

HUMAN RIGHTS AND THE U.S.-CHINA RELATIONSHIP

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INTRODUCTION

The Obama administration ended at a delicate time when the U.S. government both recognized grave concerns regarding human rights violations in the People's Republic of China (PRC or China) and acknowledged the tremendous importance of the U.S.-China relationship in areas ranging from nuclear nonproliferation to transnational crime. In October 2016, PRC state-run media reported that the United States and China were "speeding up negotiations on returning five most-wanted corrupt Chinese officials, who are still on the run in the United States, to face trial at home."¹ In September 2015, eight people actually boarded a chartered flight in the United States bound for China.² Far from a voluntary trip back to their homeland, the PRC nationals were among the U.S. government's "priorities for immigration enforcement due to their serious criminal histories."³ The repatriations occurred as the United Nations Committee Against Torture was preparing to review China's record implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁴ The Committee's report seriously

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1. Zhang Yan, *Steps Taken to 'Speed Up' Corrupt Fugitives' Return from US*, CHINA DAILY (Oct. 26, 2016), http://www.chinadaily.com.cn/china/2016-10/26/content_27172486.htm [<https://perma.cc/3RP4-REJB>].

2. James T. Areddy & Damian Paletta, *U.S. Hands Corruption Suspect Back to China*, WALL ST. J. (Sept. 18, 2015), <http://www.wsj.com/articles/u-s-hands-corruption-suspect-back-to-china-1442599612> [<https://perma.cc/UDF4-9TL3>]; see Bruce Zagaris, *U.S. Delivers Graft Suspect to China*, 31 INT'L ENFORCEMENT L. REP. 357, 357 (2015); James T. Areddy, *U.S. Departs More Criminal Suspects to China*, WALL ST. J. (Sept. 24, 2015), <http://www.wsj.com/articles/another-chinese-fugitive-deported-by-u-s-1443087121> [<https://perma.cc/X6TV-HDY6>].

3. Areddy & Paletta, *supra* note 2.

4. See Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of China, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016) (reporting developments with respect to compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) since the Committee against Torture reviewed the People's Republic of China (PRC or China) in 2008).

questioned China's claim that it is making "enormous efforts" to stop torture⁵: "[T]he practice of torture and ill-treatment is still deeply entrenched in the [PRC] criminal justice system."⁶ Shortly thereafter, in March 2016, the United States and eleven other countries issued a rare joint statement expressing "concern[] about China's deteriorating human rights record" and calling on China "to uphold its laws and its international commitments."⁷

Turning back the clock to the early days of the Obama administration, Secretary of State Hillary Clinton stated the following in 2009:

Principled pragmatism informs our approach on human rights with all countries, but particularly with key countries like China Cooperation [with China] is critical to the health of the global economy and the nonproliferation agenda we seek . . . and addressing global problems like climate change.⁸

In 2010 Michael Posner, then Assistant Secretary of State for Democracy, Human Rights, and Labor, stressed the "need to take a whole-of-government approach to human rights" when engaging with China.⁹ In the ensuing years, the Obama administration repeatedly expressed its commitment to supporting international human rights norms, with Secretary of State John Kerry noting, "I raise human rights concerns in each and every one of my conversations with President Xi [Jinping] and other Chinese leaders, because it is too important to stand in the way of China's emergence in the community of nations."¹⁰

5. *China Says It's Making 'Enormous Efforts' to Stop Torture*, DEUTSCHE WELLE (Nov. 19, 2015), <http://www.dw.com/en/china-says-its-making-enormous-efforts-to-stop-torture/a-18861300> [<https://perma.cc/948J-SYQD>] (internal quotations omitted).

6. Comm. against Torture, *supra* note 4, ¶ 20.

7. *Joint Statement—Human Rights Situation in China*, MISSION OF THE UNITED STATES IN GENEVA (Mar. 10, 2016), <https://geneva.usmission.gov/2016/03/10/item-2-joint-statement-human-rights-situation-in-china/> [<https://perma.cc/KW2A-SJ6C>] (joint statement of U.S. Ambassador Keith Harper before the U.N. Human Rights Council).

8. Hillary Clinton, U.S. Sec'y of State, Remarks on the Human Rights Agenda for the 21st Century at Georgetown University (Dec. 14, 2009), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2009a/12/133544.htm> [<https://perma.cc/4EMP-THB7>]. For an earlier use of the phrase, see Comm'n on Hum. Rts., Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 81, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (discussing "a principled form of pragmatism").

9. Press Release, Michael H. Posner, U.S. Dep't of State, Briefing on the U.S.-China Human Rights Dialogue (May 14, 2010), <https://2009-2017.state.gov/r/pa/prs/ps/2010/05/141899.htm> [<https://perma.cc/F6VP-4FW3>].

10. Press Release, John Kerry, U.S. Dep't of State, Fifth Anniversary of Liu Xiaobo's Conviction (Dec. 24, 2014), <https://2009-2017.state.gov/secretary/remarks/2014/12/235514.htm> [<https://perma.cc/5CF2-8EFD>].

The phrases “principled pragmatism” and “whole-of-government approach to human rights” are alluring. For eight years the Obama administration grappled with the challenge of actually charting a path that held true to fundamental human rights principles while still forging a productive partnership with China in areas of shared concern. This was no easy task. Now eyes have turned to President Donald Trump as he begins to formulate his administration’s China policy.

Regardless of what that policy might be—and there is no doubt that it will be markedly different from his predecessor’s—the change in presidents presents an opportune time to reflect on the role of human rights in the U.S.-China relationship. As President Trump decides to what extent he will maintain the prior administration’s support for advancing international human rights norms, this Article takes the stance that human rights should continue to be part of the United States’ policy towards China. For the Trump administration to jettison human rights entirely from the agenda would undermine long-held principles at a time when the United States is working to regain its moral authority in the world.¹¹

At the time of writing, however, it appears highly unlikely that human rights will be a priority. During his campaign, Donald Trump issued strong statements about China but largely in the context of trade.¹² A China expert at the Center for Strategic and International Studies noted in June 2016, “Who has heard Donald Trump say anything about human rights?”¹³ The little he has said indicates that human rights are far from the forefront of his China agenda.¹⁴ During a Republican presidential debate, Trump was

11. Cf. *US: Trump Should Govern With Respect for Rights*, HUM. RTS. WATCH (Nov. 9, 2016), <https://www.hrw.org/news/2016/11/09/us-trump-should-govern-respect-rights> [<https://perma.cc/7W38-YS29>] (calling on Trump to “abandon campaign rhetoric that seemed to reject many of the United States’ core human rights obligations and put rights at the heart of his administration’s domestic and foreign policy agendas”).

12. See, e.g., *What Trump Means for China*, CHINA DAILY (Nov. 11, 2016), http://www.chinadaily.com.cn/opinion/2016-11/11/content_27342463.htm [<https://perma.cc/NL68-EP3R>] (commenting in state-run PRC media on the potential for difficult relations “if [Trump] honors his campaign vow to impose punitive tariffs of up to [forty-five] percent against Chinese goods, which would surely result in a trade war erupting between the two countries”); Nick Gass, *Trump: We Can’t Continue to Allow China to Rape Our Country*, POLITICO (May 2, 2016), <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/05/trump-china-rape-america-222689> [<https://perma.cc/4H75-YEED>].

13. Everett Rosenfeld, *Trump vs. Clinton: How China Views the US Elections*, CNBC (July 7, 2016), <http://www.cnbc.com/2016/07/07/trump-vs-clinton-how-china-views-the-us-elections.html> [<https://perma.cc/94SN-HNN5>] (internal quotations omitted).

14. See Christopher Bodeen, *As in US, Trump Draws Strong Reactions in China*, ASSOCIATED PRESS (May 31, 2016), <http://bigstory.ap.org/article/c03c7621e206424481a4697d4251e8c3/though-largely-unknown-trump-finds-fans-china> [<https://perma.cc/S6HB-G6WU>]

asked about a prior comment on the PRC government's violent crackdown on the 1989 demonstrations in Tiananmen Square. Trump said he was not "endorsing" China's response, but he called the demonstrations a "riot."¹⁵ Statements about torture outside of the context of China further seriously call into question the value that President Trump will place on human rights.¹⁶

Yet grave concerns that human rights will be relegated to a subsidiary position in the Trump administration do not relieve one of asking what *should* be the role of human rights in the U.S.-China relationship. If, as expected, it is difficult for human rights-based arguments to gain traction with at least the executive branch under President Trump, it is all the more necessary for the community that cares passionately about these issues to articulate clearly how human rights should be part of the bilateral relationship. It is insufficient simply to state that human rights are important: academics, human rights advocates, and career civil servants who span administrations must present more nuanced and persuasive arguments. At least then the public discourse on China policy can strive to be more than just a stark contrast between groups labeled as pro- or anti- human rights.

(reporting that "many Chinese observers see a silver lining in [Trump's] focus on economic issues to the near-total exclusion of human rights and political freedoms").

15. Isaac Stone Fish, *A Vote for Trump Is a Vote for China*, FOREIGN POL'Y (Apr. 12, 2016), <http://foreignpolicy.com/2016/04/12/a-vote-for-trump-is-a-vote-for-china/> [<https://perma.cc/A8KD-JZVB>] (internal quotations omitted); *see also Do Not Admire the 'Strength' That Crushes Lives and Tramples Over Human Rights*, CHINA CHANGE (Mar. 15, 2016), <https://chinachange.org/2016/03/16/do-not-admire-the-strength-that-crushes-lives-and-tramples-over-human-rights/> [<https://perma.cc/RW4F-VU9W>] (criticizing Trump's use of the word "riot" to describe the Tiananmen Square demonstration).

16. *See* Ken Dilanian, *Trump Needs His 'Own Damn Bucket' to Waterboard: Ex-CIA Chief*, NBC NEWS (Feb. 22, 2016), <http://www.nbcnews.com/news/us-news/trump-needs-his-own-damn-bucket-waterboard-ex-cia-chief-n523576> [<https://perma.cc/Q3NP-GL57>]. Although this Article discusses human rights broadly, it is possible that the Trump administration will champion selective human rights in China, such as those related to the freedom of religion and freedom to build a family. *See, e.g.*, Press Briefing, White House Off. of Press Sec'y, Background Briefing by Senior Administration Officials on the Visit of President Xi Jinping of the People's Republic of China (Apr. 4, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/04/background-briefing-senior-administration-officials-visit-president-xi> [<https://perma.cc/A5CT-A4NP>] (where a reporter asked whether, when meeting with President Xi, President Trump would raise "religious persecution in China, which many of the President's supporters in the last campaign had hoped he would bring up when he engaged the Chinese"). *Cf.* CONG.-EXEC. COMM'N ON CHINA, 114TH CONG., ANNUAL REP. 2016 (2016), <http://www.cecc.gov/sites/chinacommission.house.gov/files/2016%20Annual%20Report.pdf> [<https://perma.cc/SX9Y-DM96>] (addressing concerns about coercive population planning policies and treatment of Christians by the PRC government); *but see* Matt Apuzzo & James Risen, *Donald Trump Faces Obstacles to Resuming Waterboarding*, N.Y. TIMES (Nov. 28, 2016), <http://www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html> [<https://perma.cc/7PZ3-BZWX>].

Admittedly, President Trump would not be breaking the mold by placing economic considerations above human rights. U.S. government policy towards China has always been, at least to some degree, pragmatic. President Jimmy Carter entered into office with “a human rights strategy that would serve as the cornerstone of [his] foreign policy.”¹⁷ Yet even he openly recognized the need to consider the United States’ many interests when dealing with China.¹⁸ Indeed, it was under President Carter that the United States and PRC normalized relations.¹⁹ There are simply too many strategic and economic facets of the U.S.-China relationship for human rights to control the agenda. Despite raising human rights concerns in every interaction with PRC leaders,²⁰ Secretary of State Kerry acknowledged in 2014 that differences with China “should not, and in fact, must not prevent us from acting cooperatively in other areas.”²¹ In July 2016, National Security Advisor Susan Rice affirmed, “There is no more consequential bilateral relationship than the U.S.-China relationship”²²

Even if President Trump places greater emphasis on human rights than his comments during the campaign suggest he will, addressing human rights in a principled way will not be easy. The repressive political climate in China combined with the expectation that the current leadership will hold power until 2022 means

17. *Carter and Human Rights, 1977–1981*, OFF. OF HISTORIAN, <https://history.state.gov/milestones/1977-1980/human-rights> [<https://perma.cc/FS5N-UXNE>] (last visited Mar. 22, 2017); see also M.G. Kaladharan Nayar, *Introduction: Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813, 830 (1978) (noting in article written during Carter administration the “aggressive policy of using United States foreign aid programs to promote human rights”).

18. *Compare* Luis da Vinha, *Revisiting the Carter Administration’s Human Rights Policy: Understanding Traditional Challenges for Contemporary Foreign Policy*, 7 REV. DE PAZ Y CONFLICTOS 99 (2014) (noting the difficulty in moral and material issues in the development of the Carter Administration’s foreign policy), *with* Jerome J. Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration’s Human Rights Policy*, 2 HARV. HUM. RTS. J. 25, 32 (1989) (asserting that “human rights concerns often ran a poor second to so-called ‘national security’ interests” during the Reagan administration).

19. See Jimmy Carter, *Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People’s Republic of China* (Jan. 1, 1979), <http://millercenter.org/president/carter/speeches/speech-3935> [<https://perma.cc/DC9Q-NA5G>].

20. See Kerry, *supra* note 10.

21. John Kerry, U.S. Sec’y of State, *Remarks on U.S.-China Relations* (Nov. 4, 2014), <https://2009-2017.state.gov/secretary/remarks/2014/11/233705.htm> [<https://perma.cc/LL2S-Q4UX>].

22. Susan Rice, *Why I’m Here: The Importance of the U.S.-China Relationship*, WHITE HOUSE: PRES. BARACK OBAMA (July 26, 2016), <https://obamawhitehouse.archives.gov/blog/2016/08/18/why-im-here-importance-us%E2%80%8A%E2%80%94%E2%80%8Achina-relationship> [<https://perma.cc/69MK-7EMF>].

that human rights will remain a challenging facet of the U.S.-China relationship.²³ Simultaneously with concerns for a deteriorating domestic human rights environment, the PRC government is taking a more active role outside its borders. This is not a story of an isolationist Mao-era China that shunned virtually all international engagement. Rather, the PRC government is involved in a host of international and regional organizations—including a seat on the U.N. Human Rights Council²⁴—while maintaining a strong view of national sovereignty and arguing that its domestic human rights record is not a matter for international concern.²⁵

How, then, should President Trump approach human rights in the context of the bilateral relationship? The Obama administration had a strong record for addressing human rights in China, albeit not one without criticism.²⁶ While recognizing that diplomacy is “a lot harder than it looks,”²⁷ this Article argues that there is room for greater cohesion and clarity in U.S. policy. All facets of the administration—not just offices overtly tasked with supporting human rights—should stand firmly behind core human rights

23. See, e.g., Tom Mitchell, *Xi's China: Smothering Dissent*, FIN. TIMES (July 27, 2016), <https://www.ft.com/content/ccd94b46-4db5-11e6-88c5-db83e98a590a> [https://perma.cc/7ZVW-87MR] (“As China’s most powerful party and state leader since Deng Xiaoping, Mr. Xi has presided over a crackdown without precedent since the repression that followed the 1989 Tiananmen Square massacre.”); *Xi Jinping’s Leadership: Chairman of Everything*, ECONOMIST (Apr. 2, 2016), <http://www.economist.com/news/china/21695923-his-exercise-power-home-xi-jinping-often-ruthless-there-are-limits-his> [https://perma.cc/4BWf-YNLB] (noting Xi is due to step down in 2022).

24. See Jonathan Kaiman, *China Granted Seat on UN’s Human Rights Council*, GUARDIAN (Nov. 13, 2013), <https://www.theguardian.com/world/2013/nov/13/china-granted-seat-on-human-rights-council> [https://perma.cc/HYE5-E4K9].

25. See *China Urges U.S. Not to Interfere in Sovereignty*, XINHUA (Aug. 1, 2014), http://news.xinhuanet.com/english/china/2014-08/01/c_126820502.htm [https://perma.cc/HJ53-TJ8Q]. Cf. Daniel C.K. Chow, *How China Uses International Trade to Promote Its View of Human Rights*, 45 GEO. WASH. INT’L L. REV. 681, 722 (2013) (“When China conducts business with countries with poor human rights records, China believes that it is doing no more than affirming the right of that country to exercise its sovereignty as it sees fit.”).

26. For an example of praise combined with constructive criticism to do more with respect to human rights, see *Joint Letter to Secretary Kerry and Secretary Lew: The 2016 US-China Strategic and Economic Dialogue*, HUM. RTS. WATCH (June 2, 2016), <https://www.hrw.org/news/2016/06/05/joint-letter-secretary-kerry-and-secretary-lew> [https://perma.cc/Q2SH-5GK2] (signed by ten human rights organizations); see also Editorial Board, *The Administration Missed a Chance Last Week to Speak Truth to Autocrats*, WASH. POST (Apr. 3, 2016), https://www.washingtonpost.com/opinions/speaking-truth-to-autocrats/2016/04/03/66b85650-f83c-11e5-a3ce-f06b5ba21f33_story.html?utm_term=.55cd675baf95 [https://perma.cc/UKV9-NKXP] (“Last week, some of the world’s autocrats came to town . . . , men who have thrown their critics in prison and destroyed the fabric of civil society. They got polite treatment from the Obama administration. They deserved worse.”).

27. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 297 (2002).

principles. A necessary step for addressing human rights in both a principled and pragmatic way is to not just state that human rights matter but also to articulate an integrated, executive branch-wide plan for how human rights will be raised in various contexts. Put differently, this Article focuses on the *quality* of interactions that focus on human rights over the sheer *quantity* of times human rights is mentioned.

Part I unpacks how human rights are intertwined with issues in the U.S.-China relationship and sets forth a framework for analyzing the role of human rights in different contexts. It proposes that, in light of the current political climate in China, issues on the bilateral agenda with latent human rights implications present the most promising opportunities for pushing forward the conversation on human rights. Dedicated human rights dialogues have long-term value but are unlikely to make concrete headway under the present PRC leadership. The U.S. government should work to identify issues with embedded human rights concerns for which the PRC government has strong incentives to engage with the United States. When human rights are inextricable from an issue, then human rights should also be inextricable from bilateral conversations regarding that issue.

Using the framework developed in Part I, Part II demonstrates how law enforcement cooperation provides an example of a key issue on the bilateral agenda with still underemphasized human rights implications. This issue has the potential both to cultivate engagement by China in human rights discussions and, even if greater engagement is not forthcoming, to bolster the United States' credibility as holding true to its moral compass. This inquiry is particularly ripe because the return of several PRC fugitives²⁸ demonstrates the United States' willingness to allow at least limited repatriations despite its longtime refusal to enter into an extradition treaty with China.²⁹

28. See Areddy & Paletta, *supra* note 2; *Another 'Sky Net' Success: US Returns Woman Fugitive to Face Graft, Fraud Charges in China*, S. CHINA MORNING POST (Sept. 24, 2015), <http://www.scmp.com/news/china/policies-politics/article/1861115/another-sky-net-success-us-returns-woman-fugitive-face> [<https://perma.cc/GQ9U-35JK>].

29. See 18 U.S.C. § 3181 (2012) (listing extradition treaties currently in force); see also Anna MacCormack, *The United States, China, and Extradition: Ready for the Next Step?*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 474 (2009) ("Yet the main obstacle to a possible U.S.-PRC extradition treaty is the issue of human rights in China."); Matthew Bloom, *A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 YALE J. INT'L L. 177 (2008) (considering whether the case-by-case approach to extradition with China is a sound strategy for the United States).

I. THE MULTIFACETED ROLE OF HUMAN RIGHTS IN THE U.S.-CHINA RELATIONSHIP

Concerns for human rights in China are not new. We are, however, witnessing a period when those concerns are becoming increasingly acute. The 2015 State Department Country Report on Human Rights Practices in China warned, “Repression and coercion markedly increased during the year against organizations and individuals involved in civil and political rights advocacy and public interest and ethnic minority issues.”³⁰ The Congressional-Executive Commission on China’s 2016 Annual Report cautioned that President Xi Jinping “has overseen a deterioration in human rights and rule of law conditions in China marked by greater consolidation of his own power—leading some analysts to draw comparisons to Mao Zedong—through forced ideological conformity and the systematic persecution of human rights lawyers and defenders.”³¹

The U.S. government has frequently raised human rights concerns, but those concerns do not equally imbue all aspects of the complex bilateral relationship. The spectrum ranges from overt human rights concerns when China detains a U.S. citizen³² to times when human rights at most have a highly tangential connection to the issue at hand, whether that be military dialogues³³ or bans on Sichuan peppercorns due to the risk of an agricultural blight.³⁴

A precursor to the question of when to raise human rights and the most effective methods for doing so is to clarify how human rights intersect with discrete issues in the U.S.-China relationship. Addressing the threshold question of whether the issue includes embedded human rights concerns can force a discussion of how the United States confronts those concerns in its interactions with

30. BUREAU OF DEMOCRACY, HUM. RIGHTS, & LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 2015 HUMAN RIGHTS REPORT (2015), [hereinafter 2015 CHINA REPORT] <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> [<https://perma.cc/6BMW-YJNC>].

31. CONG.-EXEC. COMM’N ON CHINA, *supra* note 16, at 2.

32. See, e.g., Edward Wong, *China Violated Rights of Detained American, U.N. Panel Says*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/08/world/asia/china-un-phan-gillis-detained-american.html?_r=0 [<https://perma.cc/P7QD-HJ59>].

33. See Franz-Stefan Gady, *US Army to Continue Military Dialogue With the PLA*, DIPLOMAT (Mar. 6, 2015), <http://thediplomat.com/2015/03/us-army-to-continue-military-dialogue-with-the-pla/> [<https://perma.cc/J59P-RKTH>].

34. See Denise Landis, *Sichuan’s Signature Fire Is Going Out. Or Is It?*, N.Y. TIMES (Feb. 4, 2004), http://www.nytimes.com/2004/02/04/dining/sichuan-s-signature-fire-is-going-out-or-is-it.html?_r=0 [<https://perma.cc/D9E8-NHWJ>].

China. This Article proposes that issues in the U.S.-China relationship fall into three general categories: non-human rights issues, explicit human rights issues, and implicit human rights issues.

A. *Non-Human Rights Issues*

Some issues are clearly on the bilateral agenda but have no discernible connection to human rights. Discussions about exchange rate policy,³⁵ for instance, do not implicate human rights concerns. “Human rights” is of course an extremely broad term that covers everything from economic and social rights to civil and political rights.³⁶ As Professor Eric Posner has pointed out, “In most countries people formally have as many as [four hundred] international human rights—rights to work and leisure, to freedom of expression and religious worship, to nondiscrimination, to privacy, to pretty much anything you might think is worth protecting.”³⁷ Perhaps exchange rates indirectly connect to the right of all people to “freely pursue their economic, social and cultural development.”³⁸ But there is no proverbial human rights elephant in the room.³⁹ In other words, there are issues (such as exchange rates) for which human rights is an extrinsic issue—human rights must be deliberately linked to the issue because they are not an essential part of the discussion.

Conversations about issues like exchange rates are complete even if the U.S. government fails to utter a word about human rights. The U.S. government does not shirk its commitment to human rights by failing to raise concerns in such inapposite contexts. Quite the opposite: to address human rights in the context of exchange rates would require an artificial linkage. To use the Chinese idiom, adding human rights to the discussion could at worst be like “drawing feet on a snake” (画蛇添足): changing (or

35. See Press Release, U.S. Dep’t of Treasury, 2016 U.S.-China Strategic and Economic Dialogue Joint U.S.-China Fact Sheet—Economic Track (June 7, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0484.aspx> [<https://perma.cc/H6TP-NTBV>].

36. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

37. Eric Posner, *The Case Against Human Rights*, GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/news/2014/dec/04/sp-case-against-human-rights> [<https://perma.cc/YP7Z-4WKL>].

38. ICESCR, *supra* note 36, art. 1.

39. Cf. Orville H. Schell, *How to Improve U.S.-China Relations*, COUNCIL ON FOREIGN REL. (Sept. 22, 2015), www.cfr.org/china/improve-us-china-relations/p37044 [<https://perma.cc/37JV-GCGR>] (“Disagreement over human rights grows out of a more divisive problem that sits unacknowledged like the proverbial elephant in the room.”).

even ruining) the effect by adding something superfluous. The discussion would be about exchange rates *and* human rights, not the human rights implications of exchange rates.

This feet-on-a-snake approach was raised during the debate regarding China's accession to the World Trade Organization. Critics called on President Bill Clinton to certify that China had made concrete human rights improvements before U.S. engagement on certain economic issues.⁴⁰ Economic ties could be withheld to serve as a countermeasure for human rights abuses in China or even because such ties indirectly make the U.S. government complicit in those abuses by supporting the existing PRC leadership.⁴¹ Ultimately pragmatism won out because "[t]he threat to revoke [most favored nation trading] status was not credible given the U.S. stake in political and economic relations with China."⁴² Likewise, Donald Trump did not indicate during his campaign that he would attach tangible economic consequences to progress on China's human rights record.

It is possible that a dramatic event could change President Trump's political calculations and elevate the prominence of human rights in his China agenda, as when President George H.W. Bush suspended military contracts and technology exchanges with China following the Tiananmen Square massacre.⁴³ Even then, President Bill Clinton restored China's most favored nation trading status four years later.⁴⁴ He declared that renewal in 1994 was contingent in part upon China's ability to make "significant progress" in conforming to international standards with regard to

40. See *U.S.-China Relations: Current Tensions, Policy Choices*, COUNCIL ON FOREIGN REL. (Mar. 29, 1996), <http://www.cfr.org/world/us-china-relations-current-tensions-policy-choices/p5041> [<https://perma.cc/JT3T-BGFT>] (statement of Sidney Jones, then executive director of Human Rights Watch/Asia).

41. Cf. Matthew Stephenson, *A Trojan Horse in China?*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 191, 212 (Thomas Carothers ed., 2006) (noting perceived frustration "over congressmen who refuse to support any program that might be seen as helping the Chinese government to do anything").

42. *Id.* at 193.

43. See *President's News Conference on Foreign and Domestic Issues*, N.Y. TIMES, June 9, 1989, at A22. Scholars have debated the legal basis for a state to go beyond critical rhetoric and actually suspend its own legal obligations to coerce another state into respecting international human rights law. See generally Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269, 271 (2015) (analyzing two juridical theories to explain states' standing to use humanitarian countermeasures and developing an alternative theory of state standing).

44. William J. Clinton, Statement on Most-Favored-Nation Trade Status for China, AM. PRESIDENCY PROJECT (May 28, 1993), <http://www.presidency.ucsb.edu/ws/?pid=46632>; Exec. Order No. 12,850, 58 Fed. Reg. 103 (May 28, 1993).

human rights,⁴⁵ but he subsequently backed down from this requirement.⁴⁶

Even under the relatively overtly human rights-friendly Obama administration, there was no indication that the U.S. government's recognition of the deteriorating human rights situation was anywhere near sufficient to suspend interactions with China. Passing statements on human rights in inapposite contexts can thus become free-floating comments rather than an integral component of bilateral negotiations. Human rights advocates have rightly called for consistency and clarity in the U.S. government's messaging on human rights. A nagging question, however, is whether raising human rights during discussions on a wide spectrum of issues is effective in encouraging the PRC government to improve its human rights record.⁴⁷ Tacking on a stray comment regarding human rights concerns in contexts like exchange rate negotiations may do little if anything to sway the PRC leadership to take human rights seriously and may even cause unnecessary friction when there is no credible threat of consequences if progress is not forthcoming.⁴⁸

If the U.S. government nonetheless decides there are moral and/or political reasons to raise unconnected human rights concerns when engaging China on an issue, the question turns to the projected costs and benefits. There may be strong countervailing reasons to insulate certain issues on the bilateral agenda from link-

45. *Id.*

46. See Thomas L. Friedman, *U.S. Is to Maintain Trade Privileges for China's Goods; Clinton Votes for Business*, N.Y. TIMES (May 27, 1994), <http://www.nytimes.com/1994/05/27/world/us-is-to-maintain-trade-privileges-for-china-s-goods-clinton-votes-for-business.html> [<https://perma.cc/3U2Y-4BBY>].

47. See, e.g., Sophie Richardson, *How to Deal with China's Human Rights Abuses*, CHINAFILE (Sept. 1, 2016), <https://www.chinafile.com/viewpoint/how-deal-chinas-human-rights-abuses> [<https://perma.cc/XH38-5TMH>] (arguing that U.S. government statements of concern about the human rights situation in China "lack . . . clarity about what the United States, the European Union, or others will actually do in response to China's sharply escalating repression"); *Can the U.S. Help Advance Human Rights in China?*, ATLANTIC (June 13, 2013), <http://www.theatlantic.com/china/archive/2013/06/can-the-us-help-advance-human-rights-in-china/276841/> [<https://perma.cc/X8X9-EJ26>] ("[T]he U.S. government needs to be consistent in the way it raises its concerns on human rights, and not be shy to use vocal diplomacy when private diplomacy yields no result." (quoting Amnesty International's Nicholas Bequelin)).

48. Cf. Schell, *supra* note 39 ("The issue [of human rights] plagues the overall health of the bilateral relationship like a low-grade infection. U.S. displeasure with China's rights record is only matched by Beijing's displeasure with Washington's judgmental attitude.").

ages to human rights.⁴⁹ For example, the U.S.-Russia space program has persevered despite tensions between the two countries.⁵⁰ Astronauts from fifteen nations have spent time on the International Space Station, but China is currently barred because of a law passed by Congress based on national security grounds and concerns about China's human rights record.⁵¹ An article in *Time Magazine* bluntly noted the downsides of this linkage:

[E]ven if a Chinese Death Star were under construction at this moment in a mountain lair in Xinjiang—forbidding the kind of international handshaking and cooperating that is made possible by a facility like the [International Space Station, barring China] is precisely the wrong way to go about reducing the threat.⁵²

As with space exploration, it is difficult to articulate a connection between human rights and bilateral discussions on efforts to improve air traffic skills and winter operation plans in the aviation industry.⁵³ The United States' insistence on freedom of navigation in the sea lanes around China further illustrates when an issue does not even indirectly implicate human rights concerns.⁵⁴ Coun-

49. See Phillip R. Trimble, *Human Rights and Foreign Policy*, 46 ST. LOUIS U. L.J. 465, 466 (2002) (discussing the potentially conflicting considerations in foreign policy that mean "in some situations the pursuit of human rights objectives may well be undesirable").

50. See *A Handshake in Space Changed US-Russia Relations: How Long Will It Last?*, CONVERSATION (July 17, 2015), <http://theconversation.com/a-handshake-in-space-changed-us-russia-relations-how-long-will-it-last-44846> [<https://perma.cc/C5BJ-3PY3>] (noting that "cooperation has lasted, even when relationships on the ground deteriorated"); see also Elliott C. McLaughlin et al., *Amid U.S.-Russian Tensions Over Ukraine, Space Show Goes On*, CNN (Mar. 11, 2014), <http://www.cnn.com/2014/03/11/tech/innovation/russia-us-space-program-ukraine/> [<https://perma.cc/YQC7-9UUF>] ("[I]n the world of U.S.-Russian relations, space is impervious . . .").

51. See Brian Weeden & Xiao He, *U.S.-China Strategic Relations in Space*, in NAT'L BUREAU OF ASIAN RES. SPECIAL REP. NO. 57 U.S.-CHINA RELATIONS IN STRATEGIC DOMAINS 63, 71 (Travis Tanner & Wang Dong eds., 2016).

52. Jeffrey Kluger, *The Silly Reason the Chinese Aren't Allowed on the Space Station*, TIME (May 29, 2015), <http://time.com/3901419/space-station-no-chinese/> [<https://perma.cc/695E-MR57>].

53. See Press Release, U.S. Dep't of State, *Previewing the Strategic and Economic Dialogue With China* (May 31, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/05/257847.htm> [<https://perma.cc/8JMU-PQ6Y>] (announcing new dialogue on aviation-related issues); Press Release, U.S. Trade & Dev. Agency, *USTDA Extends Support for U.S.-China Aviation Cooperation Program* (June 6, 2016), <https://www.usda.gov/news/press-releases/2016/ustda-extends-support-us-china-aviation-cooperation-program> [<https://perma.cc/87PF-2Y2G>].

54. Cf. James Fallows, *The Right Way to Enforce Freedom of Navigation in the South China Sea*, ATLANTIC (Oct. 28, 2015), <http://www.theatlantic.com/notes/2015/10/when-does-a-rock-become-an-island-and-other-mysteries-of-the-south-china-sea/413026/> [<https://perma.cc/5X23-WHJK>] (arguing that the United States should send vessels through sea lanes without prejudice or bias towards who is claiming submerged features). In a 1994 memorandum, the secretary of defense remarked that, in the wake of Tiananmen, human rights

tering nuclear proliferation in North Korea and Iran is yet another weighty issue that is not connected to the human rights situation in China.⁵⁵ To condition aviation, military, and nonproliferation cooperation on benchmarks regarding China's human rights record could well bring discussions in these important areas to a halt when they have nothing to do with human rights in the first place.

In sum, this Article takes the position that not only does pervasive pragmatism mean that progress on human rights *will not* be linked to all interactions with China but it also *should not* be linked. There are important issues on the bilateral agenda other than human rights. The U.S. government should first scrutinize whether each issue on the bilateral agenda has embedded human rights concerns. If the U.S. government identifies no human rights concerns, then the debate can turn to whether deep-rooted moral and/or political reasons still counsel for linking the issue with human rights because the United States feels a level of outrage that prompts a dramatic response. In contrast, when an issue does by its very nature implicate human rights concerns, either explicitly or implicitly, the U.S. government should confront those issues as an integral part of the conversation with its PRC counterparts.

B. *Explicit Human Rights Issues*

Sometimes an issue in the bilateral relationship fundamentally concerns human rights. These are "explicit" human rights issues in that the human rights implications are "fully revealed or expressed without vagueness, implication, or ambiguity."⁵⁶ The prolonged detention of U.S. citizen Sandy Phan-Gillis by PRC authorities on charges of theft of state secrets⁵⁷ provides a clear illustration. The United States engaged in regular consular visits

issues would be discussed "even in high level military discussions." Memorandum from William J. Perry, Sec. of Def., on U.S-China Military Relationship (Aug. 1994), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB19/docs/doc12.pdf> [<https://perma.cc/2YVT-D38Q>].

55. Cf. Kerry, *supra* note 21 (noting bilateral cooperation on nuclear nonproliferation).

56. *Explicit*, MERRIAM-WEBSTER'S LEARNER'S DICTIONARY (11th ed.), <http://www.merriam-webster.com/dictionary/explicit> [<https://perma.cc/H9NE-7583>] (last visited Mar. 22, 2017).

57. See *UN Experts Rule Detention of American Citizen Arbitrary, Violates International Law*, DUI HUA (July 5, 2016), [hereinafter DUI HUA, *UN Experts*] http://duihua.org/wp/?page_id=10822 [<https://perma.cc/B5B9-H6FQ>]; Marco Rubio & Chris Smith, *Supporting China's Reformers and Dissidents*, WALL ST. J. (Oct 5, 2016), <http://www.wsj.com/articles/supporting-chinas-reformers-and-dissidents-1475686054> [<https://perma.cc/PS69-XTEB>].

and criticized her treatment while in PRC custody.⁵⁸ In July 2016, the U.N. Working Group on Arbitrary Detention ruled that she had been arbitrarily deprived of her liberty by the PRC government, in violation of international human rights law and the PRC Criminal Procedure Law.⁵⁹ The issue of this U.S. citizen's treatment is glaringly about human rights. The U.S. government could conceivably ignore Ms. Phan-Gillis's case, but it would be awkward at best to discuss this case without recognizing the human rights implications, especially in light of the U.N. decision.⁶⁰

Other times, a human rights abuse is so egregious that the U.S. government feels compelled to speak out, even though there is no discernible connection to the United States. For example, the Obama administration issued a statement in August 2016 on the sentencing of four PRC-citizen lawyers and rights advocates on charges of subversion of state power: "We urge Chinese authorities to release the lawyers and rights defenders who are imprisoned or in detention, including those already sentenced."⁶¹

Another example occurred at the beginning of the Obama administration, when the 2008 Sichuan earthquake raised serious questions about corruption that made some buildings, most notably schools, prone to collapse.⁶² This revelation was followed by years of government attempts to silence parents and their advocates.⁶³ The U.S. government offered some aid for the relief efforts,⁶⁴ but the earthquake and its aftermath was at heart a domestic matter. Nonetheless, when the celebrated artist and PRC citizen Ai Weiwei was detained after drawing attention to the plight of parents who lost their children in the quake, the Obama admin-

58. See Wong, *supra* note 32.

59. See Hum. Rts. Council, Working Group on Arbitrary Detention, *Opinion No. 12/2016 Concerning Phan (Sandy) Phan-Gillis*, ¶ 10, U.N. Doc. A/HRC/WGAD/2016 (June 3, 2016); DU HUA, *UN Experts*, *supra* note 57.

60. See Hum. Rts. Council, *supra* note 59, ¶ 23.

61. Press Release, Elizabeth Trudeau, U.S. Dep't of State, Sentencing of Lawyers and Rights Advocates in China (Aug. 8, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/08/260913.htm> [<https://perma.cc/2TS5-T2G9>].

62. See Edward Wong, *China Admits Building Flaws in Quake*, N.Y. TIMES (Sept. 4, 2008), <http://www.nytimes.com/2008/09/05/world/asia/05china.html> [<https://perma.cc/YD94-VQ4H>]; Edward Wong, *Grieving Chinese Parents Protest School Collapse*, N.Y. TIMES (July 17, 2008), <http://www.nytimes.com/2008/07/17/world/asia/17china.html> [<https://perma.cc/6355-Y5D5>].

63. See Melissa Block, *In 'According To What?' Ai Weiwei Makes Mourning Subversive*, NPR (Jan. 23, 2013), <http://www.npr.org/2013/01/23/169973843/in-according-to-what-ai-weiwei-makes-mourning-subversive> [<https://perma.cc/9MLU-B59Z>].

64. See Q&A: *The Earthquake in China*, N.Y. TIMES BLOG (May 16, 2008), http://questions.blogs.nytimes.com/2008/05/16/qa-the-earthquake-in-china/?_r=0 [<https://perma.cc/Y7GX-A6Y5>].

istration responded in April 2011: “The detention of artist and activist Ai Weiwei is inconsistent with the fundamental freedoms and human rights of all Chinese citizens, including China’s commitment to the Universal Declaration of Human Rights, and we urge the Chinese government to release him immediately”⁶⁵

Similarly, the 2010 Nobel Peace Prize recipient, Liu Xiaobo, was unable to attend the Nobel award ceremony because he is serving an eleven-year sentence for his 2009 conviction on charges of subversion.⁶⁶ President Obama praised Mr. Liu as “someone who has been an eloquent and courageous spokesman for the advance of universal values through peaceful and non-violent means, including his support for democracy, human rights, and the rule of law.”⁶⁷ On the fifth anniversary of Mr. Liu’s receipt of the Nobel Prize, Secretary of State Kerry issued a statement reiterating calls to release Mr. Liu and lift his wife’s extralegal house arrest.⁶⁸ Mr. Liu had visited the United States,⁶⁹ but neither he nor his wife is a U.S. citizen.

And in December 2015, renowned civil rights lawyer Pu Zhiqiang was convicted on charges of “inciting ethnic hatred” and “picking quarrels and provoking trouble” through comments on his microblogs.⁷⁰ The U.S. Embassy requested that a representative be able to attend the trial,⁷¹ though Mr. Pu is a PRC citizen and thus not entitled to visitations by U.S. consular officers, as is the case with U.S. citizen detainees.⁷² The U.S. Embassy staff was likely

65. *US Calls on Beijing to Release Chinese Artist Ai Weiwei*, VOICE OF AM. (Apr. 3, 2011), <http://www.voanews.com/content/us-calls-on-beijing-to-release-chinese-artist-ai-weiwei-119218364/167283.html> [<https://perma.cc/BVZ4-NNAZ>] (internal quotations omitted).

66. See Press Release, Norwegian Nobel Comm., The Nobel Peace Prize for 2010 (Oct. 8, 2010), http://www.nobelprize.org/nobel_prizes/peace/laureates/2010/press.html [<https://perma.cc/49MK-4A3P>].

67. Press Release, White House Off. of Press Sec’y, Statement by the President on the Awarding of the Nobel Peace Prize to Liu Xiaobo (Oct. 8, 2010), <https://www.whitehouse.gov/the-press-office/2010/10/08/statement-president-awarding-nobel-peace-prize-liu-xiaobo> [<https://perma.cc/7E7G-Y9P8>].

68. See Kerry, *supra* note 10.

69. See Michael Bristow, *Liu Xiaobo: 20 Years of Activism*, BBC NEWS (Dec. 9, 2010), <http://www.bbc.com/news/world-asia-pacific-11492131> [<https://perma.cc/S3XZ-272U>].

70. Jane Perlez, *Chinese Rights Lawyer, Pu Zhiqiang, Is Given Suspended Prison Sentence*, N.Y. TIMES (Dec. 21, 2015), http://www.nytimes.com/2015/12/22/world/asia/china-pu-zhiqiang-sentence.html?_r=0 [<https://perma.cc/3V9D-CU77>].

71. *China Rights Lawyer Pu Zhiqiang’s Trial Ends Amid Scuffles*, BBC NEWS (Dec. 14, 2015), <http://www.bbc.com/news/world-asia-china-35089858> [<https://perma.cc/7DXM-UXYA>] (reporting on statement of a U.S. diplomat “who had tried to attend court as an observer”).

72. See U.S. DEP’T OF STATE, *Information for American Citizens about the Chinese Legal System*, <http://photos.state.gov/libraries/shanghai/228904/ACS/ACSChineseLawOverview>

unsurprised when the request was denied.⁷³ Undeterred, the U.S. government not only released a statement expressing grave concerns about Mr. Pu's treatment but also had a senior diplomat read the statement outside the courthouse.⁷⁴

The U.S. government needs to keep showing up and standing up for the principles that are core both to the country's values and to international human rights norms.⁷⁵ One should not expect such statements to prompt action, however. In fact, the times when the PRC government has most flagrantly violated its citizens' human rights are often the times when the U.S. government has the least leverage to influence the PRC government's behavior. Statements condemning human rights violations often do not have a discernible impact on the PRC leadership, but they are heard by people in China who have seen their rights, as well as those of friends and family, violated.⁷⁶ Furthermore, literally taking a stand on the courthouse steps reaffirms that the United States remains committed to the fundamental dignity and rights of all human beings despite instances where the U.S. government itself has transgressed human rights norms.

Statements regarding the treatment of people like Ai Weiwei, Liu Xiaobo, and Pu Zhiqiang aim at China's *domestic* human rights record, not issues that have a straightforward connection to the bilateral relationship. Yet domestic human rights issues can be elevated to bilateral discussions at, for example, the U.S.-China Human Rights Dialogue, which "is a chance for [the United States] to engage directly with the Chinese Government on human rights in an in-depth manner, focusing on specific issues and specific

.pdf [https://perma.cc/4N2J-S7KH] (last visited Mar. 22, 2017); *American Citizen Services: Emergency Assistance*, CONSULATE GEN. OF THE UNITED STATES SHENYANG, CHINA, <http://shenyang.usembassy-china.org.cn/acs-emergency2.html> [https://perma.cc/3NUC-VRNS] (last visited Mar. 22, 2017).

73. Cf. Zheping Huang, *Chinese Human Rights Lawyer Pu Zhiqiang Asks for a "Verdict that Stands the Test of History"*, QUARTZ (Dec. 14, 2015), <http://qz.com/572821/chinese-human-rights-lawyer-pu-zhiqiang-asks-for-a-verdict-that-stands-the-test-of-history/> [https://perma.cc/THS3-GAZK].

74. See Press Release, U.S. Dep't of State, Trial of Pu Zhiqiang (Dec. 22, 2015), <https://2009-2017.state.gov/r/pa/prs/ps/2015/12/250836.htm> [https://perma.cc/2EHR-KRY8].

75. See *China's Pervasive Use of Torture: Hearing Before the Cong.-Exec. Comm'n on China*, 114 Cong. 4-7 (2016), <http://www.cecc.gov/events/hearings/china%E2%80%99s-pervasive-use-of-torture> [https://perma.cc/TTS7-6NT8] (statement of Margaret K. Lewis).

76. See, e.g., *Translation of Liu Xia's Letter*, PROBE INT'L (Nov. 5, 2010), <https://journal.probeinternational.org/2010/11/05/translation-of-liu-xias-letter/> [https://perma.cc/QQ8Y-AZS5] (letter written by wife of jailed Nobel Laureate expressing gratitude for support from the international community).

cases.”⁷⁷ The PRC government is not always willing to discuss specific issues and cases, however. There have been years when the bilateral dialogue was not held, thus suspending one of the key forums for the two sides to address human rights head-on.⁷⁸

Even when the PRC government does sit down at the table, there is a longstanding debate over whether international pressure, including through official dialogues, has any effect on the PRC government’s compliance with human rights norms.⁷⁹ Skepticism that dialogues and so-called “naming and shaming”⁸⁰ strategies can induce norm compliance is especially warranted given the current PRC leadership’s vigorous pushback to international criticism of its human rights record.⁸¹ As explained in Section I.A above, one option is thus to link human rights concerns to unrelated items on the bilateral agenda. Not only is President Trump highly unlikely to attach human rights to real consequences in economic or other spheres, but also the costs of drawing human rights feet on a proverbial snake need to be weighed carefully against the projected benefits.

Moreover, even when there appear to be immediate advantages from pressing China on specific human rights abuses, these outcomes should be viewed with a dose of skepticism. After China released political prisoner Wei Jingsheng in 1997, prior to then-

77. Press Release, U.S. Dep’t of State, On-the-Record Briefing on the 19th U.S.-China Human Rights Dialogue (Aug. 13, 2015), <https://2009-2017.state.gov/r/pa/prs/ps/2015/08/246092.htm> [<https://perma.cc/3PSY-RTJX>] (statement by Assistant Secretary of State for Democracy, Human Rights, and Labor Tom Malinowski).

78. See Press Release, Embassy of the People’s Republic of China in the United States of America, China, U.S. Hold Human Rights Dialogue After Years’ Suspension (May 28, 2008), <http://www.china-embassy.org/eng/zt/zgrq/t459531.htm> [<https://perma.cc/TD7H-6JY2>].

79. See, e.g., Ann Kent, *Engaging China on Human Rights*, in *PRINCIPLED ENGAGEMENT: NEGOTIATING HUMAN RIGHTS IN REPRESSIVE STATES* 75, 78 (Morten B. Pedersen & David Kinley eds., 2013) (listing scholarly literature “questioning the effectiveness or otherwise of different kinds of external pressure on China’s human rights”); *US-China Human Rights Dialogue: An Exercise in Insanity?*, DUI HUA, (Aug. 29, 2013), [hereinafter DUI HUA, *US-China Human Rights Dialogue*] <http://duihua.org/wp/?p=8130> [<https://perma.cc/FAM6-3KBQ>]; Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699, 710–13 (2007) (describing China’s “normative resistance” to certain international human rights norms).

80. See Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORC. 689, 689 (2008); Trimble, *supra* note 49, at 466 (discussing “shaming” as a principal enforcement technique).

81. See, e.g., *China at the UN: Shouting Down the Critics*, HUM. RTS. IN CHINA (Mar. 15, 2016), <http://www.hrichina.org/en/press-work/press-release/china-un-shouting-down-critics> [<https://perma.cc/43J9-ERNQ>] (reporting PRC ambassador’s “blistering attack on the [United States] for hypocrisy and double standards on human rights issues”).

President Jiang Zemin's visit to Washington, D.C.,⁸² the executive director of Human Rights Watch/Asia commented:

[W]hen [PRC leaders] need to offer a concession for political reasons, they release someone they never should have arrested in the first place. When the political climate permits, they arrest a few more as bargaining chips for the next time around. In terms of the overall human rights situation, Mr. Wei's release changes little.⁸³

Certainly Mr. Wei's release changed everything for him as an individual, and there are examples where organizations and governments have quietly used lists to make a tremendous difference in the lives of specific prisoners.⁸⁴ Nevertheless, conversations regarding individual prisoners and explicit human rights issues more generally should be done with a savvy eye towards minimizing the potential that the propaganda value outweighs the actual impact on the human rights situation.⁸⁵

Then why continue human rights dialogues and other conversations on explicit human rights issues? What bilateral discussions of human rights accomplish is often intangible, at least in the short run. Building interpersonal ties is not an immediate benefit but instead lays the groundwork for more substantive long-term cooperation after the current political winds shift, whenever that may be.⁸⁶ Track 1.5 dialogues (involving both government officials and experts from outside the government) and Track 2 dialogues (involving only non-governmental experts)⁸⁷ restore one's faith that there are many reform-minded individuals both within and outside the PRC government who are committed to improving

82. *Wei Jingsheng Released*, HUM. RTS. WATCH (Nov. 16, 1997), <https://www.hrw.org/news/1997/11/16/wei-jingsheng-released> [<https://perma.cc/5VK3-SQH3>].

83. *Id.*

84. See DUI HUA, *Political and Religious Prisoners*, http://duihua.org/wp/?page_id=80 [<https://perma.cc/Y8BY-LSEQ>] (last visited Mar. 22, 2017).

85. For state-run media reports, see *China, U.S. Hold 19th Human Rights Dialogue*, XINHUA (Aug. 15, 2015), http://news.xinhuanet.com/english/2015-08/15/c_134521377.htm [<https://perma.cc/NM8K-UVHC>] ("It was agreed that the dialogue helped enhance mutual understanding on each other's human rights issues."); *China, EU Hold 33rd Round of Human Rights Dialogue*, XINHUA (Dec. 9, 2014), http://news.xinhuanet.com/english/china/2014-12/09/c_133841227.htm [<https://perma.cc/WB3R-VKQW>].

86. See DUI HUA, *US-China Human Rights Dialogue*, *supra* note 79 ("[Human rights dialogues] help[] make human rights public and mainstream, and more people can be aware of the issues through digital media." (quoting Chinese human rights lawyer Li Fangping)).

87. See generally Jeffrey Mapendere, *Track One and a Half Diplomacy and the Complementarity of Tracks*, 2 CULTURE PEACE ONLINE J. 66 (2005) (explaining the various diplomacy tracks in detail for resolving conflict).

human rights.⁸⁸ Their space to publicly advocate for this goal is at present extremely constrained. Perhaps they could be faulted for not being more outspoken, but one might be hesitant to criticize people for working gently behind the scenes when a more overt approach imperils them and their families.⁸⁹

Finding spaces to engage with people who are sincerely interested in improving human rights is a noble endeavor. There must be a reservation point, however, at which the U.S. government and non-governmental organizations will walk away from engagement that merely provides funding for people whose goal is to perpetuate the current system or stage pretty photos for state-run media.⁹⁰

C. *Implicit Human Rights Issues*

Between the poles of bilateral issues that are unabashedly about human rights and those that have no discernible human rights implications is a more complex area. There are issues that at first glance might not fall under the human rights umbrella; upon closer inspection, however, human rights are an intrinsic property. Unlike non-human rights issues—for which there must be an artificial linkage to human rights concerns—the human rights implications of these issues can be ignored but cannot be fully extracted. They are “implicit” human rights issues in that human rights are

88. Cf. Jerome A. Cohen, *Support Silent Supporters of the Rule of Law in China*, JERRY'S BLOG (July 31, 2016), <http://www.jeromecohen.net/jerrys-blog/2016/7/31/support-silent-supporters-of-the-rule-of-law-in-china> [<https://perma.cc/KXV2-R5DR>] (“[H]undreds of thousands of legal specialists in China are extremely unhappy with Xi Jinping’s oppressive policies . . .”).

89. See, e.g., Mimi Lau, *Chinese Police Hold Four Wives of Rights Activists Seized in ‘709 Crackdown’*, S. CHINA MORNING POST (July 30, 2016), <http://www.scmp.com/news/china/policies-politics/article/1996637/chinese-police-hold-four-wives-rights-activists-seized> [<https://perma.cc/C3BW-Q9PM>] (reporting that wives of four detained human rights advocates were taken away by police for questioning after visiting a local courthouse to ask about rumored trial dates for their husbands); Teng Biao, *The West Kowtows to China Through Self-Censorship*, WASH. POST (July 28, 2016), <http://wpo.st/3Unr1> [<https://perma.cc/FWC6-DX8S>] (“For my activism I’ve been banned from teaching, forced out of a job, disbarred from practicing law, jailed and tortured.”).

90. See Teng, *supra* note 89 (“[R]esources meant to support the rule of law and human rights make their way into the hands of those whose job it is to trample upon human rights—the official bar associations, courts, prosecutors and police.”); *Progress in China’s Human Rights*, XINHUA, <http://www.xinhuanet.com/english/special/human-rights/> [<https://perma.cc/6E6K-46B5>] (website of PRC state-run media reporting progress on human rights).

“involved in the nature or essence of something” even though not clearly revealed.⁹¹

For example, freedom of expression will invariably be implicated during discussions regarding cyber-activities. The U.S. and PRC governments could choose to overlook these implications and solely focus on “cybercrime or other malicious cyber activities.”⁹² As Pu Zhiqiang’s case demonstrates,⁹³ however, the possibility is always present that the PRC government will use security as justification for censoring peaceful government criticism posted on the Internet. Raising freedom of expression when addressing cyber-activities is not like drawing extraneous feet on a snake. Quite the contrary: failure to raise freedom of expression is like omitting paws when drawing a panda.

The Obama administration repeatedly voiced concerns for Internet freedom.⁹⁴ In 2009, the administration criticized China’s proposal to require filtering software on all personal computers both because it presented a barrier to trade and also because it threatened freedom of expression.⁹⁵ Secretary of State Hillary Clinton reportedly “vowed to invest more to develop advanced circumvention technology to bypass censorship by the Chinese government”⁹⁶ The 2012 U.N. Human Rights Council resolution to protect the free speech of individuals on the Internet directly addressed the right to freedom of expression and opinion on the

91. *Implicit*, MERRIAM-WEBSTER’S LEARNER’S DICTIONARY (11th ed.), <http://www.merriam-webster.com/dictionary/implicit> [<https://perma.cc/FFX5-9BFZ>] (last visited Mar. 22, 2017).

92. Press Release, U.S. Dep’t of Just., First U.S.-China High-Level Joint Dialogue on Cybercrime and Related Issues Summary of Outcomes (Dec. 2, 2015), <https://www.justice.gov/opa/pr/first-us-china-high-level-joint-dialogue-cybercrime-and-related-issues-summary-outcomes-0> [<https://perma.cc/HGN5-28PL>].

93. See Press Release, U.S. Dep’t of State, *supra* note 74.

94. See *Internet Freedom*, HUMANRIGHTS.GOV, <https://www.humanrights.gov/dyn/issues/internet-freedom.html> [<https://perma.cc/SFW3-YGD3>] (last visited Mar. 22, 2017).

95. See Loretta Chao, *U.S. Trade Officials Urge China to Revoke PC Rule*, WALL ST. J. (June 25, 2009), <http://www.wsj.com/articles/SB124584251393346953> [<https://perma.cc/JAT6-JAEE>].

96. Adam Segal & Tang Lan, *Reducing and Managing U.S.-China Conflict in Cyberspace*, in NAT’L BUREAU OF ASIAN RES. SPECIAL REP. NO. 57 U.S.-CHINA RELATIONS IN STRATEGIC DOMAINS 43, 55 (Travis Tanner & Wang Dong eds., 2016). In May 2010, then-Assistant Secretary of State Michael Posner commented that Secretary Clinton’s January 2010 speech “articulated a U.S. Government policy which promotes an unfettered, open [I]nternet across the globe. We view that as a human rights issue.” Press Release, Michael H. Posner, *supra* note 9.

Internet, with both the United States and China voting in favor.⁹⁷ And, at the 2015 U.S.-China Human Rights Dialogue, the U.S. government conveyed its “deep concern” that China’s cyber-laws and new national security law “may be used as a legal facade to justify further crackdowns on peaceful expression.”⁹⁸

Notwithstanding these statements, bilateral interactions regarding cyber-security caution that freedom of expression is being siloed rather than treated in a true whole-of-government approach.⁹⁹ Following an October 2015 bilateral agreement on cyber-security, Freedom House raised the following criticism:

More problematic from the perspective of privacy and freedom of expression was the cybertheft agreement’s focus on the economic realm. By framing the pact in this way, Obama and Xi ignored the increasingly aggressive, sophisticated, and widespread cyberattacks apparently committed by Chinese state actors against [U.S.] media companies, human rights groups, individual activists, and government bodies.¹⁰⁰

The Department of Homeland Security and Department of Justice press releases from the first two dialogues under the agreement did not mention human rights.¹⁰¹ There was a reference to creation of a “U.S.-China Senior Experts Group on International Norms,” but there was no indication that this body would be tasked with addressing human rights.¹⁰²

97. See Wendy Zeldin, *U.N. Human Rights Council: First Resolution on Internet Free Speech*, LIBR. OF CONG. (July 12, 2012), <http://www.loc.gov/law/foreign-news/article/u-n-human-rights-council-first-resolution-on-internet-free-speech/> [<https://perma.cc/42GQ-6TJF>].

98. Press Release, U.S. Dep’t of State, *supra* note 77.

99. Cf. *US: Show Breadth of Rights Commitment at China Dialogue*, HUM. RTS. WATCH (June 5, 2016), <https://www.hrw.org/news/2016/06/05/us-show-breadth-rights-commitment-china-dialogue> [<https://perma.cc/RYQ8-GWLY>] (“[U.S.] officials have described their strategy as a ‘whole of government’ approach. Yet there is little evidence that officials, other than those from the State Department or the White House, are raising such concerns.”).

100. Sarah Cook, *Obama-Xi Agreement Will Not Resolve China Cybersecurity Threat*, FREEDOM HOUSE (Nov. 9, 2015), <https://freedomhouse.org/blog/obama-xi-agreement-will-not-resolve-china-cybersecurity-threat> [<https://perma.cc/ZEL6-MLCD>].

101. See Press Release, U.S. Dep’t of Just., *supra* note 92 (describing first meeting on cyber-crime between the United States and China); Press Release, Dep’t of Just., *Second U.S.-China Cybercrime and Related Issues High Level Joint Dialogue: Joint Summary of Outcomes* (June 14, 2016), <https://www.justice.gov/opa/pr/second-us-china-cybercrime-and-related-issues-high-level-joint-dialogue> [<https://perma.cc/WFA7-RBF3>].

102. See Press Release, Dep’t of State, *U.S.-China Senior Experts Group Meets to Discuss International Security Issues in Cyberspace* (May 11, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/05/257103.htm> [<https://perma.cc/G2KG-PR6U>]; *China, U.S. Discuss Int’l Norms of State Behavior in Cyberspace*, XINHUA (May 11, 2016), http://news.xinhuanet.com/english/2016-05/12/c_135354264.htm [<https://perma.cc/B24L-T8TU>]; Franz-Stefan Gady, *China-U.S. Relations in Cyberspace: A Half-Year Assessment*,

Looking ahead to the projected fourth cyber-security dialogue in 2017, President Trump could integrate the human rights implications into an executive branch-wide conversation, extract them into a separate venue, or simply ignore them. Assuming *arguendo* that he does not choose the last option and recognizing the unlikelihood of a robust conversation across the executive branch, at best remains the middle option of an isolated dialogue. Addressing concerns primarily through dedicated human rights conversations rather than as a component of a broader strategic initiative can “essentially ghettoize[] human rights concerns by separating them out”¹⁰³ Relegation of human rights to a standalone conversation both indicates that human rights are not integral to the conversation and also results in different people at the table. As argued in Section I.B above, there are potential long-term benefits of encouraging bilateral conversations specifically on human rights. That said, it is not an either-or dilemma: the human rights implications of cyber-security can and should be addressed both through human rights dialogues and cyber-security dialogues.

Cooperation with China on infectious diseases is another area with deep linkages to human rights.¹⁰⁴ In 2015, the U.S. Health and Human Services Assistant Secretary for Global Affairs praised the two countries as “shar[ing] a strong partnership in health.”¹⁰⁵ Both governments have strong incentives to cooperate in hopes of avoiding, or at least mitigating, outbreaks of infectious diseases like H1N1 and avian influenza.¹⁰⁶ Approaching infectious diseases as purely a health issue minimizes the significant human rights impli-

EASTWEST.NGO (June 20, 2016), <https://www.eastwest.ngo/idea/china-us-relations-cyber-space-half-year-assessment> [<https://perma.cc/F92M-LPWJ>].

103. Press Release, U.S. Dep’t of State, *supra* note 77 (question from the *New York Times* reporter).

104. For examples of cooperation, see Press Release, U.S. Dep’t of State, *supra* note 53 (noting “cooperation in fighting infectious diseases and pandemics like Ebola”); NAT’L INST. OF ALLERGY & INFECTIOUS DISEASES, US-CHINA COLLABORATIVE BIOMEDICAL RESEARCH PROGRAM (Dec. 22, 2015), <https://www.niaid.nih.gov/research/us-china-collaborative-bio-medical-research-program> [<https://perma.cc/EE35-KT4U>] (discussing plans for U.S.-China Program for Biomedical Research Cooperation).

105. Jimmy Kolker, *U.S. & China: A Strong Partnership in Health*, U.S. DEP’T OF HEALTH & HUM. SERVICES BLOG (June 24, 2015), <http://www.hhs.gov/blog/2015/06/24/us-china-strong-partnership-health.html> [<https://perma.cc/828W-HJTA>].

106. See, e.g., Vishakha Sonawane, *China H5N6 Bird Flu Sickens 6 People, 1 Dead; Health Officials Issue Advisory*, INT’L BUS. TIMES (Jan. 8, 2016), <http://www.ibtimes.com/china-h5n6-bird-flu-sickens-6-people-1-dead-health-officials-issue-advisory-2256127> [<https://perma.cc/JLQ2-TNVZ>]; Lai Ying-kit, *Swine Flu: New Strain of Virus Found in China Has Potential to Transmit Easily to Humans, Cause Pandemic*, S. CHINA MORNING POST (Dec. 29, 2015), <http://www.scmp.com/news/hong-kong/health-environment/article/1896062/swine-flu-new-strain-virus-found-china-puts> [<https://perma.cc/8Q4C-SHL4>].

cations of government policy such as discrimination against people living with HIV/AIDS.¹⁰⁷ The State Department's 2015 report on China's human rights practices notes, "Discrimination against persons with HIV remained a problem, impacting individuals' employment."¹⁰⁸ Discrimination has been a longstanding problem,¹⁰⁹ but the 2002 bilateral Memorandum of Understanding on HIV/AIDS Cooperation contains no mention about discrimination or human rights more generally.¹¹⁰

Antidumping determinations provide yet another example of an issue for which the human rights implications are not readily apparent on the surface but in which they have long been embedded. In 2004, the U.S. Trade Representative's office discussed "labor rights" in China and stated, "The United States Government has made clear to China that its labor practices will affect Commerce Department determinations whether China is a 'non-market economy' (NME) for purposes of anti-dumping laws."¹¹¹ As of late 2016, the U.S. government's test for determining NME status required consideration of whether "wage rates are determined by free bargaining between labor and management."¹¹² This approach fit President Obama's rhetoric that the United States had "moved aggressively . . . to improve labor laws and working condi-

107. See *Locked Doors: The Human Rights of People Living With HIV/AIDS in China*, 15 HUM. RTS. WATCH no. 7, 2003, at 33–42.

108. 2015 CHINA REPORT, *supra* note 30, at 67.

109. See Yanqiu Rachel Zhou, "If You Get AIDS . . . You Have to Endure It Alone": Understanding the Social Construction of HIV/AIDS in China, 65 SOC. SCI. & MED. 284, 285 (2007); ASIA CATALYST, EMPLOYMENT DISCRIMINATION AGAINST PEOPLE LIVING WITH HIV/AIDS AND INJECTION DRUG USERS 6–7 (2012), http://www.asiacatalyst.org/wp-content/uploads/2014/09/Kangxin_Employment_Discrimination_Report.pdf [<https://perma.cc/WTX7-NNU5>].

110. See MEMORANDUM, EMBASSY OF THE UNITED STATES IN BEIJING, CHINA, ON UNDERSTANDING ON HIV/AIDS COOPERATION BETWEEN THE MINISTRY OF HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES OF AMERICA (Dec. 11, 2007), <http://beijing.usembassy-china.org.cn/121207hiv.html> [<https://perma.cc/YX9L-4SCZ>] (renewing memorandum of understanding originally signed in 2002).

111. Press Release, Off. of U.S. Trade Rep., Statement from USTR Spokesman Regarding China Labor Petition (July 21, 2006), https://ustr.gov/archive/Document_Library/Press_Releases/2006/July/Statement_from_USTR_Spokesman_Regarding_China_Labor_Petition.html [<https://perma.cc/UJ27-32LW>].

112. K. William Watson, *Will Nonmarket Economy Methodology Go Quietly Into the Night? U.S. Antidumping Policy Toward China After 2016*, CATO INST. 5 (Oct. 28, 2014) (but noting December 2016 expiration of World Trade Organization accession agreement's allowance of non-market economy methodology); *China's Flawed Case for Market Economy Status*, FIN. TIMES (May 11, 2016), <https://next.ft.com/content/7f3c0dea-1770-11e6-b197-a4af20d5575e> [<https://perma.cc/NFZ9-6M79>].

tions with trading partners across the globe,”¹¹³ though nonmarket methodologies can also be used for protectionist purposes.¹¹⁴ Non-governmental organizations focused on labor laws and working conditions in China have never had an easy time, but stepped-up repression prompted professors at Cornell and New York University to comment in January 2016, “It seems that the Communist Party is intent on stamping out labor activism in civil society once and for all.”¹¹⁵

Cyber-security cooperation, infectious disease, and antidumping do not grab the headlines as “human rights” issues, but they all contain inextricable human rights concerns. This potential counsels for a thoughtful, deliberate inquiry into each issue on the bilateral agenda to determine the human rights implications, if any, and a strategy to address them in an integrated manner. To be clear, this Article does not advocate a stealth approach whereby the United States would try to sneak human rights on to the agenda. Quite the opposite: implicit human rights issues provide a platform for the U.S. government to assert that human rights cannot be neatly disentangled from a number of weighty issues. Moreover, unlike most explicit human rights issues, areas like trade and health are ones for which the PRC government has strong incentives to engage with the United States.

D. *A Whole-of-Government Approach Through an Issue-Specific Human Rights Review*

The arrival of a new administration always prompts a reevaluation of the role of human rights in various aspects of the U.S.-China relationship. The political appointees who will shape President Trump’s China policy are at the time of writing just starting to

113. *Fact Sheet: The Obama Administration’s Unprecedented Trade Enforcement Record*, OFF. OF U.S. TRADE REP. (Jan. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/january/fact-sheet-obama-administration%E2%80%99s> [<https://perma.cc/G572-D83Y>].

114. See John Frisbie & Erin Ennis, *Is China a ‘Market Economy?’ It Doesn’t Matter*, CHINA BUS. REV. (Apr. 26, 2016), <http://www.chinabusinessreview.com/is-china-a-market-economy-it-doesnt-matter/> [<https://perma.cc/3TAY-GB4M>].

115. See Eli Friedman, Aaron Halegua & Jerome A. Cohen, *Cruel Irony: China’s Communists are Stamping Out Labor Activism*, WASH. POST (Jan. 3, 2016), <http://wpo.st/Hcnr1> [<https://perma.cc/98Y8-P658>]; see also AARON HALEGUA, WHO WILL REPRESENT CHINA’S WORKERS? LAWYERS, LEGAL AID, AND THE ENFORCEMENT OF LABOR RIGHTS 1–2 (Oct. 2016), <http://www.aaronhalegua.com/chinasworkers/> [<https://perma.cc/K7F5-X6T8>] (addressing consensus that “the political climate for those working on labor issues in China, including lawyers, [non-governmental organizations], and academics, is now more tense than ever before”).

take shape. The Obama administration's China policy benefitted greatly from a bevy of thoughtful, intelligent career civil servants and this presumably will continue into the next administration. They are limited, however, in their ability to shape macro policy. Presidential support disseminated through high-level political appointees is necessary to establish a robust, concerted interagency approach to addressing human rights. At a time when the web of contacts between U.S. executive branch offices and their PRC counterparts is expanding, it is all the more necessary to align the various players on the U.S. side regarding how human rights concerns overlap with their areas of competence. With so many cooks in the kitchen, there needs to be a recipe for creating a whole-of-government human rights policy.

The following series of questions are a proposed recipe. They can guide the inquiry as the new administration seeks to clarify what human rights concerns, if any, are rooted in an issue and then how to approach the issue with China. This is especially true for implicit human rights issues where the human rights implications are too easily overlooked or sidelined into a separate discussion.

- 1) For the specific issue on the bilateral agenda, what, if any, human rights concerns are implicated? If no human rights concerns are identified, are there moral and/or political reasons for the United States to raise unconnected human rights concerns when engaging China on the issue? What countervailing considerations counsel against linking human rights to the issue? Alternatively, if human rights concerns are embedded in the issue, proceed to the next question (2).
- 2) What are the U.S. government's obligations under both international and domestic law when engaging China on the issue and does the U.S. government comply with these obligations?
- 3) What are the human rights standards to which China, as a sovereign state, has committed itself through international and domestic law, and does the PRC government comply with these obligations? If the United States pushes China to go beyond these voluntary commitments, what is the basis for doing so?
- 4) What options are there for the United States to engage with China in a manner that will concurrently uphold its

human rights obligations and encourage China to uphold its obligations?

- 5) What are the potential ramifications if addressing human rights concerns prompts China to disengage from discussions on a specific issue or even react with a broader negative response?

Adoption of a systematic approach to analyze the human rights implications of bilateral issues raises several practical considerations. First, some actor or actors within the system would need to lead the analysis and coordinate across agencies. The executive branch is far from a monolithic entity in its interactions with China: “The United States and China currently discuss bilateral issues in more than [ninety] different intergovernmental bodies.”¹¹⁶ The State Department’s Bureau of Democracy, Human Rights, and Labor is an obvious candidate to be the node for conducting the nuts and bolts of such an inquiry. To reconcile the different priorities of various executive branch bodies,¹¹⁷ the National Security Council (NSC) is best positioned to then serve an interagency oversight role.¹¹⁸ Direct messaging from the White House can lay the foundation that human rights are a core, even if not the dominant, priority. For example, President Obama’s national security advisor discussed human rights concerns in a February 2016 meeting with the PRC foreign minister.¹¹⁹ In April 2016, the NSC issued a statement expressing concern about the new PRC Law on the Management of Foreign NGO Activities and

116. Travis Tanner & Zhao Minghao, *Stepping Up Investments in U.S.-China Relations: Making People-to-People Exchange a Strategic Priority*, in NAT’L BUREAU OF ASIAN RES. SPECIAL REP. NO. 57 U.S.-CHINA RELATIONS IN STRATEGIC DOMAINS 83, 88 (Travis Tanner & Wang Dong eds., 2016).

117. See Paul B. Stephan, *The Limits of Change: International Human Rights Under the Obama Administration*, 35 FORDHAM INT’L L.J. 488, 493 (2012) (explaining how “career staff tend to defend the interests of the agency rather than of the administration as a whole”).

118. See *National Security Council*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/administration/eop/nsc/> [https://perma.cc/F3CN-326N] (last visited Mar. 22, 2017) (describing the National Security Council as “the President’s principal forum for considering national security and foreign policy matters”). Cf. Koh, *supra* note 27, at 298 (“[C]ollective government decision-making creates enormous coordination problems.”).

119. See Press Release, White House Off. of Press Sec’y, Statement by NSC Spokesperson Ned Price on National Security Advisor Susan E. Rice’s Meeting with Foreign Minister Wang Yi of China (Feb. 24, 2016), <https://www.whitehouse.gov/the-press-office/2016/02/24/statement-nsc-spokesperson-ned-price-national-security-advisor-susan-e> [https://perma.cc/NNES-UGE4].

urged China to respect the rights and freedoms of people and entities operating in China.¹²⁰

Regardless of what actors coordinate the human rights inquiry, there are obvious practical challenges that come with interagency coordination. Coordination can no doubt be daunting, but having a clear set of questions could at least make the various stakeholders in the executive branch articulate why human rights are or are not relevant to a given issue, even if the executive branch ultimately fails to unify its messaging branch-wide. In turn, this could help the executive branch hone a more cohesive, clear message regarding human rights.

A second challenge is that even well-orchestrated executive branch coordination has its limits in creating a unified policy. The other branches influence U.S.-China relations, as when Congress criticizes China's human rights record¹²¹ or when the courts grant asylum to a political dissident.¹²² In particular, the Congressional-Executive Commission on China has been unflinching in its mandate to monitor human rights and rule of law developments in China. The Commission's 2016 Annual Report asserts, for example, that "[r]ule by law has taken deeper root as the [Communist] Party and government use the law to repress and control China's citizenry, yet disregard the law when it does not serve their priorities."¹²³ The role of Congress is complicated because some members demonstrate an intense commitment to human rights norms, but the Senate has been slow to approve ratification of human rights treaties.¹²⁴ To the extent that Congress writes legislation based on human rights concerns that impact China,¹²⁵ signals from

120. Press Release, White House Off. of Press Sec'y, Statement by NSC Spokesperson Ned Price on China's Foreign NGO Management Law (Apr. 28, 2016), <https://www.whitehouse.gov/the-press-office/2016/04/28/statement-nsc-spokesperson-ned-price-chinas-for-ign-ngo-management-law> [<https://perma.cc/QGL9-KEZG>].

121. See, e.g., Press Release, Cong.-Exec. Comm'n on China, CECC Chairs' Statement on President Xi's Speech on Religion (Apr. 26, 2016), <http://www.cecc.gov/media-center/press-releases/cecc-chairs%E2%80%99-statement-on-president-xi%E2%80%99-s-speech-on-religion> [<https://perma.cc/CB26-7K3E>].

122. See, e.g., *Dissident's Daughters Granted Political Asylum in United States*, RADIO FREE ASIA (Dec. 11, 2014), <http://www.rfa.org/english/news/china/asylum-12112014105111.html> [<https://perma.cc/AS3Q-YFSE>].

123. CONG.-EXEC. COMM'N ON CHINA, *supra* note 16, at 5.

124. See Aaron X. Fellmeth, *Leading from (a Bit) Behind: The United States and International Human Rights Law*, 40 N.C.J. INT'L & COM. REG. 977, 987 (2015) ("[T]he United States refuses to sign or ratify important and widely accepted international human rights treaties.").

125. See Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 249-56 (1982) (describing rise of increasingly stringent requirements that Congress enacted in response to human rights concerns).

the executive branch that it is implementing a more robust response to human rights violations could be a step towards partial alleviation of concerns of members of Congress that they must legislate to compensate for a real or perceived lack of action by the executive branch.¹²⁶

A third challenge is finding the most productive mix of private and public messaging. The extent to which human rights concerns have been raised in quiet government-to-government conversations is a “known unknown”¹²⁷ to the public: there are times that the U.S. government makes a strategic decision that it would be less effective, or even counterproductive, to engage in public messaging.¹²⁸ The U.S. government certainly need not broadcast every interaction with the PRC government, and there is already backstage coordination among the various executive branch departments that engage with China. Nevertheless, as explained below in the context of law enforcement conversations, there appears to be room to improve the extent to which human rights issues are strategically and cohesively integrated into bilateral interactions.

Part II demonstrates how law enforcement cooperation is an example of an implicit human rights issue and argues for elevating the prominence of human rights in the bilateral conversation. In doing so, Part II introduces the growth of U.S.-PRC cooperation under the broad label of fighting crime and highlights how domestic developments in China raise serious questions about adherence to human rights norms during joint law enforcement efforts.

II. THE HUMAN RIGHTS IMPLICATIONS OF U.S.-CHINA LAW ENFORCEMENT COOPERATION

China wants the United States’ help: on the list of a hundred most wanted fugitives released by the PRC government in April

126. Cf. David Sloss, *Hard-Nosed Idealism and U.S. Human Rights Policy*, 46 ST. LOUIS U. L.J. 431, 432 (2002) (“[F]ailure to tell the truth simply invites Congress to enact new legislative provisions to advance Congress’s human rights agenda, which provisions tend to place unwanted constraints on the President’s flexibility to implement foreign policy.”).

127. Hart Seely, *The Poetry of D.H. Rumsfeld*, SLATE (Apr. 2, 2003), http://www.slate.com/articles/news_and_politics/low_concept/2003/04/the_poetry_of_dh_rumsfeld.html [<https://perma.cc/DXU2-EYFB>].

128. See, e.g., Kerry, *supra* note 21 (explaining that debates between U.S. and PRC leaders “frankly, don’t take place in the spotlight, and much of what we say usually doesn’t end up in the headlines”); see also Koh, *supra* note 27, at 316–17 (encouraging technique of a mix of “inside” government-to-government dialogue combined with “outside” sanctions).

2015, forty were suspected of being in the United States.¹²⁹ As the following Sections note, the U.S. government grappled with how to engage China on law enforcement issues long before this overt request. The PRC government's crackdown on corruption simply made relations all the more challenging because law enforcement is rife with human rights concerns. This Part uses the questions posed in Part I.D above to argue that the new administration should formulate an integrated, consistent approach across the various agencies involved in law enforcement cooperation. Because the PRC government is eager to cultivate ties, there is the potential both to encourage engagement by China in human rights discussions and, even if greater engagement is not forthcoming, to bolster the United States' moral authority.

The difficulty in reconciling crime control with human rights concerns is not a new phenomenon in the international or domestic spheres.¹³⁰ Some attention has been paid to the human rights implications of U.S.-PRC law enforcement cooperation both by academics¹³¹ and in public statements of U.S. government officials,¹³² though law enforcement efforts are more commonly discussed in

129. See *A Secretive Agency Hunts for China's Crooked Officials Worldwide*, BLOOMBERG (Sept. 2, 2015), <http://www.bloomberg.com/news/articles/2015-09-02/agency-seeks-chinese-fugitives> [<https://perma.cc/AGX8-PHSR>].

130. See, e.g., John Dugard & Christine Van den Wyngaert, *Reconciling Extradition With Human Rights*, 92 AM. J. INT'L L. 187, 187 (1998) (exploring "tension between the claim for the inclusion of human rights in the extradition process and the demand for more effective international cooperation in the suppression of crime"); Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 676 (1999) (discussing Herbert Packer's "crime control" and "due process" models of the criminal process). For a discussion of the related issue of tension between intelligence gathering activities and rules protecting the rights of individuals, see generally Ashley S. Deeks, *Confronting and Adapting: Intelligence Agencies and International Law*, 102 VA. L. REV. 599 (2016).

131. See Jerome A. Cohen & Zha Daojiong, *Should the United States Extradite Chinese Fugitives?*, FOREIGN POL'Y (Aug. 7, 2015), <http://foreignpolicy.com/2015/08/07/us-china-fugitive-economic-corruption-law-ling/> [<https://perma.cc/S3DP-YX9H>] ("The United States does not want to become more of a haven than it already is for foreign criminal suspects, but it also does not want to commit any further human rights violations.").

132. See Bruce Ohr, U.S. Dep't of Just., Opening Remarks at the Joint Liaison Group on Law Enforcement Cooperation Anti-Corruption Working Group (Oct. 20, 2015), <http://beijing.usembassy-china.org.cn/opening-remarks-associate-deputy-attorney-general-bruce-ohr.html> [<https://perma.cc/3L5T-ZZ7X>] (explaining anti-corruption efforts are done "in strict compliance with our laws, which protect the rights of defendants").

terms of mutual legal assistance arrangements,¹³³ national security,¹³⁴ and transnational criminal threats.¹³⁵

A. *For the Specific Issue on the Bilateral Agenda, What, If Any, Human Rights Concerns Are Implicated?*

One need not dig far below the surface-level goal of assisting in the capture and prosecution of alleged criminals to see the human rights issues embedded therein. Before turning to the human rights concerns implicated by law enforcement cooperation (Subsection A.3), it is helpful to introduce briefly the increasing importance of law enforcement on the bilateral agenda (Subsection A.1) and why the PRC government is currently so insistent on U.S. assistance (Subsection A.2).

1. Rise of Bilateral Law Enforcement Cooperation

U.S.-China law enforcement cooperation had a rocky start following the infamous narcotics smuggling “goldfish case”—so known because a 1988 shipment of heroin from China was concealed in the cavities of dead goldfish.¹³⁶ Then, bilateral cooperation derailed when a Chinese suspect was granted political asylum in the wake of the PRC government’s violent crackdown on the 1989 protests in Tiananmen Square.¹³⁷ Efforts to reestablish cooperation coalesced in the 1997 formation of the U.S.-China Joint Liaison Group on Law Enforcement Cooperation (the JLG). The 1997 statement establishing the JLG emphasized that the two coun-

133. See Zhang Yan et al., *China, US Bear Down on Fugitives, ‘Sky Net’ Unleashed*, CHINADAILY USA (Mar. 27, 2015), http://usa.chinadaily.com.cn/us/2015-03/27/content_19921924.htm [<https://perma.cc/DMS4-VFSX>]; *It’s in the West’s Interest to Cooperate in Efforts to Send Home Corrupt Chinese Officials*, S. CHINA MORNING POST (Mar. 31, 2015), <http://www.scmp.com/comment/insight-opinion/article/1751970/its-wests-interest-cooperate-efforts-send-home-corrupt> [<https://perma.cc/P7TE-H3GC>].

134. See Mark Mazzetti & Dan Levin, *Obama Administration Warns Beijing About Covert Agents Operating in U.S.*, N.Y. TIMES (Aug. 16, 2015), <http://www.nytimes.com/2015/08/17/us/politics/obama-administration-warns-beijing-about-agents-operating-in-us.html> [<https://perma.cc/5NFK-NKJH>].

135. See, e.g., Press Release, U.S. Dep’t of State, U.S.-China Joint Liaison Group on Law Enforcement Cooperation (Dec. 19, 2012), <https://2009-2017.state.gov/r/pa/prs/ps/2012/12/202280.htm> [<https://perma.cc/7LD7-Z8TK>].

136. Constance L. Hays, *Drug Case Derails U.S.-China Law Tie*, N.Y. TIMES (Feb. 20, 1994), <http://www.nytimes.com/1994/02/20/us/drug-case-derails-us-china-law-tie.html> [<https://perma.cc/GN3L-HDNB>].

137. See John Pomfret, *Chinese Suspects Use the System to Remain in U.S.*, WASH. POST, (Nov. 22, 2001), https://www.washingtonpost.com/archive/politics/2001/11/22/chinese-suspects-use-the-system-to-remain-in-us/c2249b0f-0c42-4a7a-becd-0b92de15054a/?utm_term=.Bf5d020790be [<https://perma.cc/736Z-PBNT>]; Wang v. Reno, 81 F.3d 808, 813 (9th Cir. 1996).

tries would “strengthen cooperation in combating international organized crime, narcotics trafficking, alien smuggling, counterfeiting and money laundering.”¹³⁸ The statement was released following talks between PRC President Jiang Zemin and U.S. President Bill Clinton that covered issues ranging from the Korean peninsula to the environment.¹³⁹ A separate section of the statement mentions the two countries’ “commitment to the promotion and protection of human rights and fundamental freedoms.”¹⁴⁰ The later years of the Clinton administration also saw the development of a broader “rule of law” initiative with China.¹⁴¹ Yet there is no indication of direct overlap between this early law enforcement cooperation and discussions on human rights.

Law enforcement cooperation has since become increasingly prevalent and complex. The 2000 Agreement on Mutual Legal Assistance in Criminal Matters facilitated convictions of former Bank of China managers on criminal charges in the United States.¹⁴² The Federal Bureau of Investigation has a presence in the Beijing embassy;¹⁴³ the Department of Homeland Security has spearheaded the High Level Joint Dialogue on Cybercrime and Related Issues;¹⁴⁴ the Drug Enforcement Administration has led the Bilateral Drug Intelligence Working Group;¹⁴⁵ and the JLG has held regular meetings.¹⁴⁶

138. Press Release, Embassy of the People’s Republic of China in the United States, China-US Joint Statement (Oct. 29, 1997), <http://www.china-embassy.org/eng/zmgx/zwyj/t36259.htm> [<https://perma.cc/CQ3A-94SZ>] (statement announcing establishment of U.S.-China Joint Liaison Group on Law Enforcement Cooperation (the JLG)).

139. *Id.*

140. *Id.*

141. See Stephenson, *supra* note 41, at 194–95.

142. See Erica Teichert, *9th Circ. Affirms Ex-Bank of China Manager RICO Convictions*, LAW360 (Jan. 4, 2013), <http://www.law360.com/articles/404677/9th-circ-affirms-ex-bank-of-china-manager-rico-convictions> [<https://perma.cc/5SJ2-G7S9>]; Margaret K. Lewis, *Mutual Legal Assistance and Extradition: Human Rights Implications*, 2 CHINA RTS. F. 83, 86–87 (2007).

143. See *FBI Office Opened in US Embassy in Beijing*, PEOPLE’S DAILY ONLINE (Oct. 25, 2002), http://en.people.cn/200210/24/eng20021024_105622.shtml [<https://perma.cc/8G2F-EDT9>].

144. See Ben Blanchard, *U.S. Sees Progress in Latest Cyber Talks with China*, REUTERS (June 14, 2016), <http://www.reuters.com/article/us-china-usa-cyber-idUSKCN0Z00DN> [<https://perma.cc/C3CX-GZNX>]; Press Release, U.S. Dep’t of Just., *supra* note 92.

145. See Press Release, Dep’t of Just., Justice Department and Chinese Ministry of Public Security Coordinate Efforts to Combat International Drug Trafficking (Sept. 18, 2015), <https://www.justice.gov/opa/pr/justice-department-and-chinese-ministry-public-security-coordinate-efforts-combat> [<https://perma.cc/JUC5-KUD3>].

146. See, e.g., *China, US to Discuss Law Enforcement Cooperation*, STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, http://english.gov.cn/news/international_exchanges/2016/11/16/content_281475492603192.htm [<https://perma.cc/4CKF-XYS3>] (last updated Nov.

Human rights concerns have generally been muted in public messaging regarding law enforcement cooperation, with emphasis instead placed on priorities like “repatriation and fugitive issues” including greater sharing of information and regular status updates on important cases.¹⁴⁷ An April 2015 fact sheet following a visit between the U.S. Secretary of Homeland Security and PRC Minister of Public Security stated that counterterrorism cooperation shall occur “within a framework that provides appropriate protection for civil rights and civil liberties” and that the two countries “endeavor to effectuate removals of [fugitives] within the bounds of their respective laws.”¹⁴⁸ This gentle phrasing was the only reference to human rights. Similarly, a press release following the October 2016 U.S.-China Counterterrorism Dialogue listed “safeguarding human rights” among the topics discussed, but there was no elaboration of what this meant in practice.¹⁴⁹

The United States and PRC agreed in September 2015 to step up law enforcement cooperation, particularly in cases of corruption.¹⁵⁰ A White House Fact Sheet announced, “President Obama and President Xi decided to continue expanding law enforcement and anti-corruption cooperation, including by enhancing coordination and cooperation on criminal investigations, repatriation of fugitives, and asset recovery issues.”¹⁵¹ The fact sheet contained no mention of human rights. At the October 2015 meeting of the

16, 2016, 9:27 AM) (November 2016 statement by PRC government that “Senior Chinese and US diplomats and security officials will discuss law enforcement cooperation in Beijing next week.”); Press Release, U.S. Dep’t of State, 13th Plenary Session of the U.S.-China Joint Liaison Group (JLG) on Law Enforcement Cooperation (Nov. 30, 2015) (announcing the fourteenth plenary meeting scheduled for fall 2016 in China).

147. Press Release, U.S. Dep’t of Homeland Sec., Fact Sheet: Meeting Between U.S. Secretary of Homeland Security Jeh Johnson and China’s Minister of Public Security Guo Shengkun (Apr. 12, 2015), <https://www.dhs.gov/news/2015/04/12/fact-sheet-meeting-between-us-secretary-homeland-security-jeh-johnson-and-chinas> [<https://perma.cc/D23W-MW5M>]; see also *US Backs China’s Campaign to Hunt Down Fugitives*, CHINA DAILY (Apr. 12, 2015), http://usa.chinadaily.com.cn/us/2015-04/12/content_20415065.htm [<https://perma.cc/ZP5G-KECT>] (describing agreement between the United States and China in efforts to repatriate PRC fugitives).

148. Press Release, U.S. Dep’t of Homeland Sec., *supra* note 147.

149. Press Release, U.S. Dep’t of State, The U.S.-China Counterterrorism Dialogue (Oct. 25, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263549.htm> [<https://perma.cc/YFZ2-ULXV>].

150. See Gabriel Wildau, *China and US to Co-operate on Corrupt Asset Seizures, Deportations*, FIN. TIMES (Sept. 27, 2015), <http://www.ft.com/cms/s/0/0f6d756a-64e4-11e5-97e9-7f0bf5e7177b.html#axzz47caKeR6H> [<https://perma.cc/6N7X-LZTZ>].

151. Press Release, White House Off. of Press Sec’y, Fact Sheet: President Xi Jinping’s State Visit to the United States (Sept. 25, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states> [<https://perma.cc/3743-EGHT>].

U.S.-China Joint Liaison Group Anti-Corruption Working Group, the U.S. State Department reiterated its commitment to “improving coordination on criminal investigations, repatriation of fugitives, and asset recovery.”¹⁵² The statement contained no mention of human rights. In opening remarks, a Department of Justice official did stress that anti-corruption efforts are done “in strict compliance with our laws, which protect the rights of defendants and place heavy burdens upon prosecutors and investigators before a defendant can be convicted of wrongdoing and their property forfeited.”¹⁵³ In Secretary Kerry’s remarks before one of the 2016 Strategic and Economic Dialogue (S&ED) sessions, he also noted that they would be discussing “tougher issues,” including “differences on human rights issues,” along with “law enforcement issues.”¹⁵⁴ Although uttered in the same sentence, the extent to which law enforcement was discussed as a human rights issue is unknown. The State Department statement on “Law Enforcement Cooperation” following the 2016 S&ED made no mention of human rights, civil liberties, or similar terminology.¹⁵⁵

As previously noted, public messaging only tells part of the diplomatic story. U.S. government officials may indeed stress the deep linkages between human rights and law enforcement quietly behind the scenes. Nonetheless, public messaging matters both because it emphasizes the U.S. government’s priorities to its PRC counterparts and it broadcasts those priorities to a much wider audience.¹⁵⁶ The U.S. government should be vigilant that crime control rhetoric does not overwhelmingly dominate the public or private narratives regarding law enforcement cooperation at the expense of recognizing the serious human rights concerns embedded therein.

Furthermore, the specific language used in these public and private narratives matters. References to the laws of the United States

152. Assistant Deputy Chief of Mission, Remarks at the JLG Anti-Corruption Working Group (Oct. 20, 2015), <http://beijing.usembassy-china.org.cn/a/dcm-remarks-jlg-anti-corruption-working-group.html> [<https://perma.cc/443W-HPVL>].

153. Ohr, *supra* note 132.

154. John Kerry, U.S. Sec’y of State, Remarks Before the Small Session 1: Bilateral Issues (June 6, 2016), <https://2009-2017.state.gov/secretary/remarks/2016/06/258094.htm> [<https://perma.cc/HMX3-M8TC>] (reprinting remarks at 2016 Strategic and Economic Dialogue).

155. See Press Release, U.S. Dep’t of State, U.S.-China Strategic & Economic Dialogue Outcomes of the Strategic Track ¶ 9 (June 7, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/06/258146.htm> [<https://perma.cc/D78K-WDWX>].

156. See Kent, *supra* note 79, at 94 (arguing for “a public, transparent and accountable communicative process” when engaging China on human rights issues).

and “appropriate protection for civil rights and civil liberties”¹⁵⁷ are a clear nod towards human rights. Nevertheless, the critique of the World Bank’s use of “surrogate language” on extreme poverty and human rights by the U.N. Special Rapporteur resonates in the context of the U.S. government’s language when addressing law enforcement cooperation with China:

[T]he use of a human rights framework and discourse actually makes an enormous difference [I]t emphasizes that certain values are non-negotiable . . . and it brings into the discussion the carefully negotiated elaborations of the meaning of specific rights that have emerged from decades of reflection, discussion and adjudication.¹⁵⁸

Beyond strictly bilateral interactions, the United States and PRC engage in law enforcement efforts through multilateral mechanisms like the Group of 20 (G20) Anti-Corruption Working Group¹⁵⁹ and Asia-Pacific Economic Cooperation’s (APEC) 2014 Beijing Declaration on Fighting Corruption.¹⁶⁰ Neither of these has a discernible human rights component. The U.N. Convention Against Corruption (UNCAC), to which both the United States and China are parties, only briefly mentions human rights concerns when it provides that persons subject to extradition processes “shall be guaranteed fair treatment at all stages of the proceedings”¹⁶¹ At the 2014 S&ED, the U.S. State Department indicated that anti-corruption efforts would be strengthened through the G20, APEC, and UNCAC.¹⁶² At the January 2015 APEC Anti-Corruption and Transparency Expert’s Working Group Meeting, the United States and China spoke of their efforts concerning “international cooperation on asset recovery and denial of safe haven to persons engaged in corruption” in the context of overall

157. Press Release, U.S. Dep’t of Homeland Sec., *supra* note 147.

158. U.N. Secretary-General, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 65, U.N. Doc. A/70/274 (Aug. 4, 2015).

159. See Assistant Deputy Chief of Mission, *supra* note 152.

160. See Shannon Tiezzi, *China’s Overseas Anti-Corruption Efforts Nets 288 Suspects*, DIPLOMAT (Nov. 18, 2014), <http://thediplomat.com/2014/11/chinas-overseas-anti-corruption-efforts-nets-288-suspects/> [<https://perma.cc/8T5U-SJMH>]; Michael Plachta, *APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET) Reinforced at the Beijing Summit*, 30 INT’L ENF’T L. REP. 528, 528 (2014).

161. Convention against Corruption art. 44, ¶¶ 5, 14, Oct. 31, 2003, T.I.A.S. No. 06-1129, 2349 U.N.T.S. 41. Cf. Convention against Transnational Organized Crime art. 16, ¶¶ 4, 13, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209 (providing that a person subject to extradition “shall be guaranteed fair treatment at all stages of the proceedings”).

162. See Press Release, U.S. Dep’t of State, U.S.-China Strategic and Economic Dialogue Outcomes of the Strategic Track ¶¶ 8–9 (Jul. 14, 2014), <https://2009-2017.state.gov/r/pr/prs/ps/2014/07/229239.htm> [<https://perma.cc/JQF9-YRFV>].

anti-corruption progress and the implementation of UNCAC.¹⁶³ Following the 2016 S&ED, the U.S. State Department noted continuing cooperation to recover fugitives and assets through APEC and the G20.¹⁶⁴ And in November 2016, a PRC vice minister for public security was elected as head of Interpol, “sparking fears the move may be used to track down dissidents as well as alleged fugitives who have fled abroad.”¹⁶⁵

2. China’s Recent Anti-corruption Efforts

As U.S.-PRC law enforcement cooperation has increased, President and Party General Secretary Xi Jinping has pursued a vigorous, sustained anti-corruption campaign that has brought down both “tigers and flies” (i.e., high- and low-ranking officials).¹⁶⁶ An animated video circulated on PRC state-run media went so far as to depict a cartoon version of President Xi using a mallet to whack tigers rendered with the heads of corrupt officials.¹⁶⁷

Since President Xi rose to power in 2012, “China has seen perhaps the most thorough clean-government exercise since the end of the Cultural Revolution (1966–76).”¹⁶⁸ In early 2016, the Chinese Communist Party (CCP or Party) pledged to continue the

163. *Summary Record: APEC Anti-Corruption and Transparency Expert’s Working Group Meeting (ACT 20)*, ASIA-PACIFIC ECON. COOPERATION Agenda Item 9 (Jan. 26–27, 2015), http://mddb.apec.org/Documents/2015/ACT/ACT1/15_act1_summary.pdf [<https://perma.cc/XUP2-FIT7>].

164. See Press Release, U.S. Dep’t of State, *supra* note 155, ¶¶ 7–9.

165. Benjamin Haas, *New Interpol Head is Chinese Former Deputy Head of Paramilitary Police Force*, *GUARDIAN* (Nov. 10, 2016), <https://www.theguardian.com/world/2016/nov/10/new-interpol-head-is-chinese-former-head-of-paramilitary-police-force> [<https://perma.cc/T29P-8REW>].

166. See *Visualizing China’s Anti-Corruption Campaign*, *CHINAFILE* (Jan. 21, 2016), <https://www.chinafile.com/infographics/visualizing-chinas-anti-corruption-campaign> [<https://perma.cc/QP2H-CQLZ>] (providing a visual representation of the number of officials of the Chinese Communist Party (CCP or Party) who have been investigated, expelled/arrested, and sentenced).

167. See *Whack-a-Tiger: Xi Jinping Clobbers Corrupt Officials in New Video*, *WALL ST. J.: CHINA REAL TIME REP.* (Mar. 7, 2016), <http://blogs.wsj.com/chinarealtime/2016/03/07/whack-a-tiger-xi-jinping-clobbers-corrupt-officials-in-new-video/> [<https://perma.cc/NWB4-56WR>].

168. Willy Lam, *China’s Anti-Graft Campaign in Review*, 15 *CHINA BRIEF* 3, 3 (2015), https://jamestown.org/wp-content/uploads/2015/12/CB_15_23.pdf [<https://perma.cc/TF8U-BPUZ>]; see also Hualing Fu, *China’s Striking Anti-corruption Adventure: A Political Journey Towards the Rule of Law?*, in *THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT* (forthcoming May 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723348 [<https://perma.cc/6FVP-9LEE>] (discussing how China’s model of anticorruption enforcement has been a preeminent priority for the CCP).

fight against corruption at an “intensity and pace unchanged.”¹⁶⁹ China watchers have debated the extent to which the protracted campaign is a genuine attempt to promote clean governance or a convenient vehicle to purge political rivals.¹⁷⁰ Regardless of motives, anti-corruption efforts have included an unprecedented push to obtain the return of PRC nationals who have fled overseas.¹⁷¹

The PRC government launched “Operation Sky Net” in 2015 in an effort to “capture corrupt officials who fled abroad.”¹⁷² State-run media reported that, by the end of May 2015, 214 suspects had been returned to China under the related operation named “Fox Hunt.”¹⁷³ The PRC government has sought both informal arrangements and formal agreements to facilitate the return of fugitives.¹⁷⁴

169. *China's Anticorruption Campaign Will Continue, Party Watchdog Pledges*, WALL ST. J.: CHINA REAL TIME REP. (Jan. 25, 2016), <http://blogs.wsj.com/chinarealtime/2016/01/25/chinas-anticorruption-campaign-will-continue-party-watchdog-pledges/> [<https://perma.cc/C9PB-SPLZ>].

170. *Compare Cheng Li & Tom Orlik, China's Corruption Crackdown More Than Factional Politics*, BROOKINGS (July 31, 2014), <https://www.brookings.edu/on-the-record/chinas-corruption-crackdown-more-than-factional-politics/> [<https://perma.cc/J498-QXF7>] (noting President Xi Jinping's anti-corruption campaign is more than factional politics), *with* Muron Xuecun, *Xi's Selective Punishment*, N.Y. TIMES (Jan. 16, 2015), <http://www.nytimes.com/2015/01/17/opinion/murong-xuecun-xis-selective-punishment.html> [<https://perma.cc/2XBY-HJYD>] (suggesting the anti-corruption push is more of a purge than a genuine attempt to clean up the government).

171. *See* Chi-yuk Choi, *China to Keep Up Overseas Graft Hunt Down to Last Fugitive—Even If Ill-gotten Gains Are Gone*, S. CHINA MORNING POST (June 6, 2016), <http://www.scmp.com/news/china/policies-politics/article/1966926/china-keep-overseas-graft-hunt-down-last-fugitive-even> [<https://perma.cc/833M-4BYM>]. The desire to recapture PRC fugitives has become more pronounced but is not new. *See* Qin Gang, Foreign Ministry Spokesman, Press Briefing on June 14 (June 18, 2007), http://www.gov.cn/english/2007-06/18/content_651971.htm [<https://perma.cc/W4TH-27HG>] (mentioning “corrupt Chinese officials absconding in the US” as a specific impetus for an extradition treaty with the United States).

172. *China Launches “Sky Net” Campaign to Capture Fugitive Officials*, XINHUA (Mar. 26, 2015), http://news.xinhuanet.com/english/2015-03/26/c_134100196.htm [<https://perma.cc/4Q4B-MXNQ>].

173. *214 Fugitives Nabbed in ‘Fox Hunt 2015’*, CHINA DAILY (June 10, 2015), http://www.chinadaily.com.cn/china/2015-06/10/content_20957010.htm [<https://perma.cc/Z9HP-7UHN>].

174. As of June 2016, China had repatriation agreements with thirty-nine countries. *See* Choi, *supra* note 171. The PRC government's efforts to conclude additional extradition treaties has stalled, largely based on human rights concerns. *See, e.g.*, Steven Chase, Robert Fife & Nathan VanderKlippe, *Former CSIS Directors Question Canada's Pursuit of Extradition Treaty with China*, GLOBE & MAIL (Mar. 28, 2017), <http://www.theglobeandmail.com/news/world/china-to-canada-dont-follow-australias-lead-on-extradition-treaty/article34442527/> [<https://perma.cc/BDB8-TEYC>] (exploring Canada's potential concerns with signing an extradition treaty with Canada); Nathan VanderKlippe, *China Pressuring Canada to Ease Return of Corruption Suspects*, GLOBE & MAIL (June 6, 2016), <http://www.theglobeandmail.com/news/world/china-pressuring-canada-to-ease-return-of-corruption-suspects/arti>

To date, the United States has refused to enter into a formal extradition agreement, but it will return fugitives on a case-by-case basis.¹⁷⁵ Reports indicate that the JLG framework is being used to address repatriation of most-wanted PRC fugitives from the United States.¹⁷⁶ In September 2015, for example, the United States returned two of China's most wanted fugitives.¹⁷⁷ A former U.S. security official commented in December 2015, however, that China had "provided virtually no evidence" to support allegations against PRC fugitives.¹⁷⁸ In 2015, up to forty of the one hundred most wanted fugitives were suspected of being in the United States,¹⁷⁹ and the PRC government pressured the United States to return high-profile fugitives not on this list as well.¹⁸⁰ In October 2016, PRC state-run media reported that the United States and China were "speeding up negotiations on returning five most-wanted corrupt Chinese officials, who are still on the run in the United States, to face trial at home."¹⁸¹ The Trump administration will thus likely face many outstanding requests from the PRC government as its anti-corruption efforts continue.

cle30283903/ [https://perma.cc/PW5E-6442] (discussing proposed Chinese extradition treaty with Canada); Stephen Dziedzic, *Australia-China Extradition Treaty Pulled by Federal Government After Backbench Rebellion*, AUSTRALIAN BROADCASTING CORP. (ABC) NEWS, <http://www.abc.net.au/news/2017-03-28/government-pulls-australia-china-extradition-treaty/8392730> [https://perma.cc/LAP5-CR3V] (last updated Mar. 27, 2017, 10:55 PM); Philip Wen, *Fox Hunt: Australia Closer to Extradition Treaty on Wanted Chinese Fugitives*, SYDNEY MORNING HERALD (Feb. 19, 2016), <http://www.smh.com.au/world/fox-hunt-australia-closer-to-extradition-treaty-on-wanted-chinese-fugitives-20160217-gmwyet.html> [https://perma.cc/RVA6-LXRQ] (discussing proposed Chinese extradition treaty with Australia).

175. See Tom Mitchell et al., *Extradition Battle Looms Over US-China Relations*, FIN. TIMES (Mar. 13, 2016), <https://next.ft.com/content/0830a420-e77a-11e5-bc31-138df2ae9ee6> [https://perma.cc/PSW5-8YQM].

176. See Pinhui Zhuang & Naomi Ng, *Beijing's Most Wanted: US Repatriates One of the Leading 'Sky Net' Fugitives Days Before Xi Jinping's Visit*, S. CHINA MORNING POST (Sept. 18, 2015), <http://www.scmp.com/news/china/policies-politics/article/1859321/us-governments-forcibly-repatriates-first-chinese> [https://perma.cc/JUW6-BQZW].

177. See *Another Chinese Fugitive Repatriated From U.S.*, GBTIMES (Sept. 24, 2015), <http://gbtimes.com/china/another-chinese-fugitive-repatriated-us> [https://perma.cc/3K95-FC LL].

178. Elizabeth Dilts et al., *Insight: Some of China's Most Wanted Live Openly in U.S. and Canada*, REUTERS (Dec. 21, 2015), <http://www.reuters.com/article/us-usa-china-fugitives-insight-idUSKBN0U40GL20151221> [https://perma.cc/85M3-XETB].

179. See Alexa Olesen, *Give Me Your Tired, Your Poor, Your Chinese Fugitives*, FOREIGN POL'Y (Apr. 23, 2015), <http://foreignpolicy.com/2015/04/23/give-me-your-tired-your-poor-your-chinese-fugitives/> [https://perma.cc/TYB7-JHRT].

180. See Richard Winton et al., *Wealthy Brother of Top Chinese Corruption Suspect Lived Quiet Life in California Suburb*, L.A. TIMES (Aug. 6, 2015), <http://www.latimes.com/world/asia/la-fg-china-corruption-ling-wancheng-html-20150806-htmlstory.html> [https://perma.cc/5ZPL-NMRK].

181. Zhang, *supra* note 1.

3. Human Rights Concerns Implicated by Law Enforcement Cooperation

While visiting Beijing in April 2015, Secretary of Homeland Security Jeh Johnson spoke at the People's Public Security University and emphasized the importance of law enforcement officers whom the public trusts and a "criminal justice system perceived as humane and fair."¹⁸² Repeated, credible reports substantiate that China has failed to establish a criminal justice system that not only is *perceived* as fair but also is *actually* fair.¹⁸³ Law enforcement cooperation with the PRC raises concerns about torture,¹⁸⁴ the ability to receive a fair trial,¹⁸⁵ and other rights of the accused.¹⁸⁶ Section II.C, below, discusses the PRC government's human rights commitments and its compliance record. For purposes of this discussion, the foundational point is simply that law enforcement by its very nature implicates human rights. The process, from the first point of contact between government agents and a suspect to that suspect's eventual serving of a criminal punishment, if any, requires consideration for the suspect's rights. That the people whom the PRC government wants returned are largely Party members adds another layer of concern: they are subject to a disciplinary process that can involve incommunicado detention for extended periods of time.¹⁸⁷

The opacity of the PRC criminal justice and Party disciplinary systems heightens concerns. In March 2015, a U.S. State Department spokesperson stated, "[w]e must be satisfied that an individual extradited from the United States to another country would

182. Press Release, U.S. Dep't of Homeland Sec., Readout of Secretary Johnson's Trip to China (Apr. 11, 2015), <https://www.dhs.gov/news/2015/04/11/readout-secretary-johnsons-trip-china> [<https://perma.cc/V8WA-VJEH>] (internal quotations omitted).

183. By no means is this statement regarding criminal justice in the PRC meant to suggest by comparison that the United States has established a flawless criminal justice system. See, e.g., *infra* notes 222–223 and accompanying text.

184. See Comm. against Torture, *supra* note 4. Cf. Dugard & Van den Wyngaert, *supra* note 130, at 198 ("If any human rights norm enjoys the status of *jus cogens*, it is the prohibition on torture.").

185. See CONG.-EXEC. COMM'N ON CHINA, 114TH CONG., ANNUAL REPORT 2015 105–08 (2015), <https://www.cecc.gov/publications/annual-reports/2015-annual-report> [<https://perma.cc/L7CS-RGCV>] (reporting on concerns regarding criminal procedure in China).

186. See, e.g., Margaret K. Lewis, *Presuming Innocence, or Corruption, in China*, 50 COLUM. J. TRANSNAT'L L. 287, 317 (2012) (discussing lack of a presumption of innocence in China).

187. See generally Ling Li, *The Rise of the Discipline and Inspection Commission, 1927–2012: Anticorruption Investigation and Decision-making in the Chinese Communist Party*, 42 MODERN CHINA 447, 448 (2016) (analyzing changes in the operative structure and practices of the CCP's disciplinary institution).

receive a fair trial and not be subject to torture or other forms of mistreatment in that country.”¹⁸⁸ Absent a decision to accept the PRC government’s assurances on their face, the U.S. government’s decision about whether it is indeed satisfied requires enough transparency to obtain reliable information about the situation in China. At present, however, sources of information are severely constrained.

B. *What Are the U.S. Government’s Obligations Under Both International and Domestic Law When Engaging China on the Issue and Does the U.S. Government Comply with These Obligations?*

Having established that law enforcement cooperation with China invariably triggers weighty human rights concerns, the next question regards what the United States must do to live up to its own legal obligations. This is a baseline that the U.S. government should strive to exceed but has sometimes failed even to meet. When at a 2014 press conference President Obama addressed treatment of detainees in the aftermath of 9/11, he recognized that “we [the United States] tortured some folks.”¹⁸⁹ He continued that a detailed government report addressing instances of torture “reminds us once again that the character of our country has to be measured in part not by what we do when things are easy, but what we do when things are hard.”¹⁹⁰

The easy thing to do when faced with pressure from China to return alleged criminals is to hand them over. The United States understandably does not want to appear to be a haven for fugitives.¹⁹¹ This is especially true when the people sought are allegedly corrupt officials and business people, not political dissidents or other more sympathetic figures. Yet just because many of the people sought by the PRC government appear to be unsavory characters does not mean they are any less deserving of having their basic human rights protected. Indeed, withholding under CAT

188. Katie Hunt, *China: U.S. has Repatriated ‘Most Wanted’ Fugitive Yang Jinjun*, CNN (Sept. 18, 2015), <http://www.cnn.com/2015/09/18/asia/china-us-fugitive-returned/> [<https://perma.cc/2WR7-5ETH>] (internal quotations omitted).

189. Press Release, White House Off. of Press Sec’y, Press Conference by the President (Aug. 1, 2014), <https://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president> [<https://perma.cc/EJ7D-UQ72>].

190. *Id.*

191. See Press Release, U.S. Dep’t of Homeland Sec., *supra* note 147.

“[m]ay be granted to criminals, terrorists, and persecutors, as they cannot be returned to a country where they would face torture.”¹⁹²

The Obama administration repeatedly acknowledged the need to comply with CAT when repatriating individuals, including to China.¹⁹³ In most cases doing so is not particularly onerous because the bar for an individual to obtain withholding of removal under CAT is high indeed: “For the United States, the critical determination in the context of any transfer of an individual to a foreign country is whether it is more likely than not that the person would be tortured.”¹⁹⁴ The headache-inducing problem is that the people whom the U.S. government is least enthusiastic to shelter are the same people who have some of the stronger claims for protection. Former officials have allegedly been subjected to coercive measures amounting to torture, but concrete evidence of this threat is extremely difficult to secure.¹⁹⁵ The PRC government has, for example, rejected the vast majority of requests by U.N. special

192. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 7 (Jan. 15, 2009).

193. See, e.g., Hunt, *supra* note 188; U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW, ¶ 92 (2014) (“As a matter of fundamental policy and practice, we do not transfer any individual to a foreign country if it is more likely than not that the person would be tortured . . .”). The United States refused to send Uighurs held at Guantánamo Bay back to China because of a risk of torture. See USA: “Double Jeopardy” for Some Guantánamo Detainees, AMNESTY INT’L (Sept. 30, 2004), <https://www.amnesty.org/download/Documents/92000/amr511382004en.pdf> [<https://perma.cc/T4CW-N6NN>]; Charlie Savage, *U.S. Frees Last of the Chinese Uighur Detainees From Guantanamo Bay*, N.Y. TIMES (Dec. 31, 2013), http://www.nytimes.com/2014/01/01/us/us-frees-last-of-uighur-detainees-from-guantanamo.html?_r=0 [<https://perma.cc/FRJ5-FTGG>].

194. U.S. DEP'T OF STATE, PERIODIC REPORT OF THE UNITED STATES TO THE COMMITTEE AGAINST TORTURE ¶ 76 (Aug. 12, 2013), <http://www.state.gov/documents/organization/213267.pdf> [<https://perma.cc/SDP2-QJKJ>]; see S. EXEC. REP. NO. 101-30, at 2 (1990). This standard is higher than that for determining whether an alien is eligible for consideration for asylum based on a “well-founded fear of persecution” if transferred to a specific country. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 422 (1987). A “well-founded” fear requires proof that the fear is reasonable. See *id.* at 440; see also MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS (2009) (describing the rule against extradition “where there are substantial grounds to believe [the person] would be subjected to torture”).

195. See, e.g., Luo Jieqi & Cui Houjian, *Former Energy Official Says Police Tortured Him into Confessing*, CAIXIN (Feb. 25, 2016), <http://english.caixin.com/2016-02-25/100912688.html> [<https://perma.cc/J3J5-AVUJ>]; Nathan VanderKlippe, *Shuanggui: The Harsh, Hidden Side of China's War on Graft, and How One Man Disappeared into It*, GLOBE & MAIL <http://www.theglobeandmail.com/news/world/shuanggui-and-wilson-wang-in-china/article34400855/> [<https://perma.cc/S72M-P3EX>] (last updated Mar. 26, 2017, 8:59 AM); Comm. against Torture, *supra* note 4, ¶ 44 (expressing concern that lack of a right to counsel and extralegal operation of the Party disciplinary system “leaves [officials] at risk of torture”).

rapporteurs who have asked to visit China,¹⁹⁶ in part because of the highly critical report issued by the Special Rapporteur on Torture following his visit to China in 2005.¹⁹⁷

The result is that the PRC government benefits from the opacity of its criminal justice and Party disciplinary systems. CAT withholding applicants bear the burden of proof,¹⁹⁸ but it is difficult to prove mistreatment when it is effectively hidden.¹⁹⁹ The lack of transparency of China's criminal justice system, and even more so of the Party system, raises the question to what extent PRC nationals who seek protection cannot reasonably obtain evidence of their possible treatment upon return. The 2015 State Department Country Report on Human Rights Practices in China indicates this challenge in the section titled "Corruption and Lack of Transparency in Government":

The "shuanggui" system—the CCP internal disciplinary system used to investigate party members suspected of corruption and other violations of party rules—continued to operate without legal oversight and with allegations of torture. Many officials accused of corruption or other discipline violations were interrogated and in some cases tortured in the shuanggui system, often to extract a confession of wrongdoing, and some are later turned over to the judicial system.²⁰⁰

The U.S. government must thus at a minimum feel confident that each person returned will not be subjected to torture; but problematically, the government must do so based on highly

196. See, e.g., U.N. OFF. OF HIGH COMM'R, COUNTRY AND OTHER VISITS BY SPECIAL PROCEDURES MANDATE HOLDERS SINCE 1998 A-E (Dec. 30, 2015), <http://www.ohchr.org/EN/HRBodies/SP/Pages/CountryvisitsA-E.aspx> [<https://perma.cc/4CNC-WBNS>] (listing multiple outstanding requests to visit China regarding various human rights issues); Press Release, U.N. Off. of High Comm'r, U.N. Experts Urge China to Stop Ill-Treatment of Human Rights Defender Guo Feixiong (Aug. 4, 2016), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20340&LangID=E> [<https://perma.cc/57AX-AXDC>] (noting Special Rapporteur's "repeated requests" to visit China).

197. See Comm'n on Hum. Rts., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, ¶ 1, U.N. Doc. E/CN.4/2006/6/Add.6 (Oct. 3, 2006).

198. See U.S. DEP'T OF JUST., *supra* note 192, at 7 (CAT protection "[r]equire[s] applicants to establish that it is more likely than not that they would be tortured if removed to a specific country").

199. See REAL ID Act of 2005, H.R. 418, 109th Cong. § 101(a)(3) (2005) (credible and detailed testimony can be enough to support a claim but a judge may require corroborating evidence unless the applicant "cannot reasonably obtain [it]"); see also GARCIA, *supra* note 194, at 8 (explaining requirement that evidence concerning likelihood of torture be particularized).

200. 2015 CHINA REPORT, *supra* note 30. See generally HUM. RTS. WATCH, "SPECIAL MEASURES": DETENTION AND TORTURE IN THE CHINESE COMMUNIST PARTY'S SHUANGGUI SYSTEM (2016) (detailing abuse against detainees in the CCP-run disciplinary system).

imperfect information. To be clear, this Article does not advocate that the United States grant blanket protection for all allegedly corrupt PRC officials or, more broadly, institute an across-the-board ban on repatriating PRC nationals. Such a blunt policy would be overinclusive. There are likely many PRC nationals in the removal pipeline who do not face a significant risk of mistreatment. But concerns about criminal and Party disciplinary proceedings demand that the United States turn an extremely critical eye to the cases of any PRC nationals who may face these proceedings if repatriated.²⁰¹

The United States has further pledged its support for fundamental rights of the accused as a party to the International Covenant on Civil and Political Rights (ICCPR).²⁰² Similar to CAT, the ICCPR contains an implicit requirement of nonrefoulement when doing so would expose an individual to torture.²⁰³ The ICCPR does *not* command nonrefoulement if, for example, a person would not receive “a fair and public hearing by a competent, independent and impartial tribunal established by law,”²⁰⁴ or if a person was “compelled to testify against himself or to confess guilt.”²⁰⁵ Nonetheless, the U.S. government could demonstrate its commitment to the ICCPR by declaring that the United States must be confident that fugitives it repatriates will face proceedings that meet all of the ICCPR’s standards.

It is difficult to take such a principled stance, especially when the people whom China asks to be returned are not those who easily tug at one’s heartstrings. It is much easier to galvanize support behind helping free speech advocates or victims of religious perse-

201. In addition to CAT withholding, thirty-four percent of asylum grantees in 2013 were from China. See Daniel C. Martin & James E. Yankay, *Refugees and Asylees: 2013*, U.S. DEP’T HOMELAND SEC., OFF. IMM. STATS. 6 (Aug. 2014), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2013.pdf [<https://perma.cc/K2UK-6XC4>].

202. ICCPR, *supra* note 36. The United States signed the International Covenant on Civil and Political Rights (ICCPR) in 1977, but did not ratify it until 1992. See U.N. HUM. RTS. OFF. OF HIGH COMM’R, STATUS OF RATIFICATION INTERACTIVE DASHBOARD, <http://indicators.ohchr.org/> [<https://perma.cc/S6XR-GSQX>] (select “United States of America” from the country profile menu) (last visited Mar. 22, 2017).

203. See Hum. Rts. Comm., General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), ¶ 9, U.N. Doc. HRI/GEN/1/Rev.7 (Mar. 12, 2004) (“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return . . .”); Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 12, U.N. Doc. HRI/ GEN/1/Rev.7 (Mar. 12, 2004).

204. See ICCPR, *supra* note 36, art. 14(1).

205. See *id.* art. 14(3)(g).

cution than behind former government officials who have allegedly absconded with huge piles of ill-gotten gains. Perhaps, however, a vice can be turned into a virtue. To take a page from the American Civil Liberties Union's playbook, "It is easy to defend freedom of speech when the message is something many people find at least reasonable. But the defense of freedom of speech is most critical when the message is one most people find repulsive."²⁰⁶ Likewise, it is easy to defend human rights when the person alleging abuse is a sympathetic figure. But the defense of human rights is perhaps most critical when the person alleging abuse has been branded a criminal. Those are the hard cases that test the convictions and measure the character of a country.²⁰⁷

Diplomatic assurances regarding treatment upon repatriation are one method that the U.S. government has used to meet its legal obligations when faced with hard cases.²⁰⁸ There were no published reports of specific diplomatic assurances from the PRC government when the fugitives were returned in September 2015,²⁰⁹ though assurances have been made in prior cases.²¹⁰ Even when assurances are given, there is considerable literature questioning their reliability, especially with regard to the ongoing treatment of people once returned.²¹¹ Whether someone has been executed is relatively easy to verify. More difficult to discern is whether a person has been subjected to torture that does not leave visible scars, such as prolonged sleep deprivation. The U.N. Committee Against Torture cautioned that diplomatic assurances without enforcement mechanisms do not adequately protect against the risk of torture and therefore do not absolve the sending coun-

206. *ACLU Statement on Defending Free Speech of Unpopular Organizations*, AM. CIVIL LIBERTIES UNION (Aug. 31, 2000), <https://www.aclu.org/news/aclu-statement-defending-free-speech-unpopular-organizations?redirect=free-speech/aclu-statement-defending-free-speech-unpopular-organizations> [<https://perma.cc/9XPK-GXFR>].

207. *Cf.* Press Release, White House Off. of Press Sec'y, *supra* note 189.

208. *See* Zunyou Zhou, *China's Global Hunt for Fugitives: What Beijing Needs to Get Right*, WALL ST. J. (May 27, 2015), <http://on.wsj.com/1GCAtU2> [<https://perma.cc/A555-N7X8>].

209. *See* Hunt, *supra* note 188; *see also* Austin Ramzy, *U.S. Repatriates Fugitive Businessman Long Sought by China*, N.Y. TIMES (Sept. 18, 2015), http://www.nytimes.com/2015/09/19/world/asia/yang-jinjun-china-us-repatriation.html?_r=0 [<https://perma.cc/YP99-DLZG>] (reporting PRC statement indicating that there was "close cooperation of Chinese and United States law enforcement and diplomatic departments").

210. *See* David Lague, *China Seeks Extradition Pacts in Spite of Death Penalty*, N.Y. TIMES (May 28, 2007), <http://www.nytimes.com/2007/05/28/world/asia/28cnd-china.html> [<https://perma.cc/QC83-A33X>].

211. *See, e.g., "Empty Promises: Diplomatic Assurances No Safeguards against Torture*, 16 HUM. RTS. WATCH 1, 7 (2004).

try of its responsibility under CAT.²¹² The Committee recommended in 2006 that the United States “establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.”²¹³ In light of the impenetrability of China’s criminal justice system, let alone the Party disciplinary system, the U.S. government would be wise to pause and take a very hard look at the value of assurances.

Even if diplomatic assurances are sufficient to meet the United States’ legal obligations in a specific case, they are Band-Aid measures that are limited to the case at hand. As when Canada repatriated the notorious PRC fugitive Lai Changxing,²¹⁴ any increases in monitoring could just be isolated blips without broader implications for the human rights situation in China. Assurances are thus better thought of as an expedient measure to address a nagging problem rather than as a meaningful way for the U.S. government to deepen its commitment to international human rights norms.

In addition to reassessment of whether the current review process prior to transfer of fugitives is adequate, an important step in affirming the United States’ commitment to international human rights norms would be for the U.S. government to welcome all U.N. special rapporteurs who have outstanding requests to visit the United States.²¹⁵ Acquiescence to greater international monitoring would not directly pressure China to change its own practices. It would, however, be a valuable hypocrisy-reducing measure that would place the United States on more solid moral ground. It would also help the U.S. government to further distance itself from

212. See Comm. against Torture, Decision on Communication No. 233/2003, Mr. Ahmed Hussein Kamil Agiza v. Sweden, ¶ 13.4, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005).

213. Comm. against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, ¶ 21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

214. See John M.L. Gibb-Carsley, *Dealing with the Dragon: What Safeguards are Required to Make an Extradition Treaty Between Canada and the People’s Republic of China Conform to Canadian Extradition Law?* 53–54 (Dec. 2015) (unpublished LL.M. thesis, University of British Columbia) (on file with the University of British Columbia Library system); see also Jerome A. Cohen, *Reforming China’s Criminal Procedure: An Introduction to This Symposium*, 24 COLUM. J. ASIAN L. 213, 225–26 (2011) (discussing the repatriation of Lai Changxing).

215. See Stephanie Nebehay, *U.N. Torture Envoy Appeals Again for Visit to U.S. Prisons*, REUTERS (Mar. 8, 2016), <http://www.reuters.com/article/us-rights-un-usa-torture-idUSKCN0WA2B8> [<https://perma.cc/5NXM-WC3L>]; U.S. DEP’T OF STATE, *supra* note 193, ¶ 97 (reporting efforts to accommodate Special Rapporteur on Torture Juan Mendez’s requests for a country visit).

the glaring human rights abuses in the not-too-distant past of the post-9/11 United States.

In response to the 2016 joint statement on China's human rights situation, a PRC diplomat sharply criticized the United States for its own human rights record and accused it of hypocrisy.²¹⁶ The concerns for hypocrisy in the U.S. government's calls for improvements in China's human rights record are especially acute given the rhetoric during President Trump's campaign. As one observer noted: "[U]nder President Trump, Beijing's stockpiled ammunition against U.S. hypocrisy on human rights looks set only to grow, given his close ties to white nationalist groups, the likely gutting of civil rights, and his—and his supporters'—attacks on the notion of press freedom."²¹⁷ The United States' own transgressions do not lessen the severity of the human rights situation in China, but the PRC government does have a point that other countries need to be vigilant in examining their own records.

C. *What Are the Human Rights Standards to Which China, as a Sovereign State, Has Committed Itself Through International and Domestic Law, and Does the PRC Government Comply with These Obligations? If The United States Pushes China to Go Beyond These Voluntary Commitments, What Is the Basis for Doing So?*

The PRC government's concern with sovereignty is valid to the extent that China should be judged by the yardstick of international human rights norms to which the PRC government has voluntarily subscribed, not by standards unilaterally imposed on China by the United States or other countries.²¹⁸ To expect the PRC government simply to live up to its commitments leaves tremendous room for improvement over the current situation. China has committed itself to a number of international norms and its Criminal Procedure Law includes many protections for the

216. See Tom Miles & Stephanie Nebehay, *China Blasts U.S. 'Rape and Murder' at U.N. Human Rights Council*, REUTERS (Mar. 10, 2016), <http://www.reuters.com/article/us-china-rights-un-usa-idUSKCN0WC1VB> [<https://perma.cc/T7N9-8JB4>].

217. James Palmer, *China Just Won the U.S. Election*, FOREIGN POL'Y (Nov. 9, 2016), <http://foreignpolicy.com/2016/11/09/china-just-won-the-us-election-trump-victory/> [<https://perma.cc/47MW-XH8K>].

218. For an example of a PRC diplomat emphasizing the importance of state sovereignty and rejecting foreign criticism, see H.E. Ambassador Fu Cong, Statement at the Interactive Dialogue with the High Commissioner for Human Rights During the 31st Session of the Human Rights Council (Mar. 11, 2016), http://www.china-un.ch/eng/dbtyw/rqrd_1/thsm/t1347119.htm [<https://perma.cc/V4NX-AWH9>].

accused.²¹⁹ But these on-paper legal protections need to be viewed skeptically because as Teng Biao, a Chinese lawyer and rights advocate, astutely explained, “The major problem with rule of law in mainland China is not establishing legal provisions but rather implementing laws.”²²⁰ And here lies a key problem: the PRC government places perpetuation of one-party rule above a robust commitment to the rule of law and human rights.²²¹ For example, the PRC Constitution provides that citizens enjoy freedom of speech, of the press, and of assembly.²²² In practice the PRC government severely curtails these rights, as evidenced by the ongoing imprisonment of Nobel Laureate Liu Xiaobo.²²³

Specifically with respect to criminal justice, full implementation of provisions that protect the rights of the accused is admittedly difficult. The PRC Criminal Procedure Law underwent major revisions in 2012,²²⁴ and a sudden, comprehensive overhaul of the criminal justice system is impossible. The process of reforming a criminal justice system requires tremendous resources and resolve.²²⁵ The United States, for example, still struggles to provide quality criminal defense to indigent defendants.²²⁶ Under-

219. See U.N. HUM. RTS. OFF. OF HIGH COMM’R, *supra* note 202 (the PRC is a party to nine of eighteen key international human rights treaties); Zhonghua renmin gongheguo xingshi susong fa [Criminal Procedure Law] (promulgated by Standing Comm. Nat’l People’s Cong., July 1, 1979, effective Jan. 1, 1980) arts. 36 (right to access counsel) & 121 (requiring videotaping of interrogations for certain crimes) 2012 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 161 (China) [hereinafter PRC Criminal Procedure Law].

220. *Experts Are Not Optimistic About “Governing the Country According to Law” as Put Forward by the CCP’s Fourth Plenum* [Zhuanjia bu kanhao zhonggong si zhong quanhui tichu de yifa zhiguo], RADIO FREE ASIA (Oct. 28, 2014) www.rfa.org/mandarin/yataibaodao/zhengzhi/xq1-10282014100811.html [<https://perma.cc/H4F2-ZML4>].

221. See, e.g., Kent, *supra* note 79, at 93 (citing PRC leadership’s priority “to preserve political power at all costs” as a chief barrier to improving human rights).

222. XIANFA art. 35 (1982) (China).

223. See Sian Cain, *Authors Urge China to Release Nobel Prize Winner on Seventh Anniversary of His Arrest*, GUARDIAN (Dec. 8, 2015), <https://www.theguardian.com/books/2015/dec/08/authors-china-liu-xiaobo-nobel-prize-winner-pen-international> [<https://perma.cc/HGV8-UYDX>].

224. See Yi Yanyou, *State Ideology Transition and Procedure Model Reformation: China’s Criminal Procedure Law and Its Revisions*, 4 TSINGHUA CHINA L. REV. 155, 207–15 (2012) (describing 2012 revisions).

225. See Eric Posner, *Human Rights Treaties Are Expensive to Follow*, N.Y. TIMES (Dec. 28, 2014), <http://www.nytimes.com/roomfordebate/2014/12/28/have-human-rights-treaties-failed> [<https://perma.cc/WC3Q-M9MH>] (“Americans seem to think that rights are cheap, just a matter of the government doing the right thing. This is wrong. The right to a fair trial, for example, requires that a complex institutional infrastructure be in place . . .”).

226. See, e.g., AM. B. ASS’N, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS iv (2004); Ciara McCarthy, *New Orleans Judge Orders Inmates’ Release Amid Public Defense Crisis*, GUARDIAN (Apr. 8, 2016), <http://>

standably, then, China requires time to implement reforms both because of resource constraints and because of the obstacles inherent in changing entrenched practices of the police, prosecutors, and judges. These transitional challenges are fundamentally different, however, from the government's decision to selectively ignore legal protections embodied both in domestic law and international legal norms.

The PRC government has committed itself to a number of international norms relevant to law enforcement cooperation. China is a party to CAT and was roundly criticized in its most recent periodic review.²²⁷ Parties to human rights treaties often fall short on implementation,²²⁸ and China's fraught relationship with the U.N. human rights reporting process is not new.²²⁹ What is of pressing concern today is that the Committee Against Torture,²³⁰ non-governmental organizations,²³¹ Chinese media sources,²³² and the U.S. government²³³ have all reported grave, persistent concerns about the use of torture. In a 2015 report, Human Rights Watch found that judges excluded confessions in only twenty-three cases among a database of 158,000 criminal court verdicts and, even in those cases, the defendants were all convicted.²³⁴ The report noted,

www.theguardian.com/us-news/2016/apr/08/new-orleans-public-defense-funding-crisis-criminal-justice [https://perma.cc/5ADZ-82RP].

227. See Comm. against Torture, *supra* note 4, ¶ 6.

228. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941 (2002) (finding that ratification of human rights treaties appears to have little favorable impact on individual countries' practices); *Global Crisis on Torture Exposed by New Worldwide Campaign*, AMNESTY INT'L (May 13, 2014), <https://www.amnesty.org/en/latest/news/2014/05/amnesty-international-global-crisis-torture-exposed-new-worldwide-campaign/> [https://perma.cc/K7AF-84G8].

229. See Sonya SCEATS & SHAUN BRESLIN, CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 35 (2012), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.pdf [https://perma.cc/C377-MK57] ("In its written replies [to 2008 CAT review], China objected to the committee's suggestion that torture was pervasive in its criminal justice system . . ."); Kent, *supra* note 79, at 76 (describing "arrogance bordering on contempt" of China for 2009 Universal Periodic Review).

230. See Comm. against Torture, *supra* note 4, ¶ 7.

231. See, e.g., HUM. RTS. IN CHINA, IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN THE PEOPLE'S REPUBLIC OF CHINA i (2015), http://www.hrchina.org/sites/default/files/hric-cat-2015_report.pdf [https://perma.cc/BU6J-BN9E].

232. See Dan Yuxiao, *Member of the Chinese People's Political Consultative Conference Zhu Zhengfu: Expand the Scope of Pretrial Release on Guarantee* [*Quanguo zhengxie weiyuan Zhu Zhengfu: Kuoda qubao houshen shiyong fanwei*], CAIXIN (Mar. 1, 2016), <http://china.caixin.com/2016-03-01/100914221.html> [https://perma.cc/QM2N-YLRB].

233. See 2015 CHINA REPORT, *supra* note 30.

234. HUM. RTS. WATCH, TIGER CHAIRS AND CELL BOSSES: POLICE TORTURE OF CRIMINAL SUSPECTS IN CHINA 82 (2015).

“Absent more fundamental reforms in the Chinese criminal justice system that empower defense lawyers, the judiciary, and independent monitors, the elimination of routine torture and ill-treatment is unlikely.”²³⁵

In addition to CAT, China signed the ICCPR in 1998.²³⁶ It is arguably better to ratify a convention when a country can do so credibly rather than rush the process. Nevertheless, China has even surpassed the United States’ fifteen-year ratification delay.²³⁷ As a signatory that has expressed its intent to ratify the convention,²³⁸ China has an obligation to refrain in good faith from acts that would defeat the object and the purpose of the treaty.²³⁹ The United States thus has a principled position from which to press China both to respect the rights enumerated in the ICCPR—including those to a fair criminal process²⁴⁰—and to formally ratify the covenant.

On the domestic side, 2012 revisions to the PRC Criminal Procedure Law added that an objective of the law is to “respect and guarantee human rights.”²⁴¹ The amendments introduced a number of specific provisions related to the rights of the accused, including procedures for excluding illegally obtained evidence that were welcomed with great fanfare.²⁴² As noted above, use of these procedures is extremely limited in practice.²⁴³ Courts should rarely have to exclude evidence if police and prosecutors have done their jobs correctly and not relied on illegally obtained confessions. That said, ongoing concerns about the courts’ unwillingness and even

235. *Id.* at 3.

236. U.N. HUM. RTS. OFF. OF HIGH COMM’R, *supra* note 202 (select “China” from the country profile menu).

237. The United States signed the ICCPR in 1977, but did not ratify it until 1992. *Id.*

238. See *China Amends Laws for Ratification of ICCPR*, CHINA DAILY (July 14, 2011), http://www.chinadaily.com.cn/china/2011-07/14/content_12904570.htm [<https://perma.cc/GR4F-XH32>]; see also Frank Ching, *China Gov’t Announces Plans to Ratify 1998 ICCPR Treaty*, CHINA POST (July 20, 2011), <http://www.chinapost.com.tw/commentary/china-post/frank-ching/2011/07/20/310434/p2/China-gov’t.htm> [<https://perma.cc/KVN5-3CZY>] (citing an assessment report disclosing that China was amending domestic laws to prepare for ratification).

239. See Vienna Convention on the Law of Treaties, arts. 10 & 18, May 23, 1969, 1155 U.N.T.S. 331.

240. See ICCPR, *supra* note 36, arts. 9 & 14.

241. PRC Criminal Procedure Law, *supra* note 219, art. 2; see Yi, *supra* note 224, at 207–08 (“[M]ost scholars see this as a great progress in revising the Criminal Procedure Law.”).

242. See generally Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT’L L. & POL. 629 (2011) (examining the contents of the new evidence rules and the legal framework in which they sit).

243. See HUM. RTS. WATCH, *supra* note 234, at 82.

inability to stand up to the police, coupled with personal accounts of coerced confessions, stretch the bounds of credulity that the careful work of police and prosecutors accounts for the rare invocation of these rules.²⁴⁴

The PRC Criminal Procedure Law also provides for the right to counsel,²⁴⁵ yet the vast majority of defendants are unrepresented.²⁴⁶ Even when a defendant is able to retain counsel, defense lawyers are increasingly under siege. In July 2015, the PRC government mounted a sweeping crackdown on the legal profession by detaining hundreds of lawyers and their associates.²⁴⁷ China scholar Eva Pils has documented a variety of techniques used to control human rights lawyers and “suggest[ed] that rule by fear should be considered as a centrally important element of the ‘new normal’ under Xi Jinping’s party leadership.”²⁴⁸ The pervasive atmosphere of fear was emphasized when Wang Yu, one of China’s most respected human rights lawyers, confessed to being trained by foreign forces to “attack” and “smear” the PRC government after being detained for over a year.²⁴⁹ The American Bar Association announced in July 2016 that Ms. Wang would be the

244. See *id.* at 3 (report based in part on interviews with forty-eight recent detainees); Hu Wei, *Experts Call for Less Police Dominance in China Legal System*, VOICE AM. (Sept. 10, 2014), <http://www.voanews.com/content/experts-call-for-less-police-domination-in-china-legal-system/2445256.html> [<https://perma.cc/G9BD-4QVP>]; MIKE McCONVILLE, CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY 378–79 (2011).

245. See PRC Criminal Procedure Law, *supra* note 219, art. 36.

246. See Jia Jinfeng, *Investigation of Lawyer Representation Rates in Criminal Cases [Xingshi susong anjian de lushi bianhu lu qingkuang diaocha]*, LUNWEN WANG (Dec. 23, 2014), <http://www.xzbu.com/1/view-6405639.htm> [<https://perma.cc/298H-G63P>]; Mu Ping: *In Twenty Thousand Criminal Cases, Lawyers Represented [Defendants] in Only 2.5% of Cases [Mu ping: liangwan xingsu'an lushi jin dali 2.5%]*, BEIJING NEWS (Mar. 9, 2012), http://epaper.bjnews.com.cn/html/2012-03/09/content_322845.htm?div=-1 [<https://perma.cc/58RQ-DQ2K>] (estimate by a former chief procurator in Beijing).

247. See Andrew Jacobs & Chris Buckley, *China Targeting Rights Lawyers in a Crackdown*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html?_r=0 [<https://perma.cc/H3KQ-9MVD>]; HUM. RTS IN CHINA, MASS CRACKDOWN ON CHINESE LAWYERS, DEFENDERS AND INTERNATIONAL REACTIONS: A BRIEF CHRONOLOGY, <http://www.hrichina.org/en/mass-crackdown-chinese-lawyers-defenders-and-international-reactions-brief-chronology> [<https://perma.cc/3X7Y-82SP>] (last visited Mar. 22, 2017).

248. Eva Pils, *Rule by Fear?*, CHINAFILE (Feb. 18, 2016), <https://www.chinafile.com/conversation/rule-fear>.

249. See Emily Rauhala, *Jailed Chinese Lawyer Reappears to Deliver a ‘Confession,’ But the Script Seems Familiar*, WASH. POST (Aug. 1, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/08/01/jailed-chinese-lawyer-reappears-to-deliver-confession-but-the-script-seems-familiar/> [<https://perma.cc/6KWT-AZDH>].

first recipient of its International Human Rights Award,²⁵⁰ but she suspiciously repudiated the award as part of her “confession.”²⁵¹ Nearly simultaneously with Ms. Wang’s confession, her former colleague was convicted of subverting state power and sentenced to seven years in prison.²⁵² State-run media reported that he “has long been influenced by anti-China forces and gradually established ideas to overturn the country’s political system.”²⁵³

The PRC Criminal Procedure Law further provides that no person shall be found guilty without being judged as such by a court.²⁵⁴ The nearly one hundred percent conviction rate underscores, however, that determination of guilt in practice occurs before a defendant enters the courtroom.²⁵⁵ Even the weak protections of the Criminal Procedure Law are inapplicable to the Party disciplinary process, leaving suspects to disappear into the black box of the Party’s internal mechanisms until transfer to the courts for a perfunctory trial and sentencing. Any movement towards establishing a presumption of innocence has been further undermined by the use of televised confessions, effectively replacing formal court proceedings with public shaming.²⁵⁶ In March 2016, a deputy chairman of the All China Lawyers Association spoke out

250. See *Chinese Lawyer Wang Yu to Receive Inaugural ABA International Human Rights Award*, AM. B. ASS’N (July 8, 2016), http://www.americanbar.org/news/abanews/aba-news-archives/2016/07/chinese_lawyer_wang0.html [<https://perma.cc/JL5F-5BZ5>].

251. See Jerome A. Cohen, *More on Rights Lawyer Wang Yu’s “Confession and Release” and China’s Revival of “Brainwashing” Practice*, JERRY’S BLOG (Aug. 3, 2016), <http://www.jeromecohen.net/jerrys-blog/2016/8/3/more-on-rights-lawyer-wang-yus-confession-and-release-and-chinas-revival-of-brainwashing-practice> [<https://perma.cc/42E4-SQ7D>]; Javier C. Hernandez, *China Frees Wang Yu, Human Rights Lawyer, After Videotaped Confession*, N.Y. TIMES (Aug. 1, 2016), <http://www.nytimes.com/2016/08/02/world/asia/human-rights-lawyer-is-released-in-china-after-videotaped-confession.html> [<https://perma.cc/U2RL-NVWW>].

252. See Gerry Shih, *China’s Crackdown Raises Familiar Specter of Foreign Forces*, ASSOCIATED PRESS (Aug. 5, 2016), <http://bigstory.ap.org/article/0525a35adf5e4caa86572bdaebac9411/chinas-crackdown-raises-familiar-specter-foreign-forces> [<https://perma.cc/VJC6-3CA2>].

253. *Chinese Lawyer Gets 7 Years in Prison for State Subversion*, XINHUA (Aug. 4, 2016), http://news.xinhuanet.com/english/2016-08/04/c_135563910.htm [<https://perma.cc/934L-LZ3D>].

254. PRC Criminal Procedure Law, *supra* note 219, art. 12.

255. See *China’s Criminal Conviction Near 100 Percent in 2015*, HONG KONG FREE PRESS (Mar. 13, 2016), <https://www.hongkongfp.com/2016/03/13/chinas-criminal-conviction-near-100-percent-in-2015/> [<https://perma.cc/V2EF-QB9A>] (reporting a 99.92 percent conviction rate for 2015).

256. See Josh Chin, *Chinese Judge Criticizes Televised Confessions*, WALL ST. J.: CHINA REAL TIME REP. (Mar. 15, 2016), <http://blogs.wsj.com/chinarealtime/2016/03/15/chinese-judge-criticizes-televised-confessions/> [<https://perma.cc/JTL2-V2HZ>].

against televised confessions, warning that they can lead to “trial by public opinion” (“舆论审判”).²⁵⁷

Televised confessions create a disturbing twist on the concept of government transparency. The PRC government has undertaken an “open government” initiative,²⁵⁸ but these efforts are best understood as “embrac[ing] an instrumentalist view of transparency” that targets and “applie[s] to limited areas and with specific constraints.”²⁵⁹ As noted in Section II.B, the Party’s inner workings remain plagued by a lack of transparency. Criminal justice also remains largely shrouded in mystery despite an increase in the publication of criminal case decisions.²⁶⁰ This is in part because the PRC’s freedom of information regulations are aimed at “administrative” decisions and thus criminal matters fall outside their scope.²⁶¹ Opacity is exacerbated by weak enforcement of the Criminal Procedure Law, including strict limits on access to criminal trials in practice, despite instruction that they should, absent special circumstances, be open to the public.²⁶² When the PRC government turned a spotlight on trials by broadcasting them on television, the result was show trials “that seemed to be a new, more

257. Zhu Zhengfu: *Suspects Confessing on Television is Not Equivalent to Real Guilt* [Zhu Zhengfu, *Xianfan dianshi li renzui bu dengyu zhen you zui*], BEIJING NEWS (Mar. 2, 2016), http://epaper.bjnews.com.cn/html/2016-03/02/content_624607.htm [<https://perma.cc/H5HD-BA9V>]; see also Nathan VanderKlippe, *Prominent Chinese Lawyer Speaks Out Against Televised Confessions*, GLOBE AND MAIL (Mar. 2, 2016), <http://www.theglobeandmail.com/news/world/prominent-chinese-lawyer-speaks-out-against-televised-confessions/article28995020/> [<https://perma.cc/65ZK-X5YP>].

258. See Jamie P. Horsley, *China Promotes Open Government as It Seeks to Reinvent Its Governance Model*, FREEDOMINFO.ORG (Feb. 22, 2016), <http://www.freedominfo.org/2016/02/china-promotes-open-government-as-it-seeks-to-reinvent-its-governance-model/> [<https://perma.cc/BV7X-KMKF>].

259. Benjamin L. Liebman, *Leniency in Chinese Criminal Law? Everyday Justice in Henan*, 33 BERKLEY J. INT’L L. 153, 220 (2015).

260. See *China’s Acquittal Rate Rose in 2015, But Remains Low*, DUI HUA HUM. RTS. J. (Mar. 22, 2016), <http://www.duihuahrjournal.org/2016/03/did-chinas-acquittal-rate-rise-in-2015.html> [<https://perma.cc/QV3P-DGEW>] (discussing statistics in 2015 Supreme People’s Court work report).

261. See Comm. against Torture, *supra* note 4, ¶ 30 (noting with concern the limited scope of open government regulations “to information about administrative actions by administrative organs, excluding matters within the criminal law system”); see also HUM. RTS. IN CHINA, *supra* note 231, ¶¶ 31–33 (criticizing limited administrative scope of open government regulations).

262. Compare PRC Criminal Procedure Law, *supra* note 219, art. 183 (providing that trials should be public except for when certain exceptions apply) with *China: Confessions, Closed Trials Mock Justice*, HUM. RTS. WATCH (Aug. 3, 2016), <https://www.hrw.org/news/2016/08/03/china-confessions-closed-trials-mock-justice> [<https://perma.cc/V3ME-YD7R>]; Joshua D. Rosenzweig, *Public Access and Right to a Fair Trial in China*, DUI HUA, http://duihua.org/wp/?page_id=2542 [<https://perma.cc/9R2J-SB4X>] (last visited Mar. 22, 2017).

public phase of President Xi Jinping's campaign to cleanse the country of liberal ideas and activism."²⁶³

This chasm between the PRC government's self-imposed legal obligations and the implementation of those obligations means that heeding the "call upon China to uphold its laws and its international commitments"²⁶⁴ would necessitate a pronounced improvement in the Party and criminal justice systems to which fugitives would return. Rooting criticism of China's human rights record in the standards of PRC laws and international instruments will not stop state-run media from contending that the United States engages in "blatant interference in the internal affairs of China."²⁶⁵ This expected rhetoric aside, the U.S. government is on solid footing to assert that the United States respects China's sovereignty when it asks China to do no more than what the PRC government has committed to voluntarily, including to work towards ratification of the ICCPR.²⁶⁶

D. *What Options Are There for the United States to Engage with China in a Manner that Will Concurrently Uphold Its Human Rights Obligations and Encourage China to Uphold Its Obligations?*

While the people whom the PRC government wants returned are some of the less sympathetic human rights cases, they are also the people whom the PRC government has the greatest incentives to recover.²⁶⁷ These cases thus present one of the United States' best chances to cultivate engagement by China in meaningful human

263. Chris Buckley, *Week of TV Trials in China Signals New Phase in Attack on Rights*, N.Y. TIMES (Aug. 5, 2016), http://www.nytimes.com/2016/08/06/world/asia/china-trial-activists-lawyers.html?_r=0 [<https://perma.cc/LQE4-GTK8>].

264. Harper, *supra* note 7.

265. *West Not the Guardian of Human Rights*, CHINA DAILY (Mar. 15, 2016), http://usa.chinadaily.com.cn/epaper/2016-03/15/content_23874969.htm [<https://perma.cc/A2HA-WRY7>]; see also *China Voice: Why Should China Say No to Wrong Western Values?*, XINHUA (Feb. 13, 2015), http://news.xinhuanet.com/english/indepth/2015-02/13/c_133993051.htm [<https://perma.cc/MS5K-9XW8>] ("China's understanding of [human rights] concepts may differ to the West").

266. *China Amends Laws for Ratification of the ICCPR*, *supra* note 238.

267. See Zhang Jianfeng, *China Appreciates U.S. Repatriation of Corruption Fugitive*, CCTV.COM (Sept. 18, 2015), <http://english.cntv.cn/2015/09/18/ARTI1442576621175511.shtml> [<https://perma.cc/DB9F-SQL7>]; see also Samuel R. Gintel, *Fighting Transnational Bribery: China's Gradual Approach*, 31 WIS. INT'L L.J. 1, 32 (2013) (arguing that China has strong incentives to assist in the advancement of UNCAC to serve its interests in seeking the return of fugitives and assets); Yang Jiechi, Chinese State Councilor, Remarks at the S&ED Opening Session (June 6, 2016), <https://2009-2017.state.gov/secretary/remarks/2016/06/258091.htm> [<https://perma.cc/PN4G-BW9L>] (mentioning collaboration on law enforcement as a cooperation goal).

rights discussions at a time when the U.S. government finds its PRC counterparts increasingly recalcitrant with respect to human rights. There is no easy answer for how best to proceed with bilateral law enforcement cooperation, but there is certainly room for creative thinking. To draw on the teachings of the Buddhist monk Thich Nhat Hanh, “We have more possibilities available in each moment than we realize.”²⁶⁸

A first step in formulation of a more robust whole-of-government approach is to ask who is at the table representing the U.S. government in discussions about law enforcement and, in particular, whether there should be more overlap with the officials involved in dedicated human rights dialogues. This would visibly signal that human rights are integral to law enforcement discussions. Certainly officials from the Department of Justice and Department of Homeland Security are also charged with upholding human rights, but they primarily wear the hat of crime control. It sends a stronger message to include participants focused on the human rights implications of cooperation, such as persons with experience as defense lawyers, and therefore particularly attuned to the specific context of criminal prosecutions. Higher visibility for officials focused on human rights at law enforcement talks could in turn help to inform broader human rights dialogues by incorporating concrete examples from real cases rather than reliance upon more abstract principles.

Another way to uphold principles and still be pragmatic about bringing criminals to justice is to place even greater emphasis on pursuit of prosecutions in the United States. A U.S. Department of Justice spokesperson observed that the department “has repeatedly shown that it will vigorously pursue prosecutions in the United States where there is alleged money laundering or other criminal activity in this country by fugitives sought by China.”²⁶⁹ Bringing charges against PRC nationals in the United States who are suspected of having violated U.S. laws demonstrates that the United States will not serve as a haven for fugitives. In addition, cooperation on these cases gives U.S. and PRC law enforcement agents an

268. *Thich Nhat Hanh Quotes*, GOOD READS, <http://www.goodreads.com/quotes/99376-we-have-more-possibilities-available-in-each-moment-than-we> [<https://perma.cc/5PR5-J9NE>] (last visited Mar. 22, 2017).

269. Winton et al., *supra* note 180 (internal quotations omitted); *see also* Minxin Pei, *How China Should Repatriate Its Fugitives Abroad*, CHINA-US FOCUS (Aug. 14, 2015), <http://www.chinausfocus.com/political-social-development/how-china-should-repatriate-its-fugitives-abroad/> [<https://perma.cc/D8E9-PJ4H>] (describing immigration fraud, money laundering, and tax fraud as the “Achilles heels” of Chinese fugitives).

opportunity to work closely together.²⁷⁰ In 2015, for example, two PRC nationals were indicted in the United States on fraud and money laundering charges following a joint investigation.²⁷¹ The PRC Foreign Ministry spokesperson stated that the case was “one of the five most important cases the two countries had agreed to work on together.”²⁷² U.S. law enforcement officials can tell their PRC counterparts how our system works, but fostering people-to-people (P2P) ties actually shows protections for the accused in the U.S. criminal justice system in context, along with challenges to meaningful provision of these protections in all cases.²⁷³

Beyond hosting official visitors from the PRC government, the U.S. government could build on the International Visitor Leadership Program, which “cultivate[s] lasting relationships by connecting current and emerging foreign leaders with their [U.S.] counterparts through short-term visits to the United States.”²⁷⁴

270. See, e.g., Ronald Cheng, *A Personal History of U.S.-China Law Enforcement Cooperation*, COLUM. L. SCH. (Oct. 12, 2015), http://www.law.columbia.edu/media_inquiries/news_events/2015/october2015/cheng-2015 [<https://perma.cc/2LJH-6FVK>] (recalling taking visitors from China to arraignment of a PRC national accused of fraud); Ashley Deeks, *Intelligence Communities, Peer Constraints and the Law*, 7 HARV. NAT'L SEC. J. 1, 2 (2015) (arguing that interactions between intelligence agencies result in “peer constraints” that increase protection of individual rights). Cf. Koh, *supra* note 27, at 316 (supporting “norm-internalization” wherein “a rogue nation’s participation in transnational legal process can help, over time, to encourage its obedience with particular norms of international law”).

271. Press Release, U.S. Dep’t of Just., Fugitive Chinese Official and Former Wife Named in Grand Jury Indictment Charging Immigration Fraud and Money Laundering (Mar. 17, 2015), <https://www.justice.gov/usao-cdca/pr/fugitive-chinese-official-and-former-wife-named-grand-jury-indictment-charging> [<https://perma.cc/F7WS-XJ7S>]; see also *A Secretive Agency Hunts for China’s Crooked Officials Worldwide*, *supra* note 129 (“The indictment in itself is a support to China’s effort to hunt down fugitives overseas.”).

272. Tim Reid, *U.S. May Deport to China Indicted Ex-Wife of Fugitive Chinese Official*, REUTERS (Mar. 19, 2015), <http://www.reuters.com/article/us-usa-china-deportation-idUSKBN0ME2M320150319> [<https://perma.cc/W9C6-MX65>].

273. Cf. Tanner & Zhao, *supra* note 116, at 85 (advocating “new and innovative ways to cultivate and leverage people-to-people (P2P) ties—a long-standing bright spot in the relationship—in order to address challenges in strategic domains”). For instance, a PRC legislative official known to the Author visited a court in New York City to watch the trial of an alleged gang member who faced damning evidence. When asked by the judge what his reflections were on the lengthy proceeding, he responded, “I think you take the presumption of innocence very seriously.” Similarly, when the Author accompanied a delegation of legal academics and officials from China to visit lawyers at a police department, one of the Chinese asked what the police did after the *Miranda* decision, *Miranda v. Arizona*, 384 U.S. 436 (1966), because he assumed suspects stopped talking. The lawyers burst into friendly laughter and explained that, despite similar concerns when *Miranda* came down, they have learned in the intervening decades that most people think they are helping themselves by talking: it was a valuable lesson that telling people about their rights does not prevent police from doing their jobs.

274. U.S. DEP’T OF STATE, BUREAU OF EDUC. AND CULTURAL AFF., ABOUT IVLP, <https://eca.state.gov/ivlp/about-ivlp> [<https://perma.cc/332R-BRJR>] (last visited Mar. 22, 2017).

Scholars and practitioners from China should be encouraged to visit both different organs of the U.S. criminal justice system and non-governmental organizations working on criminal justice reforms. Forging P2P ties will not solve the immediate bilateral law enforcement challenges, but it is a step towards long-term understanding.²⁷⁵

There is also room for creative arrangements if the U.S. government ultimately decides to rely upon diplomatic assurances when returning fugitives, despite concerns for their limitations.²⁷⁶ In China, the severe crackdown on defense lawyers imperils those who take on sensitive cases and, even if they take on the risk, they are constrained in their ability to mount a zealous defense. It is thus possible that protection of PRC lawyers means insulating them from representing repatriated fugitives. Although it is unrealistic to expect that the PRC government would allow U.S. defense lawyers to take part in proceedings, lawyers from Hong Kong, Macao, and Taiwan can become licensed to practice in the mainland.²⁷⁷ Perhaps a condition of return could be that, if the defendant agreed, one of these non-mainland but PRC-licensed lawyers could be assigned as defense counsel and be assured access to case files and witnesses to the fullest extent permitted under the PRC Criminal Procedure Law. Moreover, a greater role for international observers at trials and during any ongoing incarceration could pro-

275. PRC academics have channels to influence policymaking because they often interact with government officials, who have seen their ability to travel abroad strictly curtailed in recent years. Cf. *China Begins Legislative Process for Civil Code*, SINA (June 28, 2016), <http://english.sina.com/china/s/2016-06-28/detail-iftxmwei9395913.shtml> [<https://perma.cc/3KBR-FMTV>] (noting involvement by “[j]urists from China’s academic circles” in drafting new civil code); James T. Areddy, *New Frugality Puts Strain on Chinese Firms; Anticorruption Campaign Dashes Peak Holiday Sales*, WALL ST. J. (Jan. 22, 2014), <http://www.wsj.com/articles/SB10001424052702304027204579334162357059046> [<https://perma.cc/G2Z4-RRBT>] (statement by local government official that his city “managed to cut the number of officials traveling overseas by [forty-four percent] in 2013”). Notably, foreign travel restrictions apply even to those outside the government, with Freedom House reporting that “[m]illions of people are affected by restrictions on foreign travel and passports, many of them Uighurs and Tibetans. Political and religious dissidents, human rights defenders, certain scholars, and their family members were also prevented from traveling abroad or to Hong Kong in 2015.” FREEDOM HOUSE, *FREEDOM IN THE WORLD 2016: CHINA*, <https://freedomhouse.org/report/freedom-world/2016/china> [<https://perma.cc/VY5V-2GU7>] (last visited Mar. 22, 2017).

276. See Comm. against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, ¶ 16, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014) (stating when cautioning against assurances that “non-refoulement should always have precedence over any other protection measure”).

277. See *818 Taiwan Residents to Sit Mainland Judicial Exam for First Time*, XINHUA (Sept. 10, 2008), http://news.xinhuanet.com/english/2008-09/10/content_9895480.htm [<https://perma.cc/G3QF-CVZ8>].

vide crucial oversight while avoiding the perception that the U.S. government is evaluating PRC criminal proceedings.²⁷⁸

Promisingly, unlike political critics whom the PRC government might actually prefer to have abroad,²⁷⁹ China *wants* fugitives returned.²⁸⁰ That means the U.S. government has at least some leverage. Whether it is enough to make a noticeable difference in PRC government practices will only be known once tried. The next Section contends that it is worth a try even if the PRC government ultimately rebuffs the efforts.

E. *What Are the Potential Ramifications If Addressing Human Rights Concerns Prompts China to Disengage from Discussions on a Specific Issue or Even React with a Broader Negative Response?*

Taking a stronger stance on the human rights aspects of law enforcement may prove futile,²⁸¹ especially in light of what Orville Schell, Director of the Asia Society's Center on U.S.-China Relations, calls the "boldness and unrepentant tone" of the PRC government's tactics.²⁸² This unrepentant tone was on display following the 2016 joint statement on the human rights situation in China.²⁸³ The PRC government criticized the increased politicization and double standards of the Human Rights Council²⁸⁴ and

278. See *HRIC Urges Independent Observers at Upcoming Trials of Lawyers and Activists in China*, HUMAN RIGHTS IN CHINA (Aug. 5, 2016), <http://www.hrichina.org/en/press-work/statement/hric-urges-independent-observers-upcoming-trials-lawyers-and-activists-china> [https://perma.cc/K87U-PSSX].

279. See Perry Link, *At the Nobel Ceremony: Liu Xiaobo's Empty Chair*, N.Y. REV. OF BOOKS (Dec. 13, 2010), <http://www.nybooks.com/daily/2010/12/13/nobel-peace-prize-ceremony-liu-xiaobo/> [https://perma.cc/3ARM-WDMM] ("Even if Liu Xiaobo were to be released from prison, it is unimaginable that he would agree to leave China. If he left, the regime could bar him from re-entry, as it has so many others, and his ability to influence life and ideas inside China would decline precipitously.")

280. See Lei Zhao, *New Agency to Track Down Fugitives Hiding Overseas*, CHINA DAILY (Jan. 28, 2016), http://usa.chinadaily.com.cn/china/2016-01/28/content_23279336.htm [https://perma.cc/UTR7-VZEQ].

281. Cf. Koh, *supra* note 27, at 322 ("In the end, we delude ourselves if we believe that a country as large and powerful as China will change its conduct simply because one other country happens to impose unilateral economic sanctions upon it.")

282. Orville Schell, *Crackdown in China: Worse and Worse*, N.Y. REV. OF BOOKS (Apr. 21, 2016), <http://www.nybooks.com/articles/2016/04/21/crackdown-in-china-worse-and-worse/> [https://perma.cc/LLH3-JZV5].

283. See Harper, *supra* note 7.

284. See *Human Rights Council Should Avoid Past Mistakes: Chinese Diplomat*, XINHUA (June 14, 2016), http://news.xinhuanet.com/english/2016-06/14/c_135433795.htm [https://perma.cc/8J7L-X55M]. The PRC's statement was also issued on behalf of Russia, South Sudan, and the Non-Aligned Movement (NAM). Ambassador Ma Zhaoxu, Joint Statement on Enhancing Dialogue and Cooperation to Protect and Promote Universally Recognized

accused the United States of using “its troops on foreign soil [to] commit rape and murder of local people.”²⁸⁵

Taking a stronger stance may also result in the collapse of bilateral law enforcement conversations. China reportedly threatened to end judicial cooperation unless the U.S. government agrees to return businessman Ling Wancheng, the brother of former Chinese President Hu Jintao’s chief of staff.²⁸⁶ The termination of cooperation would be unfortunate in part because the U.S. government sometimes wants the PRC government’s help, as when the United States requested PRC law enforcement assistance in the dismantling of an international weapons trafficking ring in 2012.²⁸⁷

And taking a stronger stance may even backfire on other areas of the U.S.-China relationship: examples of China cancelling official visits and stymying economic cooperation when faced with foreign criticism of its human rights record abound.²⁸⁸ Norwegian salmon imports to China dropped precipitously following Liu Xiaobo’s receipt of the Nobel Prize as reported retaliation (even though the Norwegian government does not award the prize).²⁸⁹ Similarly, PRC officials reportedly contacted Ireland’s Department of Agri-

Human Rights at the High-Level Panel on 10th Anniversary of Human Rights Council (June 14, 2016), <http://www.china-un.ch/eng/hom/t1371853.htm> [<https://perma.cc/35FZ-M37F>]. A list of NAM members is available at NUCLEAR THREAT INITIATIVE, NON-ALIGNED MOVEMENT (NAM) (Feb. 5, 2016), <http://www.nti.org/learn/treaties-and-regimes/non-aligned-movement-nam/> [<https://perma.cc/8HYX-XEKZ>].

285. Miles & Nebehay, *supra* note 216.

286. See Mitchell et al., *supra* note 175.

287. Press Release, Embassy of the United States in Beijing, China, Mutual Cooperation Between the United States and the Chinese Law Enforcement Result in the Dismantling of an International Weapons Trafficking Ring (June 12, 2012), <http://beijing.usembassy-china.org.cn/international-weapons-trafficking-ring.html> [<https://perma.cc/NP9D-JYEV>] (“This investigation resulted in the arrest of numerous individuals and seizure of a large quantity of weapons and ammunition in the United States and Mainland China.”).

288. Cf. MING WAN, HUMAN RIGHTS IN CHINESE FOREIGN RELATIONS: DEFINING AND DEFENDING NATIONAL INTERESTS 82 (2001) (presenting example of PRC reaction to criticism by Denmark and Holland).

289. Benjamin David Baker, *Soul or Salmon? Norway’s Chinese Dilemma*, DIPLOMAT (May 9, 2014), <http://thediplomat.com/2014/05/soul-or-salmon-norways-chinese-dilemma/> [<https://perma.cc/P25J-XY6U>] (reporting plummeting salmon imports: “According to unofficial sources, the Chinese have presented the Norwegian government with a list of [fourteen] demands that have to be fulfilled for relations to be normalized, one of which states that the Nobel Committee will never again award the prize to a Chinese dissident.”). Cf. Chow, *supra* note 25, at 723 (“China’s international trade policy first began with a ‘sticks’ approach, which imposed economic sanctions that punished countries that angered China on issues such as the sale of arms to Taiwan or political recognition of the Dali Lama.”); *Did Oslo Kowtow to Beijing?*, CHINAFILE (Dec. 21, 2016), <https://www.chinafile.com/conversation/did-oslo-kowtow-beijing> [<https://perma.cc/JV36-Z7MG>] (analyzing decision by Beijing and Oslo to normalize relations).

culture and warned that Ireland's criticism at the U.N. Human Rights Council threatened a deal to lift the ban on Irish beef exports.²⁹⁰ Ireland's Minister for Foreign Affairs and Trade denied the claim, stating that PRC officials made "no explicit linkage" with Irish beef exports.²⁹¹

Fear of repercussions should not dictate U.S. policies, first because there are benefits to the United States even if emphasis on the human rights aspects of law enforcement is met with resistance. The United States has been struggling to regain its "moral authority" in the years since the abhorrent treatment of detainees in the wake of 9/11 has come to light.²⁹² As Harold Koh advocated in a 2007 article, the United States "should take immediate and visible steps to put its own human rights house in order."²⁹³ Taking a principled stance on human rights would signal that the United States takes seriously its commitments beyond the context of rectifying the flagrant human rights abuses associated with the "war on terror."²⁹⁴

Under President Obama, the United States vigorously engaged with the U.N. human rights reporting process as a clear step

290. See Eoin Burke-Kennedy, *Beef Exporters Face Significant Blow if China Refuses to Lift Ban*, IRISH TIMES (Apr. 8, 2016), <http://www.irishtimes.com/news/ireland/irish-news/beef-exporters-face-significant-blow-if-china-refuses-to-lift-ban-1.2602670> [<https://perma.cc/V63E-TCHJ>].

291. Press Release, Dep't of Foreign Aff. & Trade, Statement by Minister Flanagan on Ireland-China Relations (Apr. 8, 2016), <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2016/april/minister-flanagan-statement-ireland-china-relat/> [<https://perma.cc/7BPH-UZFU>].

292. See, e.g., Christopher Hope, *US Risked Losing Its 'Moral Authority' by Using Torture, Says David Cameron*, TELEGRAPH (Dec. 9, 2014), <http://www.telegraph.co.uk/news/world-news/northamerica/usa/11283835/US-risked-losing-its-moral-authority-by-using-torture-says-David-Cameron.html> [<https://perma.cc/AJ98-B2VG>]; William Branigin, *Bush Urged to Renounce Torture, Restore 'Moral Authority'*, WASH. POST (Jan. 25, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012502561.html> [<https://perma.cc/R53J-AYVW>]; Press Release, White House Off. of Press Sec'y, Fact Sheet: Obama Administration Leadership on International Human Rights (Dec. 4, 2013), <https://www.whitehouse.gov/the-press-office/2013/12/04/fact-sheet-obama-administration-leadership-international-human-rights> [<https://perma.cc/7N95-QPF9>] ("Since joining the [U.N.] Human Rights Council in 2009 and following our re-election in 2012, U.S. leadership has helped muster international action to address human rights violations worldwide . . .").

293. Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L. J. 635, 654 (2007).

294. See, e.g., Elizabeth Beavers, *Guantanamo is Entering Its Fifteenth Year. Here Are Five People Waiting for President Obama to Keep His Promise to Close It*, AMNESTY INT'L: HUM. RTS. NOW BLOG (Jan. 8, 2016), <http://blog.amnestyusa.org/us/guantanamo-is-entering-its-fifteenth-year-here-are-5-people-waiting-for-president-obama-to-keep-his-promise-to-close-it/> [<https://perma.cc/S9CK-6EYU>] (discussing the "war on terror").

towards putting its human rights house in order.²⁹⁵ At the November 2014 hearing before the Committee Against Torture, Tom Malinowski, Assistant Secretary of State for Democracy, Human Rights, and Labor, stated, “[T]he United States actively works to combat torture around the world. Where we see it, we condemn it. We urge other governments to cease its use. We make efforts to sanction those responsible.”²⁹⁶ Mary E. McLeod, Acting Legal Adviser of the U.S. Department of State, asserted, “The United States has taken important steps to ensure adherence to its legal obligations.”²⁹⁷

Emphasizing the links between human rights and China’s global hunt for fugitives also presents an opportunity for the United States to defend human rights on its own soil. Reports have questioned the tactics used by PRC operatives abroad to encourage fugitives to “voluntarily” return to China,²⁹⁸ such as through the use of “psychological pressure”²⁹⁹ and threats against relatives in China.³⁰⁰ In August 2015, the U.S. government issued a diplomatic warning about PRC operatives who sought fugitives in the United

295. See U.S. DEP’T OF STATE, *supra* note 194, ¶ 2.

296. *Assistant Secretary Malinowski: Torture Is Forbidden in All Places, at All Times, with No Exceptions*, U.S. MISSION IN GENEVA (Nov. 12–13, 2014), <https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/> [<https://perma.cc/TN4G-KXME>] (opening statement of Assistant Secretary Tom Malinowski before the Committee against Torture).

297. *Acting Legal Adviser McLeod: U.S. Affirms Torture Is Prohibited at All Times in All Places*, MISSION OF THE UNITED STATES IN GENEVA (Nov. 12–13, 2014), <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-us-affirms-torture-is-prohibited-at-all-times-in-all-places/> [<https://perma.cc/S37D-GZF2>] (opening Statement of Acting Legal Advisor Mary E. McLeod before the Committee against Torture).

298. *Compare Chinese Fugitive Huang Yurong Returns from US as Sky Net Corruption Crackdown Continues*, S. CHINA MORNING POST (Dec. 5, 2015), <http://www.scmp.com/news/china/article/1887013/chinese-fugitive-huang-yurong-returns-us-corruption-crackdown-continues> [<https://perma.cc/G7CE-ECP2>] (describing the voluntary return of fugitive Huang Yurong from the United States to China), and *Economic Fugitive Yang Jinjun Repatriated From US*, GB TIMES (Sept. 18, 2015), <http://gbtimes.com/china/economic-fugitive-yang-jinjun-repatriated-us> [<https://perma.cc/HVX4-YHRT>] (reporting on fugitives who have been “convinced by Chinese agents to return”), with Schell, *supra* note 282 (decrying tactics that include “abducting foreign nationals abroad and ‘renditioning’ them back to China where [China] forces them into making televised confessions”).

299. Phillip Wen, *Operation Fox Hunt: Grandma Zhou Shiqin Returns to China*, SYDNEY MORNING HERALD (Apr. 25, 2016), <http://www.smh.com.au/world/operation-fox-hunt-grandma-zhou-shiqin-returns-to-china-20160425-geoel8.html> [<https://perma.cc/H85G-XYUQ>].

300. See Mark Mazzetti & Dan Levin, *Obama Administration Warns Beijing About Covert Agents Operating in U.S.*, N.Y. TIMES (Aug. 16, 2015), <http://www.nytimes.com/2015/08/17/us/politics/obama-administration-warns-beijing-about-agents-operating-in-us.html> [<https://perma.cc/65QS-YFMS>].

States without authorization.³⁰¹ A State Department spokesperson added that, with the exception of diplomatic or consular officers, anyone acting in the United States as an agent of another country without notifying the attorney general commits a criminal offense.³⁰² In response, the PRC government contended that the United States broke bilateral agreements involving law enforcement cooperation and called the warning a “regrettable move.”³⁰³

Taking a principled position with respect to law enforcement cooperation would further reaffirm ties with like-minded countries such as Canada,³⁰⁴ Australia,³⁰⁵ and New Zealand,³⁰⁶ who are also home to PRC fugitives and face the same dilemma as the United States. The March 2016 joint statement by twelve governments expressing “concern[] about China’s deteriorating human rights record”³⁰⁷ indicated the U.S. government’s willingness to take the lead in a multilateral response to China’s human rights record.

301. See *id.*; see also Bruce Zagaris, *China-U.S. Dispute Increases Over Covert Chinese Law Enforcement Operatives in the U.S.*, 31 INT’L ENF’T L. REP. 336, 336–37 (2015) (discussing statements made by John Kirby, a State Department spokesman, condemning the unauthorized presence of PRC operatives in the United States).

302. See Andrea Chen, *US Warns China Over Undercover ‘Fox Hunt’ for Corrupt Chinese Officials*, S. CHINA MORNING POST (Aug. 17, 2015), <http://www.scmp.com/news/china/society/article/1850102/china-sending-covert-agents-us-pressure-fugitives-report> [<https://perma.cc/XE5G-V38R>]; see also 18 U.S.C. § 951(a) (noting criminal offense for anyone “other than a diplomatic or consular officer or attaché [to act] in the United States as an agent of a foreign government without prior notification to the Attorney General”).

303. Dan Levin, *China Dismisses Warning About Agents Operating Secretly in U.S.*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/world/asia/china-obama-administration-warning-agents-us.html> [<https://perma.cc/QYV3-V7EZ>]; see also *Sincerity Needed in U.S.-China Anti-Graft Cooperation*, XINHUA (Aug. 17, 2015), http://news.xinhuanet.com/english/2015-08/17/c_134526505.htm [<https://perma.cc/RB7X-KLDV>] (noting that although there is no extradition agreement between the U.S. and China, both countries had previously agreed on anti-corruption cooperation); Stephen Harner, *The Obama Administration Damages American Interests in Blocking China’s Anti-Corruption Efforts*, FORBES (Aug. 19, 2015), <http://www.forbes.com/sites/stephenharner/2015/08/19/the-obama-administration-betrays-american-interests-in-blocking-chinas-anti-corruption-efforts/#5d6fb1ec329a> [<https://perma.cc/W6VF-2EQ2>] (describing the Obama administration’s China policy as “blundering, even self-damaging”).

304. See Terry Glavin, *Canada’s Unhappy Affair with China’s Princeling Millionaires*, NAT’L POST (Apr. 22, 2015), <http://news.nationalpost.com/full-comment/terry-glavin-canadas-unhappy-affair-with-chinas-princeling-millionaires> [<https://perma.cc/7URC-6BK2>].

305. See Lisa Murray, *Australian Property Developer at Centre of China’s Corruption Crackdown*, AUSTRAL. FIN. REV. (Sept. 21, 2015), <http://www.afr.com/news/world/australian-property-developer-at-centre-of-chinas-corruption-crackdown-20150921-gjr7cr>.

306. See Fran O’Sullivan, *NZ Citizen Fijth on China’s Most-Wanted Fugitives List*, N.Z. HERALD (Apr. 21, 2016), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11626012 [<https://perma.cc/9HGS-L9FR>].

307. Harper, *supra* note 7 (issued by the United States, Ireland, the United Kingdom, Australia, Germany, the Netherlands, Japan, Norway, Iceland, Denmark, Sweden, and Finland).

Put simply, if the United States, with arguably the strongest economy in the world, cannot draw a line at which point it will refuse to overlook the embedded human rights concerns in law enforcement cooperation, then who can?³⁰⁸

Drawing a line could mean that the United States will get stuck with unwanted PRC nationals. The U.S. government wants to facilitate the return of both people on China's most wanted list and the tens of thousands of other PRC nationals alleged to be in the United States illegally.³⁰⁹ An article by PRC state-run media reported that the "[United States] would assist China in repatriating economic fugitives on the so-called 'Red Notice' list, and China would expedite the return of Chinese citizens awaiting deportation from the [United States]."³¹⁰ If the PRC government rebuffed elevation of human rights concerns as part of law enforcement cooperation, the U.S. government would either need to capitulate and proceed with assistance or accept the onerous though principled consequences of retaining large numbers of PRC nationals. This latter option is economically costly, but it seems unlikely that at least the economic fugitives represent a significant public safety threat if they are already living openly in the United States. If they turn out to have violated U.S. laws, then the U.S. government could pursue charges, as when a former manager of the Bank of China was sentenced to twenty-five years in U.S. prison on charges of racketeering, money laundering, and international transportation of stolen property, as well as passport and visa fraud.³¹¹ The Department of Justice has stated that it will "vigor-

308. Cf. Louis Jacobson, *Barack Obama Says U.S. Has 'Strongest, Most Durable Economy in the World' During State of the Union*, POLITIFACT (Jan. 14, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/jan/14/barack-obama/barack-obama-says-us-has-strongest-most-durable-ec/> [<https://perma.cc/N63J-8VHK>] (noting that the United States has one of the "strongest, most durable" economies in the world).

309. See Mark Hosenball & Tim Reid, *U.S. to China: Take Back Your Undocumented Immigrants*, REUTERS (Sept. 11, 2015), <http://www.reuters.com/article/us-usa-china-deportations-exclusive-idUSKCN0RB0D020150911> [<https://perma.cc/M4RP-FXKF>] (reporting a backlog of nearly thirty-nine thousand PRC nationals awaiting deportation for violation of U.S. immigration laws); Mitchell et al., *supra* note 175 ("There are an estimated [forty thousand] Chinese illegal immigrants in the [United States] who the Obama administration would like to send back to China.").

310. Jim Spellman, *U.S. Repatriates Sky Net Suspect Yang Jinjun*, CCTV (Sept. 19, 2015), <http://english.cntv.cn/2015/09/19/VIDE1442638322050656.shtml> [<https://perma.cc/9FTV-MLSN>]; see also Paul Welitzkin, *China, US to Streamline Repatriation*, CHINA DAILY (Apr. 14, 2015), http://usa.chinadaily.com.cn/epaper/2015-04/14/content_20430208.htm [<https://perma.cc/64NU-UNAS>] (explaining the details of cooperation between U.S. and Chinese law enforcements).

311. See Press Release, Dep't of Just., Former Bank of China Managers and Their Wives Sentenced for Stealing More Than \$485 Million, Laundering Money Through Las Vegas

ously pursue prosecutions . . . where there is alleged money laundering or other criminal activity in this country.”³¹²

For PRC fugitives in the removal pipeline, although there are protections on prolonged detention, Department of Homeland Security regulations permit the continued detention of certain classes of non-U.S. citizens due to special circumstances, including serious adverse foreign policy consequences of release.³¹³ Furthermore, CAT deferral of removal can be overturned if circumstances change and a determination is made that the person no longer is likely to be tortured in the country of removal.³¹⁴ People held under deferral of removal also may be removed at any time to another country where they would not likely face torture, though of course the country has to agree to take them.³¹⁵ And deferral of removal may be terminated following a determination by the U.S. Attorney General that diplomatic assurances forwarded by the U.S. Secretary of State indicate that the person would not be tortured in the receiving country, though, as previously noted, assurances are problematic.³¹⁶

Thus, taking a principled stance on human rights does not commit the United States to permanently sheltering any PRC fugitive who presented a credible claim for potential abuse if returned. If the U.S. government wants to be pragmatic while still standing on principled ground with respect to the role of human rights in China policy, then taking a hard look at whether the U.S. government can better leverage bilateral issues with intrinsic human rights concerns is a promising place to start. If the PRC government withholds cooperation because the U.S. government takes a position rooted firmly in the obligations that the United States and China have made to support human rights, then so be it. The sky will not fall if Sky Net fails to succeed.

Casinos (May 6, 2009), <https://www.justice.gov/opa/pr/former-bank-china-managers-and-their-wives-sentenced-stealing-more-485-million-launders> [https://perma.cc/F8Q6-M8UH].

312. Dilts et al., *supra* note 178 (internal quotations omitted).

313. See 8 C.F.R. § 241.14 (2016).

314. See *id.* § 1208.17(d) (termination of deferral of removal).

315. See *id.* § 208.17(b)(2); see also *Freed from Guantanamo, But Stuck in Limbo*, PBS NEWSHOUR (Oct. 12, 2013), <http://www.pbs.org/newshour/rundown/freed-from-guantanamo-but-stuck-in-limbo/> [https://perma.cc/GM5R-PGK8]; Charlie Savage, *U.S. Frees Last of the Chinese Uighur Detainees From Guantanamo Bay*, N.Y. TIMES (Dec. 31, 2013), https://www.nytimes.com/2014/01/01/us/us-frees-last-of-uighur-detainees-from-guantanamo.html?_r=0 [https://perma.cc/GM5R-PGK8].

316. See 8 C.F.R. § 208.17(d)-(f); see also *supra* Section II.B.

CONCLUSION

President Obama declared, “Throughout our history, the United States of America has done more than any other nation to stand up for freedom, democracy, and the inherent dignity and human rights of people around the world.”³¹⁷ The hope of this Article is that throughout our *future*, the United States will firmly stand for these principles. It is too early to say definitively to what extent President Trump will take up this challenge, though there are deep-seated concerns that human rights will be overwhelmingly overshadowed by economic and strategic considerations. Pragmatism is a constant theme in U.S. policy towards China, but principles demand that engagement proceed with careful consideration for human rights. Raising human rights issues only in dedicated forums is insufficient.³¹⁸ The U.S. government should formulate a clear plan for articulating how human rights connect to items on the bilateral agenda and then for taking concrete steps to effectuate that plan in a true whole-of-government approach.

This Article’s modest contribution to the difficult work of the officials who have the daily task of navigating the fraught U.S.-China relationship is to suggest a framework that could focus intra-executive-branch discussions. Despite the many obstacles, the U.S. government can work towards a more cohesive approach that clarifies when discrete issues do not implicate human rights concerns, integrates implicit human rights concerns into key discussions on bilateral issues, and takes a vocal stance when there are egregious human rights abuses. This approach attempts to maintain a partially pragmatic bent while accepting that upholding core principles may impede bilateral relations. Words alone are not enough. At some point, the U.S. government needs to act based on principles over pragmatism. As exhorted by artist and activist Ai Weiwei, “Your own acts tell the world who you are and what kind of society you think it should be.”³¹⁹

317. Fellmeth, *supra* note 124, at 978 (quoting President Barack Obama, Statement by the President Report of the Senate Select Committee on Intelligence (Dec. 9, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence> [<https://perma.cc/7J82-SHEK>] (internal quotations omitted)).

318. Cf. Thomas Carothers, *Rule of Law Revival*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 1, 1998), <http://carnegieendowment.org/1998/03/01/rule-of-law-revival> [<https://perma.cc/AP4C-FW7M>] (rule-of-law promotion will not “miraculously eliminate the hard choices between ideals and interests that have plagued America’s foreign policy for more than two centuries”).

319. *Who You Are by Ai Weiwei*, PEACE PRIZE FOUND., <http://peaceprize.org/20141011063525.html> [<https://perma.cc/T494-VRXE>] (last visited Mar. 22, 2017).