

HUMAN RIGHTS AT THE CROSSROADS: WHEN EAST MEETS WEST

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INTRODUCTION

Li Jing, a member of China's criminalized religious group, the Falun Gong, died while in police custody on October 11, 2001.¹ According to the police, the college student jumped to her death from the police car transporting her to Changchu; Li was scheduled to undergo formal questioning upon arrival.² Given the large number of "suicides" of Falun Gong members in police custody, human rights organizations believe that Li's death can be added to the list of 295 confirmed deaths of Falun Gong members attributable to Chinese officials.³ Concerned commentators point to Li's case and to the multitude of government abuses reported in Chinese territories and question whether the international community has adequately addressed China's human rights record in recent trade negotiations and agreements with China.⁴

For fifteen years,⁵ the nations in the World Trade Organization (WTO) resisted China's attempts to join their exclusive organization, formulating

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1. *Falun Gong Member 'Jumped to Death from Police Car,'* SOUTH CHINA MORNING POST, Oct. 22, 2001. The Falun Gong is also known as the Falun Dafa. Caryle Murphy, *'We're Proud to Be Chinese!'; D.C. Festival and Parade a Cultural Show of Force for Area Immigrant Groups,* WASH. POST, Sept. 22, 2003, at B3.

2. *Falun Gong Member "Jumped to Death From Police Car,"* *supra* note 1.

3. Gao Zhan, *Changing Strategy of a Smart Chameleon,* WASH. TIMES, Oct. 21, 2001, at B3; *see also* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000: CHINA (Feb. 21, 2001) [hereinafter U.S. DEP'T OF STATE 2000] ("Various sources report that approximately 100 or more Falun Gong practitioners died as a result of torture and mistreatment in [police] custody."), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.htm>.

4. Bao Tang, *Insist on Human Rights: Bush Should Remind Chinese Leaders that Basic Standards Apply to All,* MONTREAL GAZETTE, Oct. 20, 2001, at B7; *see also* Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China,* 17 U. PUGET SOUND L. REV. 611, 625 (1994) (observing that many consider the improvement of basic economic conditions to be a human right). *See generally* Leo Wise, Recent Development, *Trading with China*, 38 HARV. J. ON LEGIS. 567 (2001) (discussing various theories explaining China's increasing status in U.S. foreign relations and trade agreements).

5. This fifteen-year span is calculated based upon the date China first re-applied for General Agreement on Tariffs and Trade (GATT) membership, until it entered the WTO, and this time period includes the actions of the members of the GATT, the international trade organization that preceded the WTO. Bruce Cumings, *China Goes for the Gold,* THE NATION, Aug. 6, 2001, at 7; *see infra* Part III.B.

their decision, in part, as an apparent sanction for China's poor human rights record.⁶ Specifically, WTO members demanded concessions for improvements in human rights in China during negotiations; however, as neither China nor the WTO members were willing to alter their positions, negotiation discussions deadlocked.⁷ Many viewed the WTO's decision to use trade sanctions for human rights violations as compliant with existing international law and the United Nations (U.N.) mandate to uphold and promote the universal concept of human rights.⁸ In fact, four out of five respondents in the United States, Britain, Germany, and France agree with the statement that:

International trade contributes to prosperity and should therefore be welcomed, but not at all cost. [Countries] must stand up for labor and human-rights standards and protect jobs, the environment and our children. Otherwise, we'll get a race to the bottom, with jobs being moved to sweatshops in China, workers in developing countries living in abominable conditions, and the loss of our ability to protect against tainted foods. That would be a race without winners, perhaps with the exception of a small group of big businesses.⁹

6. See Cumings, *supra* note 5, at 7 ("Beijing appears finally to have dotted enough i's and crossed enough t's . . . to merit admission in the eyes of the [WTO's] American and European gatekeepers . . ."); see also Wise, *supra* note 4, at 567 (noting that the United States and China have had a problematic trade relationship in the past). Even during the congressional debates that ultimately resulted in the United States granting China permanent normal trade relations (PNTR) with the United States (and thus paving the way for China's accession to the WTO), several opponents cited human rights conditions in China as justification for extending the United States' earlier decision to deny China PNTR. Margaret Huang, *U.S. Human Rights Policy Toward China*, 6 FOREIGN POL'Y IN FOCUS No. 8 (March 2001). According to Senator Helms,

[I]t is . . . [an] absurd notion that this so-called rules-based WTO will somehow help transform China into a democracy. . . . the Chinese Government continues to have one of the worst human rights records in the world, despite two decades, 20 years of having received so-called most-favored-nation status from the U.S. Government.

146 CONG. REC. S8376 (daily ed. Sept. 12, 2000) (statement of Sen. Helms) [hereinafter Statement of Senator Helms]. Others in Congress, however, believed that granting China permanent normal trade relations would ultimately improve China's human rights conditions, and "pressur[e] her from the inside to restructure her institutions and advance the rule of law." 146 CONG. REC. S8726 (daily ed. Sept. 19, 2000) (statement of Sen. Roth).

7. As will be discussed *infra*, China had to be willing to agree to the concessions required by each WTO member before accession to the WTO would be possible. GOV'T ACCOUNTING OFFICE, WORLD TRADE ORGANIZATION: CHINA'S MEMBERSHIP STATUS AND NORMAL TRADE RELATIONS ISSUES 6 (2000).

8. See Charlie Mitchell, *Foes Emphasize Human Rights, National Security Issues*, CONGRESSDAILY, May 9, 2000 (describing the U.S. political demonstrations concerning whether human rights concerns should prevent the granting of PNTR to China).

9. Jim Lobe, *Trade: Westerners Like the Idea but Not the Practice*, ASIA TIMES, July 15, 2004, at http://www.atimes.com/atimes/Global_Economy/FG15Dj02.html.

Although the ideal relationship between the WTO and the United Nations has been the source of some contention,¹⁰ it seems clear that the WTO is an “international actor” over which the United Nations has chosen to wield authority. Article 57, paragraph one of the U.N. Charter requires that “[t]he various specialized agencies, established by inter-governmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63 [of the Charter].”¹¹ According to the U.N. Charter, it is the United Nations that decides which international agencies are required to fulfill the Charter’s economic and social purposes.¹² Notably, it was this power that the United Nations invoked in 1947 to convene the Havana Conference—the international trade conference that resulted in the drafting of the Havana Charter, which in turn led to the creation of the General Agreement on Tariffs and Trade (GATT) and, nearly fifty years later, the WTO.¹³

While the Preparatory Committee was still drafting the Havana Charter, the parties conducted the first round of trade negotiations. The results of these negotiations are included in the GATT, signed in 1947.¹⁴ Although the Havana Charter was ultimately not ratified, the GATT survived.¹⁵ Between 1947 and 1994, the GATT underwent eight rounds¹⁶

10. See Chakravarthi Raghavan, *U.S., E.U. Want to Keep WTO Out of U.N. System*, SOUTH-NORTH DEV. MONITOR, Sept. 28, 1994 (observing that the United States and the European Union appeared to propose, at a meeting of the Sub-Committee of the WTO Preparatory Committee on Institutional, Procedural and Legal matters, that there was no need for the future WTO to make any formal arrangements for relationships with the United Nations), available at <http://www.sunsonline.org/trade/process/towards/09280194.htm>.

11. U.N. CHARTER art. 57, para. 1.

12. *Id.* art. 62, para. 1 & art. 63, para. 1–2 (stating that the Economic and Social Council defines the involvement of international agencies in economic and social matters).

13. The Havana Charter is also referred to as the International Trade Organization Charter (ITO Charter). As the Final Act of the U.N. Conference on Trade and Employment, which created the Havana Charter, explains:

The Economic and Social Council of the United Nations, by a resolution dated February 18, 1946, resolved to call an International Conference on Trade and Employment for the purpose of promoting the expansion of the production, exchange and consumption of goods.

The Conference, which met at Havana on November 21, 1947, and ended on March 24, 1948, drew up the Havana Charter for an International Trade Organization to be submitted to the Governments represented.

Final Act of the United Nations Conference on Trade and the Environment, U.N. ESCOR, U.N. Doc. E/Conf.2/78 (1948) [hereinafter *Havana Charter*], available at http://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm; see *infra* notes 109–111 and accompanying text.

14. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, T.I.A.S. 1700, 55 U.N.T.S. 194.

15. *Id.*

16. WORLD TRADE ORG., UNDERSTANDING THE WTO 11 (3d ed. 2003) [hereinafter

of multilateral trade negotiations, the final round (Uruguay Round) concluding with the signing of the Final Act on April 15, 1994, and establishing the WTO, the World Trade Agreement, and its annexes.¹⁷ The United Nations has oft reminded the WTO of its origins and declared that “[t]he WTO must be seen as a partner in the overall international effort—carried out by the United Nations and its various agencies—aimed at the promotion of sustainable development and human rights, and pursuit of the goals of the UN Charter.”¹⁸ As an international actor, the WTO is thus charged with furthering the goals and principles of the United Nations, including the promotion of human rights.

As a result, when China sought admission to the WTO, the WTO arguably had not only the leverage to influence China’s position on human rights, but an international obligation to use that leverage to improve China’s human rights to the extent it was reasonably able to do so. Thus, many supported the WTO’s decision to demand improvements in China’s human rights policies as a concession for admission¹⁹, viewing this tactic as a fulfillment of the WTO’s duty as an international actor.²⁰ In 2001, however, the WTO appeared to reverse nearly fifteen years of prior policy by failing to insist that China improve human rights as a condition for entry, thus allowing China to complete its negotiations with all WTO members.²¹

UNDERSTANDING THE WTO], *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

17. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994) 33 I.L.M. 1125, 1143 (1994) [hereinafter GATT 1994]. GATT 1947 was amended in 1994 and incorporated into the WTO. *Id.* at 1127. Collectively the GATT 1947 amendments and the GATT 1994 are referred to as “the GATT.”

18. Statement by Mr. Rubens Ricupero, Secretary-General of UNCTAD on behalf of the Secretary-General of the United Nations (May 19, 1998), *available at* http://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/ricupero_e.htm.

19. More precisely, each member nation of the WTO had the leverage as a result of the process of admission to the WTO, which requires each country to individually accept China’s terms (as presented during negotiations), and requires China, in turn, to accept the terms of each WTO member.

20. Interestingly, although human rights in China were continually identified as go-no-go issues for China’s entry into the WTO, reports during the same time period indicate that China’s human rights conditions continued to decline, rather than improve. *See* U.S. Dep’t of State, Country Reports (providing links to the State Department’s annual (1993-2003) reports on China’s human rights practices); *see also* Statement of Senator Helms, *supra* note 6, at S8376 (describing China as “hav[ing] one of the worst human rights records in the world”). *See generally* OFFICE OF THE INT’L INFO. PROGRAMS, U.S. DEP’T OF STATE, WASHINGTON FILE, KAPTUR DOUBTS CHINA COMMERCIAL CHANGES WILL AFFECT HUMAN RIGHTS (June 6, 2002) [hereinafter KAPTUR DOUBTS CHINA] (presenting a statement from Rep. Kaptur regarding her disapproval of China’s accession into the WTO), *available at* <http://usinfo.org/wf-archive/2002/020610/epf107.htm>; 147 CONG. REC. H4303-02 (daily ed. July 19, 2001) [hereinafter Kaptur on WTO] (providing a statement of Rep. Kaptur regarding the U.S. decision to engage in Normal Trade Relations with China).

21. Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China’s Entry (Sept. 17, 2001), *available at* http://wto.org/english/news_e/pres01_e/pr243_e.htm.

Many human rights organizations and individuals condemn the WTO's decision as abandoning human rights principles.²² They warn that the WTO's decision will likely be interpreted by Chinese officials as condoning China's current position on human rights, and will precipitate a decline in human rights in China and those countries and territories over which China claims sovereignty. It also seems fair to say that such organizations and individuals fear removing the "carrot" (entry into the WTO) where the "stick" (sanctions for violations of international law) is unlikely to be perceived by China as a substantive threat.²³

This article seeks to determine whether there is merit to these allegations and, moreover, whether the WTO's decision was a violation of its duty as an international actor and a violation of international law. If the WTO reasonably believed that granting China entry would have no effect, or a positive effect, on human rights in China, then the WTO's decision to grant China entry seems inherently reasonable under principles of international law. Conversely, if the WTO knew or should have known that granting China entry would have a negative effect on human rights conditions in China, then the WTO's decision seems inherently unreasonable under principles of international law.

Part I of this article examines several basic principles of international law, laying the necessary groundwork for later analysis. Part II provides a

China had been a founding member of the GATT, but left the organization in 1949 when the Chinese Communist Party took power under Mao Zedong. *Id.*; see *China's Long March to WTO Membership Almost at an End*, AGENCE FRANCE-PRESSE, Nov. 10, 2001 (providing a 1986–2001 timeline of the events leading to China's admission to the WTO). China began the process of re-admission to the GATT in 1986, but failed to join the GATT prior to the January 1, 1995 deadline set for founding members of the WTO. *Id.* From 1995 onward, China experienced a number of setbacks in its WTO accession process, including the Asian financial crisis of 1997, the NATO bombing of the Chinese embassy in Belgrade in May of 1999, and apparent deadlocks with the United States and the European Union over trade issues, including the treatment of laborers in China. *Id.*; see Craig S. Smith, *China and Europeans Break Off Talks on W.T.O. Membership*, N.Y. TIMES, Feb. 25, 2000, at A11 (explaining that China broke off negotiations over disagreements with the European Union's proposed changes in China's foreign policies).

22. See, e.g., Statement of Senator Helms, *supra* note 6, at S8376 (criticizing the WTO's acceptance of China); KAPTUR DOUBTS CHINA, *supra* note 20 (stating that China's entry into the WTO will not improve China's human rights record). It is beyond the scope of this article to provide details with respect to all fifteen years of China's process of accession. However, the U.S. State Reports on China will be examined at intervals throughout the fifteen-year time period to support this article's conclusions that human rights conditions continued to decline in China leading up to entry.

23. See *infra* notes 63–64. For an insightful discussion of when international intervention is appropriate, see Linda A. Malone, *Introduction: Seeking Reconciliation of Self-Determination, Territorial Integrity, and Humanitarian Intervention*, 41 WM. & MARY L. REV. 1677, 1677 (2000) (discussing "the 'competing' norms of self-determination and territorial integrity, of humanitarian intervention and prohibitions on force except in self-defense"); see also Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309, 309 (1997) (explaining the theory of the carrot and the stick as it applies to the GATT).

snapshot of China's position on human rights and human rights conditions in China during its accession. Part III discusses the duties and responsibilities of the WTO as an international actor acting under the mandate of the U.N. Charter. Part IV analyzes whether the WTO failed in its international duty to promote human rights. This article concludes that the WTO's decision is justified under principles of international law.

Although Western nations commonly equate the "human rights" protected under the U.N. Charter with civil and political rights, this interpretation only captures half the equation. The U.N. Charter not only protects "Western" civil and political rights,²⁴ it also protects "Eastern" social and economic rights.²⁵ These two categories of rights, taken together, and with neither taking precedence over the other, constitute the true meaning of "human rights." As a result, international law neither prohibits nor condemns actions designed to improve social and economic rights, even if such actions do not simultaneously improve civil and political rights. Trade organizations promote one mandate of international law by facilitating improvements in social and economic rights,²⁶ even though they may not improve civil and political rights. As a result, it seems reasonable to conclude that the WTO's decision was likely to improve social and economic human rights in China.²⁷

The allegations against the WTO, however, do not dispute this conclusion. Rather the WTO's decision was criticized as sacrificing civil and political rights in the name of social and economic gain. If true, then the WTO should not have been permitted to violate one mandate of international law, namely, promoting the development of civil and political rights, simply to achieve another, namely, promoting social and economic rights. As the *Universal Declaration of Human Rights* states, "Nothing in this Declaration may be interpreted as implying for any State, group or

24. Civil and political rights include: freedom from discrimination, freedom from oppression, freedom of speech, freedom of religion, freedom of expression, freedom from persecution, a right to a fair and impartial trial, and so forth. For an increased understanding of what constitutes "civil and political rights," see the HUMAN RIGHTS COMM., UNITED NATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS arts. 2–27 (2000), available at <http://www.hrweb.org/legal/cpr.html>.

25. Social, economic, and cultural rights include: the right to work, the right to an education, the right to healthcare, and the right to adequate wages. For an increased understanding of what constitute social, economic, and cultural rights, see OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, UNITED NATIONS, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS pmb1. & arts. 1–15, (opened for signature Dec. 16, 1966, entry into force Jan 3, 1976), available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

26. See *WTO Membership to Boost China's GDP Growth*, PEOPLE'S DAILY, Dec. 11, 2001 (designating GDP growth as a direct result of entry into the WTO and stating that China's economy will improve as a result of joining the WTO), available at http://english.peopledaily.com.cn/200112/11/eng20011211_86434.shtml.

27. See *id.* (predicting huge growth in China's GDP).

person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”²⁸ This article concludes, however, that the WTO’s decision did not come at the expense of civil and political rights. Rather, an increase in social and economic rights in China is reasonably likely to effectuate a corresponding increase in China’s civil and political rights. Thus, while it might appear that the WTO’s decision condoned China’s poor human rights record, while simultaneously removing the “carrot” for human rights improvements, upon careful examination, this article finds that the WTO’s decision will likely achieve what denying China accession had not—an improvement in social, economic, cultural, civil, and political rights in China. As a result, the WTO’s decision was, and continues to be, justifiable under principles of public international law.

This article now lays the basic foundation of this somewhat convoluted, and oftentimes contested, area of law.

I. GENERAL PRINCIPLES OF INTERNATIONAL LAW

International law, also known as “public international law” and “the law of nations,” is a body of legal rules that govern sovereign states and other such entities that have been designated “international actors” within the international community.²⁹ The Permanent Court of International

28. *Universal Declaration of Human Rights* art. 30, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, at 71, U.N. Doc A/810 (1948), reprinted in 43 AM. J. INT’L L. 127 (Supp. 1949).

29. See GIDON GOTTLIEB, *The Nature of International Law: Toward a Second Concept of Law*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 331 (Cyril E. Black & Richard A. Falk eds., 1972) (describing the structure and function of international law). The following criteria are necessary to establish an international legal order:

1. international actors (for example, states) accept sets of fairly specific rules, principles, and policies as binding—in the sense that they recognize they are not at liberty to disregard them—and as proper standards for assessing the legality of their own actions;

....

3. international actors attempt to secure compliance with such rules, principles, and policies and there is a measure of congruence between state action and accepted law;

4. there are organizations established under such rules, principles, and policies and acting pursuant to them;

....

7. international actors are committed to accept the guidance of these binding rules, principles, and policies in good faith and to apply them evenhandedly in all situations.

Id. at 365; see JAMES A. NAFZIGER, INTERNATIONAL SPORTS LAW 131 (1988) (noting that the United States and many other countries have recognized the unique legal personalities of international organizations); see also U.N. CHARTER (discussing the United Nations’ recognition of the role of, and its supremacy over, other international organizations).

Justice has stated:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.³⁰

30. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7). The Permanent Court of International Justice (PCIJ) was established under Article XIV of the Covenant of the League of Nations. For information on the PCIJ, see International Court of Justice 1946–1996: History, at <http://www.icj-cij.org/icjwww/igeneralinformation/ibook/Bbookframepage.htm> (last visited Dec. 22, 2004). The PCIJ was designed as an international court that would contribute to the peaceful settlement of international disagreements, capable of rendering both adversarial and advisory opinions. *Id.* The PCIJ began its preliminary hearings in The Hague, Netherlands, in January 1922 and rendered its first advisory opinion in May 1922. *Id.* A member-state of the League of Nations had to ratify the Statute of the PCIJ before it became a party to the Court's decisions; non-members of the League of Nations (including the United States) could sign the Statute of the PCIJ and participate in the proceedings. *Id.* The United States signed the Statute of the PCIJ, but the Senate refused to ratify. See Francis A. Boyle, *International Crisis and Neutrality: United States Foreign Policy Toward the Iran-Iraq War*, 43 MERCER L. REV. 523, 533 (1992) (noting that even the technical separation of the PCIJ from the League of Nations was insufficient to entice the Senate into ratifying the Statute of the PCIJ). Thus, while the United States was almost continuously represented on the tribunal by the presence of an American judge, the United States could not participate in PCIJ proceedings. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1506–07 (2003) (noting “Americans regularly nominated” judges, and four American judges served on the PCIJ). Article 36 of the PCIJ Statute established those States over which the PCIJ had jurisdiction:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation. The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Statute of the Permanent Court of International Justice Statute art. 36 (1929), available at http://www.worldcourts.com/pcij/eng/conventions/1920.12.16_statute.htm (last visited Dec. 22, 2004). The PCIJ held its last session in October 1945, and was replaced by the International Court of Justice (ICJ) in 1946, which is the primary judicial organ of the United Nations. International Court of Justice 1946–1996: History, *supra*; see also U.N. CHARTER art. 7, para. 1 & art. 92 (describing the International

There is much debate over the theories and concepts of international law, leading one commentator to suggest that “every theoretical formulation of the basis and essence of th[is] law has been open to challenge”³¹ since the English philosopher Jeremy Bentham (1748–1832) “coined the term ‘International Law.’”³²

The very concept of an “international law” clashes with that of national sovereignty. During the nineteenth and early twentieth century, a nation’s power was generally thought to be “exclusive and absolute” within its own territory.³³ Following World War II, this absoluteness “diminished significantly . . . as a result of economic globalization, transportation and communications advances, the rise of non-governmental organizations (NGOs), and the spread of international human rights law” under the U.N. Charter.³⁴

However, national sovereignty remains an important legal principle of international law.³⁵ National sovereignty explains why countries must consent to be bound by treaties with other nations, “respect territorial borders, confer [or] deny recognition [of other states], and honor diplomatic immunity.”³⁶

The scope of international law changed most significantly during the twentieth century, principally led by its codification and enforcement under the auspices of the United Nations during this same period.³⁷ The United

Court of Justice as “the principle judicial organ of the United Nation”). The ICJ sits at the Peace Palace in The Hague, Netherlands, with fifteen judges elected to nine-year terms by the Security Council and the General Assembly of the United Nations. For more information on decisions, news, and publications from the ICJ, see the ICJ’s website, at <http://www.icj-cij.org> (last visited Dec. 22, 2004); see also DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* 10–12 (3d ed. 2001) (discussing the role of the ICJ).

31. Christopher Osakwe, Book Review, 82 *AM. J. INT’L L.* 631, 631 (1988) (reviewing INGRID DETTER DE LUPIS, *THE CONCEPT OF INTERNATIONAL LAW* (1987)).

32. *Id.*; see 21 *THE NEW ENCYCLOPÆDIA BRITANNICA: MICROPÆDIA* 789 (15th ed. 1994) (defining “international law” as the “body of legal rules that apply between sovereign states and such other entities as have been granted international personality”).

33. Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 *STAN. L. REV.* 959, 959 (2000) (reviewing STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999)); *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

34. Goldsmith, *supra* note 33, at 959; see also U.N. CHARTER art. 13, para. 1 (stating that the United Nations shall promote international cooperation in the development of human rights).

35. Goldsmith, *supra* note 33, at 959.

36. *Id.* Louis Henkin has explained the impacts of principles of customary international law on the behavior of nations:

It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*. Every day nations respect the borders of other nations, treat foreign diplomats and citizens and property as required by law, observe thousands of treaties with more than a hundred countries.

LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979).

37. See I.A. SHEARER, *STARKE’S INTERNATIONAL LAW* 11–14 (11th ed. 1994) (describing the

Nations, chartered in 1945, is endowed with enormous responsibility to maintain international peace and world order.³⁸ The organs of the United Nations may settle disputes between states when other peaceful means fail.³⁹ In addition to the peaceful means of dispute resolution granted under the U.N. Charter, the Security Council is empowered under Article 39 of the U.N. Charter to take proper enforcement measures if it “determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression.”⁴⁰

The principal judicial organ of the United Nations, the International Court of Justice (popularly known as “the World Court”), has identified the following sources of international law:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59,⁴¹ judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁴²

The U.N. Charter is, itself, one of the principal sources of international law. Particularly relevant to this article’s analysis is the U.N. Charter

history of the law of nations and the establishment of an “authoritative international judicial tribunal”). Other important developments include: the Permanent Court of Arbitration, established by the Hague Conferences of 1899 and 1907; the Permanent Court of International Justice, established in 1921 (formally dissolved in April 1946); the International Court of Justice, established in 1946; the rise of international labor organizations; the establishment of the International Civil Aviation Organization in 1947; and the founding of the League of Nations in 1921 (the precursor to the United Nations). *Id.* at 12. While the member states of the United Nations cede a certain degree of power, international law continues to confer much more power on governments than it denies. Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 833 (1990). This conferral of power to states is the primary reason why states prefer to uphold principles of international law rather than to disobey them. *See id.* at 833–34 (explaining “why governments love international law”).

38. BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED CASEBOOK* 219, 528 (3d ed. 1997).

39. *See id.* at 219 (describing the United Nations’ gradual approach to resolving disputes).

40. U.N. CHARTER art. 39; *see id.* art. 33 (stating that parties to a dispute shall seek peaceful means of resolution).

41. Article 59 of the I.C.J. Statute reads: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” Statute of the International Court of Justice art. 59, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>.

42. *Id.* art. 38. Note however, that this statute does not explicitly account for various other innovations in international prescription that have arisen from U.N. declarations and resolutions and other international governmental institutions, which bear on international areas such as the laws of war, war crimes, and human rights. WESTON ET AL., *supra* note 38, at 76.

principle of “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”⁴³ The General Assembly, along with other U.N. organizations, has the primary responsibility for promoting human rights.⁴⁴ Perhaps the most important source of international human rights is the Universal Declaration of Human Rights, adopted by the General Assembly in 1948.⁴⁵

The Universal Declaration of Human Rights establishes the following as universal rights: equality before the law; fair trial; ownership of property; freedom of thought, conscience, religion, opinion, expression; peaceful assembly and association; the rights to work, equal pay, an adequate standard of living, and an education.⁴⁶ While not a treaty *per se*, use of the Universal Declaration of Human Rights has been widespread, even among national courts, to judge whether the human rights obligations, as set out in the U.N. Charter, have been complied with.⁴⁷

Beginning in the late 1970s, the U.N. Charter and other human rights treaties “beg[an] to take generalized effect” and have continued to grow consistently in scope since then.⁴⁸

In the area of human rights law, governmental practice of negotiating and approving international agreements has played an expanding role in the formation of customary international law.⁴⁹ Widespread acceptance of declarations, treaties, and resolutions in the area of human rights law is being increasingly viewed as evidence of state practice as well as *opinio juris* in the formation of binding international law.⁵⁰ The Restatement of the Foreign Relations Law of the United States lists several prohibitions,

43. U.N. CHARTER pmb.

44. *Id.* art. 13, para. 1.

45. *Universal Declaration of Human Rights*, *supra* note 28.

46. *See generally id.* (enumerating human rights for all people and all nations).

47. WESTON ET AL., *supra* note 38, at 529.

48. Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 135 (2001).

49. International custom requires only widespread, not unanimous, acceptance to become a source of international law. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 7 (6th ed. 2003). Thus, customary law will bind nations that have not recognized the particular principle at issue. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987 & supp. 1988); *see* N. Sea Cont'l Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 41–44 (Feb. 20) (discussing how customary principles of international law are formed).

50. *See* WEISSBRODT ET AL., *supra* note 30, at 21–22 (explaining that even in instances when international sources of law, such as treaties, have not been incorporated into a nation's statutory law, “courts in many countries have directly incorporated the international law in their national legal structures”). Article 38(1)(c) of the Statute of the ICJ directs the Court to apply “the general principles of law recognized by civilized nations.” Statute of the International Court of Justice art. 38(1)(c), available at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm> (last visited Dec. 23, 2004).

which have become a part of customary international law: “(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, [and] (g) a consistent pattern of gross violations of internationally recognized human rights.”⁵¹ Thus, those nations with divergent views are increasingly finding themselves at odds with customary international human rights law.

As one of the five permanent members of the U.N. Security Council along with the United States, France, the United Kingdom, and the Russian Federation, China reserves the right to veto any U.N. Security Council decision.⁵² To pass a Security Council resolution, there must be nine votes in favor from the fifteen-member council, which is composed of the five permanent members and ten non-permanent members.⁵³ China has often cast its vote, and occasionally used its veto, to oppose foreign infringement of a nation’s sovereignty, including its own.⁵⁴ China has defended its position by asserting that principles of customary international law are primarily creations of Western idealism and imperialism.⁵⁵

51. 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

52. See U.N. CHARTER art. 23, para. 1 & art. 27, para. 3 (stating, respectively, that China is a permanent member of the U.N. Security Council and that decisions must be passed by at least nine affirmative votes that must include the concurring votes of the five permanent members).

53. Tarik Kafala, *The Veto and How to Use It*, BBC NEWS ONLINE, Sept. 17, 2003, available at http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle_east/2828985.stm.

54. China has exercised its vote and its veto power to oppose actions it perceives as undermining its control over certain territories, such as Taiwan and Mongolia. See *China Vetoes Renewing U.N. Force in Macedonia*, CNN, Feb. 25, 1999 (reporting that China, angry with Macedonia for renewing ties with Taiwan, refused to renew U.N. peacekeeping forces to Macedonia’s borders), at <http://www.cnn.com/WORLD/europe/9902/25/un.macedonia.china>; see also Kafala, *supra* note 53 (noting that China has also used its veto power to prevent Mongolia, a country that borders China to the North, from joining the United Nations); Jonathan Mirsky, *Remind Beijing: Human Rights and Arms Control Do Matter*, INT’L HERALD TRIBUNE, Oct. 22, 2001, at 8 (reporting President Bush’s wariness that China might veto the Security Council’s decision to permit the United States to bomb Afghanistan as part of the United States’ “War on Terrorism”). China has, however, used its veto power the least of the five nations on the U.N. Security Council with just five vetoes cast. *Id.*; see also *U.S. Vetoes U.N. Resolution Condemning Killing of Hamas Leader Yassin*, ASSOC. PRESS., Mar. 25, 2004 (recounting that the United States has exercised its veto power 79 times, the Soviet Union and Russia 121 times, Britain 32 times, France 18 times, and China 5 times), available at <http://www.foxnews.com/story/0,2933,115242,00.html>. Of the other three instances of China using its veto power, two occurred in 1972; once to block Bangladesh’s application to the United Nations, and once to oppose certain actions in the Middle East. Kafala, *supra* note 53. The third occurred in 1997 when China vetoed the sending of U.N. peacekeeping forces to Guatemala. *Id.*

55. See Wang Tieya, *The Third World and International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 955, 961–63 (Ronald St.J. Macdonald & Douglas M. Johnston eds., 1983) (arguing that despite “the imperialistic, colonialistic, oppressive and exploitative principles and rules of traditional [i.e., customary] international

China has also regularly contested foreign intrusion under an exception to customary international law,⁵⁶ known as the “persistent objector rule.”⁵⁷ Under this rule, a nation who has persistently objected to the creation of a new customary rule from its inception shall not be bound by it.⁵⁸ The persistent objector rule has been endorsed by the International Court of Justice only twice, however, and both times arguably in dicta.⁵⁹

As a member of the United Nations, China has agreed to the U.N. Charter’s principles and treaties, including those addressing human rights.⁶⁰ Unfortunately, the difference between what a member of the United Nations may agree to in principle, and what that member actually does, is often widely divergent. As Arthur J. Goldberg, former U.S. Supreme Court Justice and U.S. Permanent Representative to the United Nations, said:

law, [Third World countries] do not reject international law itself. . . . [T]he Third World objects only to parts of traditional international law.”)

56. China has also opposed the universality principle, adhering instead to the culturally relativistic model. Melanne Andromedea Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT’L L. 285, 288 (1995). The theory of cultural relativism “maintains that an individual nation should have the prerogative of prioritizing [human] rights in a manner appropriate to its culture and political and economic circumstances.” *Id.* at 314–15. See generally Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984) (exploring the relationship between universal human rights and cultural relativism).

57. The legality of China’s contentions under the persistent objector rule is not clear, however, since “[a] striking feature of discussions about the existence and vitality of the persistent objector rule is the lack of a common statement of the rule itself.” Olufemi Elias, *Some Remarks on the Persistent Objector Rule in Customary International Law*, 91 DENNING L.J. 37, 38 (1991); see also Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 5 (1985) (finding a lack of solid substantive support for the persistent objector rule); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 459 (1985) (“The paucity of empirical referents for the persistent objector principle is striking.”). Some commentators agree that China’s lack of input into these principles of customary international law creates a genuine cause for concern. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 484 (2000) (pointing out that, despite being home to “nearly one-quarter of the world’s population,” “China [has] had no voice in developing” customary international law). But see ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 190–96 (1971) (arguing that nations must consent to international law as an entire system, without the freedom to opt out of a particular law not to their liking); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538 (1993) (concluding that “the rule is open to serious doubt”).

58. BROWNIE, *supra* note 49, at 11.

59. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 765 n.90 (2001) (referring to the two cases as: Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18) and Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277–78 (Nov. 20)).

60. See U.N. CHARTER pmb. & art. 2, para. 2 (stating that all members shall act in accordance with the U.N. Charter).

[The Universal Declaration] has received *universal* recognition, but it remains just that, a *declaration*. In these two words thus are reflected both the hope and the tragedy of human rights in our day. We agree all too often on principles, but practice and enforcement have not kept pace with pronouncements.⁶¹

Simply put, “treaties of human rights are mere chaff where there are no courts to which the citizen can apply for their enforcement.”⁶²

Importantly, China’s human rights violations, while extensively documented, do not rise to the level whereby the United Nations is likely to take direct action.⁶³ As a result, whether China addresses its human rights violations is effectively not a matter of international law but of China’s own choosing.⁶⁴ In contrast, however, granting China’s accession to the WTO was a decision over which China did not have unilateral control.⁶⁵ Any member of the WTO could have prevented China’s entry to the WTO unless China agreed to improve its human rights conditions. Given the status of the WTO as an international actor acting within the framework of the United Nations,⁶⁶ and the fact that all members of the WTO are also members of the United Nations,⁶⁷ the WTO’s decision to grant China entry was necessarily governed by principles of international law. Therefore, assuming without concluding that China’s entry to the WTO would violate international law, the WTO’s decision was sanctionable under international law. International bodies and organizations which are properly considered “international actors,” including the WTO, the World Health Organization,

61. Arthur J. Goldberg, *Our Concern for Human Rights*, CONGRESS BI-WEEKLY, Nov. 15, 1965, at 9.

62. Roger Scruton, *Delusions of Internationalism: David Held’s Flawed Perspective* (Aug. 7, 2004), at <http://www.opendemocracy.net/debates/article-6-27-1995.jsp>.

63. The international criminal tribunals in The Hague, formulated to investigate and prosecute those accused of genocide and other war crimes in the former Yugoslavia, Rwanda, and Sierra Leone, represent most of “the UN’s direct impact on [human] rights protection” to date. Cassel, *supra* note 48, at 132–33.

64. *See id.* at 135 (noting that “[w]here governments are powerful globally . . . they are relatively impervious to external human rights pressures, legal or otherwise”).

65. *See* U.S. GOV’T ACCOUNTING OFFICE, WORLD TRADE ORGANIZATION: CHINA’S MEMBERSHIP STATUS AND NORMAL TRADE RELATIONS ISSUES 6 (1994) (discussing China’s process of accession into the WTO).

66. International law does not govern only state actors and the dealings between two states; its scope has been defined much more broadly. *See* Gottlieb, *supra* note 29, at 365 n.58 (“[I]nternational actors” is not merely a reference to States. It is a reference to all groups and entities with the *capability* to affect international relations.”).

67. The WTO is governed by individuals representing their States, and as such could be bound under principles of international law either collectively as an organization, or individually in their respective States. *See* Gottlieb, *supra* note 29, at 365 (describing the responsibility of “international actors” to abide by the rules that bind them). Remember, too, that the WTO is inferior to the United Nations. *See supra* notes 10–18 and accompanying text.

the World Bank, and the International Monetary Fund, are *ipso facto* required to uphold the principles of international law, including human rights law, just as any nation would be if acting in their stead.⁶⁸ The United Nations has made the WTO's duties in this area clear.⁶⁹

Having determined that China's accession into the WTO should have been governed by principles of international law, Part II now examines the state of China's human rights during the time of the WTO's decision.

II. HUMAN RIGHTS IN CHINA

The People's Republic of China (PRC) is an authoritarian state established by Mao Zedong in 1949 and is currently governed by the Chinese Communist Party (CCP).⁷⁰ According to the Chinese Constitution, in the years following 1840 the Chinese people waged wave upon wave of "heroic struggles for national independence and liberation and for democracy and freedom."⁷¹ Dr. Sun Yat-sen led the Revolution of 1911, abolishing the feudal monarchy and giving rise to the PRC.⁷² In 1949 the CCP, led by Chairman Mao Zedong, overthrew Dr. Sun Yat-sen's democratic party with the intent of abolishing "imperialism, feudalism and bureaucrat-capitalism."⁷³ According to the Constitution, under Mao Zedong the Chinese people witnessed the transformation of their nation into "a socialist society."⁷⁴ Attempted sabotage of the socialist state became prohibited by law.⁷⁵

The Chinese Constitution guarantees the right of its citizens to retain lawfully obtained "income, savings, houses and other lawful property."⁷⁶ Under the Constitution, the State provides all education, medical, and health

68. See Gottlieb, *supra* note 29, at 365 (describing the responsibilities of "international actors").

69. See U.N. CHARTER art. 57, para. 1 & art. 62 (stating that specialized agencies with international responsibilities, such as the WTO, are directed by the United Nations to uphold international law).

70. P.R.C. CONST. pmbl. (1982).

71. *Id.*

72. *Id.*

73. *Id.* China is more often classified as an authoritarian regime, however. See generally SHANTHI KALATHIL & TAYLOR C. BOAS, INFO. REVOLUTION & WORLD POLITICS PROJECT, CARNEGIE ENDOWMENT FOR INT'L PEACE, THE INTERNET AND STATE CONTROL IN AUTHORITARIAN REGIMES: CHINA, CUBA AND THE COUNTERREVOLUTION (Working Paper No. 21, July 2001) (labeling the Chinese government as "authoritarian"), available at http://www.ceip.org/files/publications/HTMLBriefs-WP/WP_Number_21_July_2001/20009535v01.html.

74. P.R.C. CONST. pmbl. (1982).

75. *Id.* art. 1.

76. *Id.* art. 13. But see *The Titan Stirs*, ECONOMIST, Nov. 28, 1992, at 3 (estimating that in 1985, 100 million Chinese were living in "absolute poverty"), available at 1992 WL 11282205.

services to the legal exclusion of private systems.⁷⁷ According to the Constitution, all citizens are supposed to enjoy freedoms of speech, the press, religious belief, assembly, association, procession, and demonstration.⁷⁸ China is also a signatory state to many important international treaties, the goals of which are to assure that all citizens enjoy the basic level of human rights demanded by the U.N. Charter.⁷⁹

Nonetheless, many Chinese do not receive the level of human rights “guaranteed” under China’s Constitution, international treaties and other agreements to which China is a signatory, or the U.N. Charter.⁸⁰ Around the time that China was initiating the process of accession to the WTO, the Tiananmen Square Massacre occurred in Beijing in June of 1989.⁸¹ In

77. P.R.C. CONST. arts. 19 & 21 (1982).

78. *Id.* arts. 35 & 36.

79. China is a treaty member of the following conventions: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child; Convention Relating to the Status of Refugees and its Protocol; and International Convention on the Elimination of All Forms of Racial Discrimination. *Situation of Human Rights in China*, U.N. Comm’n on Human Rights, 57th Sess., Resolution tabled Apr. 11, 2001 by the United States [hereinafter Tabled U.N. Human Rights Resolution], available at <http://www.humanrights-usa.net/2002/statements/1104chinares.html>.

80. “Fundamental human rights provided for in the Constitution are frequently ignored in practice, and challenges to the Communist Party’s political authority are often dealt with harshly and arbitrarily.” U.S. DEP’T OF STATE, CHINA HUMAN RIGHTS PRACTICES, 1993 (Jan. 31, 1994) [hereinafter U.S. DEP’T OF STATE 1993], available at http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eap/China.html; see also Daniel C. Turack, *The Clinton Administration’s Response to China’s Human Rights Record: At the Half-Way Point*, 3 TULSA J. COMP. & INT’L L. 1, 12 (1995) (discussing the Clinton Administration’s finding that China had violated a bilateral agreement, the Prison Labor MOU (Memorandum of Understanding), by continuing to use forced labor in prisons to produce goods sold through Hong Kong subsidiaries under false pretense). See generally Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN’S RTS. L. REP. 285, 287 (1996) (discussing human rights violations against Chinese women). Chinese women experience human rights violations in the following four, generalized categories:

[T]rafficking in women and domestic violence; abuses associated with the population control policy; the lack of enforcement of labor regulations and discrimination against women in employment; and how controls on freedom of expression and association limit women’s access to information and their ability to address the rights violations they suffer.

Id. Human rights violations against women have been particularly difficult to bring to public awareness. See Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 83, 85 (Stephan Shute & Susan Hurley eds., 1993) (“What happens to women is either too particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human.”).

81. See Jim Galloway, *Tiananmen Square: Bloodstains in the Stream of History*, ATLANTA J. & CONST., Dec. 31, 1989, at D4 (“The brutal scenes of the suppression of the pro-democracy movement in China in early June 1989 were seen around the world, where they elicited the shock and disappointment at the loss of what might have been.”). As of 1993, “[t]he Government still ha[d] not provided a full or public accounting of the thousands of persons detained during the suppression of the

1991, in response to growing international criticism and concern over its human rights record, China issued a State Council White Paper on Human Rights, which outlined the Chinese Government's official position on human rights.⁸² However, international reports during the nearly fifteen-year process of China's accession to the WTO continually voiced disapproval of China's human rights policies.⁸³ In 1993, the U.S. Department of State Country Report on China found that the PRC controlled almost all of the police, military, and top government positions in China⁸⁴ and that Chinese citizens had neither the freedom to express any views opposed to official CCP policy nor the right to change the nation's leaders or the form of government.⁸⁵ "[H]undreds, perhaps thousands, of political prisoners remained under detention or in prison. Physical abuse, including torture by police and prison officials persisted, especially in politically restive regions with minority populations like Tibet."⁸⁶ In 1995, it was reported that "the [Chinese] Government continued to commit widespread and well-documented human rights abuses, in violation of internationally accepted norms" and "still ha[d] not provided a comprehensive, credible public accounting of all those missing or detained in connection with the suppression of the 1989 [Tiananmen Square] demonstrations."⁸⁷ Just prior to China completing the process of accession in 2001, the 2000 U.S. Department of State Country Report for China noted

1989 democracy movement, when millions of students, workers, and intellectuals defied the Government and participated in public demonstrations." U.S. DEP'T OF STATE 1993, *supra* note 80.

82. For an English Translation of the Chinese document, see *State Council White Paper on Human Rights*, XINHUA NEWS AGENCY, Nov. 2, 1991.

83. "Security forces, . . . includ[ing] the People's Liberation Army, the Ministry of State Security, the Ministry of Public Security, the People's Armed Police, and the state judicial, procuratorial, and penal systems, . . . are responsible for widespread and well-documented human rights abuses, including torture, forced confessions, and arbitrary detentions." U.S. DEP'T OF STATE 1993, *supra* note 80. The Department of State Human Rights Report is submitted annually to the U.S. Congress, and covers individual, civil, political, and workers rights as recognized internationally and defined in the *Universal Declaration of Human Rights*. See U.S. Dep't of State, Country Reports on Human Rights Practices (providing access to the 1996–1999 Reports, and providing a link to earlier Reports), at http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html (last visited Dec. 23, 2004).

84. U.S. DEP'T OF STATE 1993, *supra* note 80. The "banking system and legal structure" of China are similarly "skewed" in favor of those with powerful connections. John Pomfret & Philip P. Pan, *Great Leap Forward? China Joins the World Trade Organization to Frowns and Smiles*, MONTREAL GAZETTE, Nov. 11, 2001, at A7.

85. U.S. DEP'T OF STATE 1993, *supra* note 80; see also Andrew Byrnes, *And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS 318, 318 (Philip Alston ed., 1999) (discussing Hong Kong's pro-democracy movement).

86. U.S. DEP'T OF STATE 1993, *supra* note 80.

87. U.S. DEP'T OF STATE, CHINA HUMAN RIGHTS PRACTICES, 1995 (Mar. 1996) [hereinafter U.S. DEP'T OF STATE 1995], available at http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_eap/China.html.

that “[t]he Government’s poor human rights record worsened, and it continued to commit numerous serious abuses.”⁸⁸ Also in 2001, the United Nations drafted a formal expression of concern over China’s treatment of human rights.⁸⁹

China, for its part, continually and publicly denounced the international community’s condemnation of its human rights policies during most of this same fifteen-year period. In 1993, China was one of the thirty-four states who attended the five-day Asian Regional Conference on Human Rights and adopted the Bangkok Declaration.⁹⁰ The Bangkok Declaration expresses the signatory states’ belief that a nation ought to be afforded the right to subjectively enforce international human rights standards.⁹¹

88. U.S. DEP’T OF STATE 2000, *supra* note 3.

89. Tabled U.N. Human Rights Resolution, *supra* note 79. The United Nations “[e]xpress[ed] its concern:”

a) At continuing reports of failure to protect internationally recognized human rights and fundamental freedoms in China and, in particular, at severe restrictions on the rights of citizens to the freedoms of assembly, association, expression, conscience and religion, and to due legal process and a fair trial, as well as at reports of harsh sentences for some seeking to exercise their rights;

b) At increased restrictions on the exercise of cultural, linguistic, religious and other fundamental freedoms of Tibetans and others;

c) At the continuing arrests and harsh sentencing during the past year of members of the China Democracy Party and others who sought to exercise their internationally recognized rights of association, expression and participation in political life;

d) At the severe measures taken to restrict the peaceful activities of Buddhists, Muslims, Christians and others who sought to exercise their internationally recognized rights of freedom of religion or belief or conscience and of peaceful assembly;

e) At the increasingly severe measures taken against adherents of movements such as Falun Gong who, in pursuing non-violent activities, sought to exercise their internationally recognized rights of freedom of conscience, belief, and peaceful assembly[.]

Id.

90. *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. GAOR, 8th Sess., U.N. Doc. A/CONF. 157/PC/59 (April 7, 1993) [hereinafter Bangkok Declaration], available at <http://www.unhcr.ch/html/menu5/wcbangk.htm>.

91. *Id.* arts. 4–6. The Bangkok Declaration’s belief that adherence to international human rights standards are subjective matters is evidenced in the following clauses of the Bangkok Declaration:

4. Discourage any attempt to use human rights as a conditionality for extending development[al] assistance;

....

8. Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds[.]

Id. arts. 4 & 8. The following states were in attendance for the Bangkok Declaration: Bahrain, Bangladesh, Bhutan, Brunei Darussalam, China, Cyprus, Democratic People’s Republic of Korea, Fiji, India, Indonesia, Iran (Islamic Republic of), Iraq, Japan, Kiribati, Kuwait, Lao People’s Democratic

Overall, the Bangkok Declaration, while recognizing both Eastern and Western human rights, emphasized the heightened importance of social and economic rights: “Economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights.”⁹² The signatories also emphasized the importance of State sovereignty and a lack of interference by the international community. Notably, the signatories stated that human rights issues should not be used “as an instrument of political pressure.”⁹³

Many ideas expressed by the signatories to the Bangkok Declaration mirror those that China has continually advocated in favor of cultural relativism.⁹⁴ Cultural relativism argues against the universality principle of human rights, supporting instead a nation’s right to prioritize rights according to its particular “culture and political and economic circumstances.”⁹⁵ This theory highlights national emphasis on different areas of human rights law rather than under-emphasizing the importance of the subject matter as a whole, as does the universality principle.⁹⁶ Cultural relativism states “that moral values are historically or culturally specific rather than universal.”⁹⁷ The “Western” approach tends to focus on “civil and political rights and the right to private property,” while the “Socialist” approach tends to focus on economic and social rights.⁹⁸ The “Third World” approach focuses on self-determination and economic development.⁹⁹ Notably, both the Socialist and Third World approaches are more collectivist than the Western approach, which focuses on individualism.¹⁰⁰

Also in 1993, at the United Nations Conference on Human Rights the head of the Chinese delegation, Liu Huaqiu, reiterated China’s position on human rights: “one should not and cannot think the human rights standard and model of certain countries as the only proper ones and demand all

Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Oman, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syrian Arab Republic, Thailand, United Arab Emirates, and Viet Nam. *Id.* at 8. Palestine was also represented. *Id.*

92. Bangkok Declaration, *supra* note 90, pmbl.

93. *Id.* art. 5.

94. *See supra* note 56.

95. *See Civic, supra* note 56, at 314–315. In his book addressing cultural relativism and universal human rights, Jack Donnelly states that “it is often claimed that there are a variety of distinctive and defensible conceptions of human rights that merit our respect and toleration even if we disagree with them.” JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 35 (1993).

96. *See generally Civic, supra* note 56 (comparing cultural relativism and universality with regard to human rights).

97. DONNELLY, *supra* note 95, at 34.

98. *Id.* at 35.

99. *Id.*

100. *Id.*

countries to comply with them. It is neither realistic nor workable to make international economic assistance or even international cooperation conditional on them.”¹⁰¹

As demonstrated above, China has repeatedly attempted through official and unofficial statements to explain or evade its human rights responsibilities under the U.N. Charter. In addition, China has repeatedly attempted to persuade the international community to erode the principle of the universality of human rights, as stated in the 1948 Universal Declaration of Human Rights and reaffirmed during the 1993 United Nations Conference on Human Rights.¹⁰² In response, the United Nations finalized its position in the Vienna Declaration, stating, “The universal nature of [all human rights and fundamental freedoms laid out in the U.N. Charter] is beyond question.”¹⁰³

While many countries in addition to the United Nations have asked China to uphold the “universal concept” of human rights by placing equal emphasis on civil and political rights as on social and economic rights, China has often claimed national sovereignty in denying the “universality” of human rights.¹⁰⁴ As a result, when China enters trade agreements with other states and international actors, these parties must be encouraged to consider how their leverage in negotiations may allow them to promote the universal concept of human rights in China.¹⁰⁵

101. Ineke Boerefijn, *Human Rights New: United Nations*, 11 NETH. Q. HUM. RTS. 293, 295 (1993) (quoting Liu Huaqiu, Address at the World Conference on Human Rights, June 15, 1993).

102. United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Doc. A/Conf.157/24 (adopted June 25, 1993) [hereinafter Vienna Declaration], reprinted in 32 I.L.M. 1661 (1993). The Vienna Declaration squarely addressed the issue of the universality of human rights.

The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.

Id. at 1664.

103. *Id.* at 1664

104. See Civic, *supra* note 56, at 321 (“When rights are discussed in China, China’s leaders unequivocally favor economic and other group-oriented privileges and reject political freedoms.”). “The Bangkok Declaration, unlike the Universal Declaration of Human Rights, put on paper, what, in fact, China was practicing. The Declaration argued for the consideration of Asian historical, cultural and economic factors (in essence cultural relativism) when determining human rights standards.” Erin E. Douglas, Leonard v.B. Sutton Award Paper, *The Struggle for Human Rights Versus Stability: The Chinese Communist Party and Western Values Clash*, 29 DENV. J. INT’L. L. & POL’Y 151, 158–59 (2001).

105. Members of the U.N. Charter and international organizations who may be considered “international actors” are bound to promote and encourage “respect for human rights and for fundamental freedoms for all.” U.N. CHARTER art. 1, para. 3.

As the WTO's decision to grant China entry coincided with an escalation of human rights abuses in China, many observers criticized the WTO for failing to use its unique position to promote human rights in China to the full extent, as some perceived it, of its ability.¹⁰⁶ Should such an accusation prove warranted, it would be cause for concern indeed. The WTO wields great power to force its members' shared beliefs onto nations seeking entry; thus, it is of particular importance that the international community ensure that the WTO's decisions are in accordance with principles of international law.¹⁰⁷ Regardless of how powerful the WTO has become, the laws of the United Nations are, and must remain, supreme.¹⁰⁸

With an increased understanding of international law and the state of human rights in China at the time of accession, this article now examines whether the WTO's decision to admit China is justifiable under principles of international law.

III. THE WORLD TRADE ORGANIZATION AND CHINA'S ENTRY

A. *The World Trade Organization*

In 1947, the United Nations convened the Havana Conference, which produced the International Trade Organization Charter in 1948 (the Havana Charter).¹⁰⁹ Concurrent with the drafting of the Havana Charter, the first round of trade negotiations took place among the parties. The General

106. See U.S. DEPARTMENT OF STATE 2000, *supra* note 3 (stating that in 2000 China's "poor human rights record worsened"); see also *supra* note 22 and accompanying text.

107. China had much to gain economically speaking from entry into the WTO, and would presumably have been willing to make certain concessions to WTO members had it been required to do so. See *supra* notes 19–23 and accompanying text. China's anticipated economic gains were well documented. In 2001, analysts in China predicted that China's entry into the WTO would "add an extra 0.5 percentage points to [China's] GDP growth" annually through 2006 and increase exports by 16 percent annually through 2006; this expected growth would result in an increase of China's GDP from 1.075 trillion U.S.D. to 1.9 trillion U.S.D. *WTO Membership to Boost China's GDP Growth*, PEOPLE'S DAILY, Dec. 11, 2001, available at http://english.peopledaily.com.cn/200112/11/eng20011211_86434.shtml.

108. See *supra* notes 11–12.

109. As the Havana Charter explains:

"The Economic and Social Council of the United Nations, by a resolution dated February 18, 1946, resolved to call an International Conference on Trade and Employment for the purpose of promoting the expansion of the production, exchange and consumption of goods.

The Conference, which met at Havana on November 21, 1947, and ended on March 24, 1948, drew up the Havana Charter for an International Trade Organization to be submitted to the Governments represented.

Havana Charter, *supra* note 13, pmbl.

Agreement on Trade and Tariffs (GATT) resulted from these negotiations and was signed in 1947.¹¹⁰ In the end, the Havana Charter was not ratified,¹¹¹ but the GATT survived, primarily as a result of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, which was concluded in 1947 and entered into force in 1948.¹¹² The GATT underwent eight rounds of multilateral trade negotiations, with the last and final round (the Uruguay Round) beginning in 1986 and concluding with the signing of the Final Act on April 15, 1994. The Uruguay Round produced the World Trade Agreement and its annexes, and resulted in the official establishment of the World Trade Organization (WTO) on January 1, 1995.¹¹³ Although the GATT had mainly dealt with trade in goods, the WTO and its various agreements also cover trade in services, inventions, creations, and designs.¹¹⁴

The primary goal of the WTO is to eliminate international barriers to the trade of goods and services.¹¹⁵ The WTO attempts to accomplish this goal through adherence to its two overarching principles: “(i) Most Favored Nation principle, which requires that each [WTO] Member treat all other Members on an equivalent basis, and (ii) the National Treatment principle, which generally prohibits domestic discrimination against imported products, and covered foreign services and service providers.”¹¹⁶ As of October 13, 2004, the WTO was composed of 148 countries, with an annual budget for 2004 of 162 million Swiss Francs (approximately 130 million U.S.D.).¹¹⁷ Most of the countries in the WTO are founding members, having signed the Uruguay Round agreement in Marrakesh in April 1994.¹¹⁸

110. UNDERSTANDING THE WTO, *supra* note 16, at 11, 15.

111. *Id.* at 15. The United States, although one of its “driving forces,” announced in 1950 “that it would not seek Congressional ratification of the Havana Charter.” *Id.*

112. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, T.I.A.S. 1700, 55 U.N.T.S. 194.

113. GATT 1994, *supra* note 17, at 1143.

114. The GATT 1947 was further modified, supplemented, and adopted as Annex 1A of the World Trade Organization Charter. *Id.* at 1127, Annex 1A. At times the distinction between the GATT 1947, the updated parts of the GATT, and the GATT 1994 are relevant (mostly to trade lawyers), but most of the time the agreements may be referred to collectively as the GATT.

115. Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT’L. ENVTL. L. & POL’Y 191, 226 n.149 (2001). See also GATT 1994, *supra* note 17, at 1125 (stating that during the Uruguay Round participants negotiated market access).

116. Kalas, *supra* note 115, at 226 n.149.

117. World Trade Org., What is the WTO?, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 23, 2004).

118. WORLD TRADE ORG., TRADING INTO THE FUTURE 63 (2d ed., rev. March 2001), available at http://www.wto.org/english/res_e/doload_e/tif.pdf. Most of the 123 country-participants signed the Uruguay Round. *Id.* at 13. Those countries who joined GATT after 1994 but before the WTO was officially established, as well as those who completed their membership negotiations in 1995, are

To join the WTO, the state must have “full autonomy” over its trade policies, and its proposed terms must be acceptable to all WTO members.¹¹⁹ As of October 2004, thirty-one countries were negotiating membership terms with the WTO.¹²⁰ This negotiation process can be further broken down into four phases of accession.¹²¹ In the first phase, the applying government or “observing member” must divulge all aspects of its economic and trade policies that are relevant to WTO agreements.¹²² A working party is then assigned within the WTO to handle each country’s application, although participation in the working party is optional for any WTO member.¹²³

In the second phase, the country seeking accession must make bilateral agreements with any and all WTO members who desire it.¹²⁴ The results of these talks, which cover policies in goods and services, tariff rates, and specific market access commitments, determine the benefits that all WTO members will experience with the new observing member.¹²⁵ For example, if the United States secures the most favorable tariff agreement with an observing member, and Canada secures the most favorable market-access agreement, these benefits would be combined into the final terms of accession between the new observing member and the WTO.¹²⁶

In the third phase, the working party submits a report that finalizes the draft agreements with the observing member and lists the observing members’ future obligations within the WTO.¹²⁷ In the fourth and final phase, the entire negotiated package is submitted to the WTO General Council or the Ministerial Conference, where a two-thirds vote in favor of accession by WTO members is required.¹²⁸ If the observing member receives the required super-majority vote, they are permitted to sign the protocol and join the WTO (unless ratification by a country’s parliament or

considered to be founding members of the WTO. *Id.* at 63.

119. UNDERSTANDING THE WTO, *supra* note 16, at 105.

120. See World Trade Org., Members and Observers (listing thirty-one countries as “observer governments”), at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Dec. 23, 2004). China officially entered the WTO on December 11, 2001. *Id.*

121. UNDERSTANDING THE WTO, *supra* note 16, at 105; U.S. GOV’T ACCOUNTING OFFICE, *supra* note 65, at 6. The four phases consist of “(1) fact-finding, (2) negotiation, (3) WTO Decision, and (4) implementation.” *Id.* (citation omitted).

122. UNDERSTANDING THE WTO, *supra* note 16, at 105.

123. *Id.*

124. *Id.*

125. *Id.*

126. See *id.* (explaining that a new member’s commitments with an individual country, even though negotiated bilaterally, will “apply equally to all WTO members under normal non-discrimination rules”).

127. *Id.*

128. *Id.*

legislature is required prior to completion of the WTO membership process,¹²⁹ as was the case for China).¹³⁰

The member governments are responsible for making all major decisions of the WTO,¹³¹ whose rules are the result of negotiations between the members.¹³² When trade disputes arise between WTO members, enforcement of the rules is accomplished through pre-arranged processes; although, occasionally, enforcement can include trade sanctions, or the threat of sanctions, imposed by other member countries.¹³³ Much of the important decision-making process leading up to the formation of new trade rules, however, takes place outside the formal bodies of the organization, with informal consultations playing a crucial role in achieving consensus among an immensely diverse membership.¹³⁴ For negotiations to be effective, it is often necessary to overcome a deadlock between the “quad.”¹³⁵ However, once members have agreed to trade terms, the WTO is responsible for enforcing the terms. The WTO even has the power to infringe on a member nation’s national sovereignty in matters regulated by the WTA and its annexes.¹³⁶ This at-times arduous process seems worthwhile, however, as nations perceive there is much to gain, economically speaking, from WTO membership, as evidenced by the near unanimity of nations who are already, or are seeking to become, member nations.

129. *Id.*

130. See U.S. GOV’T ACCOUNTING OFFICE, *supra* note 65, at 10 (“China may also have to take some action domestically to ratify its accession package before submitting its notice of acceptance.”); see also *infra* Part III.B.

131. UNDERSTANDING THE WTO, *supra* note 16, at 101. Decisions are normally taken by consensus and can be made either by officials who meet regularly in Geneva, Switzerland, or by ministers who meet every two years. *Id.*

132. *Id.* at 9, 101, 104.

133. *Id.* at 101; see *id.* at 55–58 (outlining the process by which members settle trade disputes).

134. *Id.* at 104.

135. *Id.* at 105. The “Quad” or the “Quadrilaterals” is comprised of Canada, the European Union (which normally speaks on behalf of the European Union member countries in the WTO and is referred to as the European Commission within the WTO), Japan, and the United States. *Id.* at 105, 106.

136. See World Trade Organization Appellate Body Report on U.S.-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Oct. 12, 1998, 38 I.L.M. 118, 123, 175 (1999) (declaring actions of the United States to protect endangered sea turtles as illegal under the GATT). “By ignoring and effectively overruling decisions made by the U.S. judiciary, on the very same issues of U.S. constitutional and administrative law that the Appellate Body chose to decide, the *US-Shrimp* case has made unprecedented inroads into the sovereignty of the United States” Lakshman Guruswamy, *The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation*, 30 ENV’T L. REP. 10261, 10261 (2000).

B. The Decision to Admit China

China currently enjoys full WTO membership status following the ratification of the WTO's terms by the Chinese parliament on November 10, 2001, and China's formal accession on December 11, 2001.¹³⁷ Prior to 2001, however, the WTO had resisted China's attempts to join the organization.¹³⁸ China had been a founding member of the GATT, but left the organization in 1949 when the Communist Party took power in China.¹³⁹ China began the process of re-admission in 1986, but failed to join prior to the January 1, 1995 deadline set for founding members of the WTO.¹⁴⁰ From 1995 onward, China experienced a number of setbacks in its WTO accession process, including the Asian financial crisis of 1997, the NATO bombing of the Chinese embassy in Belgrade in May of 1999, and apparent deadlocks with the United States and the European Union over trade and foreign policy issues.¹⁴¹ Thus, China's trade agreements with other countries were, by necessity, governed by individualized treaties prior to completing its entry into the WTO.¹⁴²

Prior to 2001, the WTO used its displeasure with Chinese national and international policies, including the human rights conditions of laborers in

137. Xianwu Zeng, *Trading Rights After China's WTO Entry*, CHINA BUS. REV., Jan.–Feb. 2002, at 16.

138. See Cumings, *supra* note 5, at 7 (indicating that China's application to the WTO had been held up for fifteen years by the WTO's "American and European gatekeepers"); *China's Long March to WTO Membership Almost at an End*, *supra* note 21 (reporting that China was granted "observing member" status as early as 1995, but failed to complete the four-phase accession process until Nov. 10, 2001).

139. *China's Long March to WTO Almost at an End*, *supra* note 21.

140. *Id.*

141. *Id.*; see Smith, *supra* note 21 (reporting that China broke off negotiations over disagreements with the European Union's proposed changes in China's foreign policies).

142. The United States' trade relations with China from 1974 to 2001 were primarily governed by Title IV of the Trade Act of 1974 and the Agreement on Trade Relations between the United States of America and the People's Republic of China of July 7, 1979. Wise, *supra* note 4, at 568; see Trade Act of 1974, U.S.C. §§ 2432(a), 2434 (2000 & Supp. I 2001) (stating that in 2001, chapter 1, Title IV of the Trade Act no longer applied to China, reversing the United States' discriminatory treatment of China's products); Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651, 4652 (stating that the United States and the People's Republic of China seek to further develop trade relations). The United States has now engaged in permanent normal trade relations with China. Wise, *supra* note 4, at 567. The United States does, however, still attempt to balance such efforts with measured criticism of China's human rights policies. See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 461 (2001) (noting that international human rights litigation that is perceived as coming from the United States as a whole, such as the recent lawsuit against Chinese leader Li Ping, threatens to disrupt such a delicate balance). As one commentator has noted, "[t]he challenge for this and successive administrations is to prod the Chinese toward banking reform, stronger protection of human rights in the workplace and greater respect for intellectual property—reforms that are in China's own interest as well as the interests of outsiders." Editorial, *Living With China*, WASH. POST, July 18, 2004, at B6.

China, to justify its continued exclusion of China.¹⁴³ Part of President Clinton's re-election platform was "that China should not benefit from an improved trade status if it could not stop trading goods made by slave labor."¹⁴⁴ Not all believed the WTO's decision was so altruistic, however, as one scholar noted, "[t]he fear . . . is that the growth of developing countries like China . . . will come at Western expense."¹⁴⁵

As China's status as one of the fastest growing economies, its involvement in the telecommunications industry, and the potential for foreign markets to satisfy the needs of approximately 1.28 billion Chinese people became increasingly apparent,¹⁴⁶ many found it unsurprising that the WTO's sentiments towards China's accession appeared to begin to change. Whether causally related or not, the timing of these events caused many to speculate that the WTO was sacrificing a unique opportunity to promote the universality concept of human rights in China in exchange for economic gain.

IV. DID INTERNATIONAL LAW MANDATE INTERVENTION AND/OR PREVENTION OF CHINA'S ACCESSION?

While the members of the WTO may have decided that their negotiations with and concessions from China were adequate to earn China membership status, many NGOs, human rights organizations, activists, and politicians were not convinced.¹⁴⁷ As previously described, nations are not

143. See Wise, *supra* note 4, at 567 (identifying labor conditions in communist countries as cause for concern in international trade treaties with such countries).

144. Russell H. Stern, Note, *China: A Most Favored Nation or a Most Feared Nation—The PRC's Latest Anti-Crime Campaign and a Possible U.S. Response*, 31 GEO. WASH. J. INT'L L. & ECON. 119, 132 (1997).

145. Danielle S. Petito, Note, *Sovereignty and Globalization: Fallacies, Truth, and Perception*, 17 N.Y.L. SCH. J. HUM. RTS. 1139, 1144 (2001). Such fears are not new to trade agreements; Ross Perot echoed similar sentiments in his statement that the North American Free Trade Agreement (NAFTA) would serve to "take American jobs" away and give them to Mexico. *Id.*

146. See U.S. GOV'T ACCOUNTING OFFICE, *supra* note 65, at 3; (stating that prior to its entry into the WTO, China had "the world's largest economy" of all non-WTO member nations); China Internet Information, Population To Be Kept Within 1.28 Billion (Dec. 26, 2000), at <http://www.china.org.cn/english/2000/Dec/5714.htm> (providing population statistics). Not all Chinese citizens are excited about China's entry into the WTO. Pomfret & Pan, *supra* note 84 (discussing the beneficial and detrimental aspects of China's accession into the WTO). *Id.* For example, as a result of the accession "as many as 13 million wheat, cotton and rice farmers could lose their jobs in the next five years." *Id.* China has been trying to shift its agricultural markets to those that involve intensive labor in the harvest, such as fruits and vegetables, which China can produce cheaply for export. *Id.*

147. See, e.g., Statement of Senator Helms, *supra* note 6 (voicing dismay at the United States' position regarding China's accession into the WTO and proposing an amendment that China must meet "a series of human rights conditions prior to granting PNTR"); KAPTUR DOUBTS CHINA, *supra* note 20 (doubting "that China's entry into the WTO would lead to great reforms within Chinese society"). Certain organizations had even withdrawn from individualized trade agreements with China over human

free to violate accepted principles of international law, even under the guise of the WTO.¹⁴⁸ In addition, all of the nations in the WTO are also members of the United Nations and bound to uphold international law.¹⁴⁹ Moreover, Article 57.1 of the U.N. Charter gives the United Nations the power to determine which international organizations will be tasked with upholding the United Nations principles.¹⁵⁰ It is beyond question that the United Nations has so tasked the WTO. It bears repeating that the United Nations has oft reminded the WTO of its origins¹⁵¹ and declared that “[t]he WTO must be seen as a partner in the overall international effort—carried out by the U.N. and its various agencies—aimed at the promotion of sustainable development and human rights, and pursuit of the goals of the UN Charter.”¹⁵² As a result, the WTO is obligated to conduct itself in a manner that upholds and promotes the principles of international law.¹⁵³

rights issues during the same time period that China was engaged in negotiations with the WTO. *See, e.g., Human Rights Issues Prompt Levi Strauss Cuts in China*, N.Y. TIMES, May 5, 1993, at D5 (revealing Levi Strauss plans to reduce trade with China over human rights disagreements). The WTO’s failure to promote or require its members to adhere to high standards of environmental or human rights protection, however, is not a concern limited to China’s accession. *See Guruswamy, supra* note 136, at 10261–62 (discussing the United States’ inability to protect endangered sea turtles caught in shrimping nets, as WTO trade agreements prohibited the United States’ ban on the importation of foreign shrimp); Neal E. Boudette & Ian Johnson, *Peaceful Demonstrations Fall on Deaf Ears of Participants Inside the ‘Bubble,’* WALL ST. J. EUR., Feb. 4, 2002, at 6 (noting that more than 500 protestors were unable to effectively convey their dissatisfaction with global policies that ignore human rights and environmental issues at a recent meeting of the WTO in New York).

148. *See* N. Sea Cont’l Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 41–45 (Feb. 20) (discussing how customary principles of international law can be formed and be binding even for countries that never become parties to the Geneva Convention). In addition to customary principles of international law, treaty obligations and general principles of international law (principles that have been incorporated into most domestic legal systems) are also binding upon nations. *See* Statute of the International Court of Justice art. 38 (guiding the ICJ as to the sources of law it can apply in resolving international disputes), available at <http://www.icj-cij.org/icjwww/basicdocuments/basicstatute.htm>.

149. Compare UNDERSTANDING THE WTO, *supra* note 16, at 112 (list of WTO members), with United Nations, List of Member States (list of U.N. members), at <http://www.un.org/Overview/unmember.html> (last updated Apr. 24, 2003). All members of the United Nations are bound to uphold the principles of the United Nations, including “promoting and encouraging respect for human rights,” regardless of whether such principles have become generally accepted or customary principles of international law. U.N. CHARTER art. 1, para. 3. Interestingly, some would argue that responsibility for promoting human rights should occur at a “state and individual” level and that efforts to widen such responsibility to include organizations such as the WTO are counter-productive. *See* Joel P. Trachtman, *Changing the Rules: Constitutional Moments of the WTO*, 26 HARV. INT’L REV. 44, 44 (2004) (suggesting that the WTO merely serves as a “scapegoat” in such analysis).

150. *See* U.N. Charter art. 57, para 1 (providing for specialized agencies to be “brought into relationship with the United Nations”).

151. It was the United Nations that convened the Havana Conference, which led to the creation of the GATT and subsequently the WTO itself. *See supra* notes 13–17 and accompanying text.

152. Statement by Mr. Rubens Ricupero, *supra* note 18.

153. Since all WTO members are also U.N. members, they (as differentiated from the WTO as a whole) have a superceding obligation to uphold U.N. principles within the WTO. *See* I.I. Lukashuk,

Specifically, the United Nations has required the WTO to promote and uphold U.N. principles without unreasonably burdening the WTO.¹⁵⁴ The WTO appeared to be acting within this mandate when China's trade negotiations were stalled by several WTO member nations' demands for human rights concessions during negotiations with China; such acts appeared to be an appropriate international sanction for China's poor human rights record.¹⁵⁵ As the *Universal Declaration* states, "every organ of society" is required to "promote respect for [human] rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."¹⁵⁶

The U.S. State Department Reports for 1993–2000 demonstrate that not only were human rights violations apparently worsening during the time of China's accession, but instances of "forced labor" were consistently cited by the Reports.¹⁵⁷ Importantly, forced labor was one of the human rights violations that had previously been an issue during China's WTO negotiations, over which several WTO members and China had been unwilling to compromise their position—causing negotiations to deadlock.¹⁵⁸ Thus, the WTO's decision to no longer require concessions for improvement in human rights at a time when human rights abuses were increasing in China was widely criticized as an abandonment of human rights principles. What this article seeks to determine, however, is whether the WTO's failure to require concessions for improvements in human rights conditions in China constitutes a violation of international law.

To determine whether the WTO violated international law, a more complete understanding of the differing conceptions of "human rights" is

New Thinking by Soviet Scholars: The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law, 83 AM. J. INT'L L. 513, 513 (1989) (noting "the fundamental rule that requires all subjects of international law to exercise in good faith their rights and duties under that law").

154. See Statement by Mr. Rubens Ricupero, *supra* note 18 (urging the WTO to promote and encourage respect for U.N. principles). In accordance with the *Universal Declaration*, each member of the United Nations is requested "to promote respect for [human] rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance." *Universal Declaration of Human Rights*, *supra* note 28, pmbl; see also U.N. Charter art. 2, para. 4 (stating that "[a]ll members shall refrain" from acting in a "manner inconsistent with the Purposes of the United Nations") (emphasis added).

155. See Cumings, *supra* note 5, at 7 (noting how the United States and European "gatekeepers" have repeatedly stalled China's accession into the WTO, but also noting that China has finally met enough of their demands to warrant entry).

156. *Universal Declaration of Human Rights*, *supra* note 28, pmbl. (emphasis added).

157. E.g., U.S. DEPARTMENT OF STATE 2000, *supra* note 3; U.S. DEP'T OF STATE 1995, *supra* note 87; U.S. DEP'T OF STATE 1993, *supra* note 80. It seems fair to speculate that human rights abuses in the area of labor ought to have been of tantamount concern to the WTO, given its status as an international trade organization.

158. See U.N. CHARTER art. 57, para 1 (stating how international organizations, like the WTO, shall be brought under the purview of the provisions of the United Nations).

required. Although Western countries have traditionally placed a greater emphasis on the protection of civil and political rights, while Eastern countries have traditionally favored economic, social, and cultural rights,¹⁵⁹ both sets of rights are considered basic human rights under the *Universal Declaration of Human Rights*.¹⁶⁰ The *Universal Declaration* attempted to “settle[] the dispute between formal equality and the material means for its exercise” by combining both sets of rights into one cohesive document.¹⁶¹ In fact, its preamble states that “a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.”¹⁶² However, it was not long after the adoption of the *Universal Declaration* that the two categories of rights were split into their own separate covenants: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.¹⁶³ Thus, a cultural divergence in emphasis has continued despite the United Nation’s best efforts to reaffirm “and reiterate[] the interrelation, interdependence, and indivisibility of all human rights.”¹⁶⁴ Social and ideological formulations within different countries have seemingly led to the inevitable preference of one category of human rights over the other.¹⁶⁵

China, in addition to many other communist countries, holds a Marxian view that economic and social liberties are of greater importance than the civil and political “bourgeois” rights promoted by their Western counterparts.¹⁶⁶ However, Western countries, including the United States, have made it clear that they value civil and political rights over social and economical ones.¹⁶⁷ According to the United States Department of State,

159. See generally Joseph Chan, *Asian Values & Human Rights: An Alternate View*, in DEMOCRACY IN EAST ASIA 28 (Larry Diamond & Marc F. Plattner eds., 1998) (giving an insightful look into the Eastern emphasis on economic, social, and cultural rights).

160. See generally *Universal Declaration of Human Rights*, *supra* note 28, arts. 1–30 (enumerating basic rights, both economic and civic in nature, guaranteed to all).

161. J.A. Lindgren Alves, *Commemorative Essay: On the 50th Anniversary of the Universal Declaration of Human Rights: The United Nations, Postmodernity, and Human Rights*, 32 U.S.F. L. REV. 479, 498 (1998).

162. *Universal Declaration of Human Rights*, *supra* note 28, pmbl.

163. United Nations, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, reprinted in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 180.1 (Richard B. Lillich ed., 2d ed. 1990); United Nations, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 170.1 (Richard B. Lillich, ed., 2d ed. 1990).

164. Alves, *supra* note 161, at 498. See generally Civic, *supra* note 56 (discussing the universality principle versus cultural relativism); Donnelly, *supra* note 56 (same).

165. Alves, *supra* note 161, at 498 (noting that the denial of the other category of human rights has even gone so far as for one country to attempt to completely deny “the status of rights to economic and social claims”).

166. *Id.*

167. Cf. Green, *supra* note 4, at 623 (“The U.S. government seems primarily concerned with China’s suppression of individual civil liberties and political rights.”).

experience demonstrates that it is individual freedom that sets the stage for economic and social development; it is repression that stifles it. . . . Those who try to justify subordinating political and civil rights on the ground that they are concentrating on economic aspirations invariably deliver neither. That is why we consider it imperative to focus urgent attention on violations of basic political and civil rights.¹⁶⁸

The *Universal Declaration of Human Rights of 1948* and the human rights declarations that followed make clear, however, that neither category of rights is, nor was intended to be, superior to the other. Although, ideally, all international relations with China (or any other nation) should attempt to improve both categories of human rights, a relationship with China that improves one category of human rights may not be struck down by principles of international law simply for failing to simultaneously improve the other.

Importantly, the WTO justifies its existence, in part, with its assertions that “[t]rade raises income;” “[f]reer trade cuts the costs of living;” “[trade] provides more choice of products and qualities;” “[t]rade stimulates economic growth;” and “[t]he basic principles make life more efficient.”¹⁶⁹

168. *Id.* at 623–24 (omission in original) (quoting U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990 XI (1991)).

169. WORLD TRADE ORG., 10 BENEFITS OF THE WTO TRADING SYSTEM 1 (2003), available at http://www.wto.org/english/res_e/doload_e/10b_e.pdf. The ten primary justifications for the WTO, as offered by the WTO, include:

- (1) The system helps promote peace
- (2) Disputes are handled constructively
- (3) Rules make life easier for all
- (4) Freer trade cuts the costs of living
- (5) It provides more choice of products and qualities
- (6) Trade raises incomes
- (7) Trade stimulates economic growth
- (8) The basic principles make life more efficient
- (9) Governments are shielded from lobbying
- (10) The system encourages good government

Id. In response to criticism, the WTO suggests ten common misunderstandings of the organization are:

- (1) The WTO dictates policy
- (2) The WTO is for free trade at any cost
- (3) Commercial interests take priority over development . . .
- (4) . . . and over the environment
- (5) . . . and over health and safety
- (6) The WTO destroys jobs, worsens poverty
- (7) Small countries are powerless in the WTO
- (8) The WTO is the tool of powerful lobbies
- (9) Weaker countries are forced to join the WTO
- (10) The WTO is undemocratic

Article 25(1) of the *Universal Declaration* proclaims, “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services”¹⁷⁰ Thus, while the WTO did not require China to stop using forced labor or free those being held as a result of political or religious persecution (i.e., China’s entry might not promote civil and political rights) it seems to conclude that the WTO reasonably predicted China’s entry would increase the standard of living in China (i.e., China’s entry would promote social and economic rights). As a result, China’s entry, if viewed as promoting Eastern human rights while remaining neutral towards Western human rights, seems justified by international law, which places equal emphasis on the promotion of civil and political rights as on social and economical rights.

The WTO’s admission of China, however, faces a more vexing allegation: the WTO did not simply promote social and economic rights while ignoring civil and political rights, but rather promoted social and economic rights to the detriment of China’s civil and political rights. As the critics claimed, China would likely interpret the WTO members’ relinquishment of their former position on human rights in China as an acceptance of China’s “sovereign right” to selectively uphold human rights within its own borders.¹⁷¹ Without the international pressure to conform, the argument concluded, Chinese citizens would likely experience a decline in their civil and political rights.¹⁷² Thus, should such allegations prove true, the WTO should not have been permitted to violate one principle of international law (promoting civil and political rights) simply to further another (promoting social and economic rights).

Both the proponents of the view that admitting China to the WTO would be detrimental to civil and political rights in China, as well as those adhering to the zero-sum view (that the WTO’s decision would be neutral to civil and political rights), ignore strong evidence that redeems the WTO’s decision.¹⁷³ A causal link between the economic and social

WORLD TRADE ORG., 10 COMMON MISUNDERSTANDINGS ABOUT THE WTO 1 (2003), available at http://www.wto.org/english/res_e/doload_e/10mis_e.pdf.

170. See *Universal Declaration of Human Rights*, *supra* note 28, at art. 25, para 1.

171. In the congressional debate over China’s accession to the WTO, “several opponents” cited human rights conditions in China as justification for denying China’s request. Huang, *supra* note 6.

172. See *supra* note 23 and accompanying text.

173. Naturally, not all would agree with this conclusion. At a June 6, 2002 hearing of the Congressional-Executive Commission on the People’s Republic of China (CECC), Representative Marcy Kaptur stated:

Many proponents of Permanent Normal Trade Relations (PNTR) for China purported that China’s entry into the WTO would lead to great reforms within Chinese society, creating a near utopia. I did not support unconditional PNTR and I don’t support this naïve, if not misleading, future-look. Let’s be frank:

development of a country and a corresponding improvement in its civil and political rights has been demonstrated by other historic examples.¹⁷⁴ This rising-tide view suggests that increased trade will beget economic security, which in turn will enable a politically potent middle class to emerge.¹⁷⁵ Past leaders of China, including Deng Xiaoping, have lost power due to their failure to anticipate the increased demand for political rights that accompanies a societal increase in social and economic rights.¹⁷⁶ In fact, increased economic prosperity in China may represent the best opportunity for civil and political change in China of recent decades.¹⁷⁷

An emergent middle class will care about the freedoms of future generations, and because economic progress depends upon this class, their desires for educational and creative opportunities for their children “can be suppressed only at the expense of development.”¹⁷⁸ Social and economic prosperity thus appears to offer the greatest chance of effectuating change in China, and the WTO’s decision to admit China may be viewed as a “progressive measure” in accordance with the mandate of the *Universal Declaration*.¹⁷⁹ It should be remembered that the WTO had been “sanctioning” China for nearly fifteen years by incorporating human rights

rarely does commercial law lead to an expansion of human, labor and environmental rights.

KAPTUR DOUBTS CHINA, *supra* note 20; *see also* Kaptur on WTO, *supra* note 20 (noting additional statements of Representative Kaptur in opposition to China’s entry into the WTO and PNTR). Other commentators seem cautiously optimistic, but fear the public’s expectations may have risen too high, too fast. *See, e.g.*, Penelope B. Prime, *China Joins the WTO: How, Why, and What Now?*, BUS. ECON., April, 2002, at 26 (“To make too much of this important agreement [the WTO] is to invite a backlash against it if things do not go as well as people hope. Even in the economic realm, expectations are unrealistic.”).

174. *See* Green, *supra* note 4, at 612 (“[T]here is an historical link between the economic power possessed by any group of people and the political rights enjoyed by that group . . .”).

175. *Id.* at 625.

176. *Id.* at 626 n.89; Richard Holbrooke, *A Dilemma for Washington*, NEWSWEEK, June 12, 1989, at 32; *see also* Liu Binyan, *Civilization Grafting*, 72 FOREIGN AFF. Sept.–Oct., 1993, at 19, 21 (1993) (arguing that China cannot “mix economic freedom with political unfreedom” and thus predicting the fall of communism as capitalism takes hold within China). The Vienna Declaration mirrored such sentiments with the proclamation, “Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. . . . The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.” Vienna Declaration, *supra* note 102, art. 8.

177. *See* Green, *supra* note 4, at 612 (noting that, while tempting, the United States’ use of trade sanctions against China would in all likelihood slow down the progress of human rights, rather than accelerate them as desired).

178. Robert L. Bartley, *The Case for Optimism*, 72 FOREIGN AFF., Sept.–Oct., 1993, at 15, 17.

179. *See Universal Declaration of Human Rights*, *supra* note 28, pmbl (requiring that “every organ of society” to “promote respect for [human] rights and freedoms and by *progressive measures*, national and international, to secure their universal and effective recognition and observance”) (emphasis added).

into the negotiation process; yet, despite these sanctions, human rights in China continually declined.

The proposition that increased civil and political rights will likely follow WTO-facilitated prosperity in China is bolstered by history. Other East Asian countries, such as Korea, Thailand, and Taiwan,¹⁸⁰ have demonstrated the causal link between economic development and increased political rights and freedoms.¹⁸¹ In fact, “the third wave of democratization” is upon us with more than thirty countries having shifted from authoritarian regimes to democratic forms of government between 1974 and 1990.¹⁸²

Thailand’s democratization movement has been described as a second-order effect of economic prosperity. Two commentators in particular noted that “[a]n important factor limiting progress toward democracy [in Thailand] during the period from 1932 to 1973 was the slow development of an independent bourgeoisie.”¹⁸³

Before democratization, Taiwan, like China, was ruled by a one-party system.¹⁸⁴ In Taiwan, as in other formerly authoritarian regimes, the rise of an affluent middle class has proven to be an important catalyst for increased human rights—as the emergent educated middle class demands that the centralized government loosen its grip on political power.¹⁸⁵ Taiwan’s experience during its transition from authoritarianism to democracy has been described as follows:

180. See generally Minxin Pei, *The Fall and Rise of Democracy in East Asia*, in *DEMOCRACY IN EAST ASIA* 57 (Larry Diamond & Marc F. Plattner eds., 1998) (discussing economic and democratic developments in several South Asian countries).

181. See Green, *supra* note 4, at 630 (stating that “the link between economic development and democratic political development” can be seen with regard to North and South Korea). This argument has also been posed in the reverse: “democracy makes possible the free market, and that the free market is the economic system most favorable to growth and prosperity.” Margaret Ng, *Why Asia Needs Democracy: A View From Hong Kong*, in *DEMOCRACY IN EAST ASIA* 3, 3 (Larry Diamond & Marc F. Plattner eds., 1998).

182. Samuel P. Huntington, *How Countries Democratize*, 106 *POL. SCI. Q.* 579, 579 (1991–92).

183. Chai-Anan Samudavanija & Parichart Chotiya, *Beyond Transition in Thailand*, in *DEMOCRACY IN EAST ASIA* 147, 149 (Larry Diamond & Marc F. Plattner eds., 1998).

184. Huntington, *supra* note 182, at 580. South Korea, however, was a military regime. See *id.* at 580–81. South Korea’s military regime, like those of many Latin American countries, Greece, Turkey, Pakistan, and Nigeria, were created by coups d’etat. *Id.* In one-party systems, the identity of the state is defined by the ideology of the party, and opposition to the party is often considered treason, as is currently the case for China. *Id.* at 586. The final “group” of authoritarian regimes that shifted to democracy during the late twentieth century were “personal dictatorships.” *Id.* at 581.

185. See *id.* at 604 (describing the role of the emergent middle class in authoritarian regimes whereby an alienated middle class fuels political opposition). The primary participants in authoritarian regimes that have moved to democratic systems of government in recent years include: “the standpatters, liberal reformers, and democratic reformers in the governing coalition, and democratic moderates and revolutionary extremists in the opposition.” *Id.* at 588.

Economic development led naturally to increased political participation by those seeking to resolve tension and conflicts between newly emerged socio-economic groups. Prosperity enriched political and social resources, and drew into politics many who competed for the fruits of economic success. Rapid economic growth also led to greater population mobility in Taiwan, with students and young workers flocking to metropolitan areas. This migration phenomenon undermined traditional social institutions and altered feudal bonds. The resultant urban population became self-centered and vocally disgruntled with authoritarian feudal politics.¹⁸⁶

Taiwan's shift to democracy has also been characterized as a transformation, whereby "those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system;"¹⁸⁷ such a transformation is only possible within an economically successful authoritarian regime. In this kind of transformation, the

reformers often believe[] that democratizing [will] produce benefits for their country: increase its international legitimacy, reduce U.S. or other sanctions against their regime, and open the door to economic and military assistance, International Monetary Fund (IMF) loans, invitations to Washington, and inclusion in international gatherings dominated by the leaders of the Western alliance.¹⁸⁸

Representatives of China have already publicly expressed many of these same desires: obtaining increased legitimacy, reduced sanctions, and

186. Henry C.K. Liu, *U.S.-China: Quest for Peace: Part 5: History of the Taiwan Time Bomb*, ASIA TIMES ONLINE, Jan. 29, 2004, at <http://www.atimes.com/atimes/China/FA29Ad03.html>.

187. Huntington, *supra* note 182, at 590–91. Huntington notes that third wave transformations usually went through five phases: (1) "Emergence of reformers"; (2) "Acquiring power"; (3) "The failure of liberalization"; (4) "Backward legitimacy: subduing the standpatters"; and (5) "Coopting the opposition." *Id.* at 593–600.

188. *Id.* at 593. South Korea's shift to democracy from a military regime was spurred by the assumption of power by Kim Young Sam, who

discharged generals and colonels of the Hanahoe ("Society of One"). The Hanahoe had been a major pillar of authoritarian rule before 1987, ready to back President Chun Doo Hwan (1980–88) with a show of naked force whenever a crisis of legitimacy developed. . . . Their purge created a vacuum in military leadership, which Kim Young Sam filled with officers who had been excluded from strategic posts by Hanahoe generals.

Byung-Kook Kim, *Korea's Crisis of Success*, in *DEMOCRACY IN EAST ASIA* 113, 113–114 (Larry Diamond & Marc F. Plattner eds., 1998). South Korea's authoritarian regime and its move toward democracy appear to be sufficiently distinguishable from the current situation in China; therefore little emphasis will be placed on Korea's process of democratization.

inclusion in world gatherings.¹⁸⁹ China has also already shown, in a sense, that it is capable of moving to a democratic system of government. Hong Kong's transformation into democracy, prior to reverting to Chinese sovereignty, occurred because the citizens of Hong Kong believed "it would give the people of Hong Kong a say in decisions concerning their lives, and because it was the only instrument that could provide real protection for human rights against an authoritarian government."¹⁹⁰

While China's physical size far surpasses that of any other East Asian country to have democratized, the vast percentage of China's population inhabits a small geographic area; around China's coastline and major metropolitan cities. These dense population areas provide a suitable environment for increased communication among a rising middle class economy and for coordinated political activity. A rise in democracy-minded students and skilled laborers is also likely in the decades that follow, as China's youth flock to urban areas and encounter Western influences attendant to the increased Western trade pouring into China.¹⁹¹

China's entry into the WTO should also weaken the government's ability to keep its citizens isolated—a condition upon which the current structure of government depends.¹⁹² Increasing individual access to

189. Some commentators have speculated that inclusion in the G8 could be next on China's list of achievements. *China Could Join G8, Says Lamy*, CHINA ECON. REV., Sept. 15, 2003, available at 2003 WL 61747026. The G8 currently consists of the U.S., the U.K., Germany, France, Japan, Canada, Italy, and Russia. *Id.* Potential future members include China and "other major developing economies such as India, Brazil, and South Africa." *Id.*

190. Ng, *supra* note 181, at 6 (noting that, unlike many countries that democratize out of a desire for increased economic prosperity, Hong Kong's motives differed).

191. Just as surely as they opposed the authoritarian rule in China in the spring of 1989, Chinese students will play a fundamental role in democratizing China in the years to come. The political unrest preceding the Tiananmen Square massacre was set in motion when Zhao Ziyang, new general secretary of the Communist party, "began to open up the political system." The groundswell for liberalization provoked a severe reaction from Communist party hard-liners, who crushed the student movement, ousted Zhao, and replaced him as general secretary with Li Peng. Huntington, *supra* note 182, at 597.

192. Bartley, *supra* note 178, at 16 (discussing the reliance of an authoritarian regime on the isolation of its peoples). In the few years that have passed since China's accession into the WTO, however, the Chinese Government appears to be continuing its struggle against the perceived threat of "foreign media influence":

As Chinese media outlets continued to proliferate and increasingly to challenge government guidelines, propaganda authorities responded by obstructing the free flow of information. They blocked major Internet search engines, closed publications, harassed foreign and domestic journalists, tightened controls on satellite transmission, and hampered the work of academics and activists. For two weeks in September, officials blocked access to Google, a major search engine, and diverted traffic to sites providing officially approved content. When access was restored, users reported selective blocking. Chinese authorities appeared to be using packet sniffers—devices that scan Internet transactions, including e-mail, to block text with sensitive word combinations.

HUMAN RIGHTS WATCH, WORLD REPORT 2003, at 216, (2003), available at <http://www.hrw.org/wr2k3/>

information in China, whether through telephone, radio, television, or the internet, has already begun to decrease the isolation of the Chinese people since China's accession.¹⁹³ According to one commentator, the PRC "is no longer able to crush all independent spiritual activity, or is unwilling to risk the popular backlash that might result if it tries."¹⁹⁴ The PRC has recently amended thirteen provisions of the Chinese Constitution, including one amendment that says: "The State respects and protects human rights."¹⁹⁵ While these changes are "more important symbolically . . . than legally," they may be an important first step towards more substantive legal changes.¹⁹⁶ Also included in the changes to China's Constitution are amendments addressing citizens' rights to private property. These changes recognize the "growing economic and political might" of private businesses in China,¹⁹⁷ and potentially, "the growing economic might" of the middle class economy that is likely to emerge from this new private sector growth. It has long been observed that:

Commerce tends to wear off those prejudices which maintain distinction and animosity between nations. It softens and polishes the manners of men. It unites them, by one of the strongest of all ties, the desire of supplying their mutual wants. It disposes them to peace, by establishing in every state an order of citizens bound by their interest to be the guardians of public tranquility. As soon as the commercial spirit gains . . . an ascendant in any society, we discover a new genius in its policy, its alliances, its wars, and its negotiations.¹⁹⁸

asia4.html. For an interesting discussion on the impacts the internet poses for authoritarian regimes, see KALATHIL & BOAS, *supra* note 73 (suggesting that there is little support to the notion that the Internet poses a threat to authoritarian rule).

193. See Huntington, *supra* note 182, at 629 (describing the reactive and proactive policies the Chinese and Cuban governments have used to control the internet's political impact); CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 1992, at 72 (1993) (predicting increased television, radio receivers, and telephone availability to penetrate China), available at <http://permanent.access.gpo.gov/lps35389/1992/wf930056.txt>.

194. Philip P. Pan, *A Struggle for Spiritual Freedom; Buddhist Center Perseveres After China's Crackdown*, WASH. POST, Mar. 10, 2004, at A1.

195. Tim Johnson, *China Set to Include Human, Property Rights in its Constitution*, KNIGHT RIDDER NEWSPAPERS, Mar. 13, 2004, reprinted in MONTREAL GAZETTE, Mar. 14, 2004, at A6 as *China Set to Enshrine Human Rights: Legislators Could Also Pass Constitutional Guarantee of Property as Early as Today*.

196. Chris Buckley, *China Approves Amendments on Property and Human Rights*, N.Y. TIMES, Mar. 15, 2004, at A6.

197. *Id.*

198. ARTHUR HERMAN, HOW THE SCOTS INVENTED THE MODERN WORLD 85 (2001) (1971) (omission in original) (quoting WILLIAM ROBERTSON, THE HISTORY OF THE REIGN OF EMPEROR CHARLES V (1759)).

Therefore, despite the WTO's failure to require improved political and civil rights in China as a condition of China's accession, these rights likely will emerge as second-order effects of the prosperity China seeks through WTO entry. The intended rise in social and economic rights should trigger a spontaneous improvement in political and civil rights in China as China experiences increased urbanization, further incentives to comply with international standards,¹⁹⁹ the emergence of a middle class, and the accompanying demands for greater political rights and freedoms by its citizens.

While critics have suggested that Western conceptions of individualistic human rights are taking a backseat to Eastern notions of collectivistic human rights, international law requires neither category of human rights to take precedence over the other. The WTO's purpose of improving social and economic rights in China, combined with other historic examples of East Asian countries that have witnessed an increase in civil and political rights as a result of improved social and economic rights, suggests that the WTO's decision to grant China's accession was reasonably likely to result in increased civil, political, social, and economic rights in China. This decision was therefore justified under principles of international law.

CONCLUSION

The U.N. Charter equally promotes the development of social and economic rights (i.e. Eastern human rights) and civil and political rights, (i.e. Western human rights). These rights taken together in no rank or order constitute the United Nations' intended meaning of "human rights." Although the WTO's decision to grant China's accession seemed problematic in light of its responsibilities under the U.N. Charter to uphold *all* human rights, the WTO, whether knowingly or not, was reinforcing this principle.²⁰⁰ Allegations that the WTO's decision promoted social and

199. U.S.-China relations have recently taken a step towards improved civil and political rights in China, with the countries' signing of an agreement to protect workers' rights in China. *See China and the U.S. Sign Agreement to Protect Workers' Rights*, ASIA NEWS, June 23, 2004 (describing the recent agreement signed between the United States and China to protect workers' rights). As U.S. Secretary of Labor, Elaine Chao, proclaimed, "The U.S. Labor Department is committed to working with its Chinese counterparts to share information and practices that will help ensure that the development of labour standards in China keep pace with China's rapid economic development . . ." *Id.* While improving labor rights is certainly a commendable step towards realizing an improvement in Western human rights within China, it is also not unsurprising that labor rights were one of the first types of abuses to gain the United States' attention. "U.S. companies and trade unions have complained for some time that the exploitation of the workforce in China and the country's monetary policy have made Chinese products unfairly competitive." *Id.*

200. Cryptic comments by WTO director general, Mike Moore, at the time of China's accession

economic rights at the expense of civil and political rights are unsupported. Trade sanctions and denial of WTO membership had failed to increase the civil and political rights of Chinese citizens. Instead, these rights decreased during this time period.

Few could dispute that entry into the WTO and the elimination of trade barriers and tariffs on China was reasonably predicted to increase social and economic rights in China. In addition, other East Asian countries, such as Thailand and Taiwan, have demonstrated that increasing citizens' social and economic rights is reasonably likely to be followed by an increase in civil and political rights. The emergent middle classes in several such countries have successfully demanded shifts toward democratic regimes and increased civil and political rights.

The WTO's decision, while principally intended to further social and economic rights, was not made at the expense of civil and political rights. Rather, the WTO's stated intent to increase China's social and economic rights was reasonably predicted to increase civil and political rights in China as well. Thus, the WTO's decision to grant China entry was justified under principles of international law, which mandate the promotion and protection of *all* human rights, but prohibit the promotion of one category of human rights at the expense of the other. The WTO's decision may, in fact, represent the greatest opportunity for civil and political change in China of recent decades.

suggest that at least some within the WTO were quietly optimistic that economic prosperity within China would lead to additional beneficial changes in China as well. *See Trade Chief Hails "Defining Moment" of China's WTO Accession*, AGENCE FRANCE-PRESSE, 2001 WL 25074078, (Nov. 29, 2001) (noting that while Moore carefully refrained from making political comments, he touched on critics' assertions that human rights should have barred China's accession, by stating, "I think all these things follow from success.").