, the officials paid Guo a second visit two days later, kicking off inter-agency conflict between the FBI, which wanted to arrest the officials, and the State Department, which did not.<sup>61</sup> In late 2017, the Hudson Institute suddenly cancelled an event where Guo was slated to speak.<sup>62</sup> The event was set to take place in Washington, D.C. as the United States and China held high-level bilateral talks on law enforcement and cyber security.<sup>63</sup> The institute's president blamed the cancellation on poor planning and logistical issues.<sup>64</sup> However, the cancellation came on the heels of a cyber-attack and calls to Institute staff from the Chinese embassy, warning them not to let Guo speak.<sup>65</sup>

Guo Wengui touches an especially raw nerve for Beijing because his allegations threaten China's security as well as its political and economic stability. On the security front, Guo has valuable classified information about the top echelons of the CCP, which is a boon for organizations like the FBI.<sup>66</sup> Politically, Guo's allegations came at a time of transition. China's Nineteenth Party Congress took place in October, and Guo's claims, if substantiated, would have seriously damaged the legitimacy of Xi's popular anticorruption drive, not to mention cast aspersions on what was otherwise supposed to be a harmonious transition period for the CCP and the country.<sup>67</sup> Economically, allegations of political discord threaten to deter investors, negatively impacting China's economic growth.<sup>68</sup>

Guo is unique in his outspoken criticism of the CCP and his broad, public platform, but otherwise represents a typical Chinese economic fugitive. He is a not-too-sympathetic character whose insider knowledge the CCP seeks to contain, and

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61. Kate O'Keefe et al., *China's Pursuit of Fugitive Businessman Guo Wengui Kicks Off Manhattan Caper Worthy of Spy Thriller*, WALL STREET JOURNAL (Oct. 22, 2017, 6:24 PM), <https://www.wsj.com/articles/chinas-hunt-for-guo-wengui-a-fugitive-businessman-kicks-off-manhattan-caper-worthy-of-spy-thriller-1508717977>.

62. *Suspected Cyberattack as Guo Wenhui Appears in Washington*, *supra* note 47.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See Guo Wengui Accused of Rape*, *supra* note 55 (quoting Willy Lam, expert on Chinese politics at the Chinese University of Hong Kong).

67. *China's Most Wanted Man*, *supra* note 39.

68. *Billionaire Gadfly*, *supra* note 38.

whose ill-gotten assets the CCP seeks to reclaim. He is a symptom of a widespread corruption epidemic that has garnered a systematic response from the CCP—one that has explicitly and repeatedly recognized corruption as an existential threat.<sup>69</sup> Corruption consistently features as the top concern among ordinary Chinese people,<sup>70</sup> and is politically sensitive—the government fears a “political earthquake” (政治地震) should it fully disclose the scale and scope of corruption.<sup>71</sup> In recent years, Chinese President Xi Jinping has launched a high-profile anticorruption campaign. Under the umbrella of this larger campaign, Xi has established two dedicated international operations: “Foxhunt” and “Skynet.”

“Operation Foxhunt” (猎狐行动) was unveiled in 2014 as the international counterpart to Xi’s domestic pursuit of “tigers and flies,” or corrupt officials at the highest and lowest ranks of CCP leadership.<sup>72</sup> Operating under the auspices of the Central Anticorruption Working Group, “Operation Foxhunt” reportedly involved the coordinated efforts of 2,000 personnel, sending over seventy police teams overseas to hunt down economic fugitives.<sup>73</sup> According to Chinese media, “Foxhunt” secured the return of 680 suspected economic criminals from

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69. James Leung, *Xi’s Corruption Crackdown: How Bribery and Graft Threaten the Chinese Dream*, FOREIGN AFFAIRS (May/June 2015), <https://www.foreignaffairs.com/articles/china/2015-04-20/xis-corruption-crackdown> (quoting Xi’s warning that corruption could lead to “the collapse of the Party and the downfall of the state”); *Spotlight: China, World Stand to Benefit Big from Xi’s Anti-Corruption Campaign*, Xinhua (June 22, 2017), [http://www.xinhuanet.com/english/2017-06/22/c\\_136385831.htm](http://www.xinhuanet.com/english/2017-06/22/c_136385831.htm) (citing numerous experts for the propositions that corruption threatens CCP legitimacy and social stability).

70. *Govt Wants a Better View of ‘Naked Officials’*, *supra* note 34.

71. *See, e.g., Minitrue: Axe Story on Naked Officials*, CHINA DIGITAL TIMES (Aug. 7, 2014), <https://chinadigitaltimes.net/2014/08/minitrue-axe-story-naked-officials/> (explaining that a leaked circular from Chinese authorities directing media to cease questioning why data on “naked officials” was being withheld, and to instead report that nondisclosure was necessary to avert a “political earthquake”).

72. Tim Phillips, *China Launches Global ‘Fox Hunt’ for Corrupt Officials*, THE TELEGRAPH (July 25, 2014, 3:57 PM), <https://www.telegraph.co.uk/news/worldnews/asia/china/10991255/China-launches-global-fox-hunt-for-corrupt-officials.html>.

73. *Xi Jinping on Operation Foxhunt, 680 Fugitive Suspects Abroad Apprehended*, 21CN NEWS (Jan. 9, 2015), <https://web.archive.org/web/20160304201021/http://news.21cn.com/social/shixiang/a/2015/0109/14/28859869.shtml> [习近平批示猎狐行动，海外追逃半年抓获疑犯 680 人].

sixty-nine separate countries in its first six months, a figure 4.5 times that of the whole of 2013.<sup>74</sup>

April 2015 saw the start of Xi's second grand operation, dubbed "Operation Skynet" (天网行动). Expanding on "Foxhunt's" success at repatriating fugitives, "Skynet" is a systematic effort aimed at asset recovery that reportedly coordinates the efforts of the Ministry of Public Security (MPS), which continues "Foxhunt" for economic criminals, the Supreme People's Procuratorate, which recovers individuals and assets, the People's Bank of China, which cracks down on money laundering through offshore accounts and underground banks, and the Central Organization Department, which regulates import/export controls in tandem with the MPS.<sup>75</sup> This push to recover fugitive officials and their stolen assets has seen significant success. According to Chinese state media, China secured the return of 381 fugitive officials by extradition, "persuasion," or other means, and over 1.24 billion Chinese Yuan Renminbi (CNY) (approximately \$240 million) in the first half of 2016 from over 40 different jurisdictions.<sup>76</sup>

The cumulative achievements of "Skynet" and "Foxhunt" have resulted in the capture of some 2,873 fugitives (over 1,000 in 2016 alone) from over ninety countries and regions as well as the reclamation of nearly CNY 9 billion (approximately \$1.5 billion), according to statistics from the office of China's Central Anticorruption Working Group.<sup>77</sup> Despite its impressive efforts, China has a long way to go in its pursuit of fugitive corrupt officials and economic criminals. According to statistics from the Central Commission for Discipline Inspection (CCDI), the CCP's internal anticorruption apparatus, 946 corrupt officials remained abroad as of April 2017.<sup>78</sup> Extradition treaties are key

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74. *Id.*

75. Sha Xueliang, "Operation Skynet" Has Returned 381 Fugitives and Recovered 1.24 Billion Yuan [天网行动]上半年追逃 381 人追回赃款 12.4 亿元], PEOPLE'S DAILY (人民日报) (July 18, 2016), <http://fanfu.people.com.cn/n1/2016/0718/c64371-28561191.html>.

76. *Id.*

77. *Id.*

78. *By the End of March, 946 State Employees At Large or Unaccounted For* [截至 3 月底尚有 946 名国家工作人员在逃或失踪不知去向], COMMUNIST PARTY OF CHINA - CENTRAL COMMISSION FOR DISCIPLINE INSPECTION (中共中央纪律检查委员会 中华人民共和国监察部 版权所有) (Apr. 27, 2017, 7:52 PM) [https://web.archive.org/web/20170502024948/www.ccdi.gov.cn/yw/201704/t20170427\\_98224.html](https://web.archive.org/web/20170502024948/www.ccdi.gov.cn/yw/201704/t20170427_98224.html).

to China's making good on its promise that fugitives will have nowhere to hide.<sup>79</sup>

Alternative means of repatriating fugitives are undesirable or impractical for China. *Ad hoc* negotiations with other states are time-consuming and successful resolution uncertain.<sup>80</sup> For example, Lai Changxing (赖昌星), once China's most-wanted man, fled to Canada in 1999 and sought refugee status after claiming charges that he ran a multi-billion dollar smuggling ring were politically motivated. By the time his case had wound its way through the Canadian court system, it was already 2011. Although Canadian law permits *ad hoc* extradition, Lai was ultimately deported—not extradited—and jailed for life the following year in China.<sup>81</sup> As this example shows, repatriation without a treaty (when it is available at all) can be a lengthy process, even as countries seek to avoid being a safe haven for criminals.<sup>82</sup>

China, understandably impatient at such significant costs, has less-understandably taken to hunting down fugitives on foreign soil without contacting local authorities, a phenomenon reported in the United States, Canada, Australia, and even France, with whom China has an extradition treaty.<sup>83</sup> Multiple countries

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79. Press Release, Ministry of Foreign Affairs of the People's Republic of China, Foreign Minister Wang Yi Meets the Press (Mar. 8, 2015).

80. Bloom, *supra* note 4, at 207-08.

81. Sui-Lee Wee, *Corrupt Chinese Hiding in Western Nations Elude China's 'Fox Hunt'*, REUTERS (Aug. 27, 2014, 9:00 PM), <http://www.reuters.com/article/us-china-corruption/corrupt-chinese-hiding-in-western-nations-elude-beijings-fox-hunt-idUSKBN0GS01S20140828> (citing Chinese state media) [hereinafter *Corrupt Chinese Hiding in Western Nations Elude China's 'Fox Hunt'*].

82. See, e.g., Mark Mazzetti & Dan Levin, *Obama Administration Warns Beijing About Covert Agents Operating in U.S.*, N.Y. TIMES (Aug. 16, 2015), <https://www.nytimes.com/2015/08/17/us/politics/obama-administration-warns-beijing-about-agents-operating-in-us.html> (quoting a U.S. Justice Department spokesman, who said "the United States is not a safe haven for fugitives from any nation") [hereinafter *Administration Warns Beijing About Covert Agents Operating in U.S.*]; Andrew Russell, *Canada-China Extradition Treaty: Here's What You Need to Know*, GLOBAL NEWS (Sep. 21, 2016), (<https://globalnews.ca/news/2953881/canada-china-extradition-treaty-heres-what-you-need-to-know/>) (quoting a Canadian statement in response to questioning on its negotiations with China, which said "Canada does not want to be seen as a safe haven for fugitives and it is in Canada's interest to have such persons removed") [hereinafter *Canada-China Extradition Treaty: What You Need to Know*].

83. *Administration Warns Beijing About Covert Agents Operating in U.S.*, *supra* note 82 (referencing such incidents in the United States and Australia); Robert Fife & Nathan Vanderklippe, *Chinese Agents Enter Canada on Tourist Visas to Coerce Return of Fugitive Expats*, THE GLOBE AND MAIL (Sep. 21, 2016), <https://beta.theglobeandmail.com/news/politics/chinese-agents-enter-canada-on-tourist-visas-to-coerce-return-of-fugitive-expats/article31981251/> [hereinafter *Chinese Agents Enter*

reportedly have proof that these undercover Chinese agents intimidate and harass their targets, often by threatening their family members back in China. In the ominous terms of Li Gongjing (李公敬), captain in the economic crimes division of the Shanghai Public Security Bureau, “A fugitive is like a flying kite. Even though he is abroad, the string is grounded in China. He can always be found through his family.”<sup>84</sup> China, for its part, has enthusiastically reported on numerous fugitives “successfully convinced” to return home.<sup>85</sup> Needless to say, these violations of territorial sovereignty have proven a source of friction in several of China’s bilateral relationships.

Because the alternatives are monetarily, diplomatically, or otherwise impractical or costly, extradition treaties with nations like the United States, Canada, and Australia—the most common destinations for China’s fugitive officials—are a top priority for China.<sup>86</sup> In fact, China has explicitly called on these three nations to sign extradition treaties.<sup>87</sup> Extraditing fugitives and recovering ill-gotten assets has become a top priority for the CCDI.<sup>88</sup> A CCDI-affiliated publication reported that Xi Jinping would raise the issue of extradition and repatriation “whenever and wherever

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*Canada on Tourist Visas*] (referencing such incidents in Canada); Harold Thibault & Brice Pedroletti, *Quand la Chine Vient Récupérer Ses Fugitifs en France [When China Recovers its Fugitives in France]*, LE MONDE (May 23, 2017), [http://www.lemonde.fr/asiapacifique/article/2017/05/23/quand-la-chine-vient-recuperer-ses-fugitifs-en-france\\_5132103\\_3216.html](http://www.lemonde.fr/asiapacifique/article/2017/05/23/quand-la-chine-vient-recuperer-ses-fugitifs-en-france_5132103_3216.html) (reporting on overt Chinese agents in France despite the countries’ extradition treaty) [hereinafter *When China Recovers its Fugitives in France*].

84. See, e.g., *Administration Warns Beijing About Covert Agents Operating in U.S.*, *supra* note 82.

85. See, e.g., CCDI, *Number 15 Most Wanted Chen Yijuan Returns from England, Surrenders to the Authorities* (Jan 14, 2016), [https://web.archive.org/web/20160118054916/http://www.ccdi.gov.cn/yw/201601/t20160114\\_72816.html](https://web.archive.org/web/20160118054916/http://www.ccdi.gov.cn/yw/201601/t20160114_72816.html); Zhang Yiqian, *More Fugitives Are Persuaded to Surrender from Overseas as China Strengthens International Anti-Graft Cooperation*, GLOBAL TIMES (Oct. 17, 2017), <http://www.globaltimes.cn/content/1070724.shtml> (highlighting the success of the “persuasion” method).

86. *Corrupt Chinese Hiding in Western Nations Elude China’s ‘Fox Hunt’*, *supra* note 81 (citing Chinese state media); see also Qin Gang, Spokesman, Chinese Foreign Ministry, Press Briefing on June 14 (June 18, 2007), [http://www.gov.cn/english/2007-06/18/content\\_651971.htm](http://www.gov.cn/english/2007-06/18/content_651971.htm) (naming “corrupt Chinese officials absconding in [sic] the US” as an impetus for seeking an extradition treaty with the U.S.) [hereinafter Foreign Ministry Press Briefing June 14, 2007].

87. *Ministry of Foreign Affairs: Some Countries Harbor Negative Attitudes Toward an Extradition Treaty with China*, PEOPLE’S DAILY (Nov. 26, 2014).

88. Choi Chi-yuk, *China to Keep up Overseas Graft Hunt Down to Last Fugitive — Even If Ill-Gotten Gains are Gone*, SOUTH CHINA MORNING POST (June 6, 2016), <https://www.scmp.com/news/china/policies-politics/article/1966926/china-keep-overseas-graft-hunt-down-last-fugitive-even>.



he comes across foreign leaders.”<sup>89</sup> In 2016 then-CCDI deputy head and Minister of Supervision Huang Shuxian (黄树贤) announced China’s plans to focus on securing additional extradition deals in the official CCP journal, *Qinshi*.<sup>90</sup> China’s Foreign Ministry has also established an international law committee composed of scholars and experts to consult on how China can best advance its interests through international law, a mandate that includes extraditions.<sup>91</sup> In sum, extradition treaties—particularly with developed common law states—remain a gaping hole in China’s “Skynet,” which it is determined to close.

There are several other reasons for China’s extradition push, all of which are compatible with China’s hunt for high-value fugitives. First, extradition treaties play a symbolic role in legitimizing China’s criminal justice system because they signal a country’s imprimatur. China can then hold this endorsement up to the international community and Chinese domestic audiences.<sup>92</sup> Second, extradition treaties enable China to track down and silence political dissidents abroad.<sup>93</sup> If Xi’s “Foxhunt” and “Skynet” are the international counterparts of his domestic

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89. *Id.*

90. *Id.*

91. Teddy Ng, *Crack International Law Team to Join in China’s Hunt for Fugitives*, SOUTH CHINA MORNING POST (May 5, 2015), <https://www.scmp.com/news/china/diplomacy-defence/article/1786638/china-beefs-international-law-expertise-help-return>. One tactic was for China to leverage the United Nations Convention against Corruption (signed by China in 2003), which encourages signatories to assist in extradition, legal assistance, and criminal proceedings. *Id.*

92. *See, e.g.*, Mike Blanchfield, *Canada Looking at Extradition Talks with the Chinese*, THE STAR (Sept. 20, 2016), <https://www.thestar.com/news/canada/2016/09/20/canada-looking-at-extradition-talks-with-chinese.html> (quoting Human Rights Watch China Director Sophie Richardson, who said “China’s particular interest in pushing [an extradition treaty] with Canada at the moment is to then be able to say to the U.S. and Australia, ‘They did it, why won’t you?’”).

93. For example, in 2015, Thailand extradited two Chinese dissidents, Dong Guangping and Jiang Yefei, despite their being classified as refugees by UNHCR. Both men gave televised confessions to “human trafficking” charges. Dong allegedly “engaged” a “trafficking network” to leave China illegally, and Jiang allegedly “assist[ed] others to illegally cross [China’s] border.” Dong previously served three years in prison from 2001 to 2004 on a charge of “inciting subversion of state power” for promoting democracy, and was again detained in July 2014 following his participation in an event commemorating the victims of the Tiananmen Square crackdown in 1989. *Case History: Dong Guangping*, FRONTLINE DEFENDERS (last visited June 23, 2019), <https://www.frontlinedefenders.org/en/case/case-history-dong-guangping>. Jiang is the Chairperson of the Thai branch of the Federation for a Democratic China. He was detained and reportedly subject to torture for critical interviews given to foreign media regarding the 2008 Sichuan earthquake. *Id.*

hunt for tigers and flies, extradition policy serves as a potential avenue for Xi to internationalize his domestic suppression of rights defenders and dissidents, even as it simultaneously performs legitimate functions.<sup>94</sup> Last, but certainly not least, China—like all countries—has a strong stake in the international effort to combat transnational crime. In addition to its involvement in the United Nations Convention Against Corruption,<sup>95</sup> China is party to a number of international conventions dedicated to combatting, organized crime as well as drug and human trafficking.<sup>96</sup> While it has faced criticism in implementing its commitment to stamp out human trafficking,<sup>97</sup> China has successfully joined forces with several states to combat drug trafficking.<sup>98</sup> Consequently, a lack of extradition treaties with noteworthy common law states frustrates a variety of domestic and international goals of China.

#### IV. THE COMMON LAW-CIVIL LAW DIVIDE

China has successfully concluded 34 extradition treaties. A full list can be found in Appendix A to this Article. This roster

94. *See, e.g., China Upset as Interpol Removes Wanted Alert for Exiled Uighur Leader*, REUTERS (Feb. 24, 2018), <https://www.reuters.com/article/us-china-xinjiang/china-upset-as-interpol-removes-wanted-alert-for-exiled-ughur-leader-idUSKCN1G80FK> [hereinafter *China Upset as Interpol Removes Wanted Alert for Exiled Uighur Leader*]. China uses Interpol “red notices” in an effort to apprehend president of the World Uyghur Congress on terrorism charges, yet diplomatic sources say China has never provided them evidence of any crime. *Id.*

95. United Nations Convention Against Corruption, *opened for signature* Dec. 9, 2003, T.I.A.S. No. 06-1129, 2349 U.N.T.S. 41.

96. *See, e.g.,* United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 497;

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized

Crime, Nov. 15, 2000, 2237 U.N.T.S. 319.

97. *See, e.g.,* U.S. DEPARTMENT OF STATE, 2017 TRAFFICKING IN PERSONS REPORT: CHINA (2017) (“The Government of the People’s Republic of China [PRC] does not fully meet the minimum standards for the elimination of trafficking and is not making significant efforts to do so.”).

98. *See, e.g.,* Austin Bodetti, *China-US Cooperation and the New Opium War*, THE DIPLOMAT (Aug. 16, 2017), <https://thediplomat.com/2017/08/china-us-cooperation-and-the-new-opium-war/>. According to a senior U.S. Drug Enforcement Agency (DEA) official, “[t]he working relationship between the U.S. and China in general has been strained, but, on narcotics trafficking, there have always been fairly quiet and constructive engagements.” *Id.* Former DEA Chief of International Operations Mike Vigil stated that “China is aggressively trying to control the production of illicit opioids and is working closely with the US in the sharing of information.” *Id.*

consists near-exclusively of civil law states and includes a number of developed states. (I use “developed” as a crude stand-in for countries with levels of democratic governance, legal development, and concern for human rights that justifies their comparison to China’s most sought-after common law jurisdictions.) Even China’s earliest treaties were with developing nations.<sup>99</sup> All of them were civil law countries, and many were former socialist countries with legal systems closely related to China’s soviet-civil hybrid system.<sup>100</sup> These states were less demanding on human rights issues as well.<sup>101</sup>

China did not reach an extradition agreement with a developed state until 2006, when Spain ratified a treaty with the noteworthy condition that China refrain from imposing the death penalty on extradited criminals.<sup>102</sup> This condition was not a one-off concession but rather a standing compromise by China aimed at securing extradition agreements from a broader swathe of states. In offering to refrain from imposing the death penalty, China actively courted developed “Western” countries, most of which have outlawed capital punishment and refuse to extradite to countries that impose it.<sup>103</sup> Significant success followed China’s concession on capital punishment. China ratified treaties with France and Portugal that also prohibited the death penalty for repatriated suspects shortly after its successful treaty with Spain.<sup>104</sup> While the French treaty encountered backlash and delay for seven years after Chinese ratification in 2008, the French Parliament finally ratified it in 2015.<sup>105</sup> Its first application

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99. China concluded treaties with Thailand (Mar. 5, 1994), Belarus (Mar. 1, 1996), Russia (Mar. 1, 1996), Bulgaria (Feb. 23, 1997), Kazakhstan (Feb. 23, 1997), Romania (Feb. 23, 1997), Mongolia (June 26, 1998), Kyrgyzstan (Nov. 4, 1998), Ukraine (June 28, 1999), Cambodia (Mar. 1, 2000), and Uzbekistan (July 8, 2000). Hu Qian and Chen Qiang, *China’s Extradition Law of 2000*, 1 CHINESE J. INT’L L. 647 n.3 (2002).

100. Bloom, *supra* note 4, at 189; see also WORLD FACTBOOK: LEGAL SYSTEMS, THE CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/308.html> (indexing countries and classifying their legal systems) (last visited June 23, 2019) [hereinafter *CLA World Fact Book*].

101. Bloom, *supra* note 4, at 189.

102. Sun Shangwu, *China Signs Extradition Deal with Spain*, CHINA DAILY (May 1, 2006, 7:09 PM), [http://www.chinadaily.com.cn/china/2006-05/01/content\\_581658.htm](http://www.chinadaily.com.cn/china/2006-05/01/content_581658.htm); see also China-Spain Extradition Treaty, Nov. 1, 2005, China-Spain;

*China Ratifies Extradition Treaty with Spain*, XINHUA (Apr. 29, 2006).

104. See David Lague, *China Urges Western Nations to Enter Extradition Treaties*, N.Y. TIMES (May 29, 2007), <https://www.nytimes.com/2007/05/29/world/asia/29china.html?mcubz=1>.

105. Chen Heying, *Sino-French Extradition Treaty Begins Operating*, GLOBAL TIMES (July 18, 2015), <http://www.globaltimes.cn/content/932663.shtml>.

followed soon after with the extradition of Chen Wenhua, who was sought for embezzling \$2.9 million.<sup>106</sup> A Sino-Italian extradition treaty signed in 2010 similarly entered into effect in 2015.<sup>107</sup> China has also concluded a treaty with South Korea in 2000,<sup>108</sup> and is currently engaged in treaty negotiations with Japan,<sup>109</sup> which has only two other treaties, one with the United States and one with South Korea.<sup>110</sup> As a rough measure of development, both nations are above or comparable to France, Spain, and Portugal in the World Justice Project's Rule of Law Index.<sup>111</sup> Thus, China has had noteworthy success securing treaties with developed civil law states.

The same cannot be said for common law states. China has failed to secure extradition treaties with all but one of the world's common law countries.<sup>112</sup> Treaties with the United States, Australia, and Canada—the top destinations for China's wealthy fugitives<sup>113</sup>—have proven especially elusive, though China also lacks treaties with the United Kingdom, New Zealand, Singapore, and even the Chinese territory of Hong Kong.<sup>114</sup>

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106. T. Thomas Eder & Bertram Lang, *The Pitfalls of Law Enforcement Cooperation with China*, THE DIPLOMAT (Jan. 21, 2017), <https://thediplomat.com/2017/01/the-pitfalls-of-law-enforcement-cooperation-with-china/> [hereinafter *The Pitfalls of Law Enforcement Cooperation with China*].

107. *See generally* *China-Italy Extradition Treaty Takes Effect*, PEOPLE'S DAILY (Dec. 14, 2015), <http://en.people.cn/n/2015/1214/c90000-8989779.html>.

108. Treaty on Extradition between the Republic of Korea and the People's Republic of China, China-S. Kor., signed Oct. 18, 2000, entered into force Apr. 12, 2002.

109. *Japan, China to Meet Wednesday on Extradition Treaty for First Time in Five Years*, THE JAPAN TIMES (June 1, 2015), <https://www.japantimes.co.jp/news/2015/06/01/national/crime-legal/japan-china-meet-wednesday-extradition-treaty-first-time-five-years/#.XRBMiOtKifV>.

110. David A. Sadoff, BRINGING INTERNATIONAL FUGITIVES TO JUSTICE: EXTRADITION AND ITS IMPEDIMENTS 272 n.19 (2016).

111. RULE OF LAW INDEX, WORLD JUSTICE PROJECT (2019), <http://data.worldjusticeproject.org/> (last visited Aug. 14, 2019).

112. The exception, Pakistan, is distinguishable from other common law states because it actually follows a civil law model of extradition, permitting the executive to extradite individuals where “expedient.” *See* Extradition Act (No. XXI/1972), 4(1). It also differs from the states being compared throughout this Article by virtue of its legal development. Pakistan occupies the ninth lowest place in the World Justice Project's Rule of Law Index. *See supra* note 111.

113. *Corrupt Chinese Hiding in Western Nations Elude China's 'Fox Hunt'*, *supra* note 81 (citing Chinese state media); *see also* Foreign Ministry Press Briefing June 14, 2007, *supra* note 86 (naming “corrupt Chinese officials absconding in [sic] the US” as an impetus for seeking an extradition treaty with the U.S.).

114. Under the terms of its return to China in 1997, Hong Kong currently exists under a rubric of “one country, two systems” and accordingly has its own legal system as well as administrative autonomy. *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of

The United States currently maintains a case-by-case approach to extradition requests from China, employing disguised extradition and relying in part on diplomatic assurances regarding the treatment of repatriated individuals.<sup>115</sup> This approach offers more flexibility than a bilateral treaty, which would standardize extraditions. The United States has approximately 39,000 undocumented Chinese immigrants awaiting deportation back to China.<sup>116</sup> China reportedly drags its feet in providing the necessary documentation<sup>117</sup> such that some deportations have been in limbo for over a decade.<sup>118</sup> When the United States agrees to repatriate “Foxhunt” fugitives, it typically demands that Beijing accept a number of undocumented immigrants.<sup>119</sup> While this quid pro quo repatriation may not be considered official United States policy, the countries are engaged in parallel talks, and China clearly views both kinds of repatriation as linked.<sup>120</sup> Another consideration behind the United States’ strategy is that the additional costs of time-consuming and painstaking diplomatic negotiation for each individual extradition may spur China to make certain criminal justice reforms.<sup>121</sup> Nonetheless, the United States’ case-by-case approach has resulted in repatriations as recent as July 2018.<sup>122</sup>

Unlike the United States, Australia actually signed an extradition treaty with China in 2007. Despite endorsement by the Turnbull administration, the ratification fell through in March 2017 amid legislative opposition to China’s criminal

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China on the Question of Hong Kong art. 3(2), Dec. 19, 1984, ratified and entered into force May 27, 1985, T.S. No. 26.

115. Bloom, *supra* note 4, at 206.

116. Mark Hosenball & Tim Reid, *Exclusive – U.S. to China: Take Back Your Undocumented Immigrants*, REUTERS (Sept. 11, 2015), <https://www.reuters.com/article/us-usa-china-deportations-exclusive/exclusive-u-s-to-china-take-back-your-undocumented-immigrants-idUSKCN0RB0D020150911> [hereinafter *U.S. to China: Take Back Your Undocumented Immigrants*].

117. Tim Mitchell et al., *Extradition Battle Looms Over US-China Relations*, FINANCIAL TIMES (Mar. 13, 2016), <https://www.ft.com/content/0830a420-e77a-11e5-bc31-138df2ae9ee6> [hereinafter *Extradition Battle Looms*].

118. *U.S. to China: Take Back Your Undocumented Immigrants*, *supra* note 116.

119. *Extradition Battle Looms*, *supra* note 117.

120. *Id.*

121. Bloom, *supra* note 4, at 207–08.

122. *China’s Biggest Bank Corruption Criminal Repatriated from U.S.*, REUTERS (July 11, 2018), <https://www.reuters.com/article/us-china-crime-corruption/chinas-biggest-bank-corruption-criminal-repatriated-from-u-s-idUSKBN1K10RF>.

justice system and human rights record.<sup>123</sup> Even without an extradition treaty, Australia still repatriates fugitive Chinese on a case-by-case basis.<sup>124</sup> Canada also lacks an extradition treaty with China, but is engaged in bilateral dialogue on the subject. In September 2016, the Trudeau administration reached an agreement to hold a High-Level National Security and Rule of Law Dialogue explicitly aimed, among other things, at reaching an extradition agreement.<sup>125</sup> It is too soon to know whether these talks will bear fruit. Trudeau's political opponents and a hefty portion of public opinion reportedly oppose the prospect of a treaty.<sup>126</sup> Others have questioned the sincerity of the talks altogether, theorizing that they are a symbolic concession meant to curry diplomatic favors from China.<sup>127</sup> In short, it remains to

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123. Colin Packham, *Australia Holds Emergency Meet with China After Extradition Treaty Failure*, REUTERS (Mar. 28, 2017), <https://www.reuters.com/article/us-australia-china-extradition-idUSKBN17002j>.

124. Kevin Boreham, *Explainer: Why the Government 'Pulled' Australia's Extradition Treaty with China*, THE CONVERSATION (Mar. 27, 2017), <https://theconversation.com/explainer-why-the-government-pulled-australias-extradition-treaty-with-china-74984> [hereinafter *Why the Government 'Pulled' Australia's Extradition Treaty with China*].

125. Dan Levin, *Canada Agrees to Talks on Extradition Treaty with China*, N.Y. TIMES (Sept. 20, 2016), <https://www.nytimes.com/2016/09/21/world/americas/canada-agrees-to-talks-with-china-on-extradition.html>; see also Prime Minister of Canada, Joint Communiqué – 1st Canada-China High-Level National Security and Rule of Law Dialogue (Sept. 13, 2016), <https://pm.gc.ca/eng/news/2016/09/13/1st-canada-china-high-level-national-security-and-rule-law-dialogue>; Prime Minister of Canada, Joint Communiqué – 2nd Canada-China High-Level National Security and Rule of Law Dialogue (Sept. 13, 2016), <https://pm.gc.ca/eng/news/2016/09/13/1st-canada-china-high-level-national-security-and-rule-law-dialogue>.

126. Trudeau's Liberal Party has faced criticism from the leaders of both the Conservative and New Democratic Parties (Canada's other most influential parties) opposing an extradition treaty on human rights grounds. See Matthew Kupfer, *Trudeau Says Canada Has 'Extremely High Standards' for Extradition Treaty with China*, CBC NEWS (Sep. 21, 2016), <http://www.cbc.ca/news/politics/trudeau-china-extradition-treaty-1.3772322> (quoting National Democratic Party Leader Tom Mulcair and Conservative Interim Leader Rona Ambrose) [hereinafter *Trudeau Says Canada Has 'Extremely High Standards' for Extradition*]. Two former heads of the Canadian Security Intelligence Service have publicly opposed a treaty as well, criticizing China's legal system, human rights record, and doubting the sufficiency of guarantees from China. See Steven Chase et al., *Former CSIS Directors Question Canada's Pursuit of Extradition Treaty with China*, THE GLOBE AND MAIL (Apr. 15, 2017), <https://www.theglobeandmail.com/news/world/china-to-canada-dont-follow-australias-lead-on-extradition-treaty/article34442527/>. Lastly, public opinion is reportedly strongly against an extradition treaty with China. See Alex Lo, *Canada's Thorny Dilemma over Extradition Treaty with China*, SOUTH CHINA MORNING POST (Sept. 29, 2016), <https://www.scmp.com/comment/insight-opinion/article/2023455/canadas-thorny-dilemma-over-extradition-treaty-china>.

127. These alleged diplomatic favors include favorable terms on exports of canola oil to China, see *Canada-China Extradition Treaty: What You Need to Know*, *supra* note 82, and the release of alleged Canadian spy Kevin Garratt, see *Trudeau Says Canada Has 'Extremely High Standards' for Extradition*, *supra* note 126. Although Garratt was released shortly after Ottawa and Beijing announced their new dialogue, Canada's foreign minister denied any *quid pro quo*. See Matthew Kupfer, *Canada Made No Concessions to Bring Kevin Garratt Home*, *Stéphane Dion*

be seen whether a Sino-Canadian treaty will fail despite executive endorsement, as was the case in Australia. Like the United States and Australia, Canada repatriates dozens of Chinese fugitives on a case-by-case basis every year.<sup>128</sup>

It is clear that China's efforts to secure extradition treaties have failed with common law states where the same concerted effort has produced substantial success among the developed civil law community. I highlight below various legal and non-legal considerations that factor into any state's decision to conclude an extradition treaty. With regard to China, these considerations are shared impediments and attributes of common and civil law states. At the same time, however, four facets of domestic legal systems—the extradition of nationals, the nature of the executive power to extradite, the courts' ability to check this power, and evidentiary requirements for extradition—differentiate common and civil law states. These differences create a higher threshold for common law states, relative to their civil law counterparts, to enter into extradition treaties. China illustrates this fundamental difference.

#### V. LEGAL FACTORS: CRIMINAL JUSTICE, HUMAN RIGHTS, AND SOVEREIGNTY

Countries that decline an extradition treaty with China most commonly cite legal reasons. They frame these reasons in terms of the requested state's international or domestic legal obligations and China's corresponding failure to meet these legal standards. Some reasons are a harsh condemnation of China's criminal justice and human rights abuses, while some cite incompatible

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*Says*, CBC NEWS (Sept. 16, 2016, 5:23 PM), <https://www.cbc.ca/news/politics/stephane-dion-kevin-garratt-china-no-concessions-1.3766418> [hereinafter *Canada Made No Concessions to Bring Kevin Garratt Home*]. The alleged favors also include an effort to stem China's practice of pursuing fugitives on Canadian soil without informing Canadian authorities. See Hugh Stephens, *A Canada-China Extradition Treaty: Not Such a Bad Idea*, CHINA US FOCUS (Sept. 16, 2016, 5:23 PM), <https://www.cbc.ca/news/politics/stephane-dion-kevin-garratt-china-no-concessions-1.3766418> [hereinafter *Canada-China Extradition Treaty: Not Such a Bad Idea*].

128. Marie-Danielle Smith, *Canada Removes Dozens of People to China Every Year, Despite Fears over Torture and the Death Penalty*, NATIONAL POST (Oct. 23, 2016), <https://nationalpost.com/news/canada/canada-extradites-dozens-of-people-to-china-every-year-despite-fears-over-torture-and-the-death-penalty> (citing at least 24 removals of Chinese nationals in 2016 and over 330 removals during the previous Conservative administration).

legal systems.<sup>129</sup> In either case, criminal justice and human rights issues are a shared concern of common and civil law states.

The United States, Australia, and Canada have consistently cited China's criminal justice system and human rights record as the chief obstacle to an extradition treaty. The difficulty of monitoring an opaque Chinese criminal justice system and the sovereignty-infringing covert operations of Chinese agents within their territory further compound these apprehensions.

Regarding human rights, all three countries have decried China's systematic failure to guarantee the right to a fair trial as well as its pervasive torture, forced confessions, and other cruel treatment of criminal suspects, its oppression of defense lawyers who take up politically sensitive cases or clients, and its use of capital punishment, particularly for non-violent crimes.<sup>130</sup> China explicitly rejects the "erroneous thinking" (错误思潮) of judicial independence not to mention other "Western" ideological "traps" (陷阱) like constitutional democracy and separation of powers.<sup>131</sup> Beyond its borders, China has sought to enlist other countries and international mechanisms in what many have

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129. Cf. Joint Liaison Group on Law Enforcement Cooperation, Anti-Corruption Working Group, Opening Remarks by Bruce Ohr (Oct. 10, 2015), <https://china.usembassy-china.org.cn/joint-liason-group-law-enforcement-cooperation-jlg-anti-corruption-working-group/> (noting that "[b]ecause evidentiary laws differ, we ask our partners to furnish evidence in a form that, while different from that which might be used in their own courts, is admissible in a U.S. court in order to build a case against that country's fugitives in the United States. If we do not get this evidence, we will be unable to proceed against that fugitive in our courts") [hereinafter JLG Remarks by Bruce Ohr].

130. See Jerome Cohen, *Should the United States Extradite Chinese Fugitives?*, FOREIGN POLICY (Aug. 7, 2015), <https://foreignpolicy.com/2015/08/07/us-china-fugitive-economic-corruption-law-ling/> (raising a number of concrete issues, including China's 'attack' on human rights and criminal defense lawyers, its poor treatment of western organizations, and its general failure to meet standards of the International Convention on Civil and Political Rights, and noting their severity). For the United States' view, see Congressional-Executive Commission on China, 2017 Annual Report (Oct. 25, 2017), <https://www.cecc.gov/publications/annual-reports/2017-annual-report>; United States Department of State, China 2016 Human Rights Report, <https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/>; see also MacCormack, *supra* note 25, at 474 ("The main obstacle to a possible U.S.-PRC extradition treaty is the issue of human rights in China."). For the Australian government's views, see Australian JCST Report 167, *supra* note 24; Chelsea Nash, *Chinese Ambassador Says Democracy, Human Rights Shouldn't Factor into Trade Deal*, THE HILL TIMES (Apr. 5, 2017), <https://www.hilltimes.com/2017/04/05/chinese-ambassador-shaye-lu-says-human-rights-democracy-nothing-trade-deal/102010> (noting human rights as an obstacle to a Sino-Canadian treaty).

131. Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html?mtrref=www.google.com> (quoting Chief Justice Zhou Qiang [周强]).



determined to be politically-motivated prosecutions.<sup>132</sup> Within its borders, the CCP exercises direct control over individual cases through Political-Legal Committees at each level of government that direct and supervise the work of state legal institutions, including courts.<sup>133</sup> Limited resources and complex political realities further thwart even well-meaning reforms of China's extensive court system.<sup>134</sup>

Lack of transparency in China's criminal justice system has further frustrated extradition treaties. For example, Australia's Joint Standing Committee on Treaties noted "the secrecy and lack of transparency attached to China's judicial system," ultimately recommending an unprecedented monitoring scheme for any prospective treaty with China.<sup>135</sup>

Lastly, all three countries have expressed their displeasure at the Chinese practice of sending government agents abroad to pursue fugitives without coordinating with local authorities.<sup>136</sup> China apparently continues this troubling practice even in countries with which it has extradition agreements.<sup>137</sup> In international practice, incursions of this sort have justified states' refusal to extradite on the basis of non-compliance with its domestic law.<sup>138</sup> Whether the product of dysfunction or design, the problems outlined above represent enduring obstacles to any extradition treaty with China.

Evidently, states have genuine human rights and rule of law concerns standing in the way of an extradition treaty with China. These concerns, however, do not explain states' divergent practices of concluding or refusing extradition treaties with

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132. See *China Upset as Interpol Removes Wanted Alert for Exiled Uighur Leader*, *supra* note 94. China expressed dissatisfaction at Interpol's decision to remove a "red notice" alert seeking the arrest of Dolun Isa, president of the World Uyghur Congress. *Id.* China claims Isa is a terrorist, but according to Reuters' diplomatic sources, has never provided any evidence. *Id.*

133. See, e.g., Congressional-Executive Commission on China, *Judicial Independence in the PRC*, <https://www.cecc.gov/judicial-independence-in-the-prc> (last visited Mar. 15, 2018).

134. *Id.*

135. Australian JCST Report 167, *supra* note 24, ch. 3.37, 3.56.

136. *Chinese Agents Enter Canada on Tourist Visas*, *supra* note 83.

137. *When China Recovers its Fugitives in France*, *supra* note 83 (noting that French authorities learned of a Chinese operation on French soil only from a victorious post on the CCDI website, and Chinese authorities had not made any extradition request or informed France of the operation).

138. See Sadoff, *supra* note 110, at 232; see also Bruce Zagaris, *Curacao Denies U.S. Extradition Request for 3 Persons Accused of Narcotics Offenses*, 30 INT'L ENFORCEMENT LAW REPORTER 173 (2014).

China. After all, the civil law states that have treaties with China are not human rights or rule of law vacuums. France, Spain, and Portugal have strong human rights records.<sup>139</sup> South Korea's rule of law ranks even higher.<sup>140</sup> Moreover, many countries with which China maintains extradition treaties have also issued open criticism of its human rights record. In June 2017, Greece blocked an otherwise-unanimous condemnation of China's human rights record that was to be submitted to the United Nations Human Rights Council by the European Union.<sup>141</sup> The European Union (EU) includes a number of states that maintain extradition treaties with China, such as Bulgaria, France, Italy, Lithuania, Portugal, Romania, and Spain. France was also one of eleven countries (including Canada and Australia) that penned an unreleased letter to China in 2017 condemning its treatment of human rights lawyers.<sup>142</sup>

In 2013, Spain issued international arrest warrants for former Chinese President Jiang Zemin, former Prime Minister Li Peng, and three other retired top CCP officials for the crime of genocide in Tibet.<sup>143</sup> This act prompted a harsh response from China, which froze high-level meetings.<sup>144</sup> The case was eventually dropped in light of a new law limiting universal jurisdiction, which Spain denied was in response to complaints from China.<sup>145</sup> Nonetheless, this indicates that Spain's extradition agreement was not due to a disregard for human rights. If

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139. *See, e.g.*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015: FRANCE (2015); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015: SPAIN (2015); U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015: PORTUGAL (2015).

140. *See supra* note 11.

141. Robin Emmott & Angeliki Koutantou, *Greece Blocks EU Statement on China Human Rights at U.N.*, REUTERS (June 18, 2017), <https://www.reuters.com/article/us-eu-un-rights/greece-blocks-eu-statement-on-china-human-rights-at-u-n-idUSKBN1990FP>.

142. Nathan Vanderklippe, *Canada, 10 Other Countries Call out China for Torturing Human Rights Lawyers*, THE GLOBE AND MAIL (Mar. 20, 2017), <https://beta.theglobeandmail.com/news/world/canada-10-other-countries-call-out-china-for-torturing-human-rights-lawyers/article34346186/?ref=http://www.theglobeandmail.com&>. Reported signatories to the letter include Australia, Canada, Japan, Switzerland, Belgium, Czech Republic, Estonia, France, Germany, Sweden, and the United Kingdom. *Id.*

143. Diego Torres, *Why the West Treats China with Kid Gloves*, POLITICO (June 21, 2017), <https://www.politico.eu/article/china-europe-trade-why-the-west-treats-with-kid-gloves/>.

144. *Id.*

145. Fiona Ortiz, *Spain High Court Dismisses China Rights Cases*, REUTERS (June 23, 2014), <https://uk.reuters.com/article/uk-spain-china/spain-high-court-dismisses-china-rights-cases-idUKKBN0EY2IS20140623>.

anything, the incident reveals a rift between coordinate branches of government. For its part, Portugal opts for “pressure in private” rather than public opposition to China’s human rights problems.<sup>146</sup>

Suffice it to say that concern for human rights and rule of law is a shared feature of the common and civil law countries relevant to our inquiry. To the extent there is selective disregard for human rights by the same countries, this is a common attribute as well.<sup>147</sup> While these features constitute a general obstacle to treaty negotiation, then, they do not account for the split between common and civil law countries when it comes to extradition treaties with China.

## VI. NON-LEGAL FACTORS

It would be naïve to discount the political and practical dimensions to an extradition treaty.<sup>148</sup> Extradition resides at the crossroads of law and foreign policy and is impacted by both. There are essentially two classes of non-legal considerations that go into a state’s decision about whether to enter into an extradition treaty. I term these “distrust” and “pragmatism.”

### A. Distrust

I use “distrust” as a blanket term for an unwillingness, or at least reluctance, to cooperate with China due to ideological bias, domestic political scapegoating of China, or cultural misunderstanding. These issues feature heavily in many Chinese criticisms of common law states unwilling to conclude an extradition treaty with China.<sup>149</sup> The charge is that such factors

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146. Miguel Santos Neves, *Portugal, China, and Macau: Building a New Triangular Relationship at a Moment of Change, in EUROPE, CHINA, AND THE TWO SARs: TOWARDS A NEW ERA* 152-53 (Miguel Santos Neves & Brian Bridges eds., 2000).

147. See Alex Lo, *The Double Standards at Work over Extradition Treaties with China*, SOUTH CHINA MORNING POST (Apr. 1, 2017), <https://www.scmp.com/comment/insight-opinion/article/2083963/double-standards-work-over-extradition-treaties-china> (noting how Western countries make treaties with countries possessing equal or lesser rule of law than China) [hereinafter *Double Standards over Extradition with China*].

148. See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 9 (2014) (“[R]ealpolitik certainly plays a role in the practice of extradition.”).

149. See, e.g., James T. Areddy, *China: Western Countries Obstruct China’s Efforts to Recover Fugitives and Assets*, WALL STREET JOURNAL (Nov. 27, 2014), <https://cn.wsj.com> (noting that the Head of China’s Ministry of Foreign Affairs Treaty Law Department, Xu Hong [徐

impact governments' subjective assessment of China and its credibility, and therefore their willingness to cooperate with it. Distrust in fact does little to explain China's dearth of extradition treaties with common law states. To the extent distrust exists, it has not impeded substantial cooperation between China and these states.

The United States, Canada, and Australia all cooperate significantly with China in ways other than extradition treaties—the main difference being that other forms of cooperation do not implicate human rights concerns and are therefore less contentious. All three countries have Mutual Legal Assistance Treaties (MLATs) with China.<sup>150</sup> MLATs have proven uncontroversial because they contribute to a fair trial by facilitating the inclusion of additional evidence, and they indirectly promote future cooperation by increasing bilateral communication and forging interpersonal contacts.<sup>151</sup>

On a country-specific level, China and the United States collaborate on international law enforcement through a number of working groups under the framework of the U.S.-China Joint Liaison Group on Law Enforcement Cooperation (JLG). In particular, the Anti-Corruption Working Group deals squarely with many of the issues at the heart of a potential extradition treaty between China and the United States.<sup>152</sup> While detailed records of JLG discussions are not publicly available, both sides

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宏], attributes lack of extradition progress to prejudice, bias, and ignorance of Western legislatures and judges); *Partisan Maneuvering Halts Ratification of Sino-Australian Extradition Treaty, Foreign Ministry Hopes Australia will Focus on the Big Picture*, GLOBAL TIMES (Mar. 29, 2017), <http://news.sina.com.cn/o/2017-03-29/doc-ifycsukm4048263.shtml> [hereinafter *Partisan Maneuvering Halts Ratification*].

150. Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., June 19, 2000, T.I.O.S. No. 13102; Treaty Between Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, Can.-China, July 29, 1994, 1995 Can. T.S. No. 29 [hereinafter "China-Canada MLAT"]; Treaty Between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters, Apr. 3, 2006, ATS 21. Technically, the United States has a Mutual Legal Assistance Agreement (MLAA)—rather than an MLAT—with China. See U.S. DEP'T OF STATE, BUREAU OF INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INT'L NARCOTICS CONTROL STRATEGY REPORT: AGREEMENTS (2015). Given that the United States' only other MLAA is with Taiwan, this appears to be a matter of diplomatic phrasing that has no impacted the substance of the MLAA to distinguish it from an MLAT. See Margaret K. Lewis, *Mutual Legal Assistancess and Extradition: Human Rights Implications*, 2 CHINA RTS. F. 86 (2007) (detailing the MLAA's terms and procedure).

151. Margaret K. Lewis, *Mutual Legal Assistancess and Extradition: Human Rights Implications*, 2 CHINA RTS. F. 86 (2007) (detailing the MLAA's terms and procedure).

152. See JLG Remarks by Bruce Ohr, *supra* note 129 (discussing successes and difficulties of Sino-U.S. cooperation).

have praised the annual dialogues since their inception in 1998.<sup>153</sup> China has also been a recipient of the Department of Treasury's asset-sharing program, which shares forfeited assets with governments who contribute to joint investigations into narcotics trafficking and money laundering.<sup>154</sup> More recently, China and the United States held a high-level Law Enforcement and Cyber Security Dialogue, agreed to by Presidents Xi and Trump in April, 2017.<sup>155</sup> This dialogue, which replaced the bilateral Strategic and Economic Dialogue, reiterated both countries' continued collaboration on specific criminal cases.<sup>156</sup>

In 2013, Canada became the first country to reach a deal with China to share forfeited assets,<sup>157</sup> building on an existing MLAT that encompassed the return of stolen assets to lawful owners<sup>158</sup> as well as cooperation in the exchange of evidence.<sup>159</sup> During Prime Minister Justin Trudeau's first visit to China in September 2016, the countries agreed to hold bilateral security talks aimed in part at reaching an extradition agreement.<sup>160</sup> Even without an

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153. *See id.*; *see also* *China, US to Discuss Law Enforcement Cooperation*, XINHUA (Nov. 6, 2016), [http://english.gov.cn/news/international\\_exchanges/2016/11/16/content\\_281475492603192.htm](http://english.gov.cn/news/international_exchanges/2016/11/16/content_281475492603192.htm).

154. U.S. DEP'T OF STATE, BUREAU OF INT'L. NARCOTICS AND L. ENFORCEMENT AFF., *INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: ASSET SHARING* (2016).

155. Nike Ching, *High-Level US-China Talks Focus on Immigration, Fugitives*, VOICE OF AMERICA (Oct. 4, 2017), <https://www.voanews.com/usa/high-level-us-china-talks-focus-immigration-fugitives>.

156. U.S. DEP'T OF JUST., *FIRST U.S.-CHINA LAW ENFORCEMENT AND CYBERSECURITY DIALOGUE: SUMMARY OF OUTCOMES* (2017); *see also* JLG Remarks by Bruce Ohr, *supra* note 129 (referencing Kaiping Bank of China cases, in which individuals defrauded a Chinese bank out of \$485 million and absconded to the United States). In a recent example, the United States repatriated Yang Xiuzhu after denying her asylum. She had been on the run for 13 years and was suspected of embezzling public funds and accepting bribes totaling over \$4 million. *See* Laurie Chen, *After 13 Years on the Run, China's Most-Wanted Fugitive Jailed for Graft*, SOUTH CHINA MORNING POST (Oct. 13, 2017), <https://www.scmp.com/news/china/policies-politics/article/2115279/after-13-years-run-chinas-most-wanted-fugitive-jailed>.

157. Xiaoqing Pi and Brian Spegele, *Canada Loses Luster as Destination for Corrupt Chinese Cash*, WALL STREET JOURNAL (July 6, 2013), <https://blogs.wsj.com/chinarealtime/2013/07/06/canada-loses-luster-as-destination-for-corrupt-chinese-cash/>.

158. *Statement of Foreign Affairs Minister John Baird and Backgrounder Agreement on the Sharing of Forfeited Assets and the Return of Property*, GOVERNMENT OF CANADA (July 4, 2013), <https://www.canada.ca/en/news/archive/2013/07/stepping-up-fight-against-transnational-organized-crime.html?=&=&>

159. China-Canada MLAT, *supra* note 150.

160. *Corrupt Chinese Hiding in Western Nations Elude China's Fox Hunt*, *supra* note 81.

extradition agreement, the Canada Border Services Agency has deported 1,368 individuals to China since 2014.<sup>161</sup>

Australia maintains significant cooperation with China despite pulling out of their extradition treaty in 2016. The countries have a treaty covering the international transfer of prisoners in addition to their MLAT.<sup>162</sup> Australia repatriated AUD 7.5 million (approximately \$5.3 million) in embezzled, laundered, and fraudulently obtained assets to China between 2002 and 2014.<sup>163</sup> Most recently, April 2017 saw the launch of the Australia-China High-Level Security Dialogue, which covered issues of bilateral legal cooperation.<sup>164</sup>

Nor do cultural differences fully explain China's difficulties in securing extradition treaties. The influence of their colonial pasts notwithstanding, Singapore and the Chinese territory of Hong Kong—which both lack extradition treaties with China—are a powerful refutation to arguments alleging cultural misunderstanding.

The non-legal factors referenced above boil down to an issue of trust. The claim is that common law states do not *trust* China because of cultural and ideological differences, or because China is a strategic rival. Reality demands that we recognize some distrust between China and countries like the United States, Canada, and Australia.<sup>165</sup> These countries are strategic rivals of China and long-term allies with a history of coordinated action.<sup>166</sup> State extradition arrangements and laws sometimes reflect double standards as well.<sup>167</sup> Nevertheless, distrust has not

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161. Nathan Vanderklippe, *Canada Departs Hundreds to China Each Year with No Treatment Guarantee*, THE GLOBE AND MAIL (Apr. 3, 2017), <https://beta.theglobeandmail.com/news/world/canada-deports-hundreds-to-china-each-year-with-no-treatment-guarantee/article34558610/?ref=http://www.theglobeandmail.com&>.

162. Australian Government, Attorney General's Department, Australia's International Crime Cooperation Relationships, <https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Pages/default.aspx> (last visited July 20, 2019).

163. *Corrupt Chinese Hiding in Western Nations Elude China's 'Fox Hunt'*, *supra* note 81.

164. Australian Government, Attorney General's Department, Australia-China High Level Security Dialogue, <https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Pages/default.aspx> (last visited July 20, 2019).

165. See, e.g., KENNETH LIEBERTHAL & WANG JISI, ADDRESSING U.S.-CHINA STRATEGIC DISTRUST (2012).

166. *Partisan Maneuvering Halts Ratification*, *supra* note 149 (quoting Gao Jia [高佳], Assistant Dean of The University of Melbourne's Faculty of Arts).

167. See, e.g., *Double Standards over Extradition with China*, *supra* note 149 (noting Canada's and Australia's treaties with countries possessing equal or lesser rule of law than China).

prevented a track record of cooperation with China. Moreover, a great deal of existing distrust has different roots—skepticism in the merits of China’s criminal justice system and human rights record or inward distrust between a state’s own coordinate branches of government.

*B. Pragmatic Concerns*

“Pragmatic concerns” involve a cost-benefit analysis. These concerns undoubtedly influence the decision to conclude an extradition treaty.<sup>168</sup> Some concerns are intrinsic to calculating whether any treaty is “worth it” for a state. For example, a state will want to consider whether it will be the primary beneficiary of the treaty (that is, whether it is more likely to be the *requesting* or *requested* state),<sup>169</sup> whether the other country demands a more credible or formal commitment,<sup>170</sup> or whether a treaty imposes or reduces political costs. A treaty may spark political disapproval because of its high profile, but may also insulate the government from political heat by “legalizing” a controversial action.<sup>171</sup> States may take into account the amount of criminal traffic between them, the general benefits of reducing global crime by eliminating criminal safe havens, and the prospect of bolstering bilateral relations. States will contemplate the transaction costs of negotiating a treaty and—particularly applicable with regard to China—the costs of monitoring compliance with that treaty. Ultimately, they will calculate whether all of the above justify the expense of a treaty, or whether the same ends can be achieved by a less costly informal agreement (or should be foregone altogether). Even without applying this complex matrix of factors

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Sometimes these double standards are by defect, not design. For example, prior to its 2003 Extradition Act, England had embroiled itself in a bilateral and multilateral extradition regime under which Russia had to meet lower standards than Australia. See Theodore Bromund & Andrew Robert James Southam, *The U.S.-U.K. Extradition Treaty: Fair, Balanced, and Worth Defending*, THE HERITAGE FOUNDATION (Sep. 4, 2012), <https://www.heritage.org/europe/report/the-us-uk-extradition-treaty-fair-balanced-and-worth-defending> [hereinafter *The US-UK Extradition Treaty*].

168. See Bassiouni, *supra* note 148, at 9 (“[R]ealpolitik certainly plays a role in the practice of extradition.”).

169. Magnuson, *supra* note 2, at 865. For example, the United States makes many more extradition requests than it receives, *id.* at 866, and it has over 150 extradition treaties, see Bassiouni, *supra* note 148, at 42.

170. Magnuson, *supra* note 2, at 863.

171. *Id.* at 864, 878 (describing the use of pledges when there are high transaction costs and the use of extradition agreements).

to existing and prospective extradition treaties with China specifically, it requires a unique calculation by each state that impacts its decision to conclude or reject an extradition treaty.

Other concerns are economic and diplomatic. Besides its intrinsic value, an extradition treaty is also a bargaining chip in the marketplace of foreign relations. A country like China can sweeten an extradition deal by offering an attractive economic or diplomatic package (or threatening repercussions) in exchange. Indeed, China is known to build a strong diplomatic case for the return of its fugitives, emphasizing the costs to bilateral relations of failure to comply in *ad hoc* negotiations.<sup>172</sup> It is willing to use its economic clout<sup>173</sup> for leverage in extradition negotiations as well.<sup>174</sup> More broadly, countries have accused China of buying smaller countries' silence on human rights issues.<sup>175</sup> Dampened human rights criticism paves the way for more repatriation. There is no direct evidence of China exerting similar pressure to obtain extradition *treaties*. However, there is speculation. For example, Canadian media has theorized that Trudeau agreed to discuss a treaty with China in order to secure favorable terms on canola oil exports to China,<sup>176</sup> the release of an alleged Canadian spy in Chinese custody,<sup>177</sup> and to stem China's troubling practice of pursuing fugitives on Canadian soil without informing Canadian authorities.<sup>178</sup>

Economically stronger countries will have a greater resistance to economic and diplomatic packages because they are less easily tempted and more difficult to pressure. Even so, the economic explanation leaves questions unanswered. Why would Canada

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172. Pei Minxin, *How China Should Repatriate its Fugitives Abroad*, CHINA-US FOCUS, (Aug. 14, 2015), <https://www.chinausfocus.com/foreign-policy/how-china-should-repatriate-its-fugitives-abroad>.

173. For years now, China has been the world's second largest economy, behind the United States. Sy Harding, *China is Winning the Economic War*, FORBES (Aug. 13, 2010, 5:40 PM), <https://www.forbes.com/sites/greatspeculations/2010/08/13/china-is-winning-the-economic-war/#29bf32b37d32>.

174. Eder & Lang, *supra* note 106.

175. Jason Horowitz & Liz Alderman, *Chastised by E.U., a Resentful Greece Embraces China's Cash and Interests*, N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/26/world/europe/greece-china-piraeus-alexis-tsipras.html>.

176. *Why the Government 'Pulled' Australia's Extradition Treaty with China*, *supra* note 124.

177. *Trudeau Says Canada Has 'Extremely High Standards' for Extradition*, *supra* note 126. Although Garratt was released shortly after Ottawa and Beijing announced their new dialogue, Canada's foreign minister denied any quid pro quo. See *Canada Made No Concessions to Bring Kevin Garratt Home*, *supra* note 127.

178. *Canada-China Extradition Treaty: Not Such a Bad Idea*, *supra* note 127.



bend where Australia rebuffed its greatest trading partner?<sup>179</sup> Is France (treaty) more economically dependent on China than New Zealand or Singapore (no treaties, even though they are common destinations for Chinese fugitives)? The economic rationale is relevant, but it does not adequately explain these phenomena.

Deciding on a prospective extradition treaty implicates a wealth of pragmatic considerations. Some considerations are intrinsic to any prospective treaty, while others pertain to the treaty's value as an economic or diplomatic bargaining chip. These factors are relevant to a state's decision to enter into an extradition treaty. However, they do not entirely explain the common law-civil law divide over extradition treaties with China.

The common and civil law states with which China most desires extradition treaties have a great deal in common, then. They share apprehensions about treaty provisions, human rights and criminal justice concerns, and even strategic, ideological, or cultural distrust. The cost-benefit analysis of treaty making is inevitably country-specific, but does not sufficiently account for the divergent behavior of states either. Instead, the best explanation for the common law-civil law divide is found in the domestic legal differences of these states.

## VII. DOMESTIC LEGAL DIFFERENCES

Developed nations agree that a fair trial and due process are essential human rights,<sup>180</sup> but there is no international consensus on how these rights translate into concrete norms and procedures under domestic law.<sup>181</sup> Laws governing criminal procedure, the status of precedent, and the roles of judges, lawyers, and juries vary between common and civil law states as well as within these two broad categories.<sup>182</sup> It should come as no surprise that legal doctrines and protections—not to mention the

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179. *Why the Government 'Pulled' Australia's Extradition Treaty with China*, *supra* note 124.

180. *See* ICCPR, *supra* note 5, art. 14. Note that China has signed but not yet ratified the ICCPR.

181. Bassiouni, *supra* note 148, at 57.

182. *See* United Nations Office on Drugs & Crime, *Manual on Mutual Legal Assistance and Extradition* 13–14 (2012) [hereinafter UNODC Manual]; *see also* Vivienne O'Connor, Int'l Network to Promote the Rule of L., *Practitioner's Guide: Common Law and Civil Law Traditions* (Mar. 2012), <https://www.fjc.gov/content/298338/practitioners-guide-common-law-and-civil-law-traditions-publication-inprol>.

configuration of checks and balances between coordinate branches of government—vary among legal systems as well.<sup>183</sup> Extradition, as a “combination of national and international law,” must reconcile these differences between states.<sup>184</sup>

Some have attributed China’s difficulty in securing extradition treaties with common law states to differences in their domestic legal systems.<sup>185</sup> The Chinese legal system, a civil law model with lingering Soviet influences,<sup>186</sup> has more in common with its civil law cousins than the world’s common law systems. Nonetheless, a great number of common and civil law countries maintain extradition treaties with each other despite their separate legal pedigrees, suggesting that mere incongruence of legal systems is not an insurmountable impediment. In recent decades civil and common law systems have gone to great lengths to overcome—or at least compromise over—their differences such that there is an increasing convergence of state practice.<sup>187</sup> The purpose of this section is to discuss the enduring legal differences between common and civil law states that account for the divergent postures toward extradition treaties with China.

#### *A. The Executive and the Legislature*

There is no general obligation under customary international law to prosecute or extradite individuals for non-international

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183. See, e.g., Michael V. Profit, *Refusing to Be One’s Own Witness: How the Privilege Against Self-Incrimination Differs in China, France, and the United States*, 8 ELON L. REV. 155 (2016) (noting that the countries differ on the scope of application, the time frame in which authorities must notify individuals of the privilege, and how and when evidence resulting from police misconduct is excluded).

184. Sadoff, *supra* note 110, at 135.

185. See, e.g., Kristin Huang, *China Renews Call For US Help On Cybercrime, Extradition Of Fugitive Corruption Suspects*, SOUTH CHINA MORNING POST (Oct. 5, 2017, 4:30 PM), <https://www.scmp.com/news/china/diplomacy-defence/article/2114134/china-renews-call-us-help-cybercrime-extradition> (quoting Zhang Deshui, deputy director of Peking University’s Clean Government Centre); Xie Chuanjiao & Zhang Yan, *Canada to Seize Assets and Extradite Fugitives: Envoy*, CHINA DAILY (May 25, 2015, 8:17 AM), [http://www.chinadaily.com.cn/china/2015-05/26/content\\_20817730.htm](http://www.chinadaily.com.cn/china/2015-05/26/content_20817730.htm) (noting “difficulties caused by differences between legal systems”); JLG Remarks by Bruce Ohr, *supra* note 129 (“[Repatriation] has not been a simple task. The legal systems of the United States and China are very different...”).

186. *CLA World Fact Book: China*, *supra* note 100.

187. GEOFF GILBERT, RESPONDING TO INTERNATIONAL CRIME 4 (2006) (“[S]ome of the great distinctions of the past between civil law and common law traditions...are becoming the subject of compromises, such that there is an increasing convergence of State practice.”).

crimes.<sup>188</sup> States opt into a duty to extradite along a spectrum of commitment.<sup>189</sup> In its condensed form, this spectrum consists of duties created by *ad hoc* agreement, treaty, and national legislation.<sup>190</sup> Under these options, a duty to extradite may be owed to a single state in a one-off, negotiated exchange or at the other extreme to all states in all exchanges. Because the duty to extradite originates in formal commitment alone, states set substantive conditions on extradition as well. Most states agree that treaty and domestic law are the exclusive sources of a *duty* to extradite.<sup>191</sup> However, legal bases for the *power* to extradite vary by state. Common law states historically rely on bilateral treaties supplemented by domestic legislation to regulate procedure while civil law states find a legal basis for extradition in reciprocity and comity in addition to treaty and legislation.<sup>192</sup> Comity and reciprocity are usually enshrined in treaties and national legislation.<sup>193</sup> Extradition treaties in common law states empower the executive because they grant authority to act where none existed before. Civil law extradition treaties, on the other hand, rest against a backdrop of preexisting executive discretion to extradite. They can enable or constrain.

In common law states, the executive branch cannot effectively conclude a treaty without legislative support. Among the common law countries, the United States requires two-thirds of Congressional approval for the President to conclude a treaty.<sup>194</sup> The practice of Australia and Canada has been to seek the approval of Parliament. While neither country technically requires parliamentary approval, it is required in practice because their respective parliaments are responsible for implementing legislation.<sup>195</sup> Extradition is no exception. This division of power lays the foundation for the traditional common law model of extradition, under which a treaty is required in order to extradite.

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188. Bassiouni, *supra* note 148, at 12–13. Contrast this with the arguably customary obligation to prosecute or extradite for *jus cogens* violations. *Id.* at 14.

189. *Id.* at 168–69. A duty to extradite may be found in multilateral treaty, bilateral treaty, *ad hoc* negotiation, specific reciprocity agreement, or reciprocity or comity enshrined in the national legislation of the requested state. States may also opt for informal comity or a general reciprocity undertaking, which do not create legal duties. *Id.*

190. *Id.* at 2, 43.

191. *Id.* at 43.

192. *Id.* at 42.

193. *Id.* at 8.

194. U.S. CONST. art. II, § 2, cl. 2.

195. Susan Downing, *Treaty-Making Options for Australia*, CURRENT ISSUES BRIEF 17, 25 (1996).

The United States is the strictest adherent to this model. Supreme Court precedent requires an extradition treaty or legislative grant of authority in place before the United States may grant extradition requests.<sup>196</sup> The same restrictions apply where there is a gap in an existing treaty.<sup>197</sup> The United States' practice of "disguised extradition" is also noteworthy as an executive strategy for circumventing certain legislative and judicial checks.<sup>198</sup> This is when the executive uses the less-stringent mechanism of immigration law to deport those it cannot legally extradite. In this way, it functions like a constrained version of *ad hoc* extradition.

The other common law states have strayed to varying degrees from the strict common law model, opting to grant their executives more flexibility. Nonetheless, these deviations for the most part remain faithful to the common law tradition in ways that maintain the differences between common and civil law states.

Australia's Extradition (Foreign States) Act of 1974 allowed the executive to extradite on the basis of reciprocity. It was repealed in March 2015—in time for legislative opposition to thwart the executive's extradition treaty with China.<sup>199</sup> The current Australian law, the Extradition Act of 1988, permits repatriation to an "extradition country" in addition to those with which Australia maintains a treaty.<sup>200</sup> Extradition countries are those designated as such in executive regulations promulgated by

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196. *Valentine v. United States*, 299 U.S. 5, 9 (1936) (holding that there is no duty to extradite besides that in treaty, and that "[t]here is no executive discretion to surrender [the sought individual] to a foreign government, unless that discretion is granted by law," i.e., express legislative or treaty provision); 18 U.S.C. § 3181(a) ("The provisions of this chapter [18 U.S.C.S. §§ 3181 et seq.] shall continue in force only during the existence of any treaty of extradition with such foreign government"); see also U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-15.100 (2018) (noting that the 1996 amendments to "18 U.S.C. 3181 and 3184 permit the United States to extradite, without regard to the existence of a treaty, persons [other than citizens, nationals or permanent residents of the United States], who have committed crimes of violence against nationals of the United States" overseas). Note also that many acts of repatriation are in fact "disguised extradition," which employ legal mechanisms other than extradition, such as deportation, to achieve the same effect, thereby circumventing legal standards for extradition. See Bloom, *supra* note 4, at 183. For a recent example of this, see Sarah N. Lynch, *China Hails First Fugitive Extradition from U.S. Under Trump*, REUTERS (June 1, 2017, 6:03 AM), <https://www.reuters.com/article/us-china-usa-crime/china-hails-first-fugitive-extradition-from-u-s-under-trump-idUSKBN18S4L6>.

197. Christopher L. Blakesley, *Extradition Between France and the United States: An Exercise in Comparative and International Law*, 13 VAND. J. TRANSNAT'L L. 653, 660 (1980) [hereinafter *Extradition between France and the US*].

198. Bloom, *supra* note 4, at 181.

199. *Extradition (Foreign States) Act 1974* (Austl.) (repealed Mar. 25, 2015).

200. *Extradition Act 1988* (Austl.).

Australia's Governor-General.<sup>201</sup> These regulations are also "subject to such limitations, conditions, exceptions, or qualifications as are necessary to give effect to a bilateral extradition treaty."<sup>202</sup> This scheme appears to accord the Australian executive much of the discretion embodied in the civil law tradition because it can domestically implement its own treaties. However, the Senate's power to disallow regulations acts as a crucial limitation on this discretion.<sup>203</sup> Thus, the legislative branch retains an important control over the executive even as it permits increased flexibility. The common law tradition has evolved but not eroded in Australia.

Even where common law states permit *ad hoc* extradition, they typically condition this grant of authority on greater safeguards for the human rights of the fugitive.<sup>204</sup> For example, Section 194 of the Extradition Act of 2003 permits the United Kingdom to respond to *ad hoc* extradition requests.<sup>205</sup> *Ad hoc* extraditions require a "memorandum of understanding" (MOU) between the United Kingdom and the requesting state.<sup>206</sup> Generally speaking, MOUs describe a form of agreement that may or may not create binding obligations under international law.<sup>207</sup> However, a report commissioned by the United Kingdom Secretary of State describes these MOUs as "a mini-extradition treaty" setting the terms of a one-off extradition.<sup>208</sup> *Ad hoc* extraditions from the United Kingdom must also adhere to the more stringent procedures imposed for "Category 2" countries under the Extradition Act of 2003, including the highly

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201. *Id.*

202. *Id.* § 11(1)(a). For example, Australia's regulations regarding Cambodia limit extraditable offenses to "child sex offenses." See Explanatory Statement, Extradition Act 1988, 2003 (Cth) s 55 reg. 34 (Austl.) (explaining the Extradition [Kingdom of Cambodia] Regulations 2003).

203. *Why the Government 'Pulled' Australia's Extradition Treaty with China*, *supra* note 124.

204. THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 255 (John P. Grant & J. Craig Barker eds., 2007) [hereinafter HARVARD RESEARCH IN INT'L LAW].

205. Extradition Act 2003, c. 41 § 194 (Eng.).

206. TT BAKER ET AL., A REVIEW OF THE UNITED KINGDOM'S EXTRADITION ARRANGEMENTS 455 n.238 (2011) (commissioned by the United Kingdom Secretary of State) [hereinafter REVIEW OF THE UK'S EXTRADITION ARRANGEMENTS].

207. Treaty vs. Memorandum of Understanding, Org. for the Study of Treaty Law (Oct. 14, 2015), <https://www.treatylaw.org/treaty-vs-memorandum-of-understanding/>.

208. REVIEW OF THE UK'S EXTRADITION ARRANGEMENTS, *supra* note 206; see also *The US-UK Extradition Treaty*, *supra* note 167 (describing the United Kingdom's two-category system, including some admitted inconsistencies in its classifications).

demanding<sup>209</sup> *prima facie case* evidentiary requirement.<sup>210</sup> Thus, the UK's grant of flexibility also exhibits a distrust of executive discretion in extradition.

In the furthest break from tradition with its common law peers, Canada's Extradition Act permits the executive to enter into "specific agreements" with other states to extradite in individual cases.<sup>211</sup> Essentially, this is *ad hoc* extradition, but with added safeguards contained in the Act itself, which prevail over the terms of any ad hoc agreement.<sup>212</sup> The Act also expressly identifies the legislative provisions that an extradition *treaty* may amend or override.<sup>213</sup> *Ad hoc* extraditions in Canada remain subject to higher evidentiary standards than in civil law states.<sup>214</sup>

A pattern emerges from these common law states. The degree to which they adhere to the traditional extradition model maps onto their current posture toward an extradition treaty with China. We can gauge this posture through executive outreach and legislative resistance. The executive is the most responsive branch to requests for extradition and extradition treaties, and not only because they are the point of contact for foreign governments. The practice of disguised extradition, even by common law countries that permit *ad hoc* extradition and even as their legislatures oppose an extradition treaty with China, showcases an executive desire for expediency that circumvents legislative and judicial obstacles to repatriation. In fact, China has sensed this legislative and judicial interference in executive agendas. Speaking for the Ministry of Foreign Affairs, Treaty Law Department Head Xu Hong (徐宏) has singled out *legislators* and *judges* as the primary blocks to American, Canadian, and

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209. The UK Home Office concluded in a 1982 review of extradition law that the *prima facie case* requirement resulted in the failure of approximately one third of extradition applications made to the United Kingdom. See HARVARD RESEARCH IN INT'L LAW, *supra* note 204, at 261.

210. *Review of the UK's Extradition Arrangements*, *supra* note 209, at 272; see also *The US-UK Extradition Treaty*, *supra* note 167.

211. Extradition Act, S.C. 1999, c 18, art 10(1) (Can.) (amended July 19, 2005).

212. *Id.* art 10(2).

213. NEW ZEAL. LAW COMM'N, MODERNIZING NEW ZEALAND'S EXTRADITION AND MUTUAL ASSISTANCE LAWS 21 (NZLC R 137) (2016) (explaining the Canadian system) [hereinafter NZLC Issues Paper 137].

214. Extradition Act, S.C. 1999, c 18, art 29(1) (Can.) (establishing a probable cause standard).

Australian extradition treaties with China.<sup>215</sup> Chinese scholars have blamed legislatures as well.<sup>216</sup>

Some common law executives are more receptive than others to China's pursuit of extradition treaties. It was Trudeau's executive decision to initiate Canada's High-Level National Security and Rule of Law Dialogue with China and to "start discussions" for an extradition agreement as part of these talks.<sup>217</sup> Australia's Turnbull administration championed the Sino-Australian treaty even as it was forced to abandon it in light of legislative opposition.<sup>218</sup> Similarly, New Zealand Prime Minister John Key has stated that an extradition treaty with China is "possible," albeit with some additional safeguards.<sup>219</sup> New Zealand also permits *ad hoc* extraditions.<sup>220</sup>

Legislative resistance to an extradition treaty with China exists in countries with receptive executive branches, and the strongest pushback has been where a treaty would most empower the executive. The United States has perpetually resisted an extradition agreement with China and maintains its archetypal common law extradition regime. The canned Sino-Australian extradition treaty was signed while Australian law experimented with a civil law model, but was abandoned when Australia returned to its common law roots. Even Canada is "a long, long way from negotiations."<sup>221</sup> True, it is within the

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215. *Negative Attitudes*, *supra* note 87.

216. *See, e.g.*, Chen Qinglai, *supra* note 31 (quoting Beijing Normal University law professor Huang Feng [黄风] that the United States *Congress* obstructs a treaty with China).

217. *Trudeau Says Canada Has 'Extremely High Standards' for Extradition*, *supra* note 126 (quoting National Democratic Party Leader and Conservative Interim Leader).

218. *Why the Government 'Pulled' Australia's Extradition Treaty with China*, *supra* note 124.

219. Charlotte Greenfield, *New Zealand Again Gives Approval for First Extradition to China*, REUTERS (Sep. 21, 2016, 4:46 AM), <https://www.reuters.com/article/us-newzealand-china-extradition-idUSKCN11R0S1>.

220. NZLC Issues Paper 137, *supra* note 213, at 3.1.

221. Nathan Vanderklippe, *Canada 'a Long, Long' Way from China Extradition Deal: McCallum*, THE GLOBE AND MAIL (Apr. 3, 2017), <https://www.theglobeandmail.com/news/world/canada-a-long-long-way-from-china-extradition-deal-mccallum/article34560846/> (statement of then-ambassador McCallum). McCallum has since resigned for comments made regarding the arrest and request for extradition of Huawei CFO Meng Wanzhou (孟晚舟) to the United States. The bilateral fallout over the Meng saga to Sino-Canadian relations makes the prospect of an extradition treaty more unlikely than ever. *See* Isobel Asher Hamilton, *Canada Fired Its Chinese Ambassador After His 'Mind-Boggling' Remarks on the Arrest of Huawei's CFO*, BUSINESS INSIDER (Jan. 28, 2019), <https://www.businessinsider.sg/justin-trudeau-fired-china-ambassador-over-comments-about-meng-wanzhou-2019-1/>; Chris Buckley, *China Sentences a Canadian, Robert Lloyd Schellenberg, to Death*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/world/asia/china-canada-schellenberg->

executive's power to *negotiate* a treaty that would be opposed in the legislature. However governments do not undertake expensive negotiations lightly or waste resources where there is no chance of success.<sup>222</sup>

Civil law states are more uniform in their extradition practice relative to their common law counterparts. All of them statutorily permit extradition in the absence of treaties. These statutes in turn yield to the precise terms of existing treaties.<sup>223</sup> In France, the authority to extradite in the absence of a treaty was once the king's birthright.<sup>224</sup> The country's Extradition Law of 1927 now grants this power to the French executive.<sup>225</sup> Under this law, extradition treaties circumscribe executive discretion to engage in *ad hoc* extradition.<sup>226</sup> Thus, French legislators have cabined *ad hoc* terms to where there is no treaty, where a treaty default occurs, or where there is a gap in an existing extradition treaty.<sup>227</sup> Where an extradition falls within the scope of a treaty, the executive is bound by the legislature's terms. The Law also influences the executive more subtly by functioning as an accepted guide for negotiating new extradition treaties.<sup>228</sup>

Similar or identical schemes exist in Spain, Portugal, Italy, and South Korea. Spain's Law on Passive Extradition does not require a treaty to extradite.<sup>229</sup> In the absence of a treaty, extradition may be granted on terms of reciprocity,<sup>230</sup> and treaty terms can supplant those in the Law.<sup>231</sup> The Portuguese Constitution and The Law on International Judicial Cooperation in Criminal Matters (LIJCCM) govern extradition from Portugal.<sup>232</sup> The Constitution sets absolute prohibitions on

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retrial.html (Schellenberg's sentence related to drug charges and China arrested two others for "endangering national security").

222. Magnuson, *supra* note 2, at 860.

223. HARVARD RESEARCH IN INT'L LAW, *supra* note 207, at 254-55.

224. *Extradition between France and the US*, *supra* note 197, at 657.

225. *Id.*

226. *Id.* at 658; *see also* Loi 830520 du 10 Mars 1927 de à l'extradition des étrangers [Law 830530 of March 10, 1927 on French Extradition], DIRECTION DES JOURNAUX OFFICIELS [J.O.] [OFFICIAL JOURNALS DIRECTORATE], June 28, 1983, art. 1.

227. *Extradition between France and the US*, *supra* note 197, at 658.

228. *Id.*

229. United Nations Convention Against Corruption Implementation Review Group, Executive Summary: Spain, CAC/COSP/IRG/2011/CRP.4 (May 27, 2011); *see also* Law on Passive Extradition art. 1 (B.O.E. 1985, 4) (Spain) [hereinafter Law on Passive Extradition (Spain)].

230. Law on Passive Extradition (Spain), *supra* note 229, art. 1.

231. *Id.*

232. CONSTITUTION OF THE PORTUGUESE REPUBLIC (PORTUGAL), 25 Apr. 1976, art. 33. [hereinafter CONSTITUTION OF PORTUGAL]; *see also* Law on International Judicial



certain extraditions<sup>233</sup> while the LIJCCM recognizes the primacy of treaties over domestic law and functions in the absence of a treaty or where a treaty is silent.<sup>234</sup> It also permits extradition based in comity or reciprocity.<sup>235</sup> The Italian Criminal Code permits extradition in the absence of treaty or international convention so long as it is not expressly prohibited by the same.<sup>236</sup> Extradition in the absence of a treaty is governed by the Italian Code of Criminal Procedure, which adds, among other things, protections of the criminal suspect's fundamental rights and a default procedure.<sup>237</sup> The Italian Constitution also creates absolute prohibitions on certain kinds of extraditions.<sup>238</sup> Korea permits extradition in the absence of a treaty as well. Extradition is, however, conditioned on reciprocity by the requesting state.<sup>239</sup>

The degree to which an extradition treaty would empower a country's executive correlates strongly with that country's posture toward an extradition treaty with China. Relatively speaking, common law legislatures require more convincing to form extradition treaties because in doing so they expand the power of their executives. Civil law legislatures, on the other hand, do not expand executive power when they endorse a treaty. They may even enact specific provisions that do the opposite.

### B. *The Executive and the Courts*

Differences in the executive-judicial relationship further reinforce the differing configurations of checks and balances in common and civil law states. Nearly all countries have adopted a scheme under which courts can prevent extraditions but cannot mandate them. However, common and civil law states diverge in the degree to which courts are free to second-guess executive

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Cooperation in Criminal Matters (Portugal), art. 31 *et seq.* (Law no. 144/99) [hereinafter LIJCCM (Portugal)].

233. Constitution of Portugal, *supra* note 232, art. 33(7), (3), (6) (noting prohibitions on certain extraditions such as the extradition of nationals, death, and irreversible physical damage).

234. LIJCCM (Portugal), *supra* note 232, art. 3.

235. *Id.* art. 4.

236. C.p., n. 13 (It.).

237. Codici di procedura penale [Code of Criminal Procedure of Italy] 7 Dicembre 2007, n.45974; *see also* ALTALEX MASSIMARIO, EXTRADITION ABROAD book 11, title II, chp I (2007).

238. *See* art. 10, 26 Costituzione [Cost.] (It.) (mandating no extradition unless expressly required by treaty, and no extradition for political offenses).

239. Korea Extradition Act, art. 4.

determinations. An extradition treaty generates less worry for civil law legislatures because their courts are less deferential to executive determinations when scrutinizing extradition requests. By comparison, a common law executive empowered by a treaty faces minimal judicial obstacles.

Extradition in all countries was entirely the prerogative of the executive until the nineteenth century.<sup>240</sup> In 1842, the United States and Great Britain committed themselves in treaty to providing a judicial hearing as part of the extradition process.<sup>241</sup> Both countries soon thereafter implemented this treaty through domestic legislation.<sup>242</sup> These laws established an extradition scheme under which the judiciary could block an extradition with a negative extradition ruling, but the executive retained discretion not to extradite in the event of a positive ruling. Many countries besides the United States and England have followed this “Anglo-American scheme,” including the developed nations with which China seeks to conclude or has concluded extradition treaties.<sup>243</sup>

Executive decisions to extradite, then, are in principle subject to judicial scrutiny in both common and civil law countries. The strength of this scrutiny varies with the degree of inquiry into the requesting state’s criminal justice system. Common law jurisdictions abide strictly by the “rule of non-inquiry.”<sup>244</sup> Under this rule, states respect each other’s laws, beliefs, and culture by not scrutinizing the requesting state’s justice system, legal processes, or the motivation behind a request for extradition.<sup>245</sup>

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240. Bassiouni, *supra* note 148, at 819.

241. *Id.* at 819 (referencing Webster-Ashburton Treaty, U.K-U.S., Aug. 9, 1842, Rest 3d. Forel Index W80).

242. *Id.* at 820. England did so through generic implementation legislation and the United States through the Extradition Statute of 1848. *See* 6 and 7 Vict., Chs. 75, 76; *see also* 33 and 34 Vict., Ch. 52; Act of August 12, 1848, ch. 167 (an act for giving effect to treaty stipulations). The scheme enacted by the 1848 Extradition Statute largely survives today. 18 U.S.C. § 3184.

243. *See* Bassiouni, *supra* note 148, at 819-20; *see also* § 12 Gesetz über die internationale Rechtshilfe in Strafsachen [Act on International Cooperation in Criminal Matters] (Ger.); IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 199 (1971) (citing France’s Extradition Law of 1927); IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 199 n. 4 (1971) (citing Japan’s extradition law); Law on Passive Extradition (Spain), *supra* note 229; CONSTITUTION OF PORTUGAL, *supra* note 232, art. 33(7).

244. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 92 (2012) (explaining because of the rule of non-inquiry, courts in common law jurisdictions are often discouraged from investigating into the fairness of the proceedings of the requesting state).

245. Sadoff, *supra* note 110, at 314; *see also* Bassiouni, *supra* note 148, at 633-42 (characterizing non-inquiry as an expression of respect for state sovereignty).

Where the executive opts not to scrutinize another state's legal system, this is an exercise in discretion—a deliberate act of comity toward another state. For courts, however, non-inquiry is a judicial rule mandating deference to the executive's determinations regarding a foreign state.<sup>246</sup>

Nominal challenges to the rule of non-inquiry have appeared in common law states, as human rights conventions impose obligations that arguably require exceptions to the rule.<sup>247</sup> Even so, these challenges remain nascent if not impotent. Several United States circuit courts mention in dicta how the right set of facts could produce an exception where the requested individual would be subject to severe violations of due process or cruel, inhuman, or degrading treatment upon repatriation.<sup>248</sup> In *Gallina v. Fraser*, for example, the Second Circuit conceived of 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 rule of non-inquiry].”<sup>249</sup> This decency standard has yet to be successfully invoked despite being affirmed in other cases.<sup>250</sup> Even with the existence of *Gallina*-like exceptions in several other circuits, none has ever denied extradition on humanitarian grounds.<sup>251</sup> The prevailing rule remains that “humanitarian considerations...are within the purview of the executive branch and generally should not be addressed by the courts in deciding whether petitioner is

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246. FEDERAL JUDICIAL CENTER, INT'L EXTRADITION: A GUIDE FOR JUDGES 25 (2014) (emphasizing that the doctrine of non-inquiry is based on notions of comity and institutional competence).

247. Bassiouni, *supra* note 148, at 663; *see also id.* at 801 (addressing the principle of non-refoulement as defined by the Convention Against Torture); John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U.L. REV. 1213, 1217-48, (1996) [hereinafter “*Non-Inquiry and Human Rights Treaties*”] (arguing United States federal courts are bound by the country's human rights treaty obligations to reject the rule of non-inquiry).

248. Bassiouni, *supra* note 148, at 638.

249. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960).

250. Donald K. Piragoff & Marcia V.J. Kran, *The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts*, 3 CRIM. LAW FORUM 225, 256-57 (1992) [hereinafter *Impact of HR on US-Canada Extradition*] (explaining that the *Gallina* exception, while affirmed in other cases, has never been successfully invoked to prevent extradition); *see also* Sindona v. Grant, 619 F.2d 167, 174-75 (2d Cir. 1980) (declining to interpret *Gallina* as holding that a magistrate must consider humanitarian considerations in making an extradition determination). Where the relator cited *Gallina* and the risk of murder or injury at the hands of political factions should he be returned to Italy, the Second Circuit held that this determination was for the executive to make. Bassiouni, *supra* note 148, at 942. The relator was ultimately extradited to Italy, where he was killed in his prison cell. *Id.* at 943.

251. Bassiouni, *supra* note 148, at 943.

extraditable.”<sup>252</sup> In principle, the Secretary of State’s discretionary decision to extradite can be reviewed for abuse of discretion under the Administrative Procedure Act. But this is virtually unheard of.<sup>253</sup>

Canada’s *Canada v. Schmidt* and *United States v. Allard* cases similarly recognize circumstances that would allow courts to block extraditions where the proceedings or penalties that the requested individual faces “sufficiently shock the conscience” or are “simply unacceptable.”<sup>254</sup> These standards impose a high bar, and the Canadian judiciary undertakes such inquiry “with caution.”<sup>255</sup> Scholars have noted a minimal role for the Judiciary in Canadian legislation as well, with one remarking, “it is difficult to understand why the judicial role has been retained in the [Extradition Act of 1999], as the extradition judge has little, if anything to do.”<sup>256</sup> The Minister of Justice cannot be *arbitrary* in the decision to extradite, but this is a minimal check on his or her authority.<sup>257</sup> Canada’s Extradition Act of 1999 envisions a role for the Judiciary in extraditions even less than that in the United States.<sup>258</sup>

Australia continues its “substantial shift away from judicial review of the extradition process towards the exercise of

252. *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006) (applying the non-inquiry standard even where petitioner claimed he would face torture and possibly be murdered if extradited to Albania).

253. M. Cherif Bassiouni, *Reforming International Extradition: Lessons of the Past for a Radical New Approach*, 25 LOY. L.A. INT’L & COMP. L. REV. 389, 408 (2003) (“The Secretary of State’s prerogative is discretionary. That discretion is reviewable under the Administrative Procedure Act.”).

254. *Canada v. Schmidt* [1987] 1 S.C.R. 500, 522-23 (Can.) (dismissing an appeal of a Canadian citizen resisting extradition to the U.S. for violation of Ohio law on the grounds that she was acquitted of the same charge under federal U.S. law); *United States v. Allard*, [1987] 1 S.C.R. 564, 572 (Can.) (finding that extradition could be denied if surrender is found to violate the principles of fundamental justice).

255. *Impact of HR on US-Canada Extradition*, *supra* note 252, at 249; *see also* *Argentina v. Mellino*, [1987] 1 S.C.R. 536, 556 (Can.) (“The courts may, as guardians of the Constitution, on occasion have a useful role to play in reviewing such decisions, but it is obviously an area in which the courts must tread with caution.”).

256. Anne Warner LaForest, *The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings*, 28 QUEEN’S L. J. 95, 172 (2002)

257. Gary Norman Arthur Botting, *Executive and Judicial Discretion in Extradition between Canada and the United States* 19 (Mar. 2004) (unpublished Ph.D. thesis) (on file with the University of British Columbia Library).

258. *Id.* at 8 (“Whereas in America there remains an interplay between executive discretion and the role of the judiciary in interpreting the legal rules and exemptions with respect to allowing supportive evidence, in Canada the new Act precludes the exercise of judicial discretion in these areas. There is virtually no interaction between the executive and the courts, and the statute specifically attempts to pigeon-hole the discretionary roles of the Minister [of Justice] and extradition courts so that they do not even intersect.”).

unreviewable executive discretion.”<sup>259</sup> The Australian High Court has held that this view “has force,”<sup>260</sup> and a report from the Joint Standing Committee on Treaties (JSC) commissioned by the Australian Parliament endorsed concerns “about the way in which the [Extradition Act of 1988] has placed responsibility for scrutiny of human rights protections in the hands of the executive rather than the courts.”<sup>261</sup> For example *Stanton v. DPP* held that the Extradition Act left no room for the court to consider whether the requested individual would receive a fair trial from the requesting state, the Philippines, even as the court expressed concern.<sup>262</sup> The Minister for Justice and Customs’ decision to extradite is technically reviewable in that a court may review the process but not the merits.<sup>263</sup> However, the JSC report found that the Minister’s discretion was “to a great extent unreviewable in practice”—indeed, no such review has ever blocked an extradition from Australia<sup>264</sup>—and noted a menacing synergy between the executive’s unreviewable discretion and the lowering of Australia’s evidentiary standards for extradition, which further diminished courts’ role as a foil to the executive.<sup>265</sup>

The legal status of non-inquiry is unclear in the United Kingdom. Its domestic orthodox approach is rigid non-inquiry.<sup>266</sup> The Extradition Act of 2003, through the Human Rights Act of 1998, apparently permits inquiry by domestic courts because it incorporates protections from the European Convention on Human Rights.<sup>267</sup> There has been at least one

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259. Ivan A. Shearer, *Extradition and Human Rights*, 68 AUSTL. L.J. 451, 452 (1994); see also Ned Aughterson, *The Extradition Process: An Unreviewable Executive Discretion?*, 24 AUSTL. YEAR BOOK OF INT’L L. 13 (2005) [hereinafter *Extradition: An Unreviewable Executive Discretion*] (noting that Shearer’s observation had “perhaps even greater force” in 2005).

260. *DPP v Kainhofer* (1995) 185 CLR 528, 541 (Austl.) (finding that there has been a substantial shift from judicial review of the extradition process towards the exercise of unreviewable executive discretion).

261. Parliament of Australia, Joint Standing Committee on Treaties, *Report 40: Extradition – A Review of Australia’s Law and Policy*, 4.17 (2001) (Austl.) [hereinafter Australian JSC Report 40].

262. *Stanton v. DPP* (Unreported, Federal Court of Australia, Spender J., Jan. 12, 1993) (Austl.) (finding the Attorney-General subsequently refused to surrender the individual).

263. *Extradition: An Unreviewable Executive Discretion*, *supra* note 259.

264. *Id.*

265. Australian JSC Report 40, *supra* note 261, at 4.17.

266. *Smith and Grady v. United Kingdom*, App. No. 33985/96, 29 Eur. H.R. Rep. 493 (1999).

267. *Extradition: An Unreviewable Executive Discretion*, *supra* note 259.

judicial denial of extradition on human rights grounds.<sup>268</sup> Even so, there is doubt as to meaningful erosion of non-inquiry.<sup>269</sup>

Suffice it to say that the rule of non-inquiry remains a fixture of common law courts despite nominal exceptions in case law. A rigid rule of non-inquiry effectively removes an important check on executive power and in doing so fuels legislative apprehension of the executive and, by extension, treaties the executive might enter. This worry is well founded, considering that judicial deference exposes national governments to political pressure from foreign governments and a de-emphasis on human rights.<sup>270</sup> This generalization holds true in the realm of extradition as well.

Civil law courts play a more active role in assessing whether extradition would violate an individual's human rights. France, for example, rejects the doctrine of non-inquiry and refuses extraditions that contravene domestic public policy (*ordre public*).<sup>271</sup> The Conseil D'État, France's highest administrative court,<sup>272</sup> has the power to quash extradition orders and inquire into the conditions of the requesting state when considering such orders. For example, where Spain requested the extradition of Basque separatists, the Conseil D'État found, as a prerequisite to extradition, that the Spanish judicial system respected individual rights and liberties.<sup>273</sup> The Conseil D'État has proven itself willing to exercise its power to prevent extraditions as well. In another case, Turkey requested the extradition of an individual on murder charges. When the French government communicated that extraditing an individual into possible capital punishment violated French *ordre public*, the Turkish government replied that capital punishment was only available for

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268. Owen Bowcott, *UK Court Refuses Turkey Extradition Due to Overcrowded Prisons*, THE GUARDIAN (Feb. 15, 2018), <https://www.theguardian.com/law/2018/feb/15/uk-high-court-refuses-turkey-extradition-due-to-overcrowded-prisons>.

269. *Extradition: An Unreviewable Executive Discretion*, *supra* note 259.

270. JOANNE FOAKES, FOREIGN AFFAIRS IN NATIONAL COURTS: THE ROLE OF THE EXECUTIVE CERTIFICATE (2015).

271. *Non-Inquiry and Human Rights Treaties*, *supra* note 247, at 1227; *see also* John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. & COMM. REG. 401, 423 (1990) [hereinafter *Non-Inquiry and the Impact of Human Rights on Extradition*] (describing the stated policy of France's Attorney General).

272. The French judicial system is comprised of judicial courts and administrative courts. The Conseil D'État acts as legal adviser to the executive as well as the highest administrative court. *See generally* GEORGETOWN LAW LIBRARY, THE LAYOUT OF THE FRENCH LEGAL SYSTEM, <http://guides.ll.georgetown.edu/c.php?g=362135&p=2446075> (last visited Oct. 29, 2019).

273. *In re Lujambio-Galdeano*, Conseil d'Etat, Assemblé Fr., Sep. 26, 1984, J.C.P. II No. 20346 (1985).

premeditated murder, which had not been charged in the case. The French government subsequently ordered the defendant's extradition with the understanding that he would not be executed, but the Conseil D'État prevented it because France failed to secure Turkey's assurance (or more specifically, that of the Turkish judiciary) that it would not execute.<sup>274</sup> A number of French courts of appeals have also prevented extraditions where the extraditee was convicted in absentia.<sup>275</sup> More recently, a French court refused to extradite the former prime minister of Kosovo to Serbia, reportedly out of concern that his right to a fair trial would be violated.<sup>276</sup>

Other civil law courts have integrated international law with domestic judicial practice. The Italian Court of Cassation recently blocked an extradition to Romania with reference to case law within Italy as well as that of the Court of Justice of the European Union and the European Court of Human Rights.<sup>277</sup> The Italian Court determined that information provided by Romania, which has a history of substandard prison conditions and abuse, was insufficient to verify the conditions awaiting the requested individual.<sup>278</sup> The burden fell on the Italian executive to obtain sufficient guarantees meeting international standards before the court would permit the extradition.<sup>279</sup> In another case, Italy's Justice Ministry agreed to extradite a suspect wanted for first-degree murder to the United States on the basis of diplomatic assurances by a Florida prosecutor's office that it would not seek the death penalty. The Italian Constitutional Court blocked the extradition, unanimously declaring unconstitutional legal provisions that would have enabled Italy to extradite the suspect so long as they received assurances that the death penalty would not be applied.<sup>280</sup>

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274. Judgment of Feb. 27, 1987 (Memik Fidan), Conseil D'État, 1987 D.S. Jur. 305 (Fr.).

275. *Non-Inquiry and the Impact of Human Rights on Extradition*, *supra* note 271, at 423.

276. Gašper Završnik, *France Refuses to Extradite Kosovo Ex-PM to Face War Crimes Charges*, POLITICO (Apr. 27, 2017), <https://www.politico.eu/article/france-refuses-extradite-kosovo-former-prime-minister-ramush-haradinaj-war-crimes/>.

277. Valeria Pescini, Civil Liberties Union for Europe, *Citing Torture Concern, Italy Court Blocks Prisoner Extradition to Romania* (Dec. 18, 2017), <https://www.liberties.eu/en/news/italian-cassation-stops-surrender-to-romania/13782>.

278. *Id.*

279. *Id.*

280. John Tagliabue, *Italian Court Blocks Extradition, Citing Death Penalty in Florida*, N.Y. TIMES (June 28, 1996), <https://www.nytimes.com/1996/06/28/world/italian-court-blocks-extradition-citing-death-penalty-in-florida.html>.

In short, civil law judiciaries often refuse to defer to executive determinations about the requesting country and the treatment awaiting a requested individual.<sup>281</sup> This trend includes the developed civil law states that have extradition treaties with China. It would also be a mistake to ignore the influence of powerful regional arrangements. The European Court of Human Rights is capable of blocking extradition and imposing a duty of inquiry on states.<sup>282</sup> Perhaps even more influential is the European Arrest Warrant system, which has “judicialized” the surrender of fugitives between European Union states by removing the decision from the executive and placing it wholly in the hands of courts.<sup>283</sup> While these mechanisms are regional in scope, they reflect an influential pattern of practice. This practice stands in contrast to that of common law states because civil law courts are more reliable foils to executive decisions to extradite.

### C. *Extradition of Nationals*

Prohibitions on the extradition of nationals comprise another legal divide between common law and civil law states. In fact, such prohibitions are arguably the most common barrier to

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281. Other noteworthy examples: Spain’s National Court blocked an extradition of HSBC computer engineer to Switzerland based on the merits because his actions did not amount to the crimes alleged. The claims against him were “somewhat confusing and inconsistent,” and his leaks in fact exposed other crimes. Ilan Brat, *Spain Refuses to Extradite Ex-HSBC Employee*, WALL STREET JOURNAL (May 8, 2013), <https://www.wsj.com/articles/SB10001424127887323744604578470671572774086>. Germany nominally practices non-inquiry but often allows challenges. In the *Yemeni Citizen’s Extradition Case*, for example, the German Federal Constitutional Court noted that “the requesting state is, in principle, to be shown trust as concerns its compliance with the principles of due process of law and the protection of human rights. This principle can claim validity as long as it is not shaken by facts to the contrary.” See Individual Constitutional Complaint, BVerfG, 2BvR 1506/03; ILDC 10 (DE 2003), 5 Nov. 2003. In *Soering v. United Kingdom*, Germany intervened to argue that extradition should be denied where inhuman or degrading treatment is anticipated in the requesting state. See 195 Eur. Ct. H.R. (ser. A) at 82 (1989). In considering whether to extradite a fugitive to China, the Tokyo High Court held that it was more appropriate for the executive to decide on the compatibility of China’s system of criminal justice with human rights norms because these issues “relate to prediction of facts to occur in future.” See sources cited *supra* note 34. Sweden and Argentina also do not adhere to a doctrine of non-inquiry. See *Non-Inquiry and Human Rights Treaties*, *supra* note 247, at 1226-28.

282. See, e.g., Bassiouni, *supra* note 148, at 346 (discussing situations where the European Court of Human Rights has blocked extraditions). The factual analysis of conditions in the requesting state applied by the Court of Human Rights is “not wholly compatible with the doctrine of non-inquiry.” *Id.* In particular the Court explicitly does not apply non-inquiry with respect to the violation of certain fundamental rights. *Id.*

283. UNODC Manual, *supra* note 182, at 20.



extradition.<sup>284</sup> Traditionally speaking, common law states extradite their own nationals while civil law states do not.<sup>285</sup> This difference is often explained in terms of jurisdiction—common law states exert territorial jurisdiction over individuals, while civil law states claim universal, and often exclusive, jurisdiction over nationals and are frequently prevented from extraditing their own by legislation or constitutional provisions.<sup>286</sup> This is the case for the developed civil law countries that have extradition treaties with China. The executives of Spain, Portugal, France, and Italy generally cannot extradite nationals.<sup>287</sup> Korea retains discretion to extradite.<sup>288</sup> Exceptions to this rule are quite strict. For example, Spain and France require reciprocity, limit the practice to within the European Arrest Warrant system, and require that a national be returned to serve his or her sentence in their country if convicted.<sup>289</sup> Portugal's constitution forbids extraditing nationals,<sup>290</sup> though the Portuguese Supreme Court has permitted extradition within the European Union even in the absence of reciprocity.<sup>291</sup> Italy may only extradite nationals where expressly allowed by treaty, and specific treaties between close political and diplomatic allies occasionally permit the extradition of nationals.<sup>292</sup> But generally civil law countries do not extend this special treatment beyond a close comfort zone.

Common law states, on the other hand, do not draw a distinction between nationals and non-nationals for the purposes of extradition.<sup>293</sup> These states must therefore contemplate the fate of their own citizens under a treaty. A government-

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284. Sadoff, *supra* note 110, at 234.

285. Australian JCST Report 40, *supra* note 261, at 3.101.

286. Sadoff, *supra* note 110, at 324-36 (describing the civil law tradition).

287. See U.S. LIBRARY OF CONGRESS, LAW ON EXTRADITION OF CITIZENS (2013) (offering a comprehensive list of countries' extradition practices).

288. *Id.*

289. *Id.*; see also NICHOLLS ET AL., THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE 289 (3d ed. 2013) [hereinafter LAW OF EXTRADITION] ("The Spanish Constitutional Court... held that Spain should not extradite its own nationals in the absence of reciprocity.").

290. CONSTITUTION OF PORTUGAL, *supra* note 234, art. 33(1).

291. LAW OF EXTRADITION, *supra* note 288, at 289.

292. Magnuson, *supra* note 2, at 881; see also Extradition Treaty of the United States and Italy, art. IV, Oct. 13, 1983, T.I.A.S. 10837.

293. See U.S. LIBRARY OF CONGRESS, LAW ON EXTRADITION OF CITIZENS (2013); see also Australian JCST Report 40, *supra* note 261, chs. 3.41, 3.103 (noting that Australia does not extradite nationals and discussing the similar policies in other common law jurisdictions).

commissioned report to the United States Congress, for example, notes:

[S]ometimes not pursuing [extradition treaties] is a conscious choice, even where there is a possible law enforcement need. This is because extradition treaties are reciprocal and in addition to obtaining the return of fugitives to the United States, we must be prepared to surrender fugitives, including U.S. nationals, to face the legal, judicial and penal systems of our treaty partners. Where we are not prepared to do so, we do not pursue such a treaty even though that may mean foregoing the possibility of obtaining the extradition of fugitives from that country.<sup>294</sup>

The United States further adheres to a policy of extraditing nationals even where treaty partners cannot (due to domestic law) or will not reciprocate.<sup>295</sup> While the Secretary of State has statutory discretion to refuse extradition of citizens, it is essentially unreviewable (under the Administrative Procedure Act), and therefore is no guarantee to individual citizens who can in theory be sacrificed for the sake of bilateral relations.<sup>296</sup> This scheme—a general policy that does not distinguish between nationals and non-nationals, coupled with (rarely-invoked) discretion to refuse extradition of nationals—is a general feature of common law governments.<sup>297</sup>

An extradition treaty therefore carries risks for common law citizens and political repercussions for the elected officials accountable for putting their extradition into law. These costs are not borne by the citizens and political branches of civil law states.<sup>298</sup> Whereas these risks are minimized in a treaty with a trusted ally, they are salient in a treaty with a country like China that is often accused of human rights and fair trial violations as

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294. Admiral James W. Nance & Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001, Pub. L. No. 106-113, §211, 113 Stat. 1501 (1999).

295. *Id.* § 705.

296. 18 U.S.C. § 3196 (“If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a . . . citizen . . . if the other requirements of that treaty or convention are met.”); Bassiouni, *supra* note 148, at 751.

297. *See, e.g.*, Australian JCST Report 40, *supra* note 261, chs. 3.105, 3.108 (noting Australia’s policy and quoting an expert for the statement that discretion to refuse extradition of nationals is a general common law feature).

298. Magnuson, *supra* note 2, at 880.

well as political prosecutions aimed at silencing dissidents and critics.<sup>299</sup> These concerns further intensify the common law reluctance to conclude extradition treaties.

#### D. Evidentiary Standards

Evidentiary standards have long been regarded as one of the most intractable issues in extradition between common and civil law states.<sup>300</sup> This is beginning to change, however, as common law states increasingly accommodate their civil law extradition partners. Civil law systems generally do not insist on any evidence in connection with an extradition hearing.<sup>301</sup> Instead, they typically require a *bona fide* indictment or arrest warrant and proof that the person to be extradited is indeed the person sought.<sup>302</sup> Civil law states take these documents at face value,<sup>303</sup> granting extradition so long as a treaty's other formal obligations are fulfilled.<sup>304</sup> In contrast, common law systems traditionally impose higher evidentiary requirements to effectuate extradition. Such requirements range from the (strictest) "*prima facie* case" requirement to the (more lenient) "probable cause" requirement, to the (most lenient) "reasonable probability" requirement.<sup>305</sup> These requirements subject extradition requests to the

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299. See, e.g., Tom Lennox, *Extradition Treaty with China Is a Bad Deal for Justice*, THE AUSTRALIAN (Jan. 27, 2017), <https://www.theaustralian.com.au/opinion/extradition-treaty-with-china-is-a-bad-deal-for-justice/news-story/4011381927b6ac11193dbbb5702536bf> (highlighting numerous examples of Chinese malfeasance in the extradition context, including an apparent extralegal kidnapping).

300. Sadoff, *supra* note 110, at 215.

301. *Id.* at 216. *But see supra* note 204 (holding up the European Extradition Convention of 1957 as an exemplar of the civil law model and noting that it has no evidentiary requirement). Germany and the Scandinavian countries employ higher evidentiary requirements on a discretionary basis, making them exceptions within the community of civil law states. *Id.* at 262 n.58.

302. Sadoff, *supra* note 110, at 216.

303. Bassiouni, *supra* note 148, at 527.

304. *Id.* at 821. Article 12 of the European Extradition Convention of 1957 provides an illustrative example. It requires a written request supported by (1) an authenticated copy of the conviction, sentence, arrest warrant, or similar document; (2) a statement of the offenses for which extradition is requested, including the time and place of their commission and their legal descriptions; and (3) a copy or statement of relevant law and information helpful to identify the individual sought. Notably, there is no evidential requirement. See European Extradition Convention of 1957, Dec. 13, 1957, E.T.S. No. 024.

305. Sadoff, *supra* note 110, at 216. The *prima facie* case requirement demands evidence sufficient to convict the individual sought in the courts of the requested state. Probable cause calls for reasonable grounds to believe the individual committed the alleged crime, though not necessarily enough to convict. Reasonable probability is that sufficient to undermine confidence in the outcome of the sought individual's case. *Id.* at nn.192-94.

evidentiary standards of the *requested* state.<sup>306</sup> In other words, an extradition request will meet the *prima facie* case requirement for country X where evidence is sufficient to convict the defendant *in country X*.<sup>307</sup>

Nowadays, many common law countries relax procedural rules for the benefit of requesting states. For example, hearsay from a requesting state may be admissible because extradition hearings are not necessarily bound by all rules of evidence that would apply at trial.<sup>308</sup> That being said, common law extradition hearings sometimes deem evidence inadequate even though hearings are not supposed to hash out the merits of the case.<sup>309</sup> Examples of inadequate evidence include situations where the defendant will have no opportunity to confront a key witness, statements are suspiciously identical,<sup>310</sup> the information was collected unlawfully (under duress, torture, or unauthorized surveillance), or the reviewing court sniffs out bad faith, corruption, or discriminatory intent.<sup>311</sup> In this way courts have occasionally attempted to use evidence to cover ground left barren by a strong rule of non-inquiry.

Disparate evidentiary standards have long impeded extradition because common law standards are “alien to civil law states’ investigation-prosecution procedure.”<sup>312</sup> In the past, common law states have reported that requesting civil law states have trouble meeting their more stringent tests.<sup>313</sup> To cite a dramatic example, an Anglo-Spanish extradition treaty lapsed in 1978 because England had not granted a single Spanish request, mainly due to Spain’s inability to meet the *prima facie* case

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306. See ADB/OECD Thematic Review, *supra* note 23, at 45.

307 For example, the United States Supreme Court has defined the probable cause standard as requiring “competent evidence to justify...trial.” *Collins v. Loisel*, 259 U.S. 309, 316 (1922) (denying Collins’s petition for writs of habeas corpus in part because “[i]t was not the function of the committing magistrate to determine whether Collins was guilty, but merely whether there was competent legal evidence which, according to the law of Louisiana, would justify his apprehension”). While this evidence need not be enough to justify a conviction, *id.*, it must meet the federal standards set forth in 18 U.S.C. § 3184. Thus, evidence appended to an extradition request must be enough to justify a domestic trial, had the conduct been committed in the requested state. *Id.* at 314-15.

308. *Collins*, 259 U.S. at 317.

309. Sadoff, *supra* note 110, at 217-18.

310. *Id.*

311. *Id.* at 220-21.

312. See *supra* note 204.

313. ADB/OECD Thematic Review, *supra* note 23, at 46.

requirement.<sup>314</sup> Moreover, the United Kingdom Home Office concluded during a 1982 review of extradition law that approximately one third of extradition applications made to the United Kingdom failed due to the requesting state's inability to satisfy the *prima facie* case requirement.<sup>315</sup> Under its 2003 Extradition Act, the United Kingdom now requires *prima facie* evidence from most states. However, it maintains lower evidentiary standards with nations in the European Arrest Warrant System, and has designated its close common law allies—Australia, Canada, New Zealand, and the United States—as states that need only meet a “reasonable suspicion” test when seeking extradition.<sup>316</sup>

The United States adopts probable cause as its default standard,<sup>317</sup> but most recent extradition treaties follow the civil law evidentiary standard.<sup>318</sup> The United States appears unprepared to extend this relaxed evidentiary standard to China. In opening remarks to the Joint Liaison Group on Law Enforcement Cooperation's Anti-Corruption Working Group, then-United States Associate Deputy Attorney General Bruce Ohr highlighted disparate evidentiary standards as an obstacle to U.S.-China extradition. He noted that the sharing of information had been “slow and difficult” and requested that China “furnish evidence in a form that, while different from that which might be used in their own courts, is admissible in a U.S. court.”<sup>319</sup>

Canadian case law similarly defaults to evidence that “would justify committal for trial in Canada.”<sup>320</sup> However, its Extradition Act also permits evidence in the form of “the record of the case.”<sup>321</sup> The record of the case must include a summary of the evidence to be used against the requested individual in the

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314. See *supra* note 204. The Anglo-Spanish treaty has since been revived. See Kathryn Wescott & Vanessa Barford, *10 Things About Extradition*, BBC (June 27, 2013), <http://www.bbc.com/news/magazine-23029814>.

315. See *supra* note 204.

316. See *The US-UK Extradition Treaty*, *supra* note 167.

317. Sadoff, *supra* note 110, at 216 n.191; see also RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATE §312, cmt. f (Am. L. Inst., Tentative Draft No. 3, 2017).

318. Sadoff, *supra* note 110, at 215 n.184.

319. JLG Remarks by Bruce Ohr, *supra* note 129.

320. Extradition Act (Can.), *supra* note 211, § 29(1); see also *Ho v Australia* (In re Extradition of Ho), 2000 BCSC 1744, ¶ 19 (Can.) (“The role of the extradition judge is...to determine whether a *prima facie* case has been made out that would justify the Applicant's committal for trial if his conduct had taken place in Canada.”).

321. Extradition Act (Can.), *supra* note 211, § 32(1).

requesting state. Moreover, a judicial or prosecutorial authority of the requesting state must also certify that—under its own laws—the evidence is available for trial, was legally obtained, and is sufficient to justify prosecution.<sup>322</sup> The practical result of this system is to meet civil law systems half way. For example, it permits the introduction of hearsay, but will require more than a *bona fide* prosecution document and proof of identity. New Zealand currently maintains a *prima facie* case standard for non-exempted countries, but the New Zealand Law Commission in 2016 recommended a streamlined “case to answer” standard that mimicked Canada’s “record of the case” approach.<sup>323</sup>

Australia has been particularly flexible on evidence, primarily for the purpose of facilitating treaties with civil law countries.<sup>324</sup> Evidentiary requirements in Australian treaties range from *prima facie* case (e.g., with Hong Kong and Israel) to probable cause (e.g., with the United States and South Korea) to “no evidence” (numerous treaties), which is essentially the civil law standard.<sup>325</sup> Its now-rejected extradition treaty with China would have adhered to the “no evidence” standard.<sup>326</sup> Australia also maintains a warrant-backing program with New Zealand.<sup>327</sup> While it retains the *prima facie* evidence standard in a number of treaties, particularly those with other Commonwealth countries, Australia has adopted “no evidence” as its preferred model for extradition treaties, requiring the requesting country to provide only documentation such as a duly authenticated statement of the offense and the applicable penalty, the warrant for arrest, and a statement setting out the alleged conduct constituting the offense.<sup>328</sup> A full brief of evidence is not necessary. Australia has been able to conclude 38 extradition treaties since permitting “no evidence” in extraditions.<sup>329</sup> Thus, historical differences over

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322. *Id.* §§ 33(1), 33(3).

323. See NZLC Issues Paper 137, *supra* note 213, ch. 9 (discussing evidence).

324. See EP AUGHTERSON, EXTRADITION: AUSTRALIAN LAW AND PROCEDURE 217 (1995) (quoting from *Kindler v. Crosbie*, [1991] 2 S.C.R. 779, 844 (Can.), a landmark Supreme Court of Canada case that implies reciprocity is more important than evidentiary standards in the extradition context).

325. Australian JCST Report 40, *supra* note 261, ch. 2.23.

326. Australian JCST Report 167, *supra* note 24, ch. 3.32.

327. See Rynae Butler, *Imbalance in Extradition: the Backing of Warrants Procedure with Australia Under Part 4 of the Extradition Act 1999*, N.Z. CRIM. L. REV. 63 (2017) (examining the impact warrant-backing, a “simplified” extradition process, agreed to between New Zealand and Australia).

328. ADB/OECD Thematic Review, *supra* note 23, at 97.

329. NEW ZEALAND LAW COMMISSION, EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS ch. 7.22 (2014).

evidence required for extradition have not prevented common law states from increasingly accommodating civil law standards.

#### VIII. THE COMMON LAW-CIVIL LAW DIVIDE EXPLAINED

Multiple political and legal factors apply equally across common and civil law states with actual and potential extradition treaties with China. Political differences between China and the developed democracies with which it seeks extradition treaties mean that the political offense exception is a pronounced legal hurdle between them. Common and civil law states relatedly share grave concerns about China's criminal justice and human rights record. They harbor distrust of China as a rising power and strategic rival. Lastly, states must make individual calculations about a costly treaty's practical, political, and diplomatic value. These common concerns and country-specific valuations are undoubtedly relevant to any extradition treaty. However, they cannot entirely explain the common law-civil law divide over extradition treaties with China.

Domestic legal differences provide a more coherent explanation of the common and civil law divide over extradition treaties with China, chief among which are the nature of executive authority and existing checks on that authority. The common law configuration creates barriers to treaty formation that do not exist in civil law states because common law executive branches ordinarily cannot extradite without a treaty and treaties require legislative approval. Once empowered by treaty, the executive faces limited resistance from courts, which have fewer tools at their disposal to block extraditions due to a rigid rule of non-inquiry. Conversely, civil law extradition treaties can circumscribe the executive's preexisting power to extradite. Civil law courts are also less deferential to executive determinations, and have proven themselves willing to frustrate executive attempts to extradite in ways that are not possible for common law courts.

Second, the extradition of nationals poses a unique challenge for common law states. It is best conceptualized as an aggravator of substantive issues, rather than an issue in its own right, because it broadens the scope of existing worries to encompass the extraditing country's own nationals. This comprises a weightier obligation on a state and substantially increases the domestic

political costs of an extradition treaty.<sup>330</sup> Meanwhile, the domestic impact of civil law extradition treaties is more limited because they do not implicate the extradition of nationals.<sup>331</sup> Where the physical integrity and liberty of domestic constituencies is secured, the political branches enjoy more freedom to conclude extradition treaties.

Third, evidentiary standards obstruct extradition treaties to the extent that common law countries persist in maintaining high standards for extradition requests from countries like China. There is reluctance to invest in a treaty that, like the Anglo-Spanish treaty that lapsed in 1978, may well crumble under the weight of its own evidentiary requirements.<sup>332</sup> Sunk costs aside, this kind of failure may generate more diplomatic fallout than no treaty at all. At the same time, lowering evidentiary standards for an extradition treaty with China removes perhaps the most significant common law protection of individual rights after a treaty enters into force.<sup>333</sup> Removing familiar evidentiary protections, as most if not all common law states have done to some degree, facilitates the conclusion of extradition treaties with civil law states. However, it simultaneously raises domestic anxieties about assuming a binding treaty obligation with lower evidentiary standards that may be applied in the extradition of its own nationals.

These particular differences amount to an important thematic difference between states. Common law systems require more convincing to conclude a treaty because extradition treaties represent a “point of no return” that does not exist for civil law systems. Under the common law model, the decision to enter into a treaty in the first place is the major gateway protection of

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330. See Magnuson, *supra* note 2, at 880 (discussing the impact of excluding/including nationals in a treaty).

331. This is not to say that the individual costs of extraditing non-nationals are entirely ignored. Domestic constituencies may advocate for the interests of requested individuals and pressure their political branches to fulfill domestic and international obligations. The international community is another source of pressure on governments.

332. See *supra* note 204; see also JLG Remarks by Bruce Ohr, *supra* note 129 (“Because evidentiary laws differ, we ask our partners to furnish evidence in a form that, while different from that which might be used in their own courts, is admissible in a U.S. court in order to build a case against that country’s fugitives in the United States. If we do not get this evidence, we will be unable to proceed against that fugitive in our courts.”).

333. See Australian JCST Report 40, *supra* note 261, ch. 4.17 (indicating lower evidentiary standards diminished human rights protections); see also Sadoff, *supra* note 110, at 217-21 (noting the ways common law courts use evidence as a de facto protector of other rights, e.g., by inferring corruption, collusion, discriminatory intent, or other bad faith from the requesting state).



individual rights because without one there can be no extradition. Once a treaty is concluded, individuals are significantly more vulnerable to extradition. Common law states can extradite their own nationals, and courts have a limited ability to check executive determinations and decisions, even as they are charged with interpreting the text of treaties. Many grounds for refusal are discretionary. Executive decisions of this type are subject only to administrative review that is insurmountable in practice. Other grounds, such as the political offense exception, the rule of double criminality, and the principle of specialty, exist for the benefit of states, not individuals.<sup>334</sup> Even “mandatory” grounds for refusal require an executive determination that receives tremendous deference in common law courts.

An extradition treaty under the civil law model is not a momentous commitment, but a mere adjustment of the status quo—the executive’s preexisting power to extradite. A treaty can impose greater restrictions on extradition, or if need be, streamline the process by lifting restrictions within legislative and constitutional bounds. Furthermore, civil law systems retain a number of protections regardless of whether an extradition treaty is in place. Civil law systems do not—and in some states cannot—extradite their own nationals except to a shortlist of partners in a select few arrangements. Even where states permit the extradition of nationals, they typically mitigate post-conviction worries by demanding the convicted individual be returned to their country for punishment. Civil law courts also play a strong role in scrutinizing extradition requests, one that permits an inquiry into whether an extradition will result in rights violations for the requesting individual.

I reference the common and civil law “models” above because these are necessarily generalizations. This paper has shown that states diverge to varying degrees from the “ideal type” of their distinct legal pedigrees. A fine-grained analysis could pinpoint each country somewhere along a common-to-civil law spectrum. For my purposes, it is enough to show that the nature of the executive power to extradite, the strength of legislative and judicial checks on that power, the extradition of nationals, and to a lesser extent, evidentiary standards collectively

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334. Dugard & Van den Wyngaert, *supra* note 19, at 188; *see also* United States v. Barinas, 865 F.3d 99, 105 (2d Cir. 2017) (holding that only states, not defendants, have prudential standing to invoke the rule of specialty objection to extradition).

explain the common law-civil law divide over extradition treaties with China. This analysis has broader significance as well. A similar pattern emerges from a tentative glance at the extradition network of Russia and Turkey.<sup>335</sup> These countries, like China, are characterized by cooperative potential as well as strategic and human rights challenges. As countries seek to modernize their extradition regimes and increase global cooperation in the realm of law enforcement, the common law-civil law divide and its underlying causes should inform their efforts.

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335. Regarding Russia, the civil law countries discussed in this paper have all assumed an obligation to extradite to Russia under the European Convention on Extradition (ECE). European Extradition Convention of 1957, Dec. 13, 1957, E.T.S. No. 024. Common law states have not, with the exception of the United Kingdom, which is a signatory to the ECE. Even so, the United Kingdom has designated Russia a “Category 2” country requiring a *prima facie* case evidence for extradition. See PROSECUTOR GENERAL’S OFFICE OF THE RUSSIAN FEDERATION, BASIC DOCUMENTS: BILATERAL EXTRADITION TREATIES, [https://genproc.gov.ru/ms/ms\\_documents/megdu/prin/](https://genproc.gov.ru/ms/ms_documents/megdu/prin/) (last visited Oct. 29, 2019); PROSECUTOR GENERAL’S OFFICE OF THE RUSSIAN FEDERATION, MULTILATERAL TREATIES GOVERNING EXTRADITION, [https://genproc.gov.ru/ms/ms\\_documents/megdu/reglam/](https://genproc.gov.ru/ms/ms_documents/megdu/reglam/) (last visited Oct. 29, 2019). The common law-civil law divide also exists in Turkey, albeit to a lesser extent. Turkey has bilateral treaties with Australia and the United States in addition to its extradition arrangements under the ECE. See DIRECTORATE GENERAL FOR INTERNATIONAL LAW AND FOREIGN RELATIONS (TURKEY), EXTRADITION OF THE CRIMINALS, [http://www.uhdigm.adalet.gov.tr/english/Extradition\\_Of\\_The\\_Criminals\\_2.html](http://www.uhdigm.adalet.gov.tr/english/Extradition_Of_The_Criminals_2.html) (last visited Oct. 29, 2019). Australia concluded its treaty during its “civil law phase.” See Treaty on Extradition between Australia and the Republic of Turkey, Mar. 3, 1994, [2003] ATS 24 (entered into force Nov. 16, 2003). The United States’ 1981 treaty was aimed at modernizing a preexisting obligation under a 1923 treaty with Turkey. See Treaty on Extradition and Mutual Assistance in Criminal Matters, U.S.-Turk., June 7, 1979, 32 U.S.T. 3111; Jimmy Carter, *United States-Turkey Treaty on Extradition and Mutual Assistance in Criminal Matters Message to the Senate Transmitting the Treaty*, in THE AMERICAN PRESIDENCY PROJECT (1979). This obligation has currently placed the United States in an extradition predicament. See Julian Borger, *Turkey Requests Extradition of Fethullah Gülen, But Not for Coup Attempt*, *SAYS US*, THE GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/world/2016/aug/23/turkey-fethullah-gulen-extradition-request-joe-biden-ergodan>.

IX. APPENDIX

*A. China's Current Extradition Treaties*

Data on treaties comes from China's Ministry of Foreign Affairs and is dated February 2017.<sup>336</sup> Legal classifications are from the *CLA World Factbook*.<sup>337</sup>

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336. 我国对外缔结司法协助及引渡条约情况 [China's Status in Concluding Legal Assistance and Extradition Treaties].

337. *CLA World Fact Book*, *supra* note 100.

	Country	Legal System	Date Signed	Entry into Effect
1	Thailand	Civil law with common law influences	8/26/1993	3/7/1999
2	Belarus	Civil law	6/22/1995	5/7/1998
3	Russia	Civil law	6/26/1995	1/10/1997
4	Bulgaria	Civil law	5/20/1996	7/3/1997
5	Romania	Civil law	7/1/1996	1/16/1999
6	Kazakhstan	Civil law influenced by Romano-Germanic law and Russian theory and practice	7/5/1996	2/10/1998
7	Mongolia	Civil law influenced by Soviet and Romano-Germanic systems	8/19/1997	1/10/1999
8	Kyrgyzstan	Civil law with features of French and Russian laws	4/27/1998	4/27/2004
9	Ukraine	Civil law	12/10/1998	7/13/2000
10	Cambodia	Civil law influenced by customary law, Communist legal theory, common law	2/9/1999	12/13/2000
11	Uzbekistan	Civil law	11/8/1999	9/29/2000
12	South Korea	Mixed system of European civil law, Anglo-American law, and Chinese classical thought	10/18/2000	4/12/2002
13	Philippines	Mixed system of civil, common, Islamic, and customary law	10/30/2001	3/12/2006
14	Peru	Civil law	11/5/2001	4/5/2003
15	Tunisia	Mixed system of civil and Islamic law	11/19/2001	12/29/2005
16	South Africa	Mixed system of Roman-Dutch civil law, English common law, and customary law	12/10/2001	11/17/2004
17	Laos	Civil law	2/4/2002	8/13/2003
18	United Arab Emirates	Mixed system of Islamic and civil law	5/13/2002	5/24/2004
19	Lithuania	Civil law	6/17/2002	6/21/2003
20	Pakistan	Common law with Islamic law influence	11/3/2003	1/10/2008
21	Lesotho	Mixed system of English common law and Roman-Dutch law	11/6/2003	10/30/2005
22	Brazil	Civil law	11/12/2004	8/16/2014

23	Azerbaijan	Civil law	3/17/2005	12/1/2010
24	Spain	Civil law with regional variations	11/14/2005	4/4/2007
25	Namibia	Mixed system of uncodified civil law based on Roman-Dutch and customary law	12/19/2005	9/19/2009
26	Angola	Civil law based on Portuguese system	6/20/2006	10/17/2013
27	Algeria	Mixed system of French civil law and Islamic law	11/6/2006	9/22/2009
28	Portugal	Civil law	1/31/2007	7/25/2009
29	France	Civil law	3/20/2007	7/17/2015
30	Mexico	Civil law with US constitutional law influence	7/11/2008	7/7/2012
31	Bosnia-Herzegovina	Civil law	12/20/2012	10/12/2014
32	Italy	Civil law	10/7/2010	12/13/2015
33	Iran	Religious legal system based on secular and Islamic law	9/10/2012	1/14/2017
34	Tajikistan	Civil law	9/13/2014	1/18/2017

B. *Non-Exhaustive List of International Extradition Standards Reflected in the UN Model Treaty on Extradition*

Standard	Explanation	Article
Double criminality	Extraditable offenses are only those that are punishable under the laws of <i>both</i> parties.	2
Specialty	The extradited person can only be tried for the offense for which extradition was granted, or one to which the requested state consents.	14
Nationality	A requested state may refuse to extradite its own nationals.	4(a)
Political Offense Exception	Refusal is mandatory for offenses regarded as an “offense of a political nature” by the requested state.	3(a)
Non-Discrimination	Refusal is mandatory if the purpose of extradition is to prosecute or punish a person on account of that person’s race, religion, nationality, ethnic, origin, political opinions, sex or status, or that that person’s position in	3(b)

	court may be prejudiced for any of those reasons.	
Military Offense Exception	Refusal is mandatory if the offense for which extradition is requested is an offense under military law but not ordinary criminal law.	3(c)
Double Jeopardy (“ <i>non bis in idem</i> ”)	Refusal is mandatory if there has been final judgment rendered against the person in the requested state.	3(d)
Immunity	Refusal is mandatory if the person has become immune from prosecution or punishment for any reason, including lapse of time or amnesty.	3(e)
Torture and Other Cruel, Inhuman, Degrading Treatment Or Punishment	Refusal is mandatory if the person sought was or would be subject to such treatment, or if the person has not or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights, article 14.	3(f)
Death Penalty	Refusal is optional if the offense for which extradition is requested carries the death penalty under the law of the requesting state, <i>unless that state gives assurance</i> , considered sufficient by the requested state, that the penalty will not be imposed, or at least will not be carried out.	4(d)
Humanitarian Considerations	Refusal is optional if the extradition would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of the person sought.	4(h)
Fair Trial and Due Process	Refusal is mandatory if the person sought has had judgment rendered against him or her <i>in absentia</i> (and there will be to opportunity for retrial) or has not had sufficient notice of the trial or opportunity to arrange his or her defense. The Model Treaty also provides for optional refusal where competent authorities in the requested state have decided to drop charges, where the requested state lacks jurisdiction under its own laws, or where the individual sought faces trial by an extraordinary or <i>ad hoc</i> court or tribunal.	3(g); 4(b); 4(e); 4(g)