

# CHINESE LAW

## HUMAN RIGHTS AS “FOREIGN AFFAIRS”: CHINA’S REPORTING UNDER HUMAN RIGHTS TREATIES



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*The review by the United Nations of China's initial report under the International Covenant on Economic, Social and Cultural Rights in April 2005 will put the PRC in the human rights spotlight. This makes it timely to look back at China's reporting under human rights treaties over the last 20 years. This article focuses on China's procedural and de jure compliance with human rights treaties, including the question of the status of international human rights law in the domestic legal order. Through this lens, the article seeks to elucidate China's view of its domestic and international obligations under international human rights law. The author argues that the Chinese government essentially views these obligations as a matter of foreign affairs, and seeks to insulate the domestic arena from the reach of international human rights law, both in symbolic and practical terms.*

### Introduction

With its initial report under the International Covenant on Economic, Social and Cultural Rights (ICESCR) being reviewed in April 2005, China will be under the spotlight at the United Nations. The PRC's ratification of this treaty in 2001 was considered as being of particular significance, as it is a constituent part of the International Bill of Rights, along with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), which China signed in 1998 but has yet to ratify.<sup>1</sup> In addition, in September 2005 China's second periodic report on its implementation of the Convention on the Rights of the Child will be considered, and a report from the PRC on compliance with the Convention on the Elimination of Discrimination Against Women has been submitted to the United Nations and will probably be reviewed early in 2006.

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<sup>1</sup> The International Bill of Rights also includes the two Optional Protocols to the ICCPR.

Thus it is timely to look back over China's 20 years of experience in reporting under international human rights treaties. China began acceding to human rights treaties long before the country's human rights record became an irritant in its international relations following the suppression of the 1989 democracy movement. By 1992, China had ratified four treaties with reporting procedures: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980;<sup>2</sup> the Convention on the Elimination of Racial Discrimination (CERD) in 1981; the Convention Against Torture (CAT)<sup>3</sup> in 1988 and the Convention on the Rights of the Child (CRC) in 1992. Currently, China has ratified five of the seven instruments labelled "core international human rights treaties" by the United Nations.<sup>4</sup>

This article explores China's interaction with the four UN treaty bodies that monitor the implementation of CAT, CERD, CEDAW and CRC, concentrating on the most recent reports that have been reviewed.<sup>5</sup> It is not a comprehensive overview of China's adherence to international human rights treaties, as it will not cover treaties that primarily cover situations in other parts of the world or those which have no monitoring and reporting procedures.<sup>6</sup>

Through the experience of the reporting process, the article seeks to elucidate China's view of its domestic and international obligations under international human rights treaties. The main focus is on procedural compliance, but also on *de jure* compliance and the related issue of the status of human rights treaties in the domestic legal order. The principal argument is that the Chinese government essentially views its international obligations under these treaties as a matter of foreign affairs, and seeks to insulate the domestic arena from the reach of international human rights law, both in symbolic and practical terms.

<sup>2</sup> Ratified before China had even joined the UN Commission on Human Rights.

<sup>3</sup> The full title of the treaty is the "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment".

<sup>4</sup> Office of the High Commissioner for Human Rights, "The United Nations Human Rights Treaty System," Fact Sheet No. 30, p 23. Apart from the ICCPR, China has not ratified the newest of the seven, the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>5</sup> Since the transfer of sovereignty over Hong Kong and Macau to China in 1997 and 1999, respectively, separate reports on the two Special Administrative Regions (SARs) have been submitted to the relevant treaty bodies and considered at the same sessions as those covering mainland China. However, this article will not cover the reports of the SARs or the way they have been dealt with by the treaty bodies.

<sup>6</sup> Some of these do have important domestic implications, most notably the Convention Related to the Status of Refugees, ratified by China in 1982, and the Convention on the Prevention and Punishment of the Crime of Genocide, ratified in 1983. As of 2003, the Chinese government had acceded to a total of 21 human rights treaties. State Council Information Office (SCIO), *Progress in China's Human Rights Cause in 2003*, March 2004, available at <http://www.china.org.cn/e-white/20040330/index.htm>.

A look back at China's relationship with this body of international human rights law could, over time, be a way of assessing the effect of the 2004 amendment to the Constitution,<sup>7</sup> which made respect for and protection of human rights a constitutional principle.<sup>8</sup> Will the incorporation of the concept of human rights into the "supreme law" of the PRC change the exclusionary approach which has so far characterised China's attitude to international human rights law?

### Brief History of the PRC's Accession to Human Rights Treaties

After the PRC took over the UN seat for China in 1971, it was initially not engaged with the international human rights regime, either as an object of scrutiny or as a political actor. It was not until the 1980s that China began to enter the field, attending the UN Commission on Human Rights (UNCHR) as an observer from 1979, then being elected to the body in 1981 and sending its first delegation to the annual session in 1982.

China began signing on to international human rights treaties long before its domestic human rights situation became a focus of international attention. When China ratified CEDAW in 1980, it was not even a member of the UNCHR, and had only been an observer at that body for a year. During the course of the decade, China signed a total of four treaties with domestic application that have reporting procedures, acceding to them soon after they had been passed by the General Assembly and opened for signature by states. China's accession to CAT took place in 1988, a year which was a high point for discussion of rights in China. That year the PRC celebrated human rights day for the first time on 10 December 1988, marking the fortieth anniversary of the Universal Declaration of Human Rights with a symposium in Beijing.<sup>9</sup> At the time, CAT had one of the lowest memberships of any UN human rights treaty.

China's progressively deeper engagement with the international human rights regime reflected the growing salience of the concept of human rights in the domestic arena. The project of establishing laws that would apply to all

<sup>7</sup> A third paragraph which reads, "The State respects and protects human rights", was added to Art 33, the introduction to Chapter Two, "The Fundamental Rights and Duties of Citizens". See Announcement of the National People's Congress of the People's Republic of China, 14 Mar 2004.

<sup>8</sup> As a government White Paper on human rights put it, this amendment "indicate[s] that respecting and safeguarding human rights has been upgraded from the level of Party and government policy and stand to the level of a constitutional principle", see "Foreword" in *Progress in China's Human Rights Cause in 2003* (n 6 above). The report of 15<sup>th</sup> Party Congress had included the phrase "respect and protect human rights"

<sup>9</sup> Kent, A., *China, the United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999), p 148.

on a basis of equality was an important component of this, as was the lifting of a previous taboo on the discussion of human rights by academics. Both of these shifts reflected the move away from a focus on class struggle under Mao Zedong. This domestic shift also coincided with the establishment and maturation of procedures for the enforcement of rights within the UN, including the codification of rights in particular treaties, as well as the rise of international human rights NGOs (INGOs) and their involvement in that process.

By the 1990s, China's enthusiasm for human rights treaties appeared to have waned somewhat. Some of the reasons behind this change in attitude include the international outcry over rights abuses in China following the Tiananmen massacre; the increasingly critical approach of the treaty bodies to their work; the growing involvement of INGOs; and domestically, a more legalistic culture in which international obligations are taken more seriously. A measure of this shift can be seen in the increasingly longer periods between signing of treaties and their ratification: whereas the time from signing to ratification was only a matter of months in the case of CEDAW, ratification of CAT took two years, CRC three years and the ICESCR four years. China signed the ICCPR in 1998 but has still not ratified the treaty.<sup>10</sup>

China's accession to treaties became more politicised in the 1990s, both domestically and internationally. For example, accession has become one of the benchmarks governments claiming to be concerned about China's human rights record use to assess the country's "progress".

However, China's pattern of accession also reflects Beijing's growing familiarity with the international human rights regime and, by the time of its decision finally to sign the two covenants in the late 1990s, a sense of having established principles and procedures for dealing with it, on both multilateral and bilateral levels. As an article in the journal of the Party school put it: "It can be said that by 1997 and 1998, China had already essentially left behind the position of being passive in the face of western human rights attacks, and, adopting a positive, active position, to develop human rights cooperation and human rights diplomacy." Thus signing the covenants was a case of "the water arrives when the channel is complete."<sup>11</sup>

<sup>10</sup> Although there has been extensive discussion of ICCPR ratification in the last couple of years, especially on the fifth anniversary of the PRC's signature of the treaty, it seems unlikely that this will occur in the immediate future, as both officials and scholars now apparently adopt the position that China should be legally compliant with the treaty prior to ratifying it. While some countries, such as Canada, adopt similar positions, the United Nations argues that *de jure* compliance is not a prerequisite for ratification. Indeed, the treaty monitoring process is supposed to contribute to achieving both *de jure* and *de facto* compliance. According to Article 2(2) of the ICCPR, states parties undertake "to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant"

<sup>11</sup> Chang Xinxin, "The Background to and Meaning of China's Signing of the Two International Human Rights Covenants," 1999 1 CCP *Central Committee Party School Journal* 102. (常欣欣, 《中国签署国际人权两公约的背景及意义》中共中央党校学报, No. 1, 1999)

Another aspect of China's changing attitude to human rights treaties can be seen in the reservations entered upon ratification. China has consistently reserved on treaty provisions that allow for monitoring procedures, such as the adjudication by the International Court of Justice (ICJ) of "disputes" about its fulfilment of treaty obligations brought by other states,<sup>12</sup> and the provision of CAT that gives the committee competence to conduct investigations of emergent situations regarding torture.<sup>13</sup> China also has not signed any of the optional protocols attached to the treaties discussed here, some of which establish quasi-judicial procedures for dealing with complaints from individuals.

However, it was not until ratification of CRC that it entered any substantive reservations, in this case regarding "the right to life", which China said must be read in its case as being in accordance with state laws on family planning.<sup>14</sup> A substantive reservation was also entered on ratification of the ICESCR, when China stated that provisions on the freedom to join a trade union of one's choice would only be respected to the extent that it accorded with the PRC Trade Union Law.<sup>15</sup>

### The Domestic Status of International Human Rights Law

Although China has now been a party to some human rights treaties for more than 20 years, it has failed to clarify the status of international human rights instruments in the domestic legal order.

The domestic status of international treaties more generally remains ambiguous. As Wang Tieya put it: "A definitive solution of the whole question on the internal application of treaties and on the resolution of conflicts between treaties and laws will, after all, depend on the development in law and practice."<sup>16</sup> In recent years, some scholars have again proposed that there should be a constitutional provision that explicitly accords superior status to

<sup>12</sup> Covered in CEDAW Art 29(1), CERD Art 22 and CAT Art 30(1). Interestingly, these provisions are never used to take cases to the ICJ in any case.

<sup>13</sup> CAT, Art 20.

<sup>14</sup> It is not quite clear what this referred to as there was no national law on family planning at the time of ratification of CRC, but only Chinese Communist Party policy documents and provincial level regulations.

<sup>15</sup> For an analysis of this reservation, see Human Rights Watch, *Paying The Price: Worker Unrest in Northeast China* (New York: Human Rights Watch, Aug 2002), Vol 14, No. 6 (C), pp 12–14.

<sup>16</sup> Wang Tieya, "The Status of Treaties in the Chinese Legal System," 1 *Journal of Chinese and Comparative Law* 1, 15.

international treaties, allowing for their direct application and for their provisions to override national law when a conflict arises.<sup>17</sup>

Some Chinese scholars argue that international treaties and agreements have a status equivalent to national law and thus can be directly applied in China. This argument is based on various constitutional provisions regarding the procedures and powers of treaty ratification,<sup>18</sup> which, they point out, are virtually the same as those for enactment of laws. They conclude that laws and treaties “have equal effect in the Chinese legal system”.<sup>19</sup> This may be wishful thinking, however. According to Gong: “not all international treaties are directly enforceable in China, as this is determined according to the specific treaty.”<sup>20</sup>

Official statements have not indicated whether, in relation to international human rights law, China takes the approach of adoption (under which treaties become directly applicable) or transformation (under which treaty provisions must be incorporated into domestic legislation to be legally effective). China’s statements to the treaty bodies have presented a somewhat confused picture. In 1990, during the review of its report under CAT, Chinese officials told the Committee Against Torture:

“Under the Chinese legal system, an international treaty that China concludes or joins will go through the ratification process in the legislature or the approval process in the State Council. Once it becomes effective to China, the treaty will have legal force in China, and China undertakes the relevant obligations to implement the treaty. The application of the Convention Against Torture is also based on the aforesaid principle. On the one hand, the Convention has direct effects in China, and the offences it prescribes are also considered as crimes provided for by the domestic law in China. The specific provisions of the Convention may be directly applied in China.”<sup>21</sup>

This view is confirmed in China’s report to all the treaty bodies giving background on the country.<sup>22</sup> Once a treaty is ratified, according to this

<sup>17</sup> Shao Shaping, “The Theory and Practice of the Implementation of International Law in China” in Chen Jianfu *et al* (eds), *Implementation of Law in the People’s Republic of China* (The Hague: Kluwer Law International, 2002), p 210. During the drafting of the 1954 Constitution, proposals were put forward for a specific provision on the status of international treaties, but this suggestion was not accepted by the new Chinese government. See Wang (n 16 above), p 8.

<sup>18</sup> Arts 67, 81 and 89 of the 1982 Constitution.

<sup>19</sup> See Wang (n 16 above), p 3.

<sup>20</sup> Gong Renren, “Implementing International Human Rights Treaties in China,” in E.P. Mendes and A. Lalonde-Roussy (eds), *Bridging the Global Divide on Human Rights – A Canada-China Dialogue* (Aldershot & Burlington, VT: Ashgate, 2003), p 105.

<sup>21</sup> See Wang (n 16 above), p 6.

<sup>22</sup> This so-called “Core Document” is supposed to provide baseline information applicable to all human rights treaties.

document: "the instrument is binding under Chinese law and China must honour the corresponding obligations – no further special legal transformation is required to turn it into domestic law." In case of a conflict between a treaty provision and domestic law, "the treaty takes precedence", but such a situation is considered unlikely since "when China concludes or becomes party to an international treaty, it pays very close attention to the question of harmony between the treaty and domestic law, and no conflict of principle can arise".<sup>23</sup>

On the specific question of the applicability of treaties in court, China has repeatedly said to CAT that the Convention's definition of torture can be directly used by Chinese courts. However, no case in which this has actually happened has been presented to the Committee.<sup>24</sup> By contrast, Chinese courts have cited a variety of treaties as grounds for decisions in adjudicating trade-related cases and disputes over copyrights.<sup>25</sup>

In response to a question from the Committee on the Rights of the Child on which articles of the treaty are self-executing and have been cited in court cases, the Chinese government stated:

"The main contents as well as the basic principles of the Convention are in conformity with relevant Chinese laws and policies, and this is particularly true with provisions relating to the trial procedures involving minors. According to the Chinese laws, when China's domestic laws are in conformity with international conventions which are ratified by China or of which China is a State party, the domestic laws will be applied and the relevant stipulations of the international conventions are implemented through application of the domestic laws. Only in cases which are not covered by the domestic laws, stipulations of the international conventions will be cited in the court decisions. Since the stipulations of the Convention concerning the trial procedures of minors are in conformity with relevant Chinese laws, the Chinese courts always directly apply the Chinese laws in hearing cases involving minors and there is no need to invoke specific stipulations of the Convention."<sup>26</sup>

<sup>23</sup> Core Document Forming Part of the Reports of States Parties, HRI/Core/1/Add.21, paras 51–52, 3 Feb 1993.

<sup>24</sup> See Shao (n 17 above), p 207. The author provides a section on "protection of basic human rights in judicial practice", but he does not cite any use of international treaties, only the application of domestic law.

<sup>25</sup> *Ibid.*, pp 202–205. The main use of treaties in such cases has been to resolve conflicts between different domestic laws and regulations.

<sup>26</sup> Chinese government response to CRC List of Issues, 1996. Unpublished document on file with the author.

The writings of Chinese international law experts provide some guidance on the PRC's approach to international human rights law. Since the 1960s, following the Soviet approach, Chinese scholars have argued that individuals could never be subjects of international law. International human rights law obliges states to "guarantee that individuals under their rule enjoy certain rights", but only municipal law could actually "confer" rights; "All individuals, whether citizens within a state or aliens, are under the sovereignty of the state and are not subjects of international law."<sup>27</sup> While China's attitude to human rights has changed greatly since then<sup>28</sup> – the concept is no longer dismissed as a bourgeois fiction – on the question of whether the individual can be a subject of international law, there has apparently been no change.

Most of China's international law scholars continue to maintain that individuals cannot be "subjects" (*zhuti*) of international law, but only its "objects" (*keti*), targets of its regulatory powers.<sup>29</sup> Even when individuals do derive rights from international law, they may not do so directly, but only when the rights are granted by the state.<sup>30</sup> The idea that international human rights law can restrict the powers of sovereign nations over their citizens is denounced as an imperialist plot.<sup>31</sup> "The idea that human rights can override sovereignty has in fact become a theoretical support for strong countries and big countries to promote their hegemony. Therefore, China has consistently maintained that states' rights are much more important than human rights, for a people, the first demand is their nation's independence; they oppose interference in the internal affairs of a state under the pretext of using human rights."<sup>32</sup>

Beijing's version of sovereignty is one in which the principle of non-interference as expressed in Article 2 of the UN Charter is an absolute principle.<sup>33</sup> No scope for interference is envisaged in matters relating to civil,

<sup>27</sup> Kong Meng, "A Criticism of the Theories of Bourgeois International Law Concerning the Subjects of International Law and Recognition of States," *Guoji Wenti Yanjiu (International Studies)*, Feb 1960, translated in J.A. Cohen and Chiu Hungdah, *People's China and International Law – A Documentary Study* (Princeton, NJ: Princeton University Press, 1974), p 98.

<sup>28</sup> M. Svensson, *Debating Human Rights in China: A Conceptual and Political History* (Lanham, MD: Rowman and Littlefield Publishers, 2002), chs 10 and 11.

<sup>29</sup> Zhu Qiwu, *International Law – Theory and Practice in China* (Beijing: Law Publishing House, 1998), pp 67–68. 朱奇武, "中国国际法的理论与实践" (北京: 法律出版社, 1998)

<sup>30</sup> Zhang Aining, *International Law: Explication of Principles and Cases* (Beijing: People's Court Publishing House, 2000), p 82. 张爱宁, "国际法原理与案例解析" (北京: 人民法院出版社, 2000)

<sup>31</sup> See n 29 above, p 70; Pan Baocun, *China's International Law Theory – A New Exploration* (Beijing: Law Publishing House, 2000), p 202. 潘抱存, "中国国际法理论新索" (北京: 人民法院出版社, 2000)

<sup>32</sup> Zhu Liyu and Zhang Xiaojin, "Similarities and Differences in the Views of China and Europe on Human Rights, and Their Impact on EU-China Relations," *State Administration Institute Journal*, No. 4, 2002, p 88. 朱力宇, 张小劲 "中欧人权观的异同及其对中欧关系的影响" 国家行政学院学报, No. 4, 2002, p 88。

<sup>33</sup> See n 29 above, p 300.

political, economic, social and cultural rights, the right to development, self-determination, the protection of rights of women, children, minorities and the disabled, or regarding the punishment of criminals. Racial discrimination, genocide, slavery, the fight against drug trafficking and terrorism must be dealt with by international cooperation. Only human rights problems that threaten international order can be dealt with jointly by the state in question, other states and international organizations.<sup>34</sup>

Thus the human rights in the treaties considered here are viewed as a domestic matter. According to one eminent scholar: "Although the question of human rights has an international dimension, by its nature it is a matter belonging to the internal jurisdiction of a state. The provisions of international treaties on human rights can mostly be realised only through domestic law, and the main responsibility for protecting human rights lies with sovereign states themselves."<sup>35</sup> In this way, the principles of state sovereignty and protection of human rights can be harmonized, writes another scholar.<sup>36</sup> States granting rights to their people is said to be the basis of the system of international human rights law,<sup>37</sup> and only when states have ratified a treaty do they take on the duty to protect the rights it includes or punish violations of them, even in the case of genocide and slavery.<sup>38</sup>

In practice, the PRC has required transformation for human rights treaties to become effective. China's first White Paper on human rights stated: "A human rights system must be ratified and protected by each sovereign state through its domestic legislation," while asserting that "human rights are essentially matters within the domestic jurisdiction of a country".<sup>39</sup> Li Peng, Chairman of the National People's Congress, said in 2000 that China should enact laws "to transform" the international instruments ratified by China into domestic law.<sup>40</sup> As one Chinese international law expert puts it: "If an international treaty is to become effective domestically and reach the people, this must be done through the state, which takes legislative measures to enact domestic law, transforming the specific provisions of the treaty into domestic law. Only when the domestic law implementing the treaty provisions becomes effective, do the people enjoy the rights specified in the treaty."<sup>41</sup>

This position on international human rights law is in contrast to the approach regarding treaties dealing with civil, commercial and financial

<sup>34</sup> *Ibid.*, p 304.

<sup>35</sup> *Ibid.*, p 329.

<sup>36</sup> See Pan (n 31 above), p 202.

<sup>37</sup> See Zhu (n 29 above), pp 298–299.

<sup>38</sup> *Ibid.*, p 300.

<sup>39</sup> State Council Information Office, "Human Rights in China," Nov 1991 (unpaginated, available at: <http://www.china.org.cn/e-white/7/index.htm>).

<sup>40</sup> See Shao (n 17 above), pp 199.

<sup>41</sup> See n 29 above, p 295.

matters, which can be directly applied to resolve conflicts with domestic law relating to the interests of foreigners or their property in China.<sup>42</sup> According to a 1987 regulation that established this use of treaties: “This [policy] is advantageous both to maintain China’s prestige and to protect Chinese citizens’ interests abroad.”<sup>43</sup>

Also in 1987, regulations provided for certain criminal offences with a transnational element covered in specific international treaties (mainly related to hijacking or hostage-taking) to be treated as crimes under Chinese law.<sup>44</sup> The 1997 revisions to the Criminal Law incorporated the following statement: “This Law is applicable to the crimes provided by the international treaties or conventions to which the PRC is a party or signatory country.”<sup>45</sup> Gong argues that these provisions can be applied to bring CAT into domestic law. However, as he points out, such references to international law do not specify what the relationship between the treaty and domestic law should be.<sup>46</sup>

But in the case of legislation relating to the rights of women, children and ethnic minorities – subject matter covered by CEDAW, CRC and CERD – Gong places them in a category of domestic law that “[does] not apply the principles embodied in international law”.<sup>47</sup>

“Generally, where international law may be applied [in China], the laws will include civil, commercial or economic laws, but very rarely will they speak to domestic human rights. With human rights matters, unless they involve a specific issue, such as the rights of foreigners or international crime, the laws will not usually have an international scope. Finally, if an international human rights treaty is inconsistent with Chinese domestic law, its application remains unclear.”<sup>48</sup>

<sup>42</sup> A number of domestic laws, including the 1986 General Principles of Civil Law (GPCL) and the 1991 Civil Procedure Law (CPL), provide for direct application of international treaties domestically. Art 238 of the latter states that in the event of any conflict between the CPL and an international treaty, provided China has not made any reservation on the matter in question, the treaty provisions will prevail. See Shao (n 17 above), pp 198–201.

<sup>43</sup> Regulations on Certain Issues of Handling Cases Involving Foreign Elements, promulgated jointly by the ministries of Foreign Affairs, Public Security, State Security and Justice, the Supreme People’s Court and the Supreme People’s Procuratorate, 27 Aug 1987. Quoted in Li Zhaojie, “The Effect of Treaties in the Municipal Law of the People’s Republic of China: Practice and Problems,” 1995 *Asian Yearbook of International Law*, Vol 4, p 222.

<sup>44</sup> *Ibid.*, p 209.

<sup>45</sup> Part I, General Provisions, Chapter I, Art 9, PRC Criminal Code. Translation as provided in Luo Wei, *The 1997 Criminal Code of the PRC, With English Translation and Introduction* (Buffalo, NY: William S. Hein & Co. Ltd., 1998).

<sup>46</sup> See n 20 above, p 103.

<sup>47</sup> *Ibid.*, p 102–103. Gong specifically cites the Law on the Protection of Women’s Rights and Interests, the Law on the Protection of Minors and the Law on the Protection of the Handicapped as being in this category.

<sup>48</sup> *Ibid.*, p 105.

On the role of the Chinese judiciary, Gong states that: "the courts have remained silent" on the application of the human rights instruments China has ratified.<sup>49</sup> Even if Chinese judges had the courage to take official statements to treaty bodies at face value and apply treaties, the strictures imposed on them by their role in the legal system would make it virtually impossible for them to do so. They are given no power to interpret the law, and since treaties generally do not provide for specific remedies, it is hard to see how judges could actually apply them. Judges may not even attempt to apply domestic legal principles to matters before them. As Dowdle writes: "The judiciary does not have the power to review even executive regulations for illegality (including unconstitutionality), and the NPC has yet to develop procedures for exercising its own powers of constitutional and legislative review."<sup>50</sup> China's "Core" report to the United Nations thus proposes the solution: "To resolve specific questions of penalties for which an agreement makes no provision, the overwhelming majority of treaties have to be enforced by means of domestic laws corresponding in purpose."<sup>51</sup>

Thus China's effective position on the domestic status of international human rights law appears to be that it only applies insofar as domestic law incorporates its provisions, and that it cannot be applied directly in the domestic arena. This is in stark contrast to what China has stated to the treaty bodies.

### Outline of the Treaty Reporting System<sup>52</sup>

The principal international site for monitoring of states' compliance with human rights treaties is the so-called "treaty bodies," which are committees of experts that review compliance through the examination of reports submitted by those states on their progress on implementing the treaty in question. These treaty bodies are mostly established by the treaties themselves, with the exception of the Committee on Economic, Social and Cultural Rights, which was set up in 1986 by the UN's Economic and Social Council (ECOSOC), 20 years after the treaty was adopted by the UN General Assembly. The experts who sit on the committees are nominated by countries on the basis of geographical diversity, and are supposed to be independent

<sup>49</sup> *Ibid.*

<sup>50</sup> M.W. Dowdle, "The Constitutional Development and Operations of the National People's Congress" 11 *Columbia Journal of Asian Law* 1, 55.

<sup>51</sup> See n 23 above, para 53, 14.

<sup>52</sup> For a more detailed examination, see "The United Nations Human Rights Treaty System" (n 4 above).

and specialist in a related field, but in practice many countries propose diplomats to fill such posts. The size of the committees varies, CAT with 10, CERD with 16, CRC and CESCRC with 18 and CEDAW with 23 members.<sup>53</sup> The committees meet in Geneva or New York, each has different meeting times and frequencies.

Treaty bodies receive state party reports and cooperate with the state in reviewing this information, concluding by assessing the state's progress and making recommendations for further action in implementing the treaty in question. Each has its own schedule for state reporting. An initial report, which is supposed to include a review of constitutional, legislative and administrative arrangements regarding the particular rights, statistics regarding issues that the treaty covers, methods of implementation of specific articles and the problems encountered in doing so, is due one or two years following ratification.<sup>54</sup> States are then required to provide periodic reports at regular intervals specified in each treaty, which should address the situation since the last report and answer any questions raised by the treaty body at that time. Reports should also outline the difficulties the state has encountered in implementing the treaty in question.<sup>55</sup>

Each treaty body has a slightly different procedure for dealing with state reporting, with varying degrees of involvement for NGOs. Generally, when a committee schedules a state report for review at a subsequent meeting, it will choose a "rapporteur" to be in charge of collecting information on that country and drafting responses from the committee. Prior to reviewing a state's report, information on the situation of the rights in the treaty in question will be collected from other sources, including other treaty bodies; the so-called "special procedures" of the Commission on Human Rights<sup>56</sup>; other UN bodies, such as UNICEF and UNDP; academics; media reports; and, of course, NGOs. Prior to the committee session at which the state report is to be reviewed, the committee will compile a list of written questions regarding the state report, which may include subjects not mentioned in the report that the committee believes are important aspects of the rights it monitors. Some states provide written responses to these questions.

<sup>53</sup> China has experts on all the treaty bodies discussed in this article except CRC, but experts are not allowed to participate in the review of reports from their own countries.

<sup>54</sup> Under CAT, CEDAW and ICESCR, initial reports are due after one year. In the case of CRC and CERD, initial reports have to be submitted after two years.

<sup>55</sup> Periodic reports under CAT and CEDAW are due every four years; for CRC and ICESCR, every five years; and for CERD, every two years. There is general agreement that CERD reporting is too frequent, and thus states regularly submit "combined" reports that cover two or more reporting periods under this treaty. Combined reports are regularly used as a device to catch up with reporting schedules under other treaties as well, such as CEDAW.

<sup>56</sup> These include the reports of special rapporteurs and working groups, such as the Special Rapporteur Against Torture and the Special Rapporteur on Violence Against Women.

At the session itself, the government delegation is given time to respond to the list of issues, then experts ask further questions and the government responds again. The meetings at which this "dialogue" takes place are open to observers. The process is supposed to be non-adversarial, "the aim is to engage in a constructive dialogue in order to assist the Government in its efforts to implement the treaty as fully and effectively as possible."<sup>57</sup> Some days later, after closed door discussion among committee members, the experts give concluding comments, with the rapporteur generally responsible for a comprehensive overview and individual experts are free to raise issues of particular concern to them. These comments are then edited down into the formal conclusions of the committee, and include positive and negative aspects, recommendations for measures to be taken to realize the rights in the treaty and requests for information to be included in the next report.

Although it is not mentioned in the treaties themselves, treaty bodies and the UN human rights system have developed guidelines on the domestic dimension of the reporting process. Reporting should not be seen as "only the fulfilment of an international obligation," but should "encourage and facilitate, at the national level, popular participation, public scrutiny of government policies and programmes, and constructive engagement with civil society".<sup>58</sup> States are supposed to engage in consultation when preparing a report, reports should be made publicly available and concluding comments of treaty bodies should act as the starting point for a domestic discussion of what actions should be taken to further implement the treaties. For example, in some countries relevant parliamentary committees review reports prior to submission to the United Nations and in others they routinely take up concluding comments of the treaty body for discussion. The conclusions of an assessment of the effectiveness of the UN human rights treaties include a stress on participation, involving "cooperation at many different levels", and continuity: "Continuity is achieved where reporting is not seen as a series of once-off international encounters among strangers, (starting again and again from the beginning) but as part of an ongoing process with domestic objectives, including implementation."<sup>59</sup>

<sup>57</sup> See "The United Nations Human Rights Treaty System" (n 4 above), p 31.

<sup>58</sup> *Ibid.*, p 27.

<sup>59</sup> C. Heyns and F. Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level" 23 *Human Rights Quarterly* 526.

## China's Reporting Practices

On a formal level, China has treated its reporting obligations with a great deal more seriousness than do many states, some of which never bother to submit reports at all. Most states are late in submitting reports,<sup>60</sup> including China.<sup>61</sup> Initially, China was concerned to keep to the UN timetable for reports. During the 1980s, China submitted three reports to CERD,<sup>62</sup> but then there were long delays in preparing the two subsequent reports<sup>63</sup>; two reports were submitted on CEDAW in the 1980s,<sup>64</sup> and then a large gap, with the third report not being reviewed until January 1999.

The large delegations Beijing sends to attend treaty body sessions reviewing PRC reports demonstrate the importance China attributes to these events. Delegations generally include officials from line ministries involved in administration of related issues. For example, the 1999 CEDAW hearing was attended by officials from the Foreign Ministry, the State Council's Working Commission on Women and Children, the All-China Women's Federation, the Ministry of Justice, the Religious Affairs Bureau, the Ministry of Public Security and the State Family Planning Commission.<sup>65</sup> At the CERD session in 2000, the Chinese delegation was 30-strong (this number included officials from Hong Kong and Macau). Committees are impressed by such impressive delegations. China also regularly invites experts from the committees to visit the PRC on "study tours," for example, just prior to the 2001 CERD session, experts from Pakistan and Russia were invited to China.

But reports to the treaty bodies from mainland China have often been minimal, merely containing a list of relevant laws, regulations and policies along with a few positive anecdotes, often provided without any context. For example, figures may be given for one year without any comparison over time. Reports have mostly been very short. For example, China's first report to CERD was only three-and-a-half pages long<sup>66</sup> and its first and second reports

<sup>60</sup> None of the 20 countries included in a study on the impact of human rights treaties had fulfilled its reporting obligations according to the timetable set by the treaty bodies, with reports being submitted two years late on average. *Ibid.*, p 504.

<sup>61</sup> Beijing has apparently set its own reporting schedule which follows the principle that the period between reports starts to elapse at the time of the review of the state party report, while that of the treaty bodies requires reports at set intervals. Personal communication.

<sup>62</sup> Reviewed in 1983, 1985 and 1987.

<sup>63</sup> Reviewed in 1996 and 2001.

<sup>64</sup> Reviewed in 1984 and 1992 (the latter report had been submitted in 1989, but the Committee had a large backlog of reports at that time).

<sup>65</sup> See B. Laroche and S. Woodman, "International Scrutiny in Action: CEDAW Reviews Report from China" 1999 *China Rights Forum* 35.

<sup>66</sup> Initial Reports of States Parties due in 1983: China, CERD/C/101/Add.2, 7 Apr 1983.

to CEDAW were only 17 pages in length.<sup>67</sup> Since 1997, when reports on the situation in Hong Kong have been reviewed at the same time as those on the mainland, Hong Kong's reports have sometimes been more than twice as long as those on the rest of China.

On a number of occasions, treaty bodies have found China's reports to be insufficient. At its 1990 session, China's initial report under CAT was found to be inadequate, and the government was asked to provide supplementary information on specified subjects, which it did.<sup>68</sup> CRC also requested a supplementary report at its review in 1996, but did not label the initial government report unacceptable. The CEDAW Committee's concluding comments on China, issued following review of the PRC's most recent report in January 1999, stated that the report "insufficiently follows guidelines".<sup>69</sup>

Reports have, however, improved over time, with a somewhat more serious attempt being made to cover the ground in the treaties at least, although they are still hardly a realistic assessment of the situation.<sup>70</sup> The 1996 and 2000 reports to CERD were 21 and 27 pages, respectively.<sup>71</sup> Responses to lists of issues or specific questions from the committees sent to the Chinese government prior to the session at which the report is due to be reviewed have sometimes provided more substantive information than the actual government report. This was notable with CEDAW in 1999, when the government provided some statistics on violence against women and trafficking in a response to a list of questions prepared by a pre-sessional working group that heard statements from NGOs and met with representatives of other UN agencies.<sup>72</sup> In this case, the 39-page response to the Committee's list of questions was longer than the original government report of 31 pages, while the delegation also provided 31 pages of statistics from the State Statistical Yearbook.<sup>73</sup>

<sup>67</sup> The first report was printed in very large type, with less than 250 words per page, and thus in fact the second report is actually about twice as long and provides some more detail. Initial Reports of States Parties: People's Republic of China, CEDAW/C/5/Add.14, 25 May 1983; Second Periodic Reports of States Parties: China, CEDAW/C/13/Add.26, 13 July 1989.

<sup>68</sup> This was reviewed at the Committee's 1992 session.

<sup>69</sup> Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China, A/54/38, 3 Feb 1999, para 267.

<sup>70</sup> Several countries have provided training on reporting as part of their cooperation programmes with China. See S. Woodman, "Bilateral Aid to Improve Human Rights" 51 *China Perspectives* 38.

<sup>71</sup> Seventh Periodic Reports of States Parties due in 1995: The People's Republic of China, CERD/C/275/Add.2, 11 Apr 1996; Ninth Periodic Reports of States Parties due in 1995: The People's Republic of China, CERD/C/357/Add.4, 16 Oct 2000. This latter report was reviewed in 2001.

<sup>72</sup> See Laroche and Woodman (n 65 above), pp 34–35.

<sup>73</sup> Third and Fourth Periodic Reports of State Parties: China, CEDAW/C/CHN/3-4, 10 June 1997. In addition, China provided an 11-page addendum covering the situation in between submission of the report and its review: Third and Fourth Periodic Reports of State Parties: Addendum: China, CEDAW/C/CHN/3-4/Add.1, 25 Nov 1998. The responses to the Committee's questions and the statistics are not on the website of the Division for the Advancement of Women where CEDAW documents are available: <http://www.un.org/womenwatch/daw/cedaw/>.

One of the requirements of periodic reports is to respond to questions posed at the previous session at which a report from the state party was considered. However, China's reports have often failed to do this. For example, CERD has repeatedly requested information broken down by province in addition to basic socio-economic data on minorities, but China has not provided any.<sup>74</sup> During the CERD session, the experts' request for 2000 census data went unanswered. Basic statistics on torture cases have not been provided to CAT. In its 1999 concluding comments CEDAW stated that the government report did not include "sufficient statistical data disaggregated by sex, comparing the current situation to that at the time of the previous report".<sup>75</sup> In addition, the government has often failed to respond to questions during the "dialogue" between experts and the PRC delegation, avoiding some sensitive topics entirely.<sup>76</sup> Occasionally, answers from the government delegation have been outright falsehoods: for example, at the 1996 and 2000 sessions of CAT, the Chinese delegation denied that there was a problem of violence perpetrated by "trusties," or cell bosses, in Chinese detention centres and prisons, as such an informal system of control did not exist.<sup>77</sup>

To a certain extent, the reports reflect the relative competence of the government agencies involved. The CERD report reviewed in 2001, apparently drafted by State Ethnic Affairs Commission (SEAC), was much less informative than other recent reports from China. In the case of CEDAW, the semi-governmental All-China Women's Federation (ACWF)<sup>78</sup> is apparently responsible for drafting the government reports.<sup>79</sup> An introduction to state organizations (such as SEAC and ACWF) on the official human rights website,<sup>80</sup> says that the responsibility of the organization is to study, to fulfil and to promote the treaties that China has ratified and, as an officially responsible organization, to report China's "progress on certain treaty-related rights" to UN treaty bodies.<sup>81</sup> The Ministry of Foreign Affairs is officially

<sup>74</sup> A great deal of such data is available in provincial statistical yearbooks and the State Statistics Bureau's *China Ethnic Statistical Yearbook* (Beijing: Ethnic Press).

<sup>75</sup> See n 69 above, para 267.

<sup>76</sup> For example, at the 2001 CERD session, there was no response to experts' questions on the consultation with NGOs in the preparation of the Chinese government report. See B. Laroche, "Formalistic Cooperation: China's Record on Racial Discrimination Under Review" 2001 *China Rights Forum* 21.

<sup>77</sup> Yu Ping and B. Laroche, "Torture in China: UN Committee Highlights Gap Between Law and Practice" 2000 *China Rights Forum* 37. The practice of using cell bosses has been widely documented by academic researchers and NGOs.

<sup>78</sup> ACWF representatives attended the 1999 CEDAW session as part of the government delegation.

<sup>79</sup> However, it seems this can hardly be considered a consultative process even within the ACWF. In the case of the report reviewed in 1999, most ACWF staff members were apparently unaware that a report was being prepared.

<sup>80</sup> Established in 2001, this is operated by the China Society for Human Rights Studies, available at <http://www.humanrights.cn/china/index.htm>

<sup>81</sup> "Human rights organizations" available at <http://www.humanrights.cn/china/rqzz/menu.htm>. Apart from ACWF, the list of NGOs involved in human rights protection in this section includes the All-China Federation of Trade Unions and the All-China Federation of Disabled Persons.

responsible for "transmitting" reports: it "gathers the material and information for the reports from the domestic news media, public associations and government departments".<sup>82</sup> Beijing regularly notes in its reports that NGOs have been involved, but does not provide any detail. No groups from mainland China have so far attended treaty body hearings as NGOs.

The leaders of Chinese delegations to treaty bodies have regularly expressed anger at critical comments from experts and have dismissed NGO shadow reports<sup>83</sup> as "groundless".<sup>84</sup> At the most recent review of China's report under CEDAW, the Chinese ambassador rebuked the Committee for its focus on human rights: "There is no doubt that women's rights form an important part of human rights. However, human rights do not consist of women's rights alone, and the Committee is not the major forum for the discussion of human rights questions. ... Allowing the discussion of human rights questions to be dealt with in the [UN] Human Rights Commission would be conducive to [the] Committee's work and beneficial to all member states."<sup>85</sup>

### Insulating the Domestic Sphere From Treaty Reporting

In an interesting parallel to Beijing's de facto position on international human rights law, a major feature of the Chinese government's approach to reporting under the treaties covered here has been preventing information about such reporting from entering the domestic sphere.<sup>86</sup> Reporting to treaty bodies is very briefly mentioned in various Chinese government White Papers on human rights under the category of "international cooperation", which speaks of China fulfilling its reporting obligations under various UN treaties.<sup>87</sup> It is, of course, no accident that this is the term used to describe the work of the United Nations on human rights in the UN Charter.<sup>88</sup>

<sup>82</sup> See n 23 above, para 67, p 17.

<sup>83</sup> Human rights NGOs regularly submit such shadow reports that critique state reports and provide alternative information. For some examples, see n 103 below.

<sup>84</sup> See Yu and Laroche (n 77 above), p 34; Laroche (n 76 above), p 21; and Laroche and Woodman (n 65 above), p 37.

<sup>85</sup> "Position and Status of Women in Hong Kong Constantly Improving, Committee on Elimination of Discrimination Against Women told," UN press release, WOM/1094.

<sup>86</sup> For a measure of the lack of understanding of the nature of state party reporting under human rights treaties, see n 29 above, p 301 which only refers to the pre-1986 reporting procedure for ICESCR, without mentioning the establishment of the Committee on Economic, Social and Cultural Rights; does not give a proper account of reporting under ICCPR; and does not even mention reporting under any other treaties.

<sup>87</sup> See SCIO, "Human Rights in China"; SCIO, "Progress in China's Human Rights Cause in 2000," April 2001; and SCIO, "Progress in China's Human Rights Cause in 2003," Mar 2004, all unpaginated, available at: <http://www.china.org.cn/e-white/>.

<sup>88</sup> Chapter 1, Art 3.

While the earlier White Papers merely mention that China has “always submitted reports on the implementation of the related conventions, and seriously and earnestly performed the obligations it has undertaken,”<sup>89</sup> the more recent ones have stated that a specific report has been submitted or reviewed, with the 2004 White Paper citing the reports submitted under ICESCR, CEDAW and CRC.<sup>90</sup>

Academic Chinese commentators note the improvement in China’s foreign relations brought about by China’s ratification of ICESCR. For example, one such article notes that this: “provided a playing field for the human rights dialogue between China and the EU, giving the two sides more of a common language to use.”<sup>91</sup> A handful of articles have been published in Chinese journals that cover China’s accession to human rights treaties, but none mention reporting in detail, while none of the books on international human rights law surveyed for this article did so either.<sup>92</sup>

In addition, reporting is mentioned in bulletins relating to foreign affairs, but no detail is provided. Under its section on international human rights law, the Chinese Foreign Ministry’s website contains some information on China’s adherence to treaties, but this merely states that China has submitted reports and they have been reviewed.<sup>93</sup> There appears to be more information on the fact that Chinese experts sit on various treaty bodies than on China’s reporting.

As far as can be ascertained from an extensive Internet search,<sup>94</sup> apart from what is mentioned here, there is a complete news blackout on the specifics of reporting, particularly on any comments made by treaty bodies on China’s implementation of the instruments it has ratified. The Chinese

<sup>89</sup> See n 39 above.

<sup>90</sup> See “Progress in China’s Human Rights Cause in 2003” (n 87 above).

<sup>91</sup> See “Similarities and differences in the views of China and Europe on human rights,” p 89.

<sup>92</sup> This was obviously a limited sample, as the main focus was on China’s approach to human rights law, not the subject in general.

<sup>93</sup> Available at <http://www.fmprc.gov.cn/chn/wjb/zjg/tyfls/wjzdyflgz/zgygjrqt/129646.htm>.

<sup>94</sup> The search, conducted in Mar 2005, used four representative search engines, Sohu, Sina, Google and Renminwang. Sohu, a Beijing-based search engine, claims to be the PRC’s answer to Yahoo!. It can search most of the domestic websites, including media and government. Sina (Beijing) is the most popular search engine in China, as well as being one of the largest. It has sub-websites overseas that target Chinese people. Its search area includes domestic and overseas media and government sites. Google is the most popular international search engine, and generates some alternative information that is blocked by the Chinese government and thus would not appear in results from Sina and Sohu. But it has limited access to domestic information in China. Finally, Renminwang, the search engine of *People’s Daily*, covers the official media and governmental information databases, as well as local media under the *People’s Daily* company and other official media. Obviously, this data has limitations in terms of time, as prior to the mid-1990s, no on-line information was available at all. Information from *People’s Daily* is available from 1 Jan 1995 to the most recent date. The information available from other newspapers and magazines dates from 1 Jan 2000 to 31 Dec 2004. However, according to the author’s recollection, during the 1990s there was no coverage of reporting under human rights treaties in the domestic media in the PRC.

government has told the United Nations that government reports are available to the public. "What goes into a report is not normally a subject for public discussion, but the report, once finalized is made available to the public."<sup>95</sup> However, my search confirmed that related documents in Chinese are almost entirely unavailable,<sup>96</sup> including the Chinese government reports and supplementary information, and related UN documents, such as the concluding comments on China's reports.<sup>97</sup> Although the Chinese versions of treaty body documents relating to review of PRC reports are available to members of the public who visit UN offices, attempts have been made to restrict the circulation within China of concluding comments or observations on China's reports.<sup>98</sup>

Another indication of the Chinese government's policy of blocking penetration of human rights treaties into the domestic sphere is that the treaties discussed here have not been incorporated into the legal education campaigns China has carried out since it embarked on reconstructing its legal system in the reform era.<sup>99</sup> For example, CERD was not included in a published compilation of documents on minority rights cited in the government report,<sup>100</sup> although the text of the Convention Against Genocide was among the documents. In its reports to the treaty bodies, China tends to conflate such legal education with human rights education.<sup>101</sup> In response to a question from the Committee on the Rights of the Child on whether the treaty was available in minority languages, the government stated that there was no need to translate it, because the Law on the Protection of Women's Rights and Interests and the Law on the Protection of Minors were already available in Mongolian, Tibetan, Kazak and Korean and they "fully reflect the principles of the Convention."<sup>102</sup>

<sup>95</sup> See 23 above, para 67, p 17.

<sup>96</sup> A global Internet search located one Chinese-language state party report, on China's compliance with CERD, available on the website of the Beijing University Research Centre for Human Rights, full document list available at <http://www.hrol.org/china/index.php>. This site also has a number of China's reports in English, indicating that the problem may be lack of availability of documents in Chinese.

<sup>97</sup> Even someone knowledgeable enough, and with sufficient English, to navigate the website of the Office of the High Commissioner for Human Rights (<http://www.unhcr.ch>) would find that China's reports are available only in English.

<sup>98</sup> One Chinese scholar who was given a copy of CEDAW's 1999 concluding comments on China's report when the Chinese translation became available was reportedly told by officials not to give copies to anyone as it was a "state secret". Personal communication.

<sup>99</sup> There is one exception: apparently the Chinese government disseminated "hundreds of thousands" of pamphlets containing the Chinese text of CEDAW in the early 1990s. See Li (n 43 above), p 216.

<sup>100</sup> CERD/C/357/Add.4, para 114.

<sup>101</sup> See n 23 above, para 66.

<sup>102</sup> Summary Record of the 298th meeting: China, CRC/C/SR.298, 19 June 1996, para 20.

### Failure to Incorporate Definitions of Rights Into Domestic Law

Given China's effective position on the status of treaties and the realities of the Chinese legal system, implementation of legal obligations under international human rights treaties will depend entirely on how rights are formulated in domestic law. A comprehensive assessment of China's *de jure* compliance with these treaties is beyond the scope of this article.<sup>103</sup> However, one measure of the level of compliance is the extent to which the PRC has incorporated key definitional elements from the treaties into its domestic legislation. This section will briefly examine this question in relation to CAT, CEDAW and CERD. In their conclusions on their review of reports from China, the three treaty bodies monitoring China's compliance with these instruments have, in some cases repeatedly, called on Beijing to incorporate definitions of prohibited behaviour contained in the treaties into domestic law.

In the case of CAT, the issue has been the definition of torture in Chinese law. The definition contained in the treaty has three principal elements: (i) torture involves the infliction of severe pain or suffering, which may be physical or mental in nature; (ii) torture is intentionally inflicted for the purpose of obtaining information, for punishment, or for any reason based on discrimination of any kind; and (iii) torture is an act inflicted by, instigated by, or carried out with the consent or acquiescence of a public official or person acting in an official capacity.<sup>104</sup>

According to the assessment of the Committee Against Torture, both before and after the criminal law reforms of 1996 and 1997, the PRC had failed fully to incorporate this definition of torture into its domestic law.<sup>105</sup> PRC law does not recognize mental torture, and cases are only investigated and prosecuted when the torture results in serious injury or permanent disability. It restricts the concept of torture to instances involving obtaining

<sup>103</sup> There is an extensive literature relevant to this subject, comprising both academic studies and NGO reports. See Kent (n 9 above), pp 201–215; Human Rights in China (HRIC), *Report on Implementation of CEDAW in the PRC* (New York: HRIC, 1998); HRIC, *Impunity for Torturers Continues Despite Changes in the Law: Report on Implementation of the Convention Against Torture in the PRC* (New York: HRIC, 2000); Hecht, J., "Women's Rights, State's Law: The Role of Law in Women's Rights Policy in China," in Montgomery, J.D., (ed), *Human Rights: Positive Policies in Asia and the Pacific Rim* (Hollis, NH: Hollis Publishing Company, 1998), pp 71–96; Lawyers Committee for Human Rights, *Opening to Reform?: An Analysis of China's Revised Criminal Procedure Law* (New York: LCHR, Oct 1996).

<sup>104</sup> Art 1, CAT.

<sup>105</sup> In both its 1996 and 2000 concluding observations on China, the Committee called on the government to bring the definition of torture in PRC law into conformity with Art 1. See CAT, *Conclusions and Recommendations of the Committee against Torture: China, 9 July 1996, A/51/44*, paras 138–150; and CAT, *Conclusions and Recommendations of the Committee against Torture: China, 9 May 2000, A/55/44*, paras 106–145.

confessions or information. It only recognizes acts by defined categories of law enforcement personnel as torture, and does not provide for offences of acquiescence to, or instigation of, torture by non-official personnel (such as the trusties that are a routine feature of most Chinese places of detention).<sup>106</sup>

In the case of CEDAW and CRC, China has cited its obligations under these treaties as a reason for the enactment of the 1992 Law on the Protection of Women's Rights and Interests (LPWRI) and the 1991 Law on the Protection of Minors (LPM). According to one of the pioneers of human rights research in China, the former "fully embodies the basic principles" of CEDAW, while the latter "reflects the basic requirements of the Convention and made some provisions more concrete to facilitate the application" of the CRC.<sup>107</sup> But in fact the LPWRI and the LPM do not cover all the issues in the treaty in question, and generally do not provide remedies that could allow individuals to take action against violations of their rights by public or private parties.<sup>108</sup> The underlying assumption of the LPWRI and the LPM is that their provisions must be applied through administrative means – but there are no consequences for failure to do so. As Hecht writes:

"Despite frequent assertions that the [LPWRI] is a powerful tool for women to protect their lawful rights, the reality is that the law is not designed to be used by the victims of discrimination themselves ... [T]he law is essentially a set of normative principles to be inculcated through education and propaganda. The process of activating the legal system to enforce the norms – that is to apply sanctions against those who violate women's rights – operates almost entirely at the discretion of the state."<sup>109</sup>

Thus in its concluding comments on China's last report under CEDAW, the Committee expressed concern that the LPWRI "does not contain a definition of discrimination against women" and does not provide "effective remedies" for violations. It thus recommended that "the Government adopt legislation that expressly prohibits gender discrimination, including unintentional and indirect discrimination" as required under Article 1 of the

<sup>106</sup> For an analysis of the relevant provisions of the PRC Criminal Law (1997) and the Criminal Procedure Law (1996) see HRIC, *Impunity for Torturers Continues* (n 103 above), pp 10–13.

<sup>107</sup> Quote from Wan Exiang, *International Human Rights Law* (Wuhan: Wuhan University Press, 1994) cited in Shao (n 17 above), p 206.

<sup>108</sup> See HRIC, *Report on Implementation of CEDAW in the PRC* (n 103 above), pp 11–13; HRIC, "Protections fail to protect: China's implementation of the Convention on the Rights of the Child," 1996 *China Rights Forum* 14.

<sup>109</sup> J. Hecht, "The Legal Protection of Women's Rights in China: Discretionary Enforcement of Human Rights Norms," 1995 *China Rights Forum* 4–5.

Convention<sup>110</sup> and “improve the availability of means of redress, including legal remedies” under the LPWRI. It also said: “The Committee is concerned that the Government’s approach to the implementation of the Convention has an apparent focus on the protection of women rather than their empowerment.”<sup>111</sup>

The LPWRI is currently being revised, and amendments may address the definitional issues, although how this will be done is as yet unclear.<sup>112</sup> It will also reportedly prohibit sexual harassment, but, in a similar way to existing provisions of the law, without defining the offence or providing for remedies.<sup>113</sup> The LPM is also undergoing revisions at the time of writing. It is surely no accident that these laws are being amended at this time, as they will undoubtedly be passed in time to present the changes to the treaty bodies when China’s reports are reviewed.

To comply with CERD, states must incorporate into their laws a very broad definition of racial discrimination that “shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>114</sup>

However, PRC law lacks any kind of definition of what could constitute racial discrimination, focussing only on “protecting” the rights of identified “national minorities” (*shaoshu minzu*).<sup>115</sup> Article 4 of the 1982 Constitution does prohibit discrimination against “any nationality”, implying a group right, rather than an individual one. But there presently are no mechanisms for enforcing the Constitution, and this provision has not been incorporated into any other law. Criminal offences relating to minorities are “inciting racial hatred or discrimination” (Article 249) and publishing materials that “discriminate against or insult any minorities” (Article 250).<sup>116</sup> As criminal

<sup>110</sup> This reads: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

<sup>111</sup> See n 69 above, paras 280–284.

<sup>112</sup> A report stated that the draft revisions prepared by the All-China Women’s Federation proposed that “the principle of equality between men and women should be included in the general provisions” of the law. See “China to enact first anti-sexual harassment law,” available at <http://www.chinalawinfo.com>, 5 Mar 2005. Since the LPWRI already states the principle of equality, this may refer to an expanded definition.

<sup>113</sup> K. Kwok, “New Sexual Harassment Law Will Be Toothless, Say Critics,” *South China Morning Post* (hereinafter “SCMP”), 8 Mar 2005.

<sup>114</sup> Art 1, CERD.

<sup>115</sup> This term is often now translated in official PRC contexts as ethnic minorities. But “minority nationalities” is a more direct translation.

<sup>116</sup> PRC Criminal Code, translation as provided in Luo (n 45 above).

offences, these are subject to public prosecution. Thus no individual right of action against discriminatory behaviour is established in law.

Thus PRC law has not provided individuals protected under these treaties with effective remedies for violations of their rights, which is a crucial element of the relevant instruments. China does not appear to see its obligation as one that requires it to provide for direct remedies for individuals and/or groups, but one where the state implements its version of human rights law through its policies and procedures. "In China, any international human rights agreement, after approval by the legislature, establishes obligations which China must comply with. The judicial and executive authorities and all public associations concerned then apply the agreement within their respective spheres of competence."<sup>117</sup>

## Conclusion

China's reporting under international human rights treaties demonstrates procedural and ceremonial respect. It is seen as an important opportunity for Beijing to show its sincerity in "international cooperation." But such cooperation has been formalistic – treaties are viewed as vague declarations of intent, with few practical implications – they do not entitle individuals to rights. Legal remedies against discrimination have not been established in Chinese law, and the approach to the rights of women, minorities and children is one of protection through administrative measures, not individual empowerment. Reports to treaty bodies display a familiar legal formalism, often presenting law as reality.

Such approaches are related to the general position on human rights of the Chinese government, which in dialectical fashion joins together apparent opposites. Thus Beijing has accepted the universality of human rights while at the same time emphasizing their particularity, and China accepts international monitoring of its human rights situation under the rubric of "international cooperation" on human rights,<sup>118</sup> while continuing to maintain that the human rights of the citizens of the PRC are an internal affair. The focus is on the overall development of the state under the rubric of "collective rights", while failing to provide individuals with mechanisms to assert

<sup>117</sup> See n 23 above, para 53, 14.

<sup>118</sup> See n 29 above, p 299.

rights themselves.<sup>119</sup> Such understandings are reflected in the Chinese government reports to treaty bodies.

From the perspective of the UN human rights regime, for the reporting process to have an impact, it is assumed that the review will spill over into the domestic arena, but the Chinese government has sought to insulate the domestic sphere from the effect of international human rights law as it relates to China itself. In practice, however, people in China are increasingly using the treaties, and concepts they contain, as the brief examples below show.

Compliance with international human rights law has become a significant lobbying tool for domestic advocates of legal reforms. In recent years there has been substantial internal discussion of the reservations the PRC might make on ratification of the ICCPR. On occasion, such debates have seen legal scholars using compliance with the ICCPR to argue for reforms that go well beyond what the treaty might require, at least on a narrow reading – this is particularly the case in relation to judicial independence.

Academic research on human rights has sometimes facilitated access to information about the international human rights regime. For example, the website of the Peking University Research Centre on Human Rights<sup>120</sup> is the only domestic location where Chinese government reports to treaty bodies and some other related UN documents are available, although most of these documents are in English. Some of the new academic human rights centres are providing “training” to various officials that covers international human rights law.<sup>121</sup>

Despite the lack of anti-discrimination law, people are starting to challenge discriminatory acts in court, particularly government restrictions on entry to education and employment on the grounds of physical disability, appearance, or disease, such as hepatitis B.<sup>122</sup>

Compared with CAT and CERD, CEDAW and CRC are mentioned more frequently in domestic reports, a sign that these treaties are being used in the work of the growing network of activists working on rights of women and children. For example, CEDAW has been mentioned in relation to violence

<sup>119</sup> According to Chang, during the 1990s, a rather complete theoretical position on human rights was built up that includes the following points: respect universality, but “link the universality principle to the basic national conditions of each country”; insist on priority being given to the right to subsistence and development; acknowledge that the right to development is the basis for all human rights; recognize the principle of indivisibility, and the unity of individual and collective rights, and rights and duties. See Chang (n 11 above), p 101.

<sup>120</sup> Available at <http://www.hrol.org/china/index.php>.

<sup>121</sup> To my knowledge, this is generally rather academic in nature, and does not necessarily address particular problems the officials face in their work.

<sup>122</sup> See F. Wan, “Hepatitis B Carrier Wins Court Battle,” SCMP, 3 Apr 2004. In this case, the plaintiff argued that regulations had been incorrectly applied, and won.

against women, HIV/AIDS and academic research on women and sexuality. The text of CRC is widely posted on domestic websites in China, while reports citing it included articles on street children and health issues.<sup>123</sup>

Certainly, the limited impact of the treaty body process on China also reflects the toothlessness of the international enforcement system for rights. While the ratification of human rights treaties globally has certainly influenced understanding of rights among officials and society more generally, to be effective, treaty body monitoring "must be supplemented by creative efforts to ensure that treaty norms are internalized in the domestic legal and cultural system, and that they are enforced on this level".<sup>124</sup> In the case of China, such engagement is still in prospect, but the 2004 constitutional amendment and ratification of the ICESCR may contribute to its emergence by making human rights a more acceptable focus for advocacy. The Chinese government may hope to continue to assert its own version of human rights, but as people inside China increasingly encounter international human rights law themselves, this dominant vision is likely to be challenged.

<sup>123</sup> For results of Internet search, see n 94 above.

<sup>124</sup> See Heyns and Viljoen (n 59 above), p 488.