

# Bend, Don't Break: China's Approach to the International Human Rights Order

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Here's the bottom line. The question all of us face—in the United States, in Europe, and in nations around the world—is a simple one. What do we want the world to look like? What do we want our future to be?<sup>1</sup>

- Wendy Sherman, U.S. Deputy Secretary of State.

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1. Wendy R. Sherman, Deputy Sec'y of State, Remarks at Event with Friends of Europe (Apr. 21, 2022, <https://www.state.gov/event-with-friends-of-europe/> [<https://perma.cc/5T9N-9V6S>]).

## INTRODUCTION

There is no shortage of anxiety in the North Atlantic regarding the implications of China's rise. As Deputy Secretary of State Sherman reiterated in her recent remarks to "Friends of Europe," a Brussels-based non-governmental organization, Beijing's increasing geopolitical clout no doubt precipitates a re-shaping of many issue areas in the international legal order.<sup>2</sup> But the potential implications of China's rise have inspired particular apprehension with respect to one facet of the order in particular: the international human rights regime.

Consider the intersection of law and technology, a corner of the international legal order which was the site of bitter Sino-U.S. contention even before the Huawei saga.<sup>3</sup> Some analysts in the North Atlantic remain concerned about Beijing's purported attempts to create a "China-centered internet"<sup>4</sup> to help the Party-State satisfy its "ambitions to displace the American order."<sup>5</sup> But Euro-American anxieties with respect to the international techno-legal order can often be reduced to apprehension about the implications of China's rise for international human rights. Law and technology is just one example: the same trend holds for Euro-American trepidation regarding Chinese participation in other international orders, from the United Nations<sup>6</sup> to development finance.<sup>7</sup>

In the techno-legal context, the fear is not just that WeChat will replace Twitter, or Baidu replace Google, but that such replacements would render the internet more "susceptible to surveillance and ideological influence,"<sup>8</sup>

2. *Id.* ("I could give dozens of examples of PRC actions that seek to undermine nations' political autonomy, to coerce businesses' decision-making, and more—to literally steal intellectual property and trade secrets, to hunt down and silence human rights defenders and members of ethnic and religious minorities who have left the PRC, to bend the rules of the international system to suit their interests at the expense of the rest of the world.")

3. See generally Jonathan Weber, *Explainer: What is China's Huawei Technologies and Why Is it Controversial?*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-usa-china-huawei-explainer-idUSKBN1O5172> [https://perma.cc/VV5Q-53RJ].

4. NATHAN ATTRILL & AUDREY FRITZ, CHINA'S CYBER VISION: HOW THE CYBERSPACE ADMINISTRATION OF CHINA IS BUILDING A NEW CONSENSUS ON GLOBAL INTERNET GOVERNANCE 16 (2021).

5. RUSH DOSHI, THE LONG GAME: CHINA'S GRAND STRATEGY TO DISPLACE AMERICAN ORDER 286 (2021).

6. See Catherine Gegout & Shogo Suzuki, *China, Responsibility to Protect, and the Case of Syria: From Sovereignty Protection to Pragmatism*, 26 GLOB. GOV. 379, 382-83 (2020); Colum Lynch, 'It Was Like Having the Chinese Government in the Room With Us', FOREIGN POL'Y (Oct. 15 2021), <https://foreignpolicy.com/2021/10/15/china-sanctions-north-korea-hardball/> [https://perma.cc/M759-XNFK].

7. JUE WANG & MICHAEL SAMPSON, CHINA'S APPROACH TO GLOBAL ECONOMIC GOVERNANCE 12 (2021) ("China's bilateral overseas development finance faces increasing challenges. The returns on capital have been eroded by the volatile political, economic and security conditions in some borrower countries in combination with Chinese creditors' 'non-interference' mode of lending. Moreover, Chinese-funded projects are often criticized for their negative environmental and social governance impacts, which create tension between project operators and project-affected communities in developing countries.")

8. ATTRILL & FRITZ, *supra* note 4, at 3.

hamstringing human rights like privacy and freedom of expression.<sup>9</sup> The Huawei debacle ultimately a referendum on Beijing's human rights record, including allegations of "hostage diplomacy."<sup>10</sup>

The international human rights regime is thus where the "rubber hits the road" for Euro-American responses to an increasingly assertive Beijing. This is due, at least in part, to the fact that many principles undergirding dominant (Western-origin) human rights discourse, like individualism, natural/inalienable rights, and personal liberty, are inextricably intertwined with North Atlantic states' identities as representative democracies.<sup>11</sup> Especially in the human rights space, then, claims that Beijing is attempting to "blunt" the appeal and influence of these principles in the international legal order, while "building" and "expanding" a new human rights regime which better suits Beijing's interests, are understandably cause for concern.<sup>12</sup> On the other hand, the international human rights regime was arguably facing a crisis of legitimacy completely independent of China's meteoric rise.<sup>13</sup> This internecine crisis deepened when the United States withdrew from the U.N. Human Rights Council ("UNHRC")—albeit for Israel-related, not China-related, reasons.<sup>14</sup>

9. G.A. Res. 2200A (XXI), ¶¶ 17(1), 19(2), International Covenant on Civil and Political Rights (Dec. 16, 1966).

10. John Paul Tasker, *Michael Kovrig and Michael Spavor Are Free: What Does this Mean for Canada-China Relations?*, CBC NEWS (Sept. 25, 2021), <https://www.cbc.ca/news/politics/spavor-kovrig-released-what-does-it-mean-1.6189814> [<https://perma.cc/4HMY-4ZB9>]; Eva Dou, *Documents Link Huawei to China's Surveillance Programs*, WASH. POST (Dec. 14, 2021), <https://www.washingtonpost.com/world/2021/12/14/huawei-surveillance-china/> [<https://perma.cc/L4JP-XPKH>]; Jerome A. Cohen, *Law and Power in China's International Relations*, 52 N.Y.U.J. INT'L LAW & POL. 123, 161 (2019) (quoting David Mulroney, *We Must Finally See China for What it Truly Is*, GLOBE & MAIL (Dec. 27, 2018), <https://www.theglobeandmail.com/opinion/article-we-must-finally-see-china-for-what-it-truly-is/> [<https://perma.cc/3CMW-JYZV>]).

11. See Henri Feron, *The Chinese Model of Human Rights*, 3 CHINA LEG. SCI. 87, 90–91 (2015). But see SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 84 (2010) ("However reinterpreted with the passage of time, the American declaration was not really about rights; it had above all been intended to announce postcolonial sovereignty to the other nations of the world. If it appealed to international law, it was one in which recognition of states, not the protection of individuals, is what counted.") The significance of the relation between Western liberalism and the international human rights order is not lost on Chinese scholars. See Aijiao Huang, *The Universal Declaration of Human Rights and the Spirits of Confucian Ethics Focus*, 17 J. HUM. RTS. 518, 525 (2018) ("The Universal Declaration of Human Rights was born under western liberalism."); Deqiang Chi, *The Development of International Human Rights Law and the Chinese Contribution to the Global Human Rights Cause Academic Monograph*, 18 J. HUM. RTS. 802 (2019); Zhipeng He, *A "People-centered" Approach: The Chinese Deciphering of the Human Rights Theory*, 19 J. HUM. RTS. 153, 153–54 (2020).

12. DOSHI, *supra* note 5, at 3–4.

13. See, e.g., Carlo Focarelli, *International Human Rights "in Crisis" and the Neoliberalization of the Human Person*, 19 CHINA J. INT'L L. 53 (2020); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 215 (Janet Halley & Wendy Brown eds., 2002); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 110 (2002); Karen Engle, *Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement*, in NEW APPROACHES TO INTERNATIONAL LAW 41, 42–43 (José María Beneyto & David Kennedy eds., 2012); Jorge L. Esquirol, *Making the Critical Moves: A Top Ten in Progressive Legal Scholarship*, 92 UNIV. COLO. L. REV. 1079, 1110 (2021); MOYN, *supra* note 11, at 5.

14. *US Quits "Biased" UN Human Rights Council*, BBC NEWS (June 20, 2018), <https://www.bbc.com/news/44537372> [<https://perma.cc/7HEX-4UQ5>].

Ultimately, Euro-American anxieties regarding China's potential designs on the international human rights order stem from a fundamental misunderstanding of what those designs are and how Beijing hopes to achieve them. Western and Chinese human rights advocates, policymakers, and academics "are essentially talking past each other" on human rights issues.<sup>15</sup> Faced with Beijing's novel frameworks for defining and achieving human rights protection, some Euro-American analysts seem to have concluded that Chinese policy elites are acting in bad faith, with the ultimate goal of undermining the international human rights order in pursuit of geopolitical gain.<sup>16</sup> Deputy Secretary Sherman's recent remarks are consistent with this view,<sup>17</sup> as is the influential "blunt, build, and expand" framework articulated by the Director for China on the U.S. National Security Council, Rush Doshi.<sup>18</sup>

In contrast to this approach, I argue that Beijing is seeking to alter, but not undermine or replace, the international human rights order. Generally speaking, I agree with Andrew J. Nathan that "the liberal international order is resilient and that China prefers to join it rather than to overturn it."<sup>19</sup> It follows that, with respect to human rights in particular, Beijing

15. Feron, *supra* note 11, at 88, 101. See Yuchao Zhu, *Making Sense of Human Rights Policy on China*, 8 CAN. FOREIGN POL'Y J. 103, 103 (2001) ("It seems that a common language of discourse on human rights [is] almost nonexistent between the two groups of countries.").

16. See Shannon Tiezzi, *Can China Change the Definition of Human Rights?*, DIPLOMAT (Feb. 23, 2021), <https://thediplomat.com/2021/02/can-china-change-the-definition-of-human-rights/> [<https://perma.cc/PTF9-YCB5>] ("By promoting a redefinition of human rights to include economic and physical security, China is essentially hoping to shift the goalposts so it can better compete with the liberal democracies [and particularly the United States] for the moral high ground of human rights protection."); Lucas Niewenhuis, *China's Xinjiang Policies Debated Again at UN Human Rights Council*, CHINA PROJECT (June 22, 2021), <https://thechinaproject.com/2021/06/22/chinas-xinjiang-policies-debated-again-at-un-human-rights-council/> [<https://perma.cc/6MZ6-WAJN>]; Bjorn Ahl, *The Rise of China and International Human Rights Law*, 37 HUM. RTS. Q. 637, 657 (2015) ("It is assumed that China makes such recommendations in order to portray its own 'education through labor' camps in a more positive light as forming part of an international practice."); Matthieu Burnay & Eva Pils, *Human Rights, China and the UN*, 2 AMICUS CURIAE 244, 246 (2021) ("Within the UN Human Rights Council, China has not only attempted to silence criticisms against its own human rights record but also to promote a discourse driven by the Party-State's domestic discourse, norms and interests."); Sophie Richardson, *China's Influence on the Global Human Rights System*, HUM. RTS. WATCH (Sep. 14, 2020), <https://www.hrw.org/news/2020/09/14/chinas-influence-global-human-rights-system> [<https://perma.cc/DAA9-9M5G>] ("Beijing is no longer content simply denying people accountability inside China: It now seeks to bolster other countries' ability to do so even in the international bodies designed to deliver some semblance of justice internationally when it is blocked domestically . . . . The rights-free development the state has sanctioned inside China is now a foreign policy tool being deployed around the world. Beijing is no longer content simply denying people accountability inside China: It now seeks to bolster other countries' ability to do so even in the international bodies designed to deliver some semblance of justice internationally when it is blocked domestically . . . . The rights-free development the state has sanctioned inside China is now a foreign policy tool being deployed around the world.")

17. Sherman, *supra* note 1 ("Beijing is seeking to undermine the very system that they benefited from—to return instead to a system where might makes right, and big nations can coerce smaller countries into acting against their own interests.").

18. DOSHI, *supra* note 5, at 3–4.

19. Andrew J. Nathan, *China's Rise and International Regimes*, in CHINA IN THE ERA OF XI JINPING: DOMESTIC AND FOREIGN POLICY CHALLENGES 165, 168 (Robert S. Ross & Jo Inge Bekkevold eds., 2016). See Jonathan E. Hillman, *A 'China Model?' Beijing's Promotion of Alternative Global Norms and*

“does not appear to be aiming either for major changes in the regime or for its abandonment,” but instead “appears to be content to work within the existing human rights institutions to shape them to its own interests.”<sup>20</sup> Put otherwise, Beijing is seeking to bend, not break, the current human rights order.

Notwithstanding Nathan’s scholarship, this is not a novel conclusion. Sixty years ago, when the international human rights movement was in its infancy, Georges M. Abi-Saab noted that the “guarded attitude” of postcolonial states toward international law reflects the fact that predominantly Western “international” law is the same body of law which “sanctioned their previous subjugation and exploitation,” and has “an origin alien to them.”<sup>21</sup> Professor Abi-Saab, however, understood that this “guarded attitude” does not necessarily reflect a preference for a “radically transformed international order”:<sup>22</sup> while the attitudes of developing states toward international law “range from acceptance to rejection,” they “mainly center around a call for specific revisions in the different rules.”<sup>23</sup> It is probably fair to characterize the “specific revisions” that Beijing seeks as more ambitious than those sought by fledgling post-colonial states of the 1960s and 1970s. But the principle remains the same—it is naive to expect the People’s Republic of China (“PRC”) to be “completely passive” with respect to a regime by which it is bound, but which it did not have a hand in creating.<sup>24</sup>

The paper unfolds as follows. In the next section, I present a brief primer on China’s changing role in the international human rights order. In section II, I find that Nathan’s gloss on Abi-Saab’s framework is validated by the work of Chinese human rights scholars, as well as statements of Chinese policy included in authoritative sources like Party-State media, speeches, and white papers. This section also sketches the normative content of China’s proposed contributions to the human rights framework. Thus, the first two sections are predominantly descriptive. Section III compares Chi-

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*Standards*, CTR. FOR STRATEGIC & INT’L STUDS. (March 13, 2020), <https://www.csis.org/analysis/china-model-beijings-promotion-alternative-global-norms-and-standards> [<https://perma.cc/6XK7-NJFH>] (“Having benefitted greatly from participating in existing institutions, China has little to gain from walking away from them. Instead, it is becoming a more influential actor within existing institutions and adopting a variety of strategies—participating, obstructing, or opposing—as individual issues require.”).

20. Nathan, *supra* note 19, at 185.

21. Georges M. Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOWARD L. J. 95, 99–100 (1962). See XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW 22–23 (2012) for an example of this perspective in pre-1978 China.

22. Elizabeth Economy, *Xi Jinping’s New World Order*, 101 FOREIGN AFFS. 52, 53 (2022).

23. Abi-Saab, *supra* note 21, at 100.

24. Aining Zhang, *China and the International Human Rights System: From Passive Participation to Value Practice*, 19 J. HUM. RTS. 221 (2020); Emma Iannini, *Cultivating Civilization: The Confucian Principles behind the Chinese Communist Party’s Mass Imprisonment of Ethnic Minorities in Xinjiang and What Human Rights Advocates Can Do to Stop It*, 53 N.Y.U. J. INT’L LAW & POL. 189, 222 (2020).

nese human rights proposals with Euro-American responses, as well as historic Western human rights practice. Drawing on the foregoing descriptions of Chinese and Euro-American human rights frameworks, this section is critical of the allegedly irreconcilable differences between the two frameworks and argues that they are in some respects mutually intelligible. Section IV discusses how the international human rights order is likely to change as a result of China's rise, particularly in light of Beijing's novel human rights proposals. This section is predictive: I argue that China's human rights framework is unlikely to achieve dominance in the global marketplace of ideas. The final section concludes, offering a brief normative assessment of how scholars and policymakers ought to respond to China's growing clout in the field of international human rights law.

## I. CHINA IN THE INTERNATIONAL HUMAN RIGHTS ORDER

The Trump administration's withdrawal from the UNHRC,<sup>25</sup> and high-profile arguments about Chinese human rights abuses in that venue,<sup>26</sup> highlight the UNHRC's important status in the international human rights order in general and as a staging ground for Sino-Western disputes in particular. As Burnay and Pils note, "[d]uelling statements on the situations in Hong Kong and Xinjiang have shed light on the existence of opposing coalitions in the Human Rights Council."<sup>27</sup> This has, in turn, stoked concerns that Beijing is attempting to strengthen its influence within the international human rights order. Feron, for example, argues that "voting patterns in the UN Human Rights Council suggest that it is increasingly China, rather than the West, that is representative of the majority opinion in international human rights institutions."<sup>28</sup>

But the UNHRC is not the only game in town. As Yu-Jie Chen points out, "[t]here are other important platforms for advancing global human rights, even within the United Nations," including the human rights treaty body system, the General Assembly's Third and Fifth Committees, and the Security Council, along with "other global fora and inter-state summits."<sup>29</sup>

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25. Yu-Jie Chen, *China's Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT'L & POL. 1179, 1215 (2018).

26. Joint Statement Calling for Xinjiang Resolution at the United Nations Human Rights Council (Feb. 13, 2019); Karen Pierce, Ambassador & U.K. Permanent Rep. to the U.N., Joint Statement on Human Rights Violations and Abuses in Xinjiang (Oct. 29, 2019); Stephanie Nebehay, *U.N. Rights Chief Bachelet Takes on China, Other Powers in First Speech*, REUTERS (Sep. 10, 2018), <https://www.reuters.com/article/us-un-rights-idUSKCN1LQ0QI> [<https://perma.cc/26X3-GQRN>]; Nicholas Ross Smith & David O'Brien, *Responding to China's Crimes Against Humanity in Xinjiang: Why Dialogue is the Only Pathway for the Emerging "Coalition of the Willing"*, 7 GLOB. AFFS. 79 (2021); Andrew Garwood-Gowers, *China and the Uighurs: Options for Legal Accountability*, 13 GLOB. RESP. TO PROTECT 24, 25 (2021); Nadira Kourt, *United Nations' Response to Mass Atrocities in China*, 13 GLOB. RESP. TO PROTECT 33, 34–35 (2021).

27. Burnay & Pils, *supra* note 16, at 249.

28. Feron, *supra* note 11, at 104.

29. Chen, *supra* note 25, at 1215.

And although the primary constituents of the U.N. system are sovereign states, there are also a large number of influential international and inter-governmental non-governmental organizations (“INGOs” and “IGOs” respectively) active in the human rights space, including the UNHRC.<sup>30</sup> Many of these (Western-based) INGOs are deeply concerned about China’s growing influence in the international human rights order,<sup>31</sup> and have consequently collaborated with Euro-American China scholars to address Beijing’s growing influence.<sup>32</sup>

It is probably not an overstatement to acknowledge that “[o]ver the past quarter-century China has exerted considerable influence over the way the international human rights regime works.”<sup>33</sup> This is especially impressive, considering that China was something of a latecomer to the international human rights regime. While the international human rights order as we now know it arose in the wake of the post-WWII decolonization movement,<sup>34</sup> Beijing largely rejected international human rights law until Mao’s demise precipitated the reform and opening period in 1978.<sup>35</sup> Even then, the PRC’s engagement with the international legal order was limited by the fact that it only joined the United Nations in October of 1971 and that the Cultural Revolution (which ended in 1976) left China with few lawyers or law schools.<sup>36</sup> Nevertheless, China quickly began to engage in U.N. human rights discourse, going so far as to support criticism of and even sanctions against Israel, Rhodesia, Chile, and South Africa.<sup>37</sup> The reform-era (1982) revisions to the PRC’s Constitution further incorporated protections for a number of internationally recognized human rights, and repudiated abuses

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30. Huawen Liu, *On the Public Diplomacy of China in the Human Rights Fields*, 14 J. HUM. RTS. 361, 374 (2015).

31. See, e.g., Richardson, *supra* note 16; *China: Baseless Imprisonments Surge in Xinjiang*, HUM. RTS. WATCH (Feb. 24, 2021), <https://www.hrw.org/news/2021/02/24/china-baseless-imprisonments-surge-xinjiang> [<https://perma.cc/392Q-549K>]; HUMAN RIGHTS WATCH WORLD REPORT 2022: EVENTS OF 2021(2021).

32. See Burnay & Pils, *supra* note 16.

33. Nathan, *supra* note 19, at 184 (citing Rana Siu Inboden & Titus C. Chen, *China’s Response to International Normative Pressure: The Case of Human Rights*, 47 INT’L SPECTATOR 45 (2012)).

34. MOYN, *supra* note 11, at 208. *But see* Nathan, *supra* note 19, at 168 (dating the launch of the international human rights movement earlier, to the adoption of the Universal Declaration of Human Rights in the wake of World War II).

35. Nathan, *supra* note 19, at 171; Zhu, *supra* note 15, at 111 (“From 1949 when the People’s Republic was established, to the late 1970s, the term ‘human rights’ was basically absent from mainstream political language.”); ROBERT D. WILLIAMS, INTERNATIONAL LAW WITH CHINESE CHARACTERISTICS: BEIJING AND THE “RULES-BASED” GLOBAL ORDER (2020) (citing HANQIN, *supra* note 21 at 54–55). *But see* DAYUAN HAN ET AL., A HISTORY OF CHINESE CONSTITUTIONAL THEORY 265–67 (2020) (exploring late Qing reformers’ translation of Western human rights concepts from Japanese into Chinese).

36. Jerome A. Cohen, *supra* note 10, at 126; Xiao-hui Wu, *Human Rights: China’s Historical Perspectives in Context*, 4 J. HIST. INT’L L. 335, 339–40 (2002) (noting that during the cultural revolution, legal practice, judicial work, and law curricula were largely suspended).

37. Wu, *supra* note 36, at 351 n. 88 (“See U.N. GAOR 3d comm., 27th Sess. 1910th mtg. at p. 19, U.N. Doc. A/C.3/SR.1910 [1972] [Israel and Southern Rhodesia]; S.C. Res. 232. U.N. SCOR, 21st Sess., 1340th mtg. at 7, U.N. Doc. S/INF/21/Rev.1 [1968] [Rhodesia]; E.S.C. Res. 63, U.N. ESCOR, 42nd Sess., Supp. No. 2, at 140–41, U.N. Doc. E /1986/22 [1986] [Chile]; G.A. Res. 3116A, U.N. GAOR, 31st Sess., Supp. No. 39. at 10, U.N. Doc. A/31/39 [1977] [South Africa].”).

common during the Cultural Revolution like discrimination based on class background and arbitrary incommunicado detention.<sup>38</sup> Following Tiananmen in 1989—or, more accurately, the subsequent “storm of foreign criticism of [Beijing’s] human rights practices”<sup>39</sup>—China’s engagement with the international human rights order found a second wind.<sup>40</sup> Consequently, “Chinese lawyers, scholars, journalists and party liberals formed . . . a near-consensus on the cultural universality of human rights, [and] the legally binding status of the international law of human rights,” even with respect to capital punishment.<sup>41</sup>

To date, the PRC has ratified 26 international human rights instruments under U.N. auspices and played an important role in the negotiations establishing the U.N. Human Rights Council (*née* Commission),<sup>42</sup> a body in which the PRC seems to have ever-increasing influence.<sup>43</sup> Although Beijing has notably lodged reservations regarding the International Court of Justice’s (“ICJ”) enforcement of its human rights obligations,<sup>44</sup> and has failed to sign “a small number of widely acceded-to” human rights treaties, many of these are the same treaties that Washington has also rejected.<sup>45</sup>

While Chinese engagement with international human rights law (“IHRL”) has grown by leaps and bounds since 1978 and 1989, it is worth pointing out that, especially under General Secretary Xi’s administration, the “heavy hand of censorship and self-censorship” remains ever present in Chinese legal research and education.<sup>46</sup> It is thus highly unlikely that official sources present a complete picture of what is probably a much livelier debate among Chinese human rights scholars.<sup>47</sup> Consequently, the following brief survey of academic literature and official policy represents an oversimplification of Chinese perspectives toward human rights.<sup>48</sup>

38. *Id.* at 341–43 (citing CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA (1982)).

39. Wu, *supra* note 36, at 353–54.

40. Zhu, *supra* note 15, at 112.

41. Andrew J. Nathan, *Human Rights in Chinese Foreign Policy*, 139 CHINA Q. 622, 643 (1994).

42. Chen, *supra* note 25, at 1182–83.

43. *Id.* at 1192.

44. Zhang, *supra* note 24, at 227–28 (“China’s participation in the international human rights system was conditional on not undermining national sovereignty.”); Wu, *supra* note 36, at 353 (further noting that the PRC does not recognize the complaint procedure enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination).

45. Nathan, *supra* note 19, at 171.

46. Jerome A. Cohen, *Law’s Relation to Political Power in China: A Backward Transition*, 86 SOC. RSCH. 231, 233 (2019); Jerome A. Cohen, *supra* note 10, at 128.

47. See Perry Link, *China: The Anaconda in the Chandelier*, CHINA FILE (Apr. 11, 2002), <https://www.chinafile.com/library/nyrb-china-archive/china-anaconda-chandelier> [<https://perma.cc/F87Z-HAF5>].

48. See HAN ET AL., *supra* note 35, at 268–72, for a broad range of perspectives.



## II. CHINA'S HUMAN RIGHTS FRAMEWORK

Before 1989, although China engaged in U.N. human rights discourse, Chinese (Marxist) political theorists tended to reject mainstream (Western) human rights as a subject for rigorous intellectual engagement due to its purported saturation with bourgeois/capitalist values.<sup>49</sup> In the wake of Tiananmen, however, the paucity of homegrown human rights theory left the Communist Party of China (“CPC”) and Chinese diplomats “unable to respond to foreign criticism with its own view on human rights.”<sup>50</sup> Consequently, the Party-State began to cultivate domestic human rights perspectives, culminating with the PRC’s first white paper on human rights in 1991.<sup>51</sup> Spurred by China’s inapt response to Western human rights critiques in the wake of Tiananmen, the white paper focused heavily on the indigenization or particularization of human rights practice to suit diverse national conditions, which remains an enduring theme in Chinese rights discourse.<sup>52</sup>

Twenty-first Century Chinese human rights discourse can be roughly sorted into three interrelated streams:<sup>53</sup> (i) sovereignty and nonintervention, (ii) prioritizing the right to development, and (iii) the inseparability of rights from obligations. Each of these streams contains numerous important sub-themes—for example, the particularization of human rights practice within diverse national contexts in the sovereignty and nonintervention stream, or the guiding influence of Marxism in the right to development stream. These three discursive streams are explored below.

First, though, a brief note on ideology. Marxism-Leninism continues to exert a “profound influence on the thinking of Chinese leaders.”<sup>54</sup> Conse-

49. Zhang, *supra* note 24, at 222; Wu, *supra* note 36, at 355. As we will see in Section IV *infra*, this dismissive approach is not entirely dissimilar from some modern Euro-American analysts’ response to Beijing’s overtly Marxist proposals for international human rights reform.

50. Wu, *supra* note 36, at 355; see also Junxiang Mao et al., *The Logic of Change of the CPC’s Human Rights Discourse Since the Founding of the People’s Republic of China*, 19 J. HUM. RTS. 3, 11–12 (2020).

51. Zhang, *supra* note 24, at 223 (“In March 1991, following a letter from Robert F. Kennedy Center for Justice and Human Rights to the then-President of the Chinese Academy of Sciences, in which it stated that ‘the fate of thousands of people’ in China had been treated in an inhumane way, the Publicity Department of the CPC Central Committee convened another symposium on human rights, highlighting the ‘urgency’ of working on human rights issues. In order to refute Western fallacies, China decided to begin studying human rights issues.”); Wu, *supra* note 36, at 356; *Human Rights in China*, INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC (Nov. 1991), <http://www.china.org.cn/e-white/7/index.htm> [<https://perma.cc/JPZ7-2JC6>].

52. Wu, *supra* note 36, at 356; INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, *supra* note 51; Zhu, *supra* note 15, at 104.

53. See Wu, *supra* note 36, at 364; Chen Zhishang, *Rethinking on China’s Human Rights Ideology*, 1 INT’L CRITICAL THOUGHT 408, 408–411 (2011). For an alternative approach which identifies ten fundamental principles, see Pinghua Sun, *Fundamental Principles for Achieving International Human-Rights Standards*, in CHINESE CONTRIBUTIONS TO INTERNATIONAL DISCOURSE OF HUMAN RIGHTS 165 (Pinghua Sun ed., 2022).

54. Wu, *supra* note 36, at 358; see John Garnaut, *Engineers of the Soul: Ideology in Xi Jinping’s China* (2019).

quently, “any discussion of China’s official human rights discourse needs to be prefaced by a sketch of Marxist-Leninist premises,”<sup>55</sup> especially as regards Chinese human rights theory’s collectivist and developmentalist tendencies.<sup>56</sup> China’s Marxist-Leninist roots were initially responsible for Beijing’s recalcitrance to engage with the international human rights order at all. Marx famously critiqued “rights” as a “bourgeois invention for maintaining its own class goals,” which would be rendered unnecessary by proletarian revolution and the rise of a communist society characterized by “widespread altruism.”<sup>57</sup> The Party-State’s gloss on Leninism—especially the premise that individual rights can be granted and withdrawn by the party according to political conditions and changes in the mass line<sup>58</sup>—informed the pre-1982 Constitution’s linking of political rights to class status,<sup>59</sup> and continues to inform the contingent nature of human rights in Chinese theory (that is, the relation between rights and obligations). While an in-depth exposition of Marxist-Leninist theory is beyond the scope of this article, I attempt to identify aspects of Chinese human rights theory which have benefitted from an especially heavy dose of ideology and discuss how that ideology is likely to influence Chinese human rights proposals in practice.

#### A. *Sovereignty and Nonintervention*

The importance of sovereignty to Chinese human rights theory cannot be overstated.<sup>60</sup> China’s participation in the international human rights regime has been “conditional on not undermining national sovereignty,” a condition which continues to motivate Beijing’s rejection of ICJ jurisdiction.<sup>61</sup> The 1991 white paper, Beijing’s first authoritative exposition of human rights policy, focused heavily on preserving “national independence and state sovereignty” by tailoring international human rights principles to the Party-State’s perception of Chinese needs, especially with respect to develop-

55. Wu, *supra* note 36, at 358.

56. See, e.g., Chunde Gu, *The Communist Party of China Has Always Been the Firm Core of Leadership for China’s Human Rights Development and Progress*, 20 J. HUM. RTS. 205, 220 (2021) (describing General Secretary Xi’s contributions to Marxist human rights theories since the 18th Party Congress).

57. Wu, *supra* note 36, at 361 (citing KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO*, SELECTED WORKS, VOL. 1 (1969)); see also Mao et al., *supra* note 50, at 6–7.

58. Wu, *supra* note 36, at 362; Cohen, *supra* note 46, at 232 (“Xi Jinping and the current leaders of Chinese legal institutions, including the judiciary, have relentlessly emphasized that the legal system, as well as the government, the legislature, the media, and all social and economic organizations, must always operate under the Party’s strict control.”).

59. See HAN ET AL., *supra* note 35, at 274 (“At a human rights theory symposium convened by the Institute of Law, Chinese Academy of Social Sciences in 1991, a few people believed that the subjects of human rights are people and only workers, peasants, intellectuals and patriots who love socialism were entitled to human rights.”).

60. Wu, *supra* note 36, at 364 (“Among China’s arguments concerning international human rights, the most fundamental and most deeply rooted of them is an extremely strong, unconditional defense of State sovereignty.”).

61. Zhang, *supra* note 24, at 228.

ment.<sup>62</sup> Beijing would reiterate the importance of sovereignty to its human rights practice at the beginning of the new millennium (even amidst contentious World Trade Organization negotiations focusing on China's human rights record),<sup>63</sup> proclaiming a new doctrine of "improving human rights, protecting sovereignty, and opposing [Western] hegemony."<sup>64</sup> This reflects Beijing's more general (that is, not limited to human rights) emphasis on a "traditional positivist notion of sovereignty" in its engagement with the international legal order.<sup>65</sup>

Reflecting the post-1989 environment in which Chinese human rights discourse emerged, Chinese analysts have identified "protecting national sovereignty" and "maintain[ing] government legitimacy" as the "two inter-related functions" of China's human rights theory.<sup>66</sup> These two functions effectively merge when Beijing rebukes foreign criticism of its domestic rights record as unwarranted interference in China's internal affairs.<sup>67</sup> Beijing essentially relies on a strict interpretation of Article 2(7) of the U.N. Charter, along with a healthy dose of non-intervention *opinio juris* and state practice, to support its argument that critiques of Chinese human rights abuses violate the Charter.<sup>68</sup> This line of reasoning reflects the conclusion of Chinese human rights theorists that sovereignty is not in tension with international human rights, but is instead "the prerequisite and guarantee for the protection of human rights."<sup>69</sup> The upshot of this claim is that human rights are not inherent in the individual, but rather are facilitated by the state. This conclusion accords with the Leninist (top-down, Party-State dominated) bent of Chinese human rights theory.

As a consequence of Beijing's sovereigntist approach to IHRL, Chinese human rights theory bluntly refutes the notion that there is a "universal road for the development of human rights in the world," instead proposing that "the cause of human rights must be promoted on the basis of the national conditions and the needs of the people of that country."<sup>70</sup> This view is

62. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, *supra* note 51; Mao et al., *supra* note 50, at 4.

63. See Mike Jendrzeczyk, *China's Accession to the WTO and Human Rights (Testimony before the House Committee on Ways and Means, February 2000)*, HUM. RTS. WATCH (Feb. 16, 2000), <https://www.hrw.org/legacy/campaigns/china-99/china-testimony0216.htm> [<https://perma.cc/Z7T3-QRZC>].

64. Zhu, *supra* note 15, at 112 (促进人权, 捍卫主权, 反对霸权).

65. Wu, *supra* note 36, at 365 (citing JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 106-10 (1974)).

66. Zhu, *supra* note 15, at 113.

67. Wu, *supra* note 36, at 367 ("The Chinese government frequently dismisses foreign pressure as an affront to China's national sovereignty, politically motivated and designed to undermine the legitimacy and authority of the Chinese government."); Mao et al., *supra* note 50, at 15-16; Chi, *supra* note 11, at 813.

68. Wu, *supra* note 36, at 367; Rosemary Foot, *R2P Sidelined: The International Response to China's Repression of Muslim Minorities in Xinjiang*, 13 GLOB. RESP. TO PROTECT 29, 31 (2021).

69. Chi, *supra* note 11, at 812.

70. Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21\*\* China*, at 2, U.N. Doc. A/HRC/WG.6/31/CHN/1\* (2018); see Guangjin Lu, *Outline of the Construction of Chinese Human*

indebted to the Marxist roots of Chinese human rights theory, which dictate that unless human rights discourse accounts for the material and cultural constraints of a particular society, it will be unable to deliver on its ultimate promises of “freedom” and “development.”<sup>71</sup> On this Marxist view of human rights as “a kind of local knowledge,”<sup>72</sup> societies develop diverse human rights frameworks based on their unique material conditions. Consequently, the resolution of contradictions between rights and material conditions, as well as between diverse rights frameworks, propels the dialectical/teleological development of new and improved human rights frameworks better suited to ever-shifting material and cultural conditions.<sup>73</sup> To the extent that Chinese scholars do identify a “universal” aspect of human rights, it tends to be concentrated in formal U.N. institutions, instruments, and processes.<sup>74</sup> This finding undercuts the conclusion that the PRC seeks exclusively to undermine the international human rights order, at least as it exists under U.N. auspices.

Chinese scholars recognize that their sovereigntist approach to the human rights order creates tension with Western “universalist” human rights frameworks,<sup>75</sup> especially insofar as the sovereigntist approach leads Chinese scholars to “deny the legitimacy of ‘human rights intervention.’”<sup>76</sup> This tension was highlighted during the late 1990s and early 2000s, especially following North Atlantic Treaty Organization (“NATO”) states’ military interventions in the Balkans, which led some Chinese analysts to lament

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*Rights Culture in the New Era*, 20 J. HUM. RTS. 185, 187 (2021) (comparing the impact of Western versus Chinese cultural conditions on the development of their respective human rights frameworks).

71. See Ying Ren, *The Theoretical System of Human Rights with Chinese Characteristics*, 7 CHINESE STUDS. 210, 212–13 (2018); Chen, *supra* note 52, at 408 (“We are under the guidance of the Marxist world outlook and methodology, proceed from China’s actual conditions in combination with practical experience concerning China’s human rights, and draw on the achievements in human rights throughout human history to seek and establish the theoretical system of socialist human rights with Chinese characteristics.”); Huan Wang, *Overview of the Symposium on Human Rights Cause in China in the New Era New Development*, 17 J. HUM. RTS. 111, 120 (2018) (contrasting Chinese with Western definitions of human rights based on their different class and development stage).

72. Jianzhou Zhao & Siwen Geng, *A Centennial Journey of Putting People First — “The Communist Party of China and the Progress on Human Rights in China” International Conference Summary News-Clips*, 20 J. HUM. RTS. 515, 519 (2021).

73. Lei Li & Rui Teng, *Comparison of Human Rights Values between the East and the West — Summary of the 2019 China-Europe Seminar on Human Rights*, 18 J. HUM. RTS. 695, 697–98 (2019); see also Mao et al., *supra* note 50, at 6–7 (“The founders of Marxism further pointed out the historicity of human rights, holding that the realization of rights should be dependent on the material conditions of society.”); Zhang et al., *Mutual Promotion between the Chinese Dream and the Human Rights Protection in China Focus: The Theory and Discourse in Socialism with Chinese Characteristics*, 20 J. HUM. RTS. 3, 4 (2021) (“Armed with dialectical materialism and historical materialism, Chinese Communists know deeply that in adhering to seeking truth from facts, the most important thing is to grasp the overall situation.”); He, *supra* note 11, at 161 (“Human rights, with their commonality and class nature, are undergoing a gradual historical process, and their realization and development are restricted by various practical conditions. Therefore, we need to find a way to promote and develop human rights that is suitable for China’s reality.”); Lu, *supra* note 70, at 191.

74. Li & Teng, *supra* note 73, at 704.

75. *Id.* at 698.

76. Zhu, *supra* note 15, at 104.

that “the concept of sovereignty seems increasingly dispensable in the face of massive human rights violations.”<sup>77</sup> China’s distaste for Euro-American human rights interventions has continued, with respect to conflicts in Libya, Iraq, Afghanistan, and Syria,<sup>78</sup> as well as efforts to create new human rights obligations for sovereigns regarding conduct by corporations registered in their territory.<sup>79</sup>

Beijing’s sovereigntist, non-interventionist, and anti-universalist approach to human rights is clearly related to (if not animated by) “the legacy of unequal treaties and a century of humiliation.”<sup>80</sup> Most obviously, the country’s history of semi-colonization, and identification as a member of the Global South,<sup>81</sup> inflects Chinese scholars’ skepticism that “infringement on other countries sovereignty” and “interference in other countries internal affairs” can ever be justified in order to vindicate “universal” (Western-origin) human rights.<sup>82</sup> In this vein, Mao-influenced human rights theory, drawing on the century of humiliation, frames sovereign independence and non-interference as a kind of collective “human right” in and of itself, without which a nation’s un-liberated people are deprived of their “rights to exist.”<sup>83</sup> Some Chinese human rights theorists take this argument a step

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77. *Id.* (“The message of the Kosovo War is alarming: universal human rights principles seem to be transcending individual nation-states’ sovereignty and are becoming enforceable by international coalitions. This development is clearly a breach of the fundamental principle of sovereignty, which has been the cornerstone of international relations since the Treaty of Westphalia in 1648.”); see Chen, *supra* note 52, at 414–15; Chi, *supra* note 11, at 812.

78. Li & Teng, *supra* note 73, at 699; Mao et al., *supra* note 50, at 15–16; Huang, *supra* note 11, at 519.

79. Meng Sun & Tingting Feng, *Extraterritorial Application of International Human Rights Conventions - From the Perspective of States Regulating the Extraterritorial Human Rights Obligations of Transnational Corporations Special Topic II: Contemporary Development of International Human Rights Protection*, 20 J. HUM. RTS. 413, 414–15 (2021).

80. Zhu, *supra* note 15, at 110 (citing Jeremy T. Paltiel, *Negotiating Human Rights with China*, in DEMOCRACY AND FOREIGN POLICY 165, 172 (Maxwell A. Cameron & Maureen Appel Molot eds., 1995)); see also Wu, *supra* note 36, at 366 (“Given its bitter experience with Western and Japanese imperialism in the nineteenth and twentieth centuries, it is understandable that the PRC has adamantly argued for the absolutist notion of State sovereignty, which it learnt from the Soviet Union in the 1950s.”).

81. Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *supra* note 70, at 18 (“China is still the largest developing country in the world, and some outstanding problems of unbalanced and inadequate development remain unsolved.”).

82. Chen, *supra* note 52, at 409; He, *supra* note 11, at 163 (“China’s history of being invaded and bullied by imperialism for more than 100 years is especially helpful in understanding China’s philosophy of national independence and national liberation.”).

83. Ren, *supra* note 71, at 214; NEW CHINA RSCH., PURSUING COMMON VALUES OF HUMANITY - CHINA’S APPROACH TO DEMOCRACY, FREEDOM AND HUMAN RIGHTS, 26 (2021) (“It had been made clear to the Chinese people that, from years of suffering from the Opium War in 1840 to the founding of the People’s Republic of China in 1949, there would be no true freedom and human rights without national independence and liberation.”); Chen, *supra* note 52, at 413 (“The concept of sovereignty has two meanings. One refers to the relations between the people and the state power. We claim that the people are the masters of the country and the sole source of state power. Therefore, sovereignty lies in the hands of the people. At this level, sovereignty is the concentrated manifestation of the people’s rights and is a kind of collective human rights. That is to say, human rights and sovereignty are consistent with each other. The other refers to the relations between nations. Sovereignty denotes the right to independence and equality of a state. No country should encroach on other countries’ sovereignty. Infringement

further, claiming that not only are human rights interventions themselves a human rights violation, but that the structural violence of “hegemonism” (that is, “universal” Western-dominated human rights discourse) itself threatens human rights.<sup>84</sup> This perspective blurs the distinction between the decolonization and human rights movements, a rhetorical move which has been both advanced and critiqued by Western scholars.<sup>85</sup> The Chinese approach also sets the stage for Chinese human rights scholars to decry as the product of colonialism the “apparent discourse advantages” of Western human rights frameworks, constructing such advantages as violating the sovereigntist human rights of “developing” states like the PRC.<sup>86</sup> Consequently, as in the immediate wake of 1989, Beijing’s engagement with the international human rights order, especially to strengthen its “discourse power,” is often cast as a “strategic issue.”<sup>87</sup>

In apparent tension with its sovereigntist approach to human rights, the PRC issues annual counter-critiques of states—like the United States—which question China’s human rights record.<sup>88</sup> The precise terms of these counter-critiques, however, are arguably consistent with China’s sovereigntist approach. The State Council Information Office’s 2021 Report on Human Rights Violations in the United States, for example, accuses Washington of “hypocrisy” and “double standards,” suggesting that instead of “making irresponsible remarks on the human rights situation in other countries[,]” American policy elites should focus on their country’s own human rights shortcomings.<sup>89</sup> On China’s sovereigntist view, each state is responsible for protecting the human rights of its own citizens first and foremost. To give Beijing the benefit of the doubt (rather than assume bad faith or hypocrisy), one might cast the Report on Human Rights Violations in the United States as Beijing’s “reminder” to Washington that Americans could greatly improve the global human rights environment simply by putting their own house in order.

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of a country’s sovereignty will be the violation of the human rights of all the people in the country. At this level, human rights are also consistent with sovereignty and are also a kind of collective human rights.”); Yunlong Li, *The Influence of the Founding of the PRC on the Contemporary Development of China’s Human Rights Focus: 70 Years of Human Rights Development in China*, 18 J. HUM. RTS. 284, 288 (2019).

84. Chen, *supra* note 52, at 409.

85. MOYN, *supra* note 11, at 115, 117.

86. Mao et al., *supra* note 50, at 13; Zhang, *supra* note 24, at 224 (“Some Western countries, by virtue of their dominant position, assume the role of judges and arrogantly demand that China should improve certain human rights and expand certain freedoms, which was uncomfortable for the Chinese people.”); NEW CHINA RSCH., *supra* note 83, at 72 (“To impose one’s own view of democracy, freedom and human rights on others is a violation of the true spirit of democracy, freedom and human rights.”); *see also* Liu, *supra* note 30, at 370; Chi, *supra* note 11, at 809.

87. Zhang, *supra* note 24, at 225.

88. *See, e.g.*, THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE’S REPUBLIC OF CHINA, THE REPORT ON HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES IN 2020 (2021).

89. *Id.* at 2; Zhao & Geng, *supra* note 72, at 523 (analogizing to the equitable doctrine of unclean hands).

Former Foreign Minister Wang Yi's remarks at the UNHRC underscore Beijing's sovereigntist, anti-universalist approach to human rights: "[C]ountries differ from each other in history, culture, social system and level of economic and social development. Therefore they must promote and protect human rights in light of their national realities and the needs of their people."<sup>90</sup> More bluntly, the Foreign Minister condemned the use of human rights "as a tool to pressure other countries and meddle in their internal affairs."<sup>91</sup> Minister Wang Yi's speech was the first time a PRC official of his stature addressed the UNHRC.<sup>92</sup> This fact suggests that Beijing views the U.N. human rights regime as a source of some legitimacy for its human rights proposals, and not merely an obstacle to be undermined. If the UNHRC were a mere obstacle, one would not expect Beijing to grace it with the presence of increasingly high-profile dignitaries to speak on China's behalf.

### B. *Prioritizing the Right to Development*

One of the primary justifications for China's noninterventionist human rights approach is that it allows individual states to pursue development based on their unique cultural, political, and economic conditions, as well as their individual factor endowments.<sup>93</sup> The sovereigntist stream of Chinese human rights discourse is thus connected to its prioritization of the right to development, which could be called a "first right among equals." Some Chinese analysts suggest that the development-oriented human rights approach, which first arose from China's unique economic, political, historical, environmental, and cultural conditions, constitutes Beijing's "outstanding" contribution to "international human rights development."<sup>94</sup> In this view—and in light of Professor Abi-Saab's warning about "the fate of any legal system which does not keep up with the fundamental changes in its social environment"<sup>95</sup>—those analysts suggest that the development-oriented approach constitutes "an important theme of human rights law's advancing with the times."<sup>96</sup>

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90. H.E. Wang Yi, State Councilor and Foreign Minister of China, *A People-Centered Approach for Global Human Rights Progress* (Feb. 22, 2021).

91. *Id.*

92. Tiezzi, *supra* note 16.

93. Zhu, *supra* note 15, at 113 ("China advocates mutual respect for state sovereignty and maintains that priority should be given to the safeguarding of the right to subsistence and development. Human rights policy must be compatible with the developmental goals of the state.")

94. Ren, *supra* note 71, at 210–11; Li, *supra* note 83, at 292 ("[T]he People's Republic of China has pointed out a direction for the development of human rights: focusing on the protection of economic and social rights."); He, *supra* note 11, at 160 ("The content of human rights is constantly enriched and improved in modern Chinese society, mainly reflected in the rise and development of economic and social rights.")

95. Abi-Saab, *supra* note 21, at 119.

96. Ren, *supra* note 71, at 211; Chen, *supra* note 52, at 413 ("[T]he political model in the United States and Western capitalist countries has fallen behind the times and needs to be reformed. It is wrong to pass it off as a universal value and impose it on China.")

Article 51 of China's 1982 Constitution legitimizes the subordination of individual rights (that is, most Western liberal human rights) to collective interests like development.<sup>97</sup> Privileging "social, economic, and cultural" rights over "civil and political" rights is not a novel feature of China's post-1978 rights discourse, but in fact has historical roots in China's prior constitutions.<sup>98</sup> From a Marxist perspective, this persistent difference reflects more fundamental distinctions between the material and cultural conditions of Chinese and Euro-American societies.<sup>99</sup> Indeed, some Chinese scholars identify the roots of China's "people-centered" human rights approach in the work of late Qing reformists like Liang Qichao and Yan Fu, asserting that their approach was in turn informed by classical Chinese philosophers including Confucius and Mencius.<sup>100</sup> Influential members of the early CPC like Chen Duxiu and Li Dazhao benefit from a similar hagiography, which lionizes their contributions to Chinese human rights theory based on a sober assessment of China's material, cultural, and political conditions.<sup>101</sup> The "national conditions" which influence Chinese human rights theory's emphasis on the right to development also implicate the century of humiliation, the (continuing) rectification of which is thought to justify a developmentally-oriented approach to set the stage for national rejuvenation.<sup>102</sup>

"Development" in particular is prioritized within the Chinese human rights framework because it constitutes an "important prerequisite" to "guarantee the realization of [other] basic human rights" and "realize the freedom of everyone."<sup>103</sup> This focus on development is justified on (Marxist) ideological grounds because the Party-State has identified inadequate development in light of demand for higher standards of living as the "main contradiction in Chinese society."<sup>104</sup> From this perspective designating

97. Wu, *supra* note 36, at 344 (quoting art. 51, which reads "When exercising their freedoms and rights, citizens of the People's Republic of China shall not undermine the interests of the state, society or collectives, or infringe upon the lawful freedoms and rights of other citizens.").

98. *Id.* at 345–46.

99. Li & Teng, *supra* note 73, at 698; Chi, *supra* note 11, at 811.

100. Li & Teng, *supra* note 73, at 703; Han et al., *supra* note 35, at 265–67; Zhao & Geng, *supra* note 72, at 523.

101. See Gu, *supra* note 56, at 206–07.

102. Mao et al., *supra* note 50, at 8 ("The history of China is one in which the right to survival was not guaranteed and the human dignity mercilessly trampled on . . . . It can be seen that food and clothing were the simplest aspirations and pursuits of the Chinese people during that period, and the most important tasks of governance for the CPC after the founding of the People's Republic of China."); Zhang et al., *supra* note 73, at 11–12 ("To realize the Chinese Dream of the great rejuvenation of the Chinese nation, the entire nation must work hard to restore its own dignity and to realize the human rights of the entire nation.").

103. Ren, *supra* note 71, at 217; Chen, *supra* note 52, at 410; Han et al., *supra* note 35, at 287; *China's Progress in Poverty Reduction and Human Rights*, THE STATE COUNCIL INFORMATION OFFICE OF THE PRC (Oct. 2016), [http://english.www.gov.cn/policies/latest\\_releases/2016/10/17/content\\_281475468533275.htm](http://english.www.gov.cn/policies/latest_releases/2016/10/17/content_281475468533275.htm) [<https://perma.cc/8J44-UWGY>].

104. Mao et al., *supra* note 50, at 18; Zhang et al., *supra* note 73, at 3 ("To realize the Chinese Dream in the new era, China's human rights protection must always be people-centered, and adhere to the resolution of the main social contradictions in the new era.").



development as the “primary fundamental human right” reflects the “urgent needs and fundamental interests of the majority of people in China,” and is thus based on the “actual” political, economic, and cultural conditions of the PRC.<sup>105</sup>

Prioritizing collective development over individual entitlements also reflects a Leninist emphasis on the “pre-eminence of the State over the individual” and the “supremacy of Party power over individual rights.”<sup>106</sup> Because the Party is the vanguard of the people’s dictatorship, China’s party-dominated human rights discourse is (theoretically) consistent with, rather than in tension with, Beijing’s development-oriented and people-centered human rights approach.<sup>107</sup> As the Chinese UNHRC delegation put it, “[t]he Chinese Government takes the realization of the people’s rights to subsistence and development as its top priority.”<sup>108</sup> This approach identifies sovereignty as a predicate to the pursuit of the “primary” human right to development, which has led some Chinese scholars to transparently assert that “state sovereignty matters more than individual human rights.”<sup>109</sup>

Deng Xiaoping Theory articulated the predominance of collective rights, like the right to development, in particularly stark terms. In this view, human rights exist to benefit “the people” broadly speaking as opposed to specific individuals, and the achievement of “common prosperity” and development necessitates a human rights framework which explicitly opposes “extreme individualism” and “polarization.”<sup>110</sup> Deng’s view has matured into what is now known as the “people-centered” approach to human rights. The people-centered approach is touted as a uniquely Chinese human rights concept, which “provides an important new perspective on human rights” to the rest of the international legal order.<sup>111</sup> While the people-centered approach is surely a collectivist counterweight to individualist (liberal) human rights theory, it also represents a “top-down” as opposed to “bottom-up” human rights concept: rather than negative liberties which exist to protect individuals from the state, rights are positive entitlements which are maintained by the state as a trustee.<sup>112</sup> This top-down concept has an unmistakably Leninist flavor.

China’s response to the COVID-19 pandemic, especially in contrast to the United States’s response,<sup>113</sup> neatly illustrates the privileging of collective

105. Chen, *supra* note 52, at 409–10.

106. Wu, *supra* note 36, at 362; see Zhang et al., *supra* note 73, at 12 (“Only the CPC can enable the Chinese people to enjoy human rights.”).

107. Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *supra* note 70, at 3; Mao et al., *supra* note 50, at 19; Gu, *supra* note 56, at 205.

108. Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *supra* note 70, at 7.

109. Chen, *supra* note 52, at 413.

110. Ren, *supra* note 71, at 215.

111. He, *supra* note 11, at 155.

112. *Id.*

113. THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 88, at 2 (“The United States claimed to be most abundant in medical resources and healthcare capacity,

over individual entitlements in Chinese human rights theory.<sup>114</sup> Especially enlightening is Beijing's critique of the negative cascading effects of the COVID-19 pandemic on development-adjacent rights in the United States, like income inequality, crime rates, unemployment, and even the digital divide.<sup>115</sup> This is, of course, another instance of China framing human rights in a way that makes it look like a more responsible member of the international community than the United States.<sup>116</sup> To some degree, though, this framing reflects less of a strategic definitional/theoretical judgment by Beijing and instead more of a self-fulfilling prophecy. Precisely *because* China privileges collective over individual rights, it has responded to collective action problems posed by the pandemic in a way that optimizes social outcomes, whereas the United States has instead generally let actors pursue their own rational self-interest rather than restrict individual rights. Pandemic management thus constitutes another example of the top-down versus bottom-up distinction between Chinese Marxist-Leninist and Western liberal human rights frameworks.<sup>117</sup>

Another collective human right which Chinese scholars associate with the right to development is the "public interest" in national security,<sup>118</sup> which Euro-American scholars often identify as in tension with individual rights. Protecting national security, as a development-adjacent and thus high-priority human right, has been used to justify the Party-State's commission of atrocities against Uyghur Muslims in Xinjiang.<sup>119</sup> According to Chinese human rights theory, when the Party-State detains or "re-educates"<sup>120</sup> or even sterilizes<sup>121</sup> Muslims who "insinuate religious extremism into people's

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yet its response to the COVID-19 pandemic was chaotic, causing it to lead the world in the numbers of confirmed COVID-19 cases and related deaths.").

114. Gu, *supra* note 56, at 224.

115. THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 88, at 13–15.

116. See Zhang et al., *supra* note 73, at 5.

117. See Feron, *supra* note 11, at 93–94.

118. Li & Teng, *supra* note 73, at 699; Lu, *supra* note 70, at 194.

119. Tiezzi, *supra* note 16.

120. DARREN BYLER, TERROR CAPITALISM: UYGHUR DISPOSSESSION AND MASCULINITY IN A CHINESE CITY 32 (2021); see Adrian Zenz, *Brainwashing, Police Guards and Coercive Internment: Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang's "Vocational Training Internment Camps"*, 7 J. POL. RISK (2019); Martin Quin Pollard, *Analysis: New Xinjiang Chief Expected to Maintain Policies, Boost Economic Focus*, REUTERS (Dec. 29, 2021), <https://www.reuters.com/world/china/new-xinjiang-chief-expected-maintain-policies-boost-economic-focus-2021-12-29/> [<https://perma.cc/X5GK-28DM>]; Connor W. Dooley, *Silencing Xinjiang: The Chinese Government's Campaign Against the Uyghurs*, 48 GA. J. INT'L COMPAR. L. 233 (2019).

121. JAMES A. MILLWARD, EURASIAN CROSSROADS: A HISTORY OF XINJIANG (rev. and updated ed. 2021); ADRIAN ZENZ, STERILIZATIONS, IUDS, AND MANDATORY BIRTH CONTROL: THE CCP'S CAMPAIGN TO SUPPRESS UYGHUR BIRTHRATES IN XINJIANG 2 (rev. ed. 2020); The Associated Press, *China Cuts Uyghur Births with IUDs, Abortion, Sterilization*, A.P. NEWS (June 29, 2020), <https://apnews.com/269b3de1af34e17c1941a514f78d764c> [<https://perma.cc/ZSB5-XXPX>]; see Joanne Smith Finley, *Why Scholars and Activists Increasingly Fear a Uyghur Genocide in Xinjiang*, 23 J. GENOCIDE RSCH. 348, 354–55 (2021); Rukiye Turdush & Magnus Fiskesjö, *Dossier: Uyghur Women in China's Genocide*, 15 GENOCIDE STUD. PREVENTION 22, 24 (2021).

daily lives[,]"<sup>122</sup> it is preserving, not violating, human rights. Indeed, from Beijing's perspective—and based on the Party-State's dubious construction of the relevant facts<sup>123</sup>—it would be a human rights violation *not* to act.

The Foreign Minister's 2021 remarks to the UNHRC highlighted the "people centered" nature of Beijing's human rights framework, which in turn justifies the prioritization of collective human rights like economic development.<sup>124</sup> Wang Yi bluntly stated that "the rights to subsistence and development are the basic human rights of paramount importance."<sup>125</sup> Besides using the UNHRC as a venue to legitimate its development-oriented human rights approach, Chinese commentators also draw on U.N. General Assembly Resolutions to support Beijing's perspective,<sup>126</sup> further suggesting that the PRC views the international human rights order as a source of legitimacy, and not a threat.

### C. Inseparability of Rights and Obligations

According to Chinese interpretations of Marxist ideology, rights are derived from corresponding duties.<sup>127</sup> Consequently, since at least the late 1990s, Party-State elites have highlighted the "interrelationship between human rights and individual obligations" as a key characteristic of China's perspective on human rights.<sup>128</sup> This premise leads to a simple conclusion: in the Chinese human rights frame "the state can legitimately violate indi-

122. THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, RESPECTING AND PROTECTING THE RIGHTS OF ALL ETHNIC GROUPS IN XINJIANG (2021).

123. See generally Michael Clarke, *China's "War on Terror" in Xinjiang: Human Security and the Causes of Violent Uighur Separatism*, 20 TERRORISM & POL. VIOLENCE 271, 289 (2008); JAMES MILLWARD, VIOLENT SEPARATISM IN XINJIANG: A CRITICAL ASSESSMENT 11, 22, 31 (2004); Dooley, *supra* note 120, at 239; Joanne Smith Finley, *Uyghur Islam and Religious "De-Extremification": On China's Discourse of "Thought Liberation" in Xinjiang*, OXFORD ISLAMIC STUD. ONLINE (2019), <http://www.oxfordislamicstudies.com/Public/focus.html>; Joanne Smith Finley, *Securitization, Insecurity and Conflict in Contemporary Xinjiang: Has PRC Counter-Terrorism Evolved into State Terror?*, 38 CENT. ASIAN SURV. 1, 11, 14 (2019); Nicolas Becquelin, *Criminalizing Ethnicity: Political Repression in Xinjiang*, 1 CHINA RTS. F. 39 (2004); Sheena Chestnut Greitens et al., *Counterterrorism and Preventive Repression: China's Changing Strategy in Xinjiang*, 44 INT'L SEC. 9, 12 (2020); Matthew P. Robertson, *Counterterrorism or Cultural Genocide?*, MADE CHINA J. (2020).

124. Yi, *supra* note 90 ("The people-centered philosophy means that the people should be the real masters of their country, and that they should take part in national governance and political consultation. It also means that the wealth gap should be narrowed, and that all-round development of the people should be promoted.").

125. *Id.*

126. Chen, *supra* note 52, at 410.

127. Wu, *supra* note 36, at 343, 370–71.

128. Zhu, *supra* note 15, at 113 (citing Vice Premier Qian Qichen); Wu, *supra* note 36, at 370 (citing a Chinese delegate's statement to the Vienna Conference on Human Rights); see also World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF/157/23 (June 25, 1993), *reprinted in* 14 HUM. RTS. L.J. 352, 354 (1993) ("The rights and obligations of a citizen are indivisible. While enjoying his legitimate rights and freedoms, a citizen must fulfill his social responsibilities and obligations. There are no absolute individual rights and freedom, except those prescribed by and within the framework of law. Nobody shall place his own rights and interests above those of the state and society, nor should he be allowed to impair those of others and the general public."); Lu, *supra* note 70, at 197.

vidual rights in order to attain such collective goals as economic development.”<sup>129</sup> This conclusion is clearly reflected in Article 33 of the 1982 Constitution.<sup>130</sup>

Put in stark Marxist terms, the Chinese approach asserts that “[h]uman rights are the outcome of the people’s struggle,” such that individuals are entitled to rights as the fruit of this struggle, but also have an obligation to the Party-State to maintain those rights—which, in some cases, paradoxically requires allowing the Party-State to usurp them.<sup>131</sup> This mutually constitutive theory of rights and obligations is intimately related to the premium which Chinese human rights theory places on collective rights, as opposed to individual rights. From this perspective, rights can only be established through collective action, for example, class struggle or resource allocation that optimizes development given factor endowments. While Chinese citizens are entitled to benefit from these collectively guaranteed rights, they simultaneously bear obligations to ensure that others can (continue to) benefit as well, which in some cases dictates that certain individuals not be able to exercise certain rights for the common good.<sup>132</sup> This “unification”<sup>133</sup> of rights and obligations thus stands in stark contrast to the natural/inalienable human rights framework advanced by Western states.<sup>134</sup>

The inseparability of rights and obligations in Chinese human rights theory has profound implications in light of the “people-centered” approach to human rights. If rights were inalienable in the Chinese framework, then the people-centered approach would generally be synonymous with the prioritization of the right to development. The Party-State would identify “the people’s” rights and, in a top-down fashion, pursue policy solutions to vindicate those positive entitlements.<sup>135</sup> Given, however, that rights are inseparable from obligations in the Chinese perspective, one must ask under what circumstances the people-centered approach dictates that certain obligations should outweigh their corresponding rights—and who gets to decide. The answer to the latter question, as one might expect in a Leninist system, is the Party-State, which proactively identifies and pursues public goods like “development” by balancing individual entitlements and obligations to achieve optimal social outcomes.<sup>136</sup> Not only are human rights not inalienable, but they are also not universal: the Party-State gets to decide who has

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129. Zhu, *supra* note 15, at 113 (“The question, then, is whether the state can legitimately violate individual rights in order to attain such collective goals as economic development . . . . Obviously, for the Chinese government, the answer is yes.”).

130. Wu, *supra* note 36, at 343 n.44 (quoting art. 33, which reads in relevant part “[e]very citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.”).

131. See Chen, *supra* note 52, at 412.

132. Lu, *supra* note 70, at 197.

133. Chen, *supra* note 52, at 408.

134. *Id.* at 412 (“No one has endowed us with human rights.”).

135. He, *supra* note 11, at 155.

136. See *id.* at 165.

them and when. Thus, in the name of “social stability,”<sup>137</sup> which fosters development and subsequently the well-being of “the people,” the Party-State is justified in stripping certain groups of their rights.<sup>138</sup> One such group, which the Party-State has ostensibly identified as a source of social instability inconsistent with the people-centered development approach, is Chinese human rights lawyers.<sup>139</sup> The Uyghurs are another obvious example.<sup>140</sup>

### III. WESTERN SKEPTICISM

In light of the PRC’s increasingly active role in IHRL discourse, the consensus among many Euro-American China watchers seems to be that Beijing “has sought to promote its own interpretation of IHRL to counter the West.”<sup>141</sup> While China’s enhanced engagement with the international human rights regime could be cast in a positive light—especially given the widespread perception that Beijing has historically been one of the regime’s worst offenders—many Western observers have taken a more cynical view. Iannini’s assertion that “Beijing rhetorically endorses many human rights norms while advocating self-serving interpretations of their meaning and future development”<sup>142</sup> is probably representative of this perspective. The received wisdom seems to be that the PRC’s increasing engagement with the international human rights regime serves to (1) launder China’s reputation as a human rights violator, and (2) recast the international human rights regime such that China can, without altering its behavior, avoid such allegations in the future.<sup>143</sup>

Of course, not all Euro-American analysts are convinced that Beijing is deliberately and self-interestedly attempting to undermine the international human rights order. Professor Nathan, for example, notes that while the PRC’s geopolitical stature is dramatically improving, “a shift in the struc-

137. *Id.* at 164.

138. *Id.* at 163 (“The people-centered approach to governance means a distinction between love and hate rather than blind unity . . . . Therefore, the people-centered approach means that we shall identify the enemy and counter their attacks with effective and powerful measures.”).

139. Cohen, *supra* note 46, at 239–40.

140. See Byler, *supra* note 120; Zenz, *supra* note 120; Pollard, *supra* note 120; Dooley, *supra* note 120; Smith Finley, *supra* note 121; Turdush & Fiskesjö, *supra* note 121; Millward, *supra* note 121.

141. Iannini, *supra* note 24, at 221.

142. Williams, *supra* note 35, at 7.

143. Nathan, *supra* note 19, at 167–68 (citing AMITAV ACHARYA, *THE END OF AMERICAN WORLD ORDER* (1st ed. 2014); Mark Leonard, *Why Convergence Breeds Conflict: Growing More Similar Will Push China and the United States Apart*, 92 *FOREIGN AFFS.* 125 (2013); MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* (2nd ed. 2012); CHARLES A. KUPCHAN, *NO ONE’S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN* (reprint ed. 2013); MICHAEL PILLSBURY, *THE HUNDRED-YEAR MARATHON: CHINA’S SECRET STRATEGY TO REPLACE AMERICA AS THE GLOBAL SUPERPOWER* (2016); see also DOSHI, *supra* note 5, at 284; Economy, *supra* note 21, at 53–54, 64; Chen, *supra* note 25, at 1213–14 (“What is at stake here is the integrity of the international human rights system.”).

tural distribution of power among participating states is not the same as a shift in the norms that make up global regimes.”<sup>144</sup> Those regimes, including the human rights order, are not “static,” but have evolved in response to the preferences of both rising and incumbent powers over the course of history.<sup>145</sup> On this view, it is perfectly natural that Beijing is taking advantage of its enhanced geopolitical stature to reshape IHRL to its benefit, and the conclusion that Beijing necessarily plans to recast or undermine the international human rights regime is a non sequitur.

In the following sections, I analyze Western reactions to each of the three “streams” of Chinese human rights theory. Besides explicit Western reactions to China’s proposed human rights framework, I also highlight similarities and differences between historic Chinese and Western human rights practice to illustrate tensions and synergies between their respective human rights theories.

#### A. A Sideways Glance at Sovereignty

Western legal scholars recognize that sovereignty is a crucial component of Chinese human rights theory.<sup>146</sup> This recognition tends to focus on instrumental uses of sovereignty language in Chinese human rights rhetoric. Jerome Cohen, for example, notes that “Chinese officials have rejected the application of relevant standards to PRC actions as infringements on PRC sovereignty.”<sup>147</sup> Williams similarly accuses the PRC of using sovereignty as a smokescreen to “hollow” out IHRL norms.<sup>148</sup> Richardson counters China’s prioritization of sovereignty and noninterference on the grounds that “the international human rights system exists . . . because often states fail to protect and violate human rights.”<sup>149</sup> These two perspectives are (or at least could be) in conversation with one another. One might imagine both Chinese and Euro-American human rights perspectives as points on a sliding scale, with total nonintervention at one end and human rights protection as an erga omnes obligation on the other. The “sliding scale” approach suggests that Chinese and Euro-American human rights perspectives may be mutually intelligible, and that meaningful engagement—at least regarding the scope of international human rights protections—is possible.

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144. Nathan, *supra* note 19, at 166 (citing G. John Ikenberry, *The Future of the Liberal World Order: Internationalism After America*, 90 FOREIGN AFFS. 56 (2011)); YONG DENG, CHINA’S STRUGGLE FOR STATUS: THE REALIGNMENT OF INTERNATIONAL RELATIONS (2008); MARC LANTEIGNE, CHINA AND INTERNATIONAL INSTITUTIONS: ALTERNATE PATHS TO GLOBAL POWER (2008).

145. Nathan, *supra* note 19, at 166.

146. See, e.g., Chen, *supra* note 25, at 1211; Richardson, *supra* note 16, at 2; Williams, *supra* note 35, at 8; Burnay & Pils, *supra* note 16, at 246.

147. Cohen, *supra* note 10, at 153.

148. Williams, *supra* note 35, at 8 (citing Cohen, *supra* note 10, at 153; Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT’L L. 131, 138–40 (2020)).

149. Richardson, *supra* note 16, at 2.

Western states, for their part, have never been shy about injecting sovereignty considerations into the international human rights order or rights-adjacent subjects like genocide. To take a well-known example, certain charges were excluded from the Nuremberg Tribunal at the behest of American and British politicians, who feared that unfavorable precedent might be used against the United States and United Kingdom given their living histories of racism and colonialism.<sup>150</sup> Similarly, a provision which would have established universal jurisdiction over the crime of genocide was ultimately dropped from the U.N. Convention on the Prevention and Punishment of the Crime of Genocide (“CPPG”) because it would have abrogated sovereignty principles.<sup>151</sup> And the United States—like the PRC—remains famously opposed to the premise of universal jurisdiction, especially as potentially exercised by the International Criminal Court.<sup>152</sup>

Much more important—and largely ignored by Euro-American analysts—is the crucial role which sovereignty plays as a predicate to meaningful human rights, and indeed as a “right” in and of itself, within the Chinese framework.<sup>153</sup> Jerome Cohen recognizes an adjacent proposition of Chinese human rights theory when he points out that Beijing has become particularly averse to “universal” framings of human rights, which continue to be condemned as “Western.”<sup>154</sup> Yu-Jie Chen arguably comes even closer, noting that China’s human rights framework embodies an “identity-based, relativist politics by emphasizing China’s inherent distinctiveness.”<sup>155</sup> But neither fully spell out that in the Chinese human rights framework, sovereignty is itself viewed as a kind of human right, or a predicate to the meaningful enjoyment of such rights. Consequently, Western analysts sometimes underestimate the extent to which the creation of an “identity-based” homegrown Chinese human rights theory reflects a response to the century of humiliation and China’s exclusion from the international human rights order at the time of its conception.

This “blind spot” in Euro-American assessments of Chinese human rights theory has important consequences. Perhaps most notably, Western analysts typically under-appreciate the extent to which Chinese delegations are genuinely excited to see their “contributions” to the international human rights order recognized, especially at the United Nations. To Westerners, this excitement appears to be related to the perceived success of Beijing’s efforts to reframe the order in a way which protects its domestic policies (for example, in Xinjiang) from further scrutiny. While this conclusion is partially cor-

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150. Philippe Sands, *Genocide at 70: A Reflection on its Origins*, 36 NETH. Q. HUM. RTS. 167, 170 (2018).

151. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot Note*, 106 YALE L.J. 2259, 2266 (1996).

152. See 22 U.S.C. § 7427 (also known as the “Hague Invasion Act”); Zhang, *supra* note 24, at 229.

153. See Ren, *supra* note 71, at 214; Chen, *supra* note 52, at 413; Li, *supra* note 83, at 288.

154. Cohen, *supra* note 46, at 232–33, 246.

155. Chen, *supra* note 25, at 1182–83.

rect, it is also incomplete: it ignores the extent to which Beijing's contributions (regardless of their actual impact) are designed to vindicate a rising China's ability as a coequal sovereign to influence a regime which has for so long been a "one-way street," with Beijing exclusively on the receiving end of human rights critique.

### B. *Dismissing the Right to Development*

Like the sovereigntist stream of Chinese human rights discourse, prioritizing the right to development is often lambasted by Western analysts as a strategy to defend Beijing against human rights critiques from abroad.<sup>156</sup> Others quickly recognize the more abstract individualist versus collectivist (and, at a higher level, liberal versus Marxian) distinction which undergirds Sino-Western human rights disagreements regarding the right to development.<sup>157</sup> But, as Feron notes, this is a comparative judgment: It is not the case that the Chinese human rights approach completely denies individual rights while the Western liberal approach totally eschews collectivism, but rather that "the Chinese government gives comparatively more normative power to collective interests over individual ones than that allowed in the West."<sup>158</sup> Like the conflict between China's strong sovereigntist and the West's occasionally interventionist approach to human rights enforcement, the disagreement between collectivist versus individualist human rights orientations appears to be mutually intelligible. This arguably leaves the door open to productive engagement moving forward.

Louis Henkin recognized the impressive breadth of the rights ostensibly guaranteed according to Chinese human rights theory.<sup>159</sup> Other Western-trained academics, however, take a more critical stance, asserting that "to reduce human rights to a guarantee of mere survival is a perverse betrayal of any plausible conception of human dignity."<sup>160</sup> They similarly note that, by broadening the scope of human rights protection to include poverty alleviation, Beijing stood to cover up serious abuses of more traditional or "mainstream" human rights protections.<sup>161</sup> These claims are often supported by the remarks of Chinese policy elites, such as former Foreign Minister Wang Yi's quip that "[w]ith its GDP exceeding 100 trillion [RMB] and long-

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156. Zhu, *supra* note 15, at 115.

157. Feron, *supra* note 11, at 90.

158. *Id.* at 91–92.

159. Wu, *supra* note 36, at 344 (citing Louis Henkin, *The Human Rights Idea in Contemporary China: A Comparative Perspective*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 28–29 (1986)) ("In China, living under socialism assures the individual satisfaction of basic human needs, and society provides the individual with particular rights, the reward of fulfilling his obligations to the society.")

160. Zhu, *supra* note 15, at 115 (citing Yash Ghai, *Rights, Social Justice, and Globalization in East Asia*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 259 (Joanne R. Bauer & Daniel Bell eds., 1999)); see also Wu, *supra* note 36, at 368–69; Chen, *supra* note 25, at 1205–06 (arguing that "human rights should not be confused with economic growth").

161. Wu, *supra* note 36, at 368–69.



term social stability, China has laid a solid foundation for advancing its human rights cause.”<sup>162</sup>

As with the right to development, environmental rights are another area where China frequently frames its human rights record as stronger than that of strategic competitors (and frequent critics) like the United States. The 2021 State Council Report on Human Rights Violations in the United States, for example, highlighted Washington’s withdrawal from the Paris Agreement as an apparent breach of (collectivist) human rights obligations.<sup>163</sup> Beijing recognizes that environmental rights are an area of increasing importance,<sup>164</sup> and Chinese scholars tend to identify environmental rights as a species of the right to development—sometimes referred to as the right to “sustainable development.”<sup>165</sup>

Euro-American analysts often fail to recognize, however, that Chinese concepts like the right to development, and especially subsidiary concepts like environmental rights and the right to health, have analogues in Western human rights discourse. In fact, African American activists like Dr. Robert Bullard arguably pioneered the concept of environmental rights (implicit in the application of the 14th Amendment’s equal protection clause to the concept of environmental racism) before Beijing had articulated its first homegrown human rights theory in 1991.<sup>166</sup> The vindication of a “right to health” has also been employed by Western-educated scholars to critique the conditions of concentration camps in Xinjiang.<sup>167</sup> This suggests that (1) there is substantially more room for engagement between Chinese and Euro-American human rights approaches on the concept of collective rights than is often recognized, and that (2) some Chinese human rights concepts cut both ways: Like the “right to health,” they can often be leveraged against Beijing just as easily as against liberal Western states.

Western scholars have, importantly, recognized the obvious influence of China’s Marxist-Leninist roots on Beijing’s prioritization of collective rights like development.<sup>168</sup> Nadège Rolland takes this finding as the predicate for

162. Yi, *supra* note 90.

163. THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 88, at 16 (“The United States walked away from its commitments to and withdrew from the Paris Agreement. The United States, as the largest cumulative emitter of greenhouse gases in the world, should bear the greatest share of emission reduction based on the principle of common but differentiated responsibilities.”).

164. Yi, *supra* note 90 (“The scope of human rights is constantly evolving, and the right to health and the environmental right should also be given more prominence.”).

165. Aining Zhang & Linyan Zhong, *Conflict and Balance Between the Right to Development and Environmental Rights: China’s Practice*, 17 J. HUM. RTS. 221 (2017); He, *supra* note 11, at 157.

166. See generally ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (3rd ed. 2000).

167. See generally Adi Radhakrishnan, *An Inherent Right to Health: Reviving Article II(C) of the Genocide Convention*, 52 COLUM. HUM. RTS. L. REV. 80 (2020).

168. Wu, *supra* note 36, at 362 (quoting Louis Henkin, *The Human Rights Idea in Contemporary China: A Comparative Perspective*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 57–58 (1986)); see Wu, *supra* note 36, at 368–69 (“However, if one does not merely focus on China’s real or disguised political inten-

the claim that “China’s push for the international acceptance of the concept of the right to development reflects an effort to affirm the superiority of China’s model over the Western liberal democracies.”<sup>169</sup> Perhaps. It ultimately depends on whether one believes the Party-State’s claims that it “never seeks to export its ideology, values or development model.”<sup>170</sup> But even if they do, it is unclear why Western states should be alarmed by China’s efforts to “affirm the superiority” of its human rights framework. Especially in an international community characterized by sovereign independence and equality (as both Beijing and Washington would have it) the “superiority” of any ideological or political or development model is ultimately the result of its success in the global marketplace of ideas. If states are concerned about the potential implications of Beijing’s development-first human rights approach—as events in Xinjiang suggest they should be—then there is every indication that China’s human rights approach is unlikely to catch on.

### C. *Ignorance of the Rights/Obligations Framework*

The inseparability of rights from obligations in China’s human rights framework has received relatively little attention from Euro-American scholars. This is a critical blind spot in Western analysis of Chinese human rights theory for two reasons. First, the unity of rights and obligations plays a critical role in the Chinese human rights framework, though its content and implications can be evasive without a basic understanding of Marxist-Leninist ideology. Second, in normative terms the mutuality of rights and obligations is probably the least appealing aspect of the Chinese human rights framework to a Western audience. Consequently, if Western human rights scholars hope to defeat Chinese human rights theory in the global marketplace of ideas, they are missing a critical opportunity by ignoring the inseparability of rights and obligations within that framework. In this section, I attempt to articulate the mutuality of rights and obligations in a way that would be intuitive to a liberal Western audience, and consequently illustrate why this aspect of the Chinese human rights framework is likely unattractive to that audience.

The best way of framing the mutuality of rights and obligations, at least in American legal terms, is that the “price” Chinese citizens pay for their

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tion of initiating the conceptual debate concerning the right to subsistence, but instead seeks the origin of the Chinese approach to human rights, one would find that the promotion of the right to subsistence as the most important human right derives mainly from Marxist rights thought.”).

169. NAT’L BUREAU OF ASIAN RSCH., AN EMERGING CHINA-CENTRIC ORDER: CHINA’S VISION FOR A NEW WORLD ORDER IN PRACTICE 126 (Nadège Rolland, ed., 2020).

170. *China Never Seeks to Export Ideology, Values, Development Model: Official*, XINHUANET (Aug. 26, 2021), [http://www.news.cn/english/2021-08/26/c\\_1310150037.htm](http://www.news.cn/english/2021-08/26/c_1310150037.htm) [https://perma.cc/6KB6-BGR5].

positive entitlements *to*, for example, education, healthcare, and housing<sup>171</sup> (as opposed to U.S. citizens' negative liberties *from*, for example, prior government restraint of speech)<sup>172</sup> is the reciprocity of certain obligations between citizen and state. Thus, positive rights granted to citizens by the Chinese Constitution are effectively "offset" by reciprocal obligations imposed upon citizens by that same document.<sup>173</sup> In the Chinese model, citizens' rights are "regarded as grants of the State which are held only contingently."<sup>174</sup> To reframe in Chinese terms—which take positive entitlements as the baseline—the price that Westerners pay for the "inalienability" of their rights is the absence of substantive entitlements *to*, for example, economic, social, or cultural goods.<sup>175</sup> These two understandings of human rights—as positive but conditional entitlements versus negative and inalienable liberties—are, like differing approaches to the scope of human rights protection, mutually intelligible.

Western and Chinese approaches to the intersection of rights and obligations are consonant with the two perspectives' alignment regarding individualism and collectivism, respectively.<sup>176</sup> More importantly, however, these approaches to the intersection of rights and obligations illustrate the bottom-up versus top-down orientation of the respective human rights frameworks. This is likely what makes the mutuality of rights and obligations in the Chinese framework unappealing to a Western audience.

Take the facts of *Korematsu v. United States* as an example.<sup>177</sup> For this crude comparison, these facts are roughly analogous to the current mass internment of Uyghurs on a racial, ethnic, and/or religious basis in Xinjiang. Both American and Chinese rights frameworks accept that fundamental rights can be abrogated by the state. The difference is that the American system (theoretically) constrains the power of the state (limits the top-down imposition of obligations which cancel rights) by requiring that such impositions be justified by sufficiently individuated pursuit of a compelling state interest.<sup>178</sup> In the Chinese framework, by contrast, vague concepts like "security" are not balanced against individual rights, but instead take precedence whenever the Party-State decides that this is in the best interest of "the people" writ large. In the Chinese framework, there is (1) no proportionality requirement, and (2) no external (bottom-up or judicial) constraint on the executive (Party-State) judgment that a particular group's rights should be

171. Yi, *supra* note 90 ("China's poverty eradication is not just about higher income and living standards. More important, it is also about ensuring every individual's rights to education, healthcare and housing.")

172. *New York Times v. United States*, 403 U.S. 713, 717 (1971).

173. Wu, *supra* note 36, at 343.

174. *Id.* at 346.

175. Mao et al., *supra* note 50, at 20.

176. Feron, *supra* note 11, at 91.

177. *Korematsu v. United States*, 323 U.S. 214, *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

178. *Korematsu*, 323 U.S. 214, 216.

curtailed. Finally, within the Chinese human rights framework, the role of the state is not to safeguard “discrete and insular minorities,”<sup>179</sup> as it is in the United States, but rather to “protect the rights of the majority.”<sup>180</sup> To the extent that the Chinese framework permits such dramatic and untrammelled central authority to remove the rights of entire groups, without firewalls against identity-based animus,<sup>181</sup> I suspect that it will be extraordinarily unpopular in democratic, pluralist states.

#### IV. DISCUSSION: THE IMPLICATIONS OF GREAT POWER COMPETITION FOR THE FUTURE OF IHRL

In response to those who suggest that Beijing is attempting to undermine or completely re-write the international human rights order, the first half of this section argues that Beijing is far more likely to pursue changes to the existing order rather than create its own. The second half of the section explains why it is important to allow Beijing to make its proposals, no matter how problematic, and why the most radical of those proposals are unlikely to be successful.

##### A. *Beijing's “Bend Don't Break” Approach to IHRL*

The most obvious indicator that Beijing is not pursuing a wholesale “rip and replace” of the international human rights regime is the fact that China's international legal perspective and practice is clearly shaped by other constituents of the regime, particularly the United States.<sup>182</sup> Even while arguably flouting its international legal obligations, Beijing often attempts to justify its position with reference to existing international legal authorities, rather than attacking the entire regime as illegitimate. Certainly, the authorities upon which the PRC chooses to rely are cause for concern: In the human rights-adjacent international order of territorial sovereignty, for example, Beijing has relied on Moscow's rejection of the *Arctic Sunrise* ruling, and Washington's rejection of the *Paramilitary Activities* case, to justify its refusal to recognize the South China Sea arbitration.<sup>183</sup> Regardless of their merit, these are intelligible international legal arguments, rather than wholesale attacks on the international legal order or its constituent institutions. Put another way, even if the Party-State does not follow the letter of the law, it does not “openly denounce or disparage” its IHRL commit-

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179. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

180. *He*, *supra* note 11, at 161.

181. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *U.S. Romer v. Evans*, 517 U.S. 620 (1996).

182. *See Cohen*, *supra* note 10, at 123–24; Hillman, *supra* note 19, at 2 (“China has little to gain from walking away from them. Instead, it is becoming a more influential actor within existing institutions.”).

183. *Cohen*, *supra* note 10, at 135.

ments.<sup>184</sup> As Professor Nathan argues, as “China becomes an even stronger power relative to its rivals it is likely to bid for more influence in existing regimes rather than try to overthrow them.”<sup>185</sup>

Beijing’s response to Euro-American human rights critiques proceeds along the same lines. For example, the Party-State has cited the analysis of preeminent (Western) international legal authorities to justify its policies in Xinjiang.<sup>186</sup> Similarly, the State Council’s 2021 Report on Human Rights Violations in the U.S. substantiated its critiques with UNHRC resolutions and statements by High Commissioner Bachelet.<sup>187</sup> Further, Beijing not only completed its 2018 Universal Periodic Review (“UPR”) as required by the UNHRC, but touted the acceptance of 204 out of 252 recommendations as evidence of China’s commitment to the international human rights order.<sup>188</sup> In the same document, though the Chinese delegation transparently proposed its human rights approach as “a new type of international relationship” and a “shared future for mankind,” it simultaneously reiterated deference towards “basic principles of international law[,]” especially the U.N. Charter.<sup>189</sup> Chinese scholars certainly have complaints regarding the objectivity, fairness, and transparency of the UNHRC, especially the body’s perceived politicization.<sup>190</sup> Ultimately, though, they tend to highlight their delegation’s engagement with the Council and other U.N. human rights institutions—especially the incorporation of Chinese human rights concepts in U.N. documents<sup>191</sup>—as evidence of Beijing’s contribution to the international human rights order.<sup>192</sup> While it may be true that the Chinese delegation would “prefer to see a Human Rights Council . . . free of the values and ideas underpinning the current liberal international order,”<sup>193</sup> it seems un-

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184. *Id.* at 152–53.

185. Nathan, *supra* note 19, at 189.

186. Liu Xin et al., *How Blood-Stained West Orchestrated ‘Genocide’ Defamation Against Xinjiang Step by Step*, GLOB. TIMES (June 8, 2021), <https://www.globaltimes.cn/page/202106/1225747.shtml> [<https://perma.cc/D8UM-CYL5>] (citing Jeffrey D. Sachs & William Schabas, *The Xinjiang Genocide Allegations Are Unjustified*, PROJECT SYNDICATE (Apr. 20, 2021), <https://www.project-syndicate.org/commentary/biden-should-withdraw-unjustified-xinjiang-genocide-allegation-by-jeffrey-d-sachs-and-william-schabas-2021-04> [<https://perma.cc/B37E-4DE5>]; Alfred De Zayas & Richard Falk, *Reflections on Genocide as the Ultimate Crime*, COUNTERPUNCH.ORG (2021), <https://www.counterpunch.org/2021/04/23/reflections-on-genocide-as-the-ultimate-crime/> [<https://perma.cc/76FQ-L25E>]).

187. THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 88, at 8–9.

188. Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *supra* note 70, at 2.

189. *Id.* at 3.

190. NAT’L BUREAU OF ASIAN RSCH., *supra* note 169, at 38–39.

191. Yanhua Luo, *History of the PRC’s Participation in International Human Rights Affairs and Its Contribution to the Cause of International Human Rights*, 18 J. HUM. RTS. 308, 333–35 (2019); Sabine Mokry, *DECODING CHINESE CONCEPTS FOR THE GLOBAL ORDER* (2018).

192. Luo, *supra* note 191, at 315; see also Chi, *supra* note 11, at 802; Zhang, *supra* note 24, at 226 (“The United Nations High Commissioner for Human Rights has maintained close cooperation with China since its establishment in 1993. During her tenure, Mrs. Mary Robinson, the United Nations High Commissioner for Human Rights, visited China seven times.”); Chen, *supra* note 25, at 1195.

193. NAT’L BUREAU OF ASIAN RSCH., *supra* note 169, at 126 (citation omitted).

likely that Beijing will “take their ball and go home” absent that contingency.<sup>194</sup>

China’s UPR also highlighted Beijing’s active participation in “global human rights governance” as evidence of a credible commitment to the international human rights order.<sup>195</sup> Although Chinese experts tend to oppose the expansion of international human rights obligations and privilege economic development above human rights in the mainstream sense, they have made serious and balanced contributions to cutting edge human rights issues which implicate both subjects, like extending states’ human rights obligations to the actions of transnational corporations.<sup>196</sup> While Beijing is transparently trying to reshape the international human rights order, certainly in ways which are more consistent with China’s homegrown human rights theory, in doing so it is clear that China continues to draw legitimacy from institutions within the existing order. It thus seems unlikely that China is also trying to “blunt” that order.<sup>197</sup>

This conclusion is bolstered by the optimistic tone with which Chinese scholars describe academic exchanges with Western scholars.<sup>198</sup> Indeed, the emerging consensus among some Chinese scholars seems to be that, while there are stark differences between Chinese and Western human rights frameworks, they remain mutually intelligible. For example, Aining Zhang, Professor of International Law at the Chinese University of Foreign Affairs, notes that “[t]here is a process of mutual influence, interaction and mutual recognition between China and the international human rights systems.”<sup>199</sup> “Although there is no one-to-one mapping between the two parallel sys-

194. Hillman, *supra* note 19, at 2.

195. Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *supra* note 70, at 16–17 (“Since 2013, China has actively participated in global human rights governance and has put forward a series of initiatives in such forums as the Human Rights Council to promote the construction of a fair, just, reasonable and effective international human rights system. It maintains constructive contacts with the United Nations Office at Geneva and the Office of the United Nations High Commissioner for Human Rights, encourages them to perform their duties objectively and impartially, and attaches importance to the concerns of developing countries.”).

196. Sun & Feng, *supra* note 79, at 419 (“By neither blindly denying the state obligation to regulate the extraterritorial acts of transnational corporations, nor blindly following the view of unlimited expansion of such obligation, we can gradually promote the protection of extraterritorial human rights, take into account the fair treatment of transnational corporations, and coordinate with economic development.”).

197. See DOSHI, *supra* note 5, at 3–4. *But see* Mao et al., *supra* note 50, at 17 (“As the most important platform for multilateral human rights diplomacy within the United Nations system, the Human Rights Commission should be the main mechanism for countries to launch human rights dialogue and cooperation. However, it has been controlled by certain Western countries for a long time and been reduced to a tool for ideological and political struggle. Endless political confrontation and selective supervision within the Human Rights Commission has not only led to inefficiency in its work, but also its departure from the original intention for its establishment.”); Wang, *supra* note 71, at 120.

198. Li & Teng, *supra* note 73, at 697 (“Chinese researchers not only modestly accept the successful cases of human rights practice in European countries, but also confidently show their own research capabilities to European countries and provide mature theories and practices of human rights for reference and study to Western society.”); Luo, *supra* note 191, at 329.

199. Zhang, *supra* note 24, at 221.

tems,” Zhipeng He notes, “they can motivate, inspire and complement each other, and such interaction and impact between systems can be summarized as ‘coherence.’”<sup>200</sup> Put another way, “there is no such thing as ‘Chinese international law’ any more than there is such a thing as ‘Chinese mathematics’; there can only be a Chinese theory and practice of international law.”<sup>201</sup>

The Party-State has also responded to accusations of human rights abuses in Xinjiang by attempting to justify its policies with international legal instruments. Wang Yi, for example, cited the U.N. Global Counter-Terrorism Strategy and U.N. Plan of Action to Prevent Violent Extremism in his defense of China’s actions in Xinjiang to the UNHRC.<sup>202</sup> While these documents are not constitutive of the international human rights order as such, the Foreign Minister’s reference to U.N. principles—even in an attempt to justify potential crimes against humanity and genocide—reflects Beijing’s fundamental belief that the international legal order is a source of legitimacy, rather than an obstacle to China’s rise. The use of counter-terrorism as a justification for atrocities in Xinjiang is itself an example of Beijing’s participation in the international legal order—the United States and its European partners, after all, initiated the global war on terror.<sup>203</sup> Wang Yi further attempted to justify China’s actions in Xinjiang by referring to Chinese human rights theory, noting that violence in Xinjiang had decreased as a result of mass detentions, and “[t]he region now enjoys social stability and a sound development momentum.”<sup>204</sup> Chinese authorities similarly highlight development gains in Xinjiang and other “ethnic minority” areas as evidence of the Party-State’s “human rights” efforts in the region.<sup>205</sup> Within the Party-State’s highly sovereigntist human rights framework, Western

200. He, *supra* note 11, at 155.

201. Li Zhaojie, *Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order*, 5 SING. J. INT’L & COMPAR. L. 314, 326 (2001).

202. Yi, *supra* note 90.

203. Chen, *supra* note 25, at 1217; see SEAN R. ROBERTS, *THE WAR ON THE UYGHURS: CHINA’S INTERNAL CAMPAIGN AGAINST A MUSLIM MINORITY* 6, 201 (2020); DARREN BYLER, *TERROR CAPITALISM: UYGHUR DISPOSITION AND MASCULINITY IN A CHINESE CITY* 44, 134–35 (2021).

204. Yi, *supra* note 90; see also Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *supra* note 70, ¶39 (“In December 2015, China promulgated the Counter-Terrorism Law to further solidify the structure of the legal system for combating terrorism. In accordance with the law, the Chinese Government has handled cases of inciting and organizing acts of self-immolation, and the public security organs have cracked down hard on terrorist organizations and individuals, including ‘East Turkistan’ forces, in accordance with the law, while at the same time ensuring that the human rights of criminal suspects are protected.”).

205. Hum. Rts. Council Working Grp. on the Universal Periodic Rev., *supra* note 70, ¶75 (“In 2017, the per capita disposable income of urban and rural residents in Xinjiang increased by 8.1 per cent and 8.5 per cent respectively, and urban and rural residents’ per capita housing area reached 85 square metres and 105 square metres respectively. The 15 years’ free education programme has been implemented in southern Xinjiang, along with 3 years’ free bilingual preschool education in rural areas.”); Lu, *supra* note 70, at 198; THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 122; *Xinhua Commentary: U.S. Fabrication of “Forced Labor” in Xinjiang: Lies Still Lies*, XINHUANET (Dec. 22, 2021), [http://www.news.cn/english/2021-12/22/c\\_1310387876.htm](http://www.news.cn/english/2021-12/22/c_1310387876.htm) [https://perma.cc/VHW2-CCQE].

criticisms of forced labor are dismissed as unwarranted interference in China's domestic affairs, motivated by vague geo-strategic projects to "contain" China's rise.<sup>206</sup>

The foregoing examples all illustrate the extent to which China derives (or believes it derives) legitimacy from the international legal order. Ultimately, this suggests that it is not in China's best interest to undermine that order. But that doesn't mean Beijing isn't attempting to shape the order in a way which privileges Chinese human rights theory. The next section explores how Western policymakers and analysts should respond to Chinese attempts to bend the international human rights order.

### *B. Sovereign Equality and Beijing's Right to Alienate the International Community*

Beijing views reshaping the international human rights order as an entitlement, not a privilege. The PRC feels it was wrongfully excluded from the original formation of the modern human rights regime. Beyond the obvious equitable (China was indeed excluded from the United Nations at the regime's birth) and quantitative (any regime without the support of one-fifth of the world's population cannot truly claim to be "international")<sup>207</sup> reasons for taking China's human rights proposals seriously, I conclude that Western states also have self-interested reasons to do so.

Without accepting some Chinese influence over the definition and application of human rights concepts, Euro-American powers risk the fragmentation of the international human rights order,<sup>208</sup> and the subsequent delegitimation of their preferred vision of human rights. As Professor Abi-Saab put it sixty years ago: "International law has to develop or accept a destiny of increasing disregard. This is the fate of any legal system which does not

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206. *China Focus: China Issues White Paper on Protecting Rights of Xinjiang's Ethnic Groups*, XINHUANET (July 14, 2021), [http://www.xinhuanet.com/english/2021-07/14/c\\_1310060392.htm](http://www.xinhuanet.com/english/2021-07/14/c_1310060392.htm) [https://perma.cc/5A93-ZJKU]; Misbah Saba Malik, *Interview: U.S. Ban on Xinjiang Cotton to Further Disturb Global Supply Chain, Says Expert*, XINHUANET (Jan. 2, 2022), <http://www.xinhuanet.com/english/20220102/1ccce9f202f44f90848e407dbee9e7a2/c.html> [https://perma.cc/3BPG-YKZC]; Liu Xin, *West Humiliates Self with Xinjiang Smears at UN Human Rights Session*, GLOB. TIMES (June 21, 2021), <https://www.globaltimes.cn/page/202106/1226731.shtml> [https://perma.cc/63NH-86JS]; Liu et al., *supra* note 186; Xie Wenting et al., *Cartel of Killers: UK, US and Canada Jointly Whip up Global Xinjiang Hysteria, but What about their Joint History of Systemic Genocide, Violence and Ethnic Cleansing?*, GLOB. TIMES (June 20, 2021), <https://www.globaltimes.cn/page/202106/1226646.shtml> [https://perma.cc/XTA6-UU5T]; Liu Xin, "No Genocide in Xinjiang," *Envoys, Scholars Reaffirm during Press Conference by Xinjiang Govt, Chinese Embassy in UK*, GLOB. TIMES (Jan. 1, 2022), <https://www.globaltimes.cn/page/202201/1243890.shtml> [https://perma.cc/4BZJ-AN6Z]; *US' Lies about Xinjiang Will only Make Chinese Society More United*, GLOB. TIMES (Dec. 24, 2021), <https://www.globaltimes.cn/page/202112/1243323.shtml> [https://perma.cc/S9NP-37M5].

207. Wu, *supra* note 36, at 335 ("[T]he PRC enjoys the symbolic advantage of being the most populous country in the world, representing one-fifth of humanity. Arguably, China's inclusion in the international human rights regime will make that regime truly universal, if nothing else."); Zhang, *supra* note 24, at 225.

208. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).



keep up with the fundamental changes in its social environment.”<sup>209</sup> Even if Chinese human rights proposals (1) are as dangerous as Western human rights advocates believe them to be, and (2) gain significant traction, especially among authoritarian states, I suggest that a weakened human rights order is a preferable alternative to a completely ignored one.

But even this contingency seems unlikely. This is because, as indicated above, with the exception of certain authoritarian states who already have independent reasons to pursue closer ties with the PRC, China's human rights proposals are unlikely to be attractive to a large number of states, especially pluralist democracies. As in other corners of the international legal order, there is a conspicuous lack of demand for Chinese leadership in the human rights space.<sup>210</sup> Public opinion polls of Euro-American states, as well as China's neighbors like Japan and South Korea, reflect increasingly unfavorable views of Beijing,<sup>211</sup> especially with respect to human rights.<sup>212</sup> The PRC's position regarding Russia's invasion of Ukraine—charitably deemed “ambiguous”—has accelerated this trend.<sup>213</sup>

Finally, this intellectual debate is hardly a novel one, especially as it pertains to the top-down versus bottom-up orientation of Chinese versus Western human rights frameworks. More specifically, the current discourse is loosely analogous to the Dewey-Lippmann debate of the 1920s.<sup>214</sup> Beijing, like Lippmann, argues that a less-representative technocrat class is best equipped to identify salient public goods and balance individual against collective rights,<sup>215</sup> while the West takes a more representative (and consequently chaotic) bottom-up approach akin to that of Dewey.<sup>216</sup> While the foregoing analysis suggests that the Deweyan perspective is likely to prevail (again), Western powers should welcome good-faith ideological competition as a means of strengthening, diversifying, and improving international human rights protections.

209. Abi-Saab, *supra* note 21, at 119.

210. See Hillman, *supra* note 19, at 2; Economy, *supra* note 21, at 66 (“Xi wants China to be ‘credible, lovable, and respectable’ in the eyes of the international community, but his actions have yielded public opinion polls that reflect record-low levels of trust in him and little desire for Chinese leadership.”).

211. LAURA SILVER ET AL., UNFAVORABLE VIEWS OF CHINA REACH HISTORIC HIGHS IN MANY COUNTRIES (2020).

212. LAURA SILVER ET AL., LARGE MAJORITIES SAY CHINA DOES NOT RESPECT THE PERSONAL FREEDOMS OF ITS PEOPLE (2021).

213. See CHRISTINE HUANG ET AL., CHINA'S PARTNERSHIP WITH RUSSIA SEEN AS SERIOUS PROBLEM FOR THE U.S. (2020). *But see* Mary Hui, *The Russia-Ukraine War has Improved Americans' Perception of China*, QUARTZ (Apr. 28, 2022), <https://qz.com/2160305/russia-ukraine-war-has-improved-us-perception-of-china/> [<https://perma.cc/7GFA-SREB>].

214. See Jackson Paul Neagli, *Grassroots, Astroturf, or Something in Between? Semi-Official WeChat Accounts as Covert Vectors of Party-State Influence in Contemporary China*, 50 J. CURRENT CHINESE AFFS. 180, 183 (2021).

215. See generally WALTER LIPPMANN, *THE PHANTOM PUBLIC* (Transaction Publishers 1993) (1927).

216. See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

## CONCLUSION AND RECOMMENDATIONS

[N]either the rapid invoking of ‘Asian values’ in defense of suppressing human rights nor the expression of Western anxiety and consternation about ‘Asian ways’ helps to advance critical scrutiny of the role of human rights and their consequences in Asian societies.<sup>217</sup>

—Amartya Sen

China’s approach to the international human rights order appears to be predominantly “defensive” rather than “offensive.”<sup>218</sup> While China is certainly taking a more assertive role in the international human rights order than it has historically, this defensive posture is nothing new—indeed, the invention of Chinese human rights theory was itself largely viewed as a project of (defensive) necessity following the waves of international criticism which crashed over Beijing in the wake of 1989.<sup>219</sup> Thirty years later, Beijing is attempting to enhance its clout within the international human rights order not by undermining the order, but by working *within* the framework to build and leverage soft power to make its human rights framework more attractive to other states.<sup>220</sup> As one scholar put it, Beijing aims to “occupy the moral high ground of international human rights with the Chinese human rights discourse.”<sup>221</sup>

I argue that Chinese perspectives on the international human rights order “merit a fair hearing and careful study.”<sup>222</sup> It is probably fair to say that China often receives criticism in the human rights context in many cases “because the human rights discourse with Chinese characteristics is not fully understood by the outside world.”<sup>223</sup> In large part, this is due to shortcomings of Chinese public diplomacy, which are recognized by Chinese scholars.<sup>224</sup> But one persistent complaint of Chinese human rights scholars—which seems to me justified—is that Euro-American human rights scholars have “mistaken international human rights dialogues as a one-way process of

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217. Zhu, *supra* note 15, at 111 (citing Amartya Sen, *Human Rights and Economic Achievements*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 99 (Joanne R. Bauer & Daniel Bell eds., 1999)).

218. Feron, *supra* note 11, at 108 (citing SONYA SCEATS & SHAUN BRESLIN, *CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 2 (2012)); see Surya P. Subedi, *China’s Approach to Human Rights and the UN Human Rights Agenda*, 14 *CHINA J. INT’L L.* 437, 439 (2015).

219. See Wu, *supra* note 36, at 353-54; Zhu, *supra* note 15, at 112; Nathan, *supra* note 41, at 643.

220. Lu, *supra* note 70, at 185, 202; see FERGUS RYAN ET AL., *BORROWING MOUTHS TO SPEAK ON XINJIANG* 6-7 (2021) for an example of how China has attempted to leverage social media to influence international public opinion regarding Xinjiang.

221. Lu, *supra* note 70, at 200.

222. Wu, *supra* note 36, at 335; Iannini, *supra* note 24, at 220 (“Westerners seeking to condemn Re-education should understand some of the legitimate grievances that the PRC [and indeed, much of the Global South] has with IHRL.”).

223. Mao et al., *supra* note 50, at 4.

224. See Liu, *supra* note 30, at 361, 380.

inculcation and acceptance” as opposed to “two-way communication” on equal footing.<sup>225</sup> To be sure, China’s framing of its complaints has not always been productive:<sup>226</sup> demanding that other states “correct their attitudes . . . so they can have an objective view” is not exactly a recipe for success.<sup>227</sup> Similarly, even when not espoused in the human rights context, assertions that “the decline of the West and the rise of the East” has “provided a rare opportunity for the development of China’s human rights cause” are unlikely to inspire confidence.<sup>228</sup> Perhaps this explains why, as Hillman puts it, “the world is not clamoring for Chinese leadership.”<sup>229</sup>

Ultimately, however, it is crucial that Euro-American policymakers and academics take Chinese human rights proposals seriously, for at least two reasons. First, as noted above, China represents a massive portion of the global population, and its geopolitical stature continues to grow by the day. If its complaints—no matter how spurious—are not taken seriously, this could jeopardize the representativeness and thus the legitimacy of the international human rights order. Second, without a robust understanding of China’s human rights proposals, Euro-American experts will be unable to refute them on their own terms. Maintaining mutual intelligibility, or a “common language” in which Chinese and Euro-American scholars and officials can discuss human rights frameworks, even despite bitter disagreement, is a critical step towards leaving the door open for future engagement.

To be clear—none of this is to say that any or all of Beijing’s international human rights proposals ought to be adopted. Despite the progress which the PRC has made since 1978, key rights and freedoms are still not even nominally protected in its constitution,<sup>230</sup> and those which are protected are rarely enforced.<sup>231</sup> More pressing, the fact that a genocide<sup>232</sup> continues to unfold in Xinjiang suggests that if China’s human rights proposals are adopted wholesale, the global consequences could be nothing short of disastrous. But there is a meaningful difference between listening, studying, and analyzing, on the one hand, and affirmatively adopting Beijing’s international human rights proposals on the other.

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225. Mao et al., *supra* note 50, at 17.

226. Rana Mitter, *The World China Wants: How Power Will—and Won’t—Reshape Chinese Ambitions*, 100 FOREIGN AFFS. 161, 168 (2021) (“Chinese diplomacy can be very skilled, but its current often shrill and charmless tone is enough to put off many potential partners.”).

227. Luo, *supra* note 191, at 330.

228. Zhang et al., *supra* note 73, at 4–5.

229. Hillman, *supra* note 19, at 2; see Economy, *supra* note 21, at 66 (“Xi wants China to be ‘credible, lovable, and respectable’ in the eyes of the international community, but his actions have yielded public opinion polls that reflect record-low levels of trust in him and little desire for Chinese leadership.”).

230. Wu, *supra* note 36, at 343 (noting that the 1982 Constitution is silent on the presumption of innocence, the right to privacy, and prohibitions on forced labor, slavery, and torture).

231. Subedi, *supra* note 218, at 454 (citing QIANFAN ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* 225 (2012)); see also Nathan, *supra* note 19, at 176–77.

232. See *THE UYGHUR GENOCIDE: AN EXAMINATION OF CHINA’S BREACHES OF THE 1948 GENOCIDE CONVENTION* (2021); Uyghur Trib. Judgment (Dec. 9, 2021); Smith Finley, *supra* note 121.

Finally, American experts should acknowledge that Washington has itself taken steps to undermine the international human rights order. It wasn't Beijing who unilaterally withdrew from U.N. Educational, Scientific and Cultural Organization ("UNESCO") or the UNHRC.<sup>233</sup> If Washington truly wants to bolster the international legal order of human rights, then it should lead by example. As Jerome Cohen put it:

"The United States cannot remain on the sidelines, preaching 'do as I say, not as I do' and seeking to reap the benefits of the international system without subjecting itself to its burdens and discipline. A new, more positive American endorsement of international law, in both theory and practice, will give the PRC an incentive to increasingly submit its own conduct to an evolving 'rules-based order.'"<sup>234</sup>

Meaningful re-engagement with the international human rights order will perhaps be a bitter pill for some in Washington to swallow. But especially if re-engagement entails recognition of past human rights abuses, it also constitutes a strategic boon: taking the air out of the "whataboutism" which Beijing so frequently deploys in response to international human rights critique.

According to Deputy Secretary Sherman, Washington plans to "cooperate with the PRC where it is in our interest[,] but "will challenge—contest—the PRC" where it "must[.]"<sup>235</sup> Ultimately, the international human rights order is probably a case where Washington will have to do both, sometimes simultaneously.

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233. See Huang, *supra* note 11; see also Mitter, *supra* note 226, at 169 ("It is entirely appropriate to criticize China for expanding its influence in the UN in ways that degrade the importance of individual human rights, but China did not force the United States to reduce its funding to UN agencies and thus weaken them.").

234. Cohen, *supra* note 46, at 164–65.

235. Sherman, *supra* note 1.