

# Exploring Public International Law and the Rights of Individuals with Chinese Scholars – Part 3

5–6 March 2016

In collaboration with China University of Political Science and Law and the Graduate Institute Geneva.



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In March 2016 Chatham House, China University of Political Science and Law (CUPL) and the Graduate Institute Geneva held a two-day roundtable meeting in Geneva on public international law and the rights of individuals. This was followed by two days for Chinese participants to meet with UN experts and international lawyers from government delegations and international organizations and observe proceedings of UN human rights bodies in Geneva, including the Human Rights Committee and the Human Rights Council.

This was the third in a series of meetings exploring China's impact on the international human rights system, now part of a wider Chatham House initiative on China and the future of the international legal order. Our first two roundtable meetings on the rights of individuals were held at Chatham House (London) and China University of Political Science and Law (Beijing) in April and November 2014, respectively. Summaries of these discussions are available on the Chatham House website.<sup>1</sup>

All three roundtable meetings were held in English under the Chatham House Rule.<sup>2</sup> The specific objectives of these meetings are 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 meeting in Geneva was co-hosted by the Graduate Institute Geneva and involved 19 participants, 9 Chinese (from six research institutions in Beijing and Shanghai) and 11 non-Chinese (from eight research institutions in Australia, Germany, the Netherlands, Switzerland, the United Kingdom and the United States). To ensure continuity while also expanding the expert network being built, the third meeting included a mix of participants from the first two meetings and some new participants.

## China's ambitions to become an international law powerhouse

China is at a turning point in its approach to international law, with new ambitions to exert more influence on international law as a means of protecting and promoting the country's interests.

This agenda was made clear in October 2014, just before our second roundtable meeting in Beijing, in the Outcome Document from the Communist Party of China (CPC) Central Committee plenum on the Rule of Law. In a short but important passage the CPC Central Committee called for China to '[s]trengthen foreign-related legal work' and '[v]igorously participate in the formulation of international norms, promote the handling of foreign-related economic and social affairs according to the law, strengthen our

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<sup>1</sup> 'Exploring Public International Law on the Rights of Individuals with Chinese Scholars' (April 2014), <https://www.chathamhouse.org/event/chinese-approaches-public-international-law-and-rights-individuals>; 'Exploring Public International Law on the Rights of Individuals with Chinese Scholars - Part Two' (November 2014), <https://www.chathamhouse.org/event/chinese-approaches-public-international-law-and-rights-individuals-part-two>.

<sup>2</sup> 'When a meeting, or part thereof, is held under the Chatham House Rule, 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.'

country's discourse power and influence in international legal affairs, use legal methods to safeguard our country's sovereignty, security and development interests.'<sup>3</sup>

We discussed the implications of this announcement with Chinese international lawyers at our second roundtable meeting in Beijing, just three weeks after the plenum.<sup>4</sup>

Since this time, China has been investing to build its capabilities in pursuit of this new agenda. At the roundtable meeting in Geneva we discussed concrete steps taken by the Chinese government including:

- A new legal review mechanism for foreign policy decisions within the Ministry of Foreign Affairs to assess compliance of decisions with domestic and international law;
- A new mechanism within the State Council to strengthen coordination on international law matters across ministries;
- A new international law committee to advise the Ministry of Foreign Affairs comprising 15 or so senior international law academics (including a number of participants in the network built via this initiative);
- Preliminary research on how to clarify the status of international law in the Chinese legal system via a potential constitutional amendment sometime in the future;
- Adding more Chinese legal advisers to Chinese embassies and missions;
- Recruiting more international law graduates to the Ministry of Foreign Affairs and mainstreaming them across the ministry – there is an intake of almost 20 a year, no more than half of which are allocated to the Department of Treaty and Law;
- An increased emphasis on bilateral consultations on international law – including with the US, Switzerland, Brazil, South Korea and Germany; and
- A new training and exchange programme on international law with Asian and African countries focusing on practitioners from within governments.

Participants welcomed the new international law committee launched by the Ministry of Foreign Affairs and suggested that those serving on similar bodies in other countries could share experiences about how to make the committee effective.

In light of a shared sense that legal advisers do not enjoy the same level of authority within the Chinese bureaucracy as in Western systems, participants suggested that an enhanced role for legal advisers in formulating and vetting proposed policies and decisions would be a 'radical shift' for China and an important step in its promotion of the international rule of law.

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<sup>3</sup> An unofficial English translation of the Outcome Document is available at: <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>.

<sup>4</sup> A summary of our discussion is available in 'Exploring Public International Law on the Rights of Individuals with Chinese Scholars - Part Two' (November 2014), <https://www.chathamhouse.org/event/chinese-approaches-public-international-law-and-rights-individuals-part-two>.

## International law ‘with Chinese characteristics’?

The Ministry of Foreign Affairs has indicated that it wishes to promote the theoretical development of international law ‘with Chinese characteristics’ to reflect China’s positions and interests and achieve international recognition for the country. There was a lot of debate about this idea at the roundtable, with many Chinese participants questioning whether there could or should be a distinctive Chinese version of international law.

‘There is no such thing as international law with Chinese characteristics, in the same way that there is no mathematics with Chinese characteristics.’

– Chinese roundtable participant

‘I have been teaching international law for decades and I have been taught that there is only one international law... but now it is as if international law must be an instrument for foreign policy.’

– Chinese roundtable participant

‘It would be a disaster if US exceptionalism came into contact with international law with Chinese characteristics.’

– Chinese roundtable participant

Another Chinese participant stated that the debate might reflect a misunderstanding or mistranslation and that the Chinese government is really seeking to promote a Chinese ‘theoretical approach’ to international law (in line with calls by Chinese participants at our first roundtable meeting<sup>5</sup>).

It was suggested that any such ‘theoretical approach’ would be weighted towards concepts favoured by China in its international relations, including respect for state sovereignty and non-intervention in the internal affairs of other states and the responsibility for states to address challenges on an equal participative basis, and that this ‘does not require a new paradigm of international law’.

‘Are those in China who say that all states should be of equal importance really saying that China’s voice should not be more important than St Lucia or Liechtenstein? Are they saying that the Security Council should be scrapped, or China’s place on it? It is an interesting test: what kind of policy is China taking on the issue of reform of the Security Council?’

– Non-Chinese roundtable participant

Other Chinese participants placed emphasis on the ambition announced by the CPC Central Committee for China to exert more influence on the development of international law.

‘It probably means that formulation of international law should take Chinese interests into consideration.’

– Chinese roundtable participant

## Does China plan to disrupt the international order?

This group of Chinese international lawyers resisted the view that China is a threat to the existing liberal international order while acknowledging that they share a particular perspective favouring a rules-based approach to international governance.

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<sup>5</sup> ‘Exploring Public International Law on the Rights of Individuals with Chinese Scholars’ (April 2014) at page 3, <https://www.chathamhouse.org/event/chinese-approaches-public-international-law-and-rights-individuals>.

‘Chinese experts in this room and our colleagues in academic research institutions, we are still a minority in China. We realize there is one international legal order and we acknowledge that China is a beneficiary of this, at least in the last three to four decades... But many others still believe that might is right.’

– Chinese roundtable participant

They pointed out that China is attempting to chart a new path of 'peaceful development', which is novel for a pre-eminent re-emerging power that was largely absent or weak during the institution-building era for the existing international order. There is no 'historical mentor' for China because 'in the past, the rise of new powers resulted in drastic changes to structures and even wars.'

In any case, its formidable internal governance challenges mean that 'the perception of China as an aggressive, expansionist power is untenable'. China's main objectives at the international level are defensive: it seeks a favourable environment enabling the Chinese government to focus on its domestic problems including growing inequality, corruption in the official world, and the need for social, political and economic reform.

A Chinese participant cited with approval the view of US scholar G. J. Ikenberry that China is above all a beneficiary of the liberal international order. 'It was the challenge of survival in the face of a risk of extinction that forced China to accept the concepts of sovereignty and the equality of states. This was an instinctive reaction to international law profoundly affected by an awareness that China had not participated in the shaping of these rules'.

Other Chinese participants pointed out that 'If you benefit, you must also adapt – the system will change your direction' and that 'There is a natural logic – as I become more strong and wealthy, I want to say and do more. The problem is – will what I am saying and doing be accepted by others?' Against this backdrop, China's task is 'to define a global role that protects China's interests while winning acceptance from other powers'.

‘Increasingly, Chinese people realize that without the contemporary international order, China cannot be what it is.’

– Chinese roundtable participant

China's participation in the world trade regime was presented as an example of a logic of mutual dependence that binds China into the international rules-based system. Chinese participants agreed that 'China's prosperity relies on the prosperity of competitors' and that this is an area of the international order that has strongly benefited China.

The world trade regime is also the only area where China has agreed to a compulsory international dispute mechanism, because there was no way to accede to the World Trade Organization (WTO) otherwise.

China is now very active before the WTO dispute resolution panels – it has defended 34 cases, initiated 13 cases and appeared as a third party in 130 cases.<sup>6</sup> As its experience has grown, China's approach has become more sophisticated and there are indications that China may soon be ready to instruct skilled Chinese lawyers to draft submissions instead of foreign lawyers.

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<sup>6</sup> WTO, Disputes by country/territory as of 9 May 2016. See [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm).

Participants agreed that a real test of China's compliance with the world trade regime is its behaviour in the face of proven non-compliance. A Chinese participant explained that China has been ordered to follow a panel decision in three cases and that 'no country has yet complained that it has not complied'. In 13 cases, China has indicated it will comply with a decision by the panel. An example is a copyright case brought by the US alleging non-compliance by China with various provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. In response to a ruling by the panel that it was in breach of its obligations, China amended its regulations for customs protection of intellectual property rights.<sup>7</sup>

A dispute in relation to China's export restrictions on rare earths may represent a departure. China was found by both the panel and appellate body to be in breach of its obligations under the General Agreement on Tariffs and Trade 1994.<sup>8</sup> China has notified the WTO that it has removed the restrictions but at the roundtable we heard that some Chinese experts have suggested that China should not implement the rulings and recommendations and instead face retaliatory action since the rare metal trade '*is of strategic importance to China*'.

Generally, however, the WTO is an example of China 'learning by doing' in accordance with its 'new-comer' status in the system. Although it is still grappling with the procedures, it is gaining in confidence. Chinese participants at the roundtable emphasized that 'more and more Chinese people take China's practice in this area as evidence to show that China should accept the jurisdiction of other legal dispute settlement processes, including arbitration of disputes about the South China Sea'.

China's refusal to participate in the South China Sea arbitration initiated by the Philippines was presented as a counter-example,<sup>9</sup> although it was pointed out that China's preference for bilateral diplomatic solutions is not dissimilar to the approach of the US and other powers.

'How do we explain the different attitudes in China towards the WTO and UNCLOS [UN Convention on the Law of the Sea] dispute settlement processes? The reason may be that trade issues are not that sensitive; you may gain or lose, it's a balance. If you lose on territory, you do not gain something. That is why the Chinese government is reluctant.'

– Chinese roundtable participant

Chinese participants also expressed concern that a ruling by the arbitral tribunal in favour of the Philippines could have a negative impact on the tentative acceptance in China that international dispute resolution processes could serve China's interests.

'The WTO has set a very good precedent about the international legal system being something we can rely on, that it can be fair and just. The South China Sea arbitration might ruin that very little confidence we have built up.'

– Chinese roundtable participant

China's political system also poses challenges to the liberal international values of human rights, the rule of law and democracy. As one Chinese participant observed, you cannot talk about China's attitude to international law without touching upon 'the more profound issue of Chinese perceptions of law itself'.

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<sup>7</sup> Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, DSR 2009:V, p. 2097.

<sup>8</sup> Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014.

<sup>9</sup> Muller, W. (2015), 'China's Missed Opportunity in South China Sea Arbitration', Chatham House Expert Comment, 19 March 2015, <https://www.chathamhouse.org/expert/comment/17237>.

## Human rights and security

At our second roundtable meeting in Beijing, network participants suggested a focus on human rights and security for this meeting, including counterterrorism and rights in the digital realm.

### Counterterrorism

There is a tendency at the international level and in many states to confine discussions about the interface between human rights and security issues, including counterterrorism, to specialist human rights forums.

‘There is a disconnect generally in the discussions about human rights law and counterterrorism. There are so many counterterrorism resolutions and treaties that have been developed separately from the human rights regime but you cannot get a full picture of a state's obligations by looking at the terrorism treaties and resolutions. I've had conversations with many states that say all our laws are consistent with international law because we ratified all these counterterrorism treaties, but that is only half the picture.’

– non-Chinese roundtable participant

This compartmentalization of human rights is particularly acute in the Chinese counterterrorism context and participants suggested that it would be helpful to exchange ideas, drawing from practice in different states, about how to develop holistic legal analysis taking account of human rights standards. Following the roundtable there was an opportunity for Chinese participants to explore with two Swiss ambassadors how this is handled in Switzerland.

‘In China we do not think of human rights and counterterrorism as related issues and if you seek to raise human rights in counterterrorism discussions, people would ask: what is your intention? Whose human rights should be protected?’

– Chinese roundtable participant

International lawyers have contributed over many years to the evolving Chinese legal framework for counterterrorism. For example, a Chinese participant described successful efforts by international lawyers in 2012 to secure amendments to China's Criminal Procedure Law incorporating various human rights protections, despite opposition from practitioners and the public security agencies.

‘There is a penetrating effect of international law into domestic law in China. The National People's Congress is attentive to UN Security Council resolutions on counterterrorism.’

– Chinese roundtable participant

Our roundtable meeting was an early opportunity to consider China's new Anti-Terrorism Law, which took effect on 1 January 2016, from the perspective of human rights.

Chinese participants explained key features of the law such as inclusion of a legal definition of terrorism (the UN and many other states have refrained from setting out a definition in law) and the fact that the death penalty is not prescribed for any offences set out in the new law, in line with ‘a general policy to reduce the death penalty in China’.

The law has been controversial in many respects, including because of a provision requiring telecommunications operations and internet service providers to provide Chinese authorities with ‘backdoor’ access and decryption for the purposes of counterterrorism activities.

At the roundtable we heard about concerns among Chinese international lawyers in regard to a new system of ‘settlement and education’ introduced by the law and applied to those released from prison after serving a sentence for relevant crimes but who are still considered a public security risk. One Chinese

participant commented that the system bears many similarities to the ‘re-education through labour’ system abolished in China in 2013.

Particular problems include a risk that the system violates the principle that a person shall not be punished twice for the same crime and a lack of clarity about whether ‘settlement and education’ can be imposed multiple times such that people are effectively detained indefinitely. As one Chinese participant stated ‘There is a risk of abuse and further research is required’.

A Chinese participant suggested that international human rights law is an important lens through which to assess the law.

‘China has signed but not yet ratified the International Covenant on Civil and Political Rights, despite criticism. There has been encouragement from international society but we cannot say it has had no impact in China. In reality the Covenant is an important instrument for analysing and critiquing Chinese law and for proposing changes accordingly.’

– Chinese roundtable participant

A prima facie analysis provided by a Chinese participant identified a range of rights set out in the International Covenant on Civil and Political Rights (ICCPR) that would be engaged by the law including the right to privacy (in relation to the ‘backdoor’ provisions described above), the right to freedom of expression (in relation to provisions requiring service providers to intercept, censor and report relevant information), the right to freedom of movement (in relation to restrictions that may be placed on the movement of terrorism suspects) and the right to liberty (in relation to the settlement and education provisions).

Some Chinese participants also expressed concern about the risk of discriminatory application of certain provisions against ethnic minorities and violation of the right to freedom of religion. For example, Article 81 provides for short-term detention and fines for various religious and other activities linked to ‘extremism’ but which do not constitute a crime.

‘I admit that in our legislation we pay more attention to fighting against terrorism and less attention to the protection of human rights but our legislation does not discriminate against Uyghurs. What happens in practice is another question. I don’t think the problem is the legislation but its enforcement.’

– Chinese roundtable participant

Discrimination against Muslims in the enforcement of counterterrorism measures is a problem in many other parts of the world. For example, in the US litigation was required to revise police conduct rules relating to racial profiling and the Department of Homeland Security opened an office for civil rights and civil liberties to help guard against human rights violations. As one non-Chinese participant pointed out, ‘an independent judiciary has been vital in helping the US to address these problems’.

Participants discussed the approach to counterterrorism developed by the UN Human Rights Committee within the framework of the ICCPR, including the emphasis it places on ensuring measures meet the tests of necessity and proportionality.<sup>10</sup> The Committee has also stressed the ‘crucial role’ of the media in informing the public about acts of terrorism and warned against undue restrictions on its operations and penalization of journalists ‘for carrying out their legitimate activities’.<sup>11</sup> The possibility of administrative detention is acknowledged, but the committee cautions that it should only occur under extreme circumstances, must not last longer than absolutely necessary and must be subject to review.<sup>12</sup>

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<sup>10</sup> See for example CCPR/C/GC/29 and CCPR/C/GC/34 at para 46.

<sup>11</sup> CCPR/C/GC/34 at para 46.

<sup>12</sup> CCPR/C/GC/35 at para 15.



‘A famous US Supreme Court judge, Justice Robert H. Jackson, said that the Constitution is not a suicide pact, and international human rights law is not a suicide pact. It avoids being such in two major ways, by having limitation clauses in some rights – the fundamental freedoms in particular – for national security, public order etc., and additionally, some rights are derogable in periods of public emergency to the extent required by the exigencies of the situation. The right to life, prohibition of torture and slavery and freedom of conscience are not so limited.’

– non-Chinese roundtable participant

The use of armed force to combat terrorism deemed a threat to international peace and security is an increasingly vexed area of international law. Participants discussed the collective and individual self-defence justifications advanced by states for the use of force against Islamic State of Iraq and Syria (ISIS), including controversial arguments by coalition forces that attacks on ISIS in Syria are required in defence of Iraq (and other states) since Syria is ‘unwilling or unable’ to stop ISIS from launching attacks on other states from within its borders. The scope of the law on self-defence is increasingly unclear and this reflects a collapsing consensus about the rules on the use of force more generally.

‘The notion of self-defence can be pre-emptive, anticipatory and sometimes it is a little bit embarrassing because you have the sense it is invoked arbitrarily... some of the instances don't look like self-defence, they look like another thing that can't be named anymore: armed reprisals.’

– non-Chinese roundtable participant

## Digital rights

Cyber space poses fundamental challenges to territory-based approaches to jurisdiction. For this and other reasons it is often considered to be a new domain of international law and, as such, China sees an opportunity to exert influence at a formative stage of international law in this area.

China has invested considerable diplomatic capital in promoting a new concept of ‘cyber sovereignty’ as part of its argument that the internet should be regulated by states instead of a multi-stakeholder scheme involving business and civil society interests.<sup>13</sup> The idea has been controversial outside China, and even within China some have advocated alternative governing principles, such as the duty of states to cooperate.

‘Does “cyber sovereignty” include the human rights framework or does it presume that the existing rules do not apply?’

– Chinese roundtable participant

‘Will the notion of “cyber sovereignty” be an obstacle to the right to respect for privacy in the digital age?’

– Chinese roundtable participant

Participants rejected the idea that the international human rights law framework does not apply to the cyber realm and agreed that international lawyers from different parts of the world, including international human rights lawyers, must actively participate in the development of the standards and governance regimes for cyber space to guard against arguments to the contrary.

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<sup>13</sup> Sceats, S. (2015), ‘China's Cyber Diplomacy: A Taste of Law to Come?’, *The Diplomat*, 14 January 2015, <http://thediplomat.com/2015/01/chinas-cyber-diplomacy-a-taste-of-law-to-come/>.

‘International lawyers have to be physically present, because now there is a monopoly of security people. We have to set our feet in the circle... We have to develop internet governance standards, and we need to learn how to speak to these people.’  
– non-Chinese roundtable participant

At the domestic level, China is grappling with the same issues as many other states, including the right to privacy in the digital realm. There is no right to privacy *per se* in the Chinese Constitution, but Article 40 provides that freedom and privacy of correspondence of Chinese citizens are protected by law and that these may not be infringed except where necessary to ‘meet the needs of State security or of criminal investigation... in accordance with the procedures prescribed by law.’ Since 2012, China has enacted a range of legal provisions relevant to privacy rights in cyber space including a 2012 decision of the Standing Committee of the National People’s Congress on information protection on networks.<sup>14</sup> As in many other states, there is ongoing debate about what type and level of interference with privacy rights is permissible on security grounds.

The fact that email and other internet traffic passes through so many countries raises a number of challenging questions about the extraterritorial applicability of human rights standards and national and international legal frameworks are evolving in response.

Participants discussed particular issues around the extraterritorial surveillance of data when an individual is outside the territorial jurisdiction and not otherwise in the physical control of the state undertaking the surveillance.

The European Court of Human Rights has moved from a highly territorially focused approach to a stronger emphasis now on the concept of ‘effective control’<sup>15</sup> but it is not yet clear how this nascent legal framework would apply to the extraterritorial surveillance of data.

The Human Rights Committee’s approach to jurisdiction pivots on the question of whether the person is within the ‘power or effective control’ of the state party. Key questions in the cyber context include whether this is triggered if the state exercises power and control over the infrastructure being used to transmit digital communications (for example a server, satellite or deep sea cable) or whether it is enough that the effect of a state’s surveillance activity impacts on the right to privacy.

In its recent concluding observations on the US, UK and France, the Human Rights Committee recommended that the state comply with the right to privacy in all its data surveillance activities both within and outside its territory, which demonstrates that the committee assumes there is at least some extraterritorial jurisdiction over surveillance activities, even if it has not clearly explained the basis for this.

A non-Chinese participant asked what the reverberating effect of these developments might be for other rights. For example, does the extraterritorial effect of the right to life extend to a person who is poisoned by a security agent, rather than having their emails hacked, in the lobby of a hotel abroad? What about those killed in other countries by drones in circumstances where the victim is not within the effective control of the state that has targeted them?

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<sup>14</sup> Unofficial English translation available at <https://chinacopyrightandmedia.wordpress.com/2012/12/28/national-peoples-congress-standing-committee-decision-concerning-strengthening-network-information-protection/>.

<sup>15</sup> See for example the case of *Al-Skeini and others v United Kingdom*, European Court of Human Rights, Grand Chamber, Application no. 55721/07, Judgment, Strasbourg, 7 July 2011.

Participants also discussed the international human rights law framework relating to freedom of speech online. The Human Rights Committee made clear in General Comment 34 that Article 19 of the ICCPR covers expression on the internet<sup>16</sup>, and in 2012 the Human Rights Council adopted a groundbreaking resolution by consensus accepting that individuals have the same rights on and offline, especially freedom of expression.<sup>17</sup> As one non-Chinese participant suggested, ‘the legal framework is not the problem – the problem is implementation’ in light of extensive efforts by many states to censor free speech on the internet via blocking, take down requests and detaining and torturing those who made the speech.

In light of the European Court of Justice ruling in the Google ‘right to be forgotten’ case,<sup>18</sup> participants asked whether there is a new exception to the right of freedom of expression allowing people to ‘photoshop’ their reputations? From a human rights perspective, the ruling is challenging for many reasons, including the fact that private internet companies are now placed in charge of balancing the relevant rights in issues. A non-Chinese participant noted that the approach is spreading to other countries including Russia, where the domestic legal framework may make no mention of the right to freedom of expression or the public interest in knowing the truth.

### Refugee crisis?

Chinese colleagues asked for international refugee law to be added to our agenda on account of the surge in the number of refugees moving from the Middle East and elsewhere to Europe and indications that China is planning to develop a refugee status determination framework of its own.

Non-Chinese participants argued that the current situation in Europe is not a refugee crisis – ‘if there is a crisis, it is in the states close to Syria which are housing 90 per cent of Syrian refugees’. There is a breakdown, however, in European cooperation and a failure to offer safe and legal routes to refugees fleeing war in Syria and torture and persecution in many other states.

Nor is there a crisis of international refugee law. The legal framework is dynamic and robust enough to tackle the situation. For example, the European Union adopted a temporary protection directive to cover precisely the sort of situation created by the Syrian conflict, however, states have failed to trigger it.

There is also a failure of cooperation in Asia on refugee issues. There is no regional legal framework comparable to the EU Common European Asylum System or even the Council of Europe’s European Convention on Human Rights.

Formal participation in international refugee and statelessness treaties is low among Asian states for reasons including the European origins of the Refugee Convention, a belief that refugee status determination can cut across the principle of non-interference in domestic affairs and arguments that refugees are instead supported informally in Asia. With some notable exceptions, including Japan, Australia and South Korea, Asian states tend to make low contributions to UNHCR: as a non-Chinese participant noted, ‘Lego gives more to UNHCR than most governments in Asia’.

Participants discussed China’s history of refugee protection, including shelter afforded to 20,000 European Jews during the 1930s and 1940s, 10,000 Afghans resettled in Xinjiang and 260,000 Indochinese. UNHCR has had an office in China since 1980 and two years later China acceded to the Refugee Convention.

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<sup>16</sup> CCPR/C/GC/34 at para 12.

<sup>17</sup> A/HRC/RES/20/8.

<sup>18</sup> *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, 13 May 2014.

China's refugee law framework is still, however, fairly undeveloped. In addition to the Refugee Convention, China is a party to other relevant international treaties including the UN Convention Against Torture (prohibiting forced removal where there are substantial grounds for believing that a person would be in danger of being subjected to torture) and the International Covenant on Economic, Social and Cultural Rights (setting out many socio-economic rights that apply to refugees and asylum seekers). Article 32 of the Constitution provides that China may grant asylum to foreigners who request this for political reasons but the operative legal provisions are mainly contained in administrative legislation regulating entry and exit from China.

There is still no domestic Chinese law defining refugees and designating competent authorities to assess asylum applications. UNHCR currently fulfils the role of determining refugee status in China and participants were surprised to hear that there is no ability to challenge these decisions in Chinese courts. A Chinese participant mentioned that some graduate students in China have been critiquing this situation.

A Chinese participant explained that in 2012, Chinese media reported that six laws and regulations including measures for refugee status determination had been drafted by the State Council but these are not yet complete.

Defectors from the DPRK are an especially thorny subject in China, especially in light of a bilateral protocol requiring both states to prevent illegal border crossings by residents.<sup>19</sup> A Chinese participant explained that 'China has to support the DPRK because if the country collapses, China could be flooded by war refugees or civil war refugees without any mechanism or resources to deal with this crisis'. Another Chinese participant suggested the situation is more complex, citing the example of a North Korean who escaped from a prison just before he was due to be released, was caught, retried and sentenced for another 5 years in prison: 'My guess is that staying in a Chinese prison was better than being sent back to the DPRK'.

'The language of economic refugee is so mischievous. People face a risk of famine in the DPRK, which is a deprivation of economic and social rights and perhaps triggers complementary protection in relation to the arbitrary deprivation of life.'

– non-Chinese roundtable participant

'The example of DPRK shows the importance of taking into account China's obligations under Article 3 of the UN Torture Convention when adopting new laws defining who qualifies for protection.'

– non-Chinese roundtable participant

Participants discussed the importance of ensuring that Chinese international lawyers engage in efforts to develop Chinese refugee law, including to ensure that China adopts the definition of refugee set out in the Refugee Convention and the protections afforded by international human rights law, including in relation to the prohibition of forced removal to torture (see above), and that robust procedural guarantees are included such as the right to be interviewed as part of a credibility assessment and the right to legal aid.

'This is a sad topic. It needs cooperation of the whole world. I agree we should think about human rights obligations when defining who qualifies for protection in China.'

– Chinese roundtable participant

Participants also suggested that China guard against the overly complex processes that have developed in other countries. For example, the asylum application in Australia now runs to 70 pages and the determination process can take 3–5 years, often in detention. China should also consider developing a

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<sup>19</sup> Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order and the Border Areas.

resettlement programme. The Australian programme is a good model for its provision of free language lessons, social security, health, education and dedicated support officers: ‘This is resource intensive but has succeeded in helping refugees to make a net positive economic contribution to Australia over time... Refugees are good for business and a growing economy.’

## Looking ahead

Against the backdrop of China's ambitions to exert more influence on international law, Chinese and non-Chinese participants impressed the importance of this network as a means of engaging with each other on important international legal matters related to individual rights. A number of issues for future discussion were identified including different approaches taken by states to mainstream international human rights legal analysis into government policy and law-making processes on security and other issues, the role of academic international lawyers in policy-making processes in different states, and different means of making international legal obligations justiciable in domestic legal systems.

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