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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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. 5, 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 torture: “[T]he practice of torture and ill-treatment is still deeply entrenched in the [PRC] criminal justice system.” 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.”

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.ª

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. 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.”


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.\footnote{11. Cf. US: Trump Should Govern With Respect for Rights, HUM. RTS. W A T CH (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”).}

asked about a prior comment on the PRC government’s violent crackdown on the 1989 demonstrations in Tiananmen Square. Trump said he was not “endorse[n]” 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.


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.” Yet even he openly recognized the need to consider the United States’ many interests when dealing with China. Indeed, it was under President Carter that the United States and PRC normalized relations. 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, 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.” In July 2016, National Security Advisor Susan Rice affirmed, “There is no more consequential bilateral relationship than the U.S.-China relationship . . . .”

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


20. See Kerry, supra note 10.


that human rights will remain a challenging facet of the U.S.-China relationship.\textsuperscript{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 Council\textsuperscript{24}—while maintaining a strong view of national sovereignty and arguing that its domestic human rights record is not a matter for international concern.\textsuperscript{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.\textsuperscript{26} While recognizing that diplomacy is “a lot harder than it looks,”\textsuperscript{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

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\textsuperscript{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-d883e98a590a [https://perma.cc/TZ7W-VSMR] (“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).


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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 fugitives\(^\text{28}\) demonstrates the United States’ willingness to allow at least limited repatriations despite its longtime refusal to enter into an extradition treaty with China.\(^\text{29}\)


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

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, 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. 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.” Perhaps exchange rates indirectly connect to the right of all people to “freely pursue their economic, social and cultural development.” But there is no proverbial human rights elephant in the room. 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

38. ICESCR, supra note 36, art. 1.
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. 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. 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.” 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. Even then, President Bill Clinton restored China’s most favored nation trading status four years later. 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

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

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. 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.

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-
ages to human rights.\textsuperscript{49} For example, the U.S.-Russia space program has persevered despite tensions between the two countries.\textsuperscript{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.\textsuperscript{51} An article in \textit{Time} Magazine bluntly noted the downsides of this linkage:

\textit{[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.}\textsuperscript{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.\textsuperscript{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.\textsuperscript{54} Coun-

\textsuperscript{49.} See Phillip R. Trimble, \textit{Human Rights and Foreign Policy}, \textit{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”).


tering nuclear proliferation in North Korea and Iran is yet another weighty issue that is not connected to the human rights situation in China. 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.” The prolonged detention of U.S. citizen Sandy Phan-Gillis by PRC authorities on charges of theft of state secrets 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).


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.


administration 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 . . . .”

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. 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.” 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. Mr. Liu had visited the United States, 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. The U.S. Embassy requested that a representative be able to attend the trial, 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. The U.S. Embassy staff was likely

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68. See Kerry, *infra* note 10.


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.\footnote{See China’s Pervasive Use of Torture: Hearing Before the Cong.-Exec. Comm’n on China, 114 Cong. 4–7 (2016), http://www.cccg.gov/events/hearings/china%E2%80%99s-pervasive-use-of-torture [https://perma.cc/TT57-6NT8] (statement of Margaret K. Lewis).} 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.\footnote{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/QQ5Y-AZ55] (letter written by wife of jailed Nobel Laureate expressing gratitude for support from the international community).}

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
cases." 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.

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. Skepticism that dialogues and so-called “naming and shaming” strategies can induce norm compliance is especially warranted given the current PRC leadership’s vigorous pushback to international criticism of its human rights record. 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-


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

President Jiang Zemin’s visit to Washington, D.C., 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.

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. 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.

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. Track 1.5 dialogues (involving both government officials and experts from outside the government) and Track 2 dialogues (involving only non-governmental experts) restore one’s faith that there are many reform-minded individuals both within and outside the PRC government who are committed to improving

83.  Id.
86.  See DU 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


“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


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


Internet, with both the United States and China voting in favor.\footnote{See Wendy Zeldin, \textit{U.N. Human Rights Council: First Resolution on Internet Free Speech}, \texttt{Link to 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].} 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.”\footnote{Press Release, U.S. Dep’t of State, \textit{supra} note 77.}

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.\footnote{Cf. \textit{U.S. Show Breadth of Rights Commitment at China Dialogue}, \texttt{Hum. Rts. Watch} (June 5, 2016), \texttt{https://www.hrw.org/news/2016/06/05/u-s-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.”).} Following an October 2015 bilateral agreement on cyber-security, Freedom House raised the following criticism:

\begin{quote}
More problematic from the perspective of privacy and freedom of expression was the cyber-theft 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.\footnote{Sarah Cook, \textit{Obama-Xi Agreement Will Not Resolve China Cybersecurity Threat}, \texttt{Freedom House} (Nov. 9, 2015), \texttt{https://freedomhouse.org/blog/obama-xi-agreement-will-not-resolve-china-cybersecurity-threat} [https://perma.cc/ZEL6-MLCD].}
\end{quote}

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. . . .”

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. 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.” Both governments have strong incentives to cooperate in hopes of avoiding, or at least mitigating, outbreaks of infectious diseases like H1N1 and avian influenza. Approaching infectious diseases as purely a health issue minimizes the significant human rights impli-

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ations 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-

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108. 2015 CHINA REPORT, supra note 30, at 67.
tions with trading partners across the globe,” though nonmarket methodologies can also be used for protectionist purposes. 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.”

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


take shape. The Obama administration’s China policy benefited 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.” 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, the National Security Council (NSC) is best positioned to then serve an interagency oversight role. 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.


urged China to respect the rights and freedoms of people and entities operating in China.\textsuperscript{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 record\textsuperscript{121} or when the courts grant asylum to a political dissident.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{124} To the extent that Congress writes legislation based on human rights concerns that impact China,\textsuperscript{125} signals from

\begin{itemize}
\item \textsuperscript{123} Cong.-Exec. Comm’n on China, supra note 16, at 5.
\item \textsuperscript{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.”).
\end{itemize}
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

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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.\textsuperscript{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.\textsuperscript{130} Some attention has been paid to the human rights implications of U.S.-PRC law enforcement cooperation both by academics\textsuperscript{131} and in public statements of U.S. government officials,\textsuperscript{132} though law enforcement efforts are more commonly discussed in


terms of mutual legal assistance arrangements,\textsuperscript{133} national security,\textsuperscript{134} and transnational criminal threats.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-


tries would “strengthen cooperation in combating international organized crime, narcotics trafficking, alien smuggling, counterfeiting and money laundering.” 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. A separate section of the statement mentions the two countries’ “commitment to the promotion and protection of human rights and fundamental freedoms.” The later years of the Clinton administration also saw the development of a broader “rule of law” initiative with China. 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. The Federal Bureau of Investigation has a presence in the Beijing embassy; the Department of Homeland Security has spearheaded the High Level Joint Dialogue on Cybercrime and Related Issues; the Drug Enforcement Administration has led the Bilateral Drug Intelligence Working Group; and the JLG has held regular meetings.

139. Id.
140. Id.
141. See Stephenson, supra note 41, at 194–95.
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. 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.” 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.

The United States and PRC agreed in September 2015 to step up law enforcement cooperation, particularly in cases of corruption. 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.” The fact sheet contained no mention of human rights. At the October 2015 meeting of the

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-64e4-11e5-97e9-70bf5e7177b.html#axzz47caKeR6H [https://perma.cc/6N7X-LZTZ].
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


153. Ohr, supra note 132.


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”\textsuperscript{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.\textsuperscript{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 Group\textsuperscript{159} and Asia-Pacific Economic Cooperation’s (APEC) 2014 Beijing Declaration on Fighting Corruption.\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{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

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\textsuperscript{157} Press Release, U.S. Dep’t of Homeland Sec., \textit{supra} note 147.
\textsuperscript{159} See Assistant Deputy Chief of Mission, \textit{supra} note 152.
\end{flushright}
anti-corruption progress and the implementation of UNCAC. Following the 2016 S&ED, the U.S. State Department noted continuing cooperation to recover fugitives and assets through APEC and the G20. 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.”

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). 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.

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).” In early 2016, the Chinese Communist Party (CCP or Party) pledged to continue the


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).


fight against corruption at an “intensity and pace unchanged.”

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. Regardless of motives, anti-corruption efforts have included an unprecedented push to obtain the return of PRC nationals who have fled overseas.

The PRC government launched “Operation Sky Net” in 2015 in an effort to “capture corrupt officials who fled abroad.” 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.” The PRC government has sought both informal arrangements and formal agreements to facilitate the return of fugitives.


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.
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.”\footnote{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).} 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.\footnote{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.} Law enforcement cooperation with the PRC raises concerns about torture,\footnote{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 \textit{jus cogens}, it is the prohibition on torture.”).} the ability to receive a fair trial,\footnote{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).} and other rights of the accused.\footnote{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).} Section ILC, 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.\footnote{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).}

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...
receive a fair trial and not be subject to torture or other forms of mistreatment in that country." 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." 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."

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. 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

190. Id.
“[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


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


\(^{198}\) 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 GARICA, supra note 194, at 8 (explaining requirement that evidence concerning likelihood of torture be particularized).

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-


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).
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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.” 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.

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. There were no published reports of specific diplomatic assurances from the PRC government when the fugitives were returned in September 2015, though assurances have been made in prior cases. Even when assurances are given, there is considerable literature questioning their reliability, especially with regard to the ongoing treatment of people once returned. 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-


try of its responsibility under CAT. 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.” 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, 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. 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


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


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/dbyw/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-


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).


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/W3QM-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 . . . .”).

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,

233. See 2015 CHINA REPORT, supra note 30.
“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.”

In addition to CAT, China signed the ICCPR in 1998. 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. As a signatory that has expressed its intent to ratify the convention, China has an obligation to refrain in good faith from acts that would defeat the object and the purpose of the treaty. 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 process—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.” 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. As noted above, use of these procedures is extremely limited in practice. 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
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.\footnote{\textit{See id. at 3 (report based in part on interviews with forty-eight recent detainees); 

first recipient of its International Human Rights Award, but she suspiciously repudiated the award as part of her “confession.” Nearly simultaneously with Ms. Wang’s confession, her former colleague was convicted of subverting state power and sentenced to seven years in prison. 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.”

The PRC Criminal Procedure Law further provides that no person shall be found guilty without being judged as such by a court. The nearly one hundred percent conviction rate underscores, however, that determination of guilt in practice occurs before a defendant enters the courtroom. 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. In March 2016, a deputy chairman of the All China Lawyers Association spoke out.


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


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

Televised confessions create a disturbing twist on the concept of government transparency. The PRC government has undertaken an “open government” initiative, but these efforts are best understood as “embracing an instrumentalist view of transparency” that targets and “applies to limited areas and with specific constraints.” 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. 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. 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. 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


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).

public phase of President Xi Jinping’s campaign to cleanse the country of liberal ideas and activism.”

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” 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.”

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.

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. These cases thus present one of the United States’ best chances to cultivate engagement by China in meaningful human

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

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.”

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.” 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

opportunity to work closely together. In 2015, for example, two PRC nationals were indicted in the United States on fraud and money laundering charges following a joint investigation. 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.” 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.

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.”


273. Cf. Tanner & Zhao, supra note 116, at 85 (advocating “new and innovative ways to cultivate and leverage people-to-people (P2P) ties—a longstanding 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, in 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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-


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 abroad279 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


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.”).


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.”).


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

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. 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.

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. 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). Similarly, PRC officials reportedly contacted Ireland’s Department of Agri-


285. Miles & Nebehay, supra note 216.

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


288. Cf. MING WANG, 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 Dalai 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

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\(^{294}\) 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-five-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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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,\textsuperscript{298} such as through the use of “psychological pressure”\textsuperscript{299} and threats against relatives in China.\textsuperscript{300} In August 2015, the U.S. government issued a diplomatic warning about PRC operatives who sought fugitives in the United

\textsuperscript{295} See U.S. DEP’T OF STATE, supra note 194, ¶ 2.


States without authorization.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{303}

Taking a principled position with respect to law enforcement cooperation would further reaffirm ties with like-minded countries such as Canada,\textsuperscript{304} Australia,\textsuperscript{305} and New Zealand,\textsuperscript{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”\textsuperscript{307} indicated the U.S. government’s willingness to take the lead in a multilateral response to China’s human rights record.

\textsuperscript{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).


\textsuperscript{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-

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

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. 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. 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. 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.

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.


312. Dilts et al., supra note 178 (internal quotations omitted).
314. See id. § 1208.17(d) (termination of deferral of removal).
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)).
