

THE LAW AND POLICY CONTEXT OF EXTRADITION FROM AUSTRALIA TO THE PEOPLE'S REPUBLIC OF CHINA

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One cost of China's remarkable economic growth since 1978 has been levels of corruption among some public officials, significant enough to seriously erode public confidence in government and the Communist Party of China, and even threaten certain areas of domestic economic growth. Anti-corruption strategies seek to locate and repatriate corrupt officials, who have fled overseas as 'economic fugitives'. In furtherance of these strategies, China has sought to ratify a number of bilateral extradition treaties, including the Treaty on Extradition between Australia and the People's Republic of China, which Australia signed in 2007, but abandoned its only attempt to ratify in March 2017, due to domestic political pressure and strident criticism of its terms. Ratification is important to China, not only to supplement its pursuit of economic fugitives, but also to help enhance its soft power and diplomatic prestige internationally, and the political legitimacy of the Communist Party domestically. It is important to Australia as a means of demonstrating goodwill, to preserve crucial law enforcement collaboration, and to protect its markets with its largest trading partner. This paper argues that the current treaty impasse cannot be appropriately resolved either by ratifying the treaty in its current form or by requesting amendments that are unlikely to be acceptable to China. It considers several other interim alternatives and assesses their potential to reconcile China's need to save face and Australia's need to honour its commitment to the Rule of Law and preserve its international human rights reputation.

I CHINA'S PURSUIT OF ECONOMIC FUGITIVES – ECONOMIC AND POLITICAL CONTEXTS

The People's Republic of China ('China') has the legitimate interests and rights of any sovereign state in seeking to prevent citizens who commit offences from evading investigation and prosecution by crossing national borders. Furthermore, there is no doubt that the threats posed to China's economy and to its internal political stability as a result of the endemic nature of public sector corruption, which have arisen largely as an unintended consequence of the dramatic success of three decades of Deng Xiaoping's Comprehensive Economic Reforms and Opening-Up policies, are very real and require urgent and coordinated government responses. Australia should not underestimate the importance that China is placing on the repatriation of economic fugitives, or assume that this is simply (or solely) some veiled policy of chasing down political or regime opponents.

When Deng Xiaoping came to power in 1978 after the disastrous years of the Cultural Revolution, China's economy was moribund, with an almost non-existent export sector. By 2015, the hybrid 'socialist market economy' had become the world's second largest and had experienced economic growth at or above 10% for close to three decades.¹ Corruption flourished partly because the regulatory mechanisms were not yet in place to prevent it, especially at provincial and local levels, after a rapid devolution of authority in order to give effect to economic policies designed to stimulate commerce and business nationally. In addition,

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¹ International Monetary Fund, *China: Gross Domestic Product, Current Prices* (April 2017) World Economic Outlook Database <<https://www.imf.org/external/pubs/ft/weo/2017/01/weodata/index.aspx>>.

the sheer level of profit to be earned from corrupt practices within state owned enterprises ('SOEs'), meant government officials tasked with policing corruption, frequently colluded. In many areas, for example, cartels were formed so that if a particular vendor was not in 'business' with the right public officials in the district (who were responsible for authorising distribution and transport) they would soon be out of business, and price fixing became endemic.² The threat to the economy from this level of corruption is reflected by its impact on GDP.³ Household spending as a percentage of GDP in China is well below the Organisation for Economic Co-operation and Development (OECD) average. Chinese economists blame this, in part, on the amount of money that is drained from the domestic market by corrupt officials and private citizens who gamble vast amounts in Macau casinos,⁴ launder it, or flee with it overseas.⁵ Strategies aimed at combatting all these unlawful wealth drains have been aggressively pursued.⁶ As its economy has matured and China pivots away from export-led growth (the key driver of its economic success since the 1990s)⁷ towards a consumption-led growth model,⁸ preventing the drain of money out of the country has become a top policy priority.

The threat to internal political stability, grounded in perceptions of the waning legitimacy of the Communist Party's mandate to exclusive rule, which is exacerbated by unchecked corruption is taken just as seriously by Party leaders.⁹ The young Chinese people of today are living in a paradigmatically different economic and social world to that of most of their parents and grandparents. Prior to 1978, restrictions on internal mobility, let alone travel overseas meant that the opportunity to relocate from a rural area to a city in search of better employment or services was virtually impossible. Employment was controlled by the state and most citizens were assigned to a *danwei* (work unit) in a location different from their home-town, depending on skills and training, and attached to that work unit for life. Land and home ownership was impossible for individuals and permission was required in order to marry and have children. The average annual income in 1978 was US\$155. Annual income is now US\$8200 and rising rapidly (by 7.8% in 2013 alone).¹⁰ The one-child policy has been abolished. Private businesses and employment, entrepreneurship, and ownership of land,¹¹ residential and commercial property is common: only 8% of citizens rely on government

² Yufan Hao, 'From Rule of Man to Rule of Law: An Unintended Consequence of Corruption in China in the 1990s' (1999) 8(22) *Journal of Contemporary China* 405. According to Fenby, the scale of profiteering became so great that in 1988 the Party announced that it had expelled 150,000 CCP members – but this had negligible impact because of that number a mere 97 were officials at provincial level or above, indicating that there was insufficient political will for a serious anti-corruption campaign of the type we have seen embarked upon by Xi Jinping: Jonathan Fenby, *The Penguin History of Modern China: The Fall and Rise of a Great Power, 1850 to the Present* (Penguin Global, 2013) 579.

³ The anti-corruption measures themselves have made some local governments reluctant to engage in development projects for fear that partners may be engaged in corrupt conduct. These measures alone have affected GDP by as much as 1.5% annually: BNP Paribas, *Emerging Economies and Country Risk* (7 April 2015) 8 <<http://economic-research.bnpparibas.com/Views/DisplayPublication.aspx?type=document&IdPdf=25525>>.

⁴ T Wing Lo and Sharon Ingrid Kwok, 'Triad Organized Crime in Macau Casinos: Extra-Legal Governance and Entrepreneurship' (2017) 57(3) *British Journal of Criminology* 589.

⁵ And indirectly, the anti-corruption campaign has slowed retail sales in luxury goods, and in entertainment and service industries, because people are reluctant to be seen to give expensive gifts to public officials – a practice that was once common.

⁶ By tightening currency controls to limit outgoing funds to less than US\$6500 per visit to Macau, refusing to enforce gambling debts in Chinese courts, and by incarcerating 'junket providers' from casinos who try to lure high rollers from China, the PRC government has contributed to a fall in VIP revenue in Macau casinos from US\$29 billion in 2014 to US\$14 billion in 2016: Muhammad Cohen, *Macau's Casino Junkets Fight Back On China's Anti-Graft Rules... Will it be Enough?* (17 June 2016) *Forbes Asia* <<https://www.forbes.com/sites/muhammadcohen/2016/06/17/macau-junket-leader-explains-corruption-link-vip-promoters-go-on-offense/#1dd0daec1bcf>>.

⁷ One reason for this is that labour costs involved in all stages of manufacturing have increased, so that despite the fact that China's export markets have continued to grow, the profits from those exports have decreased: A Kubo, 'Trade and Economic Growth: Is Export-Led Growth Passé?' (2011) 31(2) *Economics Bulletin* 1623.

⁸ Chor Foon Tang, Yew Wah Lai and Ilhan Ozturk, 'How Stable is the Export-Led Growth Hypothesis? Evidence from Asia's Four Little Dragons' (2015) 44 *Economic Modelling* 229.

⁹ The credibility of the Party leadership and hence the legitimacy of the Party itself has been in question ever since the demise of the Maoists in 1976.

¹⁰ World Bank, *China: GNI per Capita* (at 8 February 2017) DataBank <<http://data.worldbank.org/country/china>>.

¹¹ The term of Land Use Rights for residential dwellings is meant to be 'automatically renewed upon expiration' of the 70-year term: Art 149 *property Law of the People's Republic of China*, National People's Congress, 16 March 2007. The State Council is currently drafting amendments to confirm that there will be perpetual free renewals of these interests: Xinhua News Agency, *Li Keqiang 70 Years in Response to Property Rights Issues: Has Instructed the Relevant Departments to Move the Motion* (15 March 2010) <<http://finance.sina.com.cn/china/2017-03-15/doc-ifychhuq4651990.shtml>>. In practice this will be functionally identical to private

for their income and China has the world's largest number of US-dollar billionaires (594 compared to 535 in the USA as of October 2016).¹²

This radical transformation in lived experience has required enormous cooperative effort, faith and compliance on the part of ordinary Chinese people – a reality which the Party has been careful not to take for granted after the Tiananmen riots of 1989. But there has been an inevitable crisis of faith in the relevance of Marxism and socialism, and falling levels of trust in the Party as a result of liberalisation, exposure to Western lifestyles and worldviews, and an increasing appetite for consumerism. The Party is therefore eager to construct itself as the only force able to effectively maintain and progress this improved standard of living (especially for the burgeoning middle class)¹³ and as the custodian of social stability, which has always been seen as the greatest existential threat to prosperity in China's historically fractured polity.¹⁴ Corruption reached a point where there were some catastrophic effects on levels of public confidence in executive probity, leading to politically dangerous high profile protests in the more notorious cases.¹⁵ A key component of the government's response to this threat has been to ensure that the campaign to repatriate economic fugitives, who are often among the worst category of offender, is highly visible and ruthless for both deterrence and propaganda purposes.

'Operation Fox Hunt'¹⁶ (now referred to as 'Skynet') is the official campaign to locate and return economic fugitives and stolen assets from overseas.¹⁷ Since its inception in 2014, the Chinese Communist Party's Central Commission for Discipline Inspection ('CCDI') claims to have repatriated over 2,000 fugitives from 70 countries and recovered 7.62 billion yuan in illegal assets.¹⁸ As this operation, and other processes, have evolved, China has realised that fugitives tend to resettle in countries with which there is no existing bilateral extradition treaty (such as Australia, Canada, the USA and Singapore). This has led to both a renewed focus on asset freezing and recovery,¹⁹ and on diplomatic efforts to secure treaty ratification with these countries. Significant progress in treaty ratification has already been made with European Union (EU) countries.²⁰ China is also willing to use its soft power and economic influence as leverage in persuading

land ownership: Donald Clarke, *Has China Restored Private Land Ownership? The Implications of Beijing's New Policy* (16 May 2017) Foreign Affairs <<https://www.foreignaffairs.com/articles/china/2017-05-16/has-china-restored-private-land-ownership>>.

¹² *Hurun Rich List 2016* <<http://www.hurun.net/en/ArticleShow.aspx?nid=20868>>.

¹³ In Zheng Wang, 'The Chinese Dream: Concept and Context' (2014) 19(1) *Journal of Chinese Political Science* 1, the author discusses the extent to which the Party is styling this as part of 'the Chinese Dream', a new 'signature ideology of the CCP'.

¹⁴ From the founding of the PRC in 1949 until the end of the Cultural Revolution in 1976, the Party (and hence the nation) had been polarised by wild swings in policy and political power, factionalised to the point where wholesale purges of political enemies, often facilitated by the ideological manipulation of large groups of citizens and cadre, made effective governance impossible. Due to Mao's failed industrial and agricultural policies during the Great Leap Forward (1958-1962), for example, were the key factors in the famine deaths of up to 40 million people. See Ralph Thaxton, *Catastrophe and Contention in Rural China: Mao's Great Leap Forward Famine and the Origins of Righteous Resistance in Da Fo Village* (Cambridge University Press, 2008).

¹⁵ One such example is the Three Gorges Dam project in Hubei Province, designed for power generation, flood mitigation and facilitating commercial shipping along the Yangtze River, which has been plagued with cases of official corruption for decades. Much of this has been highlighted by disgruntled locals who were promised government assistance to relocate, but have suffered from huge amounts being siphoned off by unscrupulous government employees and contractors. Ninety seven were arrested in 1999 and one executed: *Three Gorges Migrant Victims Decry Corruption and Abuse* (10 December 2017) Probe International <<https://journal.probeinternational.org/2007/12/10/three-gorges-migrant-victims-decry-corruption-and-abuse-2/>>. A 2013 audit found that of 83.7 billion Yuan allocated for the relocation of residents and industrial infrastructure, at least 279 million Yuan was misappropriated or misused. In other cases, officials were prosecuted for engaging in accepting bribes from contractors for dam-related work. The scale of the corruption involved, and the depth of public anger resulted in the investigations and prosecutions being referred by police to the Party Disciplinary Office: *\$45.5 Million of Three Gorges Relocation Fund Misused: Audit* (8 June 2013) Probe International <<https://journal.probeinternational.org/2013/06/08/45-5-million-of-three-gorges-relocation-fund-misused-audit/>>.

¹⁶ President Xi Jinping's promise for the operation was to swat down both 'tigers' (powerful government and Party figures likely to be organising corrupt 'networks') and 'flies' (lower-level government officials).

¹⁷ In conjunction with the People's Bank of China Anti-Money Laundering Monitoring and Analysis Center, which will soon require financial institutions to report any cross-border transfers of 200,000 Yuan (\$28,800): see *People's Bank of China Order [2016] No. 3, Measures for the Administration of Large Transactions and Suspicious Transactions of Financial Institutions* (revised), President of the People's Bank of China (9 December 2016) ch 2 art 5 <<http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3223812/index.html>>.

¹⁸ Zhang Yan and Cao Yin, *CCDI Shows Progress in Hunt for Corrupt Officials* (5 September 2016) China Daily <http://www.chinadaily.com.cn/china/2016-09/05/content_26697231.htm>.

¹⁹ Zhang Yan, 'Recovery of Fugitives' Illegal Assets is Focus of New Initiative' (21 September 2016) China Daily <http://www.chinadaily.com.cn/china/2016-09/21/content_26849470.htm>.

²⁰ Seven EU member states have ratified extradition treaties with China. They are Bulgaria, France, Italy, Lithuania, Portugal, Romania and Spain.

developing nations to extradite those it seeks to repatriate (whether or not they are classified as economic fugitives). In April of 2016, for example, Kenya agreed to extradite 45 Taiwanese citizens to the PRC, and the day after the Taiwanese citizens were forcibly extradited, Kenya accepted a \$600 million loan from China as assistance to cover its budget deficit for the 2015–2016 financial year.²¹

In pursuing economic fugitives, the Party leadership prefers to rely on its own CCDI as the vehicle for combatting official corruption,²² rather than the state's legal system, despite the implications of the inevitable lack of transparency. Being a Party-State, this is not an unusual or counter-intuitive practice, at least in the domestic context.²³ The official justification the Party provides for deploying the Commission in this role is that virtually all of the officials being investigated are Party members.²⁴ CCDI has so far conducted over 200,000 investigations. The methods used by the CCDI in conducting its investigations, especially its use of the notorious *shuanggui* interrogation process, is (as discussed in Part III) one of the grounds on which extradition agreements with China have been objected to.

In its execution of Operations Foxhunt and Skynet, China has tracked the destinations of hundreds of alleged economic fugitives and disseminated information about them widely.²⁵ A number have been traced to Australia. Some have been repatriated back to China despite the lack of a bilateral treaty, in circumstances that create perceptions of strategies that offend Australia's sovereignty. The probity of the processes by which these people have ended up back in China, given the gravity of the offences with which they were charged, the very strong likelihood of conviction, and the punitive nature of the penalties they could expect, has been called into question (as is analysed in Part III).

Although China does not have a bilateral extradition arrangement with Australia it can make extradition requests to Australia pursuant to various multilateral conventions to which both countries are a party. The *United Nations Convention against Corruption*²⁶ is sometimes suggested as a viable alternative to a bilateral treaty in that it can stand as the legal basis for extradition, but (as discussed in Part IV) it does not seem to have yet acted as a disincentive to economic fugitives and neither Australia nor China have pursued it as a serious alternative.²⁷

For both nations, a bilateral treaty would make at least the process of bringing alleged economic fugitives within the jurisdiction of China's own legal system more transparent and engender trust. For its part, the Australian government seems determined to persist in the attempt to have the current treaty ratified,

²¹ *Update 1 – Kenya Says to get \$600 mil from China to Help Fund 2015/16 Deficit* (8 April 2016) Reuters Africa <<http://af.reuters.com/article/kenyaNews/idAFL5N17B37J>>.

²² *Constitution of the Communist Party of China* art 44 provides that the main tasks of the CCDI include to 'uphold the Constitution of the Party...to check up on the implementation of the line, principles, policies and resolutions of the Party' and to organise and coordinate 'work against corruption'.

²³ In a Party-State polity, implementing Marxist principles of governance, it is not the separation of state powers which is seen as the best method of ensuring a strong, resilient and stable society, but the concentration of power. That power is concentrated, nominally, in the mechanism of the Party organisation which is the direct voice of the people acting to shape and dictate policy. For that reason, the Party apparatus and the state apparatus are inextricably linked.

²⁴ There is a body within the State Council's supervisory jurisdiction – the Ministry of Supervision ('MOS') – which is nominally charged with maintaining administrative discipline within the organs of the state, including the investigation of alleged corruption, and in the past both the MOS and the CCDI frequently conducted investigations against the same person. Functionally, the MOS has been absorbed by the CCDI and the Minister of Supervision is also a Deputy Secretary of the CCDI.

²⁵ China Daily (the Communist Party's press outlet) published an illustrated list of the details of 100 of the 'most wanted' alleged economic fugitives provided to it by the CCDI: *Interpol Launches Global Dragnet for 100 Chinese Fugitives* (23 April 2015) <<http://www.chinadaily.com.cn/china/att/site1/20150423/002170196e1c16a28b910f.pdf>>, and ensured it was distributed worldwide, including personally to as many members of the Chinese diaspora as it could reach. It has also published an infographic which lists 10 of these as currently residing in Australia: Lui Jing, *Infographic: Lowdown on Fugitive Officials* (23 April 2015) <http://www.chinadaily.com.cn/china/2015-04/23/content_20520108.htm>. Interpol currently lists 45 people as 'wanted' by China: Interpol, *Website* (at 20 October 2017)

<[https://www.interpol.int/notice/search/wanted/\(RequestingCountry\)/146/\(current_age_maxi\)/100/\(search\)/1/](https://www.interpol.int/notice/search/wanted/(RequestingCountry)/146/(current_age_maxi)/100/(search)/1/)>.

²⁶ *United Nations Convention Against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) ('UNCAC').

²⁷ These multilateral conventions also limit the range of offences for which extradition can be requested to the specific offences they contemplate. The advantages of a bilateral agreement are that it allows extradition for offences punishable under the laws of both countries.

despite a fraught procedural history and continuing objections to China as an appropriate treaty partner, regardless of the formal terms.²⁸

II AUSTRALIAN EXTRADITION LAW AND THE PROCEDURAL HISTORY OF THE TREATY

A country that requests to extradite one of its own citizens from Australia must be an ‘extradition country’²⁹ as declared by a regulation, pursuant to the provisions of the *Extradition Act 1988* (Cth) (the ‘Act’).

Generally, that regulation will either give domestic legal effect to a ratified bilateral or multilateral extradition treaty, or simply declare that the country is an ‘extradition country’ for the purposes of the Act.³⁰ Where a treaty exists, the regulation will append the text of the treaty so that any request for extradition will need to comply with both the requirements of the Act and those of the treaty.³¹ Where no treaty exists, the regulation will contain a provision entitled ‘Application of the Act in relation to [name of country]’, which lists any permissible variations to the statutory requirements that apply³² (such as time a person may be on remand before appearing before a magistrate).³³ So a treaty is not essential in order for an extradition request to be approved as the Act provides for various alternative arrangements.³⁴ Part II of the Act sets out the mandatory legal requirements that must be complied with before a person may be surrendered for extradition from Australia to another country.³⁵

Even where a bilateral treaty exists, the political or economic relationship between states can deteriorate to the point where compliant extradition requests become fraught or simply rejected. Similarly, one state may decide to reject a request from a treaty partner simply because one of its own requests was rejected (possibly in relation to a politically sensitive defendant), or the requested state may consider that the requesting state’s unlawful or aggressive pursuit of alleged fugitives within its own sovereign territory, or that of a third nation, is in breach of international law or demonstrates a disdain for sovereignty which it does not want to be seen to condone.³⁶ As discussed below, this is conduct of which the Chinese government itself has been repeatedly accused in recent times.³⁷

On 6 September 2007, the *Treaty on Extradition between Australia and the People’s Republic of China* (the ‘Treaty’)³⁸ was signed, submissions taken, and a public hearing conducted by the Joint Standing

²⁸ Nations with which China has sought to enact a bilateral treaty in order to facilitate the pursuit of both political and economic fugitives include Afghanistan, Kazakhstan, Kyrgyzstan, Russia, Tajikistan (all of which are parties to the *Refugee Convention*) as well as Bhutan, India, Laos, Mongolia, Myanmar, Nepal, North Korea, Pakistan, and Vietnam (all of which are not parties to the Convention): Andrew Wolman, ‘Chinese Pressure to Repatriate Asylum Seekers: An International Law Analysis’ (2017) 29(1) *International Journal of Refugee Law* 84, 93.

²⁹ *Extradition Act 1988* (Cth) s 5(b) ‘extradition country’ (the ‘Act’).

³⁰ The Act provides other mechanisms for the recognition of extradition arrangements with New Zealand and with certain Commonwealth nations.

³¹ Act s 11(1).

³² Ibid s 11 ‘Modification of Act in relation to certain countries’.

³³ Ibid s 17.

³⁴ Ibid s 5. Examples include the *Extradition (Canada) Regulations 2004* (Cth) and the *Extradition (Former Yugoslav Republic of Macedonia) Regulations 2009* (Cth). Thirty-one countries are currently named as extradition countries by regulation: Attorney General’s Department (Cth), *Australia’s International Crime Cooperation Arrangements* <<https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Documents/alphabetical-country-index.pdf>>. Other extradition countries are those Commonwealth member states recognised pursuant to the London Scheme and New Zealand by virtue of the endorsement of warrants pursuant to pt III of the Act.

³⁵ The Attorney-General determines under s 22(2) whether a person is to be surrendered to an extradition country in relation to an extradition offence, according to the criteria set out in ss 22(3)-(4). These criteria include many of the mandatory requirements that would appear in the terms of an extradition treaty.

³⁶ For example, the Supreme Court of Costa Rica invalidated that country’s 1991 extradition treaty with the USA, after the US Supreme Court allowed Humberto Alvarez-Machain to be tried in an American criminal court after he had been abducted in Mexico and brought to El Paso, by men hired by the US Drug Enforcement Agency: Michael Abbell, *Extradition to and from the United States* (Brill, 2010) 7–15.

³⁷ In relation to both the alleged abduction of Chinese nationals from Hong Kong and the luring of Tang Dongmei from Melbourne back to China in May 2016 and her subsequent confession to serious offences.

³⁸ *Treaty on Extradition between Australia and the People’s Republic of China*, opened for signature 6 September 2007, ATNIF 26 (not yet in force).

Committee on Treaties ('JSCOT')³⁹ on 2 May 2016. But with the change of government in November of that year, it was not then tabled for ratification in the Parliament until 2 March 2017. Successive governments seemed reluctant to bring the *Treaty* up for ratification until in December of 2016, the JSCOT⁴⁰ concluded its inquiry regarding the *Treaty* by supporting it⁴¹ and recommending that it be ratified,⁴² despite the inclusion of a dissenting report by Labor members of the Committee.⁴³

The Notice to Ratify the *Treaty* was subsequently tabled on 2 March 2017, the government intending that it would pass through both Houses by the time of the visit of Chinese Premier Li Keqiang. The Opposition in the Senate, along with minor parties signified their intention to oppose ratification, and a number of Government backbenchers threatened to cross the floor and also vote against it. Concerned that China's perceived loss of face and political embarrassment, as a result of the spectacle of a Senate decision to strike the motion to ratify down, would affect other aspects of its relationship with Australia (most notably in the area of trade),⁴⁴ the Government withdrew the Notice to Ratify on 28 March 2017 before a Senate vote on a disallowance motion⁴⁵ could be moved.

Shortly after the withdrawal of the Notice (on 21 April 2017), the Australian Foreign Minister and Attorney-General met with the Chinese Communist Party's Central Commission for Political and Legal Affairs ('CCPLA') in Sydney. In a joint statement from that meeting, it was declared that 'Australia and China agreed to strengthen pragmatic cooperation under the criminal justice framework, and improve efficiency and quality of cooperation' and that 'Australia reaffirmed its commitment to pursue ratification of the bilateral extradition treaty'.⁴⁶

The statement also advises that a second session of the China–Australia High-Level Security Dialogue will be held in China in the first half of 2018, which may indicate that the Australian Government hopes to have the *Treaty* ratified before then. The current Federal Opposition has not ruled out supporting ratification and has expressly stated that its objections are 'not just in relation to the extradition treaty with China, but a number of other treaties which were discussed in the context of the joint standing committee's report'. But it has flagged its intention to push for an independent review of the *Act* to 'ensure that Australia's extradition system continues to be consistent with community expectations and international legal obligations regarding the rule of law and human rights'.⁴⁷

The pressing question then becomes whether the legal, jurisprudential and human rights objections raised in connection with the *Treaty* are significant enough that future attempts to ratify will be vulnerable to a similar fate. If so, we need to consider what interim alternatives to a bilateral treaty are possible, and whether they are likely to reconcile the competing policy positions.

³⁹ Of the 44th Parliament.

⁴⁰ Of the 45th Parliament.

⁴¹ The current Committee of the 45th Parliament had resolved to accept the evidence received by the previous Committee of the 44th Parliament and not call for further submissions, but did hold one further public hearing on 24 November 2016.

⁴² Joint Standing Committee on Treaties (Cth), *Nuclear Cooperation-Ukraine; Extradition-China* (2016) ('*JSCOT Report*') 39 [3.60] Recommendation 6 – The Committee supports the *Treaty on Extradition Between Australia and the People's Republic of China* and, noting the power of the Minister for Justice to refuse extradition under the *Extradition Act*, recommends that binding treaty action be taken.

⁴³ *Ibid* 53.

⁴⁴ The bilateral trade relationship was valued at approximately \$152 billion as of 2014: Department of Foreign Affairs and Trade (Cth), *Australia's Trade at a Glance* <<http://dfat.gov.au/trade/resources/trade-at-a-glance/Pages/default.aspx>>.

⁴⁵ Which had been lodged the day before by independent Senator Corey Bernardi, in the form of – Notice of Motion in the Senate 'that the *Extradition (People's Republic of China) Regulations 2017*, made under the *Extradition Act 1988* (Cth), be disallowed'. Since notice to disallow was given by Senator Bernardi on 21 March 2017, s 42(2) of the *Legislation Act 2003* (Cth) had the effect that once 15 sitting days elapsed since notice was given to disallow the regulations, they were then taken to have been disallowed. For a record of this process see: Commonwealth, Senate, *Notices of Motion for Disallowance 2017*. <http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/statements/disallowance/2017>.

⁴⁶ Department of Foreign Affairs and Trade (Cth), 'Australia-China High-Level Security Dialogue: Joint Statement' (Media Release, 21 April 2017) pt 1(1)–(2) <<http://dfat.gov.au/news/media-releases/Pages/high-level-security-dialogue-with-china-joint-statement.aspx>>.

⁴⁷ *JSCOT Report*, above n 42, 62 [1.27] Recommendation 1.

III SELECTED OBJECTIONS TO THE TREATY IN CONTEXT

The most serious objections that have been raised in relation to this treaty, even when dressed in diplomatically sensitive language, illustrate a deep distrust among Australian jurists, politicians and public policy analysts, of the respect for standards of due process and human rights within the Chinese legal-political system and the probity of the officials who make assurances about its compliance with those standards. In examining these objections, it is essential to have an appreciation of some fundamental differences in how China conceives of concepts such as ‘rights’, ‘the rule of law’ and ‘separation of powers’, to avoid the sort of two-dimensional, parochial perspective which so often leads to policy impasse between China and some Western nations in the first place.

First of all, China is a Party-State in which all the organs and institutions of the State operate quite differently to their equivalents in a liberal democracy such as Australia. The formation of the communist PRC in 1949 was modelled on the Soviet Union according to Marxist–Leninist principles.⁴⁸ China has a detailed and sophisticated written *Constitution* which provides for the functions and powers of the legislature, executive and judiciary (and how they interact) – but in ideology and practice, these rules and policies are all subject to Party direction in how they are interpreted and implemented. Due to the realities of ‘democratic centralism’⁴⁹ and its role as the exclusive representatives of what the *Constitution* describes as ‘the people’s democratic dictatorship’, the Party sits legitimately at the top of all State institutions. Through its control of the Standing Committees of all key agencies, it sets policy and makes key decisions at every level. The Party is rarely mentioned in statutes or in the *Constitution*, as its authority precedes the existence of the current legislature (both physically and ideologically). Its operations and structure are regulated by its own constitution and normative instruments. So to that extent, the Party is both outside and above ‘the law’ in China, despite the fact that any particular individual is (at least nominally) subject to it.⁵⁰ President Xi Jinping has expressed that reality in these words:

...the fundamental political reality, but also China’s basic rule of law is that one must adhere to the leadership and governance of the Chinese Communist Party. This basic national policy means that our country’s style of democratic politics cannot engage in the Western multi-party system and the separation of the three powers.⁵¹

The second contextual factor is the implications that this Party-State relationship has for the strongest objection to the *Treaty*, lack of mechanisms to ensure China’s compliance with mandatory human rights obligations under the *Extradition Act*. JSCOT states in its report that ‘[t]he secrecy and lack of transparency attached to China’s judicial system—combined with allegations of the mistreatment of detainees and prisoners—have heightened concerns about this Treaty’.⁵² Given that most, if not all, alleged economic fugitives extradited to China would be dealt with in a politically charged and sensitive context, extra-legal political involvement in every aspect of their treatment can be taken for granted. This involvement of Party agencies and personnel, and political control of the legal agenda will be *prima facie* lawful pursuant to Chinese domestic law, but that is a reality that is very difficult for Australian critics to reconcile with assurances from China that treaty terms are being complied with. From the Chinese perspective, talk of ‘secrecy and lack of transparency’ are all too easy to interpret as parochial criticisms of its sovereign right to choose its own system of governance.

Finally, the very notion of ‘individual rights’ has far less import in Chinese jurisprudence than it does in the West. The language and rhetoric of rights jurisprudence is common enough in Chinese normative documents, including the *Constitution*. Article 33 provides that ‘[t]he State respects and preserves human

⁴⁸ And evolved according to the so-called ‘Four Cardinal Principles’ after 1976: (1) the adherence to Marxism–Leninism and Mao Zedong Thought, (2) the leadership of the Party, (3) the socialist system, and (4) the dictatorship of the proletariat: Deng Xiaoping, ‘Uphold the Four Cardinal Principles’ in *Selected Works* (Foreign Language Press, 1995) vol 2, 168.

⁴⁹ *Constitution of the People’s Republic of China* art 33 (‘PRC Constitution’).

⁵⁰ *Ibid* art 33 ‘All citizens of the People’s Republic of China are equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law’.

⁵¹ *Xi Jinping Answered the Question – Is Party or the Law Superior in Authority* (5 February 2015) Xinhua people’s daily WeChat <<http://politics.people.com.cn/n/2015/0205/c1001-26513950.html>> [authors trans].

⁵² *JSCOT Report*, above n 42, 32 [3.37].

rights” and Chapter II ‘The Fundamental Rights and Duties Of Citizens’ lists a number of express constitutional rights of citizens. There is, however, a notorious lack of enforcement mechanisms available in the *Constitution*, which simply provides that the legislative bodies (the National People’s Congress and its Standing Committee) have the function to ‘supervise the enforcement of the Constitution’.⁵³

The gap between what is promised in terms of statutory protection of human, civil and political rights, and the practical reality in China, especially when it comes to politically sensitive matters, is wide. Citizens are guaranteed freedom of speech, of the press, of assembly, of association, and of demonstration.⁵⁴ There are constitutional and statutory guarantees against unlawful deprivation or ‘restriction of freedom of person by detention or other means’ and ‘unlawful search of the person’. But apart from the conspicuous lack of enforcement remedies, these rights and protections are so qualified, limited and displaced by other laws which typically purport to protect national security and social stability,⁵⁵ and the extra-legal powers of non-State security agencies (such as the CCDI), that they have little in the way of formal legal protection.⁵⁶

But the constitutions and legislative rights perspectives of the Western liberal democracies are largely a product of the social contract theories of the late 17th Century. So those instruments tend to couple statements of individual civic rights and protections, with clear statutory connections to means of redress and enforcement. To expect that the use of similar language and syntactical structures in Chinese normative documents will import identical (or even similar) social contractarian views would be naïve and counterproductive.

There is a strong, consistent theme of Confucian heterocentric civics underpinning all of the Chinese constitutional and basic statutory instruments throughout its modern history. A heterocentric worldview is one in which the individual conceives of their meaning and place in life as defined by relationships and responsibilities to others. This contrasts with a more egocentric perspective, which sees the individual as the basic unit of society, born with inalienable rights. In a Confucian worldview, every person is born into a community of others and it is respect for, and protection of the web of shared relationships and responsibilities of that community, which best guarantees human flourishing. The Western ideal of a polity consisting of individuals born free and independent of any obligations, who may or may not choose to debate and vote collaboratively on which rights and responsibilities they will accept on a contractual basis, would seem repellent and unnatural from that perspective.⁵⁷ This is a disparity which the Party weaves into its current legitimacy narrative and so is unlikely to express jettison for the sake of a treaty.⁵⁸

This is not to overstate the influence of Confucian ideals on contemporary Chinese legal policy or politics, or to downplay the genuine desire on the part of many Chinese people for more genuine political freedom and transparency in the justice system, but to put into perspective the obvious currents of mutual distrust which infect the negotiation of any formal agreements between Australia and China, relating to such fundamental issues as due process and human rights. It is inevitably a complex task in cross-cultural communication to negotiate a formal agreement using terms which have such fundamentally and viscerally different import to the parties. As Žižek has pointed out there exists among China’s leadership ‘[a] fear of the corrosive influence of Western “universal values” such as freedom, democracy and human rights...’⁵⁹ Formal

⁵³ *PRC Constitution* arts 62(2), 67(1).

⁵⁴ *Ibid* art 35.

⁵⁵ *Ibid* art 51 prescribes that ‘[t]he exercise by citizens of the People’s Republic of China of their freedoms and rights may not infringe upon the interests of the state...’ – and art 54 ‘...citizens of the People’s Republic of China ... must not commit acts detrimental to the security, honor and interests of the motherland’.

⁵⁶ See generally Shiping Zheng, ‘China’s Political Stability: Comparisons and Reflections’ in Jean-Marc Blanchard and Kun-Chin Lin (eds), *Governance, Domestic Change, and Social Policy in China* (Palgrave Macmillan, 2017) 149.

⁵⁷ Or in more political terms – to be alien and part of some complex legal fiction constructed ‘to resist the impostures of monarchical autocracy’: James A Gregor, ‘Confucianism and the Political Thought of Sun Yat-Sen’ (1981) 31(1) *Philosophy East and West*, 55, 61.

⁵⁸ The narrative involves the Party as the only force which can temper the economic benefits of integrating some capitalist market systems into Chinese society with traditional Confucian values of social harmony and the socialist ideals of equality. Without its stabilising influence, ‘capitalist development would explode into a chaos or riots and protests’ and ‘unbridled hedonistic individualism would corrode social harmony’: Slavoj Žižek, ‘Sinicisation’ (2015) 37(14) *London Review of Books* 30.

⁵⁹ *Ibid* 30.

guarantees about values which they perceive as the prime causes as social instability in the West, need to be interpreted and pursued with more nuance than simplistic demands for ‘further assurances’.

With these caveats in mind, some key objections to the *Treaty* are discussed in this political and cultural context.⁶⁰

A JSCOT Identified Objections

After considering the written and oral submissions, the Committee noted that there were still serious concerns, despite assurances from the Attorney-General’s Department and its formal *National Interest Analysis* (‘*NIA*’),⁶¹ raised by the submissions regarding the *Treaty* in relation to:

1. the right to a fair trial;
2. possible imposition of the death penalty;
3. evidential standards;
4. protection from torture, cruel, inhuman, humiliating treatment or punishment;
5. omission of the words ‘unjust or oppressive’ from art 4(c);
6. extradition of minors; and
7. monitoring of individuals extradited to China⁶²

The general tone of the responses to these concerns from the Department was that the mandatory requirements within both the *Act* and the *Treaty* were sufficient to answer them.⁶³

In particular, emphasis was placed on the discretionary powers of the statutory decision makers to refuse extradition in any particular case.⁶⁴

The posture of the Department and of the current Australian Government to these concerns is, frankly, disingenuous and the specific responses to them, both in the JSCOT process and in other fora, inadequate. The detailed submissions from both the Law Council of Australia⁶⁵ and Amnesty International, lay bare the naivety of claims that Ministerial discretions in the *Act* and *Treaty* would be adequate to somehow ensure that, within the opaque operational context of China’s public security organs, Australia could be confident that it was informed of any potential or actual mistreatment of an extradited person. Given the nature of criminal procedure within China, and its intimate interconnections with political disciplinary processes which operate parallel to (but outside) the supervision of the courts, procuratorates and the executive, no amount of assurance from the Chinese government alone, or concessions in relation to monitoring or ‘access to’ extradited persons can change that opacity.⁶⁶

⁶⁰ Most of the seven ‘issues raised’ as iterated in the *JSCOT Report* below, in terms of the human rights and criminal procedure and evidentiary standards perspectives, were responded to in a succinct and authoritative manner in the submissions – especially those of Professor Andrew Byrnes from 2 May 2016 and 2 November 2016. The objections selected for discussion in Part III are therefore somewhat broader and contextual, and relate to the nature of the Australia-China relationship which must evolve in order for any meaningful future agreement on extradition to be reached.

⁶¹ Treaties which are tabled for ratification, include a *National Interest Analysis* (‘*NIA*’), which sets out the reasons why ratifying the treaty would be in Australia’s best interests. It will typically mention economic, environmental, social, and cultural impacts. It also discusses the obligations of the Requesting Party and Requested Party pursuant to the terms of the treaty and how it is to be interpreted and implemented, and how any disputes are to be resolved.

⁶² *JSCOT Report*, above n 42, 22 [3.10] – Issues Raised.

⁶³ *National Interest Analysis* [2016] ATNIA 6 [5].

⁶⁴ ‘...extradition is not an automatic process and that there are opportunities for review of extradition decisions at each stage of the process’: Joint Standing Committee on Treaties, Parliament of Australia, *Official Committee Hansard*, 2 May 2016, 13 (Ms Close).

⁶⁵ See especially Joint Standing Committee of Treaties, Parliament of Australia, *Official Committee Hansard*, 2 May 2016, 8 (Andrew Colin Byrnes, Professor of Law, Australian Human Rights Centre, Faculty of Law, University of New South Wales, and Member, Human Rights Committee, NSW Bar Association); Law Council of Australia, Submission No 1 to Joint Standing Committee of Treaties, *Treaty on Extradition Between Australia and the People’s Republic of China*, 6 September 2007, 13–15.

⁶⁶ The internal security portfolio of the PRC is managed by the immensely powerful Political Legal Committee, which is itself a sub-committee of the Central Committee of the Communist Party of China, rather than an organ of the State. It is not part of the Executive and does not report in any significant way to government. It exercises oversight and discipline with respect to the nation’s police and all other law enforcement agencies, courts and the judiciary, procuratorates and their prosecution staff, internet censors and also monitors the activities of those individuals and groups suspected of dissident activities.

B CCDI Methods

Although not an issue expressly ventilated in the Senate deliberations, virtually every alleged economic fugitive repatriated to China will have been a Party member at the time they left the country. This is a critically important reality which cannot be ignored, since this brings them within the jurisdiction of the CCDI, which will inevitably be the main agency involved in investigating their activities and connections, even though actual criminal prosecution will be carried out within the People's Procuratorate system. Interrogations and investigations by police in China, governed by statute,⁶⁷ are subjected to frequent strong criticisms by international human rights monitors.⁶⁸ But the ways in which the CCDI conducts its investigations, particularly the use of the notorious 'shuanggui interrogation system', are not regulated by law.⁶⁹ Human Rights Watch describes the process in this way:

Those summoned are deprived of liberty for days, weeks, or months, during which time they are repeatedly interrogated and often tortured. Typically, shuanggui detention ends when the official confesses to corruption or other alleged disciplinary violations; some are then transferred to the regular criminal justice system for prosecution.⁷⁰

These abuses of power in the *shuanggui* interrogation process are no secret in China, and are increasingly a matter of concern at senior levels within the Party. Growing public awareness and displeasure at these practices has been a factor in transferring the CCDI role to the public procuratorates, or to a new government commission, vested with both policing and judicial powers, which would replace all of the existing anti-corruption bodies. The Party has gone so far as to trial pilot programs of a commission in three provinces and later in 2017 the Standing Council of the National People's Congress will consider a new State Supervision Law to establish a national commission.⁷¹ Although by no means a complete answer to concerns about opacity, the willingness of the Party to respond to criticism and pressure as a result of public outrage at CCDI methods is an indication that the Party may come to recognise the need for transparency in its investigatory and disciplinary methods as a catalyst for greater treaty cooperation.

Criminal law and procedure in China is grounded, as in all jurisdictions, in a theory of social order.⁷² That theory is neither static nor simplistic and neither should be the way in which Australian policy debate engages with it. Amnesty International and Human Rights Watch regularly produce credible reports on human rights violations in China, including torture, which are well ventilated in the submissions to JSCOT and which need to inform Australia's developing relationship with China. They need to inform it in ways that avoid paternalism.

The Imperial system of cruel punishments (*kuxing*), including dismemberment (*lingchi*) and head yoke (*cangue/cha*) was officially abolished in 1905,⁷³ but the West retains a morbid fascination with their lurid details,⁷⁴ especially those detailed in the meticulous Tang and Qing Codes. It is a fascination which mostly ignores the political and cultural context and complements an intense vilification for supposed systemic cruelty at the heart of the Chinese worldview. It is only in recent decades, since the end of the Cultural

⁶⁷ Such as the *Criminal Procedure Law of the People's Republic of China*.

⁶⁸ Human Rights Watch, *Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China* (13 May 2015) <<https://www.hrw.org/report/2015/05/13/tiger-chairs-and-cell-bosses-police-torture-criminal-suspects-china>>; Amnesty International, *No End in Sight: Torture and Forced Confessions in China* (2015) <https://www.amnestyusa.org/.../no-end-in-sight_torture...>.

⁶⁹ *Constitution of the Communist Party of China* art 43 'The Party's Central Commission for Discipline Inspection functions under the leadership of the Central Committee of the Party.'

⁷⁰ Human Rights Watch, 'Special Measures': *Detention and Torture in the Chinese Communist Party's Shuanggui System* (6 December 2016) <<http://www.refworld.org/docid/5846b29f4.html>>.

⁷¹ Whether or not the Party intends to formalise this structure via the enactment of constitutional amendments is not yet known. For a detailed discussion of the proposed commissions and the legal implications, see June Wang Zhiqiong, *China's New Anti-Corruption Body Raises Worrying Questions about the Rule of Law* (17 May 2017) The Conversation <<https://theconversation.com/chinas-new-anti-corruption-body-raises-worrying-questions-about-the-rule-of-law-77001>>.

⁷² Donald C Clarke, and James V Feinerman, 'Antagonistic Contradictions: Criminal Law and Human Rights in China' (1995) 141 *China Quarterly* 135.

⁷³ Jérôme Bourgon, 'Abolishing "cruel punishments": A Reappraisal of the Chinese Roots and Long-Term Efficiency of the Xinzheng Legal Reforms' (2003) 37(4) *Modern Asian Studies* 851.

⁷⁴ Nancy Park, 'Imperial Chinese Justice and the Law of Torture' (2008) 29(2) *Late Imperial China* 37.

Revolution in 1976, that the official narrative of crime as a by-product of class in society (informing a criminal law deployed almost exclusively as a political tool of ‘class struggle’), has given way, as the inevitable criminogenic factors accompanying rapid urbanisation and economic development have become obvious and begun to shape criminal law and procedure policy.

C Sovereignty Issues and Unilateral Action

Some strategies allegedly utilised by Chinese security organs in their prosecution of Operations Foxhunt and Skynet, have had the effect of eroding the confidence of the international community in China’s credibility when it claims to respect the sovereignty of nations with which it desires to enter into extradition agreements. These include strategies of luring (or ‘coaxing’) suspects back to the mainland, using the Chinese diaspora as a source of intelligence and as de facto agents, having Chinese security cadre pose as tourists in foreign countries to track or harass fugitives, and in some cases outright abductions.

Simply abducting an alleged fugitive by force, as China has been accused of on a number of occasions, would be a fundamental breach of international law (including the *UN Charter* itself).⁷⁵

Such unilateral Chinese actions are alleged to have taken place in both Hong Kong and China, despite the absence of any formal extradition or rendition agreements.

One incident involved a naturalised Swiss citizen, Gui Minhai, who had been publishing books with salacious details of the lives of Chinese leaders. He disappeared from his Thai residence and then three months later Xinhua (the State news agency) published his full confession to offences involving the death of a woman in a motor vehicle accident in China in 2003, in which he also said that he had returned voluntarily.⁷⁶ The degree of pressure involved in unilateral actions, and the audacity of the methods involved, usually reflects the perceived power dynamics within the relationship between China and the country within which fugitives (economic or political) are pursued. Direct pressure on Thai government officials to simply surrender Uighur refugees in direct violation of the UNHCR protections under which they are resident in Thailand have been successful, whereas the more covert actions of undeclared members of the Chinese Ministry of Public Security in pursuit of corrupt officials within the USA itself, has forced the US government to publicly protest this breach of sovereignty.⁷⁷

Other forms of unilateral action, which have not required cooperation from Australian authorities, however, have clearly taken place. The simple process of communication with the fugitive, either directly, via an intermediary in the diaspora or through the media, can make use of incentives and disincentives to secure a voluntary repatriation. Whether or not any particular incentive is genuine or a deception is unlikely to ever be known to anyone but the parties involved. What little is known of these strategies suggests that threats and disincentives tend to dominate. Incentives have included promises that the death penalty will not be considered, that usual extradition treaty rights will apply, access to lawyers will be granted, the CCDI will not be involved or that certain charges will be dropped. The CCDI publishes reports on particular cases which provide surprisingly candid insights into some of these methods.⁷⁸ Typically, a multi-agency taskforce will be established to pursue a particular fugitive which will ‘repeatedly study the case, to determine the persuasion program... coordinate the Ministry of Foreign Affairs to understand [the fugitive]...and coordinate with foreign police to compress their living space, to create conditions for persuasion.’ This might include ‘mobilizing their relatives, friends and important stakeholders to actively “going out” to persuade the fugitive... recorded a persuasion video, and writing a letter to persuade...’ They discuss the example of Chen

⁷⁵ *Charter of the United Nations* art 2(4) ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.

⁷⁶ In part, the ‘confession’ reads: ‘My decision to surrender was my personal and voluntary choice... nobody else had anything to do with it. The responsibility for this situation is mine and I do not wish for any personal or institutional intervention... Although I now have Swedish nationality, I really feel that I am Chinese and that my roots are in China, so I hope that the Swedish side can respect my personal choice, respect for my rights and privacy... and let me solve my own problems’: Xinhua News Agency, ‘Investigation on the “Missing” Incident in Guimin Hai, Hong Kong Causeway Bay Bookstore’ (17 January 2016) <http://news.xinhuanet.com/legal/2016-01/17/c_1117800737.htm> [author’s trans].

⁷⁷ Nigel Inkster, ‘Coming to Terms with Chinese Power’ (2016) 58(1) *Survival – Global Politics and Strategy* 209, 213.

⁷⁸ Via its Internet presence, CCDI, *Website* <<http://www.ccdi.gov.cn/>>.

Yi Juan, persuaded to return from the UK and confess on 14 January 2016, who was told '[e]xpatriates who take the initiative to return home and truthfully confess to the crime will be leniently dealt with. But flee to avoid punishment, you will be chased and in the end severely punished according to law'. The report states that these measures are necessary because the UK has not entered into a bilateral extradition treaty with China.⁷⁹

In other popular fugitive destinations, such as Canada, 'consulting' enterprises have emerged which assist people to obtain visas, new citizenships and identities. One Vancouver firm advertises services on its website for issues related to 'International Prisoner Treaty Transfers... Dual/Second Citizenship's [sic]... Anonymous Traveling and Living'.⁸⁰

On 22 June 2016 the CCDI released a statement saying that 56-year-old Tang Dongmei, an alleged economic fugitive who was previously an accountant with the Arts and Crafts Import and Export Co Ltd in Fujian province and who fled to Australia in 2008, had voluntarily returned to China and confessed to her crimes. She was operating a small convenience store at the time she left Australia. Others have returned in similar circumstances such as Melbourne women, 64-year-old Zhou Shiqin⁸¹ and former IT manager Zhang Dawei.

Australia's close proximity with Asia, stable financial system and the relative ease with which money can be laundered through the real estate market⁸² does make it a natural destination for economic fugitives. But the claim that an influx of laundered money from the 'tigers' pursued by China's anti-corruption campaigns contributes significantly to higher real estate prices in Australia (thereby making it more difficult for Australian citizens to enter the residential housing market) seems to lack an evidence base.⁸³ Public perception though, may be strongly to the contrary, as Rogers and Nelson recently discovered.⁸⁴ They point out the potential for racial profiling in the public discussion of potential links with corruption and Chinese investment, and the risk to broader international Chinese and non-Chinese business relations.⁸⁵

China routinely denies any wrongdoing or involvement in these alleged unilateral measures, as would be expected, so highlighting this dimension to the wider security relationship, given the lack of candour, can only lead to perceptions of humiliation on the part of Chinese officials. The perceived 'loss of face' can then have catastrophic consequences for the pace of further meaningful discourse. Granted, the Australian Government seemed to recognise and respond to this potential well by withdrawing the recent Notice to Ratify in the Senate, but it is a dynamic which is going to impact whenever China feels compelled to resort to 'self-help' style unilateral measures to pursue fugitives in the absence of extradition agreements.⁸⁶ Acquiescing to, ignoring or condoning breaches of sovereignty cannot be the price paid for demonstrating

⁷⁹ *Overseas is Not Home is Not a Paradise – Hunan Catch up to Persuade the '100 Red Officers' Chen Yi Juan Ji* (9 May 2017) Central Commission for Discipline Inspection Ministry of Supervision <http://www.ccdi.gov.cn/special/zttz/zttzjxs_zttz/201705/t20170509_98914.html>. [author's trans].

⁸⁰ Amicus International Consulting, *Website* <<https://www.amicusint.org/>>. Its marketing slogan is '*Amicus can provide you with a new legal identity*'. Amicus claims it assisted the wives of two former Bank of China managers who absconded to the USA with some of the proceeds of a US\$485 million fraud, and sentenced to prison in the USA, to obtain Spanish citizenship and then a subsequent prisoner transfer to Spain via a mutual assistance agreement, to avoid a possible death penalty if deported or extradited to China.

⁸¹ Zhou Shiqin claims she was harassed and under surveillance after China made public her Interpol red notice – a request to locate and provisionally arrest an individual pending extradition – accusing her of embezzling from a state owned rail transport enterprise 10 years ago) through all state media outlets in China. Her lawyer told the Australian press, '[w]e did think at first it would be dangerous for her to return... But she can't let it go. The psychological pressure on her is extraordinary'.

⁸² Former senior employees of AUSTRAC and the Foreign Investment Review Board claim that investigations of whether funds which are to be invested in Australia, may have been unlawfully obtained, are not carried out by those agencies and fugitives are aware of this. The accuracy of this is difficult to confirm, but the perception among fugitives and those who aid them is real: ABC, 'The Great Wall of Money' *Four Corners*, 13th October 2015) (L Besser and C Hitchens).

⁸³ House of Representatives Standing Committee on Economics, Parliament of Australia, *Report on Foreign Investment in Residential Real Estate* (2014).

⁸⁴ Dallas Rogers, Alexandra Wong and Jacqueline Nelson, 'Public Perceptions of Foreign and Chinese Real Estate Investment: Intercultural Relations in Global Sydney' (2017) 48(4) *Australian Geographer* 437.

⁸⁵ *Ibid* 446.

⁸⁶ Crudely put – concepts of 'face' and how it is granted and lost, relate to both the individual's sense of self-worth and wider community perceptions of a person's status or prestige. Both impact upon power dynamics within larger networks and to be perceived as disrupting these dynamics can cause long-term damage to any existing mutual relationships of goodwill. Sociological and political analyses of the role of face in Chinese culture and politics are essential study for those trying to reach negotiated outcomes and resolutions. Two excellent sources, published six decades apart are Hsien Chin Hu, 'The Chinese Concepts of "Face"' (1944) 46(1) *American Anthropologist* 45 and Peter Hays Gries, *China's New Nationalism: Pride, Politics, and Diplomacy* (University of California Press, 2004).

sensitivity to China's 'face', but the forum and process for addressing this style of objection will need to be carefully considered.

D Criminal Procedure Reform – Systemic Unfairness

Of the objections referred to in the *JSCOT Report*, that which focuses on the absence of any grounds for refusing an extradition request on the grounds that clear systemic realities in Chinese criminal procedure law, and in the wider political–legal system, significantly prejudice people who are extradited the purported right to a fair trial, is the most significant. Senior Chinese jurists, judicial officers and political leaders all recognise and acknowledge that there are problems in criminal investigation and both pre-trial and trial procedure which require urgent attention. For example, judges in criminal trials in China rely overwhelmingly on the written testimony of witnesses, drafted by public security officials (usually police or procuratorial staff) who very rarely appear in court. Their evidence is not tested by cross-examination, not contradicted or challenged by evidence from contrary witness statements or clarified by questions from the bench. Often the trial panel will make a decision (sometimes in consultation with a judicial committee which includes personnel not involved in the matter) solely on the basis of these untested statements. The *Criminal Procedure Law* and associated regulations make provision for witnesses' appearances, which are cast as an 'obligation' or 'duty', but attendance rates are pitifully low. One important reason for this is that judges in China have far less power and status than in a common law judiciary. The judiciary is controlled and dictated to by the Executive and most judges are reluctant to compel witness attendance. As Wang and Caruso observe, in a recent survey which explores the reasons for lack of oral testimony in Chinese trials, judges:

...reside on the same, or lesser, political status level as numerous administrative officials, police agencies and procuratorates. Judges may therefore be subject to expectations concerning how they treat prosecutors or police presenting evidence at trial where those individuals are of superior political seniority, which may colour their decision-making and taint the impartiality of the judicial process. This problem is highlighted in cases where potential witnesses are government officials. This subservience to influence is borne and accepted by trial judges, not through the adversarial principle of party responsibility for witnesses, but for the same reason of acceptance of statements based on political position.⁸⁷

This partially accounts for the perennially high conviction rates that have sapped public confidence in the strength of due process in Chinese criminal procedure, despite frequent promises from senior court leaders to address the issue.⁸⁸ The Supreme People's Court reported that the conviction rate nationally was 99.93% in 2014, with only 778 acquittals in 1,099,000 criminal trials.⁸⁹

The potential for Australia to be involved in capacity building, training and collaborative work within the Chinese criminal justice system itself, especially with the judiciary, may be a far better long-to-medium-term option for remediating some of the common concerns about due process, than simply demanding more and better 'assurances'. Despite the attention which was focussed on the January 2017 speech of Supreme People's Court President Zhou Qiang, in which he towed the current ideological line by declaring that the courts must "raise the sword" against the ideologies of judicial independence, separation of powers, and constitutional democracy,⁹⁰ the Chinese judiciary is very receptive to interaction with other jurisdictions and is engaged in extensive networking and foreign sponsored training programs.⁹¹ The earlier reference to Žižek's observation that there is a genuine fear among China's leadership of 'the corrosive influence of

⁸⁷ Zhuhao Wang and David R A Caruso, 'Is an Oral-Evidence Based Criminal Trial Possible in China?' (2017) 21(1-2) *International Journal of Evidence and Proof* 52, 58.

⁸⁸ Xin Fu, 'Public Prosecutors in the Chinese Criminal Trial – Courtroom Discourse from the Prosecution Perspective' (2016) 1(2) *International Journal of Legal Discourse* 401.

⁸⁹ An increase of 7.5% and 4%, respectively over 2014: Supreme People's Court of the People's Republic of China, *The Work of China's Courts* (2015) <<http://english.court.gov.cn/pdf/TheWorkofChina'sCourts2015.pdf>>.

⁹⁰ Full text of an earlier previous speech from 22 December 2016 (Chinese only) in which Zhou Qiang expresses similar sentiments is available from the Communist Party News Website (22 November 2016) <<http://cpc.people.com.cn/n1/2016/1122/c64094-28885532.html>>.

⁹¹ Susan Finder, 'Chinese Courts and "Foreign Beneficial Experience"' (22 May 2017) Supreme People's Court Monitor <<https://supremepeoplecourtmonitor.com/2017/05/22/chinese-courts-beneficial-experience/>>.

Western ‘universal values’ such as freedom, democracy and human rights...’, ought not to be interpreted as an absolute resistance to procedural reform.

If we grant that ratification of the existing treaty may not be conducive to the development of a more constructive juristic relationship between China and Australia, but that the consequences of not making progress on the problems associated with economic fugitives are unacceptable, Part IV considers some alternative measures which could have some benefit until a treaty is supportable.

IV ARE THERE VIABLE INTERIM ALTERNATIVES TO AN EXTRADITION TREATY?

A *Non-Treaty Extradition Regulation*

Australia currently has non-treaty extradition agreements with 31 nations, declared by regulation.⁹² It may be possible to execute a non-treaty agreement by regulation, to expedite the extradition of a particular group or class of (perhaps even named) alleged offenders. This might target alleged economic fugitives against whom there is significant evidence and in relation to whom the Chinese government was willing to negotiate specific conditions on an ad hoc basis, rather than the broader requirements of a treaty. The conditions could include co-management of the procedure of the matters through the Chinese legal system by both Chinese and Australian officials, with access to the defendants secured by mechanisms which, if not honoured, would result in cancellation of the agreement. The legal and diplomatic minutiae of that sort of agreement are too numerous to engage with here, but the concept illustrates the potential for lateral negotiation if there is the political will.

B *Asset Recovery Agreement*

A priority ought to be supplementing the *Mutual Legal Assistance Treaty*⁹³ with an additional agreement designed to strengthen the process of asset recovery. A similar agreement was entered into between China and Canada in 2016⁹⁴ (the Agreement between China and Canada on Sharing and Return of Forfeited Assets), pursuant to their existing mutual criminal assistance treaty.⁹⁵ It operates in conjunction with the *Freezing Assets of Corrupt Foreign Officials Act*⁹⁶ to expedite the process of identifying impugned assets, freezing them while the source is determined, and if the precise source cannot be identified then the two countries agree to share the assets on a pro rata basis linked to their respective involvement in the investigation. This has the advantage of progressing China’s anti-corruption agenda in a significant way, especially given the amounts of money which have been unlawfully moved out of the country in the past decade, while displacing the objections and debates relating to human rights, sovereignty breaches and treatment of detainees to a separate forum. Transparency, mutual respect and working on a relationship of trust would be far less fraught in this limited context. Evidentiary issues and questions of due process might still arise of course.

Such an agreement would need to be carefully negotiated and drafted.⁹⁷ This is due to the issuing in early 2017 of a *Judicial Interpretation on Asset Recovery*⁹⁸ by China’s Supreme People’s Court and

⁹² *Australia’s Non-Treaty Extradition Arrangements*

<<https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Documents/some%20countries%20with%20which%20Australia%20has%20no%20treaty%20relationship.pdf>> provides a detailed overview and analysis of current programs.

⁹³ *Treaty Between Australia and The People’s Republic Of China on Mutual Legal Assistance In Criminal Matters* [2007] ATS 21.

⁹⁴ Xu Hong, *Beijing-Ottawa Pact Helps Asset Recovery* (22 September 2016) *Global Times*

<<http://www.globaltimes.cn/content/1007764.shtml>>; Agreement Between the Government of China and the Government of Canada on Sharing and Return of Forfeited Assets <http://news.xinhuanet.com/english/201609/24/c_135710316.htm>.

⁹⁵ *Treaty Between the People’s Republic of China and Canada on Mutual Legal Assistance in Criminal Matters* [1995] Can TS 29.

⁹⁶ *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10.

⁹⁷ In Australia, G20 countries can currently pursue a fairly convoluted asset freezing process via the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

⁹⁸ *Provisions on Several Issues Concerning the Application of Procedures for the Confiscation of Unlawful Gains in Cases Where the Criminal Suspects or Defendants have Absconded or Died*, Supreme People’s Court and The Supreme People’s Procuratorate, 4 January 2017, Legal Interpretation [2017] No 1 <<http://www.chinacourt.org/law/detail/2017/01/id/149054.shtml>>.

Procuratorate, which appears to broaden the ambit of what other nations may have thought China had in mind by entering into these recovery agreements.

The *Interpretation* (which has force of law)⁹⁹ authorises Chinese agencies to recover assets which are proceeds of crimes for which the offender has, inter alia, absconded overseas. Article 280 of the *Criminal Procedure Law* currently allows a public security organ to make an application to a people's court to seize, impound, or freeze the property of a fugitive after one year in 'a case regarding a serious crime such as embezzlement, bribery, or terrorist activities...'¹⁰⁰ This new Interpretation provides that '[a]ny of the following cases shall be determined as a "case" specified in paragraph 1, Article 280 of the Criminal Procedure Law' – and lists a range of offences which as Finder¹⁰¹ observes, include a number which are sometimes utilised by security organs in China to prosecute people for expression of contrary political views, criticism of the government or Party, or human rights activities or even private entrepreneurs who commercial activities might bring them into conflict with State enterprises.

The extent to which asset recovery agreements will provide the same degree of protection against confiscation of assets for politically motivated actions is of concern. Domestic assets will of course be subject to the expanded definition. It may be that an Asset Recovery Agreement is already on the agenda for the second part of the 'China–Australia High-Level Security Dialogue' in Beijing in 2018. Chinese State media seems to be anticipating that more of these recovery agreements are on the horizon.¹⁰²

Despite the lack of evidence as to effects on property prices, the flow of large amounts of unregulated and undocumented cash into Australia has obvious implications for tax and flow-on effects to other offences. Ubiquitous stories of suitcases of undeclared money¹⁰³ being smuggled through international airports, imply that these offences create offending networks.

C *United Nations Convention Against Corruption ('UNCAC')*

Article 44(8) of this multilateral treaty, to which both Australia and China are parties,¹⁰⁴ commits Australia and China to 'seek to conclude bilateral and multilateral agreements or arrangements to carry out or enhance the effectiveness of extradition'. In endeavouring to do that the Convention allows parties whose domestic law permits, to use the Convention as the basis for extradition¹⁰⁵ – and Convention offences are not to be considered as political offences.¹⁰⁶ Given that neither China nor Australia has any strict statutory requirement that extradition is contingent upon a treaty, offences created by *UNCAC* are extraditable offences in relation to both jurisdictions.¹⁰⁷

The difficulties with relying on *UNCAC* as an interim alternative are, unfortunately, much the same as those connected with a treaty itself. In reporting some of the muddled details on the 2016 arrest, trial and conviction of Zhang Jianping of fraud offences totalling 91 million Yuan, related to his work for an SOE

⁹⁹ Although the precise authority for their normative power is a matter of ongoing debate – art 33 of the *Organic Law of the People's Courts* (People's Republic of China) provides that '[t]he Supreme People's Court shall give interpretation of questions concerning specific applications of laws and decrees in judicial proceedings'.

¹⁰⁰ *Civil Procedure Law of the People's Republic of China* [revised], National People's Congress, 9 April 1991.

¹⁰¹ Susan Finder, *Asset recovery, Chinese Style* (9 January 2017) Supreme People's Court Monitor, <<https://supremepoplescourtmirror.com/2017/01/09/asset-recovery-chinese-style/>>.

¹⁰² Director-General of the Department of Treaty and Law, within China's Ministry of Foreign Affairs has declared that '[a]fter gaining more experience and when conditions are right, China should sign assets recovery agreements with more countries and ramp up its effort to recover illegal assets overseas. The endeavour will profoundly improve international judicial cooperation and serve the all-out promotion of rule of law': Xu Hong, *Beijing-Ottawa Pact Helps Recovery* (23 September 2016) Global Times <<http://www.globaltimes.cn/content/1007764.shtml>>.

¹⁰³ In December of 2016, for example, Australian Federal Police intercepted over \$500 000 in currency in the check-in luggage of two Singapore nationals arriving at Adelaide Airport, who were subsequently charged with being in possession of money suspected of being crime proceeds: *Airport Sniffer Dog finds \$520 000 Cash in Luggage Alleged to be Crime Proceeds* (6 December 2016) ABC News <<http://www.abc.net.au/news/2016-12-06/cash-crime-proceeds-allegedly-found-in-luggage-adelaide-airport/8095772>>.

¹⁰⁴ *UNCAC*.

¹⁰⁵ *Ibid* art 44(4).

¹⁰⁶ *Ibid* art 44(15).

¹⁰⁷ *Ibid* art 44(7).

dealing in securities, *The Australian Financial Review* reflects on the lack of cooperation between Beijing and the West on extradition as a result of the lack of trust in the integrity of criminal procedure in China:

One foreign diplomat, based in China, said co-operation between Beijing and other governments had never gone “beyond first base”. He said China had on one occasion requested his government detain and extradite a suspect under the United Nations convention on corruption. But when the foreign government asked China to provide the brief of evidence, it refused, insisting this was ‘a state secret’. ‘Since then we’ve done nothing’, said the diplomat. Part of the issue is also that foreign courts are generally unwilling to accept a brief of evidence from Chinese police given the facts have not been tested in court.¹⁰⁸

V CONCLUSION

The options for effective and credible extradition processes between Australia are not limited to either ratifying the current inadequate treaty (which marginalises the seemingly ‘wicked problem’ of systemic opacity and cultural and political differences in views of social order) or a continuing relationship of suspicion, unilateral measures and policy impasse. For genuine progress to be made, what matters most is the evolution of a more mature juristic relationship between the countries, which itself is contingent upon a more mature and culturally informed political relationship.

The mere continuation of the dialogue in relation to a treaty, perhaps with the addition of an assets agreement to bolster mutual assistance, and tightening up of deficiencies in Australia’s current immigration and asset tracking practices, ought to reduce the perception from the PRC and potential fugitives of Australia as a prime relocation target. It also takes some focus off the tendency to simply lambast the systemic human rights abuses still flourishing in the Chinese political-legal system in the hopes for ‘further assurances’ or trust in the power of ‘Ministerial discretion’. While it certainly seems that, due to the effects of campaigns such as Operation Fox Hunt and the potential price which harbouring nations might have to pay in failing to pursue fugitives with the degree of vigour China might prefer, the options for places to flee to are becoming more limited, the view that there is therefore a two-dimensional contest between an adherence to fundamental rule of law values and the preservation of a good commercial relationship with China is simplistic and self-defeating.¹⁰⁹

From China’s perspective, a broadening of current anti-corruption measures beyond those designed to bolster public confidence in the Party’s current narrative for legitimacy and relevance, perhaps with the addition of a genuine amnesty scheme and ending involvement of the CCDI in matters which are subject to criminal extradition requests would be seen by both potential bilateral treaty partners and the Chinese public as demonstrations of a move towards greater transparency.

¹⁰⁸ Angus Grigg and Lisa Murray, ‘Untold Story: China’s Operation Fox Hunt and the Capture of Zhang Jianping’, *The Australian Financial Review* (Melbourne), 18 June 2016.

¹⁰⁹ Inskster, above n77, 213.