
Exploring Public International Law and the Rights of Individuals with Chinese Scholars

14-17 April 2014

In collaboration with China University of Political Science and Law



The views expressed in this document are the sole responsibility of the speaker(s) and participants do not necessarily reflect the view of Chatham House, its staff, associates or Council. Chatham House is independent and owes no allegiance to any government or to any political body. It does not take institutional positions on policy issues. This document is issued on the understanding that if any extract is used, the author(s)/ speaker(s) and Chatham House should be credited, preferably with the date of the publication or details of the event. Where this document refers to or reports statements made by speakers at an event every effort has been made to provide a fair representation of their views and opinions. The published text of speeches and presentations may differ from delivery.

In April 2014, Chatham House and China University of Political Science and Law (CUPL) jointly organized a four day roundtable meeting at Chatham House for international lawyers to discuss a wide range of issues related to public international law and the rights of individuals. The specific objectives of the meeting were to:

- create a platform for Chinese international law academics working on international human rights law issues to present their thinking and exchange ideas with counterparts from outside China;
- build stronger understanding within the wider international law community of intellectual debates taking place in China about the international human rights system and China's role within it; and
- support networking between Chinese and non-Chinese academics working on international human rights and related areas of international law.

The roundtable forms part of a wider Chatham House project exploring China's impact on the international human rights system and was inspired by early discussions with a burgeoning community of Chinese academics thinking, writing (mainly in Chinese) and teaching about international human rights law. For China University of Political Science and Law, one of the largest and most prestigious law schools in China and perhaps the only university in the world with an entire faculty of international law, the initiative is part of a drive to forge partnerships beyond China in the international law field.

Roundtable structure and approach

The roundtable had a total of 22 participants, 10 Chinese (from universities and other academic institutions in Beijing and Shanghai) and 12 non-Chinese (from Australia, Germany, the Netherlands, Switzerland, the United Kingdom and the United States). All discussions were held in English under the Chatham House Rule.¹

The programme was built from 'the bottom up' based on suggestions from participants in the months leading up to the roundtable. In addition to tackling a range of controversial issues about the scope and enforcement of international legal rules designed to protect individuals, participants also discussed the international law environment in China, and different approaches to new thinking and research about international human rights and related areas of law emerging from China.

'International law enables another language to be brought to bear on problems – there is a lot of potential which we could help to build through these discussions'
– non-Chinese roundtable participant

Background: the evolving world of international law in China

International law is at an interesting stage of development in China. While the country has engaged to some degree in the international legal system for many decades and produced a number of eminent public international lawyers who have served on international courts and tribunals, it is not yet viewed globally as a leading centre of international legal scholarship. Generally speaking, international lawyers outside the country have limited awareness of the international law community there, partly because Chinese academics in this field usually publish in Chinese and their writings are rarely translated.

¹ 'When a meeting, or part thereof, is held under the Chatham House Rules, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s) nor that of any other participant, may be revealed.'

At the roundtable meeting, Chinese participants spoke of the need for their country to strengthen its contribution to the field of international law. They described how at the first meeting of the Chinese Society of International Law, the late Wang Tieya (a former judge at the International Criminal Tribunal for the former Yugoslavia and one of China's most famous international lawyers) and other senior Chinese international lawyers challenged the younger generation to develop distinctively Chinese theories of international law. There was a consensus at the roundtable, however, that this had not yet happened despite green shoots such as the 'international law of co-progressiveness' advanced by Sienho Yee at Wuhan University.

As China's international role has expanded, fostering home-grown international legal expertise has come to be seen as increasingly important, and many Chinese universities are investing in international law teaching and research programmes. There is now a growing community of scholars writing, teaching, debating and advising the Chinese government on the application of international law to various areas of domestic and international policy.

'We are pondering whether some day there could be an 'Eastphalian' international law. The question is how does this Eastphalia deal with Westphalia?'
– Chinese roundtable participant

A number of fundamental issues, including the status of customary international law and precedence in the event of a conflict between a provision of a treaty ratified by China and domestic legislation, remain unresolved in the Chinese legal system and are understandably a priority focus for China's international law community. In 2000 draft legislation on the status of international law in the domestic legal system was prepared but, for reasons that are unclear, it was not adopted by the National People's Congress.

Chinese theoretical approaches to international law

One Chinese participant at the roundtable explained that after the Communist revolution in 1949, international law teaching and materials in China were heavily based on Soviet approaches. This continued until the Sino-Soviet split in the 1960s and the upheaval of the Cultural Revolution, after which Chinese scholars turned to Western theories of international law. This reliance on Western international legal materials has continued ever since, with many Chinese international law professors having spent time studying abroad in North America or Europe.

While there may be a paucity of Chinese *theories* of international law, Chinese *theoretical approaches* to international law undoubtedly exist. Chinese participants at the meeting explained that these usually include a strong emphasis on strict conceptions of state sovereignty in line with classic Westphalian theories, and as expressed in the Five Principles of Peaceful Coexistence that China continues to promote officially (see further below). The writings of Xue Hanqin, Chinese judge on the International Court of Justice, are a good example of the mainstream approach.

At the roundtable it was stated that some Chinese international lawyers have questioned the efficacy of arch-sovereignty approaches in the face of China's growing international role, new global problems and human rights concerns requiring an understanding of international law that recognizes greater constraints on state action.

For the most part, Chinese international lawyers take a strongly positivistic approach focused on identifying *lex lata* (the law as it currently exists) and discussing how gaps in the law should be addressed. For example, one Chinese participant explained that inside China there is less theoretical discussion of

the relationship between human rights and sovereignty and more of a focus on *'how to revise laws on the protection of minors, women's rights, trafficking – we focus on more technical work ... We review the international standards and pursue reforms.'*

International human rights law in China

At the roundtable it was explained that the concept of human rights began to be taught in Chinese universities in the late 1970s after the end of the Cultural Revolution. Now there are university courses and sub-courses in what is effectively human rights law in many institutions, and a teaching network for academics working on human rights (supported by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, the Norwegian Centre for Human Rights and the Danish Institute for Human Rights) has almost 100 members and meets annually to discuss pedagogical and related issues. Eight universities (including China University of Political Science and Law) have established human rights education and training bases with financial support from the Chinese government.

International human rights law in China remains at a relatively early stage of development, as a sub-field of international law for a number of reasons, which include the sensitivity that attaches to human rights generally and the prioritization of other areas of public international law. Many (but not all) of the senior Chinese international law academics who teach, write and advise on international human rights law combine this interest with a primary specialization in other areas of public international law including the law of treaties, international criminal law, international humanitarian law or international economic law.

According to roundtable participants, Chinese academics tend to endorse the official position taken by the Chinese government on international human rights law issues, although a number of scholars are publishing different ideas. Milestones in Chinese practice that have informed Chinese international human rights legal scholarship include the signature by China of the International Covenant on Economic, Social and Cultural Rights in 1997 and the International Covenant on Civil and Political Rights in 1998, and ratification of the former in 2001; and the amendment to China's constitution in 2004 enshrining the principle of human rights protection. Chinese participants remarked that international human rights law issues are rarely on the agenda at meetings of the Chinese Society of International Law and queried whether steps could be taken to address this.

Roundtable dialogue

Substantive discussions at the roundtable addressed many conceptual and legal issues related to the protection of individual rights under public international law. In addition to topics covered in more detail below, participants explored a wide range of current issues and recent developments. These included the outcomes of the UN human rights treaty body strengthening process; plans for a new treaty on the rights of older persons; challenges to privacy rights and freedom of religion in the context of national security policies; current controversies connected with head of state immunity and international crimes; the work of the International Law Association on the right to reparations for victims of armed conflict; the interface between international human rights and humanitarian law, including detention in the context of internal armed conflicts; and the extra-territorial application of international human rights law to overseas counter-terrorism and combat activities.

The roundtable was also an opportunity for Chinese participants to seek views from international lawyers outside China on such issues as the soundness of the 'margin of appreciation' concept used by the European Court of Human Rights to give states a degree of flexibility in how they implement their obligations under the European Convention on Human Rights; the legal and policy challenges for

national governments when confronted with judgments from a supranational court on contentious human rights matters; tensions between the doctrine of parliamentary sovereignty and the jurisdiction of the European Court of Human Rights in the UK; and preparations for and the international law implications of the Scottish independence referendum '*after such a long history of unity*'.

Hierarchy of rights: is the Chinese position evolving?

The Chinese government's preference for socio-economic rights over civil and political rights is well known. A number of Chinese participants at the roundtable stressed, however, that the practice of distinguishing between these two sets of rights was introduced from outside, and there are signs that China is beginning to look beyond it. For example, analysis of these rights was said by a Chinese participant to have been integrated in a government advice paper released last year with 'human rights and development' now serving as the preferred frame. Another Chinese academic pointed to criminal procedure reforms, including introduction of the right to remain silent and the right to a fair trial, as further evidence that China may be moving beyond the hierarchy of rights (favouring socio-economic rights) that it has promoted over many years.

Chinese scholars cited China's impressive poverty reduction record but pointed out that poor air quality and food safety pose new challenges for delivery of subsistence rights. This led to a discussion of World Trade Organization case law related to food safety and other health issues, which is particularly interesting in the Chinese context because trade law is one area where the country has agreed to subject itself to international dispute resolution processes. There is growing concern among Chinese people about these issues and public expressions of discontent illustrate the indivisibility of socio-economic and civil and political rights. As one non-Chinese participant at the roundtable emphasized, both categories of rights contain positive and negative obligations and both are relevant to the success of the economy.

There appeared to be a consensus among Chinese participants that China is sincere in its stated commitment to ratifying the International Covenant on Civil and Political Rights (ICCPR). Some explained there are frustrations inside China at the delays, while others pointed out that detailed impact assessment processes are under way and many important domestic legal reforms have been made. While praising domestic law reforms designed to harmonize the Chinese system with international standards, a number of Chinese participants conceded that implementation of reforms has been slow. It was noted, however, that this problem is not unique to China. One non-Chinese participant queried whether strong international attention paid to China's non-ratification of the ICCPR serves to obscure poor implementation of other human rights treaties that China has ratified, some of which include civil and political rights.

There was discussion of Chinese death penalty reforms with particular focus on the recent strengthening of oversight by the Supreme Court in death penalty cases and the reduction of crimes to which the death penalty applies. One Chinese participant predicted that future reforms in this area might include a further reduction in the number of crimes to which the death penalty applies, amnesties for people on death row and a growing distinction in practice between the imposition of death sentences and their execution.

China's developing engagement with the international human rights system

China's participation in the international human rights system was described by one Chinese participant as having been transformed from rejection to '*incremental expansion*', with China now actively involved in UN human rights forums. During its second Universal Periodic Review by the Human Rights Council in 2013, China acknowledged that it had human rights problems and accepted a high number of

recommendations from other states (204 out of the 252); one Chinese participant referred to this as ‘a remarkable shift’.

Some Chinese participants suggested that it is beneficial to invoke international standards in public exchanges with China about its human rights record. One indicated that 2006 had been a turning point in relation to various domestic human rights law reforms because of the launch of the Universal Periodic Review process, which is perceived by China as non-selective and less politicized than other UN human rights mechanisms: ‘*China knew it was going to have to report*’ and this was felt to have been an impetus for reforms (China’s first review under this mechanism took place in 2009).

Another Chinese participant warned of the dangers of advocacy approaches that are perceived by Chinese officials (and the Chinese public) as humiliating, even if these approaches are applied equally to other states. Responding to this, a non-Chinese participant stressed the importance of finding ways to move beyond this: ‘*Use of sovereignty to stop discussions of a state’s human rights record or to stop international institutions from adopting resolutions critical of other states is a concern to us all ... Discussion and persuasion are all we have. It’s contrary to the spirit of engaging as a powerful member of the international community*’.

Other Chinese participants welcomed signs that independent non-governmental organizations are beginning to engage in examinations of China by UN human rights treaty bodies. Submissions prepared for China’s examination by the UN Committee on the Elimination of Discrimination Against Women in 2014 are an example of this development. The range of Chinese civil society organizations taking an interest in the Universal Periodic Review of China was also said to be expanding. Webcasting of proceedings has been especially helpful for those unable to travel to Geneva.

‘Participation of NGOs in the mechanisms of human rights protection is very important. We cannot rely on sovereign states alone for enforcement of international human rights law’

– Chinese roundtable participant

Inside China, the development of national human rights action plans by the government has been seen as an important development and it was stated that the recommendations of UN human rights treaty bodies are considered when these plans are put together.

It was noted that in recent years China has sought to develop ‘soft-power’ approaches in the human rights field, most notably through the annual Beijing Human Rights Forum meetings organized by the China Society for Human Rights Studies and the China Foundation for Human Rights Development, with backing from the State Council Information Office, to engage in dialogue with foreigners about human rights matters.

Sovereignty and individual rights

China’s insistence on strict conceptions of sovereignty reflects its deep historical sense of being the victim of aggression and ‘lost sovereignty’; a belief that protecting the sovereignty of developing or weak states contributes to equality in international relations and world peace; and a desire to prevent interference in its own internal affairs.

There are debates in Chinese academic circles about the limits of sovereignty, including the extent to which it is curtailed by *jus cogens* or peremptory rules of international law – for example, those relating

to atrocities. Even if this is not always explicitly stated, the orthodox Chinese position is that human rights are *subject to* sovereignty (which helps to explain why Chinese international lawyers tend to focus so heavily on treaties when considering the scope of international human rights law, and why the Chinese government has traditionally insisted on strict theories of immunity and declined to recognize the competence of human rights treaty bodies to hear individual complaints). Different views were presented at the roundtable. For example, one Chinese participant argued that protection of human rights is an expression or test of sovereignty.

There was some discussion at the roundtable of feminist approaches to international law which recognize the utility of sovereignty concepts as a protection against unwarranted, 'hegemonic' forms of intervention as well as the dangers of absolute notions of sovereignty that may preserve problematic international power relations. Feminist discourses tend to prefer concepts of 'responsible' sovereignty' or more 'bottom-up approaches' focused on 'sovereignty of the people'. To date feminist understandings of international law have not been explored extensively by Chinese scholars and this may be an area for future development.

Testing the waters on sovereignty: potential for new Chinese approaches

The development of the Responsibility to Protect (R2P) doctrine was described by one Chinese participant as a '*potential milestone*' in the evolution of Chinese conceptions of sovereignty. The doctrine is actively discussed among international lawyers in China. Other Chinese participants noted that China's commitment in principle to R2P has survived the experience of Libya (China is one of many states that regards NATO as having exceeded the UN Security Council's authorization of the use of force in Resolution 1973) and proposed this as an area where China's position on sovereignty could shift in the future.

'The Responsibility to Protect and peacekeeping operations are fields in which scholars function as a connection between the West and China'

– Chinese roundtable participant

There was a discussion about efforts by Chinese victims of Japanese war crimes to obtain reparation in the Chinese courts. To date, their damages claims have been unsuccessful on the basis of state immunity. Concerned by this lack of redress for victims, Chinese lawyers are discussing how to develop and test new arguments against the application of state immunity in these cases. As one non-Chinese participant observed: '*China seems to be in a position where the traditional inter-state perspective is not entirely beneficial to Chinese interests, so that is a perfect opportunity for China to consider the merits of a moderate development of the law on state immunity ... However, what would be important here would be to take Chinese interests in the Japanese context as a starting point but arrive at a principled position*'. A parallel was drawn between the approach of the Chinese courts in these cases and the arguments successfully deployed by Germany to defeat recent efforts by Greek victims to obtain reparations for Nazi atrocities.²

The destructive potential of terrorist groups from China's restive Western frontier is a major concern of the Chinese government. It was noted that at the UN China frequently recognizes the applicability of international human rights law frameworks to domestic counter-terrorism operations, even if it seeks an expansive scope for state action to protect public safety at the expense of individual rights. In this context, one non-Chinese participant queried whether China might support developing jurisprudence from the

² *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p. 99.

International Criminal Court on the responsibility under international law of non-state actors for crimes against humanity.

China's relationship with the International Criminal Court

International criminal law is an increasingly popular field of international law in China, and Chinese participants described the disappointment in this community when China did not become a party to the Statute of the International Criminal Court (ICC) after having engaged actively in negotiations at the Rome conference in 1998.

While Chinese participants acknowledged that non-ratification of the Statute by the US is a relevant factor for China, they stressed that China and the US have different concerns about the ICC: whereas the US is motivated by a concern to prevent prosecution of US soldiers '*it sends to the world*', China – against the backdrop of fears of domestic instability – is worried about the ICC's jurisdiction over non-international armed conflicts and the risk of attempts to prosecute its political leadership.

There was some discussion of how the central ICC principle of complementarity (according to which primary responsibility for addressing international crimes rests with national jurisdictions and the ICC is a court of last resort) would operate in the Chinese context: is it conceivable that China would investigate its own leaders? A Chinese participant stated that China has not yet criminalized all the crimes covered by the ICC Statute, which could lead to arguments about whether China is able to carry out an investigation or prosecution.

Even if China is not a party to the ICC Statute, it continues to engage in international criminal justice issues as a permanent member of the UN Security Council and otherwise. Chinese participants noted that China's history in this area dates back to trials it conducted of Japanese war criminals following the Second World War. China voted in favour of the Security Council resolution establishing the International Criminal Tribunal for the former Yugoslavia and a number of Chinese judges have served on this tribunal. China abstained on the resolution establishing the International Criminal Tribunal for Rwanda on account of Rwanda's objections to the Statute. It also abstained on the resolution referring the situation in Darfur to the ICC but voted affirmatively on a similar resolution on Libya. On both these votes, the positions of China and the US coincided.³

There appeared to be a consensus among Chinese participants that China would veto any proposed Security Council resolution seeking to refer the situation in the Democratic People's Republic of Korea (DPRK) to the ICC in line with suggestions made by the Commission of Inquiry established by the UN Human Rights Council.

'Is there potential for China to support referral of the situation in DPRK to the ICC?

Absolutely not

– Chinese roundtable participant

Looking ahead to the future, Chinese participants stressed that the Chinese government has not ruled out ratification of the ICC Statute (indeed, according to participants, the Ministry of Foreign Affairs has suggested that China will eventually become a state party) and it will continue to send observer delegates to the Assembly of State Parties and to monitor developments at the ICC closely.

³ It should be noted that shortly after the roundtable, China acted alongside Russia to veto a draft resolution, supported by the US, which would have referred the situation in Syria to the ICC.

The role of the Security Council as a human rights 'enforcer'

It was acknowledged at the roundtable that while the UN Security Council is a political (rather than a judicial) body, it discharges important responsibilities bearing on the protection of individual rights under international law. These include responsibilities arising from authorizing the use of force and peacekeeping operations, imposing sanctions in the context of threats to international peace and security and (as discussed above) referrals to the ICC.

One non-Chinese participant argued that whereas the Security Council is often thought of as a human rights enforcer, it should also be seen as a human rights violator. This was especially evident in relation to sanctions which, where untargeted (as in the case of Iraq), had enormous potential for harming the populace of the affected state and, where targeted, raised a range of due process issues.

There was a debate about the extent to which, as a political body, the Security Council should be expected to act consistently when exercising the functions described above, especially in the context of the developing R2P framework. It was suggested by a non-Chinese participant that since it claimed to be highly concerned about inequality in the international system, China, as a permanent member of the Security Council, could play an important role in enhancing the principle of equal justice in the context of the Security Council's responses to international crimes and threats to peace.

One Chinese participant spoke of the effects of the veto power within the Security Council and queried whether responsibility to uphold international peace and security, especially in the context of grave human rights violations, should be concentrated in this organ or whether other UN bodies without veto rules should have their powers enhanced (see below).

While China remains reluctant for the Security Council to authorize coercive action under Chapter VII of the UN Charter, UN peacekeeping was described by a Chinese participant as '*an area where the international community and the Chinese people expect the government to do more*'. Over time, China has transitioned from opposing UN peacekeeping operations in the 1970s to observing them in the 1980s to its current position of being a major contributor. There had been a turning point in 2013 when China's participation in the peacekeeping operation in Mali included combat troops for the first time. Before this, China's contributions had been restricted to engineers, medical aid, police and other non-combat personnel. It was predicted at the roundtable that China's role in UN peacekeeping missions is likely to expand further.

New ideas from Chinese scholars on international protection of individual rights

A number of Chinese participants presented or described novel thinking or research emerging from China related to the protection of individual rights in international law.

Mention was made of arguments that China, as a global power, should table proposals aimed at strengthening the capacity of the UN human rights machinery to respond to human rights situations before they become humanitarian crises engaging the responsibilities of the Security Council; for example, by advocating for the Human Rights Council to have new powers to issue binding resolutions. It was suggested that in the context of China's opposition to any Security Council reforms that might pave the way for Japanese membership, this could be a means for China '*to achieve something for the general benefit in relation to collective security*'.

One Chinese participant presented original empirical research on the role of international humanitarian law in the Human Rights Council's Universal Periodic Review process. This triggered a discussion about the interplay between international human rights and international humanitarian law, the lack of supervisory bodies in relation to the latter, competency/expertise issues arising when human rights bodies experiment with this body of law, and indications (for example the recent resolutions on Sri Lanka) that states are becoming more comfortable with the Human Rights Council's use of different mechanisms to address issues connected with international humanitarian law violations. Recommendations that were made at the roundtable included ensuring adequate attention to international humanitarian law issues in state reports for the Universal Periodic Review, and inclusion of international humanitarian law expertise in state delegations participating in the review.

'If the Chinese government hasn't clearly objected, like the UK, Norway, India or Turkey, we can have reason to say that it accepts the inclusion of international humanitarian law as a basis for the Universal Periodic Review'

– Chinese roundtable participant

Another Chinese participant proposed the possibility of using international human rights law principles to plug gaps in outer space treaty law relating to rescue obligations for private individuals (tourists) in outer space, a situation that is bound to arise as commercialization of space travel develops. During discussion, participants drew parallels with rescue duties on the high seas under the UN Convention on the Law of the Sea, and suggested this could be another source of inspiration when considering legal solutions to this issue.

'Hot spots'

We heard that international lawyers in China were actively discussing the situation in Crimea and that while there was a consensus that Russia had violated the UN Charter, there was a range of views about whether (as of April 2014) the crime of aggression had been committed. Different views were also expressed at the roundtable about the response of the international community to this situation (one Chinese participant described the situation as a '*crisis of international law*' and expressed a view that the US and Europe had not responded robustly enough) and the validity of the referendum in Crimea (some Chinese participants considered that the result would have been the same regardless of the occupation; others thought the referendum should have included the whole of Ukraine and not only Crimea).

A range of views was expressed about why China acquiesced in Security Council Resolution 1973 on Libya, although it was emphasized that China had no geopolitical interests to protect in that country. It was explained that inside China there are debates about the legal implications of key paragraphs of this resolution, including paragraph 4 authorizing '*all necessary measures ... to protect civilians or civilian populated areas under threat of attack*' and paragraph 6 establishing '*a ban on all flights ... in order to help protect civilians*'.

It was acknowledged that China's veto of various draft Security Council resolutions on Syria was conditioned not only by its close bilateral relationship with Russia but also by deep concerns that Resolution 1973 had been improperly used to effect 'regime change' in Libya.

Different views were expressed by Chinese participants about their country's position on human rights abuses in the DPRK, with some acknowledging concerns about the protection afforded by China (which they said reflects concerns about stability in China's immediate neighbourhood) and others emphasizing

the benefits of China's ability to monitor the situation and secure improvements when dispensing humanitarian assistance.

Looking ahead

Chinese and non-Chinese participants expressed strong interest in establishing a network to build on the relationships established at this roundtable and share news of developments, research, opportunities and new publications. A second meeting will be hosted by China University of Political Science and Law in Beijing in November 2014.

Contact information

For further information about this initiative please contact:

Sonya Sceats – Associate Fellow and project lead, International Law Programme, Chatham House:
SSceats@chathamhouse.org

Ruma Mandal – Senior Research Fellow, International Law Programme, Chatham House:
RMandal@chathamhouse.org

Zhu Lijiang Associate Professor, Faculty of International Law, China University of Political Science and Law: lijiangzhu@hotmail.com

The convenors would like to acknowledge the assistance during the four-day roundtable of Shehara de Soysa, intern in the International Law Programme at Chatham House.

Independent thinking since 1920

Chatham House, the Royal Institute of International Affairs, is an independent policy institute based in London. Our mission is to help build a sustainably secure, prosperous and just world.

Chatham House is an independent body that promotes the rigorous study of international questions and does not express opinions of its own. The opinions expressed in this publication are the responsibility of the author(s).

© The Royal Institute of International Affairs, 2014

All Chatham House publications are printed on recycled paper.