

Why China Should Unsign the International Covenant on Civil and Political Rights

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ABSTRACT

In March 2019, the United Nations Human Rights Council finalized its periodic review of China's human rights record just as human rights in China were under intensified attack. As during prior reviews, China was criticized for its human rights practices. And, once again, China was urged to ratify the International Covenant on Civil and Political Rights (ICCPR), which China signed over twenty years ago. It is time to reevaluate this approach.

This Article argues that the international community should change tack and instead call on China to remove its signature from this foundational human rights treaty. While this would be a brash and unusual strategy, it is sound as a matter of both law and politics. The anticipated upsides of confronting China about its failure to meet even the minimal obligations as a signatory outweigh the possible downsides of scaling back from the goal of universal participation.

This Article recognizes that China's signing of the ICCPR has provided a justification for domestic actors to promote human rights protective reforms. The strength of this argument has, however, faded in recent years. A better path is to pursue a forthright approach whereby the international community rebukes the Chinese leadership's retrograde motion on civil and political rights while supporting those within China who have looked to the ICCPR for inspiration.

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I. INTRODUCTION

In March 2019, the United Nations Human Rights Council finalized its periodic review of China's human rights record just as human rights in China were under intensified attack.¹ The review coincided with the twentieth anniversary of the People's Republic of China's (PRC or China) signing of the International Covenant on Civil and Political Rights (ICCPR), a foundational treaty that sets forth a range of protections such as freedom of speech, assembly, and religion. China not only has failed to ratify the ICCPR but is instead increasingly undermining the rights it protects.² This Article argues that the international community should respond by calling on China to remove its signature.

1. See Human Rights Council, *China, UPR Report Consideration – 38th Meeting, 40th Regular Session Human Rights Council*, UNITED NATIONS WEB TV (Mar. 15, 2019), <http://bit.ly/2Isfsnc> [<https://perma.cc/6UZx-RMRZ>] (archived Oct. 27, 2019) [hereinafter HRC Live Meeting].

2. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, <http://bit.ly/2GnkI8b> (last visited Oct. 27, 2019) [<https://perma.cc/2WTL-V2CX>] (archived Oct. 27, 2019) (notating China's signing date of Oct. 5, 1998) [hereinafter ICCPR, U.N. Treaty Collection Page].

This is not a recommendation that is made lightly, but it is one whose time has come.³ Prior to its first review before the council in 2009, China reported that the “relevant departments are carrying out necessary legislative, judiciary and administrative reforms to create the conditions for the early ratification of ICCPR.”⁴ Prior to its second review in 2013, China again reported that the “relevant organs[⁵] of the National government are continuing steadily to pursue administrative and legislative reforms in preparation for ratifying the Convention.”⁶ Prior to its third review last fall, China once again reported that the “relevant departments of the Government are steadily continuing to advance administrative and judicial reforms in preparation for [ICCPR] ratification.”⁷

These repeated claims do not fit reality. Since its 2009 review, China—in this Article being used as shorthand for the governing party-state structure⁸—has tightened suppression of civil and political rights. For example, China imprisoned until death a Nobel laureate for his peaceful expression of political views and for years arbitrarily deprived his wife of freedom of movement, without any basis even in Chinese law.⁹ It criminally convicted and/or extrajudicially

3. Cf. Quote by Victor Hugo, GOOD READS, <https://www.goodreads.com/quotes/381646-nothing-is-more-powerful-than-an-idea-whose-time-has> (last visited June 20, 2019) [<https://perma.cc/38Y2-V9KX>] (archived June 20, 2019) (“Nothing is more powerful than an idea whose time has come.”). Although this Article is being published in 2020, I first made this argument in an October 2018 Washington Post op-ed. This Article is an outgrowth of that op-ed: it draws on and expands the arguments therein. Margaret K. Lewis, *China Must Stop Making a Mockery Out of the Rights Treaties It Signs*, WASH. POST (Oct. 30, 2018), <https://wapo.st/2ETjKD3> [<https://perma.cc/C2ZU-RA2E>] (archived Oct. 26, 2019).

4. Human Rights Council, National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1: China, ¶ 11, U.N. Doc. A/HRC/WG.6/4/CHN/1 (Feb. 2, 2009) [hereinafter 2009 National Report].

5. The vague phrase “relevant organs” or “relevant authorities” (*youguan bumen* 有关部门) is commonly used by the PRC government, spurring an unintentionally humorous explanation by the PRC Ministry of Foreign Affairs that a “relevant organ” is one that is “not irrelevant.” CHINA DIGITAL TIMES (May 9, 2019), <https://chinadigitaltimes.net/> [<https://perma.cc/YEW8-6N2D>] (archived June 11, 2019). It has also spurred an intentionally humorous parody account. The Relevant Organs (@relevantorgans), TWITTER (last visited Nov. 10, 2019), <https://twitter.com/relevantorgans> [<https://perma.cc/R44A-H995>] (archived Oct. 26, 2019).

6. Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: China, ¶ 7, U.N. Doc. A/HRC/WG.6/17/CHN/1 (Oct. 22, 2013) [hereinafter 2013 National Report].

7. Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: China, ¶ 14, U.N. Doc. A/HRC/WG.6/31/CHN/1 (Nov. 6, 2018) [hereinafter 2018 National Report].

8. See generally Margaret K. Lewis, *Seeking Truthful Names: The External Implications of China's Internal Ideology on Governance*, in LAW AND THE PARTY IN XI JINPING'S CHINA: IDEOLOGY AND ORGANISATION (forthcoming 2020), <https://ssrn.com/abstract=3238464> [<https://perma.cc/Y79H-NY4W>] (archived Oct. 26, 2019) (exploring interrelated nature of Party and state).

9. See *Chinese Experts Worried About Liu Xia's Health*, U.N. OFFICE HIGH

disappeared hundreds of lawyers and other rights defenders.¹⁰ And it expanded the ability of the Chinese Communist Party (CCP or Party) to deprive people of liberty without judicial process.¹¹ The worsening climate for civil and political rights is seen most starkly in the at least one million Uighurs and members of other Muslim minority groups who have been held in so-called reeducation camps.¹²

A country's failure to fulfill its human rights commitments is not surprising.¹³ And perfection is far from required; for instance, numerous countries are struggling to implement the right "to a fair and public hearing by a competent, independent and impartial tribunal established by law."¹⁴

Nor is it unusual to have a period between signing a treaty and becoming a full party:¹⁵ the United States took nearly fifteen years to ratify the ICCPR¹⁶ and has yet to ratify the International Covenant on Economic, Social and Cultural Rights, despite signing it in 1977.¹⁷

COMM'R HUM. RTS. (July 4, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23322&LangID=E> [https://perma.cc/9VVU-W7JQ] (archived June 20, 2019); *UN Declares Detention of Imprisoned Nobel Peace Prize Laureate and Wife Illegal; Calls for Immediate Release*, FREEDOM NOW (Aug. 1, 2011), <http://www.freedom-now.org/wp-content/uploads/2015/02/Press-Release-and-Opinions-Liu-Xiaobo-Liu-Xia-8-1-11.pdf> [https://perma.cc/FMW7-4EJT] (archived June 20, 2019).

10. See *China: On "709" Anniversary, Legal Crackdown Continues*, HUM. RTS. WATCH (July 7, 2017), <https://www.hrw.org/news/2017/07/07/china-709-anniversary-legal-crackdown-continues> [https://perma.cc/JXT6-YERV] (archived June 20, 2019).

11. See Lucy Hornby, *China detention law to roll back legal protections for suspects*, FIN. TIMES (Feb. 11, 2018), <https://www.ft.com/content/147ec1ca-0a38-11e8-8eb7-42f857ea9f09> [https://perma.cc/G84X-JC5F] (archived Nov. 11, 2019).

12. See, e.g., Adrian Zenz, *'Thoroughly reforming them towards a healthy heart attitude': China's political re-education campaign in Xinjiang*, 38 CENT. ASIAN SURV. 102 (2019) (detailing arrival at number of approximately one million); Lucas Niewenhuis, *1.5 Million Muslims Are In China's Camps – Scholar*, SUPCHINA (Mar. 13, 2019), <https://supchina.com/2019/03/13/1-5-million-muslims-are-in-chinas-camps-scholar/> [https://perma.cc/K748-HDHX] (archived Oct. 26, 2019) (Zenz presenting updated estimate of 1.5 million); see also Jessica Batke, *Where Did the One Million Figure for Detentions in Xinjiang's Camps Come From?*, CHINAFILE (Jan. 8, 2019), <http://www.chinafile.com/reporting-opinion/features/where-did-one-million-figure-detentions-xinjiangs-camps-come> [https://perma.cc/6E35-A92W] (archived June 20, 2019); Stephanie Nebehay, *1.5 million Muslims could be detained in China's Xinjiang*, REUTERS (Mar. 13, 2019), <https://reut.rs/2Gu0wmf> [https://perma.cc/5GQG-HW8M] (archived Oct. 26, 2019).

13. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2020 (2002).

14. See *The Right to a Fair Trial*, FAIR TRIALS, <https://www.fairtrials.org/right-fair-trial> (last visited Oct. 26, 2019) [https://perma.cc/XJV4-MFUE] (archived Oct. 26, 2019) ("Despite the importance of fair trials being recognised by the international community, this basic human right is being abused day-in-day-out in countries across the globe."); ICCPR, U.N. Treaty Collection Page, *supra* note 2, at art. 14.

15. See Barbara Oomen, *Between Signing and Ratifying: Preratification Politics, the Disability Convention, and the Dutch*, 40 HUM. RTS. Q. 420, 429 (2018) (calculating that, "[f]or countries that end up ratifying a [U.N. human rights] treaty, this process [between signing and ratification] takes three years and ten months on average").

16. See ICCPR, U.N. Treaty Collection Page, *supra* note 2.

17. See *id.*

There is debate as to a state's obligations during this interim period but,¹⁸ at a minimum, it must refrain from acts that would defeat the object and purpose of the treaty.¹⁹ This fundamental "good faith"²⁰ obligation in international law preserves the sanctity of treaties and requires that states refrain from opportunistic or bad faith behaviors. China's intolerance for civil and political rights guts the core protections in the ICCPR: the trend is retrogression and repression, not progression and protection. Yet, during the 2018 review, members of the Human Rights Council once again urged China to ratify the ICCPR.²¹ This semidecadal wash-rinse-repeat exercise has proved futile.

Encouraging China to retract its signature to a major human rights treaty may seem counterproductive to the goals of improving conditions within China and of fortifying human rights norms on the international level. Nor is there a mechanism for other countries actually to remove China from the list of signatories. At best, countries could create a joint statement expressing this position, akin to the June 2019 letter by twenty-two countries to the United Nations (UN) High Commissioner for Human Rights urging China to stop the mass detentions in Xinjiang.²²

And state practice with respect to "unsigned" is exceptionally thin.²³ The United States' 2002 announcement²⁴ that it did not intend to join the treaty establishing the International Criminal Court²⁵ stands as a rare example of a state voluntarily declaring its intention

18. See, e.g., David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 594 (2010).

19. See Vienna Convention on the Law of Treaties, arts. 10, 18, May 23, 1969, 1155 U.N.T.S. 331; *What is the difference between signing, ratification and accession of UN treaties?*, ASK U.N. (Apr. 26, 2018), <http://ask.un.org/faq/14594> [<https://perma.cc/9TTH-YXWH>] (archived Oct. 26, 2019) (explaining signing "creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty").

20. See Oliver Dörr, *Article 18: Obligation Not to Defeat the Object and Purpose of a Treaty Prior to its Entry Into Force*, in VIENNA CONVENTION ON THE LAW OF TREATIES ¶ 4 (Oliver Dörr et al. eds., 2012) (describing the interim obligation as "basically an obligation of good faith").

21. See Human Rights Council, Report of the Working Group on the Universal Periodic Review: China, ¶ 28.4, U.N. Doc. A/HRC/40/60 (Dec. 26, 2018) [hereinafter 2018 China UPR Report]; Lewis, *supra* note 3.

22. See Nick Cumming-Bruce, *China Rebuked by 22 Nations Over Xinjiang Repression*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/world/asia/china-xinjiang-rights.html> [<https://perma.cc/Z9W3-3JZ7>] (archived Aug. 5, 2019).

23. See *infra* Part III.

24. Letter from John R. Bolton, Sec'y. of State for Arms Control & Int'l Sec., U.S. Dep't of State, to Kofi Annan, U.N. Sec'y Gen. (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> [<https://perma.cc/2RX5-K8EC>] (archived June 20, 2019).

25. See Rome Statute of the International Criminal Court, n.12, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

not to become a party despite having signed a treaty.²⁶ But China's status in the zone of mere signatory to the ICCPR makes possible a strategy that is essentially off the table after ratification; ICCPR ratification makes it exceedingly difficult, and perhaps even impossible, for a state to withdraw.²⁷ Seizing the interim period as an opportunity to press China to admit its growing distance from the ICCPR's norms would send pointed messages to the PRC Party-state, pro-human rights audiences within China, and the international community.

First, a call for unsigning would tell the Chinese leadership that the international community condemns the worsening conditions for civil and political rights and highlight that China's signature is illusory; whatever intentions the leadership had over the first twenty years after signing, China's signature on the ICCPR today does not appear to express a true intention to be bound by the norms therein.²⁸

Second, though China's signing of the ICCPR initially provided a justification for domestic actors to promote human rights protective reforms, the hope that the Chinese leadership is listening has also become illusory.²⁹ Advocating unsigning would emphasize that China is not a monolithic entity. The international community should rebuke the PRC leadership's retrograde motion on human rights while supporting those within China who have looked to the ICCPR for inspiration.

Third, rebutting China's "no one-size-fits-all"³⁰ view of human rights would be a self-affirmation by the international community of its commitment to universal values. International law scholars have long emphasized the importance of an inclusive approach to international human rights treaties.³¹ The deterioration of civil and political rights inside China combined with the PRC leadership's efforts to dilute human rights norms outside its borders gives reason, however, to rethink this position. The PRC leadership's current assault on civil and political rights means that international conceptions of

26. See generally Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

27. See *infra* note 272.

28. Cf. State Council Information Office of the People's Republic of China, *Seeking Happiness for People: 70 Years of Progress on Human Rights in China*, XINHUANET (Sept. 22, 2019), http://www.xinhuanet.com/english/2019-09/22/c_138412720.htm [https://perma.cc/CFR5-TBW7] (archived Oct. 26, 2019) (government white paper stating that "China abides by the provisions of [international human rights instruments that it has signed]" but not mentioning the ICCPR once in the forty-one page report) [hereinafter *Seeking Happiness for People*].

29. See *id.*

30. See Letter from Chinese Mission, to the U.N. Office at Geneva (Mar. 1, 2018), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbdt_665378/t1538785.shtml [https://perma.cc/8FAV-MXDQ] (archived June 20, 2019).

31. See, e.g., Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 182 (2003) ("[O]ur principal policy contention is that broad ratification of human rights treaties plays an important role in the process of building national human rights cultures (and a transnational human rights culture).").

these rights would be better served by China remaining outside the ICCPR rather than enfeebling them via engagement in the ICCPR's interpretive and monitoring mechanisms. There is no bar to China resigning (and ratifying) the ICCPR at a future date should circumstances pivot in a rights-protecting direction.

Part II examines China's three cycles of review before the UN Human Rights Council—2009, 2013, 2018—and how these reviews coincided with periods of cautious hope, increasing uncertainty, and alarm, respectively, regarding China's approach towards human rights. The Universal Periodic Review (UPR) process is, as the name indicates, a sweeping look at a country's human rights record.³² This Article's focus is on China's approach to civil and political rights largely because these rights are particularly under siege as the most threatening to the Party's lock on power.³³

Part III introduces scholarship on the requirement that states refrain from acts that would defeat the object and purpose of a treaty in the period between signing and ratification. There is no consensus as to what this so-called interim obligation entails in practice, and there is a dearth of real-world examples that might provide a guide.³⁴ Nonetheless, there is a general understanding among international law scholars that the requirements of the Vienna Convention on the Law of Treaties and customary law demand *some* level of good-faith performance.³⁵ It is an interim obligation, not an interim aspiration.³⁶

Part IV builds on the preceding two parts to argue that, as a matter of both law and politics, the international community should

32. See Human Rights Council, *Basic facts about the UPR*, U.N. OFFICE HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (last visited June 20, 2019) [<https://perma.cc/2SWF-C9LF>] (archived June 20, 2019).

33. A focus on civil and political rights is not meant to diminish the importance of other rights. China itself prefers to emphasize economic rights—as covered by the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR]. China prioritized these rights in its 2018 National Report. See 2018 National Report, *supra* note 7, ¶¶ 7, 23 (“This [road of developing human rights with Chinese characteristics] is a road that takes development as the priority. . . . The incidence of poverty dropped from 10.2 per cent at the end of 2012 to 3.1 per cent at the end of 2017.”). There is debate, however, over both how robustly China is implementing these rights today and also how much credit the government can take for a reduction in the poverty rate since the 1970s. See Rob Schmitz, *Who's Lifting Chinese People Out of Poverty?*, NAT'L PUB. RADIO (Jan. 17, 2017), <https://n.pr/2GwlGR0> [<https://perma.cc/88UP-CQXJ>] (archived Oct. 26, 2019) (addressing claims that “Chinese people lift[ed] themselves out of poverty once Mao and his horrific political campaigns expired”) (emphasis added). A focus on civil and political rights is also necessary to keep this Article manageable in its scope.

34. See, e.g., Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 283 (2001) (“While the interim obligation has been recognized in various international legal systems, it remains unclear how to determine whether the interim obligation is being violated.”).

35. See *infra* notes 197–200.

36. See *id.*

call on China to unsign the ICCPR. As a matter of law, China has failed in good faith to meet its interim obligation using a variety of measures (Part IV.A). As a matter of politics (Part IV.B), a jarring rebuke would directly confront China's efforts to undermine international human rights norms.

Undermining is distinct from redefining. There is debate in government and academic circles as to whether China is a "revisionist power," which denotes a plan to change the meaning of international norms.³⁷ The extent to which China is trying to construct an international consensus around its preferred, specific definition of human rights is a point of increasing attention.³⁸ The claim here is that, in the context of civil and political rights, China's actions demonstrate at least a desire to sap these rights of their normative force. Put visually, it is as if the PRC leadership is trying to turn these international norms into the ancient vessels (*ding*) that are beautiful to view and have an imposing presence yet are empty shells.³⁹ Once the content has been drained from human rights norms, what is left are phrases like "freedom of speech" that are visually pleasing and appear at first glance to be legally weighty but, upon closer inspection, are essentially hollow. Individual states are then left with the option, but not the obligation, to fill these vessels with whatever content they

37. See, e.g., Andrew Nathan, *China's Rise and International Regimes: Does China Seek to Overthrow Global Norms?*, in *CHINA IN THE ERA OF XI JINPING: DOMESTIC AND FOREIGN POLICY CHALLENGES* 165 (Robert S. Ross et al. eds., 2016); Steve Chan, Weixing Hu & Kai He, *Discerning States' Revisionist and Status-Quo Orientations: Comparing China and the US*, 25 *EUR. J. INT'L REL.* 613 (2018); Suisheng Zhao, *A Revisionist Stakeholder: China and the Post-World War II World Order*, 27 *J. CONTEMP. CHINA* 643, 644 (2018) ("China is a revisionist stakeholder, dissatisfied not with the principles but its status in the hierarch of the order."); Jennifer Lind, *Asia's Other Revisionist Power: Why U.S. Grand Strategy Unnerves China*, *FOREIGN AFF. MAG.*, Mar.–Apr. 2017, at 74.

38. For example, "China proposes the view that 'The rights to subsistence and development are the primary, basic human rights.'" ST. COUNCIL INFO. OFF., *PROGRESS IN HUMAN RIGHTS OVER THE 40 YEARS OF REFORM AND OPENING UP IN CHINA* 43 (Dec. 2018), http://english.www.gov.cn/archive/white_paper/2018/12/13/content_281476431737638.htm [<https://perma.cc/3RK4-JKEM>] (archived Aug. 6, 2019). A discussion regarding the extent to which China is attempting to change norms and/or is being changed by international norms is not new. See generally ANN KENT, *CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* (Bert B. Lockwood, Jr. ed., 1999) (addressing compliance, socialization, and effectiveness in the context of China's interactions with the UN human rights regime).

39. For a visual example of such an artifact, see *Da Ke Ding (food vessel)*, SHANGHAI MUSEUM, <http://bit.ly/2KJuvea> (last visited Oct. 25, 2019) [<https://perma.cc/CN54-RHLR>] (archived Oct. 25, 2019).

ascribe to the enumerated rights: a “criticism-free” approach to human rights.⁴⁰ For China, the vessels stand nearly empty.⁴¹

This is not to say that China is intent in tearing down all international institutions. The Chinese leadership has openly stated its goal of becoming a more active player abroad, both through multilateral organizations and bilateral ties.⁴² It further has expressed a general vision of its desired world order, with much attention being paid to the implications of the aim to “build a new type of international relationship featuring mutual respect, fairness, justice and win-win cooperation, to build a community with a shared future for mankind.”⁴³ China is thus better understood as disruptive rather than flat-out destructive of the international order.⁴⁴ The level and type of disruption varies based on the international regime.⁴⁵

40. See Andréa Worden, *The Human Rights Council Advisory Committee: A New Tool in China's Anti-Human Rights Strategy*, SINOPSIS (Aug. 6, 2019), <https://sinopsis.cz/en/worden-human-rights-council-advisory-committee/> [<https://perma.cc/GW33-DLBU>] (archived Aug. 6, 2019). For an empty-vessel metaphor in another context, see Donald Clarke, *Jiang Shigong on Xi Jinping and Socialism with Chinese Characteristics: An Empty Vessel*, CHINA COLLECTION (May 28, 2018), <https://thechinacollection.org/jiang-shigong-xi-jinping-socialism-chinese-characteristics-empty-vessel/> [<https://perma.cc/8QV6-Y5NT>] (archived Aug. 17, 2019) (commenting that, to Professor Jiang, Marxist ideology and communist theory in China today “are just meaningless strings of letters or characters; they are empty vessels, to be filled with whatever content happens to be China’s current governance structure.”).

41. See *id.*

42. See Ann Kent, *China's Participation in International Organisations, in POWER AND RESPONSIBILITY IN CHINESE FOREIGN POLICY 132* (Yongjin Zhang et al. eds., 2014) (“China’s growing participation in international organisations provides a source and mark of its expanding power, and a measure of its increased global commitments and responsibilities.”).

43. 2018 National Report, *supra* note 7, ¶ 10.

44. Cf. Jessica Chen Weiss, *A World Safe for Autocracy? China's Rise and the Future of Global Politics*, FOREIGN AFF. MAG., July–Aug. 2019, at 92, 94 (“Beijing’s behavior suggests that China is a disgruntled and increasingly ambitious stakeholder in [the U.S.-led international order], not an implacable enemy of it.”); Ronald T.P. Alcalá, Eugene Gregory & Shane R. Reeves, *Chinese Fazhi and the International Order: How Chinese Legal Rhetoric Undermines Rule of Law*, HARV. INT’L REV. (Jan. 4, 2019), <https://hir.harvard.edu/chinese-fazhi-and-the-international-order-how-chinese-legal-rhetoric-undermines-rule-of-law/> [<https://perma.cc/WPT2-KQSE>] (archived Oct. 25, 2019) (“China may comply with certain international norms that conflict with its national interest, not out of a respect for the rule of law, but rather as part of a pragmatic cost-benefit analysis.”).

45. See, e.g., *Managing Global Disorder: Prospects for U.S.-China Cooperation*, COUNCIL ON FOREIGN REL. (Apr. 18, 2018), <https://on.cfr.org/2UqobHZ> [<https://perma.cc/QVZ2-CQMK>] (archived Oct. 25, 2019) (“While China supports the existing trade regime and international institutions . . . it has certainly not championed the free flow of capital and information, two tenets of globalization.”). For an analysis of how China acted internationally in the late twentieth century, see ALASTAIR IAIN JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS 1980–2000* xiv (Princeton Univ. Press 2008) (concluding “that there is considerable, if subtle, evidence of the socialization of Chinese diplomats, strategists, and analysts in certain counter-realpolitik norms and practices as a result of participation in [international security] institutions.”).

The argument here is tailored to the international legal regime⁴⁶ with respect to human rights, with a focus on civil and political rights. Specifically, flaccid standards for international human rights support China's preferred vision.⁴⁷ By weakening the international conception of rights, China strengthens its stance that it should not be judged against what it sees as biased human rights standards.⁴⁸ An approach that is rooted in a sovereigntist, relativist view turns universal norms into fluid, eye-of-the-beholder concepts.⁴⁹

Part V pulls back from the immediate proposal to raise the longer-term question of what China's engagement with the international human rights regime means for the vitality of fundamental norms.⁵⁰ This inquiry is all the more salient because China's growing prominence in international human rights institutions is occurring as the scholarly community is questioning whether, as Samuel Moyn asserted in 2018, "The human rights measurement controversy of the past decade has reached its limits."⁵¹ Moyn advocates a shift in focus to the choice "either to give up the ideals for which the human rights movement has stood . . . or to seek some other framework and strategy to advance them."⁵²

This author, for one, is not giving up on those ideals. Calling on China to erase its signature from the ICCPR is a brash maneuver, at least in the generally courteous world of UN review processes.⁵³ And

46. See Nathan, *supra* note 37 (defining "regimes" in part as "the formal and informal norms and institutions that regulate interactions at the supranational level").

47. Yu-Jie Chen, *China's Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT'L L. & POL. 1179, 1204 ("China has sponsored or objected to various resolutions, demonstrating its intention not only to lessen the intensity of international scrutiny but also to promote its preferred norms.").

48. See *China rejects politically biased human rights standards, claims: FM*, GLOBAL TIMES (Nov. 7, 2018), <http://www.globaltimes.cn/content/1126358.shtml> [<https://perma.cc/P64R-5S25>] (archived Aug. 18, 2019); see also Anlei Zuo, *China's Approaches to the Western-dominated International Law: A Historical Perspective from the Opium War to the South China Sea Arbitration Case*, 6 BALT. J. INT'L L. 21, 55 (2018) ("The rise of China could be an opportunity to rectify these structural biases and systematic violence in the current Western-dominated international law with a more democratic and balanced approach.").

49. The question to what extent human rights are fully universal as compared with subject to variation across states is, of course, not new. See, e.g., Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 419 (1984) (positing that "we can justifiably insist on some form of weak cultural relativism; that is, on a fundamental universality of basic human rights, tempered by a recognition of the possible need for limited cultural variations").

50. This next step in a more sustained strategy requires a broader look into how "the international legal regime [can] encourage states to respect human rights." RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 1* (Oxford Univ. Press 2013). This issue is preliminarily addressed in Part V.

51. Samuel Moyn, *Beyond the Human Rights Measurement Controversy*, 81 LAW & CONTEMP. PROBS. 121, 121 (2018).

52. *Id.* at 137.

53. Cf. Elvira Dominguez-Redondo, *The Universal Periodic Review of the UN*

China would, in all likelihood, flatly reject the proposal. Moreover, urging unsigning is not a silver bullet that can solve the combined challenges of deteriorating civil and political rights within China and China's striving for dilution of those norms internationally. But even if symbolic and only one component in a much-needed larger strategy, pressing China to exclude itself from the ICCPR would underscore that the rights therein matter. It would further help prompt a rethinking of how other states should grapple with China's efforts to weaken the vitality of the international human rights regime. More generally, this China-specific inquiry has implications for broader debates about whether more stringent criteria should be set for engagement with human rights treaties.⁵⁴

It is expected that China, like other states, wants to influence the international regimes in which it takes part.⁵⁵ The communities that believe in the universality of human rights have not coalesced around a plan to address this influence.⁵⁶ China's growing heft on the international scene coupled with its efforts to hollow out norms requires these communities to move from enervation to innervation.⁵⁷ A challenge for those who believe that there is an essential sinew to human rights is not only how to preserve that core fiber in a defensive manner but also how to fortify—to “innervate”⁵⁸—rights such that they remain imbued with meaning.

II. CHINA'S UNIVERSAL PERIODIC REVIEWS

In the four decades since Deng Xiaoping ushered in the policy of “reform and opening,”⁵⁹ China has gone from largely eschewing international organizations to becoming a key player in multilateral fora. The PRC obtained the “China” seat in the United Nations in 1972,

Human Rights Council: An Assessment of the First Session, 7 CHINA J. INT'L L. 593 (2008) (noting the “co-operative, non-confrontational approach envisaged from the outset of the creation of [the UPR].”).

54. See *infra* notes 499–501.

55. Matthew D. Stephen, *States, Norms, and Power: Emerging Powers and Global Order*, 42 MILLENNIUM: J. INT'L STUD. 888, 890–92 (2014) (book review).

56. See *id.*

57. *Enervate*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/enervate> (last visited Oct. 25, 2019) [<https://perma.cc/KN32-8UGW>] (archived Oct. 25, 2019) (explaining connection between “enervate” and the Latin word *nervus*, meaning “sinew or nerve”).

58. *Innervate*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/innervate> (last visited Oct. 25, 2019) [<https://perma.cc/YWK5-LU7A>] (archived Oct. 25, 2019).

59. Bill Bishop, *The big picture: China's reform and opening turns 40*, AXIOS (July 27, 2018), <http://bit.ly/2ZgXd9H> [<https://perma.cc/9CCF-8VZ6>] (archived Oct. 26, 2019). For Chinese names, this Article uses the standard convention of placing the surname before given name(s) except for when the individual has demonstrated a preference through his/her/their writing to place given name(s) first.

ousting the Republic of China (Taiwan).⁶⁰ It was, nonetheless, circumspect throughout the 1970s: “China either abstained or refrained from casting any vote [in the Security Council], by using what it labeled the ‘fifth voting style’ . . . on 63 occasions (or 32.3% of all votes) during this period [from 1971–1979].”⁶¹

This unobtrusive stance continued in the 1980s and even into the 1990s. Deng’s stated approach towards foreign policy was one of “hide your strength, bide your time, never take the lead.”⁶² While not taking the lead, China did join important human rights treaties during the Deng era: the Convention on the Elimination of All Forms of Discrimination against Women (1980),⁶³ the International Convention on the Elimination of All Forms of Racial Discrimination (1981),⁶⁴ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988).⁶⁵ China’s engagement with human rights treaties continued under Jiang Zemin, including China’s ratification of the Convention on the Rights of the Child (1992)⁶⁶ and the International Covenant on Economic, Social and Cultural Rights (2001).⁶⁷ China joined the Convention on the Rights of Persons with Disabilities under Hu Jintao in 2008.⁶⁸

China signed the ICCPR in 1998 but neither Jiang nor Hu shepherded the treaty through to ratification.⁶⁹ Nevertheless, over the past two decades, China has expressed its intention to ratify the

60. On October 29, 1971, the U.N. General Assembly passed Resolution 2758, transferring representation of the seat from the Republic of China to the PRC. For a historical view leading up to this switch, see Myres S. McDougal & Richard M. Goodman, *Chinese Participation in the United Nations: The Legal Imperative of a Negotiated Solution*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY (1966), https://digitalcommons.law.yale.edu/fss_papers/2604/ [<https://perma.cc/EAZ3-LM4S>] (archived Aug. 18, 2019).

61. Joel Wuthnow, *Beyond the Veto: Chinese Diplomacy in the United Nations Security Council*, Ph.D. dissertation at Columbia University 28 (May 11, 2011) (transcript available at <https://academiccommons.columbia.edu/doi/10.7916/D8NC676K>) [<https://perma.cc/YD86-3KRX>] (archived June 20, 2019); see also Stewart Manley, *Gauging the Economic and Political Costs to China of Article 13(b) Referrals of Sudan and Myanmar to the International Criminal Court*, 7 U. PA. E. ASIA L. REV. 333, 343–45 (2012) (providing an overview of China’s voting history).

62. See Tobin Harshaw, *Emperor Xi’s China is Done Biding its Time*, BELFER CTR. (Mar. 3, 2018), <https://www.belfercenter.org/publication/emperor-xis-china-done-biding-its-time> [<https://perma.cc/8YT5-5UED>] (archived Aug. 18, 2019).

63. *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13.

64. *International Convention on the Elimination of All Forms of Racial Discrimination*, Mar. 7, 1966, 660 U.N.T.S. 195.

65. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85.

66. *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3.

67. ICESCR, *supra* note 33.

68. *Convention on the Rights of Persons with Disabilities*, Dec. 13, 2006, 2515 U.N.T.S. 3.

69. ICCPR, U.N. Treaty Collection Page, *supra* note 2.

ICCPR.⁷⁰ China is not subject to review by the UN Human Rights Committee because China is not a party to the ICCPR.⁷¹ But it is subject to the UPR process, which includes an evaluation of China's performance with respect to civil and political rights.⁷²

As explained below, the Human Rights Council has addressed China's failure to ratify the ICCPR at each of China's three reviews: 2009 (Part II.A), 2013 (Part II.B), and 2018 (Part II.C). These reviews coincided with periods of cautious hope, increasing uncertainty, and alarm, respectively, regarding China's approach towards human rights. Looking ahead to the scheduled 2023 review (Part II.D), there is little reason to think that China will ratify—let alone faithfully implement—the ICCPR before that date. Rather, the more likely scenario is that the dire human rights situation will persist and, come 2023, at least some members of the Human Rights Council will once again call for ratification.⁷³

A. 2009 Review

The UPR was created shortly after the 2006 founding of the Human Rights Council.⁷⁴ China's inaugural 2009 review coincided with a period of cautious hope that there was at least modest space for greater protection of civil and political rights, even if that space was constrained by the precondition of one-party rule.⁷⁵

70. See, e.g., *China Amends Laws for Ratification of ICCPR*, CHINA DAILY (July 14, 2011), http://www.chinadaily.com.cn/china/2011-07/14/content_12904570.htm [<https://perma.cc/5HUU-MJAW>] (archived June 20, 2019).

71. Cf. Human Rights Committee, *Introduction: Monitoring Civil and Political Rights*, U.N. OFFICE HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited Aug. 18, 2019) [<https://perma.cc/8B7Q-RHH2>] (archived Aug. 18, 2019).

72. See Human Rights Council, *Universal Periodic Review*, U.N. OFFICE HIGH COMM'R HUM. RTS., <https://www.ohchr.org/en/hrbodies/upr/pages/UPRMain.aspx> (last visited Oct. 26, 2019) [<https://perma.cc/97GJ-8BNM>] (archived Oct. 26, 2019) (describing the UPR as “a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.”).

73. See *infra* Part II.D.

74. See G.A. Res. 60/251 (Mar. 15, 2006) (establishing the Council); *Welcome to the Human Rights Council*, U.N. OFFICE HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited June 20, 2019) [<https://perma.cc/H6BN-ZJ8L>] (archived June 20, 2019).

75. See generally Ming Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, 29 HUM. RTS. Q. 727 (2007) (arguing that “[w]hile somewhat limited, China's adoption of rights laws affects how domestic politics is played out and leads to the creation of a legal profession interested in promotion of the rule of law”); Björn Ahl, *Exploring Ways of Implementing International Human Rights Treaties in China*, 28 NETH. Q. HUM. RTS. 361 (2010) (describing the establishment of the PRC government working group on the ratification of the ICCPR in 2003 and the drafting by a group of legal experts of a human rights protection law in 2008).

China stated in its National Report, submitted in advance of its first UPR, that it “respects the principle of the universality of human rights[.]”⁷⁶ had enacted “nearly 250 laws relating to the protection of human rights[.]”⁷⁷ and had joined “25 international human rights instruments.”⁷⁸ These stated advancements were counterbalanced by the repression of signatories—including later Nobel Peace Prize recipient Liu Xiaobo—to Charter 08, a manifesto calling for enhanced human rights and the end to one-party rule.⁷⁹

While the council’s report following the review included many concerns regarding human rights in China, statements by council members listed therein highlighted that aspects of China’s claims had merit.⁸⁰ For instance, in 2005 China allowed a visit by the UN Special Rapporteur on Torture.⁸¹ China criticized his strongly worded report,⁸² but that he was even allowed into China was a breakthrough.⁸³ In 2007, the Supreme People’s Court took back review of all death sentences—a procedural move that, combined with emphasis on a policy of “killing fewer and killing carefully,” led to more constrained

76. 2009 National Report, *supra* note 4, ¶ 6.

77. *Id.* ¶ 10.

78. *Id.* ¶ 11.

79. See *China’s Charter 08*, N.Y. BOOKS (Jan. 15, 2009), <https://www.nybooks.com/articles/2009/01/15/chinas-charter-08/> [<https://perma.cc/4KK3-8EDS>] (archived June 12, 2019); see generally Feng Chongyi, *The Threat of Charter 08*, in LIU XIAOBO, CHARTER 08 AND THE CHALLENGES OF POLITICAL REFORM IN CHINA 119 (Jean-Phillippe Béja et al. eds., 2012) (explaining why, despite the text of Charter 08 being a “moderate proposal[.]” it presented “a serious threat to the Chinese communist regime”).

80. See, e.g., Human Rights Council, Universal Periodic Review Report of the Working Group on the Universal Periodic Review, China, ¶ 65, U.N. Doc. A/HRC/11/25 (Mar. 3, 2009).

81. See, e.g., Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Civil and Political Rights, Including the Question of Torture and Detention, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to China*, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006).

82. See, e.g., Joseph Kahn, *China Disputes UN Envoy on Widespread Use of Torture*, N.Y. TIMES (Dec. 7, 2005), <https://www.nytimes.com/2005/12/07/world/asia/china-disputes-un-envoy-on-widespread-use-of-torture.html> [<https://perma.cc/UZ7Z-F54Z>] (archived Aug. 18, 2019).

83. China has not allowed a repeat visit. A request is outstanding, along with requests for visits by a number of other special rapporteurs overseeing various civil and political rights, such as freedom of expression, freedom of peaceful assembly and association, independence of judges and lawyers, and disappearances. Tables for UN Compilation on China, *View Country visits of Special Procedures of the Human Rights Council since 1998*, U.N. OFFICE HIGH COMM’R HUM. RTS., https://spinternet.ohchr.org/_layouts/15/SpecialProceduresInternet/ViewCountryVisits.aspx?Lang=en (last visited June 20, 2019) [<https://perma.cc/HD97-94JM>] (archived June 20, 2019); see generally Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of China, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016) (reporting developments with respect to compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

use of the death penalty.⁸⁴ In 2008, the entry into force of new regulations gave citizens the ability, albeit limited, to demand access to information in the government's hands.⁸⁵ These specific rules were part of broader rhetoric recognizing the need to decrease opacity.⁸⁶

Specifically regarding the ICCPR, several UN bodies had already "invited China to consider" ratifying the ICCPR, and the Office of the High Commissioner for Human Rights noted that it had developed six projects with China "to support preparation for the ratification of the ICCPR."⁸⁷ Domestically, legal scholars felt secure enough to submit a letter to the government in January 2008 calling for ratification of the ICCPR before that summer's Olympic games in Beijing.⁸⁸

Non-Governmental Organizations (NGOs) used the UPR's stakeholder submission procedures⁸⁹ to recommend that China should "fulfill its promise to ratify the ICCPR"⁹⁰ and "ratify all signed human rights treaties . . . in particular the ICCPR."⁹¹ Members of the council joined in these calls. Although China accepted recommendations phrased using vague language (e.g., that China "create conditions for an early ratification of the ICCPR" (Sweden, Algeria)), it rejected more forceful recommendations, such as that it "ratify the ICCPR as quickly as possible and with minimal reservations" (Australia); "release a clear

84. See 2009 National Report, *supra* note 4, ¶ 44; see generally SUSAN TREVASKES, *THE DEATH PENALTY IN CONTEMPORARY CHINA* (2012) (analyzing a shift in the 2000s towards a decrease in use of the death penalty).

85. See 2009 National Report, *supra* note 4, ¶ 61.

86. See Jamie P. Horsley, *China Adopts First Nationwide Open Government Information Regulations*, FREEDOM INFO (May 9, 2007), <http://www.freedominfo.org/2007/05/china-adopts-first-nationwide-open-government-information-regulations> [<https://perma.cc/6VQK-AT9E>] (archived Aug. 18, 2019).

87. Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1*, ¶¶ 1, 10, U.N. Doc. A/HRC/WG.6/4/CHN/2 (Dec. 16, 2008).

88. Wendy Zeldin, *China: Legal Scholars Call for Ratification of ICCPR*, LIBRARY OF CONGRESS (Feb. 2, 2008), <https://www.loc.gov/law/foreign-news/article/china-legal-scholars-call-for-ratification-of-iccpr/> [<https://perma.cc/Y3BQ-V4B2>] (archived June 20, 2019) (citing Nanfang Zhoumo, *RC Law Experts Call for Ratification of International Covenant on Rights*, Jan. 10, 2008, Open Source Center No. CPP20080113530005); see also International Seminar on International Covenant on Civil and Political Rights and Criminal Legal System Reform (Dec. 5–6, 2009) (conference materials on file with author) (conference jointly sponsored by the Institute of International Law, Chinese Academy of Social Sciences; N.Y.U., U.S.–Asia Law Institute; and City University of Hong Kong Law School).

89. The groups quoted in this Article represent only a small number of those that submitted comments during each review cycle. For other examples of comment contributors, explore the documents referenced in Human Rights Council, *Universal Periodic Review – China – Reference Documents*, U.N. Doc. A/HRC/40/6 (Dec. 26, 2018).

90. HUMAN RIGHTS FIRST, *HUMAN RIGHTS FIRST SUBMISSION TO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS* 5 (Feb. 2, 2019), <https://bit.ly/2Fo5Shr> [<https://perma.cc/8WEY-BM37>] (archived Oct. 25, 2019).

91. HUMAN RIGHTS IN CHINA, *IMPLEMENTATION AND PROTECTION OF HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA* 6 (Sept. 1, 2008), <https://bit.ly/2Cv4pVV> [<https://perma.cc/3QUL-26Y9>] (archived Oct. 25, 2019).

timetable for work towards ICCPR ratification” (United Kingdom); and “state a precise calendar for ratification and adoption of the necessary measures for the ratification of the ICCPR” (France).⁹²

These nudges a decade after China first signed the ICCPR recognized the need for significant groundwork prior to ratification while reminding China that the international community was watchful as to whether domestic momentum was slowing.⁹³ In contrast to future UPRs, developments to that date gave reason to think that the next review might bring reports of continuing incremental reforms towards improving civil and political rights.⁹⁴

B. 2013 Review

The mood was more uncertain in 2013. Important changes had occurred since China stated in its April 2009 Human Rights Action Plan that it would “make domestic laws better linked with [the ICCPR]” in preparation for ratification of the treaty.⁹⁵ Xi Jinping was elevated to General Secretary of the party in 2012 and was further named as head of state and of the military—the same trifecta of major titles held by his two predecessors.⁹⁶ Much speculation accompanied Xi’s rise, with debates whether he might reveal himself to be a reformer who had simply held his cards close to his chest during his political

92. *China: Responses to Recommendations*, UPR INFO, 1, 5, 6 (2009), <https://bit.ly/2Ft8Xy0> [<https://perma.cc/FTP9-S4Z2>] (archived Oct. 27, 2019).

93. See generally *supra* notes 91–92 (citing reports that recognize points of progress but maintain a skeptical wait-and-see attitude).

94. For an example of cautious optimism that ratification would, eventually, follow see Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINA J. INT’L L. 445 (2007).

95. *National Human Rights Action Plan of China (2009–10)*, STATE COUNCIL INFORMATION OFFICE (Apr. 13, 2009), http://www.gov.cn/english/official/2009-04/13/content_1284128.htm [<https://perma.cc/F5FZ-GAJE>] (archived Oct. 25, 2019). China stated again in the 2012 plan that it “continued to carry out administrative and judicial reforms and prepare the ground for approval of the [ICCPR].” *National Human Rights Action Plan of China, Congressional-Executive Commission on China (2012–2015)*, ST. COUNCIL INFO. OFF. (June 11, 2012), <https://www.cecc.gov/resources/legal-provisions/national-human-rights-action-plan-of-china-2012-2015> [<https://perma.cc/DA3B-VTMH>] (archived Oct. 25, 2019).

96. See *Hu Jintao Fast Facts*, CNN, <https://cnn.it/2ZhMNq5> (last updated Dec. 21, 2018) [<https://perma.cc/3BG9-9DTD>] (archived Oct. 25, 2019); *Jiang Zemin Fast Facts*, CNN, <https://cnn.it/2XmoLbF> (last updated July 30, 2019). In his later years, Deng Xiaoping held the most power in the central leadership despite not having that power reflected in formal titles. See Daniel Southeri, *For Deng, Titles Aren’t Everything*, WASH. POST (Oct. 1, 1985), <https://wapo.st/2TnciSI> [<https://perma.cc/V8MX-UKNR>] (archived Oct. 26, 2019).

rise,⁹⁷ or, as others argued, that he would dash these hopes and instead adhere to the party line.⁹⁸

In its 2013 National Report, China reiterated that it “respects the principle of universality of human rights,” though it qualified this language with the view that countries have a duty to do so “commensurate with their national conditions.”⁹⁹ The report detailed specific examples of improvements in human rights, such as the introduction of an exclusionary rule aimed at coerced confessions,¹⁰⁰ abolition of the death penalty for thirteen offenses¹⁰¹ (albeit ones for which the death penalty was seldom applied)¹⁰², and the addition of the language “respect for and safeguarding of human rights” to the Criminal Procedure Law.¹⁰³ Within two months of China’s second UPR, China further ended the long-standing practice of “re-education through labor” that allowed people to be locked up for as long as four years under a purportedly administrative sanction.¹⁰⁴ China’s report

97. See, e.g., Nicholas Kristof, *Looking for a Jump-Start in China*, N.Y. TIMES (Jan. 6, 2013), <https://www.nytimes.com/2013/01/06/opinion/sunday/kristof-looking-for-a-jump-start-in-china.html> [<https://perma.cc/S699-5KUS>] (archived Aug. 18, 2019) (“Here is my prediction about China: The new paramount leader, Xi Jinping, will spearhead a resurgence of economic reform, and probably some political easing as well.”). But see Jeffrey Wasserstrom, *Is Xi Jinping a Reformer? It’s Much Too Early to Tell*, ASIA SOC’Y BLOG (Jan. 14, 2013), <http://bit.ly/2PeRdcG> [<https://perma.cc/4GNP-H88Z>] (archived Oct. 27, 2019).

98. See, e.g., *A Discussion with Geremie R. Barmé*, CHINA FILE (Mar. 15, 2013), <http://bit.ly/2vdMery> [<https://perma.cc/Z24F-NUMD>] (archived Oct. 25, 2019) (expressing skepticism of “happy narratives” of the potential for reform); Jane Perlez, Q. and A.: *Geremie R. Barmé on Understanding Xi Jinping*, SINOSPHERE (Nov. 8, 2015), <https://nyti.ms/2XmoZj1> [<https://perma.cc/8A6R-N4GE>] (archived Oct. 26, 2019) (“For those used to thinking about China as being a country that “just wants to be like us,” or as one that fits neatly into the patterns of the Euro-American past, the Xi era is a challenge.”). For an analysis of Xi’s rise, see John Garnaut, *The Creation Myth of Xi Jinping*, FOREIGN POL’Y (Oct. 19, 2012), <http://bit.ly/2DmowpD> [<https://perma.cc/TY97-LB2E>] (archived Oct. 25, 2019); see also Carl Minzner, *What Direction for Legal Reform under Xi Jinping*, CHINA BRIEF (Jan. 4, 2013), <https://jamestown.org/program/what-direction-for-legal-reform-under-xi-jinping/> [<https://perma.cc/SN35-DRKD>] (archived Aug. 18, 2019) (“[P]rior experience suggests caution in evaluating the promise of legal reform by new party leaders.”).

99. 2013 National Report, *supra* note 6, ¶ 4.

100. See *id.* ¶ 53; see also Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT’L L. & POL. 629 (2013).

101. 2009 National Report, *supra* note 4, ¶ 46; see also Margaret K. Lewis, *Leniency and Severity in China’s Death Penalty Debate*, 24 COLUM. J. ASIAN L. 303, 314–15 (2011) (discussing these thirteen offenses).

102. Dui Hua Foundation, *2013 UPR Submission*, UPR INFO, <https://bit.ly/2HKaeSJ> (last updated October 2013) [<https://perma.cc/KBM8-YD92>] (archived Oct. 25, 2019) (noting that “most of the 13 crimes had rarely or never resulted in execution”). See generally Tobias Smith & Su Jiang, *Making Sense of Life Without Parole in China*, 21 PUNISHMENT & SOC’Y 70 (2019) (discussing history of reductions in death-eligible crimes in lead up to 2015 introduction of possible lifelong imprisonment for the crime of corruption).

103. See 2009 National Report, *supra* note 4, ¶ 47.

104. See Margaret K. Lewis & Jerome A. Cohen, *How Taiwan’s Constitutional Court Reined in Police Power: Lessons for the People’s Republic of China*, 37 FORDHAM

noded towards this forthcoming change by noting that the government was studying proposals related to ending re-education through labor.¹⁰⁵

These points needed to be heard in conjunction with the observations of NGOs. Human Rights Watch submitted that, while China claimed that it made “human rights advances” through the revised Criminal Procedure Law, the provisions on “residential surveillance” had “legalized enforced disappearances” in contravention of the ICCPR.¹⁰⁶ Despite the end of re-education through labor,¹⁰⁷ Human Rights in China reported that “legal experts noted a resurgence of informal, extra-legal political institutions that advanced predatory and repressive government policies, including ‘black jails’ and enforced disappearances used to target activists, petitioners and dissidents.”¹⁰⁸ Evidentiary reforms were undercut by reports that the conviction rate “was allegedly in excess of 99 percent” and “[e]ven when there had been no confession, lawyers placed themselves in jeopardy of criminal conviction under Article 306 [which criminalizes the falsification of, or inducing the falsification of, evidence] simply by pleading their clients ‘not guilty.’”¹⁰⁹ Amnesty International summarized as follows:

While the Chinese authorities have made progress on some of the recommendations made during its first [UPR] in 2009, they have failed to make significant progress on others, and have taken regressive steps with regard to some.¹¹⁰

NGOs once again called on China to ratify the ICCPR with, for example, Human Rights Watch reporting that China had failed to take affirmative action towards ratification and that it should ratify “without further delay.”¹¹¹ Amnesty International noted that “[s]ome legal changes made since the last review would bring China closer into

INT’L L.J. 863, 913–14 (2014).

105. See 2009 National Report, *supra* note 4, ¶ 48.

106. HUMAN RIGHTS WATCH, UPR SUBMISSION CHINA 3 (Mar. 2013), <https://bit.ly/2HB487L> [<https://perma.cc/7SM4-TL55>] (archived Oct. 25, 2019) [hereinafter HUMAN RIGHTS WATCH].

107. See *China abolishes reeducation through labor*, CHINA DAILY (Dec. 28, 2013), http://www.chinadaily.com.cn/china/2013-12/28/content_17202294.htm <https://perma.cc/V9FJ-7A6N> (archived June 20, 2019).

108. Office of the High Commissioner for Human Rights, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, ¶ 24, U.N. Doc. A/HRC/WG.6/17/CHN/3 (July 30, 2013).

109. *Id.* ¶ 32.

110. *China: Amnesty International Submission for the UN Universal Periodic Review 17th Session of the UPR Working Group, October/November 2013*, AMNESTY INT’L 1 <https://bit.ly/2CyyvAz8> (last updated Mar. 2013) [<https://perma.cc/BPG9-QPFC>] (archived Oct. 26, 2019) [hereinafter AMNESTY INT’L].

111. HUMAN RIGHTS WATCH, *supra* note 106, at 4.

compliance with international law, thereby facilitating China's ratification of the ICCPR."¹¹²

Likewise, a number of members of the council raised ICCPR ratification during the review.¹¹³ Unlike following the 2009 review, China did not reject any recommendations in its formal response. Nevertheless, it merely "noted" recommendations that it ratify the ICCPR (Albania, Hungary, Chile, Spain); establish a clear timeframe in order to ratify the ICCPR (Belgium); timely ratify the ICCPR (Japan); and move towards ratification of the ICCPR in the near future (Norway, Portugal, Republic of Korea).¹¹⁴ It "accepted" recommendations couched in more preparatory language, such as that it "consider" ratifying the ICCPR (Cape Verde); "continue carrying out administrative and judicial reforms to prepare for the ratification of the ICCPR" (Egypt); and "continue its national reforms with an aim to ratify the ICCPR" (Guatemala, Latvia, Botswana).¹¹⁵ The lack of specificity regarding next steps underscored the growing uncertainty regarding China's resolve to take even incremental steps towards strengthening rights protection, as well as whether China's involvement in the UPR was more form over substance.¹¹⁶

C. 2018 Review

By the 2018 UPR, any uncertainty about what Xi Jinping's leadership would mean for human rights had turned to alarm. A deterioration in the domestic situation was coupled with a shift in rhetoric from the 2009 National Report's reassurance that China "respects the principle of the universality of human rights"¹¹⁷ to the 2018 National Report's statement that "[t]here is no universal road for the development of human rights in the world."¹¹⁸

In rejecting definitions "on the basis of a single authority[,]"¹¹⁹ China asserted that it was "[g]uided by Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era" in "following

112. AMNESTY INT'L, *supra* note 110.

113. *See, e.g.*, Human Rights Council, Report of the Working Group on the Universal Periodic Review, China (including Hong Kong, China and Macao, China), U.N. Doc. A/HRC/25/5 (Dec. 4, 2013).

114. *China: Responses to Recommendations & Voluntary Pledges*, UPR INFO, 1–2 (2013), <https://bit.ly/2YelzjK> [<https://perma.cc/4SGP-U6KL>] (archived Oct. 27, 2019); *see also* Human Rights Council, Report of the Working Group on the Universal Periodic Review, China, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, U.N. Doc. A/HRC/25/5/Add.1 (Feb. 27, 2014) [hereinafter Rep. of the Working Group on UPR].

115. Rep. of the Working Group on UPR, *supra* note 114.

116. *Cf.* Rhona Smith, *Form Over Substance? China's Contribution to Human Rights through Universal Periodic Review*, 17 *ASIAN Y.B. INT'L.L.* 85, 115 (2014) ("China's involvement is a classic case of 'much ado about nothing.'").

117. 2009 National Report, *supra* note 4, ¶ 6.

118. 2018 National Report, *supra* note 7, ¶ 4.

119. *Id.*

the road of developing human rights with Chinese characteristics.”¹²⁰ The concept of “development” is central to this vision. In June 2017, the Human Rights Council passed China’s resolution on “the contribution of development to the enjoyment of human rights.”¹²¹ At the November 2018 council session, China stressed its “experience in promoting human rights in the process of development and poverty alleviation, which included always giving top priority to development.”¹²² For the seventieth anniversary of the Universal Declaration of Human Rights in December 2018, Xi Jinping emphasized that China “considers the rights to subsistence and development as the primary and basic human rights, and works for coordinated development of the people’s economic, political, social, cultural and environmental rights.”¹²³

China’s stance that “development is a primary human right”¹²⁴ refutes the principle of the indivisibility of human rights by placing economic development as a higher priority than civil and political rights.¹²⁵ The 2016 report on implementation of China’s national human rights action plan failed to even mention the ICCPR, thus accentuating the official diminishing of its importance.¹²⁶ China is not

120. *Id.*

121. Human Rights Council Res. 35/3, U.N. Doc. A/HRC/35/L.33/Rev.1 (June 20, 2017), http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_35_L.33Rev.docx [https://perma.cc/5BCW-4HGJ] (archived Aug. 6, 2019).

122. 2018 China UPR Report, *supra* note 21, ¶ 22 (reporting China’s response during interactive dialogue at the Council session).

123. *Xi stresses human rights development in Chinese context*, CHINA DAILY (Dec. 10, 2018), <http://www.chinadaily.com.cn/a/201812/10/WS5c0e3158a310eff303290272.html> [https://perma.cc/XF8J-JSLV] (archived June 20, 2019).

124. *China’s Perspective on Human Rights Widely Understood, Recognized, Supported: Diplomat*, XINHUANET (Nov. 7, 2018), http://www.xinhuanet.com/english/2018-11/07/c_137590004.htm [https://perma.cc/LMF2-5R32] (archived June 20, 2019). For more on implications of this approach, see Worden, *supra* note 40 (analyzing the “PRC’s effort to dramatically change the orientation of UN human rights mechanisms and norms to reflect the CCP’s view of state-led development as the paramount ‘right’ to be implemented through state-to-state cooperation, with no meaningful room for individual rights holders”).

125. See Andréa Worden, *The CCP at the UN: Redefining Development and Rights*, SINOPSIS (Mar. 17, 2019), <https://sinopsis.cz/en/the-ccp-at-the-un-redefining-development-and-rights/> [https://perma.cc/8B75-WSAX] (archived Oct. 27, 2019) (arguing that “the PRC has aggressively promoted its view that the ‘right to development’ transcends all other rights”); Chen, *supra* note 47, at 1194–95 (explaining framing of a development-centered view as a “China Proposal” . . . endorsing an alternative path for developing countries). For background, see *Frequently Asked Questions on the Right to Development, Fact Sheet No. 37 2*, U.N. OFFICE HIGH COMM’R HUM. RTS., https://www.ohchr.org/Documents/Publications/FSheet37_RtD_EN.pdf (last visited Aug. 6, 2019) [https://perma.cc/66B9-CQGJ] (archived Aug. 6, 2019) (“[T]he right to development” is “a human right on a par with all other human rights. It is neither an all-encompassing ‘super right,’ nor a highly restricted ‘mini right,’ but rather an equal right among the universal, inalienable, interrelated, interdependent and indivisible human rights.”).

126. See generally *Assessment Report on the Implementation of the National*

the first authoritarian state to show a preference for economic and social rights *vis-à-vis* civil and political rights. Similar leanings were seen “in the context of the deepening cold war tensions between East and West.”¹²⁷ But precedent does not mitigate the problematic nature of this stance. China’s framing rejects the essential interdependence of economic, social, and cultural rights on the one hand and civil and political rights on the other, “specifically, that these rights are mutually reinforcing and equally important.”¹²⁸

Concerns about China’s rhetoric were amplified by alarm at the reality on the ground. The disconnect between China’s 2018 National Report and the situation reported by nongovernmental entities was stark.¹²⁹ For example, China self-reported that it “improved the relief and accountability mechanisms for safeguarding lawyers’ rights to practice law.”¹³⁰ The “709 Crackdown”—so named for July 9, 2015, when hundreds of lawyers and other rights activists disappeared—contradicts this claim.¹³¹ Repression of lawyers who took on “sensitive” cases was not new under Xi’s leadership,¹³² but the scale and severity had increased markedly.¹³³

Similarly, the statement that “[n]etizens express their views via Internet platforms”¹³⁴ glossed over the blocking of entire websites as

Human Rights Action Plan of China (2012-15), STATE COUNCIL PEOPLE’S REP. CHINA (June 15, 2016), <https://bit.ly/2FrIEbd> [<https://perma.cc/8C4J-JYTK>] (archived Oct. 26, 2019).

127. See Ann Kent, *China and the International Multilateral Human Rights System*, in HANDBOOK ON HUMAN RIGHTS IN CHINA 61, 62 (Sarah Biddulph et al. eds., 2019) (discussing 1991 PRC White Paper emphasizing “the right to subsistence” and broader prioritization of “the right to development”); *Key Concepts of ESCRs*, U.N. OFFICE HIGH COMM’R HUM. RTS., <http://bit.ly/2Pm7bSA> (last visited Oct. 26, 2019) [<https://perma.cc/32J5-DDJ5>] (archived Oct. 26, 2019) (describing how “the centrally planned economies of the Eastern bloc highlighted the importance of economic, social and cultural rights”).

128. Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning Indigenous Peoples*, 25 HARV. HUM. RTS. J. 49, 50 (2012).

129. For NGO submissions, see Office of the High Commissioner for Human Rights, *Summary of Stakeholders’ submissions on China: Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/WG.6/31/CHN/3 (Sept. 3, 2018) and the Corrigendum issued on Nov. 5, 2018, U.N. Doc. A/HRC/WG.6/31/CHN/3/Corr.1*.

130. 2018 National Report, *supra* note 7, ¶ 50.

131. See Hualing Fu, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 J. CONTEMP. CHINA 554 (2018); Nectar Gan, *Detained and disbarred: China’s human rights lawyers*, INKSTONE (July 9, 2018), <http://bit.ly/2IsUDrR> [<https://perma.cc/9AYL-4Y9S>] (archived Oct. 25, 2019).

132. See SIDA LIU & TERENCE C. HALLIDAY, *CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK* 91 (Cambridge Univ. Press 2016).

133. See *2014 Congressional-Executive Commission on China: Annual Report*, 113th Cong. 157 (“[A]uthorities intensified the degree of harassment and abuse of both human rights lawyers and defenders”); *2015 Congressional-Executive Commission on China: Annual Report*, 114th Cong. 270–71 (including a brief section reporting on the “Harassment and Abuse of Human Rights and Public Interest Lawyers”).

134. 2018 National Report, *supra* note 7, ¶ 54.

well as the erasing from permitted platforms of comments that contain even veiled criticism of the party-state.¹³⁵ The incessant cat-and-mouse game between censors and citizens has generated creative attempts at evasion with, for instance, China's #MeToo movement adopting the term "rice bunny" because of those words' pronunciation in Mandarin—"mi tu."¹³⁶ Likewise, claims that China "protect[s] the lawful rights of news media"¹³⁷ paint a far different picture from reports by foreign correspondents and domestic journalists of the heightened repression they face.¹³⁸ And official praise for cooperation between domestic civil society organizations and international counterparts was undermined by the 2016 passage of the Law on the Management of Overseas NGOs' Domestic Activities that "significantly tighten[s] restrictions on funding and authorize[s] punishment of the leaders of such groups that seek or receive funding."¹³⁹

China's statement that, in the name of counterterrorism, "the public security organs have cracked down hard on terrorist organizations and individuals" is accurate in so far as the police presence in Xinjiang has reached unprecedented levels.¹⁴⁰ What the report omitted was that these measures include the arbitrary

135. See *Freedom on the Net 2018: China*, FREEDOM HOUSE, <http://bit.ly/2DoDMCu> (last visited Oct. 27, 2019) [<https://perma.cc/A3RX-NPBU>] (archived Oct. 25, 2019) (page includes drop-down box with links to prior years' reports).

136. Meg Jing Zeng, *From #MeToo to #RiceBunny: how social media users are campaigning in China*, CONVERSATION (Feb. 5, 2018), <http://bit.ly/2ZcFEr4> [<https://perma.cc/S5EB-8YE7>] (archived Oct. 26, 2019).

137. 2018 National Report, *supra* note 7, ¶ 55.

138. See, e.g., *FCCC Working Conditions Report 2018*, FOREIGN CORRESPONDENTS' CLUB CHINA (Jan. 29, 2019), <http://bit.ly/2ZieLCa> [<https://perma.cc/8MWY-U4N5>] (archived Oct. 25, 2019); Javier C. Hernández, *We're Almost Extinct: China's Investigative Journalists Are Silenced Under Xi*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/world/asia/china-journalists-crackdown.html> [<https://perma.cc/3R63-6ZGJ>] (archived Aug. 5, 2019); Ian Johnson, *It's Hopeless But You Persist: An Interview with Jiang Xue*, N.Y. BOOKS (Feb. 19, 2019), <http://bit.ly/2W0XLOA> [<https://perma.cc/W2LR-24MB>] (archived Oct. 26, 2019); Jane Perlez, *For China's Leading Investigative Reporter, Enough is Enough*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/world/asia/china-journalist-liu-wanyong.html> [<https://perma.cc/2YXZ-K9P8>] (archived Aug. 17, 2019).

139. Angeli Datt & Alex Beck, *Assessing Freedom of Peaceful Assembly and Association in Contemporary China*, in HANDBOOK ON HUMAN RIGHTS IN CHINA, *supra* note 127, at 397, 411. For the official PRC view, see 2018 National Report, *supra* note 7, ¶ 78 ("Civil society organizations in the human rights field . . . have actively carried out exchanges and cooperation on human rights . . .").

140. 2018 National Report, *supra* note 7, ¶ 39. There have been concerns about government surveillance in Xinjiang for years, but both the scale of surveillance and deprivations of liberty have escalated dramatically. Compare Michael Wines, *In Restive Chinese Area, Cameras Keep Watch*, N.Y. TIMES (Aug. 2, 2010), <https://nyti.ms/2VRgXOQ> [<https://perma.cc/9VDM-C8X6>] (archived Oct. 27, 2019), with Paul Mozur, *Being Tracked While Reporting in China, Where 'There Are no Whys'*, N.Y. TIMES (Apr. 16, 2019), <https://nyti.ms/2GlJ3v9> [<https://perma.cc/8AXY-93QJ>] (archived Oct. 26, 2019) ("It took four days in Kashgar, China, for the secret police to get access to my dreams.").

deprivation of liberty of over a million Uighurs and members of other Muslim minority groups.¹⁴¹

NGOs again weighed in on the ICCPR with Amnesty International not calling directly for ratification but instead emphasizing the lack of progress towards this aim: “Two decades after becoming a signatory to the ICCPR and despite accepting recommendations in this regard, China has shown no significant progress towards its ratification.”¹⁴² Other groups—including PEN International,¹⁴³ Reporters Without Borders,¹⁴⁴ and Front Line Defenders¹⁴⁵—reiterated that China should ratify the ICCPR. Human Rights in China selected more precise language: “Urge China, within the explicit focus of the Third UPR on implementation, to commit to a specific timeframe for the ratification of the ICCPR, but not beyond the time period of the [National Human Rights Action Plan] (2016-2020).”¹⁴⁶

Notably, the voices of domestic NGOs have been muted, with “the High Commissioner for Human Rights express[ing] his dismay at the continuing efforts made by China to prevent independent members of civil society from engaging with human rights mechanisms.”¹⁴⁷ In a 2017 report, Human Rights Watch detailed how “Chinese officials have photographed and filmed activists on UN premises in violation of UN rules, and restricted travel by mainland activists to the UN Human Rights Council in Geneva.”¹⁴⁸

141. See James Millward, *‘Reeducating’ Xinjiang’s Muslims*, N.Y. BOOKS (Feb. 7, 2019), <https://www.nybooks.com/articles/2019/02/07/reeducating-xinjiangs-muslims/> [<https://perma.cc/QY4M-2A22>] (archived Aug. 18, 2019); *supra* note 12 and accompanying text.

142. *China: Human Rights Violations in the Name of “National Security”*, AMNESTY INT’L 5 (Mar. 2018), <http://bit.ly/2VeKMvA> (last visited Oct. 25, 2019) [<https://perma.cc/NPE6-PHMU>] (archived Oct. 25, 2019).

143. See *Joint Submission for the UPR of the People’s Republic of China*, PEN INT’L (Mar. 2018), https://pen-international.org/app/uploads/Joint-Submission-for-the-UPR-of-China_Final.pdf [<https://perma.cc/3PDP-A9DW>] (archived Oct. 26, 2019).

144. *In submission to UN panel, RSF urges China to free detained journalists*, REPORTERS WITHOUT BORDERS (Mar. 29 2018), <https://rsf.org/en/news/submission-un-panel-rsf-urges-china-free-detained-journalists> [<https://perma.cc/LYP4-FHUA>] (archived June 20, 2019).

145. *UPR Submission – China 2018*, FRONT LINE DEFENDERS 6 (Mar. 29, 2018), <https://www.frontlinedefenders.org/en/statement-report/upr-submission-china-2018> [<https://perma.cc/U3VW-PJ7L>] (archived Aug. 18, 2019).

146. *Stakeholder Submission by Human Rights in China*, HUM. RTS. CHINA 7 (Mar. 2018), https://www.hrichina.org/sites/default/files/hric_china_upr_2018_submission.pdf [<https://perma.cc/LH7A-W3HK>] (archived Aug. 18, 2019).

147. U.N. Human Rights Council, Working Group on the Universal Periodic Review, “Compilation on China: Report of the Office of the United Nations High Commissioner for Human Rights,” ¶ 8, U.N. Doc. A/HRC/WG.6/31/CHN/2 (Aug. 27, 2018).

148. *UN: China Blocks Activists, Harasses Experts*, HUM. RTS. WATCH (Sept. 5, 2017), <https://www.hrw.org/news/2017/09/05/un-china-blocks-activists-harasses-experts> [<https://perma.cc/HDQ6-K994>] (archived June 20, 2019); see also Justin Worland, *U.N. Panel Claims China Tried to Silence Women’s Rights Activists*, TIME (Nov. 7, 2014),

Also telling were shifts in the stakeholders that submitted reports; Beijing Aizhixing Institute's 2013 submission documented a number of instances of discrimination and other mistreatment of people with HIV/AIDS, such as restrictions on people with HIV/AIDS from coming to Beijing during large, important government meetings.¹⁴⁹ Beijing Aizhixing did not make a submission in 2018,¹⁵⁰ and its founder was living outside of China as a fellow at the National Endowment for Democracy.¹⁵¹

Moreover, for those organizations that provide submissions as part of the UPR process, their names do not necessarily capture the nature of their organizations. "China Foundation for Human Rights Development," for example, is a "GONGO"—a government-organized NGO that is part of the state's fabric, not an independent watchdog.¹⁵² Its 2013 submission recognized that much work was left to be done to improve human rights education but largely listed the "breakthroughs" since 2009.¹⁵³

Despite commenting in its 2018 National Report that China continued to prepare for ICCPR ratification,¹⁵⁴ China made no mention of this aim in the "Future goals" section.¹⁵⁵ In February 2019, China rejected sixty-two of the 346 recommendations lodged at the UPR "mainly because they are inconsistent with China's national conditions, contradictory with Chinese laws, politically biased or untruthful."¹⁵⁶ Among the rejected recommendations was that China

<https://time.com/3572796/united-nations-china-activists/> [https://perma.cc/2FSE-T66P] (archived Aug. 18, 2019) (reporting the UN committee's request "that China 'take steps to ensure that in the future no travel restrictions are placed on individuals/human rights defenders[']").

149. Beijing Aizhixing Institute, *Individual UPR Submission-China-October 2013: Report on Security Monitoring and Controlling of People with HIV/AIDS in China* (Oct. 2013), https://www.upr-info.org/sites/default/files/document/china/session_17_-_october_2013/aizhixing_upr17_chn_e_main.pdf [https://perma.cc/NHE8-CHNX] (archived June 20, 2019).

150. Human Rights Council, *Contributions for the Summary of Stakeholder's information*, U.N. OFFICE HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRCNSTakeholdersInfoS31.aspx> (last visited Oct. 26, 2019) [https://perma.cc/ED7E-C2WN] (archived June 20, 2019) (list of stakeholders does not include the organization).

151. See *Fellows: Mr. Yanhai Wan*, NAT'L ENDOWMENT FOR DEMOCRACY, <https://www.ned.org/fellows/mr-yanhai-wan/> (last visited Nov. 11, 2019) [https://perma.cc/9Y3V-L2NX] (archived Aug. 18, 2019).

152. Yuting Su, *The 2018 Forum on Human Rights concludes in Beijing*, CGTN (Sept. 22, 2018), <http://bit.ly/2UJAqof> [https://perma.cc/9TQA-ZDHT] (archived Oct. 26, 2019); cf. HRC Live Meeting, *supra* note 1, at 49 min. (statement by John Fisher of Human Rights Watch, describing GONGOs as "government cheerleaders").

153. See generally *Human Rights Education in China*, CHINA FOUND. HUM. RTS. DEV., <https://bit.ly/2WixAD5> (last updated Oct. 2013) [https://perma.cc/NY67-GB3V] (archived Oct. 26, 2019).

154. 2018 National Report, *supra* note 7, ¶ 14.

155. See generally *id.* ¶¶ 85–89.

156. Human Rights Council, Report of the Working Group on the Universal Periodic Review, China, Addendum, Views on conclusions and/or recommendations,

ratify the ICCPR, with China responding: “China is making preparations for ratification, but the specific date of ratification depends on whether relevant conditions in China are in place.”¹⁵⁷

On March 15, 2019, the Human Rights Council completed China’s third UPR process.¹⁵⁸ The tone had shifted from the first UPR cycle in 2009 when there were indications that China was leaning towards engaging with—even if not openly embracing—universal conceptions of human rights.¹⁵⁹ By the time the third UPR process concluded, China had moved to refuting universal standards as the yardstick by which its practices should be judged.¹⁶⁰ At the closing session, the PRC representative noted his gratitude for countries that “expressed respect for China’s path and model.”¹⁶¹ He further affirmed that “China resolutely opposes the use of human rights as an excuse to interfere in China’s internal affairs and undermine China’s sovereignty and territorial integrity.”¹⁶²

D. 2023 Review

China’s fourth UPR is scheduled for November 2023. Xi Jinping was initially slated to hand over the reins of power to a successor in 2022.¹⁶³ His attainment of a constitutional amendment abolishing presidential term limits opened the door for him to retain this title indefinitely.¹⁶⁴ Intensified propaganda emphasizing Xi’s core leadership role expresses an intention to extend the duration of his

voluntary commitments and replies presented by the State under review, ¶ 2, U.N. Doc. A/HRC/40/6/Add.1 (Feb. 15, 2019).

157. *Id.* at rec. 28.5.

158. *See generally* 2018 China UPR Report, *supra* note 21; HRC Live Meeting, *supra* note 1 (recording of the closing session).

159. *See* 2009 National Report, *supra* note 4, ¶¶ 6–8.

160. *See, e.g.*, HRC Live Meeting, *supra* note 1, at 45 min. (statement by Helsinki Foundation for Human Rights that China’s engagement during its third UPR demonstrated how it “questions the universality and indivisibility of human rights principles”).

161. *Id.* at 52 min. (H.E. Mr. Le Yucheng, Deputy Minister of Foreign Affairs of the People’s Republic of China (Final Remarks)).

162. *Spotlight: China completes 3rd Universal Periodic Review at UN Human Rights Council*, XINHUANET (Mar. 16, 2019), http://www.xinhuanet.com/english/2019-03/16/c_137899908.htm [<https://perma.cc/2QHL-9J3T>] (archived June 20, 2019) (quoting Vice Foreign Minister Le Yucheng).

163. *See* Chris Buckley, *Xi Jinping, Seeking to Extend Power, May Bend Retirement Rules*, N.Y. TIMES (Mar. 2, 2017), <https://nyti.ms/2KJybN0> [<https://perma.cc/SRD8-KU33>] (archived Oct. 26, 2019).

164. *See* Jerome A. Cohen, *Xi Jinping Amends China’s Constitution*, LAWFARE BLOG (Mar. 7, 2018), <https://www.lawfareblog.com/xi-jinping-amends-chinas-constitution> [<https://perma.cc/P5RH-BE8Z>] (archived Aug. 18, 2019).

power.¹⁶⁵ These developments cast a pall over any hopes for a turnaround in the domestic atmosphere for human rights.¹⁶⁶

2022 also marks the one-hundredth anniversary of the founding of the CCP,¹⁶⁷ a momentous occasion the run-up to which is expected to be marked by tight repression. Sensitive anniversaries—and important meetings—regularly prompt periods of heightened control.¹⁶⁸ The PRC Party-state tends to clamp down with greater intensity when those anniversaries are of a significant number of years.¹⁶⁹ The thirtieth anniversary of the June 4, 1989, massacre, for example, saw the detention of activists and a near media blackout.¹⁷⁰

2022 is further notable because China will host the winter Olympics.¹⁷¹ The International Olympic Committee website includes articles like “Beijing 2022 Shows Positive Impact of Games Vision.”¹⁷² In contrast, the surveillance state and widespread repression that accompanied the 2008 Olympics portend that Beijing 2022 will have a negative impact on human rights.¹⁷³ Accordingly, absent an

165. See John Garnaut, *Engineers of the Soul: Ideology in Xi Jinping's China*, SINOCISM (Jan. 16, 2019), <https://sinocism.com/p/engineers-of-the-soul-ideology-in> [<https://perma.cc/3GZG-NRQ7>] (archived Aug. 18, 2019).

166. See generally Susan L. Shirk, *China in Xi's "New Era": The Return to Personalistic Rule*, 29 J. DEMOCRACY 1, 21 (Apr. 2008), <https://www.journalofdemocracy.org/articles/china-in-xis-new-era-the-return-to-personalistic-rule/> [<https://perma.cc/E4DE-XFU2>] (archived Oct. 26, 2019).

167. Eleanor Albert & Beina Xu, *The Chinese Communist Party*, COUNCIL ON FOREIGN REL. (Mar. 14, 2018), <https://www.cfr.org/background/chinese-communist-party> [<https://perma.cc/P2EQ-TCLZ>] (archived Aug. 18, 2019).

168. For an analysis of tightened periods of repression, including activists being “touristed” (i.e., sent on trips with government minders), see *Sinica Podcast: Live with Zha Jianying, On China's Troublemakers*, SUP CHINA (Feb. 21, 2019), <https://supchina.com/2019/02/21/sinica-podcast-live-with-zha-jianying/> [<https://perma.cc/7QUN-CTWD>] (archived Aug. 17, 2019).

169. Cf. Neil Thomas, *The Politics of History: Why Anniversaries Matter in China*, MACRO POLO (June 18, 2019), <https://macropolo.org/china-2019-political-anniversary/> [<https://perma.cc/9QH6-A7QG>] (archived Aug. 6, 2019) (“Anniversaries are important primarily because the CCP, lacking the popular mandate conferred by elections, has made its role in China’s history a cornerstone of its political legitimacy.”).

170. Tom Embury-Dennis, *Tiananmen Square: Dozens of activists detained or threatened in 'wave of persecution' ahead of 30th anniversary*, INDEPENDENT (May 31, 2019), <https://www.independent.co.uk/news/world/asia/tiananmen-square-anniversary-protests-china-beijing-june-4-xi-jinping-a8937756.html> [<https://perma.cc/H9WX-4C3Q>] (archived Oct. 25, 2019).

171. See generally *Beijing 2022*, OLYMPIC, <https://www.olympic.org/beijing-2022> (last visited Oct. 23, 2019) [<https://perma.cc/BK97-YGFR>] (archived Oct. 26, 2019).

172. *Beijing 2022 Shows Positive Impact of Games Vision*, OLYMPIC (July 19, 2019), <https://www.olympic.org/news/beijing-2022-shows-positive-impact-of-games-vision> [<https://perma.cc/9JLN-FDY5>] (archived Aug. 6, 2019).

173. See, e.g., Ying Yu et al., *Governing Security at the 2008 Beijing Olympics*, 26 INT’L J. HIST. SPORT 10–11 (2009) (linking “Beijing’s security approach” to “the repression of unwanted ‘elements’ considered to threaten Beijing’s harmonious urban environment and to endanger the games’ smooth running.”); Paul Mozur et al., *Made in China, Exported to the World: The Surveillance State*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/technology/ecuador-surveillance-cameras-police-government.html> [<https://perma.cc/E4ZJ-CXA3>] (archived Aug. 6, 2019) (tracing origins

unexpected shock to China's governing system, the chances that China will ratify the ICCPR prior to its next UPR—let alone faithfully implement it—are slim. It is time to ask what, if anything, would be accomplished at the next UPR by once again advising China to work towards ratification, especially if the deterioration of internal human rights conditions continues apace. It is further time to ask if there is a better approach as a matter of law and politics. The law question necessitates stepping back to address what is required of a state between the signing and ratification of a treaty (Part III). Then the inquiry turns to whether China has met those legal requirements and, if China has not, what should the international community do about it (Part IV).

III. THE INTERIM OBLIGATION

That a state signs a treaty but fails to ratify it promptly is not unusual.¹⁷⁴ A variety of political and legal considerations can slow the process. The United States is infamous for its reluctance to join multilateral treaties; even with the executive branch's endorsement, attaining the two-thirds vote in the Senate that must precede ratification is a formidable task.¹⁷⁵ It took nearly fifteen years to ratify the ICCPR,¹⁷⁶ and the United States has signed but not ratified the Convention on the Rights of the Child¹⁷⁷ and the International Covenant on Economic, Social and Cultural Rights.¹⁷⁸ An example outside the human rights realm is the UN Convention on the Law of

of a security system to 2008 Olympics); *China: Hosting Olympics a Catalyst for Human Rights Abuses*, HUM. RTS. WATCH (Aug. 22, 2008), <https://www.hrw.org/news/2008/08/22/china-hosting-olympics-catalyst-human-rights-abuses> [<https://perma.cc/Z4RX-P5KK>] (archived Aug. 6, 2019).

174. The Republic of China (Taiwan) is an unusual example of a signatory that is unable to deposit ratification papers because of its international status. See Yu-Jie Chen, *Localizing Human Rights Treaty Monitoring: Case Study of Taiwan as a Non-UN Member State*, 35 WIS. INT'L L.J. 277, 290 (2018).

175. See U.S. CONST. art. II, § 2 (explaining the process for treaty ratification); *Treaties Pending in the Senate*, U.S. DEPT OF STATE (July 17, 2019), <https://www.state.gov/s/treaty/pending/> [<https://perma.cc/6WUK-6GF9>] (archived Oct. 25, 2019) (showing the number of treaties pending in the Senate).

176. See ICCPR, U.N. Treaty Collection Page, *supra* note 2 (showing date of US ratification of ICCPR).

177. Convention on the Rights of the Child, *supra* note 66. For contending views on whether the United States' previous use of the death penalty for offenses committed when the offender was under eighteen violated the object and purpose of the convention, compare Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 512–13 (2002), with Panel Discussion, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 FORDHAM L. REV. 2793, 2812 (1999) (comments of William Schabas).

178. ICESCR, *supra* note 33.

the Sea, which, despite substantial support on both sides of the political aisle,¹⁷⁹ has yet to obtain Senate approval.¹⁸⁰

That a signature does not fully bind a state is understandable in an age where governments often separate powers such that the legislative branch must also give its approval.¹⁸¹ Outside the specific American context, Barbara Oomen explains as follows:

The period of ratification is the time in which the treaty is introduced into the domestic arena and in which (successive) governments and political parties take a position on different treaty provisions. In addition, parliaments have their say on how they would like to see a treaty implemented and substantial lobbying pertaining to a treaty takes place.¹⁸²

This explanation applies with less force to China where, although there is a national legislature, it does not act as a serious check on executive power.¹⁸³ The structure is better understood as a separation of functions, with the entire government operating under the CCP's direction.¹⁸⁴ Just as the constitutional amendment abolishing presidential term limits passed by a margin of “2,958 votes in favor, two against, three abstentions and one invalid vote[.]”¹⁸⁵ the National People's Congress (NPC) Standing Committee¹⁸⁶ would no doubt

179. See Dave Majumdar, *Why the United States Needs to Join UNCLOS*, NAT'L INTEREST BLOG (July 12, 2016), <https://nationalinterest.org/blog/the-buzz/why-the-united-states-needs-join-unclos-16948> [<https://perma.cc/77NJ-U7LP>] (archived June 20, 2019) (discussing bipartisan resolution H.Res.631 (2016)). *But see* Theodore R. Bromund, James Jay Carafano & Brett D. Schaefer, *7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea*, HERITAGE FOUND. (June 4, 2018), <https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea> [<https://perma.cc/9GE3-5UFM>] (archived June 20, 2019) (arguing that ratification would bring no new benefits to the United States and would create burdens and risks).

180. *Treaties Pending in the Senate*, *supra* note 175.

181. Jonas & Saunders, *supra* note 18, at 594–96.

182. Oomen, *supra* note 15.

183. See generally NPC OBSERVER BLOG, <https://npcobserver.com/> (last accessed Nov. 10, 2019) [<https://perma.cc/B6D9-GQ9K>] (archived Oct. 25, 2019) (discussing the PRC's National People's Congress and its operation).

184. See, e.g., Susan Trevaskes, *A Law Unto Itself: Chinese Communist Party Leadership and Yifa zhiguo in the Xi Era*, 44 MOD. CHINA 347 (2018); Christopher K. Johnson & Scott Kennedy, *China's Un-Separation of Powers*, FOREIGN AFF. MAG. (July 24, 2015), <https://www.foreignaffairs.com/articles/china/2015-07-24/chinas-un-separation-powers> [<https://perma.cc/2M9J-C9LE>] (archived Aug. 18, 2019).

185. Chris Buckley & Steven Lee Meyers, *China's Legislature Blesses Xi's Indefinite Rule. It Was 2,958 to 2*, N.Y. TIMES (Mar. 11, 2018), <https://nyti.ms/2v9mynR> [<https://perma.cc/8W2F-NNQH>] (archived Oct. 25, 2019).

186. Cf. Hanqin Xue & Qian Jin, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299, 302 (2009) (noting that ICCPR ratification “would require a decision on the part of the Standing Committee of the NPC”); Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, art. 3, <https://www.legal-tools.org/doc/ff6c2a7/pdf/> (last visited Jan. 30, 2020) [<https://perma.cc/N9EZ-4UDD>] (archived Oct. 25, 2019) (“The Standing Committee of the National People's Congress . . . decides on the ratification and abrogation of treaties

promptly approve the ICCPR if directed to do so by the central Party leadership. As described by Björn Ahl:

When the NPC Standing Committee approves a treaty, internal decision-making includes not only the delegates of the Standing Committee but involves in the process of informal decision-making other relevant actors of the Party-State. Therefore, the NPC Standing Committee's power to approve treaties is, in practice, not a genuine power of parliamentary participation and control.¹⁸⁷

During the zone between signing and ratification, the Vienna Convention on the Law of Treaties (Vienna Convention) provides that a state must, at a minimum, refrain from acts that would defeat the treaty's object and purpose.¹⁸⁸ Even for states, like the United States, that have failed to ratify the Vienna Convention, much of the convention's contents are deemed to reflect customary international law.¹⁸⁹ China became a party to the Vienna Convention in 1997.¹⁹⁰ Consequently, there is no need to use customary international law to apply this "object and purpose" requirement to China. The tricky part is figuring out what this requirement entails.

The "object and purpose" language appears in other contexts as well, most notably in the Vienna Convention's prohibition on reservations that are incompatible with a treaty's object and purpose.¹⁹¹ There is much debate about what this phrasing means in the context of reservations, but at least in that realm there is considerable state practice.¹⁹²

...").

187. Björn Ahl, *The Application of International Treaties in China*, 207 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 355, 357–58 (2009).

188. See Vienna Convention, *supra* note 19, at art. 18 ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.").

189. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 145 (quoting S. EXEC. DOC. L., 92d Cong., 1st Sess., at 1 (1971)) ("Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice"); see also Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. J. INT'L L. 307, 307–08 (2007) ("Although the United States is not a party to the Vienna Convention, many commentators claim that Article 18 reflects customary international law that is binding on nations that have not joined the Convention, a claim that the United States has not denied."); Herbert W. Briggs, *United States Ratification of the Vienna Treaty Convention*, 73 AM. J. INT'L L. 470–71 (1979) (addressing status of Vienna Convention as customary law).

190. *Multilateral Treaties to Which China is a Party or Which China has signed*, CHINA-UN, <http://www.china-un.org/eng/zghlhg/flsw/t28583.htm> (last visited Nov. 10, 2019) [<https://perma.cc/6VHB-M73Y>] (archived Oct. 25, 2019).

191. See generally Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, 8 AM. SOC'Y INT'L L. (2003) (explaining when treaty reservations are considered permissible).

192. See, e.g., *International Covenant on Civil and Political Rights*, U.N. TREATY

What is required of states during the period between signing and ratification is murkier.¹⁹³ The series of special rapporteurs at the International Law Commission who worked on the issue during the Vienna Convention's drafting did not share a common understanding of the clause's meaning.¹⁹⁴ Nevertheless, at least "the [International Law Commission] drafters intended the interim obligation to be legal in nature."¹⁹⁵

There is general agreement among scholars that the requirements of the Vienna Convention and customary law demand *some* level of good-faith performance.¹⁹⁶ In his 2019 article, Ryan Scoville notes that "[t]he precise nature of the interim obligation is the subject of disagreement," but the doctrine "likely requires at least that the United States refrain from 'actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification.'"¹⁹⁷ In their 2018 article, Curtis Bradley and Jack Goldsmith cite the United States' position that states are "expected to avoid actions which could render impossible the entry into force and implementation of the [agreement], or defeat its basic purpose and value to the other party or parties."¹⁹⁸ They continue that "[t]his narrow interpretation of Article 18 is defensible in light of both its text and drafting history, despite some academic claims about a broader scope of the obligation."¹⁹⁹ To wit, even if the obligation is narrow, it exists.

In attempts to bring greater precision to this inquiry, scholars have delved into the "object and purpose" language and proposed tests to determine whether a state has failed to meet even a minimal

COLLECTION (Dec. 16, 1966), <http://bit.ly/2GnkI8b> [<https://perma.cc/267Y-3867>] (archived Oct. 25, 2019) (listing declarations and reservations made by ICCPR parties); see also Int'l Law Comm'n, *Rep. on Its Sixty-Six Session*, ¶ 75, U.N. Doc. A/66/10 (Jan. 8, 2011) <http://bit.ly/2GkWcEN> [<https://perma.cc/Y7S6-7TGN>] (archived Oct. 25, 2019) (Guide to Practice on Reservations). *Contra* Dörr, *supra* note 20, ¶ 5, (listing only five instances where the interim obligation was invoked, and none involved the ICCPR).

193. Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L & ECON. 71, 114 (1991) (addressing "the difficulty inherent in attempting to adequately define and develop the contours of interim obligation expressed in article 18").

194. See U.N. OFFICE HIGH COMM'R HUM. RTS., *supra* note 32, at 306–10.

195. Charme, *supra* note 193, at 95.

196. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 cmt. e (AM. LAW INST. 2018) (noting that while "there appears to be widespread acceptance of an interim obligation...[t]he scope of such interim obligations, however, has remained unclear, in particular as to the nature of the acts prohibited.").

197. Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 994 (2019) (quoting Bradley, *supra* note 189, at 315–16).

198. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1237 (2018) (quoting Memorandum from Roberts B. Owen, U.S. Dep't of State Legal Adviser (Feb. 21, 1980), *reprinted in* S. EXEC. REP. NO. 96–33, at 47 (1980)) (alterations in original).

199. *Id.* at 1237–38.

requirement.²⁰⁰ In a 2010 article, David Jonas and Thomas Saunders reviewed four proposed tests and suggested a fifth that should be adopted in their place.²⁰¹ This article stands as the most comprehensive effort—at least in an American law review²⁰²—to make the interim obligation more concrete.²⁰³

First, the “essential elements” test focuses on whether a state has adhered to the critical parts of the treaty, even if it has failed to comply with relatively minor aspects.²⁰⁴ Ryan Goodman and Derek Jinks, for example, distinguish between mere signature and full ratification by explaining that “core treaty obligations attach earlier in the incorporation process—that is, upon signature of the treaty.”²⁰⁵ Jonas and Saunders critique this approach both as unworkable because of uncertainty regarding what elements are “essential” and also as undermining the importance of domestic review.²⁰⁶ Using this test, “essential parts of the treaty are binding immediately upon signature, depriving domestic political factions of the same full opportunity to review those obligations before the state is bound by them.”²⁰⁷

Second, the “impossible performance test” hinges on whether subsequent performance would become “meaningless” as a result of the state’s actions.²⁰⁸ This test is most easily applied to a bilateral treaty where one country has, for example, agreed to return an ancient artifact to another country but, prior to return, destroys it. This irreplaceable-object scenario is, however, but one of many contexts for a treaty. Jonas and Saunders thus question this test on the basis that

200. See, e.g., Charme, *supra* note 193, at 72 (noting that, in 1991, scholars, courts, and tribunals had already looked to Article 18 of the Vienna Convention for over thirty years).

201. See Jonas & Saunders, *supra* note 18.

202. Barbara Oomen notes that “[o]ne particularly surprising lacuna in the *social science literature* on treaty implementation concerns the period between signing and ratifying human rights treaties.” Oomen, *supra* note 15, at 426 (emphasis added).

203. Cf. Matthew Neely, *Good Law for “Bad Hombres”*, 32 EMORY INT’L L. REV. 255, 276–77 (2018) (citing Jonas & Saunders, *supra* note 18, for a description of various tests); Paul Williams & Laura Livingston, *Lawfare: Law as a Weapon of War. By Orde F. Kittrie*. Oxford, 110 AM. J. INT’L L. 838, 843 n.30 (2016) (book review) (citing Jonas & Saunders, *supra* note 18, in support of the statement that “[t]hrough the specific meaning of the term [object and purpose] remains the subject of extensive academic debate, it has generally been defined to refer to a treaty’s or statute’s essential or otherwise principal goals”).

204. Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311, 343 (1998) (assessing a treaty’s object and purpose based on separating the treaty’s essential elements from the unessential ones).

205. Goodman & Jinks, *supra* note 31, at 173.

206. *Id.*

207. Jonas & Saunders, *supra* note 18, at 597.

208. Charme, *supra* note 193, at 101–02 (quoting MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 322 (1985)); Jonas & Saunderson, *supra* note 18, at 598; see also Dörr, *supra* note 20, ¶ 37.

“some actions defeat a treaty’s object and purpose even when subsequent performance has not been rendered impossible.”²⁰⁹

Furthermore, this test is an uncomfortable fit for treaties addressing human rights: “If one signatory state engages in torture prior to ratification, this act does not defeat the goals of preventing torture and shaming those who practice it. Rather, the fresh violation makes the treaty’s goals even more compelling.”²¹⁰ One option is that some treaties would, in reality, not be subject to the interim obligation. Curtis Bradley proposes a narrow reading of the interim obligation that would “preclud[e] only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification.”²¹¹ He notes that this would mean the interim obligation “has little relevance” to certain types of treaties, including human rights treaties.²¹²

Third and fourth, Jonas and Saunders address the related “bad faith” and “manifest intent” tests.²¹³ These tests look beyond “contract-based treaties”—in which states “engage[] in a reciprocal exchange of considerations”—to also address “law-creating treaties”—in which states “agree to abide by particular rules of conduct.”²¹⁴ The ICCPR falls squarely within the latter camp. The “bad faith” test assesses whether a signatory state’s actions “are unwarranted or condemnable” whereas the “manifest intent” test merely requires that the state’s actions “seem unwarranted and condemnable . . . regardless of actual proof of bad faith.”²¹⁵ Jonas and Saunders critique these tests as both “highly subjective” and as leaving unanswered the thorny question of “which actions actually demonstrate bad faith or the manifestation thereof.”²¹⁶

Unsatisfied with these four tests, Jonas and Saunders propose a “facilitation test” that proceeds in two parts.²¹⁷ It first asks if a state has “transgressed” any articles of the pending treaty, defined as “acting contrary to the obligations the treaty would impose had the treaty already entered into force.”²¹⁸ If this transgressing is not new, Jonas and Saunders posit that “there has been no violation.”²¹⁹ The argument being that “[s]ignatory states may not move away from eventual

209. Jonas & Saunders, *supra* note 18, at 600.

210. *Id.* at 600 (citing Klabbers, *supra* note 34, at 286) (“[I]t is awkward to argue that states have a right to lay landmines if they have signed . . . a treaty prohibiting such practices, simply because the calendar has not yet reached a certain date.”).

211. Bradley, *supra* note 189, at 308.

212. *Id.*

213. See Jonas & Saunders, *supra* note 18.

214. *Id.* at 601 (citing Klabbers, *supra* note 34, at 289–91).

215. *Id.* at 602 (quoting Klabbers *supra* note 34, at 330).

216. *Id.* at 603.

217. *Id.*

218. *Id.* (explaining use of “transgressed” because the treaty is not yet binding law and thus cannot be breached in a legal sense.”).

219. *Id.*

compliance, but they are permitted to move toward it.”²²⁰ At least the *status quo* must be maintained: a state is permitted to tread water, but, hopefully, there will be directional thrust towards increased compliance.²²¹ The domestic review of a treaty can proceed under conditions that “minimize[] the potential burden on signatory states by shaping the interim obligation to fit each state’s existing pattern of behavior.”²²²

Some tests discussed in this Part are an awkward or even inapposite fit for multilateral human rights treaties. For those that do lend themselves to use in that context, the next Part contends that, as a matter of law, China has failed to meet the required threshold for adherence to the ICCPR. That no single measure is the accepted benchmark for compliance with the interim obligation counsels in favor of a holistic evaluation rather than the selection of a single test. Going a step beyond legal arguments, as a matter of politics, there are strong reasons that states should call for China’s unsigning.

IV. THE CASE FOR UNSIGNING

Signatures languish but are seldom renounced.²²³ While remaining in limbo between a treaty’s signing and ratification is unexceptional,²²⁴ a state’s decision to undo its own signature is big news. The United States, for instance, made a splash in 2002 when, despite prior signature, it announced its intention not to become a party to the Rome Convention establishing the International Criminal Court.²²⁵ Similar to the rift between the Clinton and Bush Administrations over the Rome Convention, in July 2019 the Trump

220. *Id.* at 604.

221. *Cf. id.* at 605.

222. *Id.* at 608.

223. See Curtis A. Bradley, *Treaty Signature*, in THE OXFORD GUIDE TO TREATIES 208, 216 (Duncan B. Hollis ed., 2012) [hereinafter Bradley, *Treaty Signature*] (“There is little State practice involving [Vienna Convention Article 18 on making clear an intention not to become a party]. Although it is not uncommon for signatory States to delay their ratification of a treaty, these States generally do not make express statements indicating that they do not intend to ratify the treaty.”).

224. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, S. EXEC DOC. O, 81-1 (1949) (providing several examples of extended delay: Bolivia (signed 1948, ratified 2005); New Zealand (signed 1949, ratified 1978); Paraguay (signed 1948, ratified 2001); United States (signed 1948, ratified 1998)).

225. See Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOC. INT’L L. INSIGHTS (May 11, 2002), <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty> [<https://perma.cc/TN9H-XJNN>] (archived Nov. 10, 2019); see also Swaine, *supra* note 26 (analyzing the “tumult over the Bush Administration’s decision to ‘unsign’ the treaty establishing the [ICC].”). For an earlier example, see Bradley & Goldsmith, *supra* note 198 (noting that, in 1981, “the Reagan Administration made clear to the Soviet Union that the United States had no intention of ratifying the [Strategic Arms Limitations Talks (SALT) II Treaty]”).

Administration sent a letter to the UN Secretary General stating “that the United States does not intend to become a party to the [Arms Trade Treaty]. Accordingly, the United States has no legal obligations arising from its signature on September 25, 2013.”²²⁶ This followed the Trump Administration’s 2017 announcement that it was renouncing the Paris Agreement on climate change,²²⁷ to which the Obama administration had previously signed on.²²⁸ Although then President Obama “adopted” the agreement using an executive order, Eugene Kontorovich argues that the United States never properly joined because “[i]t is a treaty that requires the advice and consent of the Senate.”²²⁹

Irrespective of the Paris Agreement’s legal status, Trump made clear that the United States was pulling out. He explained his decision based on domestic considerations, namely what he perceived as “the draconian financial and economic burdens the agreement imposes on our country.”²³⁰ Countervailing international considerations are in play if the executive branch abandons a treaty, in a similar manner to when the legislative branch fails to ratify it: “[A] decision by the legislature to not ratify an international treaty, which was signed by the government, may damage the state’s international reputation and its ability to conduct negotiations in the future, especially bilateral agreements.”²³¹ For unsigned as compared with mere delay, the issue is not just one of reputation but also of law.²³² The international law

226. *President Trump “Unsigns” Arms Trade Treaty After Requesting Its Return from the Senate*, 113 AM. J. INT’L L. 813, 816 (2019).

227. *See* Statement by President Trump on the Paris Climate Accord (June 1, 2017), <http://bit.ly/2UpfZYO> [<https://perma.cc/PWE4-QVZE>] (archived Oct. 26, 2019) (statement by Trump that “[i]t is time to exit the Paris Accord”); *see also* Robinson Meyer, *Syria Is Joining the Paris Agreement. Now What?*, ATLANTIC (Nov. 8, 2017), <https://www.theatlantic.com/science/archive/2017/11/syria-is-joining-the-paris-agreement-now-what/545261/> [<https://perma.cc/3QEP-7VZ5>] (archived Oct. 26, 2019) (reporting that the United States’ “declaration means that the United States is the only country in the world that has rejected the treaty and promised to withdraw from it”).

228. *See* Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, OBAMA WHITE HOUSE (Sept. 3, 2016), <http://bit.ly/2UJjKNv> [<https://perma.cc/8L92-DTNB>] (archived Oct. 26, 2019).

229. Eugene Kontorovich, *The U.S. Can’t Quit the Paris Climate Agreement, Because It Never Actually Joined*, WASH. POST, (June 1, 2017), <https://wapo.st/31DdWFh> [<https://perma.cc/GKE3-RT7V>] (archived Oct. 26, 2019).

230. Statement by President Trump, *supra* note 227.

231. Rivka Weill, *Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters*, 45 VAND. J. TRANSNAT’L L. 1381, 1425 (2012); *accord* Swaine, *supra* note 26, at 2076 (“Unsigning with abandon, or exploitatively, would cause their reputations to suffer, leading fewer nations to trust them as signatories (and likely impugning, in the bargain, their more general reputations for honoring commitments).”).

232. With respect to United States’ practice, it is worth noting that, while there is debate regarding the reputational concerns of pulling out of the Iran nuclear agreement, it was a political commitment and not a treaty under international law. *See* Julian Ku, *How President Obama Gave President-elect Trump the Power to Undo the Iran Deal and Paris Agreement*, OPINIO JURIS (Nov. 9, 2016), <http://opiniojuris.org/2016/11/09/why-president-obama-gave-president-elect-trump-the-power-to-undo-the-iran-deal-and->

implications of unsigning are unclear.²³³ One view is that the act of unsigning even seems impossible.²³⁴

There is, of course, no literal way for a state to unsign a treaty—there are no magic words or diplomatic erasers that can undo a historical signature.²³⁵ “Unsigning” is a shorthand for acts through which a state “ma[kes] its intention clear not to become a party.”²³⁶ China has not explicitly done so with respect to the ICCPR or any treaty signed by the PRC for that matter.²³⁷ On the contrary, China stated in its 2018 National Report submitted as part of the UPR process that it continued to prepare for ICCPR ratification.²³⁸ It is thus fair to hold China—as a party to the Vienna Convention and a signatory to the ICCPR—to the interim obligation.²³⁹ Whether other states should and will hold China to the interim obligation ventures into uncharted waters.

paris-agreement/ [https://perma.cc/N9PY-6UDS] (archived Sept. 10, 2017) (“President Obama’s lawyers went even farther to clarify that the Iran Nuclear Deal was a nonbinding political agreement and that the emissions targets in the Paris Climate Change Agreement were also legally nonbinding”); see also Jamil N. Jaffer, *Withdrawal from Treaties and Accords: Elements of Its Own Demise: Key Flaws in the Obama Administration’s Domestic Approach to the Iran Nuclear Agreement*, 51 CASE W. RES. J. INT’L L. 77, 78 (2019) (noting that the agreement was not submitted for ratification as a treaty); David S. Jonas & Dyllan M. Taxman, *JCP-No-Way: A Critique of the Iran Nuclear Deal as a Non-Legally-Binding Political Commitment*, 9 J. NAT’L SECURITY L. & POL’Y 589, 590 (2018) (describing the agreement as a “non-binding political commitment”).

233. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1508 (2003) (“Under international law, it is unclear what the precise legal force of ‘unsigning’ a previously signed treaty should be.”).

234. Swaine, *supra* note 26, at 2063, n.12.

235. See *id.* at 2082 (noting that there is “no guidance on how this intention [not to be bound] may be made manifest”); Bradley, *Treaty Signature*, *supra* note 223, at 217 (“Nor does the [Vienna Convention] or State practice provide any support for the possibility of such a physical ‘unsigning.’”).

236. Vienna Convention, *supra* note 19, at art. 18.

237. Cf. *Multilateral Treaties to Which China is a Party or Which China has Signed*, CHINA-UN, <http://www.china-un.org/eng/zghlhg/flsw/t28583.htm> (last visited Nov. 10, 2019) [https://perma.cc/6VHB-M73Y] (archived Oct. 25, 2019) (no mention of unsigning).

238. 2018 National Report, *supra* note 7, ¶ 14.

239. Vienna Convention, *supra* note 19, at art. 18. Cf. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 cmt. e (AM. L. INST. 2018) (“That obligation arises at the time of the state’s signature (or its exchange of instruments subject to ratification) until such time as the state has made its intention clear not to become a party to the agreement. It also applies from the time of a state’s expression of consent to be bound until the agreement enters into force.”). Regarding the second clause of Article 18 on extended delay prior to a treaty entering into force, the ICCPR entered into force in 1976, more than twenty years before China even signed the treaty. See ICCPR, U.N. Treaty Collection Page, *supra* note 2. In addition, that the Vienna Convention applies only to treaties concluded after the Convention has entered into force with respect to a state (see art. 4) is satisfied because China acceded to the Vienna Convention in 1997 and signed the ICCPR in 1998.

A state's decision to unsign is rare.²⁴⁰ A call by other states that a treaty be unsigned is, perhaps, unprecedented. While it is impossible to know all that has transpired behind closed doors among diplomats, there appears to be no high-profile example of a public, peer-incited unsigning based on a failure to fulfill the interim obligation. With respect to China, the author's experience is that a common response from diplomats, scholars, and human rights advocates has been a reluctance to press China to disengage from international treaties because the international community worked so hard to get China to engage in the first place and/or because of concerns for precedent such action might set.²⁴¹ These are valid concerns, and even a couple of years ago this Article would have been written with a question mark in the title. As explained below, however, accelerating concerns about China's position towards civil and political rights both at home and abroad necessitates a departure from repetition of thus-far ineffective strategies as well as a broader rethinking of how to counter China's rights-diluting initiatives on the international plane.²⁴²

With these considerations and the intended collegial nature of the UPR in mind,²⁴³ it is not surprising that, at China's 2018 UPR, council members stopped short of a brusque proposal that China withdraw entirely from the ICCPR. Some did adopt a more pointed tone in their questioning compared with the relatively milquetoast approach at prior reviews. For instance, the United Kingdom asked in its advance questions what steps China was taking to ensure that activists "detained for merely exercising their constitutional rights are released without delay?"²⁴⁴ Australia pointed out China's shift in wording between its 2013 and 2018 National Reports and pressed, "Does China

240. Swaine, *supra* note 26, at 2064 (describing the United States' unsigning of the Rome Convention as "apparently unprecedented").

241. This assessment is based on informal conversations. A search for past written suggestions that China has even violated the interim obligation with respect to the ICCPR—let alone that other states should call for it to disengage from the treaty—did turn up an unpublished student Note in which the author stresses China's use of pervasive surveillance and harsh state-secrets laws to "reveal a violation of the interim obligation." Nicholas Hernandez, *Determining Defeat: The PRC, the ICCPR, and the Interim Obligation 25* (Dec. 16, 2010) (unpublished note) (on file with SSRN). The Note concludes by proposing a few discrete steps that China could take to comply with the interim obligation, such as defining state secrets and leaving it to parents to decide when to block their children's access to the Internet. *See id.* at 51–54.

242. *See infra* Part IV.B.

243. *See* Statement by the President of the Human Rights Council, Vojislav Šuc (Slovenia), to the 73d Sess. of the U.N. General Assembly, Third Committee, U.N. Headquarters (Nov. 2, 2018), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23842&LangID=E> [<https://perma.cc/7CM5-A5CJ>] (archived Aug. 18, 2019) (UPR as "a platform for non-politicized, non-selective and non-confrontational discussion among peers").

244. *Advance Questions to China (First Batch)*, U.N. HUM. RTS. COUNCIL, https://www.upr-info.org/sites/default/files/document/china/session_31_-_november_2018/advancequestionschina.pdf (last updated 2018) [<https://perma.cc/6JWG-KWEV>] (archived Oct. 26, 2019).

still accept the principle of universal human rights, and if not, can China explain how its conception of human rights fits into the international human rights regime built on the concept of universality?”²⁴⁵

With the third UPR cycle now concluded, this Article posits a bold prescriptive claim: states should call on China to unsign the ICCPR and China should do so. This Part explains why the international community should pursue this path both as a matter of law and politics. Martti Koskenniemi has long argued that lawyers and scholars should grapple with the intertwined nature of politics and law in the international realm.²⁴⁶ Just as the classic optical illusion can be viewed as a duck or a rabbit,²⁴⁷ international events simultaneously carry legal and political significance.²⁴⁸ Koskenniemi has cautioned about the use of “and” between law and politics because “[t]he conjunctive form would suggest a meeting of two separately identifiable entities whose action upon each other would be subjected to analysis.”²⁴⁹ While recognizing that caution, in this Part, the two are addressed separately because “[t]o speak of ‘politics’ is intended to highlight the reality of choice in international law and to contrast it with the technical production of the justification for it.”²⁵⁰

For this Article’s argument in favor of unsigning to prevail, it must speak both “‘Duckalese’ (or legal language)” and “like a rabbit (that is politics).”²⁵¹ A narrow legal perspective is insufficient. Accordingly, this Part justifies unsigning based on the legal doctrine behind the interim obligation and because it is sound policy.

There is uncertainty about what would happen if states heeded this Article’s advice. Just because the current approach may not be producing the desired result of many (though far from all²⁵²) countries that China ratify the ICCPR and uphold the rights therein does not

245. *Advance Questions to China (Fourth Batch)*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CNindex.aspx> (last updated 2018) [<https://perma.cc/3CXJ-GP4Z>] (archived Oct. 26, 2019).

246. MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* v (2011) (“The relationship (if that is the correct word) is not one of two entities colliding against each other but one of identity. International law is an *expression* of politics.”).

247. *Duck-Rabbit*, ILLUSIONS INDEX, <https://www.illusionsindex.org/i/duck-rabbit> (last visited Nov. 10, 2019) [<https://perma.cc/9P5T-GSU5>] (archived Oct. 26, 2019).

248. See Martti Koskenniemi, *Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits, and Then Some*, in *MOBILISING INTERNATIONAL LAW FOR ‘GLOBAL JUSTICE’* 22–45 (Jeff Handmaker et al. eds., 2018).

249. KOSKENNIEMI, *supra* note 246, at v.

250. *Id.* at vi.

251. Koskenniemi, *supra* note 248, at 27.

252. For countries that sign (and even ratify) the ICCPR but also have deeply problematic human rights records, they may prefer the current recurring admonitions followed by periods of relative inaction. *Cf.* HRC Live Meeting, *supra* note 1 (statements by Mali, Mozambique, Namibia, and others praising China at the closing session of its third UPR).

mean that a different approach would be more effective.²⁵³ Nor is a call for unsigning guaranteed to have beneficial externalities, even if not improving China's domestic adherence to the ICCPR.²⁵⁴ A different approach could even be a worse approach. One could imagine, for example, China responding to calls for it to disengage from the ICCPR by not just maintaining its current foot dragging with respect to ratification but actually becoming even more resistant to outside criticism.²⁵⁵ And the very act of pressuring China to disengage could prompt other states to renounce treaties they had signed, though practice to date gives little reason to worry about such a parade of horrors.²⁵⁶ But this Article's proposal is not a rash "kick the broken television" maneuver. Despite the leap of faith that comes with any dramatic switch in diplomatic posturing, this Part contends that the potential upsides of advocating unsigning outweigh the possible downsides.

First, as a matter of law, states can make a sound argument that China has failed to fulfill the interim obligation.²⁵⁷ Second, not only can states make this legal argument on firm even if not rock solid legal footing,²⁵⁸ they should do so for political reasons, with "politics" understood broadly as "the total complex of relations between people [and here "states"] living in society."²⁵⁹ In other words, beyond the lawyers' ability to make a technical legal argument that China has violated the interim obligation, the diplomats and other officials who formulate China policy could find this argument a useful tool in

253. There is a longstanding debate about the effectiveness of external pressure on China's internal human rights practices. *See, e.g.*, Ann Kent, *Engaging China on Human Rights*, in *PRINCIPLED ENGAGEMENT: NEGOTIATING HUMAN RIGHTS IN REPRESSIVE STATES* 75, 78 (Morten B. Pedersen et al eds., 2013) (listing scholarly literature "questioning the effectiveness or otherwise of different kinds of external pressure on China's human rights"); Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 *CHINA Q.* 699, 710–13 (2007) (describing China's "normative resistance" to certain international human rights norms).

254. *See infra* Part IV.B on importance of messaging to various audiences even if there is no discernible improvement in China's adherence to international human rights norms.

255. *Cf.* Associated Press, *China rebukes Canada and other diplomats for letter on Muslim rights*, CBC RADIO–CAN. (Nov. 15, 2018), <https://www.cbc.ca/news/politics/china-canada-ughurs-letter-1.4906522> [<https://perma.cc/VR77-HQF7>] (archived Oct. 26, 2019). The human rights situation in Xinjiang has deteriorated since the November 2018 letter, *see* Nebehay, *supra* note 12, though any causal relationship is speculative.

256. *Cf.* Bradley, *supra* note 225, at 218 ("In any event, at least to date it does not appear that there have been substantial abuses by States of the ability to decide not to ratify a treaty after signature.").

257. *See infra* Part IV.A.

258. The novelty of this approach means that there is not an iron-clad legal argument that China has breached the interim obligation. While recognizing the lack of both precedent and clear guidance in treaties, there is nonetheless a serious argument to be made.

259. *Politics*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/politics> (last visited 2019) [<https://perma.cc/URM9-YADZ>] (archived Oct. 26, 2019).

pushing back on China's enfeebling of human rights norms. Policymakers could stop short of actually calling for unsigning and instead simply put forward the legal analysis. There are, however, benefits to a more pointed reprimand.²⁶⁰

A. Law

Evaluating whether China has fulfilled its interim obligation as a signatory to the ICCPR begins with determining what, if anything, has been said about the interim obligation as applied to the ICCPR (Part IV.A.1). With this backdrop, the inquiry then turns to China's case: How does China's performance measure up to the various proposed tests for whether a state has failed to meet even the minimal obligations of a signatory (Parts IV.A.2-4)?

1. The Interim Obligation and the ICCPR

As explained in Part III above, there is no consensus regarding the precise contours of the interim obligation under international law.²⁶¹ Article 18 of the Vienna Convention may be an "enigmatic provision[.]"²⁶² but it is some sort of obligation: "A State is *obliged* to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty."²⁶³ And this obligation is legal in character.²⁶⁴ The question is not whether the signatory state has to do something but rather what exactly that something is.

Even if there were agreement that a specific case constituted a violation of the interim obligation, there is disagreement regarding what, if anything, could be done about it.²⁶⁵ And even if a state wants to unsign a treaty, there is no literal way to erase a signature, plus state practice is exceedingly thin.²⁶⁶ Nonetheless, under the Vienna Convention, a signatory state may declare its intention not to become a party.²⁶⁷ And there is no legal barrier to other states telling it to

260. See *infra* Part IV.B.

261. See *supra* Part III. In addition to the lack of specificity in the Vienna Convention itself, there is "relatively little judicial precedent [regarding the obligations that attach at signing], and most of what there is long predates the [Vienna Convention]." Bradley, *supra* note 225, at 213.

262. Charme, *supra* note 193, at 73.

263. Vienna Convention, *supra* note 19, at art. 18 (emphasis added).

264. See Charme, *supra* note 193, at 95.

265. See Buffard & Zemanek *supra* note 204, at 311.

266. See *supra* Part III. For instance, the United Nations still lists the United States as a "Participant" to the Rome Convention but includes a footnote regarding the 2002 communication announcing the United States "does not intend to become a party to the treaty. . . ." Rome Statute, *supra* note 25.

267. See MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 250 (2008) (noting the ability of a State that has signed but not ratified a treaty to be "free at any time to make its intention clear not to become a party to the treaty, *i.e.*, either by means of an express statement or through implied conduct,

unsign even if they cannot compel such action. Joni Charme wrote in 1991 that the interim obligation of Article 18 “does not represent a readily definable and, therefore, enforceable obligation.”²⁶⁸ However, “an obligation, undertaken upon signature, to respect the signed instrument, is an undisputed consequence of the codification of the interim obligation in article 18 of the Vienna Convention.”²⁶⁹

There is no specific guidance in the ICCPR concerning either the obligation to respect the signed instrument prior to ratification or a signatory state’s ability to declare, prior to ratification, its intention to no longer be bound. The drafters could have articulated views on these points but did not.²⁷⁰ Nor has the Human Rights Committee—the body charged with monitoring implementation of the ICCPR²⁷¹—expressed its opinion on unsigning prior to ratification. In contrast, with respect to *post*-ratification behavior, the committee is “firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the [ICCPR] to denounce it or withdraw from it.”²⁷² The UN Secretary General has opined that withdrawal requires consent of all other parties, in line with Article 54 of the Vienna Convention.²⁷³

That neither the committee nor Secretary General has issued similar guidance regarding renouncing a signature suggests that China is free to unsign the ICCPR.²⁷⁴ Additionally, that the UN Secretary General cited the Vienna Convention’s provisions regarding withdrawal²⁷⁵ in the context of interpreting the ICCPR suggests that the Convention’s provisions in Article 18 should also apply, namely that a signatory state need only make clear its intention not to be bound without any requirement of outside approval.²⁷⁶ Furthermore, a rule that signature alone irrevocably binds a state to comply with the

in which case Article 18 can no longer be invoked”).

268. Charme, *supra* note 193, at 104.

269. *Id.* at 113.

270. Cf. Ed Bates, *Avoiding Legal Obligations Created by Human Rights Treaties*, 57 INT’L & COMP. L. Q. 751, 756 (2008) (explaining that “many human rights treaties include a specific provision providing for their denunciation” though not addressing unsigning).

271. See *Human Rights Committee*, U.N. OFFICE HIGH COMM’R HUM. RTS., <http://bit.ly/2Gteyo9> [<https://perma.cc/3QE3-ZMWN>] (archived Oct. 26, 2019).

272. U.N. Human Rights Committee, General Comment No. 26(61), General comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights 2, CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997) [hereinafter General Comment 26].

273. See Aide Memoire: Denunciation of the ICCPR by the Democratic People’s Republic of North Korea, C/N/467/1997 (Sept. 23, 1997), <https://treaties.un.org/doc/Publication/CN/1997/CN.467.1997-Eng.pdf> [<https://perma.cc/8W4L-56KR>] (archived June 20, 2019).

274. For a discussion of how states should handle unsigning, and a suggestion “that the period for withdrawal may be easily borrowed in order to establish the lead time for unsigning,” see Swaine, *supra* note 26, at 2087–88.

275. See Aide Memoire, *supra* note 273 (citing Vienna Convention, *supra* note 19, at arts. 54, 56, 56.1, 62).

276. *Id.* at art. 18.

ICCPR would contradict the intended purpose of an interim period as providing space for domestic debate prior to solidifying a commitment through ratification.²⁷⁷

A separate question from whether a state can unsign the ICCPR is what kind of behavior would constitute a violation of the interim obligation. This requires some speculation because the committee also has not opined on what kinds of actions would contravene the “object and purpose” of the ICCPR in the context of a state’s interim obligation. In 1994, however, the committee issued guidance on what kinds of *reservations* would be incompatible with the object and purpose of the treaty.²⁷⁸ Despite sharing the same “object and purpose” phrasing, the Vienna Convention differentiates between the two scenarios by disallowing reservations that are “*incompatible* with the object and purpose”²⁷⁹ but providing that signatory states are “obliged to refrain from acts which would *defeat* the object and purpose.”²⁸⁰ The significance of this difference is debated, with Curtis Bradley noting, “[t]he word ‘incompatible’ in that limitation may not signify the same limitation as the word ‘defeat’ in Article 18.”²⁸¹ “Defeating” something sounds more forceful than merely being “incompatible” with it, but they are at least related to the extent that the inquiry is whether the state is acting in a manner that goes against the treaty’s object and purpose.

The ICCPR’s “object and purpose” exists independently of a state’s status as mere signatory as compared with party.²⁸² There is nothing in its text to indicate that this same phrasing should be interpreted differently in the two contexts. Thus, it is appropriate to use the committee’s view on the ICCPR’s “object and purpose” in the context of reservations as a basis upon which to conjecture what the committee might say in the context of the interim obligation, with the important caveat that the “defeat” language applied to the latter stresses a more serious affront.

The committee has first clarified that reservations offending customary international law—and particularly peremptory norms²⁸³—would not be compatible with the ICCPR’s object and purpose:

277. See Oomen, *supra* note 15.

278. Covenant on Civil and Political Rights General Comment 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. GAOR, Hum. Rts. Comm., 52d Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994) [hereinafter General Comment 24].

279. Vienna Convention, *supra* note 19, at art. 19 (emphasis added).

280. *Id.* at art. 18 (emphasis added).

281. Bradley, *supra* note 225, at 213.

282. See generally General Comment 24, *supra* note 278.

283. See, e.g., David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT’L L. 219, 228–29 (2005) (explaining peremptory norms as “protect[ing] the most compelling and essential interests of the international community as a whole . . .”); Vienna Convention, *supra* note 19, at art. 53 (defining a peremptory norm, in part, as

[A] State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.²⁸⁴

This list is illustrative but not exhaustive, with the committee then “[a]pplying more generally the object and purpose test to the [ICCPR,]” for example, as a basis for refusing a reservation that provided a state would not respect rights in a nondiscriminatory manner.²⁸⁵ Reservations to nonderogable²⁸⁶ provisions (e.g., imprisonment for debt) should be examined with particular scrutiny,²⁸⁷ and reservations that remove critical supportive guarantees (e.g., need to provide remedies for rights violations) are flagged as unacceptable.²⁸⁸

The committee further recognized that “[o]bjections [to reservations] have been occasional, made by some States but not others, and on grounds not always specified” but that “the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable.”²⁸⁹ The pattern might not be clear, but that the committee recognizes the ability of other states to lodge objections is.²⁹⁰ By analogy, if a state can object to a reservation because it goes against the ICCPR’s object and purpose—even though the objecting state does not have the power to block the reservation²⁹¹—it is reasonable that a state may object to another state’s performance during the interim period because that practice goes against the ICCPR’s object and purpose.²⁹² There might not be a formal mechanism through which to lodge a protest, but the objecting state could at least issue a statement or otherwise make its opinion public. Put simply, pressing China to unsign the ICCPR is brash but not barred.

“accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.”).

284. General Comment 24, *supra* note 278, ¶ 8.

285. *Id.* ¶ 9.

286. See ICCPR, U.N. Treaty Collection Page, *supra* note 2, at art. 4; see also *Core Human Rights in the Two Covenants*, U.N. OFFICE HIGH COMM’R HUM. RTS. (Sept. 2013), <https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf> [<https://perma.cc/97Z7-5ETU>] (archived Oct. 26, 2019).

287. General Comment 24, *supra* note 278, ¶ 10.

288. *Id.* ¶ 11.

289. *Id.* ¶ 17; see also ICCPR, U.N. Treaty Collection Page, *supra* note 2 (listing objections by state parties to reservations made by other states).

290. See generally General Comment 24, *supra* note 278.

291. See *id.* ¶ 18 (“It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.”).

292. *Id.*

With this at least tangentially related guidance in mind, the analysis turns to the various proposed measures for evaluating the interim obligation.²⁹³ Because there is no consensus supporting a single test, this analysis draws on several tests to demonstrate the expanding gap between the ICCPR's protections and China's domestic human rights conditions.

The aim here is not to create an exhaustive list of discrete acts of noncompliance in part because that would extend far beyond the bounds of a law review article.²⁹⁴ And, in part, because of the prevalence of "known-unknowns":²⁹⁵ efforts to catalogue human rights abuses are frustrated by the heavily restricted access to people and sites in China, as well as the party-state's efforts to limit the flow of information.²⁹⁶ In May 2019, an intrepid journalist traveled fifty miles on foot to view a detention facility in Xinjiang after her taxi was told to turn around.²⁹⁷ A 2016 UN report noted:

Reportedly, seven Chinese human rights defenders, who had intended to travel to Geneva to attend the Committee [Against Torture's] consideration of the report of China, had been threatened by [PRC] authorities with negative professional consequences. Moreover, those who had defied the authorities' orders had reportedly been detained on the ground that their participation could 'endanger national security' . . .²⁹⁸

Such challenges to obtaining information underscore the party-state's concern that an unfiltered view of domestic conditions will reach international audiences.²⁹⁹ Any analysis of China's human rights practices must proceed with imperfect information. But that reality does not torpedo an analysis of China's compliance with the interim obligation. This Part's claim is that there is clear, credible evidence

293. See *supra* Part III.

294. For example, see *2018 Congressional-Executive Commission on China: Annual Report*, 115th Cong. (2018), <https://www.cecc.gov/publications/annual-reports/2018-annual-report> [<https://perma.cc/E8XJ-8E9P>] (archived Oct. 27, 2019) (report mandated by Congress monitoring China's compliance with norms in the ICCPR and Universal Declaration of Human Rights, which runs 324 pages in tiny font).

295. Cf. Hart Seely, *The Poetry of D.H. Rumsfeld*, SLATE (Apr. 2, 2003), <https://slate.com/news-and-politics/2003/04/the-poetry-of-donald-rumsfeld.html> [<https://perma.cc/ZQM3-2HBA>] (archived Aug. 18, 2019).

296. See, e.g., Stephanie Nebehay, *U.N. religious freedom expert seeks visit to China's Xinjiang*, REUTERS, Mar. 5, 2019, <https://reut.rs/2KMEzQ> [<https://perma.cc/GRZ9-Z4S6>] (archived Oct. 27, 2019).

297. See Sophia Yan, *China's Uighur Muslims Forced to Eat and Drink as Ramadan Celebrations Banned*, TELEGRAPH (June 1, 2019), <https://www.telegraph.co.uk/news/2019/06/01/chinas-uighur-muslims-forced-eat-drink-ramadan-celebrations/> [<https://perma.cc/J99B-8478>] (archived June 11, 2019).

298. U.N. Human Rights Council, Annual Rep. of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, ¶ 22, U.N. Doc A/HRC/33/19 (Aug. 16, 2016).

299. See *id.*

that China has defeated the object and purpose of the ICCPR. It highlights illustrative examples documented by reputable NGOs, media outlets, and governments.³⁰⁰ There is enough “there” there for states to call on China to unsign the ICCPR in a compelling manner.

2. The Essential Elements and Facilitation Tests

This part addresses the “essential elements” and “facilitation” tests together first by trying to discern the core norms of the ICCPR and then by analyzing whether China has engaged in new transgressions of these norms since signing.

To begin, the “essential elements” test asks whether China has adhered to the critical parts of the ICCPR, even if it has failed to comply with relative minor aspects.³⁰¹ As noted above,³⁰² Jonas and Saunders first critique this approach on the basis that it “deprive[s] domestic political factions of the same full opportunity to review those obligations before the state is bound by them.”³⁰³ This criticism has limited, if any, salience in the context of China because of the CCP’s lock on power.³⁰⁴ The party has stamped out attempts to create opposition parties, leaving no recognized alternative political factions to engage in the review.³⁰⁵ At most there are disparate views within the party,³⁰⁶ but despite intraparty disagreement on some issues,³⁰⁷ there is no outward indication of a move from within the party to end one-party rule. And disagreements are rarely played out in the open. Looking back to the 1980s, a rare publicly seen chink in the armor occurred when the death of relatively reform-minded Hu Yaobang sparked protests leading to the June 4, 1989, massacre in Beijing and broader crackdown across China.³⁰⁸

300. See *infra* Parts IV.A.2–4.

301. Cf. Buffard & Zemanek, *supra* note 204.

302. See *supra* notes 181–187 and accompanying text (explaining emphasis on domestic debate and why this factor applies with less force to China).

303. Jonas & Saunders, *supra* note 18, at 597.

304. For a recent example of voting by the NPC, the new Foreign Investment Law passed with a 2929–8 vote, with eight abstentions and three delegates not voting. See Changhao Wei, *Summary of China’s New Foreign Investment Law*, NPC OBSERVER (Mar. 15, 2019), <https://npcobserver.com/2019/03/15/summary-of-chinas-new-foreign-investment-law/> [<https://perma.cc/AYF2-9DJZ>] (archived Aug. 18, 2019).

305. See, e.g., *Sinica Podcast*, *supra* note 168 (discussing Zha Jianguo, “a democracy activist in China who was charged with subversion of state power and subsequently jailed for nine years”).

306. See Cheng Li, *The Powerful Factions Among China’s Rulers*, BROOKINGS (Nov. 5, 2012), <https://www.brookings.edu/articles/the-powerful-factions-among-chinas-rulers/> [<https://perma.cc/E8Q3-YVGB>] (archived Aug. 18, 2019).

307. Joseph Torjigan, *Elite Politics and foreign policy in China from Mao to Xi*, BROOKINGS INST. (Jan. 22, 2019), <https://www.brookings.edu/articles/elite-politics-and-foreign-policy-in-china-from-mao-to-xi/> [<https://perma.cc/SDP2-BUAT>] (archived Oct. 27, 2019).

308. See Matt Schiavenza, *China’s Forgotten Liberal Hero*, ATLANTIC (Apr. 16, 2014), <http://bit.ly/2PknqX> [<https://perma.cc/7KM3-ELKQ>] (archived Oct. 27, 2019).

Jonas and Saunders also question the usefulness of this test because of uncertainty regarding what elements are “essential.”³⁰⁹ The Human Rights Committee has not labeled certain provisions of the ICCPR as “essential.” General Comment 24 did, however, stress the importance of some elements: “[P]rovisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations.”³¹⁰

The committee listed a number of critical norms. For example, a state may not reserve the right “to arbitrarily arrest and detain persons” or “to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.”³¹¹ China is flagrantly violating these norms in Xinjiang, where estimates are that at least one million members of Muslim minority groups have been held at locations that the government describes as providing vocational training but that have been roundly criticized as internment camps.³¹² The European Union noted, after three diplomats were allowed to visit government-selected facilities in early 2019, that their improved understanding of official policy did “not invalidate the E.U.’s view of the human rights situation in Xinjiang, including in relation to mass detention, political re-education, religious freedom and sinicization policies.”³¹³ Or as more bluntly put by Michael Kozak while a senior official at the U.S. State Department’s Bureau of Democracy, Human Rights, and Labor, in March 2019, “Rounding up, in some estimations . . . in the millions of people, putting them into camps, and torturing them, abusing them, and trying to basically erase their culture and their religion and so on from their DNA. It’s just remarkably awful.”³¹⁴

The situation in Xinjiang speaks to Jonas and Saunders’ proposed “facilitation test.”³¹⁵ As to the initial “transgression” inquiry,³¹⁶

309. Jonas & Saunders, *supra* note 18, at 597.

310. General Comment 24, *supra* note 278, ¶ 8.

311. *Id.*

312. *See, e.g.*, Nebehay, *supra* note 12.

313. Nick Cumming-Bruce, *Rights Groups Seek U.N. Inquiry Into China’s Mass Detention of Muslims*, N.Y. TIMES (Feb. 4, 2019), <https://nyti.ms/2KQXFIn> [<https://perma.cc/XCE8-A84H>] (archived Oct. 27, 2019).

314. Lesley Wroughton & David Brunnstrom, *U.S. says China’s Treatment of Muslim minority worst abuses ‘since the 1930s’*, REUTERS, Mar. 13, 2019, <https://reut.rs/2HLNtxN> [<https://perma.cc/9N52-AANW>] (archived Oct. 27, 2019). The August 2018 press release by the UN Committee on the Elimination of Racial Discrimination following its review of China’s practices similarly reported as follows: [A]n Expert said citing “credible sources,” China had turned [Xinjiang] into something that resembled a massive internment camp shrouded in secrecy, a “no rights zone”, while members of the Xinjiang Uyghur minority, along with others who were identified as Muslim, were being treated as enemies of the State based on nothing more than their ethno-religious identity. *Id.*

315. Jonas & Saunders, *supra* note 18, at 603.

316. *Id.* (explaining use of “transgressed” instead of “breached”).

China's actions are "contrary to the obligations the treaty would impose had the treaty already entered into force."³¹⁷ The detentions lack any judicial process, are targeted at groups because of their religious beliefs and ethnicity, and suppress dissenting voices.³¹⁸ As to the "status-quo maintaining" inquiry,³¹⁹ while China's Muslims have long faced discrimination, the scale of detentions is unprecedented and has grown in terms of numbers and geographic scope.³²⁰ China reiterated in a March 2019 white paper that "[e]ducation and training centers have been established with the goal of educating and rehabilitating people guilty of minor crimes or law-breaking and eradicating the influence of terrorism and extremism."³²¹

Even if, as claimed by China in July 2019 but as of yet unverified, "most of the inmates" in the detention facilities have been released,³²² they return to all-encompassing surveillance and the threat of renewed detention if they step out of line.³²³ This indicates not momentum towards compliance with the ICCPR but rather mounting evidence of the extension of "rule by fear."³²⁴

China's increasingly draconian treatment of religious groups extends beyond Muslims.³²⁵ The Buddhist population in Tibet, for

317. *Id.*

318. *See, e.g.,* Millward, *supra* note 141.

319. Jonas & Saunders, *supra* note 18, at 605.

320. Rob Taylor, *China Supersizes Internment Camps in Xinjiang Despite International Criticism*, WALL ST. J. (Nov. 1, 2018), <https://www.wsj.com/articles/chinese-internment-camps-in-xinjiang-swell-1541052650> [<https://perma.cc/TUT2-YATK>] (archived Aug. 18, 2019) (using satellite imagery to estimate size of facilities).

321. *Preventive Approach: China's effective means to combat terrorism*, XINHUANET (Mar. 18, 2019), http://www.xinhuanet.com/english/2019-03/18/c_137904900.htm [<https://perma.cc/33VP-CJRC>] (archived Aug. 18, 2019).

322. Chris Buckley & Edward Wong, *Doubt Greet's China's Claim That Muslims Have Been Released From Camps*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/world/asia/china-xinjiang.html> [<https://perma.cc/M8SB-W25S>] (archived Aug. 5, 2019).

323. *See Is China Really Freeing Uighurs?*, N.Y. TIMES: THE DAILY (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/podcasts/the-daily/china-xinjiang-ughur-detention.html> [<https://perma.cc/DE5B-R33Y>] (archived Aug. 17, 2019) (describing experience of Uighur family whose family member was temporarily released under tight surveillance and then re-detained); Mozur, *supra* note 140.

324. *Cf.* Eva Pils, *The Rise of Rule by Fear*, ASIA DIALOGUE (Feb. 15, 2016), <https://theasiadialogue.com/2016/02/15/rule-of-law-vs-rule-by-fear/> [<https://perma.cc/55EK-FKRR>] (archived Aug. 18, 2019); *see also* Timothy Grose, 'Once Their Mental State is Healthy, They Will Be Able to Live Happily in Society', CHINA FILE (Aug. 2, 2019), http://www.chinafile.com/reporting-opinion/viewpoint/once-their-mental-state-healthy-they-will-be-able-live-happily-society?utm_source=HRIC+Updates&utm_campaign=d8b8696556-EMAIL_CAMPAIGN_2018_12_04_11_54_COPY_01&utm_medium=email&utm_term=0_b537d30fde-d8b8696556-255334385 [<https://perma.cc/2GX9-V9MU>] (archived Aug. 6, 2019) (analyzing conflation of Uighur identity with mental illness and "a history of C.C.P. attempts to pathologize any culture that poses a political threat.").

325. Anna Fifield, *With wider crackdowns on religion, Xi's China seeks to put state stamp on faith*, WASH. POST (Sept. 16, 2018), <https://wapo.st/2FmRRak>

example, has long been repressed, including an official requirement that the reincarnation of a living Buddha must obtain government approval.³²⁶ But the policies of Chen Quanguo—party secretary of the Tibetan Autonomous Region from 2011–2016—brought a marked escalation in repressive policies.³²⁷ Chen has since moved on to oversee the crackdown in Xinjiang.³²⁸

A further example of the Human Rights Committee’s concern for both arbitrary detention and a denial of “freedom of thought, conscience and religion”³²⁹ is the treatment of Christian groups. The December 2018 arrest of a popular pastor on charges of inciting subversion followed an uptick in repression of Christian groups and destruction of places of worship.³³⁰ As with the treatment of Muslims and Buddhists, this is not merely a continuation of *status quo* denial of religious freedom but rather a heightened government effort to control religious groups. Eva Pils explains, “What happens in Xinjiang and what happens to house churches is connected Those kinds of new attitudes have translated into different types of measures against Christians, which amount to intensified persecution of religious groups.”³³¹

The deterioration of civil and political rights in China is far from limited to religious practices. Turning to the treatment of people accused by the state as law breakers, the ICCPR prohibits arbitrary detention and requires that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other

[<https://perma.cc/47ZV-3AUC>] (archived Oct. 27, 2019).

326. *Reincarnation of Tibetan living Buddhas must get government approval*, PEOPLE’S DAILY ONLINE (Aug. 3, 2007), <http://en.people.cn/90001/90776/6231524.html> [<https://perma.cc/DBH3-YZH4>] (archived Aug. 18, 2019); see Jessica Batke, *Is This the Last Dalai Lama?*, CHINAFILE (Mar. 15, 2019), <http://www.chinafile.com/reporting-opinion/viewpoint/last-dalai-lama> [<https://perma.cc/A3A3-3YAS>] (archived Aug. 18, 2019) (explaining succession question once the eighty-three year-old Dalai Lama dies).

327. *Beijing Defends Policies as Tibetans Mark Anniversary*, CHINA DIGITAL TIMES (Mar. 12, 2019), <http://bit.ly/2UJnP4h> [<https://perma.cc/7E4Q-C5KR>] (archived Oct. 27, 2019); *ICT’s Submission to UN Committee Against Torture on China’s action in Tibet*, SAVE TIBET (Nov. 16, 2015), <http://bit.ly/2KP1qhp> [<https://perma.cc/9UWS-5UTR>] (archived Oct. 27, 2017) (“[A]lthough the PRC officially prohibits torture, it has become endemic in Tibet, a result both of a political emphasis on ensuring ‘stability’ and a culture of impunity. . .”).

328. See *Beijing Defends Policies as Tibetans Mark Anniversary*, *supra* note 327.

329. General Comment 24, *supra* note 278, ¶ 8.

330. Ian Johnson, *This Chinese Christian Was Charged With Trying to Subvert the State*, N.Y. TIMES (Mar. 25, 2019), <https://www.nytimes.com/2019/03/25/world/asia/pastor-wang-yi-detention.html> [<https://perma.cc/6HQQ-7ZBH>] (archived Aug. 5, 2019); Ian Johnson, *Pastor Charged With ‘Inciting Subversion’ as China Cracks Down on Churches*, N.Y. TIMES (Dec. 13, 2018), <https://nyti.ms/2Djll1Q> [<https://perma.cc/BY4Z-VFCD>] (archived Oct. 27, 2019).

331. Lily Kuo, *In China, they’re closing churches, jailing pastors – and even rewriting scripture*, GUARDIAN (Jan. 13, 2019), <http://bit.ly/2XIXjuF> [<https://perma.cc/G2MP-DN9R>] (archived Oct. 27, 2019).

officer authorized by law to exercise judicial power.”³³² The 2012 addition of “residential surveillance at a designated location” to the PRC Criminal Procedure Law, however, allows people to be held up to six months without access to a lawyer or judicial review.³³³ “Residential” means outside of official detention facilities; it does not mean at the person’s residence.³³⁴ Joshua Rosenzweig wrote of the law’s revisions: “The fact that ‘non-residential’ residential surveillance and waiver of notification of criminal detention in certain cases have been given the imprimatur of ‘law’ makes them no more legitimate in the eyes of international human rights law, which strictly prohibits arbitrary detention and enforced disappearance.”³³⁵

Following detention, the Human Rights Committee’s admonition that “a general reservation to the right to a fair trial would not be [acceptable]”³³⁶ brings to the fore questions about trials in China. Since signing the ICCPR in 1998, China has seen moves towards professionalization of the judiciary along with reforms to formal criminal procedure laws. For instance, the push for “trial centered” reforms seeks to place more emphasis on the presentation of evidence at trial.³³⁷ Yet these reforms exist within “a highly legalist and instrumentalist vision of law [that] seeks to build the legitimacy and credibility of the political-legal regime and to more effectively control

332. ICCPR, U.N. Treaty Collection Page, *supra* note 2, at art. 9.

333. PRC Criminal Procedure Law [*Zhonghua renmin gongheguo xingshi susong fa*], passed July 1, 1979, as amended Mar. 14, 2012, effective Jan. 1, 2013, art. 73 (China).

334. PRC Supreme People’s Procuratorate, *Provisions on People’s Procuratorates’ Oversight of Residential Surveillance in a Designated Location*, CHINALAWTRANSLATE (July 14, 2017), <https://www.chinalawtranslate.com/en/procuratoratedlrs/> [<https://perma.cc/CV8T-QR9Q>] (archived Nov. 10, 2019) (“Designated locations shall possess the conditions for ordinary life and rest and shall be separate from places of interrogation; they shall be equipped with surveillance equipment to facilitate monitoring and management; and they shall possess security measures to ensure the security of case handling.”).

335. Joshua Rosenzweig, *Disappearing Justice: Public Opinion, Secret Arrest and Criminal Procedure Reform in China*, 70 CHINA J. 73, 95–96 (2013).

336. General Comment 24, *supra* note 278, ¶ 8.

337. See *Implementation Opinion of the Supreme People’s Court on Comprehensively Advancing the Trial-Centered Criminal Procedure System*, CHINA LAW TRANSLATE (Feb. 21, 2017), <https://www.chinalawtranslate.com/en/implementation-opinions-of-the-supreme-peoples-court-on-comprehensively-advancing-the-trial-centered-criminal-procedure-system/> [<https://perma.cc/RT67-7RA7>] (archived June 12, 2019). Compare *Reform Puts Trial in Court at Center of Justice System*, CHINA DAILY (Oct. 12, 2016), http://www.chinadaily.com.cn/opinion/2016-10/12/content_27031253.htm [<https://perma.cc/34SR-E8CJ>] (archived Oct. 27, 2019) (describing the reform as a break from the “decades-old model of criminal procedure centered around investigations by the police and prosecutors”), with Elisa Nesossi, *Justice Restored Under Xi Jinping: A Political Project*, CHINOIRESIE (June 20, 2018), <https://www.chinoiresie.info/justice-restored-under-xi-jinping-a-political-project/> [<https://perma.cc/A7VL-JTED>] (archived Oct. 27, 2019) (noting muted international praise for reforms in part because they were “being carried out at the same time as the expansion of legally dubious tactics employed to suppress any form of dissent”).

dissent and crime through criminal law so as to sustain Party supremacy and social stability.”³³⁸

This repression is pervasive but not always blatant. China law scholars have drawn comparisons to Ernst Fraenkel’s work in the 1930s on the “dual state” when explaining China’s current political-legal system.³³⁹ Hualing Fu describes this duality in China as “a normal legal system, full of Chinese characteristics, of course” coexisting with a “prerogative state to solve politically sensitive matters through substantively extra-legal methods.”³⁴⁰ This duality means that life in China can simultaneously be extremely repressive for some people while vibrant and fun for others.³⁴¹ But to enjoy that excitement requires an acceptance of loosely defined and ever-shifting boundaries as well as an accompanying relinquishment of civil and political rights.³⁴² Challenging those boundaries risks severe reprisal.³⁴³ And, as Fu cautions, the prerogative state “has become more visible, expansive, and assertive under Xi’s rule.”³⁴⁴ The risks that come with challenging the party-state are demonstrated by the lawyers who advocated for clients who had been denied fair trials, and then the lawyers themselves became subject to abuse.³⁴⁵ Being an outspoken lawyer in China’s single-party state has always carried risk.³⁴⁶ The magnitude of those risks heightened with the July 9, 2015, *en masse* round-up of lawyers and other rights advocates, marking the shift towards an even more repressive era.³⁴⁷ In March 2019, a UN

338. Sarah Biddulph, Elisa Nesossi & Susan Trevaske, *Criminal Justice Reform in the Xi Jinping Era*, 2 CHINA L. & SOC’Y REV. 63, 112–13 (Dec. 2017).

339. See, e.g., Eva Pils, *China Dual State Under Xi Jinping*, UNIV. B.C. (Nov. 2, 2017), <https://open.library.ubc.ca/cIRcle/collections/ubccommunityandpartnerspublicati/52387/items/1.0366867> [<https://perma.cc/J26M-NB9G>] (archived Oct. 27, 2019) (video of talk delivered at the University of British Columbia).

340. Hualing Fu, *Duality and China’s Struggle for Legal Autonomy*, 1 CHINA PERSP. 1, 3 (2019).

341. Compare Shiwei Ye, *UN Rulings on Arbitrary Detention in China Since 2014*, MEDIUM (Nov. 28, 2018), <https://medium.com/@Shiwei.ye/un-rulings-on-arbitrary-detention-in-china-since-2014-2f3177c24387> [<https://perma.cc/CB85-8CHY>] (archived Oct. 27, 2019) (links to cases recognized by the UN Working Group on Arbitrary Detention, many involving human rights advocates) *with* Time Out Shanghai, *Shanghai’s best New Year’s Eve dinners and parties of 2019*, http://www.timeoutshanghai.com/features/Nightlife-Nightlife_features/41348/Shanghais-best-New-Years-Eve-parties.html [<https://perma.cc/5JV3-FBM7>] (archived Feb. 4, 2020) (“From fancy Bund-side parties to down and dirty alternative music gigs, this is where to . . . welcome 2020 in Shanghai”) (archived Jan. 27, 2020).

342. See Stephen McDonnell, *China Social Media: WeChat and the Surveillance State*, BRIT. BROAD. CORP.: CHINA BLOG (June 7, 2019), <https://www.bbc.com/news/blogs-china-blog-48552907> [<https://perma.cc/7HUV-ZXPY>] (archived Aug. 18, 2019).

343. See, e.g., Fu, *supra* note 340.

344. *Id.* at 8.

345. *Id.* at 3, 6 (discussing the “continuous crackdown” on human rights attorneys and the “repressive measures” taken against the entire legal profession under President Xi Jinping).

346. See generally LIU & HALLIDAY, *supra* note 132.

347. See *China: On “709” Anniversary, Legal Crackdown Continues*, *supra* note 10;

press release reported, “UN experts said human rights defenders in China are at risk of enforced disappearances, arbitrary detention and ill-treatment in custody for their work.”³⁴⁸

The UN statement was issued shortly after lawyer Jiang Tianyong completed his two-year sentence for inciting subversion—though even after “release” he was put under constant surveillance at his parents’ home.³⁴⁹ Jerome Cohen coined the term “non-release release” to describe this type of situation “when a prisoner is formally released from prison but immediately put under other forms of official surveillance or control.”³⁵⁰ Jiang had previously been detained in 2016.³⁵¹ In 2017, a group of UN human rights experts called on China to immediately release him, “express[ing] concern that Mr. Jiang’s ‘crime’ apparently included communications with foreign entities, which potentially included the United Nations human rights mechanism.”³⁵²

Concerns extend beyond the reasons for deprivations of liberty to include the conditions thereof. Detainees have been subject to torture and other “cruel, inhuman or degrading treatment or punishment,”

see also Third Anniversary of the Lawyers Crackdown in China: Where are the Human Rights Lawyers?, AMNESTY INT’L (July 9, 2018), <https://www.amnesty.org/en/latest/campaigns/2018/07/china-human-rights-lawyers-crackdown-third-anniversary/> [<https://perma.cc/8JLV-FCJZ>] (archived Oct. 25, 2019) (In January 2019, for example, lawyer Wang Quanzhang was sentenced to four and a half years in prison for subversion); Lily Kuo, *Wang Quanzhang: China Sentences Human Rights Lawyer to Four Years in Prison*, GUARDIAN (Jan. 27, 2019), <https://www.theguardian.com/world/2019/jan/28/wang-quanzhang-china-sentences-human-rights-lawyer-to-four-years-in-prison> [<https://perma.cc/KL9Q-DCA9>] (archived Oct. 25, 2019).

348. *China: UN Experts Renew Calls for Probe into Death of Cao Shunli*, U.N. OFFICE HIGH COMM’R HUM. RTS. (Mar. 14, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24331&LangID=E> [<https://perma.cc/QV53-LMVJ>] (archived Oct. 25, 2019); *see also Defending Rights in a “No Rights Zone”: Annual Report on the Situation of Human Rights Defenders in China (2018)*, CHINESE HUM. RTS. DEFENDERS (Feb. 21, 2019), <https://www.nchrd.org/2019/02/2018-hrd-report/> [<https://perma.cc/2NXW-2RLF>] (archived Oct. 25, 2019) (discussing the “relentless persecution of human rights defenders” in the form of arbitrary detention, enforced disappearances, and torture).

349. Mimi Lau, *Freed Chinese Human Rights Lawyer Jiang Tianyong Threatens to Protest If Reunion with Wife and Daughter is Blocked*, S. CHINA MORNING POST (Mar. 7, 2019), <https://www.scmp.com/news/china/politics/article/2189070/freed-chinese-human-rights-lawyer-jiang-tianyong-threatens> [<https://perma.cc/A5NG-F5D3>] (archived Oct. 25, 2019) (Tianyong under “close watch” by police, with officers following him each time he left home and restricting his phone access and visits with relatives).

350. Sophie Beach, *Lawyer Jiang Tianyong Disappears Upon Release*, CHINA DIGITAL TIMES (Feb. 28, 2019), <https://chinadigitaltimes.net/2019/02/lawyer-jiang-tianyong-disappears-upon-release-from-prison/> [<https://perma.cc/QBX8-665N>] (archived Oct. 25, 2019); *see also* Jerome A. Cohen, *Human Rights Lawyer Jiang Tianyong Has Disappeared for Nine Days After Visiting 709 Family in Changsha*, JEROMECOHEN.NET (Dec. 1, 2016), <http://www.jeromecohen.net/jerrys-blog/human-rights-lawyer-jiang-tianyong-has-disappeared> [<https://perma.cc/K6GN-ULTE>] (archived Oct. 25, 2019).

351. Beach, *supra* note 350.

352. U.N. Human Rights Council, *supra* note 147, ¶ 25.

which the Human Rights Committee lists as core rights in the ICCPR.³⁵³ China has introduced legal restrictions and used technology (e.g., taping confessions) to reduce misconduct during interrogations,³⁵⁴ but the opacity of the system stymies efforts to ascertain the extent to which abusive practices continue.³⁵⁵ There was enough evidence reaching the UN Committee against Torture to conclude in 2016 that “the practice of torture and ill-treatment is still deeply entrenched in [China’s] criminal justice system.”³⁵⁶ Researchers have documented denial of medical treatment,³⁵⁷ use of forced medication,³⁵⁸ and extended interrogations while constrained in metal chairs.³⁵⁹ Opacity is especially acute when, as with “residential surveillance,” detention is carried out at locations other than the facilities constructed for the formal criminal justice system.³⁶⁰

In December 2018, the detention of two Canadians in China following the arrest in Canada of Huawei CFO Meng Wenzhou brought increased international scrutiny to conditions of confinement.³⁶¹ During at least his initial detention, Michael Kovrig reportedly had the lights on twenty-four hours per day, was not allowed to see a lawyer, and was only allowed one consular visit per month.³⁶² At the time of writing, the Canadians are still under investigation for allegedly

353. General Comment 24, *supra* note 278, ¶ 8.

354. See generally Ira Belkin, *China’s Tortuous Path Toward Ending Torture in Criminal Investigations*, 24 COLUM. J. ASIAN L. 273 (2011).

355. See Margaret K. Lewis, *Freedom from Torture*, in HANDBOOK ON HUMAN RIGHTS IN CHINA, *supra* note 127, at 348, 361–62.

356. Committee Against Torture, Concluding Observations on the Fifth Periodic Report of China, ¶ 20, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016).

357. Frances Eve, *China Is Risking the Lives of Political Prisoners by Denying Them Medical Care*, CHINA FILE (Aug. 28, 2017), <http://www.chinafile.com/reporting-opinion/viewpoint/china-risking-lives-of-political-prisoners-denying-them-medical-care> [https://perma.cc/PDX8-YH3H] (archived Oct. 25, 2019) (reporting on withholding of medical care for detainee with frostbite, psychological distress, and severe dehydration and suggesting that his “case is not an outlier”).

358. Eva Pils, *A New Torture in China*, ASIA DIALOGUE (Aug. 10, 2017), <https://theasiadialogue.com/2017/08/10/a-new-torture-in-china/> [https://perma.cc/DN5B-RJBT] (archived Oct. 25, 2019) (reporting that detainees were given prescription medication without being informed of their diagnoses, and in some cases, “the authorities never even bothered to claim that the drugs were prescribed by qualified doctors”).

359. *Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China*, HUM. RTS. WATCH (May 13, 2015), <https://www.hrw.org/report/2015/05/13/tiger-chairs-and-cell-bosses/police-torture-criminal-suspects-china> [https://perma.cc/J7WF-EZ58] (archived Oct. 25, 2019) (detainees reported police strapping them to “tiger chairs” for hours or days to deprive them of sleep, causing immobilization and swelling of legs).

360. See *Dialogue-Issue 45: Separate and Unequal*, DUI HUA, <https://duihua.org/dialogue-issue-45-separate-and-unequal/> (last visited Oct. 25, 2019) [https://perma.cc/82P3-XJWA] (archived Oct. 25, 2019).

361. See Anna Fifield, *Canadian Analyst Held in China is Kept in a Cell with Lights Always On*, WASH. POST (Dec. 21, 2018), <https://wapo.st/2YfMOKD> [https://perma.cc/6ZG3-FY9Y] (archived Oct. 25, 2019).

362. *Id.*

endangering national security and have yet to see a lawyer or their families.³⁶³

China is not unique in its harsh detention conditions. People familiar with the United States' rights-depriving practices in Guantanamo Bay,³⁶⁴ Rikers Island,³⁶⁵ and other sites might raise that there would be a pot-calling-the-kettle-black scenario if the United States—and other states that have likewise violated civil and political rights—urged China to unsign the ICCPR.³⁶⁶ First, that other states have violated rights does not immunize China from censure; each state's performance should be assessed on the merits. Countries are free to criticize each other, as seen in the annual dueling reports issued by the United States and PRC governments on each other's human rights practices.³⁶⁷ Pointing out other states' transgressions starts a conversation, it does not end one. Second, engaging in "whataboutism"³⁶⁸ attempts to deflect attention to other governments' behavior but does not change the severity of any existing rights abuses in China. Third, efforts to create a moral equivalence, say between Guantanamo Bay and Xinjiang, throws out the window all sense of proportion—even one human rights abuse is one too many, but the

363. See Nathan Vanderklippe et al., *Canadians Michael Spavor, Michael Kovrig formally arrested in China months after being detained*, GLOBE & MAIL (May 17, 2019), <https://tgam.ca/2Kn0yj1> [<https://perma.cc/7QEN-T9E9>] (archived Oct. 25, 2019).

364. See Samantha Pearlman, *Human Rights Violations at Guantánamo Bay: How the United States Has Avoided Enforcement of International Norms*, 38 SEATTLE U. L. REV. 1109, 1109 (2015) (asserting that the United States' Guantánamo Bay is "globally known for the human rights violations committed there").

365. See Erika L. Glenn, *Violence at Rikers Island Lands NYC Right in Court*, AM. BAR ASS'N (Jan. 12, 2015), <http://bit.ly/2IFOhEQ> [<https://perma.cc/468N-5LCW>] (archived Oct. 25, 2019) (reporting that "an infectious cycle of violence" was inflicted upon teenage detainees at Rikers Island).

366. Cf. *China Focus: China Issues Report on U.S. Human Rights Situation*, XINHUA (Mar. 14, 2019), http://www.xinhuanet.com/english/2019-03/14/c_137894687.htm [<https://perma.cc/8N7D-BEPP>] (archived Oct. 25, 2019) ("China's report said the U.S. government, a self-styled 'human rights defender,' has a human rights record which is flawed and lackluster, and the double standards of human rights it pursues are obvious.").

367. *Compare Country Reports on Human Rights Practices for 2018, China (Includes Tibet, Hong Kong, and Macau)*, U.S. DEP'T OF STATE (March 2019), <http://bit.ly/2PinnUA> [<https://perma.cc/6XV6-JCXV>] (archived Oct. 25, 2019) (reporting a litany of human rights violations, such as "arbitrary or unlawful killings by the government"; forced disappearances by the government"; "torture by the government"; and "arbitrary detention by the government"), with *Human Rights Record of the United States in 2018*, PRC INFO. OFF. OF THE STATE COUNCIL (Mar. 14, 2019), <http://bit.ly/2XhYxXY> [<https://perma.cc/8G9E-NSVM>] (archived Oct. 25, 2019) ("[I]t will not be difficult to find that the United States government, a self-styled 'human rights defender,' has a human rights record which is flawed and lackluster, and the double standards of human rights it pursues are obvious.").

368. See Donald Clarke, *Whataboutism: Valid and Invalid Forms*, CHINA COLLECTION (Feb. 5, 2018), <https://thechinacollection.org/whataboutism-valid-invalid-forms/> [<https://perma.cc/KD47-6EPR>] (archived June 20, 2019).

arbitrary deprivation of liberty of approximately a million people is of a magnitude that deserves extreme condemnation.

Other less facially egregious violations further support the case that China is defeating the object and purpose of the ICCPR and doing so in a manner that is creating greater distance between China's practices and the convention's aims.³⁶⁹ For example, a fusing of party and state disciplinary processes may look at first glance like a mundane bureaucratic maneuver, but China's decision in 2018 to do just that has further codified repressive practices. The party has always had a separate system for disciplining members.³⁷⁰ In 2018, however, a constitutional amendment created a "super-sized anti-corruption body called the National Supervision Commission" that makes the new body "ultimately accountable only to the CCP."³⁷¹ This commission has the power to hold people under a system of *liuzhi* (retention in custody) for up to six months, during which time people have no access to lawyers or courts.³⁷² The legalization of *liuzhi* continues the trend described in 2017 by Sarah Biddulph, Elisa Nesossi, and Susan Trevaskes of "innovations designed to support the current Party leadership's agendas."³⁷³ Rather than fortifying rights, the entwining of party and state structures is moving China further away from the ICCPR.

Another example of China distancing itself from the ICCPR's core guarantees is the right to "freedom of expression [including] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers."³⁷⁴ The PRC Constitution provides for freedom of speech, but Rogier Creemers explains that "in practice, speech in China can be very costly. Few legal norms protect expression against state intervention."³⁷⁵ Pervasive censorship led Freedom House to

369. 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 MOD. CHINA 447 (2016).

370. See *id.*

371. Jamie P. Horsley, *What's So Controversial About China's New Anti-Corruption Body?*, DIPLOMAT (May 30, 2019), <https://thediplomat.com/2018/05/whats-so-controversial-about-chinas-new-anti-corruption-body/> [<https://perma.cc/EYS8-9XEZ>] (archived June 20, 2019). See generally Flora Sapio, *The National Supervision Commission: A History of Power Limitations and Untapped Possibilities* (Apr. 27, 2019), <https://ssrn.com/abstract=3427836> [<https://perma.cc/6APS-TUC3>] (archived Oct. 25, 2019) (explaining creation and powers of the National Supervision Commission).

372. See Laney Zhang, *China: Supervision Law Enacted Establishing a New State Supervisory Organ*, LIBRARY OF CONG. (July 9, 2018), <http://www.loc.gov/law/foreign-news/article/china-supervision-law-enacted-establishing-a-new-state-supervisory-organ/> [<https://perma.cc/BJ9C-T4KZ>] (archived June 20, 2019) ("The Law grants supervision commissions the power of retention in custody (*liu zhi*) in investigating serious corruption cases." Retention cannot exceed three months, but may be extended by another three months).

373. Biddulph et al., *supra* note 338, at 64.

374. ICCPR, U.N. Treaty Collection Page, *supra* note 2, at art. 19(2).

375. Rogier Creemers, *The Privilege of Speech and New Media: Conceptualizing China's Communications Law in the Internet Era*, in THE INTERNET, SOCIAL MEDIA AND

conclude in 2018 that “China was the world’s worst abuser of internet freedom . . . for the fourth consecutive year,” and that the level of internet freedom declined compared with previous years.³⁷⁶ In July 2019, a Chinese journalist told *The New York Times*, “The space for free speech has become so limited It’s now dangerous to say you are an independent journalist.”³⁷⁷ Censorship goes beyond removing content to tracking carefully who is posting what content.³⁷⁸ Quite simply, the Chinese leadership decides what information people within China’s borders receive and impart. They have nailed proverbial Jell-O to the wall.³⁷⁹

The chill in academia has also deepened. In March 2019, constitutional law professor Xu Zhangrun was banned from teaching and put under investigation for writing essays critical of Xi Jinping.³⁸⁰ Taisu Zhang commented in May 2019 on this tightening space: “Since 2015, Chinese scholars, students, and public intellectuals have faced escalating levels of governmental control, intimidation, and occasional persecution. Academic freedom is arguably at its lowest point since the early 1980s.”³⁸¹

In light of the restrictions on even relatively arcane academic criticism of the leadership, it is not surprising that there are severe restrictions on the right to “take part in the conduct of public affairs, directly or through freely chosen representatives.”³⁸² The party’s lock

A CHANGING CHINA (Jacques deLisle et al. eds., 2016).

376. *Freedom on the Net 2018: China*, *supra* note 135 (in June 2019, additional newspapers were added to the growing list of blocked websites); *see also* Gerry Shih, *China Adds Washington Post, Guardian to ‘Great Firewall’ Blacklist*, WASH. POST (June 8, 2019), https://www.washingtonpost.com/world/china-adds-washington-post-guardian-to-great-firewall-blacklist/2019/06/08/5ae4fb76-8a56-11e9-b1a8-716c9f3332ce_story.html [<https://perma.cc/Y84Q-58FD>] (archived June 12, 2019) (“[T]he trend since 2013 has shown more and more foreign websites being irrevocably added to China’s blacklist.”).

377. Hernández, *supra* note 138.

378. *See, e.g.*, McDonell, *supra* note 342 (reactivation of WeChat account suspended for “spreading malicious rumors” after posting photos of vigil commemorating June 4, 1989 required faceprint and voiceprint).

379. *See Clinton’s Words on China: Trade is the Smart Thing*, N.Y. TIMES (Mar. 9, 2000), <https://www.nytimes.com/2000/03/09/world/clinton-s-words-on-china-trade-is-the-smart-thing.html> [<https://perma.cc/2K7B-BSMM>] (archived June 12, 2019) (quoting then President Bill Clinton: “Now there’s no question China has been trying to crack down on the Internet. Good luck! That’s sort of like trying to nail Jell-O to the wall.”).

380. *See What Does the Punishment of a Prominent Intellectual Mean for Intellectual Freedom in China?*, CHINA FILE (Mar. 28, 2019), <http://www.chinafile.com/conversation/what-does-punishment-of-prominent-scholar-mean-intellectual-freedom-china> [<https://perma.cc/T8FR-5MLQ>] (archived June 11, 2019). For translations of Xu’s work, *see Xu Zhangrun Archive*, CHINA HERITAGE, <http://chinaheritage.net/xu-zhangrun-%E8%A8%B1%E7%AB%A0%E6%BD%A4/> (last visited Nov. 10, 2019) [<https://perma.cc/W5HW-92BJ>] (archived June 12, 2019).

381. Taisu Zhang, *This Year, I Couldn’t Avoid May Fourth*, CHINA FILE (May 8, 2019), <http://www.chinafile.com/reporting-opinion/viewpoint/year-i-couldnt-avoid-may-fourth> [<https://perma.cc/X23D-G2CL>] (archived June 11, 2019).

382. ICCPR, U.N. Treaty Collection Page, *supra* note 2, at art. 25.

on power has only become tighter and even the previously limited space for local elections has contracted.³⁸³ Since Mao Zedong, the party has justified its rule based on the “People’s democratic dictatorship,” meaning the people’s interests are represented despite the lack of a direct electoral mechanism.³⁸⁴ The current leadership has emphasized this claim: People’s Daily stated in March 2018 that only the party can fully promote democracy.³⁸⁵

Not only is the right to take part in the conduct of public affairs curtailed, so is the right to take part in civil society organizations. The ICCPR provides a right to “freedom of association.”³⁸⁶ yet the repression of student Marxist groups, as Mary Gallagher explains, “is part of a broader crackdown on labour activists, lawyers and feminists who have all tried to build more sustained movements for social change. . . . The party is more concerned with their ability to organise than with the substantive issues.”³⁸⁷ Zheng Churan—the wife of detained labor activist Wei Zhili and herself a formerly detained women’s-rights activist—is running ten thousand kilometers to draw attention to her husband’s plight.³⁸⁸ Wei, the editor of a prolabor website, is reportedly being investigated for the criminal charge of “picking quarrels and provoking trouble,” the same charge that Zheng faced in 2015.³⁸⁹

The “right of peaceful assembly”³⁹⁰ was tightly constrained prior to Xi Jinping’s rise. Kam C. Wong wrote in 2006 that “the PRC Assembly Law makes clear that police officers should be concerned

383. See Monica Martinez-Bravo et al., *The Rise and Fall of Local Elections in China: Theory and Empirical Evidence on the Autocrat’s Trade-off* (Nat’l Bureau of Econ. Research, Working Paper No. 24032, 2017); see also *Freedom in the World 2019*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2019> (last visited Nov. 10, 2019) [<https://perma.cc/MUM3-RYL4>] (archived Aug. 18, 2019) (“[The Party] seeks to monopolize all forms of political organization and does not permit any meaningful political competition.”).

384. Mao Zedong, Address in Commemoration of the Twenty-Eighth Anniversary of the Communist Party of China: On the People’s Democratic Dictatorship (June 30, 1949).

385. 轩理 (pseudonym), 保证党和国家长治久安的重大制度安排, 人民日报 (Mar. 1, 2018), <http://politics.people.com.cn/n1/2018/0301/c1001-29840344.html> [<https://perma.cc/U5H9-UGYX>] (archived June 20, 2019).

386. ICCPR, U.N. Treaty Collection Page, *supra* note 2, at art. 22(1).

387. Yuan Yang, *Inside China’s Crackdown on Young Marxists*, FIN. TIMES (Feb. 13, 2019), <https://www.ft.com/content/fd087484-2f23-11e9-8744-e7016697f225> [<https://perma.cc/24SQ-NVLP>] (archived Nov. 11, 2019).

388. Nishita Jha & Chermaine Lee, *This Woman is Running to Save the Love of Her Life*, BUZZFEED NEWS (June 7, 2019), <https://www.buzzfeednews.com/article/nishitajha/zheng-churan-feminist-five-china-running> [<https://perma.cc/87VU-ETXQ>] (archived June 20, 2019); see also @allisonrabbit, TWITTER, <https://twitter.com/allisonrabbit> (last visited Nov. 10, 2019) [<https://perma.cc/2D72-P5B2>] (archived Nov. 10, 2019) (journaling her #racetofreeweizhili).

389. See Jha & Lee, *supra* note 388.

390. ICCPR, U.N. Treaty Collection Page, *supra* note 2, at art. 21.

with state security and social stability over and above the citizens' right of assembly."³⁹¹ Today, the concern for stability above all remains, but the police now have the technology to match it. The New York Times explains that "the police across China gather material from tens of millions of cameras, and billions of records of travel, internet use and business activities, to keep tabs on citizens."³⁹² Efforts to gather people for a public demonstration are hence first stymied by challenges to coordinating a meeting place and time.³⁹³ If a non-officially-sanctioned demonstration is formed, then it faces the risk of being immediately quelled. Didi Kirsten Tatlow described a small gathering in support of women's rights on March 6, 2017—two days before International Women's Day in an effort to evade official censure: "[D]espite the deliberately low-nature of the event, . . . security guards repeatedly chased them away, saying that banners were not permitted in the park and that their dress [of the gowns worn by female students when the Day was first marked in China in 1924] was 'strange[']."³⁹⁴

In sum, evaluating China's performance under the essential elements test and Jonas and Saunders' proposed "facilitation test" not only produces a litany of articles in the ICCPR that China has transgressed, it further demonstrates that China is moving away from compliance.³⁹⁵ Or, as put by a Chinese lawyer with whom this author spoke in June 2019, instead of "*jie gui*" (接轨) (literally "connecting the rails" but figuratively used for "integration"), China is diverging from international human rights norms.³⁹⁶ In his June 4, 2019, testimony to the Congressional-Executive Commission on China, Carl Minzner warned of this retrograde motion: "[T]he decision that Party leaders took [in 1989] continues to reverberate and amplify today. And it is now dragging the country backwards out of the reform era, raising the

391. Kam C. Wong, *Law of Assembly in the People's Republic of China*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 155, 169 (2006).

392. Paul Mozur, Jonah M. Kessel & Melissa Chan, *Made in China, Exported to the World: The Surveillance State*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/technology/ecuador-surveillance-cameras-police-government.html> [<https://perma.cc/9QFM-QFBA>] (archived June 12, 2019).

393. See Gerry Shih, *Liu Xiaobo Supporters Mark His Death amid Concerns for Widow*, AP NEWS (July 19, 2017), <https://www.apnews.com/2f7b967359d0462f85914314d88fe221> [<https://perma.cc/7NCS-5FWP>] (archived Oct. 26, 2019) (reporting on the difficulties of commemorating Liu Xiaobo, resulting in arrest of individual responsible for staging muted protest).

394. Didi Kirsten Tatlow, *Postcard From China: Secret Video of a Women's Rights Demonstration*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/insider/postcard-from-china-secret-video-of-a-womens-rights-demonstration.html> [<https://perma.cc/W7FH-247M>] (archived Aug. 5, 2019).

395. Cf. Jonas & Saunders, *supra* note 18, at 603.

396. Further identifying information omitted to preserve the speaker's anonymity.

risk that China will relive even yet more tragic periods of its own history.”³⁹⁷

3. The Impossible Performance Test

As noted in Part III, measures other than the essential elements test and facilitation test are an awkward fit for human rights treaties.³⁹⁸ Regarding the “impossible performance test,”³⁹⁹ given the Party’s thus-far unshakeable premise that its dominance is not subject to question, it is impossible that people could freely choose their representatives under the current party-state structure.⁴⁰⁰ There would need to be a fundamental shift in party doctrine and practice. Nonetheless, the civil and political rights that China is currently denying its citizens could, and hopefully will, someday take hold. In that respect, China’s future performance of the ICCPR remains possible. And, even if China never respects the rights in the ICCPR, performance is not only possible in other countries but is already occurring.⁴⁰¹ Subsequent performance of the ICCPR can continue, just perhaps not in China.

The analysis is more complicated, however, when viewed from the Human Rights Committee’s emphasis on the ICCPR’s rights belonging to the people:

The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.⁴⁰²

397. Carl Minzner, *Congressional Testimony, Tiananmen at 30: Examining the Evolution of Repression in China*, CONG.-EXEC. COMM’N ON CHINA 3 (June 4, 2019), <https://www.cecc.gov/events/hearings/tiananmen-at-30-examining-the-evolution-of-repression-in-china> [<https://perma.cc/XZ8F-PJQU>] (archived June 20, 2019).

398. See *supra* Part III.

399. See Charme, *supra* note 193, at 101–02 (“[T]here is a distinction between actions that render *meaningless* subsequent performance of the treaty, and actions that render *impossible* subsequent performance.”).

400. See *China’s Party System is Great Contribution to Political Civilization: Xi*, XINHUA (Mar. 5, 2018), http://www.xinhuanet.com/english/2018-03/05/c_137015955.htm [<https://perma.cc/VQG8-QF9X>] (archived Jan. 20, 2020) (Xi asserted that China’s system “pools ideas and suggestions through institutional, procedural, and standardized arrangements and develops a scientific and democratic decision making mechanism.”).

401. See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009) (documenting examples where ratification of human rights treaties, including the ICCPR, have led to improved human rights practices).

402. General Comment 26, *supra* note 272, ¶ 4.

The phrase “once the people are accorded the protection of the rights under the Covenant” suggests that at least ratification must occur.⁴⁰³ But what about before ratification? If the ICCPR’s rights devolved fully to the people upon signature alone, then the owners of the treaty would be the people at that moment, as compared with devolution occurring at the later point of ratification. In this case, the *state* (through the formal government structure) would presumably not be permitted to make “its intention clear not to become a party”⁴⁰⁴ because the owners of the treaty would already be the people. This would, however, create a modification to the general rule of Article 18 of the Vienna Convention that is not stated in the ICCPR’s text or interpretations by UN bodies. Stripping states of the ability to unsign would further undermine the goal of domestic debate prior to cementing a state’s commitment.⁴⁰⁵

On the opposite end of the spectrum, it could be that none of the protections in the ICCPR—other than those applicable independently as peremptory norms⁴⁰⁶—devolve to the people prior to ratification.⁴⁰⁷ This approach would focus solely on the benchmark of ratification at which point the ICCPR’s rights would spring fully formed to protect the people as an armored Athena from Zeus’s head. During the interim period, in contrast, the people within the state would have no claim that the ICCPR’s rights applied to them.

Regardless of what the Human Rights Committee would say if in the future it spoke directly to the meaning of the interim obligation, this inquiry is important today because it shifts the conversation to asking to whom the interim obligation is owed. Just as the interim obligation demands some minimal level of adherence to a treaty’s object and purpose albeit one far short of total compliance, perhaps for the ICCPR at least some minimal level of devolution occurs during the interim period. If the rights therein begin the process of residing in the people themselves upon signature, then the transition from signing to ratification would not be an on-and-off light switch but rather a dimmer. Indeed, in his commentary on the Vienna Convention’s interim obligation, Oliver Dörr reasons, “If the treaty in question entails subjective rights for individuals . . . (e.g. human rights treaties),

403. See Xue & Jin, *supra* note 186, at 305, 309 (There is a further issue of the steps China would need to take to incorporate the ICCPR’s provisions into domestic law. The PRC Constitution does not stipulate either a monistic or dualistic approach, but “international conventions on human rights do not have direct legal force in domestic law.”).

404. See Vienna Convention, *supra* note 19, at art. 18.

405. See *supra* notes 181–187 and accompanying text.

406. Cf. *supra* note 285.

407. In other words, one possible reading of the language in General Comment 26, *supra* note 272, ¶ 4, that “once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them” is that ratification is required to accord people any of the ICCPR’s protections.

it would seem natural that those individuals could also demand compliance with the interim obligation in respect of their rights.”⁴⁰⁸

If China’s interim obligation is understood as according the people currently living therein a claim to the minimal protection that their government not defeat the object and purpose of the ICCPR, then the impossibility of two decades of retroactive performance is apparent. Regardless of future improvements in China’s domestic human rights environment, it cannot fully remedy the violations that have already occurred to individuals who have lived or are currently living there.⁴⁰⁹

The possible impossibility of China’s future performance is seen with respect not just to individual lives but also to collections of people. Namely, there are concerns among scholars and activists that repression of ethnic and religious minorities could result in cultural genocide, or “ethnocide”⁴¹⁰ if cultural and ethnic practices are irremediably lost.⁴¹¹ Such extinction fits Edward Swaine’s explanation that “the interim obligation is more commonly understood to safeguard against acts that would disable the mere signatory (or others) from complying with the treaty once it entered into force—in an attempt to maintain, as relevant, the status quo ante.”⁴¹² If an ethnic or religious community is irrevocably altered, or even extinguished, today because of repressive practices, the chance to enhance that community’s civil and political rights at some point down the road will be lost. Elise Anderson—a scholar of Uighur music and other performing arts—explained in 2019,

408. Dörr, *supra* note 20, ¶ 32.

409. See Updated: *Li Wenzu Meets Husband Wang Quanzhang in Prison*, CHINA AID (June 28, 2019), <https://www.chinaaid.org/2019/06/li-wenzu-meets-husband-wang-quanzhang.html> [<https://perma.cc/EZS4-XLJP>] (archived Oct. 26, 2019). The account of jailed lawyer Wang Quanzhang’s wife of her first visit in over four years exemplifies that the absence of the rights in the ICCPR has real, daily impacts on people during the period between signing and ratification. “Quanzhang looked more devastated, avoiding my eyes, lowering his chin, and murmuring repeatedly, “I am fine! I am fine! The prison is good to me!” *Id.*

410. See Peggy McInerny, *China’s Xinjiang Province: Assimilationist policies turn coercive on a mass scale*, UCLA INT’L INST. (Jan. 22, 2019), <https://www.international.ucla.edu/Institute/article/199647> [<https://perma.cc/LL8J-4FEV>] (archived Oct. 26, 2019) (Georgetown University Professor of Qing and Inner Asian history James Millward said: “It’s really a campaign of cultural genocide [or ‘ethnocide,’ as another scholar interjected]: they are trying to change the nature of people’s ethnicity to make them more pliable and Chinese.”).

411. See Lukunka Barbra, *Ethnocide*, SCIENCESPO (Nov. 3, 2007), <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/ethnocide> [<https://perma.cc/2ZQ6-RCKM>] (archived Oct. 26, 2019) (“[*E*]thnocide refers to extermination of culture and not necessary extermination of people.” It can also mean the “physical, biological, and cultural dimensions of ‘genocide.’”).

412. Swaine, *supra* note 26, at 2078; see also Bradley, *supra* note 225, at 214–15 (interim obligation as ensuring parties do “not change the status quo in a way that substantially reduces either its ability to comply with its treaty obligations after ratification or the ability of the other treaty parties to obtain the benefit of the treaty.”).

“My dissertation is about a space that no longer exists.” Public performance events have dropped significantly in number over the past several years, and prominent Uighur singers are beginning to produce songs and writings, some in Mandarin, that overtly praise Xi Jinping . . . “I think they feel they have to do this.”⁴¹³

Reports are also surfacing of the removal of Muslim children from their families in a “campaign to systematically remove children from their roots.”⁴¹⁴

4. The Manifest Intent and Bad Faith Tests

Turning to the final two proposed tests, the “manifest intent” test asks whether a state’s actions “seem[] unwarranted and condemnable . . . regardless of actual proof of bad faith.”⁴¹⁵ The scope and magnitude of China’s squelching of civil and political rights has been condemned by UN bodies, NGOs, and a number of foreign governments.⁴¹⁶ But this “highly subjective” test⁴¹⁷ seems more like a summary of an analysis of a state’s conduct under the essential elements or facilitation test than a helpful, standalone measure. The “bad faith” test’s assessment whether a signatory state’s actions “are unwarranted or condemnable”⁴¹⁸ encapsulates a general appraisal of China’s practices but does not provide much guidance about what exactly should be part of that inquiry, including how to gauge whether a government made up of a varying mix of leaders over time is acting in good or bad faith.

At a minimum, none of the proposed tests lend themselves to supporting an argument that China has *not* violated the interim obligation. While a step-by-step analysis of China’s performance in light of proposed tests for the interim obligation builds the foundation for a legal argument, it also distracts from seeing the forest for the trees: China’s undermining of civil and political rights is so glaring, pervasive, and expansive that any claim it is sincerely working toward ratification fails on its face.

B. Politics

Even if a case can be made that, as a matter of international law, China has engaged in acts that defeat the object and purpose of the

413. Zhang, *supra* note 381.

414. John Sudworth, *China Muslims: Xinjiang Schools Used to Separate Children From Families*, BRIT. BROAD. CORP. (July 4, 2019), <https://www.bbc.com/news/world-asia-china-48825090> [<https://perma.cc/9EFQ-X6Z5>] (archived Aug. 7, 2019).

415. Jonas & Saunders, *supra* note 18, at 602 (citing Klabbers, *supra* note 34, at 330).

416. *Id.*

417. *Id.* at 603.

418. *Id.* at 602.

ICCPR, it does not necessarily mean that states should, as a matter of politics, recommend unsigning. This Part explains why states should mobilize the interim obligation to confront China with its obligations under the ICCPR.⁴¹⁹ This is a complicated, multifaceted inquiry for which many a “Yes, but . . .” can be raised. Nevertheless, this Article contends that, in light of accelerating concerns about China’s domestic and international positions towards civil and political rights, the potential upsides of a call for unsigning outweigh the possible downsides.

As an initial point, there is an important expressive function to invoking the interim obligation whether China rejects that recommendation or unexpectedly agrees with it. Calling for unsigning would place China in the position of being in the spotlight to respond how it is *not* defeating the object and purpose of the ICCPR. There is nothing to stop China from repeating its routine line that it is working towards ratification, but a reframing of other states’ messaging from the current “please ratify the ICCPR” to “please remove yourself from the ICCPR” would, at a minimum, refresh the stale debate that has persisted for over two decades.⁴²⁰ In addition, such public pressing of China to be forthright about its growing divergence from the ICCPR’s norms would send messages to the Chinese Party-state, pro-human rights groups within China, and the international community.⁴²¹

First, jettisoning the staid encouragement that China should ratify the ICCPR in favor of a stern, and iconoclastic, rebuke would make plain the growing alarm over human rights abuses. Such blunt criticism of China’s “hypocritical compliance”⁴²² with the international human rights regime would be a marked escalation in the standard naming-and-shaming tactics.⁴²³

There are many domestic and international forces that can influence the direction of a country’s human rights practices. The polite rebukes issued during the first three UPRs have not brought China closer to adherence with the ICCPR, though perhaps one could argue

419. JEFF HANDMAKER & KARIN ARTS, *Taking Seriously the Politics of International Law: A Few Concluding Remarks*, in MOBILISING INTERNATIONAL LAW FOR ‘GLOBAL JUSTICE’ 234 (Cambridge Univ. Press 2019) (describing legal mobilization in part as instrumentalizing law “to confront states . . . with their obligations under international law.”).

420. Cf. Eva Pils, *Human Rights and the Political System*, in HANDBOOK ON HUMAN RIGHTS IN CHINA, *supra* note 127, at 32, 53 (arguing for the “re-politicization” of human rights “to address the changed circumstances of global human rights advocacy more actively and creatively at a point in time when polities across the globe seem ready to revert to a crude and outdated notion of national sovereignty.”).

421. See Lewis, *supra* note 3.

422. Nathan, *supra* note 37, at 176.

423. Cf. Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689, 689 (2008); Phillip R. Trimble, *Human Rights and Foreign Policy*, 46 ST. LOUIS U. L.J. 465, 466 (2002) (discussing “shaming”).

that the regression in rights would have been even worse but for those rebukes because the PRC leadership cares what the world thinks.⁴²⁴ In the context of the UN Security Council, for example, Courtney Fung argues for the importance of status, specifically that recognition from other states plays into China's decisions whether to support intervention.⁴²⁵ In the context of the ICCPR, it is speculative whether civil and political rights in China would have eroded even further in the absence of international calls for ratification. Furthermore, acceptance by other states of China's "be patient, we're working on it" refrain itself has given China status: the decorum of the UPR in Geneva provides a gloss on the realities of what is occurring within China.

Stepping up pressure by calling on China to extract itself entirely from the ICCPR is admittedly unlikely to change the party-state's practices. Nonetheless, it is worth exploring this more assertive stance because there are indications that countries seek to avoid "losing face" in connection with the UPR process.⁴²⁶ A refusal by other states to be placated by hollow assurances of preparation for ICCPR ratification would be a jolt to China. This matters because the official media surrounding China's recent UPR indicates the party-state's desire to portray the process as an affirmation of China's human rights successes—a China Daily headline the day after the conclusion of the UPR in March 2019 heralded "Human rights work gets UN stamp of approval" alongside a photo of smiling women at a Xinjiang harvest festival wearing colorful ethnic garb.⁴²⁷ It would at least be harder for China to propagandize the UPR process and claim a "stamp of approval" if there was a collective voice calling for unsigning.

That said, given the tight media control, it is expected that any action would be construed in a light most favorable to the party-

424. See Courtney J. Fung, *Is China's Influence at the United Nations All It's Cracked Up to Be?*, WASH. POST (Oct. 7, 2019), <https://www.washingtonpost.com/politics/2019/10/07/is-chinas-influence-united-nations-all-that-its-cracked-up-be/> [<https://perma.cc/X2AB-33LB>] (archived Oct. 13, 2019) ("China is motivated by a variety of interests, including maximizing status recognition from *both* great powers and the global south.").

425. See *generally* COURTNEY J. FUNG, CHINA AND INTERVENTION AT THE UN SECURITY COUNCIL (2019).

426. See, e.g., Valentina Carraro, *The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?* 39 HUM. RTS. Q. 943 (2017) ("[T]he political element of the mechanism helps to increase the willingness of states to seriously commit to the review in order to avoid 'losing face' with political allies.").

427. Sun Meng, *Human Rights Work Gets U.N. Stamp of Approval*, CHINA DAILY (Mar. 16, 2019), <http://www.chinadaily.com.cn/a/201903/16/WS5c8c4bf6a3106c65c34ee f23.html> [<https://perma.cc/XA3K-9UH3>] (archived Oct. 26, 2019). Cf. Jerome A. Cohen, *China's Xinjiang Propaganda*, JEROMECOHEN.NET (Mar. 18, 2019), <http://www.jeromecohen.net/jerrys-blog/2019/3/18/chinas-xinjiang-propaganda> [<https://perma.cc/KN3P-KNMW>] (archived Oct. 26, 2019).

state.⁴²⁸ If a group of states actually called for unsigning, the state media could frame it as evidence of hostile Western forces that are seeking to exclude China from its seat at the international table.⁴²⁹ Moreover, given the praise for China at the UPR by friendly governments—based on economic and/or ideological ties⁴³⁰—there will remain examples of vocal support on which the state media can draw. In July 2019, for example, thirty-seven countries issued a joint letter in support of China following the letter by twenty-two countries criticizing human rights abuses in Xinjiang.⁴³¹ Consequently, how a call for unsigning would be portrayed by the PRC leadership should not be a significant factor: the international community cannot win.

Where the decision whether to call for unsigning becomes more complicated is with respect to audiences in China who support ICCPR ratification and who can obtain news outside the state media. China's signing of the ICCPR in 1998 was a victory for human rights advocates and served as a symbolic tool to justify calls for reform.⁴³² This recalls strategic use of the Helsinki Accords by reformers in the former Eastern bloc.⁴³³ Further, Sida Liu, Ching-Fang Hsu, and Terence Halliday have shown how the party-state's discussion of law-based governance "is evoked as a discursive instrument to legitimize lawyers' fight against the authoritarian state."⁴³⁴

With respect to the ICCPR, however, whatever hope and protected space China's signature provided for reform advocacy has faded in recent years. Law-based governance is an official part of the party's

428. Cf. Meng, *supra* note 427.

429. Cf. *Document Nine: A ChinaFile Translation*, CHINA FILE (Nov. 8, 2013), <http://www.chinafile.com/document-9-chinafile-translation> [https://perma.cc/Y9D5-LX57] (archived Aug. 18, 2019) (Party-issued document that warns against critics whose "goal is to use Western constitutional democracy to undermine the Party's leadership, abolish the People's Democracy . . . and bring about a change of allegiance by bringing Western political systems to China.").

430. See, e.g., Zhao Shukun, *UN Praises China's Progress in Human Rights*, CHINA DAILY (Mar. 21, 2019), <http://www.chinadaily.com.cn/a/201903/21/WS5c92d755a3104842260b1b1a.html> [https://perma.cc/W7TZ-5VCL] (archived June 12, 2019) ("[T]he Mauritius representative praised China's inclusive development, and the Nepal representative complimented China for adhering to interactive contact in developing human rights.").

431. *37 Countries Rally Around China at Top UN Human Rights Body*, ASSOCIATED PRESS (July 12, 2019), <https://www.apnews.com/a2584de07c014e4786a21bcf9f446a40> [https://perma.cc/T9AD-78RV] (archived Aug. 6, 2019).

432. See, e.g., Zeldin, *supra* note 88.

433. See generally DANIEL C. THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM* (2001) (contending that the Helsinki Final Act directly contributed to the demise of communism in the former Eastern bloc).

434. Sida Liu et al., *Law as a Sword, Law as a Shield: Politically Liberal Lawyers and the Rule of Law in China*, 1 CHINA PERSPECTIVES 65, 65 (2019).

platform, even if more pomp than reality.⁴³⁵ This at least gives lawyers empowering language that is currently being touted by the party-state. In contrast, China's official rhetoric now unabashedly prioritizes economic development over civil and political rights.⁴³⁶ Aside from the rote statements at the United Nations regarding ongoing preparations, the ICCPR has all but fallen out of the party-state's vocabulary. A December 2018 PRC white paper on "Progress in Human Rights over the 40 Years of Reform and Opening Up in China" does not mention the ICCPR and includes only a short section titled, "The legal norms guaranteeing civil and political rights have been improved."⁴³⁷ Likewise, a September 2019 PRC white paper titled "Seeking Happiness for People: 70 Years of Progress on Human Rights in China" does not mention the ICCPR.⁴³⁸

This assessment that the ICCPR has lost its force as a discursive instrument is not based on a systematic investigation of the views of people within China who have supported a strengthening of civil and political rights. Nor does this author claim to speak for them. An effort to gain a better understanding of these internal audiences' views, though difficult in the current political climate, would be helpful in this analysis. Yet it was telling that, when asked in casual conversations in 2019 about the prospects for and importance of ICCPR ratification, a Chinese law professor remarked that ratification does not necessarily mean better human rights practices nor is ICCPR ratification necessary for improving those practices.⁴³⁹

Today, innovative rights advocacy is still being carried out under the radar in China, such as by "feminist activists [who] have cultivated a networked community numbering into the thousands, revolving around university students and graduates."⁴⁴⁰ This diffuse approach is markedly different from prior direct appeals to the PRC leadership that it should adhere to international human rights norms.⁴⁴¹ Besides, lawyers and academics in China who disagree with this proposal could

435. *See id.* (discussing the March 2018 announcement of the Party's intent to establish a "Committee on Comprehensive Law-Based Governance").

436. *See Seeking Happiness for People*, *supra* note 28 ("The right to subsistence and development are the primary rights.").

437. ST. COUNCIL INFO. OFF., *supra* note 38, at 28.

438. *See generally Seeking Happiness for People*, *supra* note 28.

439. Further identifying information omitted to preserve the speaker's anonymity.

440. Leta Hong Fincher, *China's Women's Movement Has Not Only Survived an Intense Crackdown, It's Grown*, *GUARDIAN* (Mar. 7, 2019), <https://www.theguardian.com/world/commentisfree/2019/mar/07/chinas-womens-movement-has-not-only-survived-an-intense-crackdown-its-grown> [<https://perma.cc/G4ZL-8X4D>] (archived Aug. 6, 2019).

441. *Compare supra* notes 78, 91 (on domestic debate regarding human rights and ICCPR ratification in the 1990s and 2000s), *with* SARAH BIDDULPH & JOSHUA ROSENZWEIG, *Introduction*, in *HANDBOOK ON HUMAN RIGHTS IN CHINA*, *supra* note 127, at 1, 4 (explaining that because of the "serious political challenge" they pose to the current Party-state structure, "the main advocates of a human-rights-centered political-

speak out against it—though those, if any, who agree might have to be more cautious with their support given that an endorsement of this Article’s proposal would contradict the expected official response. The process of stirring up debate over the value of the ICCPR in China today would in itself be preferable to the official repetition of preparation without any stated benchmarks or timeline.

If the international community pursues the approach recommended herein, careful messaging will be necessary such that a call for unsigning not be seen as an abandonment of hopes for improved civil and political rights in China. Much has been written about possible “decoupling” of the United States and China in the high-tech industry.⁴⁴² Similarly, the international community’s rebuke of the party-state’s retrograde motion on human rights should be accompanied by clear support for people in China who look to the ICCPR for inspiration. U.S. Secretary of State Michael Pompeo’s statement on June 3, 2019, demonstrated such decoupling of leadership and people when he commended “ordinary Chinese citizens [who] continue to seek to exercise their human rights, organize independent unions, pursue justice through the legal system, and simply express their views.”⁴⁴³

As Jianying Zha wrote in her 2011 book *Tide Players* about life in China, “[i]n the face of cheerful indifference, jaded apathy, fearful compromise, cynical swagger, and pure evil, acts of noble courage and idealism—or just common decency—continue to rear their head and surge forward, sometimes when you least expect it.”⁴⁴⁴ These words ring all the more true today. For those people within China who put themselves at risk to stand up for civil and political rights, the least that those outside China can do is to hold on to a modicum of idealism and express support for that mission. Part of that support is making clear that the outside world does not take the leadership’s periodic statements of preparation towards ratification at face value.

Third, a public declaration that China has failed to fulfill even its minimal obligations as a signatory would affirm that the states making that declaration take seriously the rights the covenant proclaims. Even

legal structure in China have come under direct attack since the ascendance of Xi Jinping to power in 2012.”).

442. See, e.g., Samm Sacks, *Samm Sacks Testifies Before House Foreign Affairs Committee on ‘Smart Competition’ with China*, NEW AMERICA (May 10, 2019), <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/samm-sacks-testifies-house-foreign-affairs-committee-smart-competition-china/> [<https://perma.cc/UF8D-WLXW>] (archived June 12, 2019) (“Efforts to segregate or “decouple” the two systems will come at a steep cost to U.S. innovation and technological leadership.”).

443. Michael R. Pompeo, *Press Statement: On the Thirtieth Anniversary of Tiananmen* (June 3, 2019), <https://www.state.gov/on-the-30th-anniversary-of-tiananmen-square/> [<https://perma.cc/T23Q-622F>] (archived June 20, 2019).

444. JIANYING ZHA, *TIDE PLAYERS: THE MOVERS AND SHAKERS OF A RISING CHINA* 225 (New Press 2011).

those rights, like freedom of expression, for which some limitations are permitted, have aspects that are unalterable. The Human Rights Committee has stressed that the allowed restrictions “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.”⁴⁴⁵

A glimpse of cohesion in pushing back against China’s human rights record was seen in the March 2016 joint statement by twelve governments—including the United States, which at the time was a member of the Human Rights Council.⁴⁴⁶ The statement expressed “concern[] about China’s deteriorating human rights record.”⁴⁴⁷ Similarly, in June 2019, twenty-two countries (not including the United States) wrote a joint letter to the UN High Commissioner for Human Rights urging China to stop the mass detentions in Xinjiang.⁴⁴⁸ A collective call for China’s unsigning of the ICCPR would be an opportunity to reengage in concerted messaging as well as to declare that the contours of rights in the ICCPR are not so malleable as to be contrived into whatever shape fits a particular country’s idiosyncratic views.

Coordinated messaging is, of course, not costless. It takes time and political capital both to negotiate wording among states (even those who are “friendly” and share similar views of civil and political rights) and then to raise these issues with China. There are opportunity costs to using time during the UPR or other fora to make this argument when there are many pressing concerns, such as ongoing arbitrary detentions.⁴⁴⁹ One question then is how much more energy this Article’s approach would require as compared with repeated calls for ratification. And, even if organizing and voicing a multilateral response takes significant energy, that energy might be well spent because a critique rooted in the Vienna Convention to which China is a party provides a law-based platform for criticism.

Even if states that support a robust view of civil and political rights ultimately issue a call for unsigning, this Article is written with

445. U.N. Hum. Rts Comm., General Comment No. 34, General Comment on Issues Relating to the Freedoms of Opinion and Expression to the International Covenant on Civil and Political Rights, ¶ 23, CCPR/C/GC/34, Sept. 12, 2011; *see also* Lewis, *supra* note 3.

446. Michele Kelemen, *U.S. Pulls Out of U.N. Human Rights Council*, NAT’L PUB. RADIO (June 20, 2018), <https://n.pr/2IERwMJ> [<https://perma.cc/3WKN-AV2N>] (archived Oct. 26, 2019).

447. Keith Harper, *Joint Statement – Human Rights Situation in China*, MISSION U.S. GENEVA (Mar. 10, 2016), <https://geneva.usmission.gov/2016/03/10/item-2-joint-statement-human-rights-situation-in-china/> [<https://perma.cc/Z422-C8NV>] (archived June 20, 2019).

448. *See* Cumming-Bruce, *supra* note 22.

449. *See generally* *Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Fourth Session*, U.N. OFFICE HIGH COMM’R HUM. RTS. (May 29, 2019), https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGA_D_2019_15.pdf [<https://perma.cc/5BF7-ZJLM>] (archived Oct. 26, 2019).

the expectation that China would reject the proposal and frame it as an example of the politicization of the international human rights regime.⁴⁵⁰ The party-state leadership has become more brazen in its pushback when faced with foreign criticism, as seen in 2017 when Nobel Peace Prize recipient Liu Xiaobo died in custody.⁴⁵¹ He was serving an eleven-year sentence allegedly for subversion, though the international community widely criticized his conviction as criminalizing his peaceful expression of political opinions.⁴⁵² Following Liu's death, the chair of the Norwegian Nobel Committee recalled that Liu received the award "for his efforts to implement the fundamental human rights secured in international instruments as well as in the constitution of [China]."⁴⁵³ Liu's widow was finally permitted to leave in 2018 after years of extralegal house arrest.⁴⁵⁴

If, however, China did unsign the ICCPR, that would be a refreshing admission by the party-state of its intolerance for civil and political rights. In light of the PRC leadership's current assault on civil and political rights, making clear its intention not to become a party to the ICCPR would also be good for the rights therein. If and until the PRC leadership pivots in a rights-protecting direction, the international conceptions of civil and political rights would be better served by China remaining outside the ICCPR rather than enfeebling these rights via engagement in the ICCPR's interpretive and monitoring mechanisms.

One concern is that China's unsigning could lead to a mass exodus from the ICCPR. There are factors tempering this concern. The only other signatories who have not yet become parties to the treaty are Comoros, Cuba, Nauru, Palau, and St. Lucia.⁴⁵⁵ Even if all five of these quite-small signatories suddenly voiced their intention not to become parties, it hardly seems that the fabric of the ICCPR would unravel.

For the 172 states that are already parties,⁴⁵⁶ it is at least extremely difficult, and perhaps even impossible, to withdraw. The

450. Cf. *Chinese Official Urges Human Rights Council to Avoid Repeating Past Mistakes*, CHINA DAILY (Mar. 16, 2016), http://www.chinadaily.com.cn/world/2016-03/16/content_23885822.htm [<https://perma.cc/QYW6-TG9P>] (archived June 20, 2019).

451. See *Liu Xiaobo: China Rejects Foreign Criticism Over Dissident's Death*, BRIT. BROAD. CORP. (July 14, 2017), <https://www.bbc.com/news/world-asia-china-40603059> [<https://perma.cc/8KWK-FBY7>] (archived Oct. 26, 2019).

452. See, e.g., *Liu Xiaobo: China*, PEN AMERICA, <https://pen.org/advocacy-case/liu-xiaobo/> (last visited Nov. 10, 2019) [<https://perma.cc/VK3D-9KNG>] (archived Oct. 27, 2019).

453. Berit Reiss-Andersen, *Statement by Ms. Berit Reiss-Andersen, Chair of the Norwegian Nobel Committee*, NOBEL PRIZE (July 13, 2017), <https://www.nobelprize.org/prizes/peace/2010/statement/> [<https://perma.cc/7CHW-7B6Y>] (archived Oct. 27, 2019).

454. Jane Perlez, *Liu Xia, Detained Widow of Nobel Peace Laureate, Leaves China*, N.Y. TIMES, July 10, 2018, <https://nyti.ms/2ZjMivQ> [<https://perma.cc/VX9M-2B7X>] (archived Oct. 27, 2019).

455. See ICCPR, U.N. Treaty Collection Page, *supra* note 2.

456. *Id.*

Human Rights Committee determined that states cannot withdraw once they are parties to the ICCPR.⁴⁵⁷ The committee made this clear in its General Comment No. 26, which was issued in December 1997, shortly after the Democratic People's Republic of Korea (North Korea) was rebuffed when it attempted to renounce the ICCPR.⁴⁵⁸ The committee's views are not legally binding, and there is debate about their significance.⁴⁵⁹ Nevertheless, "at a minimum, good faith interpretation of the Covenant . . . obliges state parties to duly consider the content of General Comments, as they are the product of a body established by state parties to interpret the Covenant, as well as to monitor and promote compliance with it."⁴⁶⁰

While under the Human Rights Committee's view a party cannot withdraw from the ICCPR, the UN Secretary General has taken the position that withdrawal is possible but exceedingly difficult. When North Korea sent notice of its withdrawal, the UN Secretary General issued an opinion that "a withdrawal from the Covenant would not appear possible unless all States Parties to the Covenant agree with such a withdrawal."⁴⁶¹ North Korea failed to obtain unanimous consent.⁴⁶² In 2000, it submitted its periodic report under the ICCPR and, in 2001, participated in the review process, indicating that even this state that is not known for its adherence to international norms accepted the General Secretary's conclusion.⁴⁶³

The UN Treaty Collection notes no formal requests for withdrawal other than North Korea's attempt in 1997.⁴⁶⁴ The Netherlands reportedly considered withdrawal as well.⁴⁶⁵ Perhaps other countries have contemplated this approach, but the quiescence since North Korea's failed attempt indicates that other states have not openly pushed back on the restrictive view taken by the Human Rights Committee and Secretary General.

457. General Comment 26, *supra* note 272, at 2.

458. See Michael P. Scharf & Patrick Dowd, *No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and Other Human Rights Courts*, 9 CHI. J. INT'L L. 573, 607–09 (2009); Bates, *supra* note 270, at 754–55 (a party to the ICCPR since 1981, the move to withdraw was "in response to the resolution of a UN sub-commission criticizing its human rights practices.").

459. See HELEN KELLER & GEIR ULFSTEIN, UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 128–29 (2012).

460. *Id.* at 129 (citing interview with Eckart Klein).

461. ICCPR, U.N. Treaty Collection Page, *supra* note 2 (citing art. 54 of the Vienna Convention).

462. See Bates, *supra* note 270, at 755 ("At least one State, Denmark, sent a notification to the Secretary General agreeing with his understanding of Article 54 VCLT and stating that it did not consent to the [North Korea's] withdrawal.").

463. *Id.* at 755–56.

464. See ICCPR, U.N. Treaty Collection Page, *supra* note 2.

465. See Elizabeth Evatt, *Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence*, 5 AUST'L J. HUM. RTS. 215, 218 (1999) (noting that "The Netherlands had considered denunciation of the ICCPR after two decisions by the [Human Rights Committee]").

As for possible implications on the broader human rights regime if China actually unsigned the ICCPR, the experience of the United States unsigning the Rome Convention in 2002 suggests that a domino effect is unlikely—the Philippines exited the International Criminal Court in 2019, but in doing so it became only the second country in the world after the United States.⁴⁶⁶

Nor would China's acceptance of this proposal eject it from being a member of the Human Rights Council⁴⁶⁷ or otherwise exclude it from involvement in the international human rights conversation. By 2009, "China [was] a party to all the core human rights treaties, except for the [ICCPR], which is yet to be ratified."⁴⁶⁸ Many doors would remain open for engagement, including the periodic UPR process. The hope is that mobilizing the interim obligation—and perhaps even getting China to agree—would bring renewed candor and energy to the discussion surrounding civil and political rights. Even if this Article's proposal is rejected, it would still serve a useful role by shaking up the stale routine of urging ratification as civil and political rights continue to erode.

V. FROM ENERVATION TO INNERVATION

Changing the messaging towards China is a beginning, not an end in and of itself. A broader discussion is needed concerning what China's rising voice means to the international human rights regime. In particular, strategies are necessary to stop the dilution of norms (enervation) and, instead, to work towards fortifying those norms (innervation). This need to innervate human rights norms is but one facet of a larger debate about how to recalibrate engagement with China. For example, a task force of American China specialists wrote in its February 2019 report that China "sometimes cheats, other times ignores, and occasionally outright opposes international law rulings

466. Regine Cabato, *Philippines Leaves International Criminal Court as Duterte Probe is Underway*, WASH. POST (Mar. 18, 2019), https://www.washingtonpost.com/world/asia_pacific/philippines-leaves-international-criminal-court-as-duterte-probe-underway/2019/03/18/f929d1b6-4952-11e9-93d0-64dbcf38ba41_story.html [https://perma.cc/SP3C-7WQC] (archived Oct. 27, 2019); see also Patricia Lourdes Viray, *Pangalangan to Finish Term as ICC Judge Despite Philippine Withdrawal*, PHILSTAR GLOBAL (Mar. 29, 2018), <https://www.philstar.com/headlines/2018/03/19/1798338/pangalangan-finish-term-icc-judge-despite-philippine-withdrawal> [https://perma.cc/X632-D88U] (archived Aug. 6, 2019) (Philippines-nominated judge allowed to complete term).

467. Cf. *Current Membership of the Human Rights Council for the 13th cycle, 1 January–31 December 2019*, U.N. OFFICE HIGH COMM'R HUM. RTS. <https://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> (last visited Nov. 10, 2019) [https://perma.cc/5A88-C3DC] (archived Oct. 27, 2019) (China's term expired Dec. 31, 2019).

468. Xue & Jin, *supra* note 186, at 309.

and standards to leverage its participation in global governance forums to push international norms in directions that benefit authoritarian regimes at the expense of liberal democratic systems and values.”⁴⁶⁹

Such straightforward criticism is a departure from more cautious diplomatic language. It also highlights the challenge of reframing an approach to China’s rise that forthrightly addresses China’s influence beyond its borders without tipping into reactionary rhetoric. Regardless of people’s views on tone, it is naïve to think that the impact of the PRC Party-state’s view of civil and political rights is felt only within China.⁴⁷⁰ The leadership has created a selectively permeable membrane that allows its preferred discourse on human rights to pass through and enter the international realm while simultaneously attempting to block unfavorable information about domestic rights violations from breaching the barrier.⁴⁷¹

To be clear, this concern for the external influence of China’s human rights discourse should not divert attention from its domestic human rights situation. The international community has been encouraging China to ratify the ICCPR for over two decades precisely in hopes that doing so would spur improved civil and political rights for the 1.4 billion people living in China.⁴⁷² These hopes have proved chimerical and, absent a dramatic upheaval in domestic politics, the bitterly cold climate for civil and political rights in China is expected to continue for the foreseeable future.⁴⁷³ Consequently, there are extensive conversations among scholars and practitioners outside of China regarding what avenues are still available to collaborate with people within China on legal reform initiatives and other projects related to human rights.⁴⁷⁴ Despite the challenges—and ever mindful

469. COURSE CORRECTION: TOWARD AN EFFECTIVE AND SUSTAINABLE CHINA POLICY 33 (Orville Schell & Susan L. Shirk Chairs, Feb. 2019) [hereinafter COURSE CORRECTION].

470. See, e.g., Titus C. Chen, *A Flamboyant Mandarin in a Declining Liberal Order: China’s Revisionist Agenda in Global Human Rights Institutions*, NAT’L SUN YAT-SEN UNIV. (June 12, 2019) (“China under Xi Jinping’s rule has leapt forward to mainstreaming her illiberal model as the new universal solution for rights protection.”).

471. Cf. Anne Marie Helmenstine, *Selective Permeability Definition and Examples*, THOUGHTCO. (June 24, 2018), <https://www.thoughtco.com/selectively-permeable-4140327> [<https://perma.cc/S3P3-W982>] (archived Aug. 18, 2019) (describing membranes that “choose[] which molecules are allowed to pass based on specific criteria”).

472. See, e.g., *China: Ratify Key International Human Rights Treaty*, HUM. RTS. WATCH (Oct. 8, 2013), <https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty> [<https://perma.cc/BN2S-79JM>] (archived Oct. 27, 2019) (quoting HRW China Director, Sophie Richardson, that ratify the ICCPR “will improve China’s global credibility, but above all, Chinese citizens are themselves increasingly demanding basic human rights.”).

473. See Shirk, *supra* note 166, at 34 (“The more repressive Xi’s regime becomes, however, the more reluctant he will be to leave the throne. He has made too many enemies.”).

474. See, e.g., COURSE CORRECTION, *supra* note 470, at 37 (“Overseas governments and civil society organizations must renew their resolve to think creatively about ways to support human rights in China under these new and far more challenging

of the risks to interlocutors in China—efforts to engage across the membrane do and should continue.⁴⁷⁵

What is seen now is a distinct concern that China's position on human rights can simultaneously weaken human rights outside China. A 2014 CCP decision makes this external push plain: "Vigorously participate in the formulation of international norms, . . . strengthen our country's discourse power and influence in international legal affairs, use legal methods to safeguard our country's sovereignty, security and development interests."⁴⁷⁶ This aim is evident, for example, in efforts to gain international support for China's view that crime prevention is a blanket justification for restricting rights.⁴⁷⁷ The United Nations' June 2019 decision to send its top counterterrorism official to Xinjiang "risk[ed] confirming China's false narrative that this is a counterterrorism issue, not a question of massive human rights abuses."⁴⁷⁸

It is expected that China will take on an even more vocal role in international organizations as it grows in economic and military might.⁴⁷⁹ The United States' retreat from the Human Rights Council has further opened up space for China to fill.⁴⁸⁰ Andrew Nathan explains that, through joining various international regimes—

circumstances.”).

475. See, e.g., *U.S.-China Track II Dialogue on the Rule of Law and Human Rights*, NAT'L COMM. ON U.S.-CHINA RELATIONS, <https://www.ncusr.org/program/us-china-track-ii-dialogue-rule-law-human-rights> (last visited Jan. 20, 2020) [<https://perma.cc/9JYH-PQ8Q>] (archived June 20, 2019) (for example, the author has participated in a number of such exchanges ranging from small discussions at law schools on issues of shared interest to more formal dialogues on human rights).

476. *CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law*, CHINA COPYRIGHT & MEDIA (Oct. 23, 2014), <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> [<https://perma.cc/2MWQ-6XVJ>] (archived Aug. 17, 2019).

477. See, e.g., *Chinese Foreign Ministry Spokesperson Slams U.S. Official "Defamatory Words" on Xinjiang*, *Xinhua*, XIN HUA NET (Sept. 23, 2019), http://www.xinhuanet.com/english/2019-09/23/c_138415912.htm [<https://perma.cc/7MSN-C6PL>] (archived Oct. 27, 2019) (“Since Xinjiang adopted a series of preventive measures against terrorism and extremism, including vocational training, there has been no violent terrorist attack in Xinjiang for three consecutive years.”).

478. Colum Lynch & Robbie Gramer, *Xinjiang Visit by U.N. Counterterrorism Official Provokes Outcry*, FOREIGN POLY (June 13, 2019), <http://fpreg.onecount.net/onecount/redirects/index.php?action=gettokens&js=1&sid=&return=https%3A%2F%2Fforeignpolicy.com%2F2019%2F06%2F13%2Fxinjiang-visit-by-u-n-counterterrorism-official-provokes-protest-human-rights-china-uighurs-internment-camps-east-asia-united-nations%2F&sid=v93o0b62371855q5jjgjq71uq3> [<https://perma.cc/TFP5-VXVN>] (archived Oct. 27, 2019) (quoting Louis Charbonneau, the U.N. director for Human Rights Watch).

479. Stephen, *supra* note 55.

480. See COURSE CORRECTION, *supra* note 469, at 40 (recommending that the United States rejoin the Human Rights Council “to fight for the integrity of that institution against the efforts of China and its allies to weaken it.”).

including on human rights—China “has gained the opportunity to try to shape the future evolution of that regime to its preferences.”⁴⁸¹ And Thomas Kellogg has noted the “intensification of long-term trends that have been a key part of China’s approach to the UN human rights system for decades.”⁴⁸² Ted Piccone has analyzed the intensification of these trends, with China’s 2017 and 2018 resolutions in the Human Rights Council having “emphasized national sovereignty, called for quiet dialogue and cooperation rather than investigations and international calls to action, and pushed the Chinese model of state-led development as the path to improving their vision of collective human rights and social stability.”⁴⁸³

China’s shift from a passive presence to an active, weighty player on the international scene gives reason to reevaluate the big-tent approach aimed at universal participation in human rights treaties.⁴⁸⁴ This reevaluation has already begun. For example, Human Rights Watch documented how China has “work[ed] assiduously to weaken or block key human rights reviews at the United Nations, ease important standards, and ensure only praise for its rights record.”⁴⁸⁵ Similarly, Human Rights in China has criticized China’s “overt rejection of the standards for assessing their compliance [with human rights.]”⁴⁸⁶ Jessica Chen Weiss has noted how “China’s growing economic clout has also led other states, particularly those in Africa and Latin America that trade heavily with China, to join Beijing in opposing human rights resolutions in the UN General Assembly.”⁴⁸⁷

The conversation regarding China’s efforts to disrupt human rights norms, however, has long been largely within the China-specialist and rights-advocacy communities. For example, China

481. Nathan, *supra* note 37, at 173.

482. Thomas Kellogg, *China Is Getting Better at Undermining Global Human Rights*, FOREIGN POLY (Oct. 18, 2017), <https://foreignpolicy.com/2017/10/18/china-is-getting-better-at-undermining-global-human-rights/> [<https://perma.cc/6WBB-9A9C>] (archived Oct. 27, 2019).

483. Ted Piccone, *China’s Long Game on Human Rights at the United Nations*, BROOKINGS INST. (Sept. 2018), https://www.brookings.edu/wpcontent/uploads/2018/09/FP_20181009_china_human_rights.pdf [<https://perma.cc/5RYB-UWCM>] (archived Oct. 27, 2019).

484. Cf. Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT’L & COMP. L. REV. 213, 220–21 (2002) (pointing to Rome Statute as an example of aiming for universal or nearly universal membership).

485. Sophie Richardson, *Is China Winning Its Fight Against Rights at the UN?*, HUM. RTS. WATCH (Dec. 12, 2018), <https://www.hrw.org/news/2018/12/12/china-winning-its-fight-against-rights-un> [<https://perma.cc/J3XJ-F3EM>] (archived Oct. 27, 2019).

486. *UPR China: Will Governments Stand Firm on Accountability and Universal Standards?*, HUM. RTS. IN CHINA (Nov. 1, 2018), <https://www.hrichina.org/en/press-work/hric-bulletin/upr-china-will-governments-stand-firm-accountability-and-universal> [<https://perma.cc/8ACB-S4WQ>] (archived Oct. 27, 2019) (stating that the March 2018 Human Rights Council resolution “turned the state’s accountability for the protection of fundamental rights into something akin to a management project among states”).

487. Weiss, *supra* note 44, at 96 (but also noting instances where China has refrained from using its power to defend authoritarian states).

scholar Ann Kent wrote in her 1999 book analyzing compliance, socialization, and effectiveness in the context of China's interactions with the UN human rights regime, "[t]o the extent that China has sought to introduce new priorities of rights and to influence existing UN norms and procedures, the UN human rights regime has been under continual challenge."⁴⁸⁸ Yet she expressed cautious optimism that China had gradually begun to implement human rights norms.⁴⁸⁹ In 2007, Kent observed, "[i]n general, China complies with the rules of international organizations and treaties and its compliance has usually improved over time."⁴⁹⁰ In 2013, Kent adopted a more wary tone, noting indicators of "a definite regression from China's increasingly internationalist and mature responses to international human rights engagement since 1991. If the international community wishes to uphold the legitimacy of the international bill of rights, it must now act to defend it more resolutely."⁴⁹¹

China's human rights record has only worsened since 2013, with Kent warning in 2019, "[R]ather than conforming to international rules, or even seeking to impose an alternative normative agenda, China is turning human rights on their head and adopting the role of norm disruptor in the current system in the interests of its immediate political and strategic advantage."⁴⁹² It is crucial to engage the broader academic field concerned with international human rights in this conversation about norm disruption. This conversation is all the more salient because China's growing prominence in international human rights institutions is occurring as the scholarly community is questioning whether, as Samuel Moyn recently asserted, "[t]he human rights measurement controversy of the past decade has reached its limits."⁴⁹³

There is extensive literature on the conditions that encourage states to comply with human rights norms. For example, Goodman and Jinks detail the mechanisms that drive the law's social influence on the international plane.⁴⁹⁴ They address the potential "for the diffusion

488. KENT, *supra* note 38, at 9.

489. *See id.*

490. ANN KENT, BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY 4 (Stan. Univ. Press 2007).

491. Kent, *supra* note 253, at 76; *see also* Sarah M. Brooks, *Will the Future of Human Rights Be 'Made in China'?*, in *DOG DAYS: A YEAR OF CHINESE LABOUR, CIVIL SOCIETY, AND RIGHTS, MADE IN CHINA YEARBOOK 2018* (Ivan Franceschini et al. eds., 2019) (arguing that "a human rights system 'with Chinese characteristics' is entirely incompatible with the demands of the human rights movement—and why the current system, despite its flaws, is nonetheless worth fighting for.").

492. Kent, *supra* note 127, at 76.

493. Moyn, *supra* note 51, at 121.

494. *See generally* GOODMAN & JINKS, *supra* note 50. Debates about mechanisms to encourage compliance are also occurring in regional organizations, such as within the European Union. *See, e.g.*, Patrick Lavelle, *Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States*, 22 TRINITY C.L. REV. 35 (2019) (discussing mechanisms to address breaches of

of undesirable policies” but add an optimistic twist: “In the case of deleterious norms, actors and institutions that have a better understanding of acculturation can learn how to overcome or impede the causal process.”⁴⁹⁵ One cited benefit of acculturation is that “inclusive membership encourages illiberal states to define and justify their resistance to global norms in terms of the relevant treaty obligations.”⁴⁹⁶ While it is true that China draws on the language of international human rights in its pronouncements to the UN,⁴⁹⁷ what deserves further attention is the extent to which this rhetoric has shifted from benign lip-service to instead a *façade* behind which the stated norms are actually being sapped of energy.⁴⁹⁸ Scholars including Beth Simmons,⁴⁹⁹ Oona Hathaway,⁵⁰⁰ and Emilie Hafner-Burton⁵⁰¹ have explored in non-China-specific contexts the pessimistic side of when international human rights ideals come up against the realities of repressive states.

Today, this conversation in the academic literature has renewed importance as China’s growing heft on the international scene couples with its effort to hollow out human rights norms. What is beyond the scope of this Article is a deep analysis of how past research—both qualitative and empirical—regarding human rights treaties’ influence on human rights compliance is relevant in understanding China’s behavior today. To what extent is China in 2020 challenging views regarding the benefits of broad inclusion in human rights treaties? While no two states are exactly alike, are there certain characteristics about China and its approach to human rights that present special concerns? How in the face of China’s outward push do communities that believe in robust international human rights prevent enervation of those norms? The word enervate comes from the Latin word meaning “out of nerve” or “sinew.”⁵⁰²

the “rule of law” by member states, specifically Poland and Hungary).

495. GOODMAN & JINKS, *supra* note 50, 74–76 (explaining that their account of norm transmission includes diffusion of “rights restricting” models of state behavior).

496. *Id.* at 101.

497. *See, e.g.*, UNITED NATIONS WEB TV, *supra* note 1 (opening statement by Mr. Le Yucheng, Deputy Minister of Foreign Affairs, China).

498. *Cf.* JEFF HANDMAKER & KARIN ARTS, *Mobilising International Law as an Instrument of Global Justice: Introduction*, in MOBILISING INTERNATIONAL LAW FOR ‘GLOBAL JUSTICE’, *supra* note 419, at 3 (“States may ratify human rights treaties as a symbolic gesture in order to avoid international criticism.”).

499. *See generally* SIMMONS, *supra* note 401 (exploring barriers to citizen mobilization in autocratic regimes for fear of state repression).

500. *See generally* Hathaway, *supra* note 13 (analyzing how human rights treaty ratification has been accompanied in some situations by increased violations).

501. *See generally* EMLIE HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY* (Princeton Univ. Press 2013) (analyzing state conditions that are associated with improved human rights).

502. *Enervate*, *supra* note 57.

The Human Rights Committee captured this need to preserve the core fiber in international norms in its guidance on the meaning of “object and purpose” in the context of reservations:

So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an *autonomous meaning to Covenant obligations*, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.⁵⁰³

Reaffirming that states cannot unilaterally alter the meaning of international norms via domestic law affirms the universal nature of core human rights. Those who believe that there is an essential sinew to international human rights should not only preserve the core fiber of autonomous, universally shared meanings in a defensive manner but also fortify—“innervate”⁵⁰⁴—rights such that they remain imbued with meaning.

VI. CONCLUSION

The inviolability of fundamental human rights is under strain as China pushes for greater recognition of countries’ uniqueness instead of embracing the universality of norms. An initial step in reinvigorating bedrock principles would be opting for forthright pushback against China’s claims of efforts towards ICCPR ratification instead of yet another round of polite encouragement.

As argued herein, calling on China to unsign the ICCPR would be well-grounded in the legal scholarship’s understanding of the interim obligation. In addition, it would send a strong signal to audiences inside China as well as affirm to international audiences the normative force of civil and political rights.

This Article was written surrounding the thirtieth anniversary of the June 4, 1989, massacre. The protests leading up to the crackdown were, in part, driven by a desire for rights that are enshrined in the ICCPR.⁵⁰⁵ Three decades after Tiananmen and two decades after

503. General Comment 24, *supra* note 278, ¶ 19 (emphasis added).

504. *Innervate*, *supra* note 58.

505. The protests were not just fueled by students demanding democratic reforms. A much broader swathe of the populace sympathized with the students and also had their own concerns, including workers seeking to organize labor unions. See Robin Munro, *Remembering Tiananmen Square*, THE NATION (June 2, 2009), <https://www.thenation.com/article/remembering-tiananmen-square/> [https://perma.cc/M9FZ-JSBK] (archived Aug. 18, 2019) (describing how a workers federation “headquartered in a couple of scruffy tents in the northwest corner of Tiananmen Square, raised an issue that had been taboo in China since 1949: the right of workers to engage in independent labor organization and self-representation.”).

signing the ICCPR, China not only has failed to ratify the ICCPR but also could not do so in good faith in light of the current state of civil and political rights in China. Until such time as the PRC leadership evidences a shift towards convergence with the ICCPR's norms, the international community can best be unflinching in its support for civil and political rights by calling on China to unsign.

Concerns about corruption, inflation, and salaries were also among the grievances. *See Timeline: What Led to the Tiananmen Square Massacre*, PBS FRONTLINE (June 5, 2019), <https://www.pbs.org/wgbh/frontline/article/timeline-tiananmen-square/> [https://perma.cc/QKN5-6NZR] (archived June 20, 2019).