The Justifiability of Particular Reasoning in Constructive Dialogue between China and International Human Rights Treaty Bodies

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For Mom and Dad

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List of Abbreviations

CAT:	Convention against Torture
CED:	Committee on Enforced Disappearances
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
CERD:	Committee on the Elimination of racial Discrimination
CESCR:	Committee on Economic, Social and Cultural Rights
CLS:	Critical legal studies
CRC:	Convention on the Rights of the Child
CRPD:	Committee on the Rights of Persons with Disabilities
DPRK:	Democratic People's Republic of Korea
ECtHR:	European Court of Human Rights
ECHR:	European Convention on Human Rights
HR Committee:	Human Rights Committee
ICC:	International Criminal Court
ICCPR (CCPR):	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Court of Justice
ICISS:	International Commission on Intervention and State Sovereignty
ICTY:	International Criminal Tribunal for the former Yugoslavia
IHRL:	International human rights law
ILC:	International Law Commission
ILO:	International Labour Organization
OHCHR:	Office of the United Nations High Commissioner for Human Rights
RtoP:	Responsibility to Protect
SPT:	UN Subcommittee on Prevention of Torture
UN:	United Nations
UNHCR:	United Nations High Commissioner for Refugees
VCLT:	Vienna Convention on the Law of Treaties
WTO:	World Trade Organization

Introduction

The relationship between China and international human rights law (IHRL) is an often-discussed issue that nonetheless remains peripheral from an academic perspective. The reason that it is often discussed has to do with China's rapid rise to its global superpower status—economically, politically, militarily, and (in a way) culturally. Against this background, China's relationship with the international (legal) order in general and with IHRL in particular has thus gathered quite some scholarly attention over the past decades.[1] It remains 'peripheral', however, insofar as the common approach situates China as an outlier[2] in the international legal order that must be treated differently. It follows that this often-presupposed difference when it comes to China's engagement with the international legal order has to either be tamed in order to preserve the current UN system or be encouraged in order to change or reform the system. Either way, it is probably fair to say that China is often considered an 'outsider' with regard to the international legal order. It is this commonly held point of view that first prompted this study.

This research focuses on the justifiability of arguments found in the ongoing dialogue between China and international human rights treaty bodies and the implications of this constructive (and sometimes less constructive) dialogue on the relationship between them. Research on this rather niche topic has been limited. Nonetheless, given the new insights and ways of looking it may provide, it is worthy of much attention. The procedure of constructive dialogue, as a formal procedure in which international human rights treaty bodies examine state parties' compliance with human rights standards they adhere to, is where we find the most systemic and comprehensive arguments from both state parties and treaty bodies. The justifiability of arguments used serves as an indicator of where the state situates itself in relation to the international legal order, in particular to IHRL. It is probably reasonable to suggest that a party that provides justifiable arguments, or tries to justify its arguments under the rules is a 'game player', whereas

[1] For example, Ann Kent, 'China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994' (1995) 17 Human Rights Quarterly 1; Daniel A. Bell, 'The East Asian Challenge to Human Rights: Reflections on an East-West Dialogue' (1996) 18 Human Rights Quarterly 641; Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999); Ann Kent, *China, the United Nations, and Human Rights: The limits of Compliance* (University of Pennsylvania Press 1999); Ann Kent, 'China's International Sociolization: The Role of International Organization' (2002) 8 Global Governance 343; Marc Lanteigne, *China and International Institutions: Alternate Paths to Global Power* (Routledge 2005); Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford University Press 2007); Phil C.W. Chan, *China, State Sovereignty and International Legal order* (Brill Nijhoff 2015).

[2] I use this term neutrally.

one that insists on unjustifiable views without further intention to change can be seen as an 'outsider', wilfully or not. In a more nuanced (and perhaps more common) understanding of this phenomenon, the justifiability of the arguments may vary from topic to topic and from time to time. In this sense, whether China is a 'game player' or indeed an 'outsider' (or somewhat of both) is the overarching question of this study. A carefully mapped discussion on this matter can then reveal an important facet of the relationship between China and the international human rights legal order—a facet to which other types of research do not have access.

I will explain the main definitions, research question, and scope of this study in the following sections. However, I would first like to begin by outlining two forms of scholarship in international legal studies—studies on compliance and critical legal studies. These two approaches, which have gathered much attention and support in the past decades, provide something of a backdrop for this research: it is by critically reflecting on the insights from these two approaches that I have come to the conclusion that a (re)turn to legal argumentation is necessary in order to better understand China's relationship with substantive IHRL and the bodies of independent experts looking after the compliance thereof by the state parties.

In the remainder of the introduction, I will first briefly depict these two forms of scholarship (i.e. studies on compliance and critical legal studies). I will then explain the main definitions, research question, and scope of the study. Finally, I will indicate three implications of this study.

1. Compliance study and critical legal studies in international (human rights) law[3]

The famous quote from Louis Henkin that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time',[4] whether true or false, has become a tagline in promoting the importance of international (human rights) law. The most pressing question that follows is: why do states comply with international (human rights) law?[5]

[3] The term 'international (human rights) law' here means international law in general and IHRL in particular.

[4] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed. edn, Published for the Council on Foreign Relations by Columbia University Press 1979) 47.

[5] See, for instance, Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 International Organization 175; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995); Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 The Yale Law Journal 2599; Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (June 2002) The Yale Law Journal 1935; Oona A. Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (Aug 2007) 51 Journal of Conflict Resolution 588, Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Thomas Risse-Kappen Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (SAGE Publications 2002); Beth Simmons, 'Civil Rights in

Strictly speaking, studies on compliance with international (human rights) law is not a school in the sense that scholars who study compliance do not necessarily share the same fundamental assumptions. However, they do share the same focal point, which is state compliance with international (human rights) law and the incentives behind it. State compliance therefore becomes a key (and perhaps the only) measurement not only for depicting the relationship between states and the international (human rights) legal order, but also, and perhaps more importantly, for measuring states' 'good-will'. Those states that fall short when it comes to compliance are considered threats or 'destabilisations' with regard to IHRL.

This emphasis on compliance is understandable. Given that there is little strictly legal enforcement in the international (human rights) legal mechanism, states must be given other incentives to obey the rules. In the course of exploring the possible (mostly non-legal) incentives for state compliance, however, some legal perspectives, which concern questions such as how to interpret the law, what makes an argument good in the given context, and how great a margin the law grants when it comes to implementation, get lost. This is because, as Kratochwil rightly points out, 'no rule "makes" one behave in a certain way, as rules or norms are not causes, but provide reasons for actions'.[6]

In a similar way, the school of critical legal studies (CLS) is also constituted by a highly heterogeneous group of scholars. Unlike compliance studies, which shares the same focal point, the subjects studied by CLS span from the history of international law to feminist critiques of law, from development and law to post-colonial research.[7] The commonality among these studies is

International Law: Compliance with Aspects of the "International Bill of Rights"' (2009) 16 Indiana Journal of Global Legal Studies 437. Andrew T. Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 California Law Review 1823.

[6] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge Studies in International Relations, Cambridge University Press 2014) 57. cf: Koh distinguishes between four concepts of compliance based on the relationship between norms and conduct: coincidence, conformity, compliance, and obedience. According to Koh, a coincidence occurs when the subject simply appears to 'follow' the rules. Conformity occurs when subjects only 'loosely conform[] their conduct to the rule when convenient, but feel little or no legal or moral obligation to do so.' Compliance is when 'entities accept the influence of the rule, but only to gain specific rewards … or to avoid specific punishments'. Obedience 'occurs when an entity adopts rule-induced behavior because it has internalized the norm and has incorporated it into its own internal value system'. Therefore, Koh is concerned with the 'causes' that make states behave a certain way, not their 'reasons' for action. Koh. 'How is International Human Rights Law Enforced?' (1999) 74 Indiana Law Journal 1397.

[7] Works that represent the main thesis of CLS include, for instance, Deborah Z. Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) Nordic Journal of International Law 341; David Kennedy, *International legal structures* (Nomos 1987); David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 Wisconsin International Law Journal 1; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005); and Martti Koskenniemi, *The politics of international law* (Hart 2011).

their shared critique of the traditional liberal approach to law, which treats law as an objective, neutral, rational institution. In the branch of CLS that focuses on international law, also known as the 'New Stream', the work of two scholars in particular, David Kennedy and Martti Koskenniemi, have had the most impact—so much so that 'critical legal scholarly work has now reversed the roles by becoming "mainstream" in international legal scholarship'.[8] Although both scholars have different focuses when it comes to the critical legal approach to international law and may even have different theoretical views, they do share certain basic assumptions. For instance, they both agree that international law is inherently political: '[p]olitics is … inescapable and inherent in the very argumentative structure of international law'.[9] The structure (rather than the content) of international law discourse should be brought to the forefront, as 'international law is rhetoric and is characterized by a dialectical process'.[10] There is much left to say about CLS's main ideas and its impact on international (human rights) law.[11] This shall be pursued gradually in the course of this study, however. Here, it is sufficient to point out one aspect that CLS may fall short of justifying. This is the jump from the assumption of the constitutive power of language to CLS's disregard for the performativity of law. The former is the assumption that language has social constitutive power in and of itself. This assumption is shared by most CLS scholars, especially regarding the myth of sovereignty. The latter is the fact that by taking up the slogan 'law is politics',[12] CLS scholars treat politics, rather than law, as the foundation of the international legal enterprise. It is this very assumption that I do not share in this research.[13]

By no means do studies on compliance and CLS exhaust the interests, ideas, and focuses of current international legal studies. Nonetheless, these two approaches form a useful backdrop for the present research in the sense that the idea of this research comes from engaging with those two branches of work regarding international law. Learning about compliance theories prompted me to consider other possible forms of relationship between IHRL and its state parties; while contemplating the eloquent arguments provided by CLS scholars inspired me to focus on the role

[8] Jan Klabbers, 'Whatever Happened to Gramsci? Some Reflections on New Legal Realism' (2015) 28 Leiden Journal of International Law 471.
[9] Andrea Bianchi, 'Critical Legal Studies and the New Stream' in Andrea Bianchi (ed), *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 148.
[10] ibid 145.
[11] From here on, I will use CLS to denote critical legal studies in general, and the New Stream studies in particular; it is not necessary to differentiate the two in the current discussion (unless stated otherwise).
[12] For a nuanced discussion on this slogan, see Bianchi (n 9) 136.
[13] I do, nevertheless, agree with some of the ideas of CLS, particularly on the social constitutive power of language and the myth of sovereignty.

of dialogue and the power of language. Nevertheless, at its core, this study returns to the basics of law. Rather than centring on buzzwords such as compliance, the structure of law, post-modernism, etc., this study focuses on a traditional branch of legal study, namely legal argumentation and its justification. In this sense, this study may not be situated in the schools of thought mentioned above. The main focus of this research is to analyse argumentation and its justification in the context of IHRL, to apply this understanding to the relationship between China and international human rights treaty bodies, and to engage with the ideas put forward by these schools of thought.

2. Working definition, the research question, and the scope of the research

The present study is concerned with the following question: in what sense and to what extent are the particular reasoning–based arguments offered by China in constructive dialogue in human rights treaty bodies justifiable? Its corollary question is: can a development of the relationship between China and IHRL towards institutionalisation be detected? Particular reasoning–based arguments are arguments that invoke particular reasoning. Particular reasoning is a type of reasoning that resorts to particular facts or circumstances, arguing for exclusion or deviation from certain rules or principles.[14] To answer the questions, I first identify the nature of constructive dialogue. I then develop evaluation criteria for the justifiability of arguments in this context and apply these criteria to the actual arguments I have chosen as case studies. Finally, I outline key implications of this study, with emphasis on the relationship between China and IHRL.

Let me now clarify the terms and delineate the boundaries of this study. Given their rich connotations (and potential confusions) in the area of logic, and especially in argumentation theory, it seems necessary to first outline the differences between the terms ‘argument’, ‘argumentation’, ‘dialogue’, and ‘reasoning’. According to Douglas Walton, an argument refers to ‘a social and verbal means of trying to resolve, or at least to contend with, a conflict or difference that has arisen or exists between two (or more) parties. An argument necessarily involves a claim that is advanced by at least one of the parties’.[15] In this sense, not all opinions or statements in constructive dialogue between China and the committees are considered arguments.

[14] For a more detailed explanation, see Chapter 3.
[15] Douglas N. Walton, ‘What Is Reasoning? What Is an Argument?’ (1990) 87 The Journal of Philosophy 399, 411.

Building upon the term 'argument', argumentation denotes the 'dynamic process of connecting arguments together for some purpose in a dialogue'.[16] A dialogue is 'a type of goal-directed conversation in which two participants (in the minimum case) are participating by taking turns. At each move one party responds to the previous move of the other party'. [17] Reasoning, 'is the making or granting of assumptions called premises (starting points) and the process of moving toward conclusions (end points) from these assumptions by means of warrants. A warrant is a rule or frame that allows the move from one point to the next point in the sequence of reasoning'.[18]

Although there are categorical differences between these concepts, there is also an organic connection among them: a chain of argument constitutes argumentation, which usually comes in the form of a dialogue composed of reasoning. I therefore suggest leaving the nuanced distinctions between these terms to the logicians. In the following discussion, these terms will be used according to the above definitions, but their differences will not be emphasised unless doing so is necessary.

The scope of this study is the arguments found in constructive dialogue between China and international human rights treaty bodies. The term 'constructive dialogue' was first suggested by Phillip Alston.[19] It is a process in which state delegations and treaty body committee members exchange information and opinions on state compliance with IHRL.

The term 'justifiable' is used in accordance with its dictionary meaning, i.e. 'able to be shown to be right or reasonable; defensible' (I will further elaborate on this term in Chapter 1).[20] Therefore, the starting point of this research is to ask what counts as good reasoning in this context. It will become clear that the arguments considered in this study are not the full-fledged legal arguments commonly found in courtroom debates. Thus, being justifiable in this broad sense is not restricted to legal criteria. In fact, I will argue that a justifiable argument in constructive dialogue must be both legally justifiable and dialogically constructive.[21]

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[16] Douglas Walton, *Fundamentals of Critical Argumentation* (Cambridge University Press 2006) 1.
[17] ibid 2.
[18] Walton (n 15) 403.
[19] Philip Alston, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights.* United Nations General Assembly, Forty-fourth session. A/44/668. 8 NOV 1989.
[20] See https://en.oxforddictionaries.com/definition/justifiable
[21] In what follows, the term 'justifiable' or 'justifiability' is used in a broad sense, while 'legally justifiable' or 'legal justifiability' is used to denote the legal context, unless otherwise stated.

Following this logic, this study investigates particular reasoning–based arguments offered by China in constructive dialogue on specific topics (i.e. interpretation, reservation, sovereignty, and treaty implementation). The purpose of conducting this investigation is first and foremost to examine the justifiability of China's arguments—that is, to identify those arguments that are in fact justifiable from the point of view of the human rights treaties to which China is a party, along with other human rights instruments it adheres to, versus those arguments that indeed deviate from IHRL. Therefore, it aims to give China's arguments a fair examination. Moreover, by investigating the arguments in constructive dialogue between China and human rights treaty bodies over time, this research also expounds the relationship between China and the international human rights legal order.

This study can be situated in at least three larger debates: the debate on the universality vs. the relativity of human rights, the debate on the relevance of legal arguments in international law, and the debate on the relationship between China and IHRL. I shall therefore ground this study in each of these debates. By revealing its place in these debates, I aim to make clear the purpose and relevance of this study.

3. The debate on the universality versus the relativity of human rights

The question whether human rights are universal or relative has plagued human rights scholars for decades. Four sorts of opinions have been brought to the table thus far. The first group of opinions asks us to abandon the universality vs. relativity debate altogether. The second group argues for the universal character of human rights, whereas the third defends the relative character of human rights. The last group tries to find a 'mid-way' and strives for reconciliation.[22]

This debate is far from settled (if the settlement of divergent opinions is ever possible). However, we can still contribute to the debate by bringing clarity to the discussion. First and foremost, it is important to differentiate between ontological and epistemic perspectives on the debate. That is to say, there are at least two different senses of universality/relativity at issue: an ontological sense and an epistemic sense. 'The ontological sense has to do with existence', whereas '[t]he epistemic sense has to do with knowledge'.[23] Therefore, the ontological question about the

[22] Chapter 3 takes a closer look at the four sorts of opinions.
[23] John Rogers Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010) 18.

universality/relativity of human rights concerns whether human rights *are* universal/relative in nature, independently of how we think about them. On the other hand, the epistemic question about the universality/relativity of human rights concerns whether human rights are *recognised as/perceived as being/claimed to be* universal/relative. Without an *ex ante* clarification of what sense (ontological or epistemic) of universality vs. relativity is being discussed, we risk confusing these two questions (for example by using an argument for ontological universality to respond to questions about epistemic relativity, or vice versa), which would largely hamper the debate's progress.

This study, which focuses exclusively on arguments about core international human rights instruments, restricts itself to the epistemic side of the debate. A state's joining a human rights instrument is an epistemically objective fact. This is to say that the state's accepting to be a party to that human rights instrument is the foundation of the following discussion. Therefore, this study does not answer ontological questions about, for example, what the nature of human rights is, or whether human rights indeed 'trump' other considerations.[24] Instead, this study concerns the sense in which (and the extent to which) a state (such as China), which has become a party to an international human rights treaty, can justifiably offer relative arguments for its exclusion or deviation from the rules and principles as codified in that treaty. Put differently, this study investigates how rights and obligations regarding human rights are perceived by both China and the relevant international human rights instruments. This is not to say that this study merely concerns opinions held by China or these treaty bodies, however. To the contrary, this study discusses the criterion (or criteria) for judging these opinions when they are voiced in the form of arguments. It therefore concerns epistemic objectivity rather than epistemic subjectivity.[25] In a way, epistemic objectivity is the foundation of universality in the context of international human rights instruments, whereas the criterion for reaching such objectivity is the benchmark for determining the line between 'particular' and 'too particular'.

The above distinction between epistemic subjectivity and epistemic objectivity leads us to a second key debate. This is the debate on the relevance of legal arguments in international law in general.

[24] Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 153–67.
[25] For the concepts of epistemic subjectivity and epistemic objectivity, see Searle (n 22) 17–18.

4. The debate on the relevance of legal arguments in international law

In arguably one of the most cited works in CLS, *From Apology to Utopia: The Structure of International Legal Argument,* Martti Koskenniemi argues that objectivity in international law is a mirage insofar as there is a fundamental dilemma that cannot be solved in international legal discourse. The dilemma hinges on the fact that the two asserted necessary and sufficient conditions for the objectivity of international law, namely concreteness (i.e. 'the law [is] to be verifiable, or justifiable, independently of what anyone might think that the law should be') and normativity (i.e. 'the law [is] to be applicable even against a state … which opposed its application to itself') cannot be achieved simultaneously.[26] Correspondingly, two kinds of arguments are found in the international legal order. The first are 'descending' arguments, which assume that there is 'a given normative code which precedes the State and effectively dictates how a State is allowed to behave, what it may will and what its legitimate interests can be'.[27] The second are 'ascending' arguments, which take 'the existence of States and attempt to construct a normative order on the basis of the ''factual'' State behaviour, will and interest'.[28] Koskenniemi points out that although international legal discourse aims to make the two kinds of arguments seem compatible, this always leads to 'an incoherent argument which constantly shifts between the opposing positions while remaining open to challenge from the opposite argument'.[29] Therefore, in his view, these two conditions (concreteness and normativity) function as two 'intellectual operations' in international legal discourse, which not only give rise to a dilemma but, if taken together, 'do not leave room for any specific legal discourse'.[30] About 15 years later, in the new epilogue to *From Apology to Utopia,* Koskenniemi again confirmed this idea:

> In the search for justifiability, again, every argument is vulnerable to the logic of apology and utopia. Of course, no argument can continue interminably. At some point, it is better to agree than to fight, and the competent lawyer is constantly keeping an eye on that point. But there is no legal criterion that will say when it has been reached. And even when it has been reached, the law will always possess resources

[26] Koskenniemi (n 7) 513.
[27] ibid 59.
[28] ibid.
[29] ibid.
[30] ibid 16.

> for re-opening the debate, undoing the settlement, attacking the ('unjust') hegemony of the mainstream.[31]

In his view, therefore, the relevant legal argumentation is primarily meant to justify political standpoints that states and agencies take in the first place. This is to say that legal arguments have merely instrumental meaning. Moreover, there is no single specific overriding criterion or set of criteria for determining the justifiability of legal arguments in the context of international law. Therefore, when it comes to assessing arguments in international law, even if it is not true that 'anything goes', at least, as Klabbers says 'quite a lot goes'.[32]

Although I do not intend to refute speculation about the political agendas that lie behind legal arguments in international law, I do hold that it is possible to derive certain criteria for deciding on the justifiability of arguments in the context of IHRL. I will show not only that identifying such criteria is possible but that the process of argumentation also has a normative function.

The possibility of determining the justifiability of arguments in the context of international (human rights) law can be derived precisely from the concept of epistemic objectivity. The term 'epistemic objectivity' is used to describe a phenomenon that, although it depends on and exists from the perspective of the subject, is not determined by the particular intentions of individual subjects. For instance, the concept of money depends on and only exists from the perspective of individuals in society. However, the value of a twenty euro note is not determined by any individual's particular understanding of it. A person may say that it is just a piece of paper, but this opinion does not take away from the fact that anyone can use that piece of paper to pay for a taxi where euros are accepted. On the other hand, two people may disagree about whether Beethoven is a better composer than Mozart. The question of whether Beethoven is indeed a better composer than Mozart can only be settled by a person's own criteria, which may or may not be shared by others. The first scenario concerns epistemic objectivity, while the second concerns epistemic subjectivity. IHRL is, as I view it, more akin to a twenty euro note than the evaluation

[31] ibid 598.
[32] Jan Klabbers, 'Virtuous Interpretation' in M. Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers 2010) 34.

of famous composers. In this sense, although different individuals or states may hold different opinions regarding IHRL, it is not a field in which 'anything goes'.

One may argue that what Koskenniemi's theory explicitly shows is not that international law is subject to individuals' intentions but rather that there are two kinds of sources (concreteness and normativity) in international law, which makes any argument based on either of the sources vulnerable to attacks from arguments based on the other. As this study will reveal, however, in the context of IHRL, even though there are indeed different sources for justifying a legal argument, it is still possible to decide on the threshold for considering the justifiability of a given argument. This study shows that bridging the gap between apology and utopia is to some extent still possible, and we (those in legal professions) are better to take up this task sooner rather than later. Moreover, the process of arguing, and especially the ways in which arguments change during this process, can be viewed as an indicator (alongside compliance) of a state's relationship with international human rights legal regimes. This brings us to the final debate concerning the relationship between China and international (human rights) law.

5. The debate on the relationship between China and international (human rights) law

In *Beyond Compliance: China, International Organisations, and Global Security*, Ann Kent views China as a special case with regard to state compliance with international treaties. She argues that because China historically considered itself the 'Middle Kingdom', 'constrained by the international society', culturally speaking it lacked 'a tradition of the rule of law' and was 'powerful enough to ignore its international obligations'. China therefore constitutes a 'least-likely case' when it comes to complying with 'the norms, principles, and rules of international organizations and their associated treaties'.[33] Therefore, by assessing the extent to which China—the least likely case—has complied with international treaties, Kent examines the extent to which 'all states, even non-liberal ones, comply with the norms and rules of the international system'.[34] In other words, Kent treats China's compliance as a special case in international law: as the shortest plank on the bucket (as described in the bucket theory).[35]

[33] Kent (n 1) 2.
[34] ibid.
[35] According to the bucket theory, because a bucket will leak as soon as the water reaches the shortest plank, this plank is the threshold for measuring the bucket's capacity. In this context, this means that if China complies with international law, other countries may comply as well.

Phil Chan criticises Kent's ideas regarding China's compliance with international treaties, particularly her Western-centred perspective. Chan argues that China's compliance with international law, where it does occur, does not prove that all states comply with international law; 'it only shows that China does, and only on those occasions of compliance'.[36] Distinguishing his work from Western-centred studies, Chan focuses on 'China's potential to influence and shape the substantive content of international norms',[37] arguing that 'China has served important contributions, an objective appraisal of which is essential to our understanding of international law, including the locus in which the principle of State sovereignty resides in international legal order, and its continuing significance and implications'.[38]

I agree to a great extent with Chan's criticism of the 'Western bias' when it comes to the relationship between China and the international legal order. Studies along this line tend to underestimate China's role in the international legal order and fail to take concerns and requests from non-Western or non-liberal countries seriously. However, I am hesitant to claim that China is a special case with regard to the international legal order (for better or for worse). This claim will be developed in the remainder of this study. Nonetheless, it can already be seen that the view of compliance offered in compliance theories is far from comprehensive when it comes to understanding the relationship between states and international (human rights) law. China might be deemed special in the sense that it uses its own reasoning and arguments regarding international (human rights) law. China is also one of many countries to do so, because just like other state parties, China is trying to argue its way out rather than simply refusing to cooperate with IHRL instruments. In this sense, Chan's claim that China has the 'potential to influence and shape the substantive content of international norms' has yet to be examined.

In sum, this study will shed light on: 1) the sense in which and the extent to which relativistic arguments *qua* particular reasoning can be considered justifiable when it comes to universal human rights rules and principles; 2) the sense in which these arguments matter in the context of IHRL; and 3) how to view the relationship between China and IHRL when we move beyond traditional compliance theory. The main tasks of this study are to derive criteria for 'justifiable' argumentation in the context of constructive dialogue before international human

[36] Chan (n 1) 8.
[37] ibid 7.
[38] ibid 19.

rights treaty bodies, to reconstruct the arguments used by China and the relevant treaty bodies, and to deconstruct the relationship between China and the relevant treaty bodies from the perspective of argumentation.

6. Research outlook and methodology

This study consists of two parts. The first part (Chapters 1, 2, and 3) lays the groundwork for the study. The framework, methods and materials, as well as the relevant justification rules, will be discussed in each chapter. The second part (Chapters 4, 5, 6, and 7) investigates arguments concerning specific topics. A conclusion is provided in Chapter 8.

In Part I of this study, I consider the question of what counts as a good argument in constructive dialogue. I begin by identifying the characteristics of constructive dialogue by comparing it with legal arguments in the courtroom, which helps me to develop criteria for determining what counts as a justifiable argument in constructive dialogue. I then investigate the interpretation rules for international treaties in general and international human rights law in particular. Finally, I articulate the concept of particular reasoning and its implications for legal argumentation in constructive dialogue. This part mainly builds on the legal theories of Neil MacCormick, Robert Alexy, and Ian Sinclair. Placing these theories in the current context of constructive dialogue and international human rights law provides a theoretical framework for the remainder of the study.

In Part II, I investigate arguments that employ particular reasoning under the four topics identified above (namely the core definitions of a given treaty, substantive reservations, the sovereignty and mandate of treaty bodies, and the implementation gap regarding economic, social, and cultural rights in the constructive dialogue between China and the five human rights treaty bodies (i.e. CAT, CEDAW, CRC, CERD, and CESCR). A representation and reconstruction of the arguments is then carried out, in chronological order. The main materials for my analysis are summary records[39]. It should be noted that state reports and concluding observations may also be referred to when necessary to complete the arguments insofar as they are the organic constitution of constructive dialogue. In the interest of brevity, the original arguments will not be cited in full

[39] The summary records are part of the United Nations official record, which is defined as follows: 'a series of printed publications relating to the proceedings of the principal organs of the United Nations or certain United Nations conferences; they include verbatim or summary records of the meetings of the organ concerned, annexes and supplements' (Rf. ST/AI/189/Add.3/Rev.2).

unless it is necessary to do so. Nevertheless, all of the original arguments can be found in the annex.

To summarise the main content of each chapter:

Chapter 1 discusses 'justifiability' with regard to arguments in constructive dialogue before international human rights treaty bodies. This chapter argues that constructive dialogue has a 'quasi-legal' character and that the arguments raised in it have a dual function. Therefore, the criteria for argumentative 'justifiability' in this context include both criteria of legal justifiability and criteria of dialogical constructiveness.

The main criteria for determining the legal justifiability of an argument are further discussed in Chapter 2, which considers IHRL interpretation rules. Based on the interpretative character of law, this chapter provides the foundation for determining the legal justifiability of arguments in constructive dialogue.

Nonetheless, as pointed out in Chapter 3, this study does not cover all of the arguments that occur in constructive dialogue. It only concerns those that use what I call 'particular reasoning'. Chapter 3 provides an account of particular reasoning and the general rule for justifying particular reasoning in the legal context. It also summarises the methods and topics that will be investigated in Part II of this study.

Chapters 4 to 7 (Part II) investigate cases of particular reasoning raised in constructive dialogue in which China 1) holds to its own understanding of certain treaty provisions (Chapter 4), 2) makes substantive treaty reservations (Chapter 5), 3) uses sovereignty as a shield against interference by committees on certain subjects (Chapter 6), and 4) requests a margin of discretion in implementing economic, social, and culture rights (Chapter 7).

Chapter 8 concludes the study by summarizing the observations gleaned thus far and by situating these observations in the three abovementioned debates, as a means of clarifying how this research can contribute to each.

Part I

Chapter 1 Between Legal Justifiability and Constructiveness: The Janus Face of Justifying Arguments in Constructive Dialogue

'*Legal praxis, unlike many other social phenomena, is argumentative*.'
Ronald Dworkin, *Law's Empire*.

Introduction

Constructive dialogue is a long-established means of holding states accountable for their treaty obligations. Not only has this process 'been vindicated in practice and has the potential to be an important and effective means by which to promote respect for human rights', but it is also considered not to have been superseded by other approaches or mechanisms created for the same purpose.[40] It provides a space for dialogue between state representatives and committee members concerning states' human rights treaty obligations. As a result, the committees issue (non-binding)[41] judgements and recommendations (i.e. concluding observations) to states in order to improve their human rights situations. Therefore, given current developments in human rights treaty body mechanisms, constructive dialogue is one of the most important means of monitoring state parties' compliance with IHRL.

However, this topic has not received sufficient attention in the numerous studies on international human rights treaty bodies in general, which can be divided into two general groups: studies that are conducted by or within the UN system and studies conducted by researchers who

[40] Philip Alston, 'Effective Functioning Bodies Established Pursuant to United Nations Human Rights Instruments', *Final report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System.* E/CN.4/1997/74 (27 March 1997).
[41] The word 'binding' here is understood in its narrow and strict legal sense: that is, having validly entered the apposite legal systems, such that an authoritative body can impose the decisions or rules coercively by sanctioning non-compliance. In this sense, the recommendations (concluding observations) issued by the treaty bodies are considered to be non-binding, for they are not accompanied by a sanctioning mechanism (either the use of force or other coercive methods). Nevertheless, the wording does not mean that this recommendation does not have legal effects or is practically ineffective.

are not directly linked (in an administrative sense) to the UN machinery. With regard to the former group, representative studies include the reports prepared by Philip Alston on enhancing the long-term effectiveness of the United Nations human rights treaty system,[42] the Office of the United Nations High Commissioner for Human Rights (OHCHR) 2005 report on improving the working method of the state party reporting process,[43] the concept paper adopted by OHCHR in 2006,[44] and the 2012 report by OHCHR on strengthening human rights treaty bodies.[45] This group's main concern is reforming the procedures and formality of the treaty body machinery in order to tackle obstacles to implementing treaties, such as overdue state reports, overloading examining tasks for each committee, the burden of preparing different reports for different committees, etc. With regard to the latter group, which includes research conducted outside the UN system, there are a large number of studies that focus on the impact and effectiveness of treaty bodies.[46] Within this large body of research, however, little attention has been paid to the particular process of constructive dialogue.[47] It is even said that, '"constructive dialogue" has not been sufficiently developed in terms of substance and process to deliver on the potential added value in providing … authoritative recommendations'.[48]

In my view, this under-development regarding constructive dialogue is largely due to a mistaken understanding of the characteristics of this process. On the one hand, certain studies tend

[42] Philip Alston, 'Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights', A/44/668 (8 November 1989); 'Status of preparation of publications, studies and documents for the world conference' A/CONF.157/PC/62/Add.11/Rev.1 (22 April 1993). Philip Alston (n 40).

[43] OHCHR, Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process, UN Doc. HRI/MC/2005/4 (25 May 2005).

[44] OHCHR, Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body—Report by the Secretariat, UN Doc. HRI/MC/2006/2 (22 March 2006).

[45] Navanethem Pillay, Strengthening the United Nations Human Rights Treaty Body System—A report by the United Nations High Commissioner for Human rights, UNCHR (June 2012).

[46] For instance, see Christof Heyns and Frans Vijoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International 2002); Ann Bayefsky (ed), *The UN Human Rights Treaty System in the 21 Century* (Brill Nijhoff 2000); Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000); Alfred Zayas et al. (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (2nd edn, Martinus Nijhoff Publishers 2009); John Morijn, 'Reforming United Nations Human Rights Treaty Monitoring Reform' (2011) 58 Netherlands International Law Review 295; Jasper Krommendijk, 'The Domestic Dffectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies' (2015) 10 The Reivew of International Organization 489.

[47] For recent research focused on constructive dialogue, see Beata Faracik, '"Constructive Dialogue" as a Cornerstone of the Human Rights Treaty Bodies' (2006) 38 Bracton Law Journal 39. For other research that, while not concerned exclusively with 'constructive dialogue', treats it as an important part of the discussion, see, for instance, Morijn (n 46); Kerstin Mechlem 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905.

[48] Morijn (n 46) 313.

to overlook its legal characteristics and view the entire process as an exchange of (political) opinions among committee members and state parties.[49] This view underestimates what I call the 'enacting' or performative role that constructive dialogue plays in the international human rights legal order. As a result, most of these analyses tend to focus solely on the procedures of the monitoring mechanism (in order to improve communication between the state parties and the committees), thus downplaying the differences between the procedure and the substance of the process, which usually follows with suggestions for reforming the procedures and the formality of the treaty body machinery.[50] These suggestions, although important and necessary, often fail to reflect on the legal substance of this process. On the other hand, some analyses seem over-emphasise the legal nature of international human rights treaties. While these studies usually give attention to legal arguments and justifications under IHRL, they tend to neglect the political/dialogical characteristics of this process.[51] Therefore, a lack of interest in the political and dialogical role of the process may make some of the research unable to respond to the practical challenges that treaty bodies face.[52] With regard to the latter group, the bar is sometimes set so high that international human rights treaties are considered to have something of a constitutional character and even to be out of the scope of Vienna Convention on the Law of Treaties—the most authoritative tool for understanding the characteristics of international law thus far, which seems too ambitious for the current human rights treaty body system.[53] Hence, these suggestions usually fail to gain support from state parties, let alone to have an impact on them. All this is an illustration of the diversity of the landscape of international human rights scholarship. While both groups greatly contribute to our understanding of international human rights treaty bodies, and while their views will be revisited in later chapters, they do, in my view, to varying extents mistake the nature

[49] Philip Alston and James Crawford (n 46), for instance, assert that '[t]he process (constructive dialogue) takes on the aura of a conversation, albeit an often difficult one, described by the Committee as a process of "constructive dialogue" rather than as a discrete moment of third-party judgement and demand for compliance' (p. 51). Morijn (n 46) also suggests that constructive dialogue is 'pre-legislative, pre-policy and pre-judicial authoritative', 317. See also Beata Faracik, '"Constructive Dialogue" as a Cornerstone of the Human Rights Treaty Bodies' (2006) 38 Bracton Law Journal 39.

[50] For instance, see Alfred Zayas et al. (eds) (n 46).

[51] See, for instance, Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL 489, 489–519; Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I' (2008) XXI Hague Yearbook of International Law 101, 101-53; Kerstin Mechlem (n 47); and John William Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1.

[52] See the reform suggestions from the OHCHR, Ann Bayefsky (n 46).

[53] See HR Committee General Comment no. 24 (52) on the 'special character' of the human rights treaties. See also Matthew Craven (n 51).

of constructive dialogue. Therefore, this chapter will begin by identifying the nature and function of constructive dialogue.

1.1 introduces the process of constructive dialogue conducted under human rights treaty bodies. 1.2 investigates the nature of constructive dialogue by comparing it with the use of legal arguments in the courtroom. It then reveals the characteristics that arguments in constructive dialogue and arguments in the courtroom share, as well as what differentiates them. Following this analysis, 1.3 discusses the way in which legal justification types can be applied to arguments in constructive dialogue. 1.4 moves on to discuss the non-legal (dialogical) nature of constructive dialogue. This is where the normative goal of this process—being 'constructive'—comes into the picture, which makes up for what the legal perspective could not grasp.

1.1 Constructive dialogue in treaty-based international human rights bodies: A synopsis

Treaty-based international human rights bodies (also known as treaty bodies) are to be distinguished from UN Charter–based bodies. The latter include the Human Rights Council (the successor to the Commission on Human Rights) and Special Procedures. The former, as the name suggests, are based on international human rights treaties. There are currently nine core international human rights treaties and ten treaty bodies (the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has its own treaty body, the SPT).[54] The treaty bodies are created in accordance with the treaties they monitor and are constituted by a committee of individual experts. The output of a treaty body is viewed as authoritative expert output and is used to 'help in building up judicial argumentation'.[55] In general, the treaty monitoring mechanism is carried out through five modalities: state reporting, individual complaints, inquiries, inter-state complaints, and treaty bodies' adoption of explanatory texts.[56] Among these five modalities, it is largely held that state reporting is the most important mechanism for monitoring international human rights treaties.[57] Constructive dialogue is essential to the state reporting procedure.

[54] For the full list of international human rights treaties and their treaty bodies, see http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.
[55] Morijn (n 46) 304.
[56] ibid 301–02.
[57] See, for instance, Alston (n 42).

The whole process of state reporting starts when the state ratifies a treaty, because 'it is exactly at that moment that the state … "announce[s]" its readiness to enter the dialogue based on considerations of periodic reports on the measures it has adopted'.[58] Each treaty lays down specific obligations to submit state reports. Hence, after the entering into force of the treaty, together with the ratification of a state, that state party is under a treaty obligation to submit state reports under the guidance of the reporting guidelines of the given treaty. An initial state report must be submitted within a fixed time period and 'must be comprehensive to give the members of the treaty body an in-depth understanding of the situation in the country regarding the specific area or areas covered by the conventions'.[59] After the initial report, the state must submit periodic reports at fixed intervals.

Constructive dialogue, considered essential to the examination process, is conducted between the committee members and the state's delegation. There are also exchanges between both sides before and after the constructive dialogue. Before the constructive dialogue takes place, committee members prepare *lists of issues and questions* for the state party in order 'to receive additional information on issues of particular concern, and at the same time to indicate to the state party the issues that will be raised during the formal examination'.[60] In this sense, the *lists of issues and questions* usually form the ground for the constructive dialogue. The formal examination usually begins with an opening statement from the head of the state's delegation. The country rapporteur or members of the country task force then present their evaluation of the state party's situation (with further inquiries to the delegation). The committee members also address their concerns, inquiries, and General Comments. The delegation is expected to give the country rapporteur and committee members a response to the best of its ability. The delegation's response may generate further questions or comments from the committee members or country rapporteur. This 'to and fro' is the *prima facie* reason why the whole process is considered a dialogue between the committees and the states. Moreover, it is said that 'the purpose of the examination is not to "blame and shame", but rather to offer assistance to the state party on how to improve implementation of the convention'.[61] This process is also described in the OHCHR report

[58] Faracik (n 47) 41.
[59] Marten Kjaerum, 'State Report' in Alfred Zayas et al. (eds) (n 46) 18–19.
[60] ibid 21.
[61] *Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process,* (HRI/MC/206/4, 17 May 2006). See also: ibid.

Strengthening the United Nations Human Rights Treaty Body System—A Report by the United Nations High Commissioner for Human Rights:

> In general, the face-to-face or constructive dialogue in all treaty bodies follows the same broad structure: (a) The State party is invited to send a delegation to attend the meetings at which the committee will consider the State party's report; (b) The head of the delegation, usually led by Government experts from the capital, is invited to make a brief opening statement; and (c) Members of the committee, in some cases led by the country rapporteur(s) or country task force members, pose questions on specific aspects of the report of particular concern. Dialogues based on an initial report require the treaty body to cover most if not all treaty provisions in order to allow a complete understanding of the country situation; dialogues on a periodic report require more focused attention on a number of key specific issues and provisions which the State party is not yet fully implementing. In practice, depending on the treaty body, there is regularly no difference or a superficial difference between the dialogue for an initial report and the one for a periodic report. Many periodic dialogues are similar to comprehensive ones for initial reports and discussions on the implementation of the previous concluding observations often remain marginal to the dialogue.[62]

At the end of each session, the committee members issue a concluding observation, which usually includes both positive and negative perspectives (which are usually addressed in the section titled 'subjects of concern') regarding the state's compliance with its treaty obligations. The committee also provides recommendations for how the state might improve its human rights situation. States are usually expected to mention any developments in the relevant areas of concern in order to maintain continuity of dialogue.

A recent development that concerns the post-examination period are reports of follow-ups that the state party is requested to make. At the time of writing, follow-up procedures have been developed by HR Committee, CAT, CERD, CEDAW, CRPD, and CED.[63] In this procedure, the state party is asked to prepare an additional document with information on implementation regarding specific concerns voiced by the committees (usually drawn from the concerns and recommendations in the concluding observations) within a timeframe of one year (two years in the case of CEDAW). This procedure, as some scholars have pointed out, has further contributed to the continuity of constructive dialogue in general.[64]

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[62] http://www.ishr.ch/sites/default/files/article/files/HCReportTBStrengthening.pdf, 56.
[63] http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx.
[64] Kjaerum (n 59) 22.

It is clear that the discursive element is central to the process as a whole. Dialogue is therefore the main form of monitoring used by the treaty bodies. However, the main suggestions and proposals concerning constructive dialogue given by both scholars and the United Nations mainly focus on the formality and procedural aspects of the process, not the actual arguments. In his 1993 report,[65] for instance, Phillip Alston suggests that treaty bodies should focus on '(a) dissemination in local language of the text of the relevant instrument; (b) the modalities of the preparation of the State report; (c) the submission of information to the treaty body from diverse sources in connection with the examination of State reports; and (d) national level discussion of the results of the Committee-State party dialogue'.[66] He also addresses the problem of overdue state reporting and methods for tackling the problem.[67] Matters of content (especially arguments) are seldom discussed in these reports, however.[68] It seems that, in this regard, the arguments that take place in constructive dialogue have been left largely unexplored. This is a dangerous lacuna. If we continue to exclude the content of this dialogue from the discussion, suggestions concerning how to reform the formality and procedures of human rights monitoring instruments may seem less and less convincing. After all, the content of the dialogue is the main (if not the only) substantive part of this monitoring process. Moreover, the shortcomings of the examination process usually identified by state parties (such as '[state parties] do not always feel they are receiving useful guidance on implementing their international obligations',[69] or 'the recommendations issued by the Committees often lack the clarity, precision and practical value required to be seen as giving helpful support'[70]) are more often than not substantive problems which cannot be addressed by proposals and suggestions that mainly concern formality and procedures. The construction of a method for analysing the content of constructive dialogue therefore remains an urgent task.

[65] This is the second of three reports on reforming treaty bodies submitted by Alston to the Commission on Human Rights, referred to above in note 3.
[66] Alston (n 42) (A/CONF.157/PC/62/Add.11/Rev.1 (22 April 1993)) [12].
[67] ibid [13]–[16].
[68] Alston offers twin criteria for determining which demands from the committee should be met by the states: '(i) minimizing the burden placed on States and (ii) maximizing the effectiveness of measures to ensure respect for human rights' (ibid, [17]). In addition to possibly clashing with each other, however, these criteria seem to lead to more questions than solutions.
[69] Morijn (n 46) 297.
[70] ibid 304.

1.2 The quasi-legal nature of constructive dialogue [71]

In this section, I argue that the arguments in constructive dialogue are quasi-legal in nature. That is to say, the arguments in constructive dialogue share essential characteristics with legal arguments, although there are also significant differences between them.

1.2.1 What is legal argumentation?

Studying legal argumentation is like stepping into a swamp that includes not only theories of legal reasoning but also logic, linguistics, argumentation theory, and legal theory in general. One strategy in this situation is to follow reasonably sound tracks that have already been marked by former scholars and to build one's own path from there. This also means that a clear definition of legal argumentation and its characteristics must first be provided in order to determine the directions and boundaries of the discussion.

There are certain constraints that distinguish legal arguments from other practical arguments. These constraints can therefore be viewed as characteristics of legal argumentation. In *A Theory of Legal Argumentation—the Theory of Rational Discourse as Theory of Legal Justification*, Robert Alexy distinguishes legal reasoning from general practical reasoning by appealing to the following features: (1) 'legal discussions are concerned with practical questions';[72] (2) these questions are discussed under the claim to correctness by virtue of '[their] relationship with valid law, however this is to be determined';[73] and (3) legal arguments in the courtroom are subject to further constraints. These constraints include being 'institutionalised' and resulting in 'binding decisions'.[74]

For the institutionalisation of legal arguments in the courtroom, for instance,

> the roles are unequally distributed, the participation of the defendant is not voluntary, and the obligation to tell the truth is limited. The reasoning process is limited in time and regulated by the rules of procedural law. The parties are entitled to be guided by their own interests. Frequently, perhaps even

[71] All subsequent references to 'constructive dialogue' refer to the entire examination process.
[72] Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press 1989) 212.
[73] ibid.
[74] ibid 211.

> commonly, they are not concerned with arriving at a correct or just outcome but rather at one that is advantageous to themselves.[75]

Legal arguments that result in binding decisions means that in the courtroom, legal arguments shall have 'an impartial and respected judgement', and result in situations 'where someone refuses voluntary compliance [are met] with backup sanctioning or remedial norm[s]'.[76] The former secures a third impartial party for adjudication; the latter requires an enforcement mechanism to ensure the bindingness of the decision.

The above features and constraints may seem scattered at first glance. They can be grouped into three categories, however, which together depict the distinguishing features of legal argumentation: it is 1) based on valid law and established procedures; 2) defeasible; and 3) constrained by a binding judgement.

Let us elaborate on these three features of legal argument.[77] First, the connection between legal argumentation and valid law, along with its institutionalisation, should be self-evident; legal reasoning is meant to be derived from norms found in valid law and conducted in line with procedural rules. In Chapter 3, I further explain the legal syllogism, which is a crucial format when it comes to capturing this relation. For now, it suffices to say that valid law and established procedures demarcate the sources and bases of legal argumentation.

Second, the defeasibility of legal arguments entails that the goal of legal argumentation is to attack and defeat the rival party's argument.[78] A defeasible argument is one 'in which the conclusion can be accepted tentatively in relation to the evidence known so far in a case, but may

[75] ibid 212. These constraints specifically describe the constraints of a 'trial'—one of the legal discourse types under Alexy's taxonomy. Other types include discussions in legal science (legal dogmatics), judicial deliberation, debates in courts of law, legislative treatments of legal questions, discussions of legal questions among students or among jurists, lawyers, or legally qualified personnel in administration or industry, as well as debates on legal problems in the media, at least where these take the form of juristic arguments (ibid 211). In the context of the above discussion, however, legal discourse is to be understood in its narrow sense, namely in terms of courtroom debate (during a trial). Therefore, the above constraints that apply to this case in particular are used directly. Moreover, legal argument as defined in this discussion is also understood in its narrow sense, as legal argument in the courtroom.

[76] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005) 3.

[77] The term 'legal argument' will thus be understood here in its strict sense, as 'legal argument in the courtroom', unless indicated otherwise.

[78] In the case of legal arguments in judgements, this can be understood in terms of attacking and defeating one's opponent's arguments, whomever those arguments belong to.

need to be retracted as new evidence comes in'.[79] Douglas Walton defines the term 'defeasibility' in the context of the argumentation scheme:

> If an argument put forward by a proponent meets the requirements of a scheme, and the premises are acceptable to the respondent, then the respondent is obliged to accept the conclusion. But such an acceptance—or commitment, as it is often called—is provisional in the dialogue. If the respondent asks one of the critical questions matching the scheme and the proponent fails to offer an adequate answer, the argument defaults. Thus we see that defeasibility is linked to a dialogue structure in which a burden can shift back and forth. The original weight of an argument, before it defaulted and had to be retracted, is restored only when the proponent gives a successful answer to the question.[80]

I shall refrain from discussing the rich topic of argumentation schemes. My reason for referring to Walton's definition of defeasibility is that this definition underscores the practical consequences of a defeasible argument, which can be summarised as follows: 1) a defeasible argument is to be taken as justified as long as it has not been defeated; 2) a defeasible argument is defeated when the proponent cannot offer an adequate answer to the opponent's inquiry or attack; and therefore 3) the burden of argument shifts between proponents and opponents throughout the dialogue.

Legal arguments are defeasible insofar as they involve more than deductive reasoning on the basis of valid law.[81] As long as external justification (over and above a syllogism) is required, it is possible to ask critical questions, and hence to attack a proponent's argument, which means that it is always possible to defeat a legal argument. In most current legal systems, for example, expert testimony (such as ballistics evidence, DNA evidence, etc.) is accepted as evidence in support of a legal argument. However, such arguments are only justified and accepted if the party who submits the evidence is willing and able, if challenged, to prove the credibility of the expert, his or her expertise in the given case, the reliability of the relevant sources, and so on. This is what Prakken and Sartor call 'inference-based defeasibility'. It means that the conclusions of legal

[79] Douglas Walton, Chris Reed and Fabrizio Macagno, *Argumentation Schemes* (Cambridge University Press 2008) 2.
[80] ibid 9.
[81] It could also be inductive, abductive, analogical, or empirical and practical. See Scott Brewer, 'An Essay by S. Brewer: Law, Logic, and Leibniz. A Contemporary Perspective' in Alberto Artosi et al. (eds), *Leibniz: Logico-Philosophical Puzzles in the Law: Philosophical Questions and Perplexing cases in the Law* (Springer 2013).

reasoning are open to defeat as further input information is provided.[82] In their view, there are two other types of defeasibility concerning legal reasoning: 'process-based defeasibility' and 'theory-based defeasibility'. The former is due to the rules of legal procedures (for instance, rules on the admissibility of evidence provided in court). The latter concerns the development of legal theory, which can result in one argument's being defeated by another that is based on a better legal theory.[83] Therefore, based on Prakken and Sartor's account of defeasibility, because legal reasoning is inferential by nature, regulated by rules of procedure, and based on legal theories, it is innately defeasible. In this sense, any legal argument is only tentatively justified.

In courtroom debate, the defeasibility of legal argumentation is overcome by the third feature of legal argumentation, namely that it is constrained by a binding judgement supported by authority. This feature relates to what Radbruch termed 'legal certainty'. In his *Antinomies of the Idea of Law*, Radbruch stated that legal certainty is one of the three values (or postulates) that are necessarily inherent in the idea of law (the other two are justice and expediency). This postulate requires that the law be positive.[84] It means that 'if what is just cannot be settled, then what ought to be right must be laid down; and this must be done by an agency able to carry through what it lays down'.[85] In other words, in courtroom debate, not only is the adjudicator the (only) authority for deciding whether the opponent has indeed defeated the proponent's argument, but what the adjudicator decides is to be carried out.[86] By virtue of legal certainty, authority therefore constrains the infinite loop of argument between rival parties that stems from the defeasibility of legal argument.

Although the characteristics of legal argument listed at the beginning of this section are not exhaustive, the three features of legal argumentation are. They are in this sense categorical. That is to say, any characteristic of legal argument can be placed under one of these categories. For instance, one characteristic of legal argument is that it maximises the advantages and interests of

[82] Henry Prakken and Giovanni Sartor, 'The Three Faces of Defeasibility in the Law' (2004) 17 Ratio Juris, 118.
[83] Ibid.
[84] Emil Lask et al., *The legal philosophies of Lask, Radbruch, and Dabin* (Harvard University Press 2013), 108.
[85] ibid.
[86] Of course, in the court debate, there is also the appeal procedure. At the end of the chain, however, there is always a judicial body that functions as a final check on the defeasibility of a legal argument, and what that body decides is therefore final and certain. The same logic applies to judicial dialogue and legal scholars' views on law. They are at first glance rather 'un-judiciable' in the sense that no judgement is made that relates to them directly and immediately. However, all of these arguments are put forward for the purposes of influencing 'final decisions' which have legal certainty and are supported by authority. In this sense, being 'judiciable' (in the sense of reaching legal certainty supported by authority) is indeed a necessary condition of legal argument.

one's own party. In the context of courtroom debate, this aim can be understood in terms of attacking and defeating the rival party's arguments, and thus persuading the adjudicator to make judgements that favour one's own position. This indicates the defeasibility of legal argumentation. Characteristics such as 'governed by valid law', 'related to the procedure of law', and 'concerned with practical questions' are characteristics that connect legal argument with valid law. Impartial third-party adjudication and enforcement are meant to guarantee legal certainty. In sum, because these three features (being based on valid law, being defeasible, and being constrained by a binding judgement backed up by authority) constitute the distinguishing features of legal argument, they are necessary and sufficient conditions for legal argument.

1.2.2 The quasi-legal nature of constructive dialogue

It is now time to examine the extent to which the arguments in constructive dialogue resemble legal arguments. Recall the characteristics of legal argument and the process of constructive dialogue. The resemblance can be identified as follows: they both concern practical questions and are based on valid law (in the case of constructive dialogue, the valid law is the body of international human rights treaties), regulated by the relevant procedural law (or the procedural clauses), and conducted under a limited timeframe. Moreover, the roles of the engaging parties are unequally distributed in various ways. On the other hand, there are also differences between these two types of argument. One of the most fundamental differences is that the roles of both parties in the constructive dialogue, i.e. committees and state parties, are not identical to the roles of the two rival parties (plaintiff and defendant) in the courtroom. In courtroom debate, the roles are not equally distributed in the sense that proponents and opponents are only equal to each other with regard to the superior position of the adjudicator, who has the authority to make binding judgements. In constructive dialogue, however, committee members are neither proponents, nor opponents, nor adjudicators. Instead, their role involves aspects of all three; they call a state to account, partly to defeat the state parties' arguments and partly to decide whether the arguments are justified. One might argue that the committee members' role is not to defeat or attack the state party's arguments at all, but only to give recommendations and suggestions. Giving recommendations and suggestions is indeed an important part of their mandate. However, given that constructive dialogue is based on international human rights treaties for the purposes of examining state implementation and compliance, it is inevitable that any valid recommendation or

suggestion given by a committee must be based on a judgement of insufficient implementation or non-compliance on the part of a state party. On the other hand, state parties will defend their own positions. This means that defeating the state's argument is a necessary step in making the relevant recommendations and suggestions. Nonetheless, the decisions (in the form of concluding observations and recommendations) that are made by committees are not binding and therefore lack the certainty enjoyed by courtroom judgements. Moreover, a state party can always make counter-arguments in its follow-up documents or in the next state's session. Therefore, although the roles played by the committees and the state parties are not equally distributed, they are not distributed in the same way as the roles played by the rival parties and the adjudicator in the courtroom debate. Apart from the different roles played by each party, the parties in the constructive dialogue are not entitled to be entirely guided by their own interests; nor are they expected to only regard their own position or advantage. Committee members, who are selected for their 'high moral standard[s]',[87] are expected to conduct the examination process with an eye to correctness and justice. As for the state parties, although they make arguments in their own interests, they are under an obligation to cooperate with the treaty bodies.[88]

Thus far, it seems that the similarities and differences between constructive dialogue and courtroom legal argumentation are rather patchy. If we approach the above observations from the perspective of the three features of legal argumentation, however, the picture may become clearer. Arguments in constructive dialogue are based on valid law and are defeasible, which puts them alongside legal arguments. With this said, the committee does not have the authority to reach a binding judgement, which distinguishes the arguments in constructive dialogue from legal arguments in the courtroom. This observation might also explain certain requirements associated with constructive dialogue that are not commonplace in legal discourse. In constructive dialogue, for instance, the parties are not expected to maximise their own interests. This is because when a binding judgement is not guaranteed, other remedies are needed to constrain the infinite loop of argument that stems from the defeasibility of legal reasoning.

[87] ICCPR Art.28: '2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.' For the full text, see http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.
[88] Such as the principle of *Pacta sunt servanda.*

In sum, the arguments conducted in constructive dialogue resemble legal arguments in two essential respects: they refer to valid law as their basis, and they are defeasible. One crucial feature of legal argument—providing legal certainty—is missing from constructive dialogue, however. In this sense, arguments in constructive dialogue have only a quasi-legal character. They are therefore not legal arguments in the full sense but rather what I shall call 'partly legal, partly dialogical' in nature.

Nevertheless, while the identification of this 'partly legal, partly dialogical' character should be sufficient for our current goal of conducting a practical analysis of legal argumentation raised in this process, the nature of constructive dialogue is, all things considered, more legal than dialogical. One of the main arguments that cast doubt on the legal character of IHRL in general and its examination process in particular is that constructive dialogue only results in non-binding observations (including recommendations). However, I shall argue that this process does count as law-enacting for the following reasons. First, these observations, although non-binding, are issued by authoritative bodies (i.e. international human rights treaty bodies) generally constituted by renowned experts. Second, these observations are decisions taken on the basis of hearing the other party on allegations made by that very committee (although in a different role). Third, although they do not carry legal certainty in the sense of enforcement as explained above, these decisions impose an obligation on the state in question. This obligation stems partly from the international consensus voiced by the treaty bodies, partly from the procedures built into the process, and partly from the state's own agreement to being bound by the treaty in the first place. Under the current development of the international human rights machinery, it is true that state commitment to IHRL cannot be obtained by coercion. Nevertheless, the fact that constructive dialogue, as the main substantive treaty monitoring mechanism, not only refers to valid law and acknowledges the defeasibility of the arguments underpinning such references but also 1) adheres to the criterion of expediency by taking international relations between sovereign states into account, 2) provides legal certainty in the sense of ushering in authoritative recommendations, gradually building up an *acquis* from which no party to the treaty can easily free itself without loss of credibility in the international arena, and 3) provides sufficient grounds for arguing that this process, in and of itself, enacts law. This understanding of the fundamental characteristics of IHRL in general and constructive dialogue in particular, however, does not mean that the latter is *only* legal. Therefore, I submit that constructive dialogue is partly legal, partly dialogical; although it is fundamentally

legal, these two features are interdependent. Against this background, we may now analyse both aspects of constructive dialogue.

In the following sections, I first apply legal justification types to the arguments in constructive dialogue. This will help us to decide on the route for determining the legal justifiability of the arguments in the light of valid law. When legal justification reaches its limits (such that no binding judgement can be issued), I subject the arguments to the applicable and necessary rules of dialogical justification. This is, as I shall argue, to guarantee the constructiveness of the arguments.

1.3 Applying legal justification types to constructive dialogue: The route to determining legal justifiability

In this section, I first revisit the basic legal argument justification types articulated by Neil MacCormick. These justifications can be divided into two categories, namely internal justification (1.3.1) and external justification (1.3.2). According to Robert Alexy, '[i]nternal justification is concerned with the question of whether an opinion follows logically from the premises adduced as justifying it',[89] whereas '[t]he correctness of these premises is the subject-matter of external justification'.[90] I then explain the sense in which these justification types can be used to help to determine the legal justifiability of the arguments in constructive dialogue (1.3.3).

1.3.1 Internal Justification

With internal justification, a legal statement is justified according to the rules of *modus ponens*—a rule of syllogistic logic passed down from antiquity. In this form of deduction, the given law is treated as the major premise, the facts as the minor premise, and the verdict as the conclusion. In this sense, the syllogistic approach treats law as self-evident, cognitively operable knowledge.[91] Its adapted modern legal version can be expressed as follows:

If OF then NC,

OF,

[89] Alexy, above (n 72) 221.
[90] ibid.
[91] Massimo La Torre, 'Theories of Legal Argumentation and Concepts of Law: An Approximation' (1998) EUI working paper no98/1 14.

therefore NC.[92]
(In this formula, OF denotes operative facts, and NC denotes normative consequences.)

This means that if an argument follows a legal norm ('If OF then NC') and provides the empirical statement (OF), then its conclusion (NC) is considered justified given both the legal norm and the empirical statement.[93]

There are at least three reasons to take the internal justification of a legal argument seriously in today's context. Firstly, this form of justification promotes the universalisability of legal norms.[94] Universalisability in the legal context is the principle of treating like cases alike. For instance, as Hare elaborates, '[i]f a person says that a thing is red, he is committed to the view that anything which was like it in the relevant respects would likewise be red'.[95] In this sense, internal justification secures the equality of law. Secondly, because internal justification relies on the logic of deduction, any external premises—those premises 'which do not derive from positive law'—are 'brought out into the open'.[96] In other words, by scrutinising internal justification, the areas where external justification is needed are revealed. Thirdly, when invoking a legal text as a basis for a specific claim in a concrete situation, one will inevitably reason by way of legal syllogism, albeit (usually) in a more informal way.[97] Therefore, an argument can be justified only if it is syllogistically valid. In sum, the classic legal syllogism still plays an irreplaceable role in justifying legal arguments.

However, the conclusion of a syllogism is only as convincing as its premises.[98] This means that the legal syllogism alone is not a sufficient tool for analysing legal arguments. First of all, the form of the legal syllogism prescribes that it must start from a normative statement as its major premise. This means that it presupposes a political or normative order, the validity of which may remain to be established. Second, since the law is composed of human language, which is often vague and ambiguous, interpretation is needed to give law concrete meaning. This process of interpretation cannot be captured in the form of a syllogism. Third, syllogisms *per se* cannot

[92] MacCormick (n 76) 32. In Alexy's theory, the legal syllogism comes in both simple and more complicated forms. See Alexy (n 72) 221–30.
[93] For a different description of the legal syllogism, see Alexy (n 72) 2, 222.
[94] ibid 228.
[95] R. M. Hare, *Freedom and Reason* (Oxford University Press 1965) 10.
[96] Alexy (n 72) 228.
[97] ibid 122.
[98] MacCormick (n 76) 76.

determine whether the norm (as the major premise) is applicable to the case at hand.[99] Put differently, because the major sources of defeasibility in legal reasoning are non-deductive, they cannot be revealed (let alone settled) through internal justification, which relies primarily on the syllogistic model. It is for this reason that external justification is of primary concern when it comes to the justification of legal arguments.

1.3.2 External justification

In *Rhetoric and the Rule of Law*, Neil MacCormick argues that there are four types of questions that together exhaust the possibilities for challenging legal reasoning from a non-deductive (and therefore external) perspective, namely the problem of proof (or fact), the problem of classification, the problem of interpretation, and the problem of relevance. These are, he argues, the four (and only four) types of problem concerning legal reasoning that 'require in principle non-deductive, that is, rhetorical or persuasive, reasoning to resolve them'.[100] In this sense, these four types of problem exhaust the possibilities when it comes to non-deductively attacking and defeating a legal argument.

The 'problem of proof' arises when the existence of the alleged instance ('OF') has yet to be proven. It involves the claim that no instance of 'OF' as alleged in the indictment or pleadings has been proven to have existed (or at least not up to the required standard of proof).[101] It therefore involves questioning the empirical statement in the proponent's argument.[102] The 'problem of classification' arises when the alleged facts cannot be properly characterised as an instance ('OF') in the sense proper to the law.[103] Charges based on this problem question the categorical judgements about empirical facts made by the proponent. The 'problem of interpretation' raises the question of whether the argumentation involves a misreading of the relevant provisions of the law.[104] When it is raised, what is challenged is the proponent's reading of the law. The 'problem

[99] La Torre (n 91) 14; MacCormick (n 76) 69.
[100] MacCormick (n 76) 43.
[101] Ibid.
[102] The word 'proponent' refers to the party that must defend its argument, while 'opponent' refers to the party that is on the attack.
[103] When this second possibility, as MacCormick further indicates, includes a value expression or standard (e.g. 'reasonable', 'fair', 'equitable', etc.), it can also be considered as a problem of evaluation. Ibid 43. There is also another understanding of 'problem of classification', which views classification as evaluation. In this case, a standard of judgement (such as 'reasonable', 'fair', 'just', 'proportionate', etc.) is introduced into the legal text, and the classification is meant to decide issues like what counts as being 'reasonable' (etc.) in the given context.
[104] Ibid.

of relevance' asks the question 'whether there is a rule dealing with the alleged facts'.[105] In other words, it concerns whether the relevant norm ('whenever OF then NC') can be properly read off the adduced materials, as the proponent alleges.[106]

As for the role of these four types of problem in legal reasoning, MacCormick provides a thoughtful elaboration, which is worth quoting in full:

> In the end, it is not the legal syllogism that alone determines the outcome of the case. Some or all of the terms in the statute will have to be interpreted, and the facts of the case must be interpreted and evaluated to see if they really count, if they really fit the statute. Reasons can and should be given for preferred interpretations that are decisive in a case … The reasons for reading the syllogism in a certain way are, it may be said, the real reasons of the case.[107]

On the flip side, these four types of problem are also four categories of external justification for legal arguments, as each type of problem requires a corresponding type of justification. They can therefore be called arguments of fact, arguments of classification, arguments of interpretation, and arguments of relevance.

1.3.3 Applying legal justification types to arguments in constructive dialogue

I noted earlier that the arguments in constructive dialogue share two main features with legal arguments in the courtroom: they are based on valid law and they are defeasible. By contrast, the arguments in constructive dialogue do not possess the third feature of courtroom arguments to the extent that they are not constrained by binding judgements. From the first characteristic, their being regulated by positive law (i.e. international human rights treaties), it follows that the rules of legal syllogism as well as the types of external justification are applicable. Due to its quasi-legal nature, however, the arguments in constructive dialogue will always be open to the argumentative moves of attacking and defeating. Here in particular, the absence of ultimate discretion is conspicuous. In constructive dialogue, an argument can never be deemed 'justified' in the sense that a final decision (justification) has been reached. In this regard, we need to introduce another concept to make the analysis more suitable to the nature of the arguments in constructive dialogue. That is, instead of

[105] Giovanni Sartor, 'Syllogism and Defeasibilty: A Comment on Neil MacCormick's Rhetoric and the Rule of Law' (2006) EUI working paper Law No 2006/23, 4.
[106] MacCormick (n 76) 43.
[107] ibid 42.

using ‘justified’ as a benchmark for judging an argument, I propose that we use the term ‘justifiable’ as an analytic criterion. The latter purports to express both the intentional attitude of commitment on the part of the parties to justify their claims and a degree of success they may achieve in pursuing this commitment without ever achieving it in full. Put differently, certainty regarding the justifiability of an argument on the basis of the given law will come in different degrees. In constructive dialogue, because of the non-binding nature of its decisions, any legal argument is non-justified in the sense of never being completely justified by binding authoritative judgement. A ‘justifiable’ argument, by contrast, satisfies all the applicable justification rules while remaining exposed to the possibility of being attacked and defeated in the future.

In what way the types of legal justification can be used to help to determine the legal justifiability of arguments in constructive dialogue? To answer this question is, in a way, to investigate the sense in which types of legal justification can be applied to the arguments in constructive dialogue. The justification rules found in each justification type can then be used to determine the justifiability of the arguments in constructive dialogue as well.

Firstly, the internal justification associated with legal syllogisms is applicable to the arguments in constructive dialogue. This is because the basic form of the arguments in constructive dialogue is still a syllogism—such arguments use specific articles from international human rights treaties as norms, confronting them with alleged violations of the relevant articles and reaching conclusions by way of deduction. Internal justification is therefore relevant.

As for external justification, the most important tools in determining the legal justifiability of arguments in constructive dialogue are interpretation rules. This is because each type of external justification is ultimately about settling interpretation. With regard to the problem of proof, the facts must be interpreted in order to determine whether they count as operative facts (OP) in the particular case at hand. For the problem of qualification (or classification), one must interpret the given law to decide whether this is a situation that falls within the ambit of the statute.[108] The problem of interpretation by definition concerns the preferred interpretation of the law. As for the problem of relevance, whether a given norm can be drawn from the adduced materials as being relevant to the empirical facts depends on the interpretation of both the law and the operative facts, as well as their relationship. This is to say that each external justification type eventually comes back to the question of deciding on the best interpretation. This is particularly the case when it

[108] ibid 41.

comes to constructive dialogue. Because of the absence of binding judgements, any meaningful result of this process must be based on how the problem of interpretation is settled. In fact, this is precisely the point made by many scholars from CLS. According to them, it is because such questions cannot be settled that international law in general becomes a (more) political forum. This also shows that determining interpretation rules for IHRL is of the utmost importance when it comes to determining the legal justifiability of arguments in constructive dialogue. In other words, determining interpretation rules lies at the heart of justifying arguments in constructive dialogue from an external point of view. The question of how to determine interpretation rules for IHRL will be further discussed in the next chapter.

1.4 The dialogical nature of constructive dialogue: Criteria of constructiveness

Thus far, I have argued that the arguments in constructive dialogue are quasi-legal in nature. Therefore, the legal justification types are applicable to them. However, since human rights treaty bodies do not issue binding judgements, the decisions made by the committee members do not constitute the final say; states always have the chance to provide counter-arguments. This is to say that, in the absence of binding judgements, merely applying legal argument justification would leave too wide a margin for an argument to be considered justifiable (as some scholars have put the worry, 'anything goes'). Nonetheless, since the whole process is partly legal, partly dialogical, when we take the applicable dialogical rules into consideration, the margin is considerably narrowed.

Alexy has argued that legal reasoning is a special case of practical reasoning.[109] Under this thesis, it may seem to some that both general rules of practical reasoning and the rules of dialogue should be taken as the basis of legal reasoning. In principle, I subscribe to this view as well. However, the problem dealt with in the current discussion is not about the rules that *could* be applied to justify the given arguments, but about understanding the current human rights treaty body mechanism in terms of such rules in order to see whether and how they lend justifiability to the argumentative discourse before the committees. In other words, it is not about arriving at criteria for perfect reasoning in theory but about the threshold for determining a justifiable argument in practice. In practice, not all of the general practical and dialogical rules are

[109] Alexy (n 72) 211–20.

intentionally applied in the process of argumentation. Rather, most of the general rules function like common sense, driving the process without being explicitly thematised. The arguer (or the adjudicator) only consults them from time to time. In comparison, the dialogical rules identified in this discussion are those that I suggest should be applied intentionally. In this sense, they are considered constraints on the arguments in constructive dialogue in addition to being criteria of legal justifiability.

The dialogical essence of the process can be grasped by its name, i.e. 'constructive dialogue*'*. As the term suggests, the entire process is first and foremost a dialogue. Secondly, it has a concrete normative goal—it is meant to be constructive.

The goal of constructive dialogue, as articulated by the OHCHR, is:

> to engage with the State party … with the aim of assisting the Government in its efforts to implement the treaty as fully and effectively as possible. The notion of constructive dialogue underlines the view that the treaty bodies are not judicial bodies (even if some of their functions are quasi-judicial) but rather are bodies created to monitor the implementation of the treaties.[110]

This view confirms the quasi-legal nature of the process while also emphasising its practical focus. According to the UN, the goal of constructive dialogue is to 'assist the Government [of a state party] … to implement the treaty as fully and effectively as possible'. However, without binding judgements and enforcement mechanisms, assisting in the implementation of a treaty can only be achieved in the form of dialogue. That is to say, assisting with treaty implementation is the primary goal of constructive dialogue. Hence a constructive argument is an argument that assists in treaty implementation.

The next logical step is to map the practical goal of assisting treaty implementation onto the dialogical goal of being constructive. Although it is clear that conducting a constructive dialogue alone cannot guarantee treaty implementation, what it might achieve is the clarification and identification of what stands in the way of implementing a given treaty, which may further contribute to that treaty's being implemented. In order to clarify or identify what stands in the way of implementing a given treaty, it is important for the engaging parties to communicate within the same dialogue type. According to Walton and Krabbe, there are six general types of dialogue,

[110] http://www2.ohchr.org/english/bodies/treaty/glossary.htm.

depending on what is being pursued: persuasion, negotiation, inquiry, deliberation, information, and eristic.[111] 'Each dialogue type constitutes a separate normative model of argumentation'[112] and therefore serves a particular normative goal. The goal of persuasion is to resolve or clarify an issue, that of inquiry is to prove (or disprove) a hypothesis, and that of negotiation is to reach a reasonable settlement that both parties can live with. Information-seeking dialogue is undertaken for the sake of exchanging information. Deliberation dialogue is undertaken to decide on the best available course of action. Finally, eristic is undertaken to reveal the deeper basis of a conflict.[113] In this regard, a good and therefore constructive argument 'contributes to a goal of the type of dialogue in which that argument was put forward'.[114]

Moreover, when the party with the burden of argument puts forward an argument that serves its dialogical goal, the burden of argument shifts to the responding party. The responding party then either adjusts the practice or adopts a counter-argument. In the latter case, the counter-argument should also serve its dialogic goal. And the dialogue goes on. Therefore, the dialogue will indeed be furthered if both parties' arguments serve their dialogical goals. Moreover, it is precisely when both parties put forward arguments that serve their dialogical goals but that cannot be accepted by the other side that the obstacles to treaty implementation and compliance are revealed.

Therefore, arguments that serve a given dialogical goal can ultimately assist in clarifying or identifying obstacles to implementation and can be viewed as assisting the implementation of treaties, and hence as being constructive, while arguments that do not serve the goals of their dialogical type are considered non-constructive. In information-seeking dialogue, for instance, the party with the burden of argument must provide the information in question; in an inquiry dialogue, it must establish the evidence to prove or disprove the hypotheses. In these cases, if an argument fails to serve the goals of its dialogue type, it stalls the dialogue and is therefore considered non-constructive. This is why it is essential to develop not only legal but also dialogical criteria for justifying the arguments in constructive dialogue. In other words, by applying dialogical criteria

[111] Douglas Walton and Erik C. W. Krabbe, *Commitment in Dialogue: Basic Concepts of Interpersonal Reasoning* (State University of New York Press 1995) 66. As Walton and Krabbe mention, there is also a 'mixed' type. As it is not a prototype but a combination, however, I have decided to leave it out of the current discussion.
[112] M. Lewiński, *Internet Political Discussion Forums as an Argumentative Activity Type: A Pragma-Dialectical Analysis of Online Forms of Strategic Manoeuvring in Reacting Critically* (Rozenberg Publishers 2010) 18.
[113] Walton and Krabbe (n 111).
[114] ibid 2.

to determine whether an argument in constructive dialogue falls into one of the dialogue types and serves its dialogic goal, we can diagnose impediments to the implementation of human rights law.

This is also to say that the bottom line of serving one's dialogical goals is to shift the burden of dialogue/argument. In an information inquiry dialogue, for instance, the committee usually initiates the inquiry. The burden is on the state. If the state provides the required information, the burden shifts to the committee. The committee must either end the discussion or question the state's source of information by citing other sources *and* argue why this source is indeed a better one. The burden then shifts back to the state. The state will either accept the information provided by the committee or offer a counter-argument on the quality of the sources. In this case, if one party does not accept the other party's source of information and does not provide an argument concerning the quality of the sources, that party will be viewed as stalling the dialogue, and its arguments will therefore be viewed as non-constructive. On the other hand, if both parties remain in the same dialogical type and cannot accept each other's arguments, the obstacles will then be revealed. In the case of an information inquiry, the dialogue usually stalls at the point where the state does not accept the committee's source of information, and vice versa. This is probably due to a lack of procedure for weighing different sources of general information in the current human rights mechanism.[115]

In sum, it is by serving their dialogical goals that arguments in constructive dialogue advance in a way that ultimately clarifies and identifies the obstacles to treaty compliance and implementation, therefore assisting in treaty implementation. Because of their quasi-legal status, the arguments in constructive dialogue are always open to defeat. In the absence of a binding judgement, applying the legal justification alone can only identify the justifiability of the argument relative to the given law, while leaving room for a loop of argumentation between the two parties. Therefore, by identifying the normative concerns of constructive dialogue and assessing the arguments against the criterion of 'constructiveness', this loop of argumentation can be redirected towards a more constructive result. This will ultimately help to improve the human rights monitoring system in general.

[115] For recent developments in this area, especially in UN fact-finding procedures regarding serious violations of international humanitarian law and IHRL, see 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guide and Practice' (OHCHR 2015).

1.5 Conclusion: The Janus face of constructive dialogue

This chapter argues that constructive dialogue has a quasi-legal nature. Accordingly, the arguments in constructive dialogue have a dual function: they are meant to justify legal reasoning and to be constructive (that is, to assist treaty implementation). These two functions are inter-dependent. On the one hand, to justify legal reasoning is to clarify the permissions and prohibitions under the treaty. This is the ground of treaty implementation. On the other hand, due to the lack of binding judgements, the arguments are only 'justifiable' in relation to the given law. Hence the normative goal of being constructive consists in moving the dialogue forward. This means that only arguments that are both legally justifiable *and* dialogically constructive are good arguments in the context of constructive dialogue.

Dialogue theory has long involved two approaches, namely the descriptive approach and the normative approach. The descriptive approach answers the question of 'how the phenomenon can be observed empirically and, when observed, why it takes place'.[116] On the other hand, the normative approach aims to 'establish standards of good argumentation in distinct, theoretically conceived types of context'[117] and points to the higher goal that a dialogue tries to achieve. Nonetheless, as modern dialogue theories are inclined to agree, the two approaches are usually inseparable. This is also evidenced in this discussion. The analytic tools developed in this chapter not only describe the entire process but also capture its normative goal.

From this perspective, in Part II of this research, I focus on China's arguments as presented in the context of constructive dialogue with five human rights treaty supervisory committees. Arguments that are both legally justifiable and constructive further contribute to the debates (such as universality vs. particularity) regarding IHRL. Meanwhile, arguments voiced by China and the committees that are either non-justifiable or non-constructive will also be considered. With these arguments, the question is whether they have changed over time, and if so, in what direction. Tracing the changeability of non-justifiable or non-constructive arguments brings to light the relationship between China and the treaty bodies over time from the perspective of institutionalisation.

[116] Lize Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 69.
[117] Lewinski (n 112) 13–14.

In his famous paper on institutionalisation in the context of international organisation, Keohane gives the term institutionalisation the following definition:

> institutionalization in an international organization will be regarded as the process by which the international organization becomes differentiated, durable, and autonomous. Differentiation refers to development of organizational distinctiveness from its environment … Durability can be defined as the tendency of an organization to persist over time. Autonomy implies that the organization's norms and patterns of behavior significantly affect the outcomes of its political process.[118]

He further elaborates the term 'autonomy' as follows:

> Autonomy for international organizations means the development of political organizations and procedures that are not simply expressions of the interests of particular states or other international actors. An autonomous international organization has some degree of independence in making its own decisions without dictation from outside actors; the outputs of the system do not merely reflect inputs from the environment but also bear the mark of the system's value … Thus autonomy is enhanced by the process whereby the organization becomes 'valued for itself, not as a tool but as an institutional fulfillment of group integrity and aspiration'.[119]

In this sense, a legally justifiable and dialogically constructive argument precisely represents the last dimension of institutionalisation in Keohane's terminology, i.e. autonomy. To put forward a legally justifiable and dialogically constructive argument is to trace the value of the legal system and to maintain 'group integrity and aspiration' rather than merely 'reflect[ing] inputs from the environment'. Therefore, evaluating constructive dialogue by investigating its legal justifiability and dialogical constructiveness provides us with a perspective from which to observe the institutionalisation process of international human rights treaties. More specifically, investigating constructive dialogue between human rights treaty bodies and China by questioning both the legal justifiability and dialogical constructiveness of the arguments, especially over a longer period of time (more than one reporting period), shall be able to reveal the direction of institutionalisation: the more legally justifiable and dialogically constructive the arguments become, the more institutionalised China will be.

[118] Robert O. Keohane, 'Institutionalization in the United Nations General Assembly' (1969) 23(4) *International Organization* 859, 861–62.
[119] ibid 862.

Nonetheless, before we jump into the sea of arguments between China and human rights treaty bodies, two guiding ideas must first be established. These are the rules of interpretation regarding international (human rights) treaties (Chapter 2) and the vantage point for justifying particular reasoning in the legal context (Chapter 3).

Chapter 2 Treaty Interpretation and Legal Justifiability

Introduction

'There is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation'.[120] This quote from Sir Arnold McNair clearly shows the difficulty and anxiety associated with the topic of treaty interpretation. From a collective point of view, it also explains the phenomenon of 'extensive doctrinal dispute' on this topic.[121] With this noted, this chapter tries to explore the similarities and differences among the various schools of treaty interpretation – and, more importantly, the rationale behind these views – in order to find a practical approach to determining legal justifiability regarding the interpretation of legal arguments in constructive dialogue.

Chapter 1 laid out the main reasons for viewing interpretation as an intrinsic and essential part of determining the legal justifiability of an argument. That is, interpretation is the ultimate problem to be solved in each external type of legal argumentation, which means that every legal justification rule eventually comes back to the question of determining the best interpretation.[122] In the discussion in this chapter, I approach the importance of interpretation for legal justifiability under international law from a different angle. The issue here is: can we determine whether legal justifiability is indeed shattered by the 'indeterminacy' of law, as some scholars from the Critical Legal School have claimed? This would be the case if there were no way to decide which interpretation(s) to turn to regarding a given law.[123] The flip side is therefore that being able to determine the appropriate interpretation(s) of a given law is a necessary condition for determining the legal justifiability of an argument.

In this chapter, I first reflect on the idea that determining the justifiability of a legal argument is not a feasible task due to what has been called the problem of the indeterminacy of law. Through the lens of the relationship between the justifiability of legal arguments, the problem

[120] Arnold D. MacNair and Arnold Duncan MacNair, *The Law of Treaties* (The Clarendon Press 1961) 364.
[121] Sir Ian Sinclair, *The Vienna Convention of the Law of Treaties* (2nd edn, Manchester University Press 1984) 114.
[122] See Chapter 1.
[123] Here I do not want to deny that there can be more than one 'right answer' in a given context. However, this does not lead to the assertion of 'indeterminacy' and its corollaries, 'relativism' and nihilism. As Kratochwil convincingly points out, the flip side of 'indeterminacy' (as 'determinacy') is not 'uniqueness'. In this sense, attacking the fact that there can be more than one right answer under a given law does not support the idea that the law is 'indeterminate'. See Friedrich V. Kratochwil, 'How do norms matter?' in Michael Byer (ed), *The Role of Law in International Politics : Essays in International Relations and International Law* (Oxford University Press 2000) 45–46.

of the indeterminacy of law, and the interpretation of law, I suggest that, contrary to the above concern, such justifiability is indeed feasible. It depends on interpretation according to the given law and the concrete situation (2.1). I then focus on the rules for interpreting international treaties, i.e. Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT), and outline three approaches to treaty interpretation embodied in the VCLT rules, namely the textual approach, the intentional approach, and the teleological approach (2.2). After investigating the VCLT interpretation rules, and inspired by Radbruch's conception of law, I propose a perspective for approaching the rules of treaty interpretation, as well as a principle for applying them in practice. I will show that the criticism that the VCLT rules are too abstract and all-encompassing (and therefore not practically useful) is mistaken (2.3). I then discuss the applicability of the VCLT interpretation rules to IHRL (2.4). The main task of this chapter is therefore to explore a practical approach to applying the interpretation rules in the context of IHRL in order to further the ongoing discussion on determining the legal justifiability of an argument in the context of IHRL.

2.1 Justifiability, indeterminacy, and the interpretation of law

The problem of the indeterminacy of law is said to challenge the justifiability of legal arguments. This problem is regarded as the main weakness of the systemic conception of law and has been a focus of Critical Legal Studies (CLS) in particular. According to CLS, the contradictions between different rules or different orders of principles make 'both the notion of one "correct" judicial decision, and the idea of definite rule guidance for decisions in general, rather fanciful'.[124] These contradictions arise when choosing between specific rules and more general standards, between different (and often contradictory) doctrines, and between 'rules [that] express the ideals of self-reliance and individualism' and 'standards [that] favour substantive justice, and possibly altruism'.[125]

The 'indeterminacy' at work in a legal argument can be found at different levels. At the deontic/constitutive level, 'indeterminacy' occurs when there is no rule to clarify preferences between different choices, in which case the system is seen as indifferent to them. At the normative

[124] ibid 43.
[125] ibid.

level, a clash of different norms is the main source of indeterminacy. At the semantic level, indeterminacy is almost inevitable due to the profound ambiguity of human language.[126]

Recognition of the indeterminacy of law is hardly new. It is the attitudes and approaches that different scholars take towards the problem that prompt us to explore the potentials and boundaries of legal justifiability. For instance, 'optimists' like Dworkin suggest that it is necessary to hold on to the presupposition that there is one right decision even in 'hard cases',[127] although this one right decision depends on the judge's legal and political philosophy.[128] In other words, in Dworkin's theory, a judge's political view plays an integrated and even determinant role when it comes to finding the best interpretation and thus making the right decision. Against this approach, CLS generally holds that it is impossible to decide on the justifiability of legal arguments since different arguments can be supported by different grounds, and there is no rule to guide us in choosing between them. Martti Koskenniemi, whose work has tackled legal argumentation in international public law, therefore takes a more 'pessimistic' view, asserting that as far as international public law is concerned, states can always 'cherry-pick' either 'ascending' arguments (those that draw justification from state practices and distance themselves from theories of natural justice) or 'descending' arguments (normative arguments that create distance between law and state behaviour) that suit their political agendas, whereas little guidance is provided by law for making choices or adjudicating controversies.[129] Such indeterminacy inevitably leads to stalemate, rendering international law useless. In response to this view, Kratochwil argues that the problem of indeterminacy (especially the semantic one) can be reduced by bringing pragmatic considerations into play.[130] Hence, although he refutes the hope for 'one right answer', he puts

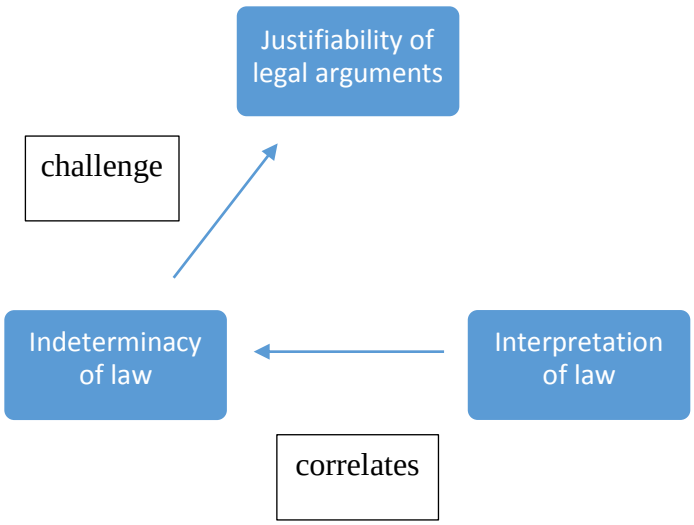
[126] For a discussion of the three levels of indeterminacy, see ibid 47–51.
[127] Ronald Myles Dworkin, *Taking Rights Seriously* (Duckworth 1977) Chapter 4.
[128] The term 'legal philosophy' here refers to 'a political theory sensitive to those issues on which interpretation in particular cases will depend'. Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 162.
[129] In *From Apology to Utopia* (Cambridge University Press 1989), Koskenniemi argues that to reach objectivity in legal argumentation under international law is to ensure concreteness and normativity simultaneously. However, the demands of concreteness (i.e. remaining close to state practices and distancing oneself from theories of natural justice) and normativity (i.e. creating distance between law and state behaviour) are contradictory and eventually cancel each other out. As a result, states (as well as other participants, such as lawyers and adjudicators) simply cherry pick either ascending (concreteness) or descending (normativity) arguments in the international legal context, which inevitably leads to stalemate, rendering international law useless. Koskenniemi would go on to reiterate this idea twenty years later in *The Politics of International Law* (Hart Publishing 2011).
[130] Kratochwil (n 123) 47.

emphasis on the context of interpretation, where some interpretations are indeed better than others.[131]

It is further seen that people's attitudes toward the indeterminacy of law correlate with their stances on the interpretation of law. That is to say, if one argues that 'anything goes' in international law when it comes to interpretation, as Koskenniemi seems to hold, one is bound to believe that indeterminacy is the essential character of international law. Some will even say that there is hardly any 'law' left in that sense. A person who holds not that 'anything goes' but that 'quite a bit goes'[132] may think that although indeterminacy is not a dominant quality or overwhelming problem, the chances of reaching a justified decision are still slim. If, like Kratochwil, one thinks that there are better interpretations in a given context, one may hold that the indeterminacy can be relieved by bringing pragmatic considerations into play.[133] Those who submit to the 'one right answer' thesis may even agree that there is no such thing as the 'indeterminacy of law' after all. Therefore, one's approach to the interpretation of law marks one's position on the spectrum of the indeterminacy of law. The gist of the debate can therefore be summarised as follows: on the one hand, the justifiability of a legal argument is said to be challenged by the problem of the indeterminacy of law. On the other hand, the perception of this indeterminacy correlates with one's approach to the interpretation of law. This relationship is captured in the following diagram:

Diagram 2.1

[131] ibid 68.
[132] Jan Klabbers, 'Virtuous Interpretation' in M. Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, vol 1 (Queen Mary Studies in International Law, Martinus Nijhoff Publishers 2010) 34.
[133] Kratochwil (n 123) 47.



One aspect of Kratochwil's view should be underscored here:

> Far from drawing us into the vortex of 'relativism', the recognition of plural possibilities on the one hand, and the need to justify particular choices on the other is the basis for 'pluralism' and orderly change, which are the central goods a legal system is supposed to preserve. That these goals often conflict is hardly news. However, this conflict in no way implies the nihilistic or existential conclusion that anything goes and/or that because there is no single right answer, any answer is as good as another.[134]

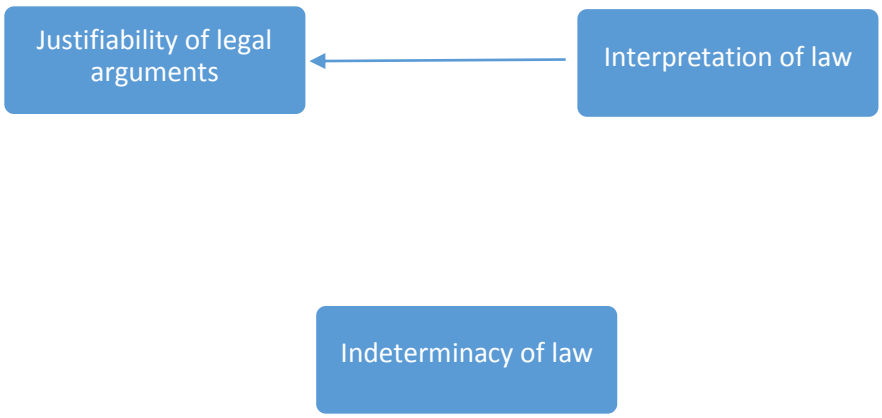
This view is important for the ongoing discussion because it questions the very presumption that this debate has taken for granted: the notion that the indeterminacy of law is a problem, a fault, and a threat to a legal system. Questioning this presumption prompts us to reconsider the very essence of the relationship among the plural possibilities of interpretation, concerns about the indeterminacy of law, and the justifiability of legal argumentation, as depicted above. One possible alternative is the view that although the plural possibilities of interpretation may *appear* to be a problem of indeterminacy, they are in fact the conditions for reaching a justifiable legal decision or argument. This is because the indeterminacy of law only becomes a problem (in other words, a fault or threat) for a legal system when there is no rule for determining whether a specific interpretation is legitimate or justifiable, which is not the same as a rule for determining the (one

[134] ibid 46–47.

and only) best interpretation in a given situation. Put differently, as Kratochwil rightly points out, the flip side of 'indeterminacy' is not 'uniqueness' but determinacy.[135] In this sense, the fact that there may be more than one right answer under a given law does not entail that the law is 'indeterminate'. [136] Moreover, there are other forms of logic that can be used in legal argumentation. As Scott Brewer indicates, these other forms include induction, inference to the best explanation, and analogy.[137] Therefore, it is possible that, based on different tools of logic, there can be different arguments, all of which can be legitimate and logically valid. In this sense, the fact that there is no rule for deciding on the one and only best interpretation does not mean that the indeterminacy of law is a problem and that it makes the justifiability of legal arguments unfeasible. This does not mean, however, that 'anything goes' in legal argumentation, that all possible interpretations are justifiable (and therefore allowed), or that there is no way to weigh two interpretations in a concrete context. There are rules for determining which interpretations are justifiable, and choosing a particular interpretation depends on the specific context and the prudence of the jurists. Diagram 2.2 illustrates this revised relationship:

Diagram 2.2

[135] Kratochwil (n 123) 46.
[136] For Kratochwil's argument on the 'indeterminacy' of legal arguments from a logic point of view, see ibid 45–47.
[137] Scott Brewer, 'Law, Logic, and Leibniz: A Contemporary Perspective' in Alberto Artosi, Bernardo Pieri and Giovanni Sartor (eds), *Leibniz: Logico-Philosophical Puzzles in the Law* (Springer 2013) 204–5.



The revised diagram means that although more than one interpretation can be justifiable (hence the indeterminacy), the justifiability of a legal argument ultimately depends on interpretation according to the given law and context. The indeterminacy of law does not get in the way of (or become a problem for) determining the justifiability of legal arguments.

Moreover, while I agree that context plays an important role in constraining (if not determining) a justifiable choice between different possible/plausible interpretations, the selection of which features of the context are relevant and which are not is, at the end of the day, a legal one. In this sense, the political open-endless should eventually be tamed by legal instruments in the domain of international law. It is on this very point that my view departs from CLS.

I am aware that entirely resorting to judicial prudence (or the virtue of jurists) may not be a satisfying answer, since it seems to give a theoretical question a practical solution. Nevertheless, I do hold that judicial prudence is an essential ingredient in determining what counts as appropriate interpretation and justifiable argumentation in a given context. As one scholar notes, means of interpretation are like a toolbox; jurists can choose which one fits best in a concrete situation in order to come to a justifiable outcome.[138] What I wish to argue further in this chapter, however, is that this deliberation must only occur within the constraints set by the general rules and strongholds found in that *legal* system. These general rules and strongholds of legal interpretation filter out any unjustifiable arguments, while those that remain are put in the hands of lawyers and jurists, who determining which elements are 'salient' and ultimately bringing out the best interpretation in the context, all things considered. The latter part (resorting to judicial prudence) is arguably a prerequisite for any legal decision, while the former part establishes the threshold for any

[138] Willem van Genugten, personal communication. June 2018.

discussion's being 'legitimate' under the given legal order. In this sense, it is the former part (exploring the general rules or strongholds of legal interpretation) that is at issue in the following discussion.

In sum, indeterminacy is simply an aspect of law that can be (and has been) tackled by various legal systems throughout human history. When it comes to the justifiability of legal arguments, what is at issue are the rules and boundaries for establishing justifiable interpretations rather than finding the one and only best interpretation. In the next two sections, I will consider the rules of interpretation for international treaties and argue not only that there are indeed boundaries for delineating justifiable interpretations but also that they have practical value and can guide practice.

2.2 Treaty interpretation: An art or a science?

The dispute on treaty interpretation, as Sinclair puts it, can be perceived from the standpoint of viewing treaty interpretation as a spectrum.[139] At one end of the spectrum, treaty interpretation is treated as an art, whereas at the other end it is considered a science.[140] Those who hold that treaty interpretation involves mastery of an art deny that there is any rule or principle that governs it. In their opinion, the 'application (of such rules and principles) is merely an *ex post facto* rationalisation of a conclusion reached on other grounds or serves as a cover for judicial creativeness'.[141] Those who treat treaty interpretation as a science believe that there are general rules that guide the universal application of treaties (as far as their jurisdiction goes). Nonetheless, few scholars have followed either of these ends to their extreme: on the one hand, as a human linguistic practice, treaty interpretation can never be perfectly scientific;[142] on the other hand, if we view treaty interpretation as an art that relies exclusively on the skills and virtues of the interpreter, we risk sacrificing one of the most fundamental characteristics of the rule of law, i.e. legal certainty. In this sense, referring to treaty interpretation as an 'art' or a 'science' should be understood more loosely, as a metaphorical way of formulating the question 'To what extent can

[139] Sinclair (n 121) 114.
[140] Sinclair (n 121) 114. The language of 'art' and 'science' is inspired by Panos Merkouris, 'Introduction: Interpretation is a Science, is an Art, is a Science' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, vol 1 (Queen Mary Studies in International Law, Martinus Nijhoff Publishers 2010) 1.
[141] Sinclair (n 121) 114. For more on viewing treaty interpretation as an art, see Klabbers (n 132).
[142] Merkouris (n 140) 6.

treaty interpretation be guided by universal rules?' The answer to this question constitutes a standpoint for approaching treaty interpretation.

Although descriptions vary, it is largely agreed that there are three schools of treaty interpretation: the textual (or objective) school, the intentional (or subjective) school, and the teleological (or object and purpose) school. The textual school 'centres on the actual text of the agreement and emphasises the analysis of the words used'.[143] On this approach, treaty interpretation is an objective process in the sense that its primary goal is to ascertain the meaning of the text.[144] The intentional school 'looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions'.[145] Hence, the primary goal of this school is to ascertain the intentions of the contracting parties.[146] As for the third school, it holds that the object and purpose of the treaty should be 'the most important backcloth against which the meaning of any particular treaty provision should be measured'.[147] In other words, the teleological school calls on the interpreter to decide on the purpose and object of a treaty in the first place and to then 'interpret it so as to give effect to that object and purpose'.[148] Although each school draws on different sources for determining the interpretation, none of them entirely abandons rules and principles of interpretation or denies that there can be deviation when interpreting according to certain rules. It is therefore fair to say that each of the three schools locates interpretation somewhere between the 'art' and the 'science' ends of the spectrum.

Although all three schools have roots that extend long before the adoption of the 1969 VCLT,[149] the 1969 VCLT is still the first and only attempt thus far[150] to give treaty interpretation a set of universal codified rules. Therefore, further discussion of the two articles on treaty interpretation in the VCLT (i.e. Articles 31 and 32, hereafter referred to as the VCLT rules) is necessary.[151] The drafting of the VCLT involved the work of four Special Rapporteurs. Although

[143] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 932–33.
[144] Sinclair (n 121) 114–15.
[145] Shaw (n 143).
[146] Sinclair (n 121) 114–15.
[147] Shaw (n 143).
[148] Sinclair (n 121) 114–15.
[149] Klabbers (n 132) 28–29.
[150] As noted by Alexander Orakhelashvili in *The Interpretation of Acts and Rules in Public international law*, 'The only codified set of rules on treaty interpretation is provided in Article 31 and 32 of the 1969 Vienna Convention on the Law of Treaties'. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 287.
[151] Section 3 of the VCLT, which includes Articles 31–33, concerns the interpretation of treaties. However, Article 33 of the VCLT, concerning the 'interpretation of treaties authenticated in two or more languages', deals with an

these Special Rapporteurs held different views on the interpretation of treaties, they demonstrated a common concern for codifying the rules for treaty interpretation.[152] For instance, Sir Humphrey Waldock informed the ILC members at the 726th meeting that '[the subject] was a vast and difficult one and he was anxious not to penetrate too deeply into the realm of logic and what might be described as the art of interpretation'.[153] Likewise, a member of the ILC at the time commented that 'the interpretation of documents is to some extent an art, not an exact science'.[154] These 'art-prone' comments do not mean that the VCLT rules take the 'art' approach to interpretation. To the contrary, in the ILC's commentary, the Commission also stated that 'the text must be presumed to be an authentic expression of the intention of the parties; … in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties'.[155] Although both the Commission and the Special Rapporteurs recognised that it was almost impossible to reach certainty from a set of interpretation rules, they also made clear that there should be a limited margin for *ad hoc* interpretation (or even judicial invention). In fact, this standpoint is well represented in Articles 31 and 32 of the VCLT. The following, therefore, analyses these two Articles, in order to further elaborate the position of the VCLT's interpretation rules.

Article 31 establishes the general rules of interpretation and reads as follows:

31.1 A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
31.2 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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independent issue in the area of treaty interpretation. On the other hand, Article 31 deals with 'general rules of interpretation', while Article 32 indicates 'supplementary means of interpretation'. Hence it is logical to take Articles 31 and 32 as a whole. This chapter therefore takes Articles 31 and 32 together as the general rules of interpreting international treaties, leaving Article 33 to the side. This is also due to the fact that none of the interpretation issues that are dealt with in this study resort to Article 33.

[152] Klabbers (n 132) 18.

[153] ILC, 726th Meeting: Law of Treaties, (A/CN.4/167), reproduced in YILC (1964), Vol. I: 20, [4]. See Merkouris (n 140) 8.

[154] ibid.

[155] United Nation Conference on the Law of treaties, Official Records: Documents of the Conference, A/CONF.39/11/Add.2, 40, [11]. See also Richard Gardiner, *Treaty Interpretation* (OUP 2008) 6 and Sinclair (n 121) 115–16.

a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

31.3 There shall be taken into account, together with the context:

a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
c. Any relevant rules of international law applicable in the relations between the parties.

31.4 A special meaning shall be given to a term if it is established that the parties so intended.

In the context of this research, several elements included in Article 31 require further elaboration:

- 'Good faith'

The principle of good faith flows directly from the rule *pacta sunt servanda*.[156] It refers primarily to 'the good faith of the parties to the treaty'.[157] That is to say, this rule guarantees that '[w]here a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith which should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up'.[158] In this regard, the principle of good faith represents the idea that derives from the intentional school of interpretation.

- 'Ordinary meaning'

To read a treaty text in accordance with its 'ordinary meaning', as outlined in Article 31, is not to read that text literally or to subject it to pure grammatical analysis.[159] Rather, this term states that 'the true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonable flow from the text'.[160] In Special Rapporteur Fitzmaurice's view, this

[156] *Yearbook of* the *International Law Commission*, 1966, Vol II, 221. See also Sinclair (n 121) 119.
[157] ibid.
[158] ibid 120.
[159] ibid 121.
[160] ibid.

principle also implies the 'principle of contemporaneity', according to which 'the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded'.[161] Although the principle of contemporaneity has been challenged by the ECtHR in a recent decision,[162] the principle of ordinary meaning is clearly an important part of the general rules of treaty interpretation and resonates with the textual school of interpretation.

- 'Object and purpose'

There has been some ambiguity and controversy with regard to the application of the phrase 'object and purpose' in treaty interpretation. According to the original wording of Article 31, the phrase 'object and purpose' is used within the context of searching for the 'ordinary meaning' of a text. Moreover, given how the phrase is put ('*In the light of its object and purpose'*), Sinclair even suggests that the reference to the object and purpose of a treaty is 'a secondary or ancillary process in the application of the general rule on the interpretation'.[163] However, although there is concern that the 'emergent purpose' in terms of which the object and purpose are deemed to develop over time may increase the risk of judicial legislation and compromise legal certainty,[164] there is a tendency to resort to the notion of objects and purposes in treaty interpretation in human rights supervisory bodies.[165] In some situations, emphasis on the object and purpose of treaties has even trumped the principle of contemporaneity.[166] There are several possible reasons for the prevalent use of 'object and purpose' rules in human rights supervisory bodies. One is that, unlike other international treaties in which the object and purpose are either vaguely articulated or diluted by contracting parties' different intentions, human rights treaties usually have clearer and more focused goals, namely to protect the human rights at issue. It is therefore easier to identify the relevant objects and purposes and to use them as a source for interpretation. Another, probably more important, reason is that, compared to other international treaties, human rights treaties have a normative agenda. Human rights supervisory bodies may therefore consider it important to

[161] ibid 124.
[162] See George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509. Nevertheless, this is still far from asserting that this principle does not apply in today's context. For instance, the principle *clausula rebus sic stantibus* still applies to treaty interpretation (see Article 62 of the VCLT 1969).
[163] Sinclair (n 121) 130.
[164] ibid 128, 131.
[165] Letsas (n 162) 509.
[166] ibid.

protect this normative core, whereas other international courts or tribunals do not have this concern (or do not take it to be paramount). Nonetheless, this element, with its increasing importance, clearly creates room for a teleological approach to treaty interpretation.

- 'Context'

Paragraphs 2 and 3 of Article 31 are about the context of interpretation and state that attention should be paid to any agreement, instrument, subsequent agreement, or subsequent practice that relates to the treaty between the parties. Article 31.3 (c) also mentions that any relevant rules of international law applicable to the relations between the parties should also be taken into consideration.

On the one hand, referring to the context of treaty interpretation, including the principle of relevant international rules, indicates a systematic reading of international law (which shall be understood in contrast to fragmentation).[167] On the other hand, it also represents the intentional approach to treaty interpretation in that the contracting parties' agreements, instruments, and subsequent practices are commonly used to establish their intentions.

Article 32 elaborates on supplementary means of interpretation and reads as follows:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> Leaves the meaning ambiguous or obscure; or
> Leads to a result which is manifestly absurd or unreasonable.

It is clear from the text that the *travaux préparatoires* and the circumstances of the conclusion are important in treaty interpretation. However, the fact that they are included in Article 32 as 'supplementary means' also shows that their permissibility should be conducted in 'carefully controlled circumstances'.[168] Although some scholars suggest that Articles 31 and 32 should be taken as a set of rules, and thus that Article 31 should not be treated as more important than Article 32, it is still important to bear in mind that according to Article 32, the meaning resulting from

[167] For the systematic reading of international law, see: (finalised by) Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (13 April 2006) A/CN.4/L.682.
[168] Sinclair (n 121) 142

reading into the *travaux préparatoires* and the circumstances of the conclusion should not lead to results that contradict the results of applying Article 31.[169]

To sum up, the VCLT interpretation rules are informed by all three schools of interpretation. This 'all-encompassing' approach has been criticised for its attempt to compromise the three schools and for its vagueness on the relative priority of the different rules (and thus for its supposed uselessness in practice). In the first article of *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, for instance, Jan Klabbers argues that, among other drawbacks,

> the rule(s) of Articles 31 and 32 are … a compromise between various approaches which itself goes back to a compromise concerning the various distinct activities that treaty interpretation signifies—and it will be obvious that not too much ought to be expected from Articles 31 and 32 as such. While it goes too far to suggest that 'anything goes' under these provisions, still, 'quite a bit goes' would be a fairly accurate synopsis.[170]

He ultimately recommends the 'virtuous' approach to interpretation, which involves reviving a particular element of treaty interpretation: 'reference to the virtues – the good faith – of the interpreter',[171] i.e. an emphasis on the 'virtuous reading', rather than 'virtuoso technique', when it comes to treaty interpretation.[172]

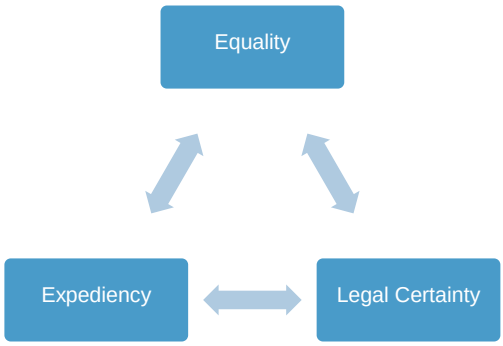
Is this all-encompassing VCLT approach simply a compromise between different schools of interpretation, and therefore practically useless? Here, I disagree with the critics. My view is that the VCLT interpretation rules capture the intertwined relationship between the three approaches to interpretation, and thus that unpacking this relationship is key to applying the VCLT rules. This is to say not only that the *raison d'être* of the VCLT interpretation rules goes deeper than a mere compromise between the different schools but also that these rules are in fact practically applicable. To gain a better understanding of this idea, I take inspiration from Gustav Radbruch and his theory of the antinomies of the idea of law.

[169] Sinclair ibid 141–47.
[170] Klabbers (n 132) 34.
[171] ibid 37.
[172] ibid.

2.3 A practical approach to applying VCLT interpretation rules

In his work on legal philosophy,[173] Radbruch proposed that the essence of the rule of law was constituted by equality, expediency, and legal certainty (as shown in Diagram 2.3). In his view, equality belongs to distributive justice (the principle of treating like cases alike and different cases differently), expediency addresses the purpose of the law, and legal certainty requires that the law be positive.[174]

Diagram 2.3

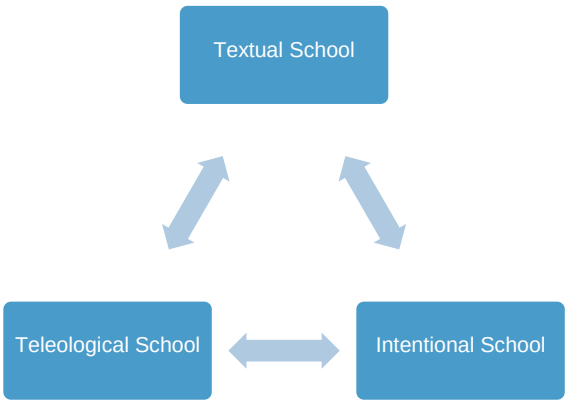


It is probably no coincidence that the three schools of interpretation represent each of the elements of Radbruch's theory, respectively. The textual school embodies the equality element. This is because this school emphasises that the original treaty text should be taken as it is. The ordinary meaning of the text should be treated as the general backdrop against which any interpretation is made. This objective perspective is the basis for guaranteeing that equals are treated equally. The intentional school's approach resonates with legal certainty. The intentional approach focuses on the authority of the interpretation by resorting to the intentions of the contracting parties (such as *travaux préparatoires*, subsequent state practice, and so on). In other words, this approach implies that by investigating the contracting parties' intentions, certain interpretations are given authority and therefore should be considered correct. In this sense, this approach also constrains judicial legislation and invention. The teleological school, as the third pillar, represents the expediency aspect given that it focuses on the purpose and object of the treaty when it comes to its

[173] See Emil Lask, Gustav Radbruch and Jean Dabin, *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press 1950) 47–224.
[174] ibid 107–8.

interpretation. Therefore, there is a triangular relationship between the three schools of interpretation that corresponds to Radbruch's original formula, which can be expressed as follows:

Diagram 2.4



In his work, Radbruch further explains the relationship between these three elements. On the one hand, these three elements contribute to each other. Equality requires expediency as the vantage point from which the substance of equality can be decided; expediency demands legal certainty since expediency is subject to disagreements between individuals and therefore cannot sustain a legal order. On the other hand, they also undermine each other. Expediency 'is bound to individualize as far as possible', and thus 'every inequality remains essential',[175] while legal certainty demands positivity without regard to either equality or expediency.[176] Hence, these three elements—namely equality, expediency, and legal certainty—are relative to each other, 'yet at the same time they contradict one another'.[177] This relationship also applies to the three schools of interpretation and is represented in the way that Articles 31 and 32 of the VCLT are constructed: all three schools are embodied in the two articles, while the absence of any rule to determine priority means that the three schools are in constant tension in their application. This relation is evident in court decisions on human rights issues. In *Golder v The United Kingdom*, for instance, the European Court of Human Rights (ECtHR) decided whether Article 6 of the European Convention on Human Rights (ECHR), on the right to a fair trial, provided for a right of access to court, with the following reasoning: on the one hand, the Court 'not only rejected the view,

[175] ibid 109.
[176] ibid.
[177] ibid 109–11.

defended by the United Kingdom, that lack of an explicit provision in the text constitutes a reason against granting an unenumerated right. It also stressed that the question whether to grant an unenumerated right is not a question whether we should stick to the actual text or read words into the text'.[178] On the other hand, the Court also 'felt confident that "the object and purpose" of the ECHR contains the ideal of the rule of law which leaves no ambiguity (which triggers resort to supplementary means under Article 32 VCLT)'.[179] Hence it is seen from this case that the Court made its decision by taking all three elements into consideration while inclining toward the teleological reading over the other two approaches. This shows that rather than simply viewing the VCLT rules as a compromise, it is probably more accurate to view them as a fair representation of the relative but contradictory relationship among the three schools of interpretation. The difference between these two sorts of understanding is that the former views the VCLT rules as vague abstractions with limited practical meaning, whereas the latter views them as a way of representing the complex nature of treaty interpretation, in which case none of these elements should be neglected. Therefore, I consider that the 'cocktail' approach represented in Articles 31 and 32 of the VCLT is not a weakness but a faithful way of representing the relationship between the different elements of treaty interpretation.

Following this logic, I shall propose a practical way of viewing treaty interpretation under the guidance of the VCLT rules: That is to view treaty interpretation as a manoeuvre among the three elements, namely equality (as suggested by the textual school), certainty (as proposed by the intentional school), and expedience (as represented by the teleological school). It is the interpreter's job to master the balance among these three elements. That is to say, it is also in the interpreter's power to manoeuvre among the three elements. It is probably fair to say that until human language and the (international) legal order achieve logical perfection, there will always be room to manoeuvre within and argue about treaty interpretation. This does not mean that the power lies solely in the hands of the interpreter, however, or that all arguments are acceptable. The bottom line is that no interpretation should contradict any of the three elements and be supported by at least one particular approach. This is, as I suggest, a practical way to apply the VCLT interpretation rules while preserving the value of judicial prudence. In fact, this approach also resonates with the ultimate principle of interpretation: *pacta sunt servanda*. In this regard, I agree

[178] Letsas (n 162) 516.
[179] ibid 517.

to some extent with the virtuous approach suggested by Klabbers. In my view, however, this approach is already embodied in Articles 31 and 32 of the VCLT. Moreover, bearing in mind the virtue of judicial prudence (or applying the principle of *pacta sunt servanda*) when interpreting a treaty does not mean that interpretation is simply a matter of art, over which the interpreter exercises complete control. The interpreter's power resides in his or her ability to manoeuvre among the three elements. Nevertheless, the interpretation must never contradict any one element or ignore these three elements altogether. Hence, just like any other legal practice, treaty interpretation is a craft; neither pure art nor pure science, it comes with bottom-line rules and practical skills.

2.4 Is IHRL a special case?

One question that must be considered before we close the present discussion concerns the extent to which the VCLT interpretation rules can be applied to IHRL. Casting this question in a more relatable form that has been discussed intensively by international legal scholars, especially those concerned with the fragmentation of international law, is IHRL a special case within international law?

The main argument for the view that IHRL is a special case of international law and that the VCLT does not apply to IHRL can be summarised as follows: first and foremost, unlike the other international treaties, which often contain inter-state obligations, the obligations generated by IHRL are mostly non-reciprocal.[180] Based on this understanding, in his paper 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', Matthew Craven argues that our understanding of IHRL should extend beyond our conventional understanding of 'international legal relations', which is contingent on states' consent and reciprocity, whereas IHRL is something else in the sense that it 'not only serve[s] to place certain limits upon the nature and scope of governmental authority but also contribute[s] to the

[180] '[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States … In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.' See the Advisory opinion given by the Inter-American Court of Human rights on the Effect of Reservations Case: *The effect of Reservations on the Entry into Force of the American Convention on Human Rights (Art 74 and 75).* Advisory Opinion OC-2/82 of 24 September 1982. See also Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL 498.

development of a justifiable basis for that authority'.[181] Therefore, the VCLT rules apply 'from time to time'. Resorting to *jus cogens* obligations is an even further step.[182] In general, the view that IHRL is a special case of international law is largely based on the idea that because IHRL has special features that traditional international law does not, it falls out of the purview of the VCLT. Therefore, the rules and principles that are applicable to general international law as codified in the VCLT do not automatically apply to IHRL.

Over the past decades, there has been much discussion on the possible *lex specialis* status of IHRL. In Human Rights Committee General Comment no. 24 (1994/52), for instance, the Committee made a controversial case for the special status of human rights treaties, claiming that the human rights regime should be treated differently than traditional international law and falls outside of the VCLT framework. This claim is reframed by Special Rapporteur on reservations to treaties Allan Pellet in his second report as follows: 'do, or should, certain treaties escape application of the Vienna regime by virtue of their object? Should the answer be yes, to what specific regime or regimes are, or should, these treaties be subject with respect to reservations?'[183] As a response, Pellet rejects the special case claim. One of the main arguments given in this report specifically concerns the argument regarding the 'non-reciprocal' nature of human rights treaties:

> Indeed, while it is clear that human rights treaties display these characteristics in a particularly striking way, it must also be recognized that they are not unique in doing so. The same is true of most environmental protection or disarmament treaties and, in a broader sense, all "normative" treaties by which the parties enact uniform rules which they undertake to apply.[184]

Therefore, Pellet argues, IHRL should not be considered a special case when it comes to applying the VCLT rules.

In her empirical research on the rules of human rights interpretation as applied by UN treaty bodies (i.e. HR Committee, CAT, CERD), Brigit Peters investigates the rules found in the views

[181] ibid 519.
[182] For an overview of studies that take this line, see Birgit Peters, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies, Law and Legitmacy* (CUP 2012) footnote 15.
[183] http://legal.un.org/ilc/documentation/english/a_cn4_477.pdf, [66].
[184] http://legal.un.org/ilc/documentation/english/a_cn4_477.pdf, [87].

rendered upon individual communications within the treaty bodies and compares them with the VCLT interpretation rules. Her conclusion is along the lines of Pellet's opinion: the treaty bodies generally follow the rules of the VCLT.[185] The interpretations of human rights treaties may have shown more focus (than other international treaties) on the contemporary context and state consensus[186] which, nevertheless, does not go beyond the bounds of the VCLT rules. Therefore, the study shows that an integrated approach to the VCLT and IHRL is the method preferred by international human rights treaty bodies.

In sum, the claim that IHRL is a special case in international law and therefore lies beyond the purview of the VCLT rules has yet to be proven. If most IHRL obligations are still essentially based on states' consent to be bound,[187] and if international human rights treaty bodies do not openly question the applicability of the VCLT rules, it suffices to say that the VCLT in general, and the VCLT interpretation rules in particular, are still applicable to IHRL.

2.5 Summary

The present chapter is meant to serve not as a comprehensive study of the VCLT treaty interpretation rules but rather as a proposal for the reconciliation of the three schools of treaty interpretation and for its practical applicability.

As universal rules of treaty interpretation, Articles 31 and 32 of the VCLT serve as an overarching guideline for interpreting IHRL. While some may hold that Articles 31 and 32 of the VCLT are too abstract and compromised, and therefore not useful in practice,[188] in truth they represent the delicate balance among the three approaches to treaty interpretation (i.e. the textual, intentional, and teleological approaches). This also implies that there is room for states to argue for alternative interpretations when it comes to international law in general. Such room is rather limited, however, as it is confined by the relevant textual, intentional, and teleological readings of the conventions at stake. This is because, as I have proposed in this chapter, if an interpretation

[185] Peters also emphasises that, on the other hand, the 'supposedly special methods, such as the principle of dynamic treaty interpretation and the principle of effectiveness, also fit well within the concept of the VCLT'. Peters (n 182) 42.
[186] ibid.
[187] Here, the word 'most' is used because there are indeed cases where states are bound by *jus cogens* or *erga omnes* obligations, which by definition do not need the states' consent.
[188] Cf. Klabbers (n 132) 31–34 ('IV. How the Vienna Convention Rules on Interpretation Are by their Very Nature of Little Concrete Help').

argument is to be justifiable, it cannot contradict any of the three approaches to interpretation and must be supported by at least one of them.

Chapter 3 The Issue of Particular Reasoning

Introduction

The remainder (Part II) of this study does not cover all of the arguments found in the constructive dialogue between China and human rights treaty bodies; instead, it focuses on a specific type of argument, which I refer to as particular reasoning. The idea of the particular, almost always coupled with the idea of the universal, has a history that traces back to the beginning of Western philosophy, appearing in Aristotle's discussion on *kath' hekasta* (of a particular), as opposed to *katholou* (universal, as 'of a whole').[189] In this sense, universals and particulars are opposite categorical propositions,[190] where the former can serve as a predicate while the latter cannot. 'Particular reasoning', as used in the legal context, is derived from this understanding.

In the legal context, universals are usually presented as rules or principles. Formally, universals as rules or principles correspond to universal quantification (for all subjects *x*, statement P(*x*) holds).[191] In this sense, universality is intrinsically linked with one of the essential characteristics of the rule of law—equality, which occurs when equals are treated equally under a given rule or principle. Particular reasoning, on the other hand, involves taking particular facts or circumstances into consideration when applying universal rules and principles. One may argue that, in this sense, almost all legal reasoning (or at least all legal reasoning worth discussing) involves particular reasoning, for one of the main tasks of legal argumentation is to bring the particulars of the case out into the open. In this regard, for the purposes of the present study, a more articulated and tailored account of particular reasoning is provided as follows: particular reasoning argues that, because of particular facts or circumstances, presupposed universal rules or principles do not apply automatically or should be open to alteration. On this account, the particular reasoning considered in this study can also be viewed as a defensive argumentation strategy, which, by appealing to particular circumstances, argues for *exclusion* or *deviation* from a certain rule or principle (i.e. the universal).

[189] The current study will not enter into the rich philosophical discussion of this issue and will instead focus on its implications in the legal context.
[190] See Michele Abrusci et al., 'Universal vs. Particular Reasoning: A Study with Neuroimaging Techniques' (2013) 21 Logic Journal of IGPL 1017.
[191] This form of logic is usually denoted as $\forall x\, P(x)$.

The choice to rely on this account of particular reasoning is based on two considerations. First, this is the definition most scholars adopt when dealing with particular reasoning in the legal context.[192] By confirming this understanding of particular reasoning, this study fits well with the main discussion of particular reasoning and its justification in law. Second, in the context of IHRL, this account of particular reasoning is often used to argue for a so-called relativistic point of view regarding human rights rules and principles. In other words, a relativistic point of view regarding human rights rules and principles is almost always put in this form of particular reasoning. By focusing on this account of particular reasoning in the context of IHRL, this study will be able to reflect on one of the most debated issues in human rights studies—the universality vs. the relativity of human rights.

The main aim of this chapter is to explore (in a preliminary way) the relationship between 'the universal' and 'the particular' in the context of IHRL. To this end, I first sketch the contours of the universality vs. relativity debate on human rights (3.1). I then expound on the method of justifying particular reasoning in the legal context in general and in the context of IHRL in particular, which will have further implications for the rule for determining the justifiability of particular reasoning in the context of IHRL (3.2). Finally, I introduce the four topics that will be investigated more thoroughly in Part II of this study (3.3).

3.1 A good old debate on human rights: Universal or particular?

The question whether human rights are universal or relative (particular)[193] has troubled human rights scholars for decades. Four main opinions have been put on the table thus far: the first two argue for either the universal or the relative character of human rights, the third tries to find a 'mid-way' between these and aims for reconciliation, and the fourth recommends that we abandon the whole universality vs. relativity debate altogether. In this section, I briefly introduce each of these approaches and then propose my own approach to this debate.

For the sake of consistency, I will first introduce (and dismiss) the approach that recommends the abandonment of the whole debate. This approach does address the question of

[192] See Zenon Bankowski and James MacLean, *The Universal and the Particular in Legal Reasoning* (Edinburgh Centre for Law and Society series 2006).

[193] In this context, I take the relative position to be equal to the particular position. This is because saying that some propositions on human rights are relatively true has the same effect as saying that some particular facts or circumstances exclude some subjects from some propositions.

where the debate can possibly go wrong;[194] however, abandoning the debate, burying the question, and attempting to direct attention to other 'practical' approaches is likely to render this question an elephant in the room, all the more obvious and salient. The reason for keeping the debate relevant is that, as 'one of the most invoked concepts in contemporary political discussion',[195] the basic character of human rights—the question of whether they are universal or relative—underpins almost all other arguments concerning human rights. 'Practical' approaches must be undertaken from a certain vantage point, which inevitably returns to this very question. Therefore, although dismissing the whole debate may seem to (temporarily) relieve the pressure, the question of the universality vs. the relativity of human rights will eventually rear its head once again (presumably sooner than later) and must be dealt with at some point. The other three approaches do indeed deal with this question.

In 'The Relative Universality of Human Rights', Jack Donnelly identifies different types of universality and relativity arguments in human rights discourse. I borrow his categories to describe the second and third approaches. Within the approach that argues for the universality of human rights,[196] various kinds of universality are cited. First is historical or anthropological universality, which is associated with the idea that the concept of human rights can be traced back to ancient history (not only in Europe but also in Asia and Africa).[197] Next is functional universality, which is connected to the idea that human rights are 'attractive remedies for some of the most pressing systemic (modern)[198] threats to human dignity'.[199] Following this, there is international legal universality, which is endorsed by the Universal Declaration of Human Rights (UDHR) and IHRL in general.[200] Finally, there is overlapping consensus universality, which is connected to Rawls's theory of overlapping consensus and focuses on the practical preference for human rights in the

[194] Randall Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia"' (2002) University of California, Los Angeles School of Law Research Paper Series, Research Paper No 02-23; M. Goodhart, 'Neither Relative nor Universal: A Response to Donnelly' (2008) 30 Human Rights Quarterly 183.
[195] Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 Philosophy and Public Affairs 315.
[196] Donnelly also distinguishes between conceptual and substantive universality. Although it was relevant in the original context, however, this differentiation overlaps with the other universality schools. To avoid confusion, I therefore do not mention these two types of universality in this section. Donnelly makes his thoughts on the various approaches clear in his paper: he approves of functional universality, international legal universality, and overlapping consensus universality while criticising historical/anthropological universality and ontological universality. For the purposes of the current discussion, I shall deliberately skip over these judgements.
[197] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Human Rights Quarterly 284.
[198] Bracket added.
[199] Donnelly (n 197) 288.
[200] ibid.

current international context,[201] and ontological universality, which is associated with the idea that human rights have '[a] single trans-historical foundation'.[202] Although these are different views of universality, they do have something in common: by providing varying grounds for the universality of human rights, they posit a link between the universality of human rights and their legitimacy.[203]

As for the approach that argues for the relativity of human rights, there are three main types of argument involved in the debate: the cultural relativism argument, the self-determination and sovereignty argument, and the post-colonial/critical argument. Cultural relativism is probably the most common argument for relativity.[204] This idea demands 'respect for cultural differences' and claims that human rights norms are relative to different cultural traditions. Hence 'practice is to be evaluated … by the standards of the culture in question'.[205] The self-determination and sovereignty argument advocates non-interference and non-intervention in states' practices when it comes to human rights issues by invoking protection of self-determination and international legal sovereignty into international law.[206] The post-colonial/critical argument, addressing the context of globalisation, bases its tenets on 'the civilizationally asymmetrical power relations embedded in the international discourse'[207] and advocates a critical approach in order to prevent 'imperial humanitarianism'.[208] Apart from some forms of extreme cultural relativism (which is seldom the main focus of the debate), relativistic arguments generally do not aim to challenge the legitimacy of the idea of human rights in general, but rather pose the following question: given cultural, political, and structural particularities, in what sense (post-structural arguments) and to what extent (cultural relativism and sovereignty arguments) can the relativity of human rights be justified over and against abstract universal norms?

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[201] ibid 289–91.
[202] ibid 292.
[203] In the debate between Donnelly and Goodhart, Goodhart points out this connection, while Donnelly expresses his objection. See Jack Donnelly, 'Human Rights: Both Universal and Relative (A Reply to Michael Goodhart)' (2008) 30 Human Rights Quarterly 194. However, I do think this connection is at work (implicitly or explicitly) in each of the universality arguments.
[204] Donnelly (n 197) 293.
[205] The cultural relativism idea presented here is a 'substantive normative doctrine', as Donnelly puts it in his paper. Another stream of cultural relativism—methodological cultural relativism—has been held by certain anthropologists as a way of guarding against the invasion of modern Western values. However, since this point of view has rarely been mentioned in human rights debates, I have decided not to include it in the current discussion (ibid 294).
[206] ibid 296–97.
[207] ibid 297.
[208] ibid 298.

This question is captured in a sense by the last approach—that is, the approach that advocates reconciling these two characterisations of human rights and finding an (all-encompassing) solution. Representative of this group is Donnelly's relative universality approach. He argues that 'human rights are (relatively) universal at the level of the *concept*', while for 'particular rights concepts … relativity is not merely defensible but desirable'.[209] This reconciling perspective has been used to argue for the possibility of the co-existence of human rights systems and the states or regions that usually invoke relativism arguments on this matter.[210] This idea to some extent echoes the distinction between 'thin' and 'thick' concepts in ethics.[211] However, this 'relatively universal' approach implies that the more 'particular' a human right concern, the more 'relative' that right becomes—an idea which, however plausible at first glance, is logically implausible (as I will argue in the next section).[212]

Nonetheless, the approach I shall propose goes along with the last group in the sense that I also presuppose the co-existence of the two characterisations of human rights (at least as far as legal argumentation is concerned). Unlike Donnelly's view, however, on my view, the debate over the universality or the relativity of human rights, as far as legal argumentation is concerned, must be justified from the side of universality. This means that justified (or justifiable) particular legal reasoning is universalised (or universalisable) particular reasoning. I will further elaborate on this point in the next section. Here, it suffices to note that this approach differs from most of the approaches that fall under the last category in a number of respects. First, I situate this debate in the context of IHRL. Given not only the universal implications of the UDHR but also the fact that all UN member states have ratified at least one of the core international human rights instruments,[213] this context does not change the overall focus of the debate but rather gives it a more defined scope and concreteness. Second, by situating the entire debate in the context of IHRL, I will not be responding to the ontological aspect of the question, i.e. the question of whether (or in what sense) human rights *are* universal or relative. Instead, I take an epistemic approach to this debate. Finally, reconciliation is neither the method nor the purpose of this approach. Given

[209] ibid 299.
[210] See Declan O'Sullivan, 'Is the declaration of human rights universal?' (2000) 4 The International Journal of Human Rights 25.
[211] See, for instance, Alfred Jules Ayer and Ted Honderich, *Language, Truth and Logic* (Palgrave Macmillan 2004).
[212] This holds at least as far as human rights law is concerned.
[213] 'There are nine core international human rights treaties … [A]ll UN Member States have ratified at least one core international human rights treaty, and 80 percent have ratified four or more'.
See: http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

that there are both universal and relative elements in international human rights instruments and that the debate about the universality vs. the relativity of human rights has created much confusion when it comes to justifying these two kinds of approaches, the aim of this study is to establish the criteria by which the justifiability of these arguments can be determined in the context of IHRL.

3.2 Justifying particular reasoning in the legal context: A vantage point

To justify a particular reasoning, Neil MacCormick submitted that:

> There is[]no justification without univerzalisation; motivation needs no universalization; but explanation requires generalization. For particular facts—or particular motives—to be justifying reasons they have to be subsumable under a relevant principle of action universally stated.[214]

In this section, I elaborate on this view of justifying particular reasoning and its practical implications.

3.2.1 Justifiable particular reasoning is universalisable

The justifiability of particular reasoning in the legal context depends on whether such particular reasoning can be justified in the form of universals. This insight has been argued eloquently by Neil MacCormick in his *Rhetoric and the Rule of Law*.[215] MacCormick argues that in order for particular reasoning to be deemed justifiable, it must be able to apply to all cases that bear the same particulars. That is, justifiable particular reasoning must be universalisable.

Moreover, MacCormick also points out that universals *qua* rules or principles in the legal context are defeasible universals, which means that as far as legal rules or principles are concerned, there is always room for raising particulars that require revision of the rules, principles or their application. Nonetheless, once such particulars are acknowledged as exceptions to the relevant rules or principles, they become universalised exceptions. To make this point, MacCormick uses the conjoined twins example, stating that no matter how 'most unlikely to be repeated' the case is (the case is described in the judgement as 'very unique'), it is still considered a type case.[216] That is to say, if in the future another case happens to satisfy all the relevant particulars stated in this

[214] Neil Maccormick, 'Particulars and Universals', in Zenon Bankowski and James MacLean (eds) *The Universal and the Particular in Legal Reasoning* (Ashgate 2006), 19.
[215] The point concerning the distinction between particulars and universals is argued in Chapter 5 of *Rhetoric and the Rule of Law*.
[216] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005) 90.

case, the same judgement should be passed. This understanding of universal and particular reasoning—taking universalisability as a criterion for the justifiability of particular reasoning—is well explained in MacCormick's own words as follows:

> This is so, even if one wisely allows for the ever-present possibility of unforeseen events and circumstances requiring one to revise hitherto accepted near-certainties. If 'particularism' is understood as no more than a position that insists on this openness to evaluate new cases and circumstances when these arise, then it is acceptable. But this is openness to new particulars within a justifying schema of defeasible universals, and each new exception once acknowledged becomes itself a universalized exception.[217]

Put differently, the borderline between particulars and universals must be drawn on the side of the universals. Only particulars that are universalisable are justifiable particulars. This is also the standpoint I will be taking when determining the justifiability of particular reasoning in the context of IHRL.

3.2.2 Implications for the universalisable particular thesis

Particular reasoning can be represented in the form of a legal syllogism as follows:

Whenever OF then NC;
OF (p);
[Implicit or explicit rule: Whenever OF (p) then not NC];
Therefore, not NC.
[OF denotes operative facts; NC denotes normative consequences; OF (p) denotes particular operative facts.]

By putting particular reasoning into syllogistic form, we can identify at least three implications that are relevant to the current discussion.

First, not all particulars are significant when it comes to particular reasoning—only those that are universalisable. This point is significant because it explains how particulars can entail

[217] ibid.

'universals'. If we examine the origins of these terms—which trace back to ancient Greece, to Aristotle—a potential problem is revealed. According to its definition, a universal is considered 'a repeatable item, something common to many things. Hence a universal is located in the many places in which these things are located'. A particular, as the antithesis of a universal, is 'a non-repeatable item; it has a unique occurrence or location, in the case of spatio-temporal particulars, a unique location in space and time'.[218] These seemingly plausible and intuitive definitions challenge our 'universalisable particular' justification rule; since particulars are unique and non-repeatable, they cannot be 'universalisable'. However, particular reasoning does not (and should not) include all relevant particulars that make the given subject unique (and therefore 'particular'); rather, it merely brings out the features that are salient in the given context. Those features explain why the given subject is particular enough and therefore permitted to deviate from the universal rule. In this sense, such particular reasoning can be universalisable.

Second, there are two ways to construct a chain of justifiable particular reasoning, which can be put in the form of a syllogism as follows:

(1) Whenever OF then NC;
OF (p);
[Implicit (or explicit) rule: Whenever OF (p) then not NC];
Therefore, not NC.

(2) Whenever OF then NC;
OF (p);
[Implicit or explicit rule: Whenever OF (p) then not NC];
Therefore, not NC.
Whenever OF (p), then NC (p);
Therefore, NC (p).
[NC (p) denotes particular normative consequences.]

[218] Verity Harte, 'What's a Particular, and What Makes it So? Some Thoughts, Mainly about Aristotle' in Robert W. Sharples (ed), *Particulars in Greek Philosophy: The Seventh S. V. Keeling Colloquium in Ancient Philosophy* (Brill 2009) 97.

It is clear that although formulas (1) and (2) are both logically correct and legally justifiable, they entail significantly different burdens of argument. In formula (1), the reasoning is considered justifiable until the opponent makes a justifiable counter-argument. It is therefore a defensive move that does not further the dialogue. In formula (2), on the other hand, the arguer voluntarily takes up the burden of argument, which moves the dialogue forward by explicating the salient features that make the given subject a particular case that should be allowed to deviate from the relevant universal rules. Therefore, although both cases can be legally justifiable, only the second is considered constructive.

Third, deciding whether such particular reasoning is justifiable involves deciding whether the implicit or explicit rule of universalisability is valid. In other words, deciding whether particular reasoning is justifiable involves deciding whether cases that have the same salient features are permitted to deviate from the universal rules in a given legal system.

In sum, a particular is by definition 'unique' and 'non-repeatable'. However, this does not affect the justification rule by which it can be shown that a piece of particular reasoning is universalisable. This is because particular reasoning need not (and should not) identify every feature that makes the subject a particular; rather, it must only articulate the 'salient' feature(s) that explain(s) why the particular should be excluded or should deviate from the universal rules or principles. The 'universalisability' therefore lies in the fact that the 'salient' feature as articulated in the particular reasoning should be universalisable in the sense that any subject that shares that feature should also be excluded or allowed to deviate from the given rule or principle. To decide whether such reasoning is justified is to decide whether the rule that indicates the universalisability of the salient feature is justified. Constructive particular reasoning must also take up the burden of argument and move the dialogue forward (as in formula 2).

3.3 Particular reasoning in the constructive dialogue between China and the five human rights treaty bodies: An overview

This section further sets out the framework for analysing the particular reasoning found in the constructive dialogue between China and human rights treaty bodies and introduces four topics that will be the focus of later chapters (Part II). I first revisit the taxonomy of external legal arguments (3.3.1). This discussion on the taxonomy of legal argumentation refers to Neil MacCormick's *Rhetoric and the Rule of Law* (2005). It provides guidance and a framework for

selecting, identifying, and organising the particular reasoning found in the constructive dialogue between China and the core international human rights treaty bodies (3.3.2).

3.3.1 The taxonomy of external legal arguments revisited

Imagine the following scenario. A delegation from Nambia[219] is presenting at a constructive dialogue session of the CRC Committee. The committee members are concerned that Nambia has an imbalanced gender ratio in primary schools, with female attendees making up only 30 percent of the total students. The committee members argue that this situation violates Articles 2 and 28 of the Convention on the principle of non-discrimination and children's right to education. The state's delegation does not agree with the committee's judgements, however, arguing that Nambia has not violated its treaty obligations. What could their possible arguments be?

A. The delegation may deny the data presented by the committee members and claim that a more accurate statistic shows that female students in fact make up more than 30 percent of total students.
B. The delegation could point out that there are different types of primary schools in Nambia. The committee only takes certain types into consideration. When taking other types of primary schools into account, the gender ratio is more balanced.
C. The delegation could argue that the gender ratio in the school cannot be used as an indicator of whether the country is protecting children's right to education and non-discrimination. An equal right to education means that when the relevant conditions are equal, the chances of receiving education are equal. Hence the state holds a different (and therefore particular) interpretation of the right to education that deviates from the committee's.
D. The delegation could argue that the fact that only 30 percent of primary school attendees are female does not mean that girls do not have an equal right to education. This is a constitutional right held by every citizen, but putting this right into practice is a different issue. Therefore, Articles 2 and 28 are not relevant to this discussion.

[219] Nambia is, of course, a fictional state. Those interested in speech acts may find it interesting that the fact that US President Donald Trump mentioned it as an actual state in the UN General Assembly does not make it real (http://edition.cnn.com/2017/09/20/politics/donald-trump-africa/index.html).

E. The delegation could argue that, given that Nambia is a developing country, gender equality with regard to education takes time. Nambia has already taken certain measures to improve the situation, but it cannot guarantee that the gender gap will be closed in the short term.

The above scenarios are concrete examples of different types of external argument that, according to MacCormick, exhaust the non-deductive ways in which a legal argument can be defeated. As we have seen, included in these four types are fact arguments, classification arguments, interpretation arguments, and relevance arguments. As for the last scenario, it mainly concerns the interpretation of Article 2 (1) of the ICESCR, which concerns progressive implementation. It is singled out as a separate scenario due to its importance to economic, social, and cultural rights as well as relativistic argumentation. If this observation holds true, these five types of argument can be used as a comprehensive framework for analysing legal arguments, serving not only as a taxonomy for categorising and organising the empirical data but also as a lens through which to select arguments for further investigation.

The hypothetical Nambia case is in fact also an example of particular reasoning used under each external legal argumentation type:

1. Scenario A: to deny the validity of the data is to offer a particular fact as a ground for refuting the committee's judgement.
2. Scenario B: by pointing out certain particular circumstances, namely that there are different types of primary schools in Nambia, the delegation challenges the classification of 'primary school' as used by the committee.
3. Scenario C: the delegation holds a particular interpretation of the right to education that deviates from the committee's interpretation.
4. Scenario D: by arguing that the implementation gap is beyond the purview of the committee, the delegation offers its particular reasoning to challenge the relevance of the rules of the Convention at issue.
5. Scenario E: by claiming 'developing country' status, the delegation asks for a margin of discretion with regard to implementing social and cultural rights.

In what follows, I will use the above taxonomy as a lens through which to select, categorise, and organise the particular reasoning at work between China and human rights treaty bodies in

constructive dialogue, which I will first outline in the next section of this chapter and further investigate in Part II of this study.[220]

3.3.2 The four topics that will be investigated further in Part II

Having established a basic understanding of particular reasoning in the legal context, including the vantage point of its justification and taxonomy, it is now time to introduce the particular reasoning that will be investigated in detail in the second part of this book. Four topics will be studied: core definitions, substantive reservations, sovereignty, and the implementation gap.

The arguments on core definitions in the given Convention concern cases in which China and the committee members disagree on the interpretation of core definitions in the relevant human rights treaties and in which China invokes particular reasoning, arguing for exclusion or deviation from the committee members' interpretation. Chapter 4 enquires into whether those arguments are justifiable. The focus is on integrating the core definitions into domestic law as codified in Article 1 of CAT, CEDAW, CERD, and CRC.

The arguments on substantive reservations concern cases in which China makes a substantive reservation upon entering into a human rights treaty and in which China justifies this reservation by invoking particular reasoning. These reservations have also been challenged by the committee members in several cases. In China's response, the arguments invoking particular reasoning are either reiterated or elaborated. Although reservations to international treaties is a highly technical issue, Chapter 5 tries to approach it from an argumentation perspective in general. Special attention is paid to the interplay between the universal and the particular in this context.

The sovereignty arguments are themselves particular reasons. By invoking sovereignty (or its variations), China has claimed that certain human rights rules either do not apply to it or should be adapted. This is one of the most debated examples of particular reasoning when it comes to human rights law. Chapter 6 will give this issue a closer look.

Last but not least, particular reasoning has also been largely used in the context of economic, social, and cultural rights. This is mostly due to the generally asserted 'progressive' rather than 'immediate' characteristic of these rights, which is codified in the controversial Article 2 (1) of the ICESCR. Among other ambiguously worded stipulations, this article indicates a

[220] For the original wording of these arguments, see Annex.

method for ‘progressively’ working towards the full realisation of the rights recognised by the treaty. Particular reasoning, which is usually used to support the so-called ‘implementation gap’ (as seen in scenario E), has been common in constructive dialogue within the CESCR and other treaty bodies that concern economic, social, and cultural rights, especially among developing countries. Chapter 7 investigates the question of how wide the margin ought to be (and actually is) when it comes to establishing an implementation gap with regard to economic, social, and cultural rights and tries to put both China and the committees’ arguments into perspective.

The reasons for focusing on these four topics are as follows. First, they represent the issues with regard to which most particular reasons and arguments are found (on both sides). As indicated at the beginning of this study, not all statements are arguments, and not all arguments invoke particular reasoning. In fact, a large proportion of the discourse in constructive dialogue has the aim of exchanging information and stating facts. These four issues, however, are ones that both China and the committees have systematically put forward in their arguments, with a focus on particulars.

Secondly, from the perspective of international human rights treaties, these four issues cover the most important aspects of treaties, namely core definitions, reservations, jurisdiction (scope of the mandate), and implementation. In other words, although many other issues could have been discussed with regards to international human rights treaties, these four topics sufficiently depict the scope of the relevant treaties and the contours of the relationship between international treaties and their state parties.

Thirdly, in terms of the analytical framework mentioned above, these four topics also correspond to the different types of external legal argumentation. Although it is possible for there to be more than one argumentation type within each topic, a dominant type can be identified in the first three topics: arguing about core definitions involves interpreting a given treaty; the question of whether a reservation made by a state is valid is a classification problem; and arguments about sovereignty concerning a treaty and its supervisory committee’s mandate involve determining their relevance. Furthermore, the arguments about implementation gaps are largely based on the interpretation of Article 2 of the ICESCR, the classification of the core obligations, and the relevance of the given treaty to the situation at hand. Therefore, it is a combination of the external

types of legal argumentation. In short, the four topics that are discussed in Part II of this study embody each external legal argumentation type and their combinations.[221]

Finally, the choice of focus is also due to practical considerations. Had I adopted a taxonomy that only focused on arguments that are themselves particular reasons (for instance cultural relativism arguments, sovereignty arguments, or post-colonial arguments), I would have found that those particular reasons are used to support arguments that fall under different topics. For instance, cultural relativism has been used by China in the context of topics related to treaty interpretation, reservations, and implementation gaps. Determining the justifiability of the cultural relativism argument would thus involve taking into account the full range of perspectives concerning interpretation, reservations, and economic, social and culture rights. Likewise for the sovereignty arguments. Taking this on would have been complex and redundant, to say the least.

In sum, the four topics studied here a) are the issues that most often prompt particular reasoning in the constructive dialogue between China and the core international human rights treaty bodies, b) offer essential perspectives from which to depict the relationship between China and the treaties at issue in this study, c) are examples of each of the external legal reasoning types and their combinations, and d) are based on practical considerations such as avoiding redundancy.

3.4 Summary

This chapter is the final chapter of Part I and completes my account of the theoretical approach and method that I will be adopting in my investigation of the justifiability of particular reasoning in constructive dialogue between China and five human rights treaty bodies. The importance of discussing the justifiability of particular reasoning becomes clear when we consider long-held debates on the universality vs. the relativity of human rights. Following Neil MacCormick's arguments concerning universal and particular reasoning in the legal context, I have argued that, contrary to 'relative universality', the proper standpoint for justifying particular reasoning is 'universalised or universalisable particularity'. This means that the general rule for determining the justifiability of particular reasoning in the legal context lies in its universalisability. Although this is a fundamental understanding regarding the justification of particular reasoning, this insight

[221] Factual arguments, as a specific empirical argumentation type, will not be discussed separately in this study, for that the justifiability of a factual argument does not depend in a significant way on interpretation of the treaty, but mainly about the fact finding and establishing methods, procedures, and capabilities of the given treaty. Therefore, it is beyond the purview of this research.

alone cannot get us to the point of deciding whether an instance of particular reasoning is indeed justifiable (although it can be used to decide whether an instance of particular reasoning is not universalisable, in which case such reasoning is not justifiable). Hence, the first three chapters must be read as a whole in order to get a grip on justifying particular reasoning in the context of constructive dialogue. This point will be emphasised in the Summary of Part I.

Summary of Part I: Justifying Particular Reasoning in Constructive Dialogue

This study attempts to establish a practical approach to determining the justifiability of particular reasoning in the context of constructive dialogue within international human rights treaty bodies and to apply it to the constructive dialogue between China and five human rights treaty bodies. The first part of this inquiry comprises the first three chapters.

Chapter 1 asks what counts as a 'good argument' in the context of constructive dialogue. I suggest that legal argumentation in constructive dialogue is partly legal, partly dialogical. Accordingly, the legal arguments found in constructive dialogue should be justified against two criteria, namely legal justifiability and dialogical constructiveness. In practice, dialogical constructiveness depends on whether the arguer takes up the burden of argument and successfully shifts it to the other party (the opponent). As for legal justifiability, I argue that the external justification of a legal argument mainly comes down to interpretation. This holds in particular in the context of international (human rights) law. Given that general enforcement is relatively limited in international (human rights) law compared to domestic legal instruments, the key task of justifying a given legal argument ultimately comes down to evaluating the interpretation of the given law. Whenever the justifiability of an interpretation is at issue, I will apply the practical approach proposed in Chapter 2. That is, a justifiable interpretation cannot be in conflict with the text as codified, the shared intentions of the drafters[222] and the purposes and objects of the legal order. In addition, it should be supported by (at least) one of these. In Chapter 3, I focus on particular reasoning in legal arguments and discuss a vantage point for determining the justifiability of particular reasoning in this context. As I argue, justifiable particular reasoning is universalisable particular reasoning.

When we take all three chapters together, we get the whole picture of the theoretical foundation of the second part of this study. In short, when determining the justifiability of particular reasoning in the constructive dialogue between China and the treaty bodies, we should ask the following: is the relevant particular reasoning universalisable? Are the interpretations justifiable? And is the argument constructive? Only when the argument satisfies all these criteria can it be considered justifiable.

[222] There should also be room for developing shared intentions as time goes by. Nevertheless, the emphasis is on 'shared' rather than 'individual'.

Part II

Chapter 4 Particular Reasoning on Interpretation in the Constructive Dialogue between China and International Human Rights Treaty Bodies

Introduction

In this chapter, I investigate the particular reasoning found in interpretation arguments made by China in front of core international human rights treaty bodies. By 'interpretation arguments', I mean arguments that solely concern the interpretation of the relevant convention in a direct and strict sense. In other words, the issues dealt with in this chapter are solely about the interpretation of a given convention. As shown in Chapter 2, inquiry into interpretation is one of the most important elements in determining an argument's legal justifiability. Therefore, investigations into the justifiability of a legal argument will inevitably touch upon the issue of interpretation. This chapter will not discuss topics that have been argued for by reference to a certain interpretation, however; instead, it will focus on topics that are themselves interpretation disputes. For example, if in a CEDAW constructive dialogue session the committee members criticise the Chinese government for not having enough female officials, the interpretation of 'discrimination against women' as in Article 1 of the Convention can be invoked and interpreted in different ways in order to support either side's arguments. In this scenario, however, different interpretations of 'discrimination against women' merely serve as one aspect of the debate, whereas the question of whether there is a sufficient number of female officials also involves other forms of reasoning, such as reasoning about reasonableness. Hence, in this case, interpretation of 'discrimination against women' alone cannot determine the legal justifiability of the relevant arguments. By comparison, if the issue at hand is whether the definition of 'discrimination against women' in Chinese law is compatible with the term codified in the CEDAW, then the relevant arguments will be interpretation arguments in and of themselves, for their main concern is interpretation *per se*. In other words, when it comes to the arguments examined in this chapter, the interpretation of a given convention is not a means but the end of the discussion.

Two issues are discussed in this chapter: Article 1 of the CAT (4.1) and the state's obligation towards North Korean border-crossers (4.2). Under each topic, both China and the committees' arguments are first reconstructed chronologically. I then analyse the legal

justifiability of these arguments by referring to the relevant provisions of the conventions. The criteria for justifiable interpretations as proposed in Chapter 2 will be used as a benchmark for determining the legal justifiability of the interpretation arguments in this chapter. Recall the criteria: a justifiable interpretation is an interpretation that does not contradict textual, intentional, or teleological readings of the given law and is supported by at least one of these.

In addition, over the past decades, human rights treaty bodies have issued numerous General Comments (or General Recommendations, in the case of CEDAW), which in most cases aim to clarify specific state party obligations under the conventions. The General Comments are therefore pertinent to the committees' stances on these matters. As arguably the most authoritative interpretation,[223] there is good reason to use the General Comments as a source when interpreting the treaties. Some scholars have also suggested that the General Comments may either reflect or trigger subsequent agreements and practices of the parties, as in Article 31 3(b) of the VCLT.[224] However, there are also opinions that cast doubt on both the normative role and the quality of the General Comments. Regarding the General Comments adopted by Human Rights Committee, for instance, McGoldrick argues that some General Comments are better than others in terms of representing 'valuable indications of the content of the respective rights and steps that States parties could or should undertake to ensure the implementation of those rights'.[225] Other critics highlight the inconsistency and lack of general method of the General Comments, which, it is claimed, undermine their legitimacy.[226] All things considered, then, it would seem as though a comprehensive search for an authoritative interpretation of the treaties must refer to the General Comments as a source while remaining careful not to give them the same importance as the textual, intentional, and teleological readings of the original treaties. Especially in cases where the General Comments are found to contradict the readings of a given convention or to add new obligations that are not specified in the original convention, they should be subject to further investigation into their own justifiability.

[223] See Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press 1998) 91.
[224] Georg Nolte, 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings', in Georg Nolte (ed), *Treaties and Subsequent* Practice (Oxford University Press 2013) 381.
[225] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) 94.
[226] See Kerstin Mechlem, 'Treaty Body and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905.

As for the constructiveness of the arguments, since responsibility for keeping the dialogue constructive is given to the side that bears the burden of argument, the main criterion for determining the constructiveness of the arguments is whether the side bearing the burden of argument has changed its former unjustifiable arguments and come up with a different one, thus shifting the burden of argument. This also means that not all arguments, but only those topics that have been argued consecutively in more than one session, can be assessed in terms of their constructiveness.

4.1 On Article 1 of the CAT

Article 1 of the CAT, which codifies the definition of torture, reads as follows:

> 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.[227]

The interpretation of Article 1 has been discussed since China's first national session in the CAT in 1990 and up until the latest session in 2015. Several concerns have been raised during these dialogues. First and foremost is the request by the committee to incorporate the definition of Article 1 into Chinese domestic law, which follows discussions on the scope of torture in Chinese domestic law compared to the scope as codified in Article 1. In addition, China invoked particular reasoning to defend its views on the 'seriousness' of torture. Furthermore, China raised concerns about whether involuntary disappearances should be examined under the CAT. These issues, although closely related, concern different aspects of Article 1 of the CAT. The arguments under each issue will therefore be investigated separately.

[227] http: www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx.

4.1.1 Incorporating the definition of torture into domestic law

Since the text of the CAT does not directly require that states incorporate the definition of torture as codified in Article 1 into their domestic law, the focus of justifying arguments is placed on the intentional and teleological aspects of the Article. During one of the earliest national sessions in 1990, committee member Mr. Chanet mentioned that 'no specific definition of torture had been included in Chinese legislation so as to ensure that torture was an offence under criminal law'.[228] As a response, the Chinese delegation argued that the '[d]efinition of torture varied, so that what in the Chinese view was positive might be considered negative elsewhere'.[229] This response, as one of the earliest arguments China had expressed to international human rights treaty bodies, simply claimed that China was 'playing a different game'. This is therefore not only an argument of relevance but also a form of particular reasoning. In other words, by claiming that it constituted a particular case, China argued that it could hold a different definition of torture than the committee's definition, and thus that Article 1 was not relevant. It should be self-evident that the argument does not refer to the textual or teleological interpretation of Article 1 since the Chinese delegation neither explained their understanding of Article 1 nor turned to the purpose and object of the Convention. As for the intentional approach, although the Chinese delegation expressed their different point of view regarding torture, they did not establish this intention during the drafting of the Convention, nor did they invoke the subsequent agreements or state practices to support their statement. Moreover, they did not argue that this intention was shared by other states. In addition, this particular reasoning is not universalisable, for if other state parties were entitled to their own views on torture, there would be no ground for the existence of the CAT in the first place. This argument therefore failed to respond by appealing to either a textual, an intentional, or a teleological reading of Article 1. It is thus not a justifiable argument.

In the 1993 session, the committee reiterated its request that Article 1 be incorporated into domestic law by further arguing that because there was no definition of torture in Chinese domestic law, it was difficult to establish accurate statistics on the situation with regards to torture,[230]

[228] *Committee Against Torture, Fourth session, Summary Record of the 51st Meeting (CAT/C/SR.51),* 4 May 1990), para 36.
[229] ibid para 50.
[230] *Committee Against Torture, Tenth session, Summary Record of the Third Part (Public) of the 145th Meeting (CAT/C/SR.145/Add.2)* (20 July 1993), para 17; *Committee Against Torture, Sixteenth session, Summary Record of the 251st Meeting (CAT/C/SR.251)* (5 June 1996), para 8.

especially psychological torture.[231] Moreover, the lack of a clear definition meant that acts of torture were not generally punished.[232] As a response, the Chinese delegation listed several articles in the Chinese Penal Code[233] and argued that '[t]orture as such was defined in China's Penal Code as a criminal activity'.[234] Therefore, China changed its previous argument and argued that the definition of torture was included in Chinese domestic law but diffused into different provisions.

In the 1996 session, the Chinese delegation provided three further justifications for Chinese practice with regards to incorporating the definition of torture into the domestic law. The first was that '[a]lthough China's domestic legislation did not incorporate the definition of torture appearing in Article 1 of the Convention, its domestic legislative provisions designated various forms of torture as criminal offences. Consequently, China was in a position to implement the Convention effectively and honour its obligations thereunder'.[235] The second justification was that 'the National People's Congress had to approve the accession of China to international legal instruments. Once approved, such an instrument was binding upon the Government, which was obliged to incorporate its provisions into domestic law, the international instrument always taking precedence in the event of any discrepancy. When, however, China entered reservations to an international instrument, the relevant provisions were not binding. That general principle held good for the Convention against Torture'.[236] The third justification was that '[i]n addition, the Criminal Law, which contained a definition of torture that complied with Article 1 of the

[231] *Committee Against Torture, Tenth session, Summary Record of the Third Part (Public) of the 145th Meeting (CAT/C/SR.145/Add.2)*, para 17.
[232] ibid para 48.
[233] 'Chapters IV and VIII of the Penal Code contained specific provisions guaranteeing the protection of individuals against any violation of their rights; more precisely, Article 136 stipulated that any person found guilty of extorting confessions through torture, the definition of which corresponded to that appearing in Article 1 of the Convention, was liable to a prison term commensurate with the seriousness of the offence, and, in particularly serious cases, to the death penalty. Article 143 of the Penal Code provided for a three-year prison term for any official who harassed or humiliated a prisoner, a prison term of three to six years if the ill-treatment caused injury or disability, and at least seven years' imprisonment if the ill-treatment resulted in death. Article 145 of the Penal Code laid down a three-year prison term for anyone who inflicted mental torture on an individual. Under Article 146 if an official was found guilty of such an offence, the penalty was a minimum of seven years' imprisonment. Under Article 188 members of the judiciary guilty of abuses of power were liable to up to 15 years' imprisonment. Finally, in accordance with Article 189 of the Penal Code, any staff member of a prison establishment who was found guilty of corporal punishment or ill-treatment of prisoners might be sentenced to up to 10 years' imprisonment … Chapter II of the Penal Code set out the procedure to be followed in investigating alleged offences, and chapter III set out the procedure for the trial in the criminal courts of persons charged with acts of torture' CAT/C/SR.145/Add. 2, para 12.
[234] *Committee Against Torture, Tenth session, Summary record of the third part (public) of the 146th meeting (CAT/C/SR.146/Add.2)* (28 April 1992), para 15.
[235] CAT/C/SR.251, para 5.
[236] CAT/C/SR.252/Add.1, para 6.

Convention, prohibited and penalized torture. Since the Convention did not, however, set out punishments for particular acts of torture, the relevant organs were obliged to rely on domestic legislation for the determination of appropriate sentences. Hence the absence of the word "torture" from Chinese domestic law'.[237] The overarching point, as the Chinese delegation pointed out, was that although Chinese domestic law did not use the word 'torture' as in Article 1 of the Convention, it was nevertheless a punishable crime according to its domestic law. Therefore, China had not violated its treaty obligation.

China did change its argumentative strategy, from arguing for relevance by invoking particular reasoning in the 1990 session, to arguing that it had incorporated the definition of torture but in a diffused manner in 1993, to the 1996 argument that although it did not mention the term 'torture' in particular or put it directly into its domestic law (because the definition of torture as in Article 1 was diffusely incorporated into different domestic Chinese laws and international instruments took precedence over domestic laws when there was a discrepancy), it had in fact complied with Article 1.

As a response, the committee also adjusted its arguments, from requesting that Article 1 be incorporated to comparing the scope of torture outlined in Article 1 against that in the relevant Chinese domestic laws. In the committee's opinion, '[China's] various prohibitions applied only to the practice of torture to extort confessions, whereas the definition in Article 1 was much broader'.[238] This shift of focus on the committee's side was partly due to the aforementioned change in China's arguments and partly due to the insufficient state practices undertaken to comply with the committee's request that CAT Article 1 be incorporated into national laws. According to one commentary,[239] only a small number of state parties have directly incorporated Article 1 into their criminal codes.[240] This inadequacy with regard to state practices may be due to the fact that the CAT definition 'was not precise enough for defining a criminal offence'.[241] As the commentary further points out, because '[m]ost governments … simply ignored the need to bring their domestic criminal law in line with the definition of torture contained in Article 1', 'the Committee has increasingly criticized the failure of governments to implement the CAT definition of torture',

[237] CAT/C/SR. 251, para 8.
[238] ibid.
[239] Manfred Nowak et al., *The United Nations Convention Against Torture: A Commentary* (Oxford Commentaries on International Law, Oxford University Press 2008).
[240] ibid 54.
[241] ibid.

especially since 1994.[242] Nonetheless, the committee also noted that 'a national definition of torture does not literally have to follow the wording of Article 1, but it must at least adequately cover the CAT definition'.[243] In this sense, China's argument that due to the abstract character of Article 1 the original definition must be adapted in line with definitions that are more suitable to domestic criminal charges is, as confirmed by the committee, compatible with the committee's own understanding. Moreover, China argued that the scope of Article 1 was covered by China's domestic law. This argument, if proven, is also in line with the views of the committee. However, this claim was challenged by the committee members.

The committee members were concerned that the scope of torture in Chinese domestic law was much narrower than in Article 1 because the relevant offences only involve obtaining confessions from accused persons under torture,[244] the provisions only apply to public servants in the strict sense of the term,[245] and the provisions do not take psychological torture into consideration.[246]

In its response to the Concluding Observation (2008), China replied in detail about the scope of torture in Chinese domestic law. The response is worth citing in full:

> [U]nder the Chinese law, punishable acts of torture include both acts that cause physical pain, such beating or assaulting with instruments of torture, and acts causing mental pain, such as ill-treatment, humiliation and other means. For example, Article 43 of the Criminal Procedure Law provides that 'it shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means'. Of these, 'threat' is typically a way of causing mental suffering. The phrase 'other unlawful means' includes any means that can cause physical and mental pain. Article 238 of the Criminal Law stipulates that anyone who unlawfully detains another person or deprives another person of his/her personal freedom by other means commits a crime. If a person is found to have assaulted or insulted another person, a heavier sentence shall be imposed. Under Articles 247 and 248 of the Criminal Law, the crimes of extorting confessions by torture, violence and ill-treatment of detainees include those committed by use of violence and also by use of abuse, humiliation and other means or causing severe mental suffering. A public servant who has caused another person mental suffering by humiliating, slandering, illegally searching, illegally intruding into a citizen's home, illegally depriving he or her of his or her freedom of

[242] ibid.
[243] ibid 55.
[244] CAT/C/SR.143/Add.2, para 26, CAT/C/SR.251, para 8.
[245] CAT/C/SR.416, para 14; CAT.C.SR. 416, para 29; CAT/C/SR.844, para 30.
[246] CAT/C/SR. 416, para 14.

religious belief or infringing the customs of ethnic minorities, when performing official duties, he/she shall be punished according to law.[247]

As seen from China's arguments above, the 'punishable acts of torture' found in China's domestic law so far include extorting confessions by torture, corporal punishment or ill-treatment of prisoners, and unlawful detention. '[A]cts causing mental pain' are also considered torture. Emphasis was indeed put on extorting confession by torture.

From the *travaux préparatoires* of the CAT, one of the main discussions concerning Article 1 is how to distinguish torture from cruel or inhumane treatment (which is defined in Article 16 of CAT). At the end of this discussion, it was concluded that 'the requirement of a *specific purpose* seems to be the most decisive criterion which distinguishes torture from cruel or inhuman treatment'.[248] 'This interpretation is based on the case law of the European Commission of Human Rights and has been confirmed, e.g. by the ICTY in *Prosecutor v. Delalic et al.*'[249] Article 1 lists the purposes of torture as follows: extracting a confession, obtaining from the victim or a third person information, punishment, intimidation and coercion, and discrimination. As the commentary further points out, these listed purposes can be considered common denominators of the purposes of torture and should therefore be understood in the narrow sense.[250] The other side of the coin is that protecting victims of torture and acknowledging their powerless is 'the essential criterion which the drafters of the Convention had in mind when they introduced the legal distinction between torture and other forms of ill-treatment'.[251]

In terms of the scope of torture as covered in Chinese domestic law, which includes the extortion of confession from torture, the punishment or ill-treatment of prisoners, and unlawful detention, torture occurs only once one has been detained. Compared to the above intentional and teleological reading of Article 1, the scope of torture should not be confined to cases of detention. Therefore, the scope of torture on China's understanding (judging from its arguments) does fall short of the scope laid out in Article 1. Nonetheless, this is not because the scope of torture on

[247] CAT/C/CHN/CO/4/Add.2, 19–20.
[248] Nowak (n 239) 74, italics added.
[249] According to the Rome Statue of the ICC (1998) Part II, Art.30, the purpose constitutes the only element to distinguish the war crime of torture from the war crime of cruel and inhuman treatment. See Rome Statute of the ICC (1998) Part III, Art. 30. See also Nowak (n 239) 74-77.
[250] ibid 75.
[251] ibid 77.

China's understanding only covers 'obtaining confession', as the committee members suggested. That is, from China's arguments, its understanding of the scope of torture is broader than the committee claimed, while still not 'adequately cover[ing]' the definition as in Article 1.

As for the committee's other concern that the provisions only apply to public servants, the delegation argued that 'China's Criminal Law is applicable to all criminal acts of torture, irrespective of the identity, intent or purpose of the perpetrators'.[252] However, the examples that China used to elaborate its point indeed mostly concerned state officials, with the exception of the provision that if an 'ordinary person commits an act of torture abetted by or with the consent or tacit consent of a government official or a person exercising authority in an official capacity, under the provisions of the Criminal Law relating to joint offences, the ordinary person shall be considered to be an accomplice and the applicable charges shall be brought against the government official'.[253]

According to the wording of Article 1, it is said that '[torture is] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Hence, it is compatible with China's arguments. Moreover, according to the *travaux préparatoires,* the drafters intended to strike a balance between the traditional view that 'States can only be held accountable for human rights violations committed by State actors', as laid out in the 1975 Declaration and original Swedish draft of the Convention, and the opinion that the definition should also cover private individuals and 'the non-State actors who exercise authority over others and whose authority is comparable to government authority'.[254] According to the record, the 'working group agreed on a US compromise proposal which extended state responsibility to the consent or acquiescence of a public official. Since the delegations could not

[252] CAT/C/CHN/CO/4/Add.2, para 16.

[253] 'Chinese legislation has provisions that specifically cover crimes committed by officials and persons in specific capacities. For example, Article 238, paragraph 4, of the Criminal Law stipulates that if a public servant of a State organ commits the crime of unlawful detention by exploiting his/her office, he/she shall be punished severely. The provisions of Article 247 of the Criminal Law concerning the crime of extorting confessions by means of torture and violence apply to judicial officers who obtain evidence by acts of torture. The provisions of Article 248 of the Criminal Law concerning the crime of ill-treatment of detainees apply to supervisors who commit acts of torture against detainees. The establishment of these specific crimes reflects the determination to severely punish crimes committed by government officials and to more effectively protect the legitimate rights and interests of citizens. Furthermore, China's policies and measures to prohibit torture are applicable to public servants in both the field of criminal justice and the field of administrative law enforcement. If an ordinary person commits an act of torture abetted by or with the consent or tacit consent of a government official or a person exercising authority in an official capacity, under the provisions of the Criminal Law relating to joint offences, the ordinary person shall be considered to be an accomplice and the applicable charges shall be brought against the government official' (CAT/C/CHN/CO/4/Add.2, para 16).

[254] For the debate, see Nowak et al. (n 239) 77–9.

agree on a definition of the term "public official", the Austrian proposal to add the phrase "or other person acting in an official capacity" was adopted',[255] which was inserted in order to meet the Federal Republic of Germany's concern that 'certain non-State actors whose authority is comparable to governmental authority should also be held accountable'.[256] Therefore, the provisions mentioned by China that concern state officials, in connection to those who 'commit[] an act of torture abetted by or with the consent or tacit consent of a government official or a person exercising authority in an official capacity' are in line with textual, intentional, and teleological readings of the Convention. Hence, they are justifiable.

In sum, China's early, particular reasoning–based argument concerning the relevance of the definition of torture is a non-justifiable argument. Nonetheless, China has developed its argument on incorporating CAT Article 1 into its domestic law over the past decades. The committee's main concerns include the worry that the scope of torture under China's domestic law is much narrower than in Article 1 and that the domestic provisions only concern public servants. With regard to the former, the scope of torture in China's domestic law is indeed narrower than in Article 1. However, the committee's arguments did not correctly identify the difference. The committee members even requested that China change its domestic law by introducing a single definition of torture in order to make the committee's investigation less complicated.[257] This request seems unreasonable, since no such requirement can be read from the textual, intentional, or teleological aspects of the Convention. China did not respond to these requests. As for the latter, it turns out that China's arguments are indeed justifiable. However, the further development of China's arguments on incorporating CAT Article 1 into domestic law has shifted away from particular reasoning. China did not claim at that point that it had a different view on incorporating the definition of torture into its domestic law, on the scope of torture, or on the role of public servants. When it comes to the two issues discussed below (i.e. distinctions with regard to the seriousness of torture and the classification of involuntary disappearance), however, China did insist on its own understanding of Article 1, which was said to deviate from the committee's interpretation.

[255] ibid 77–8.
[256] ibid 78.
[257] See, for instance, CAT/C/SR.844, para 30.

As for the constructiveness of the argument, China did change its argument with regard to incorporating the definition of torture into its domestic law, and the burden of argument shifted to the committee (since the committee did not correctly identify the scope of torture codified in China's domestic law, it still bears the burden of argument); hence it is considered constructive. When it comes to the scope of torture, since China did elaborate its argument in the later session, the burden to point out the differences regarding the scope of torture in China's domestic laws and in Article 1 fell on the committee. As mentioned above, the committee did not correctly point out such differences. Therefore, the burden of argument remains on the committee's side, and the committee's argument on this topic is not constructive. As a result, the discussion has not moved forward, as there has been no further response from China. For the committee's concern about the provisions' applying to civil servants, the fact that the committee has not made any further inquiries on this topic thus far may suggest that both sides have reached a consensus (even in the sense of agreeing to disagree).[258]

4.1.2 Distinctions based on the 'seriousness' of torture

China's report distinguishes between cases of torture on the basis of whether they are minor, serious, or especially serious. In its comment, the committee argued that,

> [i]n connection with the use of torture, the State party's report spoke of 'serious or especially serious cases' defined in the light of certain criteria, such as cases leading to serious injury or mental derangement. But torture was by definition a serious crime, and no degree of seriousness could be established in respect of it. The delegation ought to explain why only cases covered by the said criteria were considered serious or especially serious.[259]

As a response, China provided the following counter-argument:

> Concerning the distinction made by judicial bodies between acts of torture constituting minor, serious or particularly serious offences, all acts of torture were prohibited and punished under Chinese law. *Given its cultural and legal specificity*, however, China believed that minor offences were part of

[258] When it came to seriousness and involuntary disappearance, there was not enough debates on these topics to decide on constructiveness.
[259] CAT/C/SR. 844 (2008), para 64.

> administrative law and should consequently be subject to administrative punishment ... In Chinese law, that procedure was consistent with the principle of proportionality. As a matter of fact, the practice was that procuratorates carried out the preliminary investigation when complaints and information concerning acts of torture were referred to them. Only cases that were sufficiently substantiated would then be registered, investigated and prosecuted if criminal responsibility was assigned. In the case of relatively minor offences with less serious consequences, the procuratorate would make recommendations to the competent departments with a view to the imposition of disciplinary and administrative punishments.[260]

The above arguments invoked a relative point of view by referring to the particularities of China's cultural and legal tradition. However, this argument contradicts both the teleological and the intentional readings of the article. As the committee members commented, torture is a serious crime by definition and therefore cannot be further subdivided on the basis of 'seriousness'. To prevent torture as understood in the Convention is to prevent all forms of torture. Hence, to say that there could be a torture case that counts as 'a minor offence' and be subject to administrative punishment contradicts the purpose and object of the Convention. Moreover, according to the *travaux préparatoires*, the 'severity' of torture is one of the essential elements for establishing whether torture has occurred.[261] In this sense, the 'seriousness' distinction also contradicts the intentional reading of the Convention. Therefore, China's argument on distinguishing between types of torture on the basis of seriousness is not justifiable.

4.1.3 Involuntary disappearance

The debate on involuntary disappearance (also called enforced disappearance) concerns the mandate of the CAT, which is mostly set out in Article 1. According to the argument given by the Chinese delegation, although China recognised that there was a connection between enforced disappearances and torture, it insisted that such cases 'did not fall under the same international instruments or within the purview of the same bodies in the United Nations human rights system'.[262] In China's view, the mechanism that should serve as a platform for discussing involuntary disappearance is not the CAT committee but the International Convention for the Protection of All Persons from Enforced Disappearance (CED), for this Convention takes enforced

[260] CAT/C/SR. 846 (2008), para 19.
[261] Nowak (n 239) 30–50.
[262] CAT/C/SR. 846 (2008), para 6.

disappearance as its 'specific mandate'. China further argued that 'bodies in the United Nations human rights system … [are] comprised [of] various mechanisms, each with its own specific mandate to be respected'. This argument might be based on the fact that China was not a party to the CED. Thus, by arguing that the CAT's jurisdiction was limited, China was arguing that the topic of involuntary disappearance did not apply to it at all. However, the CAT committee did not agree with China's argument and instead argued the following:

> On the subject of forced or involuntary disappearances, the Committee thought that such facts certainly fell within the purview of the Convention; in particular, it could be argued that the families of the persons who had disappeared were victims of maltreatment within the meaning of the Convention … He was surprised that China should think the question of forced disappearances lay outside the purview of the Convention. Article 1 of the Convention referred to any act by which severe pain or suffering was inflicted, and it was difficult to see how forced disappearances escaped that definition. Disappearance occasioned by persons acting in the exercise of their official duties could cause intense suffering; the victim had the impression that he or she did not exist, and felt that those who had made him/her disappear could dispose of him/her as they wished. It was desirable that the delegation should say something on the subject, the more so as, according to some reports, the State party was itself involved in forced disappearances whereas it ought to be punishing the persons participating in such acts.[263]

The key to determining the justifiability of both sides' arguments first lies in whether involuntary disappearance counts as torture, as codified in CAT Article 1. If the answer is positive, then by definition it should be discussed under the CAT. Second, there is also the question of whether the fact that involuntary disappearance is a specific mandate of another Convention means that it lies outside the purview of the Committee against Torture.

As to the first question, it seems that most opinions within the UN human rights treaty machinery do consider involuntary disappearance to be torture. In Article 1 of the Declaration on the Protection of All Persons from Enforced Disappearance, it is clearly stated that enforced disappearance may amount to torture:

> Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to

[263] CAT/C/SR.844 (20081107), paras 57 and 63.

> liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.[264]

The UN Special Rapporteur on Torture, Sir Nigel Rodley, has also argued the following:

> Prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture. The suffering endured by the disappeared persons, who are isolated from the outside world and denied any recourse to the protections of the law, and by their relatives doubtless increases as time goes by.[265]

This view was again confirmed by the UN Working Group:

> The very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been presented to the Group as torture.[266]

It is thus clear that involuntary disappearance, as the committee members argued, is considered a form of torture and should therefore be subject to the CAT. Moreover, this understanding also implies that the relationship between the CAT and the CED corresponds to the relationship between the *lex generalis* and the *lex specialis*. This insight sheds lights on the second question of whether involuntary disappearance still falls under the mandate of the Committee against Torture despite the fact that it is regulated by the CED. China's argument was that because the CED had a specific mandate over involuntary disappearance, the issues of involuntary disappearance should therefore only be discussed within the CED. This is a misunderstanding of the relationship between the *lex generalis* and the *lex specialis.* The fact that more than one treaty can regulate the same case does not mean that the treaty that stands as the *lex generalis* automatically loses its jurisdiction. Nevertheless, in cases of disagreement between the two treaties, the principle *lex specialis derogat legi generali* generally holds. This is not the case at issue, however. Moreover,

[264] Article 1(2) of *Declaration on the Protection of All Persons from Enforced Disappearance*. A/RES/47/133. See http://www.un.org/documents/ga/res/47/a47r133.htm.
[265] Inter-American Convention on the Forced Disappearance of Persons, adopted 9 June 1994, OAS Doc OEA/Ser.P/AG/Doc 3114/94 (entered into force 28 March 1996) ('OAS Convention').
[266] E/CN.4/1983/14, para 131.

the essence of China's argument concerns the assumed self-contained nature of human rights treaty regimes. As explicitly pointed out in the Report of the Study Group of the International Law Commission on Fragmentation of International Law,[267] however, '[a] limited jurisdiction does not … imply a limitation of the scope of the law applicable in the interpretation and application of those treaties'.[268]

In sum, the Committee against Torture should not have any technical difficulty in including involuntary disappearance in its treaty mandate. Therefore, China's arguments are not justifiable.

4.2 On the state's obligation towards border-crossers from the Democratic People's Republic of Korea (the DPRK or North Korea)

Before delving into the topic of DPRK border-crossers, it should be pointed out that the landscape of discussions about refugees has changed and expanded drastically due to the 'refugee crisis' in Europe since 2015. Despite the ever more complicated refugee situation, the arguments that are dealt with in this section occurred long before this recent development. Moreover, the issue of DPRK border-crossers – a longstanding problem – must be put in its own context. Therefore, in the present section I shall refrain from discussing the recent, overwhelming issues that have been sparked by these developments and will instead focus on the arguments and sources given by China and the committees with regard to DPRK border-crossers in particular.

The issue concerning people fleeing from the DPRK and entering Chinese territory was mentioned in all five committees. All committees acknowledged the opinions of the United Nations High Commissioner for Refugees (UNHCR) and considered these people asylum seekers or refugees. In this sense, China's treatment of these people (i.e. returning them to the DPRK) violated several human rights treaty obligations, including the principle of 'non-refoulement', female refugee's rights, children refugee's rights, and the non-discrimination principle. On China's side, however, the Chinese delegation also kept its arguments consistent when addressing these committees, claiming that North Koreans were entering China for economic reasons and therefore did not meet the criteria for being refugees as set out in the 1951 Convention relating to the Status of Refugees (hereafter referred to as the 1951 Convention) and its Protocol. China argued that they

[267] Finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.*International Law Commission. A/CN.4/L.682. 13 April 2006.
[268] ibid 28.

should therefore be treated as illegal immigrants and that their repatriation was in compliance with international practices.[269] In this case, there are two main arguments from China's side: first, that people from the DPRK do not count as refugees according to Article 1 A (2) of the 1951 Convention, and second, that China has a right to decide on that status. In terms of the former, the Chinese delegation elaborated its viewpoint in the CAT 2008 session as follows:

> With regard to the status of North Korean migrants, the Chinese delegation recalled the definition contained in the 1951 Convention relating to the Status of Refugees, pursuant to which the term 'refugee' applied to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, was outside the country of his nationality and was unable or, owing to such fear, was unwilling to avail himself of the protection of that country. The North Korean nationals mentioned by Ms. Gaer had unlawfully entered China for economic reasons and had not requested political asylum. They were not therefore refugees in the sense of the 1951 Convention.[270]

On these grounds, recommendations based on treating DPRK 'immigrants' as 'refugees' or 'asylum-seekers' were rejected by the Chinese delegation. This was reiterated in the 2006 CEDAW session,[271] the 2001 CERD session,[272] and the 2005 CRC session.[273] This argument also leads to a second question: who decides on refugee status? According to UN human rights committees, it was the UNHCR's mandate to decide who can be categorised as a refugee.[274] According to China, however, it was claimed in the 2006 CEDAW session that, '[a]s a party to the Convention, China had the right to distinguish between refugees and non-refugees in accordance with the provisions of the Convention. The right to determine who was a refugee was 'the prerogative of the State

[269] CERD/C/SR.1469 (2001) para 3. CEDAW/C/SR.743 (B) (2006) para 42. CAT/C/CHN/CO/4/Add.2 (2009) para 10.
[270] CAT/C/SR.846, (2009), para10.
[271] CEDAW/C/SR.743 (B), 29.
[272] In CERD/C/SR.1469: '3. With regard to the repatriation of North Koreans, large numbers of illegal economic immigrants had entered China, largely as a result of food shortages in North Korea, and could not be considered refugees; their repatriation was therefore in compliance with international practice. The Government took illegal migration very seriously and had adopted an integrated approach which involved careful verification of the identity of migrants before repatriation. A series of procedures and mechanisms had been put in place. China accepted unconditionally any Chinese citizen whose identity had been verified. The Government had recently applied for observer status at the International Organization for Migration (IOM)'.
[273] In CRC/C/SR.1064: 'China had recently witnessed an influx of illegal economic migrants from the Democratic People's Republic of Korea; those immigrants were not refugees and were therefore not treated as such'
[274] CAT/C/SR.844 (2009) para 36. CEDAW/C/SR.744 (B) (2006) para 40. CRC/C/SR.1062 (2005) para 58.

party and not of UNHCR'.[275] Therefore, China not only put forward a particular classification of DPRK border-crossers that deviated from the committees' opinions but also claimed that the committees' opinions are not relevant in this case.

Based on the 1951 Convention and its Protocol, refugee protection must be provided to political asylum seekers. In the case of North Korea, the majority of border-crossers are driven by food shortages and extreme poverty in North Korea.[276] In 2005, Refugee International found that only two out of every sixty-three migrants in China who had left North Korea had left for political reasons.[277] From this perspective, China's argument does hold some water when it comes to the assertion that most of those who leave North Korea and enter into China do so for economic reasons and that they therefore do not qualify for refugee status under the 1951 Convention and its Protocol, according to which refugees must have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[278]

One member of the Committee against Torture raised the question of whether North Koreans who had fled to China might nonetheless count as refugees *sur place*.[279] That is, although border-crossers from North Korea may have left for non-political reasons, once they left North Korea it is plausible that they developed a well-founded fear of persecution upon return, in which case they may now be considered refugees *sur place.*[280] Although there is no record of China's counter-argument on this topic, according to the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status 2011, the description of refugees *sur place* is still largely in line with the criteria for being a refugee from the 1951 Convention: '[A] person becomes a refugee "sur place"', according to the Handbook, 'due to circumstances arising in his country of

[275] CEDAW/C/SR.744 (B) (2006) para 48.
[276] Elisa Gahng, 'North Korean Border-Crossers in Yanbian: The Protection Gap between the Economic Migrant and Refugee Regimes' (2009-2010) 24 Georgetown Immigration Law Journal 363.
[277] Charny, Cong Executive Commission on China, Protection Strategies for North Korean Refugees in China, Issues Roundtable (2004). Refers to ibid, 374.
[278] UN General Assembly, *Draft Convention relating to the Status of Refugees*, A/RES/429, 14 December 1950, Article 1 A (2). In the original text of the 1951 Convention, there are geographic (mainly concerning Europe) and time (before 1 January 1951) limits when it comes to defining the term 'refugee'. These were removed in the 1967 Protocol (UN General Assembly, *2198 (XXI) Protocol relating to the Status of Refugees*, A/RES/21/2198, 16 December 1966, Article 1).
[279] CAT/C/SR.844, para 36.
[280] 'Refugee sur place': 'a person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "sur place"'. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees)* (December 2011), para 94.

origin during his absence', such as when 'diplomats and other officials serving abroad, prisoners of war, students, migrants workers and others have applied for refugee status during their residence abroad and have been recognized as refugees',[281] or 'as a result of his own actions, such as associating with refuges already recognized, or expressing his political views in his country of residence'.[282] Given that those who leave North Korea may face penalties if they return to their home country, a 'well-founded fear of persecution' could be established in such a case. In this sense, there is room to argue that border-crossers from North Korea should be considered refugees *sur place*. China's lack of response is therefore viewed as unconstructive, and the burden of argument remains on China's side.

A further contextual element should be mentioned in this case. This concerns the Constitution of the Republic of Korea and Article 3 of the Nationality Act of the Republic of Korea, according to which North Koreans are entitled to citizenship in the South.[283] Moreover, the South Korean government has a longstanding policy of accepting and resettling refugees from the DPRK.[284] Therefore, refusal to recognise North Korean border-crossers as refugees in principle will not result in a breach of the 1951 Convention according to its Article 1 A (2), paragraph 2, on dual or multiple nationality, given that the people concerned may be expected to avail themselves of the protection of another country where they can assert citizenship rights.

As for the question of who determines who will be given the status of refugee, it is stated in the UNHCR 2011 Handbook that 'the determination of refugee status … is left to *each Contracting State* to establish the procedure that it considers most appropriate'.[285] Therefore, from China's standpoint, there is room to argue not only that border-crossers from North Korea are not refugees but also that China has the right to determine that status. Nonetheless, 'establishing the procedure' cannot be read as entirely equal to 'deciding'. With regards to the former, state parties must guarantee equality in the decision-making process. As some committee members have pointed out, the fact that China has recognised Indonesians as refugees while rejecting the claims of people from North Korea may trigger concern about the equality of the procedure.[286]

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[281] ibid para 95.
[282] ibid para 96.
[283] COI report on North Korea, July 2009. See North Korea OGN v 5.0 issued July 2010, 4.
[284] North Korea OGN v 5.0 issued July 2010, 4–5.
[285] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees)*, para 189, Italic added.
[286] CRC/C/CHN/CO/2, para 80.

More importantly, no matter what their status, border-crossers from the DPRK are covered by the principle of non-refoulement, which is codified not only in Article 33 of the 1951 Convention but also, and more relevantly to this context, in Article 3 of the CAT. In the latter, the relevant provision applies not only to refugees but to all who 'would be in danger of being subjected to torture'. Moreover, 'Article 3 CAT guarantees an absolute right which is not subject to any exclusion or limitation clause'.[287] Therefore, under Article 3 of the CAT, those who have left North Korea have a right to non-refoulement, regardless of whether they are considered refugees under the 1951 Convention and its Protocol.

This is to say that although China's arguments on the non-refugee status of border-crossers from North Korea may have its ground in the 1951 Convention and its protocol, China's arguments do not hold under Article 3 of the CAT. In fact, the committee members have also pointed out the lack of attention given to Article 3 of the CAT in China's arguments,[288] which, according to the record, did not receive a direct response from the Chinese delegation.[289]

Therefore, all things considered, China's arguments concerning its obligations to DPRK border-crossers are neither justifiable nor constructive.

4.3 Summary

This Chapter has investigated the justifiability of arguments provided by China to international human rights treaty bodies. As proposed in the first part of the dissertation, two dimensions of justifiability are considered: legal justifiability and constructiveness. This chapter discusses interpretation arguments and focuses on two main issues: the definition of torture as laid out in Article 1 of the CAT and the state's obligations toward DPRK border-crossers. Among these topics, incorporating the definition of torture into domestic law and the state's obligations toward DPRK border-crossers can be scrutinised both in terms of their legal justifiability and in terms of their constructiveness.

With regard to incorporating the definition of torture into domestic law, China initially used an argument of relevance that did not refer to either textual, intentional, or teleological elements

[287] Nowak (n 239) 129.
[288] CAT/C/SR.846, para 42.
[289] Although, in the Chinese delegation's argument, China respects the principle of non-refoulement. There is no substantive argument on applying this principle to border-crossers from the DPRK, however. See CAT/C/SR.846, para 10.

of the interpretation of the Convention and was therefore unjustifiable. However, China has changed its initial argument and now holds that the definition of torture as laid out in Article 1 of the CAT has been diffusely incorporated into different provisions of Chinese domestic law. As discussed above, this argument does not contradict textual, intentional, or teleological readings, is further supported by the intentional approach to the interpretation of the CAT, and is therefore justifiable. Nonetheless, the scope of torture in China's domestic law is indeed narrower than the definition in Article 1; therefore, the claim that China's domestic law fully covers the scope of torture as laid out in the Convention is false. Although this difference was not correctly pointed out by the committee members, China's argument is still considered legally unjustifiable. As for the discussions on distinguishing between cases of torture based on their 'seriousness' and on 'involuntary disappearance', China's arguments turned out to be unjustifiable here as well. With regard to the former, China argued that its legal and cultural traditions were grounds on which to determine the seriousness of torture. This argument does not hold up; not only is it not supported by either of the three approaches, but it contradicts both textual and intentional readings of the Convention. As for the latter, China argued that involuntary disappearance was out of the purview of the Convention and therefore should not be discussed in the CAT session. This argument is not justifiable given that it contradicts general rules of international law. As for China's arguments on its obligations towards North Korean border-crossers, China treated this as a classification problem under the 1951 Convention and argued that these people did not qualify as refugees and were instead to be considered economic immigrants, and that therefore deportations did not violate China's obligations. This argument on its own is justifiable under the 1951 Convention. However, the state obligation is much broader under Article 3 of the CAT, namely the principle of non-refoulement, for which no record of China's further comments can be found. It therefore seems that in the last case, China strategically confined its discussion to the 1951 Convention rather than the CAT to justify its practice. The argument cannot be justified as an acceptable interpretation of the CAT.

Among the above topics, two re-occur in the different sessions and across different committees and are therefore subject to assessment in terms of their constructiveness. The first topic is that of incorporating the definition of torture into domestic law. The other is the state's obligation towards DPRK border-crossers. With regard to incorporating the definition of torture into domestic law, China's argument did change from one of relevance to one of interpretation.

Moreover, when it comes to arguments of interpretation, not only did China provide different arguments according to the committee's former comments, but these arguments were legally justifiable. Therefore, on this topic, China's arguments are constructive overall. However, China's arguments on its obligations towards DPRK border-crossers have not changed over the past decades and have been consistent across different committees. Particularly in light of the fact that China did not respond to the comment that its obligations should be determined not only under the 1951 Convention but also under Article 3 of the CAT on the principle of non-refoulement, its arguments are not constructive.

Chapter 5 China's Particular Reasoning on Making Reservations to International Human Rights Treaties

Introduction

China has made two substantive reservations[290] to core elements of IHRL: one to Article 8.1 (a) of the ICESCR, and the other to Article 6 of the CRC. Both reservations have been challenged by their respective committees, and China has likewise offered arguments for retaining its reservations. One of China's main arguments for its reservation to Article 8.1 (a) of the ICESCR was as follows:

> [W]hen China had ratified the Covenant, the provisions of its Constitution, the prevailing trade union and the labour laws and its historical and national circumstances had necessitated a reservation to article 8, paragraph 1. The All China Federation of Trade Unions was highly effective in conveying the recommendations of its members to Government and monitoring the authorities' work, ensuring respect for the rights of trade union members.[291]

As for its reservation to Article 6 of the CRC, China argued that it should fulfil its obligations under Article 6 of the CRC only to the extent that the Convention was consistent with the provisions of Article 25 of the Constitution (concerning family planning) and with the provisions of Article 2 of the Law of Minor Children.[292] Both arguments were intended to establish China's standing as a 'particular case'. China appealed to its own Constitution and domestic laws, its historical path, and its economic and social situations to argue that because it constitutes a particular situation, it ought to be excluded or allowed to deviate from these provisions—hence the reservations.

The first part of this chapter expounds on the sources for determining the justifiability of arguments for making reservations to a treaty. It investigates the traditional rules for making reservations, the VCLT provisions on reservations to treaties, the particular concerns of human rights treaty regimes, and the Guide to Practice on Reservations to Treaties. Taken together, these

[290] The term 'substantive reservations' is used here in order to differentiate these reservations from 'procedural reservations'. The former are reservations regarding substantial clauses of a given Convention, while the latter concern procedural clauses. This chapter focuses on the former.
[291] E/C.12/2014/SR.17, para 38.
[292] CRC/C/SR. 298, para 14, CRC/C/SR. 1062, para 27, CRC/C/SR. 1083, para 23.

sources cover the textual, intentional, and teleological aspects of making reservations to treaties and therefore establish a reasonable parameter for determining the justifiability of arguments for reservations. The second and third parts assess China's arguments for the above two reservations. The concluding section reflects on China's relations with human rights treaty regimes through the lens of argumentation for reservations.

5.1 Regulating reservations to treaties: Developing a balance between the particular and the universal

The process of regulating reservations to treaties has always been a struggle between maintaining the integrity of the treaty texts and protecting the particular interests of the contracting parties. Different international legal regimes have expressed their opinions on this topic. The most important of these include the International Court of Justice's (hereafter the ICJ's) advisory opinions on the *Genocide Case* (1951), the VCLT 1969, General Comment No. 24 (52) on the reservation to the ICCPR issued by the Human Rights Committee (hereafter the HR Committee), and one of the most current developments—the ILC's opinion on reservations to treaties, i.e. the *Guide to Practice on Reservations to Treaties*. Not all of these views on reservations to treaties, made by different international legal regimes, have equal importance. However, they do represent the positions of the most relevant international legal regimes on making reservations to treaties. Therefore, the decisions about making reservations to treaties issued by these regimes can be taken as parameters for the justification of reservations. Moreover, the ongoing dialogue among these regimes on this topic demonstrates a developing understanding of this issue. In this regard, the recent ILC *Guide to Practice on Reservations to Treaties* by special rapporteur Alain Pellet will be given more attention in what follows. This is not only because it is one of the most recent developments on making reservations to treaties, but also because in this voluminous report Pellet studies, discusses, and answers some of the most controversial issues regarding making reservations to treaties, which on the one hand largely enriches the debates on this topic and on the other hand narrows the scope of controversies by clarifying unclear issues, filling the gaps, and providing practical guidelines for dealing with reservations to treaties. Moreover, given that the report has been adopted by the ILC, in particular regarding the reservations clauses in the VCLT, this report is arguably the most important source for determining the justifiability of arguments in support of making reservations to treaties.

5.1.1 International practice in making reservations to treaties prior to the VCLT

The traditional general rule governing reservations to treaties was the 'unanimity rule', which stipulated that a reservation can only be admitted when all other contracting parties accept it, expressly or tacitly, and usually before the signing of the treaty.[293] Where unanimous acceptance is not obtained, the reserving party has the choice either to withdraw its reservation or to refrain from becoming a party to the treaty.[294] The unanimity rule was considered the established customary rule of international law before the First World War. It was also supported by the League of Nations.[295] This restrictive approach reflects a contractual view of the nature of treaties and is meant to guarantee, as far as possible, the unity of the relevant treaty regime and the integrity of the treaty's text.[296] However, this emphasis on unity was largely challenged by the ICJ in its advisory opinion on *Reservations to the Genocide Convention Case*.

The Genocide Convention (1948) contains no provision governing reservations. Therefore, in 1951, the UN General Assembly requested an advisory opinion from the ICJ about certain reservations that had been made to the Convention. In its requests, three significant questions concerned the permissibility of reservations.[297] As a response, the Court ruled by seven to five and issued the following opinion:

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[293] Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (The Melland Schill lectures; Melland Schill monographs in international law, 2nd., rev. and enlarged ed. edn, Manchester University Press 1984) 54–55; Anthony Aust, *Modern Treaty Law and Practice* (2nd [new] edn, Cambridge University Press 2007) 140.

[294] Sinclair (n 293) 55.

[295] ibid 54–57. However, it is also noted by Sinclair that 'it must not be thought, however, that the unanimity rule governing the admissibility of reservations was universally acknowledged to be correct even during the League of Nations period and the early post-war period' (ibid 56–7).

[296] Malcolm Shaw, *International Law* (6th edn, Cambridge University Press 2008) 918.

[297] The three questions are:

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to the question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

(a) The parties which object to the reservation?

(b) Those which accept it?

III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

(a) By a signatory which has not yet ratified?

(b) By a State entitled to sign or accede but which has not yet done so?

Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice (ICJ), 28 May 1951.

On Question I:

That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II:

(a) That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

On Question III:

(a) an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so is without legal effect.[298]

An important aim of this advisory opinion was to have as many parties to the Convention as possible, which broadening permission for reservations would help to achieve.[299] The core of this advisory opinion on reservation permissibility is the 'compatibility test'. This approach, which deviated substantially from the traditional restrictive rule, was initially criticised for being fundamentally subjective and therefore uncertain in its application and unworkable in practice.[300] Nonetheless, around the same time, the UN General Assembly also invited the ILC to study the question of reservations to multilateral conventions as part of its work on codification of the Law of Treaties. This process, which began in 1951 and was concluded in 1966, coincided with the process of rapid decolonisation and an increase in the number of new states—which were also potential parties to multilateral conventions.[301] Against this background, the ILC found that the traditional restrictive rules had become impractical (if not impossible) and was inclined toward the more flexible approach proposed by the ICJ. The compatibility test approach used in the ICJ

[298] ibid.
[299] Ineta Ziemele and Lāsma Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24 EJIL 1135, 1137.
[300] Sinclair (n 293) 57–8; Aust (n 293) 141.
[301] *Yearbook of the International Law Commission: Documents of the Fourteenth Session Including the Report of the Commission to the General Assembly*, 1962 Vol II, A/CN.4/SER.A/1962/Add.l, 63.

Genocide Case advisory opinion was ultimately favoured by the ILC, which stated that 'the difficulty with the compatibility test lay not so much in the test itself, but in the process by which it is applied. Yet when a test is so very difficult to apply, the process is crucial'.[302] It was therefore this flexible approach, rather than the traditional rule, that was incorporated into the final text of the 1969 Vienna Convention.

5.1.2 The Vienna Convention on the Law of Treaties (VCLT) on reservations to treaties

Article 2.1 (d) of the VCLT defines a reservation as follows:

> [A] unilateral statement, however phrased or named, made by a State, when signing, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[303]

Section 2 of the Convention provides further information, including the conditions under which reservations may be formulated (Article 19), accepting and objecting to reservations (Article 20), the legal effects of reservations and of objections to reservations (Article 21), the withdrawal of reservations and of objections to reservations (Article 22), and procedures regarding reservations (Article 23). In this section, instead of providing an all-encompassing review of the provisions on reservations under the VCLT, I focus on two issues, namely the criteria for the permissibility of a given reservation and the legal effects of reservations, which are covered by Articles 19, 20, and 21 of the Convention. I have chosen this focus not only because these two issues are the most controversial and widely debated but also because they are closely related to international human rights treaties and to the assessment of China's arguments under the ICESCR and the CRC.

Article 19: Formulation of reservations. This article, which governs the permissibility of reservations to multilateral conventions, reads as follows:

> 'A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> a. The reservation is prohibited by the treaty;

[302] Aust (n 293) 141.
[303] Article 2 (d) Vienna Convention on the Law of Treaties 1969, No. 18232.

b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made;
c. In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[304]

Article 19 authorises the formulation of reservations subject to three exceptions. A reservation is permitted if it is not explicitly (Article 19 [a]) or implicitly (Article 19 [b]) prohibited by the treaty, or not incompatible with the object and purpose of the treaty (Article 19 [c]). Hence Article 19 (c) confirms the compatibility test approach laid down by the ICJ in its Advisory Opinion on Reservations to the Genocide Convention.[305] The problem raised here is one of the most debated controversies regarding reservations: should the compatibility test be subject to the judgement of each contracting state, or should it be treated objectively, as in the criteria set out in Articles 19 (a) and (b)? The subjective character of the compatibility test laid down in the ICJ advisory opinion should not be overemphasised. According to the advisory opinion, the reserving state can remain a party to the Convention when one or more contracting states object to the reservation 'if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention'. In this sense, it seems that 'the compatibility test should be applied objectively, even if in most cases the test has to be applied by states rather than by a court'.[306] However, this interpretation of the ICJ advisory opinion does not fully solve the above question. For instance, when a contracting state objects to a reservation on the grounds of the compatibility test while other contracting states hold different opinions, how is a decision on the permissibility of the reservation to be made?

Article 20: Acceptance of and Objection to Reservations. Article 20 (1) indicates that if a treaty expressively allows a certain kind of reservation, this kind of reservation does not require the acceptance of other contracting states. Article 20 (2) affirms that the traditional unanimity rule is applied in cases where there are only a limited number of negotiating states and where the entirety of the treaty is an essential condition of each party's consent to be bound. Article 20 (3) states that where a treaty is a constituent instrument of an international organisation, the acceptance of the

[304] Article 19 Vienna Convention on the Law of Treaties 1969, No. 18232.
[305] Sinclair (n 293) 61.
[306] Aust (n 293) 145.

competent organ of that organisation is required. Article 20 (4) concerns the cases that fall outside of Articles 20 (1), (2), and (3), unless the treaty provides its own reservation rules:

> (a) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States; (b) An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State; (c) An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

Article 20 (5) specifies that acceptance can be either explicit or tacit, where the latter is assumed if no objection is raised within a specific period. Therefore, the combined effect of Articles 20 (4) (b), (c) and 20 (5) is that the reserving state will become a party to a treaty unless all other contracting states: '(1) object to the reservation *and* (2) explicitly object to the reserving State becoming a contracting State'.[307] This threshold is set so high that it is almost impossible for a reserving state not to become a party to the treaty. In other words, under normal circumstances, a reserving state will become a party to the treaty regardless of whether there are objections from *some* other contracting states.

Article 21: Legal Effects of Reservations and of Objections to Reservations. The controversy over the permissibility of reservation continues in Article 21, which regulates the legal effects of reservations and objections to reservations:

> 1. A reservation established with regard to another party in accordance with article 19, 20, and 23:
>   a. Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation;
>   b. Modifies those provisions to the same extent for that other party in its relations with the reserving State.
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se.*
> 3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

[307] ibid 142.

Article 21 (1) outlines the legal effects of reservations that have been established with regard to another party. The term 'established' can be understood in the sense of being legally effective in relation to another party to the extent that the reservation is 'not prohibited by Article 19, has not been objected to by another party in accordance Article 20 and meets the procedural requirements of Article 23'.[308] Article 21 (3) regulates the legal effects of reservations with regard to objecting states, provided the relevant objecting state does not oppose the entry into force of the treaty between itself and the reserving state. However, the VCLT does not explicitly indicate the legal effect of an impermissible (in other words, prohibited) reservation, which raises the question of whether the reserving state is bound by the treaty without the benefit of the reservation.[309] Moreover, it seems that, according to Article 21 (3), for non-reciprocal treaties (as for most human rights treaties), the legal effect of an objection would be *de facto* the same as acceptance, which means that objections to reservations to non-reciprocal treaties would be made in vain.

These unsettled issues concerning the permissibility and legal effects of reservations become more salient when it comes to international human rights treaties. In 1994, the HR Committee adopted a General Comment (24/52) to express its opinion on reservations to the CCPR, in which it approached the above issues from a human rights perspective.

5.1.3 Human Rights Committee General Comment No. 24 (52)

The HR Committee adopted General Comment No. 24 (52) on 2 November 1994 to address the issue of reservations to the CCPR, which touched upon some unsolved issues under the VCLT and emphasised the special characteristics of human rights treaties in general. Because the content of this General Comment was rather controversial, it stirred up the debate on reservations to treaties under the VCLT. Two questions, among others, were raised in the General Comment: (1) Do human rights treaty bodies or other such monitoring organs have the authority to determine the permissibility of reservations? And, perhaps more importantly, (2) should human rights regimes be treated differently, and therefore fall outside the scope of the VCLT framework? With regard to the first question, the General Comment indicates that the Committee 'has the legal authority to make determinations as to whether specific reservations are compatible with the object and

[308] Aust (n 293) 143.
[309] ibid 145.

purpose of the Covenant'.[310] With regard to the second question, the Committee believed that the subjective approach taken in the VCLT (as in 'its provisions on the role of State objections in relations to reservations'[311]) is 'inappropriate to address the problem of reservations to human rights treaties'.[312] The basis for the above answers, elaborated by the Committee, is the non-reciprocal nature of human rights treaties. It stated that because human rights treaties 'are not a web of inter-State exchanges of mutual obligations', but rather concern the 'endowment of individuals with rights', the objections from contracting states may be ambiguous, as are the attitudes of the non-objecting states.[313] Moreover, the Committee determined the legal effect of impermissible reservations: 'such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party *without* benefit of the reservation'.[314]

However, it seems that the Human Rights Committee's approach was not met with generally positive responses from state parties. For instance, France and the US insisted that 'the Vienna regime is applicable also to impermissible reservations'.[315] It nevertheless brought out the controversy of unsolved problems regarding reservations to treaties under the VCLT, especially regarding the permissibility of reservations to non-reciprocal multilateral treaties, the legal effects of impermissible reservations, and who has authority to determine this. As Shaw puts it: 'the controversy with regard to this (General Comment 24/52) included the issue as to the powers of the committee and other such monitoring organs as distinct from courts which under their constituent treaties had the competence to interpret the same in a binding manner'.[316] In a way, HR Committee General Comment 24 (52) prompted, rather than settled, more in-depth discussion on reservations to treaties in international law. In 1993, the ILC put reservations to treaties on its agenda. After 17 reports and 18 years, special rapporteur Alain Pellet handed out an over 600-page *Guide to Practice on Reservations to Treaties* (hereafter 'the Guide' or 'Guidelines'), which is by far the most comprehensive and up-to-date work on this issue. Responding to the human rights regime's 'special case' perspective was one of the main tasks of the Guide. In his second report,

[310] UN Human Rights Committee (HR Committee), *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para 16.
[311] ibid para 17.
[312] ibid.
[313] ibid.
[314] ibid para 18, italics added.
[315] Ziemele and Liede (n 299) 1144. See also Manisuli Ssenyonjo, 'State Reservations to the ICESCR: A Critique of Selected Reservations' (2008) 26 Netherlands Quarterly of Human Rights 315.
[316] Shaw (n 296) 923–4.

Pellet specifically discussed this issue,[317] concluding that the Vienna regime is 'well balanced, flexible, and adaptable' enough for 'all kinds of treaties',[318] including human rights treaties.[319] Eventually, in the formal Guide, guideline 3.1.5.6 is adopted to cover all 'reservations to treaties containing numerous interdependent rights and obligations', which does not designate human rights treaties as 'special cases', as General Comment 24 (52) had it. It is recognised that on the one hand the Guide accommodates the human rights–inspired critique of the Vienna regimes; on the other hand, it does not give special standing to human rights regimes *per se*.[320] That is to say, against HR Committee General Comment 24 (52), the ILC report holds that reservations to human rights treaties shall still be discussed under the VCLT rules. In the next section, I investigate the Guide more closely, with a focus on its implications for human rights treaties.

5.1.4 The ILC Guide to Practice on Reservations to Treaties: Current developments in reservations to treaties

The Guide not only interprets and elaborates reservations provisions under the VCLT but also builds upon the wealth of actual post-Vienna treaty practice and further develops the VCLT reservation rules by filling in the gaps and clarifying the ambiguities.[321] Therefore, the Guide is important for comprehending the original VCLT reservation rules and the Convention's current stance.

Since the Guide is a non-binding instrument, it is necessary to first explain its legal effects. To what extent can we resort to the Guide when settling issues about reservations to treaties? It is made clear in the beginning of the Guide that it is 'a soft law instrument mixing … hard rules with soft recommendations'.[322] Some scholars suggest that we treat it as a 'toolbox' in which the stakeholders can find answers to practical questions raised by issues concerning reservations under the VCLT.[323] However, the 'soft' character of the Guide does not on its own mean that its content

[317] *2nd Report on Reservations to Treaties*. Doc.A/CN.4/477, *Yrbk ILC* (1996), II (1), at 52–82, paras 55–260.
[318] Alain Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur' (2013) 24 EJIL 1061, 1078.
[319] ibid.
[320] Marko Milanovic and Linos-Alexander Sicilianos, 'Reservations to Treaties: An Introduction' (2013) 24 EJIL 1055, 1058.
[321] ibid 1056.
[322] Pellet (n 318) 1072.
[323] Report of the ILC on the Work of its 63rd session, GA, Official Records, 66th Session, Supplement No. 10, Addendum 1, Doc. A/66/10/Add. 1, 35–6, para 4.

is 'soft'. In fact, some parts of the Guidelines are taken as binding rules because 'they have acquired (independently of the Conventions and, *a fortiori*, of the Guide) the status of customary rules'.[324] That is, although the Guide is a non-binding instrument, a considerable part of its content does build upon binding and customary rules and should therefore be treated as binding. Hence we must distinguish between those guidelines that reflect the *lex lata* and those that have been formulated *de lege ferenda.*[325]

Part 1 of the Guide addresses definitions. Although there are few controversies regarding the definition of a reservation, there are some unsettled issues. One of these concerns the distinction between reservations and interpretative declarations, on which the VCLT remains silent. Part 2 concerns the procedures for formulating reservations, interpretative declarations, the withdrawal and modification of reservations and interpretative declarations, as well as objecting to and accepting reservations. The more difficult but important issues are dealt with in Parts 3 and 4. Part 3 is about the permissibility of reservations and interpretative declarations. Part 4 concerns the legal effects of reservations and interpretative declarations. Part 5 concerns the succession of states.

For criteria for the permissibility of a reservation, especially on the 'impenetrable notion' of 'object and purpose' in Article 19 (c) of the VCLT, the Guide again confirms the compatibility

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[324] According to *Introduction to the Guide to Practice*, there are 'various provisions in the guidelines [that] cover a wide range of obligatoriness and have very different legal values':

- Some of them simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial at the time of their inclusion in the Conventions or have since become so as such[;] while not peremptory in nature, they are nevertheless binding on all States or international organizations, whether or not they are parties to the Conventions;
- Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question; reproducing them in the Guide to Practice should contribute to their crystallization as customary rules;
- In some cases, guidelines included in the Guide supplement Convention provisions … are silent on modalities for their implementation[,] but these rules are themselves indisputably customary in nature or are required for obvious logical reasons;
- In other cases, the guidelines address issues on which the Conventions are silent but set out rules the customary nature of which is hardly in doubt;
- At times, the rules contained in the guidelines are clearly set out *de lege ferenda* and, in some cases, are based on practices that have developed in the margins of the Vienna Conventions;
- Other rules are simply recommendations and are meant only to encourage.

(ibid 34–5, para 3). The Guide also gives examples of each situation: see footnotes 6–15, 34–5.

[325] ibid 34.

test approach and, more importantly, considers it *an objective assessment as far as objectivity can be reached in international law*.[326] The Guide not only provides a general account of the phrase 'incompatibility with the object and purpose of the treaty' (Guideline 3.1.5) but also suggests a general method for determining the object and purpose of a treaty (Guideline 3.1.5.1) and how to conduct the compatibility test in specific situations (Guidelines 3.1.5.2–3.1.5.7). Hence, Part 3 of the Guide not only develops practical guidance for conducting the compatibility test but also stipulates that Article 19 (c) shall be conducted objectively, not according to the individual state's stance (Guideline 3.3.3). This is a significant clarification for assessing arguments for reservations. Regarding the concerns of human rights regimes, Part 3 also indicates that treaty monitoring bodies have the competence to assess the permissibility of reservations (Guideline 3.2.1). However, such competence 'has no greater legal effect than that of the act which contains it'.[327]

Let us turn to the legal effects of reservations. According to the Guidelines, Articles 20, 21, and 22 are only applicable to reservations that are permissible under Articles 19 and 23, which raises the question: what is the legal effect of an impermissible reservation? According to Guideline 4.5.1, a reservation that does not meet the conditions of formal validity (Article 23) and permissibility (Article 19) is null and void and therefore devoid of any legal effect.[328] As for the status of parties who make invalid reservations, it depends on the intention expressed by the reserving state in the sense that it has a choice either to be bound by the treaty without the benefit of reservation or not to be bound by the treaty;[329] 'In the absence of a clearly expressed position in this regard, there is a rebuttable presumption that the reserving State intends to remain a party'.[330] Guideline 4.2.5 deals with the legal effects of established reservations[331] in the context of human rights treaties.[332] Under this guideline, because 'the treaty itself is not based on reciprocity of rights and obligations between the parties, a reservation can produce no such reciprocal effect',[333] which would otherwise be given under VCLT Article 21, para. 1 (b). However, the Guide does not offer much of a breakthrough in this case. The problem here remains

[326] Pellet (n 318) 1081.
[327] Guideline 3.2.1, A/66/10/Add.1, para 2.
[328] Guideline 4.5.1, A/66/10/Add.1.
[329] Guideline 4.5.3, A/66/10/Add.1, para 1.
[330] Milanovic and Sicilianos (n 320) 1058.
[331] For the conditions for establishing a reservation, see Guidelines 4.1, A/66/10/Add.1.
[332] Although in its commentary it is noted that this Guideline is not only related to human rights treaties. See Guidelines, A/66/10/Add.1, 469, para (6).
[333] ibid 469, para (3).

that an objection to non-reciprocal provisions 'produces in concrete terms the same effects as an acceptance'.[334] In other words, the treaty relations that hold between reserving states and accepting states are the same as those that hold between reserving states and objecting states.[335] However, the Guideline does emphasise that acceptance and objection have entirely different meanings: the former 'is tantamount to agreement, or at least to the absence of opposition to a reservation', while the latter 'expresses disagreement and purports to protect the rights of its author much as a unilateral declaration (protest) does'.[336] Moreover, Guideline 4.3.8 considers the notion of an objection with 'super-maximum' effect. This occurs when 'the author of the objection affirms that the treaty enters into force in its relations with the author of the reservation without the latter being able to benefit from its reservations'.[337] It is important to note that objections with 'super-maximum' effect relate only to reservations that are incompatible with the object and purpose of a treaty (and are therefore considered invalid), whereas accepting or objecting to a reservation relates only to valid reservations. The former is, nevertheless, an important notion, for it allows for an objection with 'super-maximum' effect to an impermissible reservation as a 'unilateral declaration[] … through which the author expresses its disagreement with the reservation'.[338] This is, in fact, a subjective reaction to the objective criteria of permissibility.

In sum, the Guideline does move the discussion on reservations to treaties forward and has an important impact on human rights treaties in particular. This impact to some extent resolves the unsettled issues mentioned in the previous section. Although there are still (if not always) questions that remain unsettled and controversial, the Guideline does provide important insights into the delicate balance between objective criteria *qua* universals on the one hand and subjective participation and recognition from states *qua* particulars on the other. More importantly, at its 68th session, the General Assembly adopted resolution 68/111 (16 December 2013), in which the Assembly 'welcomed the successful completion of the work of the Commission on the topic, took note of the Guide to Practice on Reservations to Treaties, including the guidelines, the text of which was annexed to the resolution, and encouraged its widest possible dissemination'.[339] This shows not only that the Guideline is a more comprehensive and up-to-date effort to develop a

[334] ibid 495, para (39).
[335] ibid.
[336] ibid 495–6, para (39).
[337] ibid 499, para (1).
[338] ibid 500, para (5).
[339] http://legal.un.org/avl/ha/rtt/rtt.html.

textual and teleological reading of reservations to treaties under the VCLT but also that it has been widely acknowledged and accepted in the international community, which makes it the most suitable source for deciding on the justifiability of China's arguments for maintaining its reservations to Article 8.1 (a) of the ICESCR and Article 6 of the CRC.

5.2 China's reservation to Article 8.1 (a) of the ICESCR

The arguments for making, maintaining, and objecting to reservations in constructive dialogue mainly concern the permissibility of the relevant reservations. Therefore, assessing the justifiability of these arguments involves examining the extent to which they make a justifiable case for the permissibility of the relevant reservations. This raises two interrelated questions: first, is the relevant reservation permissible? Second, are the arguments justifiable?

5.2.1 China's reservation to Article 8.1 (a) of the ICESCR

China's reservation to ICESCR Article 8.1 (a) reads as follows:

> The application of Article 8.1 (a) of the Covenant to the People's Republic of China shall be consistent with the relevant provisions of the Constitution of the People's Republic of China, Trade Union Law of the People's Republic of China and Labor Law of the People's Republic of China.[340]

The Article itself reads as follows:

> 1. The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.[341]

[340] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec.
[341] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

As noted at the beginning of this chapter, in the latest session in 2014 the Chinese delegation argued that the reasons for maintaining its reservation are the provisions of its Constitution, the prevailing trade union and labour laws, and its unique historical and national circumstances.[342] In addition, according to the Chinese delegation's argument from earlier sessions,

> China's Trade Union Act provided for the establishment of a single All-China Federation of Trade Unions across the country. Trade unions in various industries and regions were the component parts of the Federation, although they enjoyed a large degree of autonomy concerning their activities. Although it was illegal to organize a trade union outside the context of the All-China Federation of Trade Unions, the Government resolved attempts to do so through dialogue; no punishment had ever been meted out to trade union organizers …
>
> The Government was encouraging trade unions to play a more active role in ensuring safe working conditions in private companies and those owned by local authorities, where the unions were less active in safeguarding workers' rights than in State-owned enterprises. Trade unions had participated in drafting legislation on safety at work and on the prevention of occupational illness, and had been instrumental in establishing safety inspection committees.[343]

Given the definition of a reservation under the VCLT,[344] China's statement on Article 8.1 (a) does constitute a reservation in the sense that it is meant 'to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.[345] China's statement limits the effect of Article 8.1 (a) of the Covenant and confines it to what is allowed under China's domestic laws, namely the Constitution of the People's Republic of China, the Trade Union Law of the People's Republic of China, and the Labour Law of the People's Republic of China. In other words, it modifies the individual's right to form and join a trade union as granted in Article 8.1 (a) of the Covenant. It should also be noted that since there is no provision or General Comment on reservations under the ICESCR, reservations to the Covenant should therefore be assessed against the relevant provisions of the VCLT.

[342] E/C. 12/2014/SR. 17.
[343] E/C. 12/2005/SR. 7, paras 27, 33.
[344] Article 2.1 (d) VCLT (1969).
[345] ibid.

5.2.2 The justifiability of China's arguments for its reservation to Article 8.1 (a) of the ICESCR

According to the VCLT, the most relevant provision in this case is Article 19 (c) on the permissibility of reservations that fall outside the scope of the cases mentioned in Articles 19 (a) and (b). As discussed at length above, however, the 'purpose and object' test as outlined in Article 19 (c) is too ambiguous to be applied directly in practice. We must therefore resort to the Guide. Guideline 3.1.5.5 concerns making reservations on the grounds of domestic law and reads as follows:

> A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour.[346]

This is to say that China can formulate a reservation that aims to preserve the integrity of specific rules of its domestic law insofar as that reservation does not affect *essential elements and the general tenour* of the ICESCR. In other words, in order to know whether China's reservation is justifiable, the key is to assess whether the right included in Article 8.1 (a) of the Covenant, i.e. the right to form and join trade unions, is an essential element of the Covenant or relevant to its general tenour. To this end, Guideline 3.1.5.1 provides a general method for determining the object and purpose of a treaty.[347] In its commentary, it also mentions the method adopted by the ICJ for the same purpose.[348] Both methods emphasise that the title and preamble of a treaty, along with

[346] Guideline 3.1.5.5, A/66/10/Add.1.
[347] Guideline 3.1.5.1 'The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties' A/66/10/Add.1.
[348] '[The] International Court of Justice has deduced the object and purpose of a treaty from a number of highly disparate elements, taken individually or in combination:
—From its title;
—From its preamble;
—From an article placed at the beginning of the treaty that "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied";
—From an article of the treaty that demonstrates "the major concern of each contracting party" when it concluded the treaty;
—From the preparatory work on the treaty; and

the preparatory work, are essential for determining its purpose and object. In addition, when it comes to international human rights treaties the rights and obligations are usually in the substantive provisions and are interdependent. Guideline 3.1.5.1 should thus be read together with 3.1.5.6, which considers the case of reservations to treaties containing numerous interdependent rights and obligations:

> To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.

In its commentary, Guideline 3.1.5.6 is broken down into three elements: (1) the interdependence of the rights and obligations; (2) the importance of the provision to which the reservation relates and its relation to the general tenour of the treaty; and (3) the extent of the impact of the reservation on the treaty.[349] To elaborate, the first element emphasises

> the goal of achieving global realization of the object and purpose of a treaty and aims at preventing the dismantling of its obligations, that is, their disintegration into bundles of obligations, the individual, separate realization of which would not achieve the realization of the object of the treaty as a whole.[350]

The second element recognises that 'certain rights protected by these instruments are less essential than others—in particular, than the non-derogable ones'. One of the most important criteria for assessing the importance of a particular provision is whether it falls under the 'general tenour' of the treaty.[351] The third element indicates that 'even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime'.[352] Hence, according to the Guidelines, there is still room for states to make reservations to the provisions of international human rights treaties regarding substantial (even essential) rights and obligations: the reserving state must prove,

—From its overall tenour'
(Commentary to Guideline 3.1.5.1, A/66/10/Add.1, 362–3).
[349] Commentary to Guideline 3.1.5.6, A/66/10/Add.1, 389.
[350] Commentary to Guideline 3.1.5.6, para (7), 389.
[351] ibid para (8).
[352] ibid para (9).

however, that the rights that have been reserved do not prevent the achievement of the object of the treaty as a whole, especially with regard to non-derogable rights, and, in the case of reservations regarding essential rights, that the way in which the reserving state has made its reservation does not preclude the protection of rights and does not excessively modify the legal regime.

At the time of writing this chapter, the CESCR has not adopted a General Comment on Article 8. Therefore, a task to situate Article 8.1 (a) in the context of the Covenant must be undertaken. This is because, since the way China has constituted its reservation regarding Article 8.1 (a) precludes the protection of such a right, it can only be permissible if that right is not non-derogable or as not affecting the general tenour of the ICESCR.

Given the complex nature of the economic, social, and cultural rights provided for in the Covenant, the Committee has developed the concept of 'minimum core obligations' to help states to achieve the objects of the Covenant by fulfilling the minimum core standard. This concept has been variously equated with a presumptive legal entitlement, a non-derogable obligation, and an obligation of strict liability.[353] The Maastricht Guidelines state that 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant'.[354] In General Comment No. 3, the CESCR states that under the concept of 'minimum core obligation', 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant'.[355] In this regard, it seems that the right regulated in Article 8.1 (a) is not usually included in the minimum core obligations. This idea is further confirmed in the following commentary:

> a specific human right to form and join a trade union is perhaps not as fundamental to human dignity as certain 'survival' rights under the ICESCR, such as rights to food, water, housing, health care or social security; nor is it as formative of life chances or personal identity as rights to education or culture…

[353] Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale International Law Journal 113, 115.
[354] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22–6, 1997, para 9.
[355] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para 1, of the Covenant), 14 December 1990, E/1991/23, para 10.

> To describe trade union rights as innate to human dignity, or as a universal feature of the human condition, is … ahistorical … [The right to form and join a trade union—] unlike food, water, housing and so on—[is] not [itself] an integral or universal part of human existence or experience.[356]

As indicated in its *travaux préparatoires*, the right to join and form trade unions as listed in Article 8 derives from the more general right to freedom of association, which can be found in Article 22 of the ICCPR.[357] This point was also mentioned in one of the Committee members' inquiries during the constructive dialogue with the Chinese delegation, in which he stated that 'the committee would like to know whether the Government would consider withdrawing its declaration under article 8, paragraph 1 (a) of the Covenant in respect of freedom of association'.[358] As some explanations of the choice of minimum core obligations have suggested, the Committee is under pressures to 'operate meaningfully with respect to the Covenant while not impacting other substantive treaty regimes'. That is, 'core obligations allow the committee to claim its own jurisdictional turf'.[359] Certain rights—such as the right to work, which is mainly regulated in the conventions of the International Labour Organisation (hereafter the ILO)—are therefore omitted.[360] If this argument stands, it may also explain why the right to join and form trade unions, as derived from a more general right to freedom of association, which is codified in the ICCPR and also closely related to the ILO, is not usually mentioned when it comes to minimum core obligation under the ICESCR.

In addition, according to Committee member Philippe Texier, the Committee had not discussed the issue of reservations to the Covenant because 'the number of reservations relating to the International Covenant on Economic, Social and Cultural Rights was not large, and mainly concerned articles 6–8'.[361] Article 6 is about the right to work, Article 7 concerns the right to enjoy just and favourable work conditions, and Article 8 is mainly about the right to join and form trade unions. It is therefore no coincidence that Articles 6–8 do not lie within the usual scope of the

[356] Ben Saul et al. (eds), *The International Covenant on Economic, Social, and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2016) 490.
[357] Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Paperbacks, OUP 1998) 261.
[358] E/C.12/2014/SR. 17.
[359] Young (n 353) 156–7.
[360] ibid.
[361] See Report of the Meeting of the Working Group on Reservations, UN Doc HRI/MC/2006/5 (4 July 2006), para 8.

minimum core obligations as discussed above[362] and that the Committee member considered the fact that most reservations of the ICESCR concern Articles 6–8 was not sufficient to call for further attention on reservation issue. Moreover, at the time of writing this chapter, among the Articles that concern substantive rights (Articles 6–15) under the ICESCR, only Articles 8 and 10 do not have their own General Comments that address the whole or part of the Article.[363] This may also shed light on the Committee's priorities.

In a similar vein, some scholars also argue that, in the context of the ICESCR,

> impermissible reservations include general and broad reservations subjecting the Covenant to domestic law incompatible with the Covenant, or those extending to minimum core obligations which are non-derogable, and thereby depriving the Covenant of its raison d'être.[364]

In this sense, China's reservation to Article 8.1 (a): a) is not a general or broad reservation and b) does not extend to minimum core obligations that are non-derogable. In sum, this reservation does not affect an essential element of the Covenant or its raison d'être. Hence, China's reservation to Article 8.1 (a) is permissible. Nevertheless, this does not necessarily mean that China's arguments for maintaining the reservation are justifiable.

5.2.3 The justifiability of China's arguments for its reservations to Article 8.1 (a) of the ICESCR

China's arguments for maintaining its reservations to Article 8.1 (a) of the ICESCR can be represented as follows. The All-China Federation of Trade Unions is a product of Chinese history. Nevertheless, China will comply with its obligations in view of its particular situation.[365] Although it is illegal to organise trade unions outside the context of the All-China Federation of Trade Unions, which does infringe on the right to join and form trade unions as set out in Article 8.1 (a),

[362] In General Comment No. 18 (2005), the Committee suggests that in relation to the right to work, 'core obligations' relate mainly to duties of nondiscrimination and equal protection of employment. See General Comment no. 18, E/C.12/GC/18, para 31.
[363] Some General Comments address only part of an Article. For instance, one of the most recent General Comments adopted by the CESCR, General Comment No. 22 concerning the right to sexual and reproductive health, is part of the matter under Article 12 regarding the right to health.
[364] Manisuli Ssenyonjo, 'State Reservations to the ICESCR: A Critique of Selected Reservations' (2008) 26 Netherlands Quarterly of Human Rights 315, 357.
[365] Reservation on Article 8 (1) (a) of ICESCR, para 45. Translated from French.

illegal trade union organisers are not punished but dealt with through a process of dialogue.[366] The All-China Federation of Trade Unions is meant to ensure safe working conditions, to participate in drafting legislation on safety at work, and to prevent occupational illness, all of which is meant to support the rights of workers.[367] Finally, '[t]he reservation [does] not imply that the Covenant provisions were not respected. Nevertheless … [t]he possibility of withdrawing the reservation [will] … be given due consideration.'[368]

In other words, China argued that although it had made a reservation to the right to join and form trade unions, there was good reason to believe that it provided this right to some extent on its own terms. This argument is in general justifiable insofar as it makes the case that the reservation could pass the objective and purpose test under the ICESCR. However, it should be noted that this particular reasoning, which resorts to China's domestic law, culture, and history, only holds to the extent that the reservation neither conflicts with the object and purpose of the Covenant nor affects its essential elements or its general tenour. That is, the particular reasoning employed by China is only justifiable on the condition that the reservation is permissible; should the reservation itself be an impermissible one, the particular reasoning would not hold.

As for the arguments from the Committee, first, one Committee member argued that China's 'declaration' regarding Article 8.1 (a) was in fact a 'reservation'.[369] This point has also been established above. Second, the Committee expressed its regrets regarding China's reservation. This latter point was stated without further elaboration. As one scholar notes, the strategy of refraining from elaborating on state parties' reservations is in fact an attempt on the part of the Committee to avoid frustrating current state parties and to encourage future state parties to join the Covenant.[370] However, it seems that the Committee's lack of argument on the justifiability of state parties' reservations has blurred the line between permissible and impermissible reservations under the ICESCR, which is not constructive when it comes to conducting constructive dialogue and the Committee's role in assessing reservations made by state parties.

[366] E/C.12/2005/SR.7 (2005), para 27.
[367] E/C.12/2005/SR.7 (2005), para 33.
[368] E/C.12/2014/SR.17 (2014), para 38.
[369] E/C.12/2005/SR.6 (2005), para 24.
[370] Ssenyonjo (n 364) 329.

5.3 China's reservation to Article 6 of the CRC

Unlike the CESCR, the CRC does have its own provision for reservations (Article 51), which reads as follows:

Article 51 of the Convention on the Rights of the Child:

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

This provision does not go beyond the scope of the VCLT, however, nor does it narrow its scope. Instead, it reaffirms the 'compatibility test' approach. Therefore, in this section, Article 51 of the CRC, together with the VCLT and the Guidelines, is used as the main source for assessing specific reservation practices.

Regarding the Convention, China's reservation reads as follows:

> [T]he People's Republic of China shall fulfil its obligations provided by article 6 of the Convention under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and in conformity with the provisions of article 2 of the Law of Minor Children of the People's Republic of China.[371]

Article 6 of the Convention reads as follows:

> 1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.[372]

China has made a reservation to Article 6 of the CRC on the basis of the argument that the right to life should be consistent with China's family policy, as laid out in the Constitution and the Law of Minor Children. In its General Guidelines Regarding the Form and Content of Initial Reports

[371] https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en#EndDec.
[372] http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

(1991), the CRC Committee identified the right to life, survival and development (Article 6), non-discrimination (Article 2), the best interest of the child (Article 3), and respect for the views of the child (Article 12) as the four general principles of the Convention.[373] In the General Guidelines for periodic reports adopted in 1996, the Committee reaffirmed these four general principles,[374] which were again confirmed in the General Comment on the General Measures of Implementation of the CRC (2003).[375] Article 6 of the CRC is thus an essential element of the Convention. Hence in this case, China has 'a heavy onus to prove'[376] that its reservation does not impair the raison d'être of the Convention.

According to the summary records, in the 2005 session the Chinese delegation first argued that 'owing to extremely high population growth and a number of economic and social constraints, China's family planning policy was a necessity',[377] which explained the particular circumstances that made China's reservation to Article 6 necessary. However, although it pointed out the particular situation that China was facing, this argument alone cannot justify a reservation to one of the essential articles of the Convention, as established in Guidelines 3.1.5.5 and 3.1.5.6. In 2013, the Chinese delegation argued that China's reservation to Article 6 of the Convention 'was not inconsistent with the respect for the right to life', but 'merely sought to clarify that China intended to fulfil its obligations under article 6, provided that they did not contravene the country's family planning policy'.[378] The delegation further pointed out that 'the Law on the Protection of Minors defined the child as any person under the age of 18, which did not include foetuses'.[379] Put differently, the delegation argued that China did respect the right to life of the child as listed in Article 6. Given China's family planning policy, however, China only considered that right to apply after birth. In this sense, this argument tries to prove that China's reservation to Article 6 does not impair the raison d'être of the Convention, since China's reservation does not impair the

[373] UN Doc.CRC/C/5, para 13. See also Manfred Nowak, *A Commentary on the United Nations Convention on the Rights of the child: Article 6 The Right to Life, Survival and Development* (Brill Nijhoff 2005) 14–15.
[374] UN Doc.CRC/C/58, para 40 See also *A Commentary*, 15.
[375] CRC Committee, *General Comment No.5: General Measures of Implementation of the Convention on the Rights of the Child.* UN Doc.CRC/GC/2003/5.
[376] Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10.
[377] CRC/C/SR. 1062, 27.
[378] CRC/C/SR. 1833, 23.
[379] CRC/C/SR. 1833, 23.

right to life of the child, provided that the category 'child' ranges from birth up to (but not including) the 18-year mark.

This reservation brings out the controversy in Article 6 of the Convention concerning the definition of 'child'. According to one CRC commentary, 'since … the definition of the child in Article 1 of the CRC deliberately leaves open the starting point of childhood, it is left to the State parties to decide for themselves the conflicting rights and interests involved in issues such as abortion and family planning'.[380] In addition, it states in particular that 'Article 6 of CRC does not expressly determine the point at which the protection of the right to life begins. It is, however, clear from the *travaux préparatoires* of Article 6 of the CCPR that the life of the unborn child was not (or not from the moment of conception) to be protected'.[381] In this regard, not only do China's arguments seem to justify its reservation in the sense that the reservation does not impair the object or purpose of the Convention, but, more importantly, China's reservation may not count as a reservation after all, for it does not exclude or modify the legal effect of Article 6.

In fact, China did not refer to its claim a 'reservation' in the first place, but rather a 'declaration'.[382] Prior to the 1996 session, the Chinese delegation still referred to it as a 'declaration', stating that 'the *declaration* had been dictated by the economic and social situation in China and that steps would be taken in due course to adjust it'.[383] However, although one Committee member pointed out that 'article 6 of the Convention was open to a broad interpretation',[384] other Committee members who have commented on this matter have all referred to China's declaration as a 'reservation'.[385] One Committee member in particular argued that 'China's declaration on the implementation of article 6 of the Convention … was actually a reservation, in form as well as in substance'.[386]

It is therefore important to clarify the distinction between a reservation and a declaration. The core element of a reservation, as defined in Article 2.1 (d) of the VCLT, is that it 'purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state'.[387] As for interpretative declarations, although they were discussed in the *travaux*

[380] Nowak (n 373) 27.
[381] ibid 26-27.
[382] CRC/C/SR. 298.
[383] ibid para 14, italic added.
[384] ibid para 26.
[385] ibid paras 26, 30, 46.
[386] ibid para 46.
[387] Article 2.1 (d) of VCLT 1969.

préparatoires of the VCLT,[388] the final text of the VCLT remains silent on the matter. Nevertheless, it was again brought up in the Guidelines, where 'interpretative declaration' is defined as 'a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions'.[389] Hence, the difference between these two instruments lies in the 'legal effect that its author purports to produce'.[390] As also elaborated in the Commentary,

> the character of a unilateral statement as a reservation depends on whether its object *is to exclude or modify* the legal effect of the provisions of the treaty in their application to the author State or international organization; and the character of a unilateral statement as an interpretative declaration depends on whether its object is to *specify or clarify* the meaning or scope attributed by its author to a treaty or to certain of its provisions.[391]

It is also important to point out that although there is no express definition of an interpretative declaration in the VCLT, the difference between reservations and interpretative declarations, as outlined in the Guidelines and the Commentary, is confirmed in judicial practices, such as in the *Belilos Case* and the *Case Concerning the Delimitation of the Continental Shelf*.[392] Therefore, it suffices to say that distinguishing between a reservation and an interpretative declaration involves deciding on the function of the statement, as the former modifies or excludes the legal effect of the reserved provision, while the latter specifies or clarifies the meaning or the scope of the reserved provision. Since Article 6 of the CRC does not necessarily include the right of the child from the point of conception, China's statement regarding Article 6 is only meant to clarify the definition of 'child' and to specify that the scope of 'child' as codified in Article 6 should be in line with its family planning policy. In this sense, China's statement is actually a clarification of the scope of the article. That is, it clarifies that this provision only applies to the child after birth in China. This is, by definition, an interpretative declaration rather than a reservation. However, China did not make any further arguments for its position on the declaration. Taking everything into

[388] Guideline 4.7.1, A/66/10/Add.1, 547–8.
[389] Guideline 1.2, A/66/10/Add.1.
[390] Guideline 1.3, A/66/10/Add.1
[391] Guideline 1.3. para (2). pp. 74–5, italics added.
[392] ibid, para (3), 75.

consideration, China's arguments for its 'reservation' to Article 6 of CRC are justifiable, while the comments from the Committee are not.

5.4 Conclusion: Particular reasoning in the case of reservations

When a state makes a reservation to a human rights treaty, it purports to exclude or modify the legal effect of some provision(s) of the treaty or the treaty as a whole to suit its particular interests or situation. It has been made clear in the VCLT and the Guidelines that this practice is allowed with certain limits, even within a human rights regime. Reservations, in this sense, represent a balance between the particular interests of the state and the universality and equality of the treaties. In other words, the reserving state can make a reservation in the subjective sense, meaning that it can make a reservation considering its subjective requests (i.e. its particular situation), and other contracting states can also have subjective reactions to this reservation (i.e. acceptance or rejection). Objective criteria have been (and continue to be) developed regarding the permissibility and legal effects of these particular statements. These criteria, in this sense, are meant to universalise the particulars. Because of these criteria, particulars are universalised and can therefore be subject to a judgement to decide whether they are justifiable. Therefore, the universalised particularity in the case of reservations has two levels of meaning: first, when a state makes a reservation to a treaty, that state shall nevertheless comply with the object and purpose of the treaty; second, the reservation is subjected to objective assessment.

When a reservation to an international human rights treaty is assessed as invalid by the treaty body and a request for withdrawal is made, if the reserving state does not comply with the treaty body's request or provide further argumentation on the permissibility of its reservation, the reserving state is not 'playing the game by the rules'. However, as shown above, this is not what occurred when China made arguments for its reservations to the ICESCR and the CRC. Insofar as the CESCR has yet to provide a counter-argument, China's reservation to Article 8.1 (a) of the ICESCR is permissible, and China's arguments are justifiable, all things considered. China's 'reservation' to Article 6 of the CRC is a more complicated case: first, although China initially presented its claim as a 'declaration' concerning Article 6, it ultimately adopted the Committee's assessment that it was a 'reservation'. This process in a way shows China's acceptance of the Committee's competence to assess reservations. Secondly, although the Committee did not decide that China's reservation to Article 6 was impermissible, it did request that China withdraw the

reservation. China, on the other hand, explained the scope of its reservation and showed its respect for Article 6 in general. In other words, China argued that its reservation was in line with the object and purpose of the Convention. Therefore, although Article 6 is one of the principal articles of the CRC and reservations to Article 6 do bear a heavy burden of proof, China justified the permissibility of its reservation by indicating that its reservation did not impair the raison d'être of the Convention. Thirdly, the situation was complicated by the fact that the Committee's assessment was problematic. Nonetheless, the latter point is something of a technical matter residing in the application of the VCLT; although important, it does not significantly alter China's relationship with human rights treaty bodies in terms of making reservations. China's arguments for its reservations to Article 8.1 (a) of the CESCR and Article 6 of the CRC are both legally justifiable and dialogically constructive.

Making a reservation involves making a particular case upon entering into a treaty. Making a particular case *per se* is not sufficient to justify a reservation's permissibility, however. As the above analysis shows, the particular reasoning employed by China was not sufficient to justify the permissibility of its reservations. In other words, although China made reservations based on its particular situation, the permissibility of these reservations and the justifiability of its arguments depend not on how 'particular' its situation is but on the results of objective assessment, i.e. the compatibility test, as established in the VCLT and the Guidelines.

Committees, on the other hand, have a responsibility to apply the compatibility test to the reservations made by state parties diligently. As discussed above, however, both the CESCR's lack of arguments and the CRC Committee's problematic definition make it difficult to assess China's reservations and their supporting arguments, thus are considered as non-constructive. If, as some scholars have noted,[393] the attitude taken by the Committees is attributed to the idea of motivating current state parties and encouraging future state parties to join the Convention, then it certainly fails short of expectation. On the one hand, the relevant committees have a responsibility to assess the permissibility and legal effects of reservations made by state parties; failing to carry out this task diligently means failing to treat current state parties universally and equally, as it blurs the line between permissible and impermissible reservations. On the other hand, if making a reservation that is incompatible with the purpose and object of a convention is what it takes to convince a state to join or stay in an international human rights treaty, then perhaps the treaty

[393] Ssenyonjo (n 364).

regime is better off without that state. In short, when it comes to assessing state party's reservation, there is certainly a reasonable expectation that calling for more and better engagement on the part of the Committees.

Chapter 6 Particular Reasoning on Sovereignty in the Constructive Dialogue between China and International Human Rights Treaty Bodies

Introduction

As one of the most important concepts in the domains of international politics and international law, sovereignty is the subject of a complex and broad debate that easily exceeds the scope of this chapter.[394] When it comes to a concept as rich and powerful as sovereignty, one can only hope to penetrate it from a certain angle. Sometimes, even choosing such an angle seems too ambitious a task given the context and length of the relevant discussion. Therefore, common ground must first be established so that the discussion can move forward and have the possibility of reaching a meaningful conclusion.

The common ground of the present discussion, first and foremost, is that the Westphalian notion of sovereignty is a myth.[395] This premise has at least the following three implications. First, the idea that the modern concept of sovereignty has a clear-cut 'birthday', supposedly when the Treaties of Westphalia were signed at the end of the Thirty Years War (1648),[396] is historically inaccurate.[397] Second, the theoretical origin of the principle of non-intervention is often utilised in an oversimplified manner. The origin of this external perspective on sovereignty is usually attributed to Vattel and his work *Droit des Gens*.[398] However, as Vattel also offered a justification

[394] Or, in Stéphane Beaulac's words: 'The word "sovereignty" is one of those powerful words which has its own existence as an active force within social consciousness'. Stéphane Beaulac, *The Power of Language in the Making of International Law* (Martinus Nijhoff Publishers 2004) 1.

[395] See for example Benno Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (Verso 2003); Beaulac (n 1); Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 International Organization 251. Luke Glanville, 'The Myth of ''Traditional'' Sovereignty' (2013) 57 International Studies Quarterly 79.

[396] This view has prevailed in both international relations and international legal work. See, for instance, Mark Weston Janis, 'Sovereignty and International Law: Hobbes and Grotius', in R. St. J. Macdonald (ed) *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Hijhoff 1994) 393. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999).

[397] It was once believed (especially among IR scholars) that this historical event marked the establishment of sovereignty, which allowed sovereign states to 'enjoy absolute and exclusive control and power over a relatively well-defined territory', 'free from outside interference or intervention'. However, as most contemporary legal historians agree, this story is historically unsupported. See Beaulac, 'The Westphalian Legal Orthodoxy - Myth or Reality?' (2000) 2 Journal of the History of International Law 148; Osiander (n 395); Luke Glanville, 'The Myth of "Traditional" Sovereignty' (2013) 57 International Studies Quarterly 79.

[398] See Beaulac, 'Emer de Vattel and the Externalization of Sovereignty' (2003) 5 Journal of the History of International Law 237.

for intervening under certain circumstances,[399] it suffices to say that even as a firm believer in and pioneer of promoting the principle of non-intervention, Vattel still left room for intervention as a 'last resort' for humanitarian purposes.

Third, having acknowledged that both the concept of Westphalian sovereignty and its corollary, the principle of non-intervention, are shrouded in a veil of historical and theoretical inaccuracy, it is worth pointing out here that the traditional notion of sovereignty involves circular logic. According to the classic definition, a sovereign power is supreme over its territory and therefore not subordinate to any other power.[400] In this sense, sovereignty is in fact a linguistic sign that functions as a placeholder for the 'supreme power at the apex of the pyramid of authority'.[401] However, if we assume that a sovereign power is the highest power in a legal order (in the normative sense),[402] we would then seem to require another, higher norm that grants this power, which is impossible if the sovereign itself is to serve as the highest power. Hence the *petitio principii*. This observation implies that sovereignty—like money and marriage—*is an institution that is what human society makes of it*. This is not to say that sovereignty can be interpreted by any subject as he or she wishes, but that the notion of sovereignty is the result of the shared intentions (or commitments) of international societies.[403] In this sense, this concept has always been and will remain subject to further development.

With these three grounds laid out above, the following discussion focuses on the question of determining the justifiability of the argument that invokes sovereignty under the IHRL. By invoking sovereignty under the IHRL, the state in fact argues that because it is only subject to its own judgement on this issue, it should be excluded or allowed to deviate from the relevant rules

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[399] These exceptions include: 'if the prince, by violating the fundamental laws, gives his subjects a legal right to resist him,—if tyranny becoming insupportable obliges the nation to rise in their own defence,—every foreign power has a right to succour an oppressed people who implore their assistance' and in the case of civil war when neither party within a nation has been able to bring about peace. Emer de Vattel, *The Law of Nations, or, Principles of Law of Nature, Applied to the Conduct and Affairs of Nations and Soveriegns, with Three Early Essays on the Origin and Nature of natural Law and on Luxury* (Edited and with an Introduction by Béla Kapossy and Richard Whatmore, Liberty Fund, Inc. 2008) 290, 648-49. See Jennifer Pitts, 'Intervention and sovereign equality: legacies of Vattel', in Stefano Recchia and Jennifer M. Welsh (eds), *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill* (Cambridge University Press 2013) 146.

[400] Or in Jean Bodin's terms, 'the most high, absolute, and perpetual power over the citizens and subjects in a Common-wealth'. See Beaulac (n 394) 107.

[401] ibid 117.

[402] ibid 41.

[403] For the account of shared intention that is referred to here, see Margaret Gilbert, 'Shared Intention and Personal Intentions' (2009) 144 Philosophical Studies 167. For the idea that an institution is what society makes of it, see John Searle, *Making the Social World* (Oxford University Press 2010).

or principles. In this sense, it employs particular reasoning. In the first section of this chapter (6.1), I will consider an account of sovereignty that aligns with the codification of the United Nation Charter, which is one of the main sources for justifying the sovereignty argument in international law. The second section (6.2) discusses the particular situation of a state's joining an international (human rights) treaty, where the sovereignty argument functions as a buffer for the state. This section approaches the question by turning to another source—the relevant rules of the VCLT. The third section (6.3) explores the shared intentions of the international community with regard to human rights issues by focusing on the World Conference on Human Rights in Vienna (1993), as well as the concept of RtoP, in order to determine the current international consensus on the relationship between sovereignty and human rights. A short conclusion will be given regarding the justifiability of sovereignty arguments based on international law shared intentions, and the purpose and object discussed thus far. The fourth part (6.4) turns to the case of China and analyses the justifiability of the sovereignty arguments found in the constructive dialogue between China and international human rights treaty bodies. China's approach to the sovereignty issue in general will also be discussed. The conclusion (6.5) addresses the element of objectivity in the notion of sovereignty in the context of the international legal order.

6.1 The account of sovereignty in the Charter of the United Nations

Following the logic that 'the notion of sovereignty is what states make of it', sovereignty as an artefact has always been (re)created to adapt to the relevant social context. The notion of sovereignty in its traditional Westphalian sense and its corollary non-intervention sense has also been challenged to some extent by international legal systems and practices. Therefore, in order to discuss the justifiability of the sovereignty arguments in international human rights treaties, an understanding of sovereignty that can go beyond the 'Westphalian myth' is needed. Nevertheless, this cannot be just any understanding but must be one that is in line with the current international legal order(s) and practices. The Charter of the United Nations (hereafter the Charter or the UN Charter), perhaps the most important codification of the current international legal and political

order (some scholars may even hold it to be the Constitution of the international legal order),[404] is therefore considered the essential source for providing this understanding.

The account of sovereignty provided in the Charter is mainly included in Article 2, which as a whole is considered to contain the 'principles' of the Charter. Among the seven paragraphs of Article 2, paragraphs 1 and 7 are particularly related to the notion of sovereignty.

6.1.1 Article 2(1) of the Charter: Sovereignty as equality

> Article 2
>
> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
>
> 1. The Organization is based on the principle of the sovereign equality of all its Members.

Article 2 paragraph 1 is about the principle of sovereign equality, which is also a vantage point for understanding sovereignty according to the Charter. It is first worth noting that although Article 2 as a whole is described in terms of 'principles', which by definition articulate fundamental rules, purposes and objects rather than entailing rights and obligations, within Article 2 only Article 2(1) is in fact a 'principle' in this sense.[405] In other words, '[o]nly Art. 2(1) can be said to possess the character of a mere, though important, principle'.[406] This insight in a way supports the view that Article 2(1) provides a vantage point for an account of sovereignty based on the Charter.

The key element of Article 2(1) is the concept of sovereign equality. Starting from a textual reading of the terminology, during the drafting of the Charter the subcommittee voted to keep this terminology on the assumption that the notion of sovereign equality conveys the following understandings:

1. That states are juridically equal;
2. That they enjoy the rights inherent in their full sovereignty;

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[404] For instance, see Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (2nd edition, Oxford University Press 2002). Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Publishers 2009).
[405] Simma ibid 64.
[406] Ibid.

3. That the personality of the state is respected, along with its territorial integrity and political independence;
4. That the state should, under the international order, comply faithfully with its international duties and obligations.[407]

This understanding of sovereign equality was later confirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereafter the Declaration on Friendly Relations),[408] with a slight addition.[409] On this reading, there are in fact two perspectives involved in this term: the relationship between the sovereign member states, and the relationship between the organisation (the UN) and the sovereign member states.

The sovereign equality between sovereign member states is a form of legal equality. It is important to note that this is 'equality before law', not 'equality in law',[410] for the permanent members of the Security Council do have a privileged status compared to other sovereign member states.[411] Nevertheless, according to the Declaration on Friendly Relations, '[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community'.[412] In this context, 'equal rights are the sovereign rights equally enjoyed by states, as defined by international law or, more exactly, the constitution of the international community'.[413] In other words, in the legal order codified by the UN Charter, every state, regardless of its size or other characteristics, equally enjoys the rights that are granted by international law as equal subjects of the law.[414] Hence sovereign equality also refers to legal equality. Moreover, the status of legal equality can be further explained in terms of having 'the same legal personality'. That is

[407] See Report of Rapporteur of Sub-committee I/1/A to Committee I/1: Chapter II, June 1, 1945; Simma ibid 77.
[408] It is said that because of its careful preparation and adoption by consensus, the Friendly Relations Declaration of 1970 (Annex to GA Res. 2625 (XXV)) can be relied on almost as a text that enjoys binding force: 'the Declaration … set out principles which the General Assembly declared to be "basic principles" of international law' (*The Case Concerning Military and Paramilitary Action In and Against Nicaragua*, Judgment, ICJ Reports (1986), 14 *et seq.* at 107. See also Simma ibid 80, footnote78.
[409] Compared to the report from the subcommittee, in the Friendly Relations Declaration it is added that '[e]ach State has the right freely to choose and develop its political, social, economic and cultural systems' under the term of sovereign equality.
[410] Simma (n 404) 65.
[411] ibid.
[412] A/RES/25/2625.
[413] Simma (n 404) 85
[414] ibid.

to say, sovereign equality refers to the states' possession of the *same legal personality*.[415] As Crawford comments,

> [t]he sovereignty of states represents the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having, in principle, a *uniform legal personality* … If states (and only states) are conceived of as sovereign, then in this respect at least they are *equal*, and their sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.[416]

In this sense, as codified in Article 2(1) of the Charter, the notion of sovereignty as sovereign equality equates to this notion of a uniform legal personality in the context of the international legal order. Following the logic of equality, i.e. 'treating like cases alike', this means that all sovereign states in the current international legal order should be treated equally under the law.

As for the latter perspective on the relationship between international organisations (such as the UN) and sovereign states, in Simma's Commentary there appear to be deviating opinions, which I take to be significant. Not only do these different opinions reveal different stances on this important principle, but they can also function alongside each other to bring us to a more comprehensive understanding.

Earlier in the Commentary, we read that:

> The principle of sovereign equality laid down in para. 1 as a basis for the UN expresses the fact that the latter wishes to confirm in principle, rather than change in any way, the fundamental character of contemporary public international law as a co-operative body of law. *The UN is not an organization superior to the member States in the sense that, by the very fact of their membership, the latter have given up their sovereignty*. They remain sovereign States because the imitations on their sovereignty in connection with UN membership are based on a treaty arrangement, i.e. they are brought about by agreement and are *not of such an extent* that they would affect the core of the member State's *constitutional authority*.[417]

[415] Simma ibid 65, italics added.
[416] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 447, italics added.
[417] Simma (n 404) 65.

The above paragraph can be compared with later arguments in the Commentary on the same issue, according to which 'sovereignty [is] meant to exclude legal superiority of any state over another, but *not to exclude a greater role of the international community* played *vis-à-vis all* its members',[418] and according to which 'sovereignty cannot mean complete independence or absolute power over internal matters'.[419]

On the one hand, as the former opinion suggests, member states maintain their sovereignty when entering the organisation. In other words, the UN is not a supranational organisation (e.g. compared to the EU). On the other hand, as the latter view argues, this does not mean that such sovereignty is absolute under any circumstances. According to the Charter and Commentary, the fault line lies in Article 2(7) on defining domestic jurisdiction and non-intervention, which stipulates that '[w]hat follows from the sovereignty remaining with the member States pursuant to para. 1 is the prohibition in para. 7, addressed to the Organization, on intervening in matters that are essentially within the domestic jurisdiction of any State'.[420] This brings us to discussion of Article 2(7) of the Charter.

6.1.2 Article 2(7) of the Charter: Sovereignty as domestic jurisdiction free from intervention

Article 2(7) of the Charter reads as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This article sets out an important logic of sovereignty, which can be simplified as the conditional 'if domestic jurisdiction, then non-intervention'. This account has two main elements, namely 'domestic jurisdiction' and 'non-intervention'. In this sense, if a state has sovereignty over a given matter, this means that it has domestic jurisdiction over that matter and hence that intervention is impermissible.

[418] ibid 83.
[419] ibid 150.
[420] ibid 65.

Let us start with the term 'domestic jurisdiction'. The meaning of 'domestic jurisdiction' is controversial and therefore subject to further debate. This is largely due to the fact that, apart from the option of addressing to the ICJ in a specific case and procuring an advisory opinion, there is no authority to determine its meaning, which in fact was a decision made at the San Francisco Conference. A committee report states the following:

> In the course of the operations from day to day of the various organs of the Organisation, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorising or approving the normal operation of this principle.[421]

This means that 'any organ of the United Nations confronted in a given case with a plea of domestic jurisdiction will have to take a decision on its applicability and, thus, to establish some form of practice in dealing with such issues'.[422] In other words, the United Nations has initially in principle delegated the power to interpret 'domestic jurisdiction' to individual organisations and states on an *ad hoc* basis.

Having said that, the Permanent Court's decision on the *Tunis and Morocco Nationality Decrees* case (1923) provides an important understanding of 'domestic jurisdiction'. The Court stated that '[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the *development of international relations*'.[423] Although this near-century-old decision does little more than decide that 'domestic jurisdiction' is a term that will develop according to international practices, this observation 'has been and is still accepted by most authors as the leading pronouncement on the question of what

[421] Report of the Rapporteur of Committee at San Francisco Conference IV/2 (PC/LEG/22). On the importance of this report, see Pollux 'The Interpretation of the Charter' (1946) 23 BYIL 73–4; Dan Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (Martinus Nijhoff 1975) 154–5; and Tetsuo Satö, *Evolving Constitutions of the International Organizations: A Critacal Analysis of the Interpretative Framework of the Constituent Instrument of International Organizations* (Kluwer Law International 1996) 164.
[422] Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Intersentia 2006) 27.
[423] *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) (Feb 7, 1923), PCIJ, Series B, No.4, 24, italics added. https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_B/B_04/Decrets_de_nationalite_promulgues_en_Tunisie_et_au_Maroc_Avis_consultatif_1.pdf.

constitutes "domestic jurisdiction" under the UN Charter'.[424] The implication of this judgement is that 'domestic jurisdiction' does not refer to a certain sphere that is 'clearly defined, irreducible, or in any way inherently removed from the international sphere',[425] but rather 'circumscribes areas which, taking into account the situation at issue, are not even *prima facie* affected by rules of international law'.[426] It also implies that some matters that used to be regulated by states themselves may later become the subject of international regulation—'either through the emergence of rules of customary international law or through the process of treaty making'.[427] In short, states' domestic jurisdiction is subject to change over time.

Let us turn to the concept of non-intervention. This term further prompts the following question: 'if a matter falls essentially within the jurisdiction of a State, is the corresponding prohibition on the United Nations "intervening" absolute or relative?'[428] This question implies that, like 'domestic jurisdiction', the term 'intervention' allows for different interpretations. There are in general two groups of opinions: those that read this term in the narrow sense and those that read it in the broad sense. The narrow sense of 'intervention' entails a more relative prohibition on UN interventions in established domestic jurisdictions. The principal proponent of this interpretation is Lauterpacht, who, in his famous *Hague Lectures on the International Protection of Human Rights*, provides the following definition of intervention:

> Intervention is a technical term of, on the whole, unequivocal connotation. It signifies *dictatorial interference* in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand for positive conduct or abstention—a demand which, if not complied with, involves a threat of or recourse to compulsion in some form.[429]

It follows from this definition that 'any form of action falling short of dictatorial interference would be permitted, even if the matter had been found to be essentially within the domestic jurisdiction of a State'.[430] Lauterpacht's views greatly influenced debates in the United Nations at the time. For example, in the dispute concerning the treatment of Indian people in the

[424] Simma (n 404) 157.
[425] ibid.
[426] ibid, italics added.
[427] ibid.
[428] ibid 29.
[429] Hersch Lauterpacht, 'The International Protection of Human Rights' (1947) 70 *Recueil des cours* 19.
[430] Gutter (n 422) 30–31.

Union of South Africa (1949), the representative of India quoted extensively from Lauterpacht's work.[431]

However, this narrow understanding of non-intervention has also been criticised on the grounds that it 'hardly left any field of application for Art. 2(7)' since '[t]he UN organs … only have powers of recommendation'.[432] In this sense, a broader interpretation is gradually accepted in the later debate and in international practices. In the Declaration on Friendly Relations, the term 'intervention' refers not only to 'armed intervention' but also to 'all other forms of *interference* or attempted threats against the personality of the State or against its political, economic and cultural elements'.[433] In the *Nicaragua* case, the ICJ made a judgement that was in line with the Declaration:

> A prohibited intervention must accordingly be one bearing on matters on which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices which must remain free ones. The element of coercion which defines and indeed forms the very essence of prohibited intervention is particularly obvious in the case of intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[434]

In this case, the Court held a broad view on intervention and a restrictive view on the UN's power over states' domestic matters.

At this point, another perspective should be brought out in the discussion. This is the distinction between *intervention* and *interference*. There is definitional overlap between these two terms. In a way, interference can be understood in terms of the broader sense of intervention, whereas intervention refers to the narrower/stricter sense of interference. In this sense, intervention refers to using force (directly or indirectly) to coerce a state, whereas interference refers to becoming involved with a state's free choices with regard to its political, economic, and cultural affairs and foreign policy making. Arriving at a clear-cut distinction between these two terms is a

[431] See Lawrence Preuss, 'Article 2, paragraph 7 of the Charter of the United Nations and matters of domestic jurisdiction' (1949) 74 *Recueil des cours*, 616–7. Also see Gutter ibid 30.
[432] Simma (n 404) 152.
[433] GA Res 2625 (XXV) 24 Oct 1970.
[434] ICJ, *Reports of Judgements. Advisory Opinions and Orders: Case Concerning Military and paramilitary Activities in and against Nicaragua* (27 June 1986) 107, para 205.

difficult task. One of the reasons is that the criteria for these terms are still open to discussion. Nevertheless, situating a specific case according to these two terms is useful; while the threshold for intervention has become higher over the past decades, other mechanisms under the term 'interference' have been further developed. The scope of 'domestic jurisdiction' therefore also changes depending on what case is at issue. Returning to Article 2(7) of the UN Charter, for instance, it was once generally accepted that the term 'intervention' was to be understood in a broad sense.[435] On this reading, many forms of interference are forbidden under the clause, including, for example, diplomatic démarches and the adoption of critical recommendations. However, the proceeding discussions on whether a certain topic falls within the domestic jurisdiction of a state is permissible. It has been observed that in 'several cases States have tried, by invoking para. 7[,] to prevent even the discussion of certain topics by the Organization, but those attempts have, generally speaking, been unsuccessful'.[436] According to current UN practices, 'the placing of an issue on the agenda, its discussion and the adoption of General Recommendation, i.e. of recommendations which are not addressed to one particular State, do not constitute intervention contrary to para. 7'.[437] Moreover, it is also observed that 'in practice, the UN has developed the consistent tendency to limit the scope of domestic jurisdiction by reference to human rights and the maintenance of peace and security'.[438]

In this sense, Article 2(7) helps to pave the way for the account of sovereignty that prevails in the current international legal order. Not only is this article mainly in line with the current mainstream understanding of sovereignty, but it also captures its two essences—domestic jurisdiction and non-intervention—so that the word sovereignty can stop being a myth and can instead be grounded in concrete legal terms that discussants actually grasp and reflect upon. Furthermore, these elements, namely domestic jurisdiction, intervention, and interference, are the variables of the concept of sovereignty. In other words, the evolution of the concept of sovereignty (as far as international law is concerned) can be understood as a result of the changing meanings of these variables. The meaning of sovereignty can in this regard (and with this account) evolve accordingly.

[435] See Friendly Relations Declarations.
[436] Simma (n 404) 67.
[437] ibid.
[438] Philipp Kunig, 'Intervention, Prohibition of', *Max Planck Encyclopedia of Public International Law* 5. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?prd=EPIL.

6.2 The effects on sovereignty of states' entering into treaties: A reading of the VCLT

Alongside the Charter, the VCLT is another important source for understanding sovereignty in the current international legal order, for it provides an overarching perspective for approaching the notion of sovereignty with regards to international treaties. It is worth noting that, although the VCLT only entered into force in 1980 (which is later than some of the international human rights treaties discussed in this study), a large part of the VCLT is also a codification of customary international law,[439] which can therefore be applied to international treaties in general.

Taking both the characteristics of international human rights treaties and the VCLT into consideration, there are three elements in the VCLT that can help us to approach the notion of sovereignty in the context of a state's entering into an international (human rights) treaty: the principle of consent to be bound (Preamble), the principle of *pacta sunt servenda* (Art. 26), and the relationship between domestic law and international treaties (Art. 27).

- The principle of consent to be bound

The principle of consent to be bound is embodied in Paragraph 3 of the Preamble to the Convention, which reads as follows:

> *Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised.

Although this principle is not explicitly mentioned elsewhere in the Convention, it is implicitly contained in Articles 1, 2 subpara 1(b), 6, 11, and 16.[440] According to this principle, '(u)nless and until a State consents to be bound, a treaty cannot create rights and obligations for that State'.[441] In this sense, the principle implies a contractual view of international treaties in

[439] See Sir Ian Sinclair, *The Vienna Convention of the Law of Treaties* (2nd edn, Manchester University Press 1984) 5–10. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 1–27.
[440] Villiger ibid 48.
[441] ibid 176. Although it should be borne in mind that this is a treaty-making scenario, there is also the scenario of customary laws, which are deemed to be binding regardless of any specific expression of consent from a specific state. This scenario will be discussed below.

which 'consent infers consensus, *i.e.*, the concurrence of wills with a view to performing a contractual act'.[442] On this view, a sovereign state can withhold its consent and maintain its sovereignty with regard to rights and obligations codified in a treaty. On the flip side, it also means that once a state has given its consent to be bound by a treaty, it has expressed its commitment to abiding by the treaty. In the latter scenario, not only will the state be expected to comply with the provisions of the treaty when the treaty enters into force, but it must also 'refrain itself from acts which would defeat the object and purpose of the treaty prior to its entry into force provided such entry into force is not "unduly delayed"'.[443]

- The principle of *pacta sunt servanda*

Following the principle of consent to be bound, the principle *pacta sunt servanda,* which is also included in Paragraph 3 of the Preamble, is further elaborated in Article 26:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This principle seems to have been 'applied since time immemorial' and is today viewed as 'the cornerstone of international relations'.[444] It emphasises what is perhaps the most salient aspect of the relationship between sovereign states and international treaties, i.e. the binding and obligatory nature of the latter.[445] In other words, once a state expresses its consent to be bound by a treaty, it must carry out its treaty obligations in good faith.[446] Applying this principle to the sovereignty argument in international human rights treaties, this means that the relevant state party must interpret and perform its treaty obligations both in their spirit and according to their letter.[447] Therefore, this principle also coincides with the textual reading of sources and with the purpose and object conditions for determining the legal justifiability of an argument. Moreover, this principle suggests that 'if a party to a treaty does not perform it, that will, to the extent of the non-performance, be a breach of its international obligations to the other party or parties'.[448]

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[442] ibid.
[443] VCLT Art. 18, subpara, [b].
[444] Villiger (n 439) 363.
[445] ibid 365.
[446] ibid 367.
[447] ibid.
[448] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2007) 180.

- Article 27, Internal law and the observance of treaties

Article 27 of the Convention reads:

> [a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

This rule was added to the ILC Draft at the 1969 Vienna Conference (73 votes to two, with 24 abstentions).[449] It is the corollary of Article 26, *pacta sunt servanda.* Following the principles of consent to be bound and *pacta sunt servanda,* Article 27 can be seen as a further step toward putting the relationship between sovereign states and international treaties into perspective. That is, states cannot invoke their own internal laws (including the provisions of their constitutions)[450] to evade their treaty obligations.[451] In this sense, Article 27 establishes a hierarchy among international treaties and domestic laws (with the former having priority over the latter).

In sum, when the principle of consent to be bound, the principle of *pacta sunt servanda*, and Article 27 of the VCLT are read together, we see that there are limits to justifiably using sovereignty *qua* domestic jurisdiction as an argument for non-compliance with international treaties in general, and with international human rights treaties in particular.

6.3 Shared intentions of the international community: The Vienna World Conference on Human Rights and the concept of Responsibility to Protect (RtoP)

In this section, I articulate shared intentions of the international community regarding the relationship between sovereignty and human rights by delving into the Vienna World Conference on Human Rights and the concept of RtoP.

[449] The high number of abstentions, however, also shows 'the hesitations of some States to recognise the supremacy of international law over municipal laws and powers'. See Villiger (n 439) 371.
[450] '[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.' *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) (1932) PCIJ Series A/B no. 44, 24.
[451] Villiger (n 439) 371.

6.3.1 The Vienna World Conference on Human Rights (1993)

Apart from taking signing and ratifying international human rights treaties as a way of expressing states' consent, there are other events that can also work as channels for expressing states' intentions. International human rights conferences are probably the most representative occasions for this purpose. In this section, I focus on the Vienna World Conference on Human Rights (hereafter the Vienna Conference) for the following reasons: first, this Conference can be viewed as representative when it comes to the quantity of participants. It was attended by the representatives of 171 States, 2 national liberation movements, 15 United Nations bodies, 10 specialized agencies, 18 intergovernmental organizations, 24 national institutions, 6 Ombudsmen, 11 United Nations human rights and related bodies, 9 other organizations, 248 non-governmental organizations in consultative status with the Economic and Social Council, and 593 other non-governmental organizations.[452] Therefore, the result of this conference can be taken as the consensus at large with regards to the issues reflected in its final Declaration. Secondly, this conference was initiated in 1989, immediately following the fall of the Berlin Wall. This means that it was the first time following the long period of the Cold War that state leaders from all over the world gathered together and tried to reach consensus on issues related to human rights, despite the ideological battles that had haunted the UN in previous decades. This does not mean that consensus was naturally and easily achieved, however. On the contrary, the obvious gaps between West and East, North and South, revealed themselves not only in regional meetings but also during the Conference, which leads to the third point. This is the fact that although the Vienna Conference initially aspired to achieve consensus on human rights issues that was compatible with the optimistic atmosphere of world politics after the Cold War, it also encountered highly reluctant, dissident opinions from the representatives from the East and the South. In the words of the then Secretary-General Boutros Boutros-Ghali, the conference encountered 'the fundamental dialectical conflict between the universal and the particular, between identity and difference'.[453] In this sense, after numerous changes made during the preparatory work, the final Declaration of the Conference is not only an impressive achievement of world politics on human rights issues at that time,[454] but also a valuable document that illustrates the extent to which states could commit

[452] A/CONF.157/24 (Part I), 9, para 17.
[453] A/CONF.157/22, 3.
[454] Some scholars think that the Conference's achievements were quite limited. See Kevin Boyle , 'Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993' (1995) XLIII Political Studies 79.

themselves to certain interpretations of human rights following the Cold War. Last but not least, regarding the particular issue of sovereignty and human rights, the changes that took place from the report of the Asian regional meeting to the final Declaration in a way reveal the extent to which the Asian states' intentions were adapted during the World Conference, eventually allowing them to reach progressive interpretations on this matter. With the above considerations in hand, in the following section I focus on the evolution of the sovereignty principle from the Asian regional meeting report to the Declaration of the Vienna Conference.[455]

In 1993, representatives from Asian countries gathered together in Bangkok and held a regional preparation meeting for the World Conference. In its report, also known as 'The Bangkok Declaration', the principle of sovereignty is addressed in several paragraphs of the Preamble as follows:

> Reaffirming the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of States.[456]
>
> …
>
> 5. Emphasize the principles of respect for national sovereignty and territorial integrity as well as *non-interference in the internal affairs* of States, and the non-use of human rights as an instrument of political pressure;
>
> 6. Reiterate that all countries, large and small, have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development.[457]

The above three paragraphs not only reiterate the principle of sovereign equality as laid out in the UN Charter but also connect it with non-interference (note that in the Charter, the wording is 'non-intervention'), non-use of human rights as an instrument of political pressure, and states' right to determine their political systems, economic resources, and development. This standpoint did give sovereignty a strong presence in the discourse on human rights. If the above principles regarding sovereignty are held, the international mechanism for protecting human rights will be rather limited.

[455] It is worth noting that because the Declaration is not an international treaty, the interpretation rules of the VCLT are not applicable. I shall therefore only turn to the texts as a source for the interpretation.
[456] A/CONF.157/ASRM/8, A/CONF.157/PC/59, 3.
[457] A/CONF.157/ASRM/8, A/CONF.157/PC/59, 4, italics added.

In the preparatory document for the Conference, *Consideration of the Final Outcome of the World Conference, Taking into consideration the Preparatory Work and the Conclusions of the Regional Meetings*,[458] the above paragraphs concerning the sovereignty principle were adapted into the following two principles:

Principle 3:

… It is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[459]

…

Principle 4:

The processes of promoting and protecting human rights, which are a legitimate concern of the international community, are to be understood in the framework of respect for the principles of sovereign equality, territorial integrity and political independence of States.[460]

Principle 3 makes clear that political, economic and cultural systems cannot be used as excuses when it comes to a state's failure to ensure human rights protection and fundamental freedoms, which, as is emphasised, is 'the duty of States'. In Principle 4, in contrast to the Bangkok Declaration, only the principles of states' sovereign equality (instead of 'respect for national sovereignty'), territorial integrity, and political independence (instead of 'non-interference with domestic affairs') are mentioned. Moreover, these principles are understood as the context for promoting and protecting human rights, not the other way around (as the Bangkok Declaration has it).

In the follow-up document *Report of the Preparatory Committee, Annexes II Part II,* 'Decisions adopted by the Preparatory Committee for the World Conference on Human Rights at its fourth session',[461] Principle 4 from the above report was further adapted:

> Paragraph 4
>
> The processes of promoting and protecting human rights, should be conducted in conformity with the purposes and principles of the United Nations Charter, and international law.[462]

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458 Note by the Secretary-General, A/CONF.157/PC/82, 14 April 1993.
459 A/CONF.157/PC/82, 5.
460 ibid.
461 A/CONF.157/PC/98.
462 A/CONF.157/PC/98, 23.

Here, the phrase ‘the principles of sovereign equality, territorial integrity and political independence of States’ is eliminated altogether and replaced with an even broader expression, namely ‘the purposes and principles of the United Nations Charter and international law’. In this expression, the principles of sovereign equality, territorial integrity and political independence are taken to have equal weight with other principles and purposes included in Articles 1 and 2 of the UN Charter, as well as other principles and purposes enshrined in international law in general. Moreover, unlike most other paragraphs in this report, no alternative, further negotiable expressions (versions) of this paragraph are included. Although this does not mean that this paragraph was not open to further discussion, it does shed light on the standpoint of the Preparatory Committee on this matter.

In his Opening Address at the World Conference,[463] Boutros Boutros-Ghali raised three concerns: namely the imperative of universality, the imperative of guarantees, and the imperative of democratisation. Under the second concern, he devoted several paragraphs to elaborating at length on the relationship between sovereignty and human rights. He first pointed out that the issue of human rights demands a new perspective for considering the international order and sovereignty, which should give rise to ‘a new legal permeability’, to ‘cooperation and coordination between states and international organizations’, rather than a viewpoint that prioritizes ‘absolute sovereignty’ and ‘political intervention’.[464] He then recognised that states are in the best position to guarantee human rights.[465] However, in those cases where states fail to protect individual’s rights, ‘the international community—that is to say, international organizations, whether universal or regional—must take over from the States that fail to fulfil their obligations’. This viewpoint, as he argued, ‘does not harm our contemporary notion of sovereignty’. He further stated that sovereignty cannot be used as the ultimate argument when the states at issue are in fact undermining fundamental human rights. In other words, sovereignty, in his view, is contingent upon the protection of human rights.[466] He concluded this argument by pointing out that ‘States

[463] 14 June 1993, A/CONF.157/22.
[464] A/CONF.157/22, 12 July 1993, 8.
[465] ibid.
[466] ibid 8–9.

must be convinced that the control exercised by the international community ultimately results in the greatest respect for their sovereignty and spheres of competence'.[467]

In line with Boutros-Ghali's view on sovereignty and human rights, not only is the sovereignty principle not mentioned in the Preamble to the Declaration of the Vienna Conference, but the whole issue of sovereignty is confined under the right to self-determination. The relevant text reads as follows:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.
>
> …
>
> In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.[468]

In the Declaration, the phrase 'territorial integrity or political unity of sovereign and independent States' is used in a very limited context: (i) it is used under the general context of the right to self-determination; (ii) it is used under the further condition that states 'conduct[] themselves in compliance with the principle of equal rights and self-determination of peoples'; and (iii) it emphasizes that the government is to represent 'the whole people belonging to the territory without distinction of any kind'. Hence, representative functions of the government and the principle of non-discrimination are also enshrined in the texts. This is to say that, with regard to the relationship between sovereignty and human rights, the Declaration of the Vienna Conference does not take the position of the Bangkok Declaration. Instead, it situates territorial integrity and sovereignty in the context of the right to self-determination and further limits it with the spirit of democracy and the principle of non-discrimination.

According to the Declaration of the Vienna Conference, sovereignty therefore has rather limited standing with regard to human rights issues. This is in line with the conclusions I drew

[467] ibid.
[468] A/CONF.157/24 (Part I), page 22, No. 2.

earlier from the reading of the VCLT rules. Put differently, the view that sovereignty arguments can be used as a buffer for states in the context of international human rights treaties is supported neither by the rules of the VCLT nor by the joint intentions expressed in the Declaration of the Vienna Conference. This intention was further confirmed through the initiation of the concept the Responsibility to Protect.

6.3.2 The Responsibility to Protect (RtoP)

In December 2001, the International Commission on Intervention and State Sovereignty (ICISS) issued a report titled the *Responsibility to Protect*. The Commission was asked to respond to the following question: 'when, if ever, is it appropriate for states to take coercive—and in particular military—action against another state for the purpose of protecting people at risk in that other state?' In the report, the answer was the following: 'sovereignty is based on the ability and willingness of governments to accept the Responsibility to Protect their own citizens. Failing that, the international community has a right to intervene'.[469] Hence, instead of taking sovereignty to be the prerogative of states (as the traditional Westphalian notion suggests), the concept of RtoP primarily anchors sovereignty in a state's responsibility to protect its citizens. In other words, the notion of RtoP implies that if 'a state legitimately protects its citizens, then [and only then] it is in full right of its sovereign power'.[470]

Followed by the ICISS report, the 2005 World Summit in New York, which is considered one of the largest gathering of world leaders, addressed this issue in particular. The Summit adopted the World Summit Outcome (A/RES/60/1). Later, the results of the Outcome were affirmed by Resolution 1674 through the Security Council.[471]

According to the 2005 World Summit Outcome, RtoP is applied in cases of 'genocide, war crimes, ethnic cleansing, and crimes against humanity',[472] and its main goal is to stop mass atrocities. RtoP challenges the traditional Westphalian notion of sovereignty and grounds the

[469] Jared Genser and Irwin Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (Oxford University Press 2011) 11–12.
[470] ibid 12.
[471] This resolution was debated for six months in the Security Council. See Genser and Cotler (n 469) 15.
[472] In the ICISS report, the scope is much broader, including 'situations of state collapse, and the resultant exposure of the population to mass starvation and/or civil war; and overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened'. See *The Responsibility to Protect: Report of the International Commission on Intervention and state Sovereignty*, 33. http://responsibilitytoprotect.org/ICISS%20Report.pdf.

possibility of the international community's stepping in when states fail to protect their own people from serious human rights violations.[473] In this sense, 'RtoP is revolutionary because it acknowledges for the first time in a global declaration that there are limits on the UN Charter's prohibition against international involvement in what goes on inside the sovereign state'.[474] As Anne Peters notes, RtoP is '(a) big step … which definitely ousted the principle of sovereignty from its position as a *Letztbegründung* (first principle) of international law'.[475]

In sum, the concept of RtoP and the World Summit in 2005 again confirmed and reinforced the tone that was set in the 1993 World Conference on Human Rights in Vienna (especially in its Declaration)—the notion that the concept and priority of sovereignty are subject to change (or at least fine-tuning), especially when it comes to human rights.

6.3.3 A brief conclusion: Can sovereignty arguments be justified in the context of international human rights treaties?

The principle of sovereign equality and its corollary, non-intervention (which some may interpret in a broader sense as non-interference), are indeed two of the principles codified in the UN Charter and followed by the international community. However, whenever a state enters into an international human rights treaty, according to the rules of the VCLT, that state should comply with the obligations listed in the treaty in good faith. Moreover, in the context of international human rights treaties, it was shown in the 1993 World Conference on Human Rights and the 2005 World Summit that the meaning and priority of sovereignty has been challenged and subject to change for human rights purposes (among other things). Furthermore, the purpose and object of international human rights treaties is to guarantee the protection of human rights. Therefore, the brief conclusion here concerning the use of sovereignty arguments in the context of international human rights treaties is that there is little room for states to use sovereignty arguments as a justification for breaching their treaty obligations.

Having said that, there are nevertheless 'grey areas' when it comes to determining the relationship between sovereignty and international human rights treaties, often due to the ambiguous way in which states' obligations are articulated in treaties. To put it differently, what

[473] Genser and Cotler (n 469) 4.
[474] ibid 16.
[475] Anne Peters, 'Humanity as the A and {Omega} of Sovereignty' (2009) 20 EJIL 514.

counts as states' treaty obligations (and as non-compliance) is often the key issue in determining how far a state can invoke sovereignty to defend itself in an argument. In this sense, it would be overly optimistic to assume that all of the sovereignty arguments found in constructive dialogue can easily be dismissed. This can be seen in those cases where China invoked sovereignty reasoning before human rights treaty bodies.

6.4 Sovereignty arguments in the constructive dialogue between China and international human rights treaty bodies

In this section, I first analyse how the Chinese delegation has invoked sovereignty in its arguments in constructive dialogues. I then make a further comment on the reasons that have driven the Chinese government to maintain its position on sovereignty in international practices in general and in international human rights law in particular.

6.4.1 Chinese sovereignty arguments in human rights treaty bodies

In international human rights treaty bodies, Chinese delegations have invoked sovereignty in their arguments by referring to sovereignty as national unity and territorial integrity or sovereign equality. In terms of the former, most arguments were made before the CERD committee (and one argument was made before the CRC committee). In terms of the latter, the most-debated topic is the State Secrets Law.

6.4.1.1 Sovereignty as national unity and territorial integrity

In the constructive dialogue under the CERD committee, China has often cited its constitution, which stipulates the following:

> all nationalities … are equal. The State … upholds and develops ties of equality, unity and mutual assistance among all of China's nationalities. Discrimination against or oppression of any nationality are prohibited, as are any action injurious to ethnic unity or causing ethnic divisions.[476]

This statement indicates China's general position when invoking its sovereignty arguments regarding the ICERD, which can be concluded as a two-pronged argument. On the one hand, China

[476] CERD/C/CHN/CO/10-13/ADD.1, 4.

insists that all nationalities in China are equal. On the other hand, China also attaches this position to the protection of national unity and territorial integrity. This is a consistent position that China has held since its first national report under the ICERD in 1985 up to the latest follow-up document submitted in 2009. To reflect on this position, some Committee members have raised concerns about its impact on the rights of minority groups. For instance, one Committee member in a 2001 session argued that 'the movement towards national unity might have an adverse effect on the rights of individual groups'.[477] The Chinese delegation did not respond to this concern. Instead, the delegation continued to emphasise national unity and territorial integrity regarding the treaty.[478]

This position was applied to a more controversial topic in the case of two incidents in the Autonomous Regions in 2008 and 2009.[479] In response to the committee's inquiry into the incidents, the Chinese delegation made the following statement:

> There was evidence that the two incidents had been premeditated and masterminded by separatists abroad and carried out by separatists within China with a view to promoting ethnic hatred, disrupting harmonious development in ethnic minority areas and *undermining national unity and territorial integrity*. The violent crimes perpetrated were also serious *breaches of the purposes and principles of the Convention* and had been widely condemned by Chinese people of all ethnic groups. The Government had taken prompt action to halt those criminal activities and to protect citizens' right to life and property. Public order had been quickly restored and *unity among ethnic groups preserved*.[480]

On the one hand, the Chinese delegation emphasised that preserving national unity and territorial integrity was an important justification for the Chinese government's reaction to the incidents. On the other hand, they also noted that the incidents involved violence against citizens' lives and property. The government therefore took action against the criminals, a decision which was not based on considerations of race.

As I have argued above, sovereignty arguments have limited weight in justifying breaches of human rights treaty obligations. It follows that deciding on the justifiability of these sovereignty arguments comes down to the states' obligations under the ICERD. The purpose and object of the ICERD is to 'eliminat[e] racial discrimination throughout the world in all its forms and

[477] CERD/C/ SR. 1469. 44.
[478] CERD/C/SR. 1842. 5.
[479] On 14 March 2008 and 5 July 2009, violent protests were held in Lhasa and Ürümqi.
[480] CERD/C/SR.1942, 14 August 2009, 15, italics added.

manifestations and [to] secur[e] understanding of and respect for the dignity of the human person'.[481] The first part of the Convention lists seven articles concerning rights and obligations. These concern eliminating distinctions and discriminatory treatment based on race, colour, national or ethnic origin.[482] In the above case, the Chinese delegation argued that the two incidents in the minority areas were crimes perpetrated by separatists. Therefore, they were not considered cases of discrimination against a particular ethnic minority group.[483] In other words, China argued that it had not violated its treaty obligations regarding non-discrimination under the ICERD, and this argument stands as long as no further counterargument is provided by the Committee. This is not to say, however, that this sovereignty argument (the appeal to the protection of 'national unity and territorial integrity', as the Chinese delegation put it many times in its argument) is justifiable *per se*. Rather, it is to say that the argument as a whole is justifiable, all things considered. In this regard, the two-pronged argumentative tactic seems to work effectively in terms of 'slipping in' China's national unity and territorial integrity policy. However, as one Committee member voiced the concern that 'the movement towards national unity might have adverse effect on the rights of individual groups'.[484] Another Committee member also specified, '[w]hile the State party appeared to blame the unrest on separatists set on undermining its unity and territorial integrity … the Committee's sole concern was the implementation of the Convention's prohibitions against racial discrimination'.[485] In other words, the two-pronged argumentative strategy not only 'slipped in' China's position on national unity and territorial integrity but also shielded China from inquiry into the implementation of prohibitions against racial discrimination. China did not answer whether the national unity and territorial integrity policy would indeed have a negative impact on the equality of nationalities. It may be expected that, without further input from China, it will be difficult for Committee members to point out whether there has been a breach of treaty obligations on the part of the state. In this sense, China's argument is not constructive.

In a less controversial case regarding minority children, the Chinese delegation first emphasised racial equality under Chinese law and denied the existence of the suppression of ethnic

[481] 'International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19', Preamble, paragraph 4, see http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf.
[482] For the 7 Articles, see http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf. Part I.
[483] The content in the bracket is information implied in the original argument.
[484] CERD/C/SR.1469, para 44.
[485] CERD/C/SR.1942. 40.

groups. It followed that the 'behaviour aimed at[] disuniting the nation [i]s prohibited'.[486] It then mentioned several policies and measures taken to boost the economy and education in minority areas. Finally, national unity was again emphasised as the purpose of its policy.[487] This reasoning once again uses a two-pronged argument. On the one hand, the Chinese delegation indicated the importance of racial equality in Chinese law and the policies it had put in place to reinforce such equality, arguing that there had been no breach of their treaty obligations. On the other hand, they stated that behaviour that could threaten national unity was prohibited. This prompts further questions. What kind of behaviour is prohibited, and what are the relevant prohibition measures? Answers to these questions are key to determining the justifiability of the arguments in question; should this prohibition breach the state's treaty obligations, this kind of argument would not be justified. However, there is no further information available about the Committee's requests on this topic.

In sum, those of China's arguments concerning sovereignty that refer to national unity and territorial integrity are justifiable, all things considered. However, they are not constructive in the sense that the two-pronged argument scheme is used as a shield, while the inquiries that could take the dialogue forward are not acknowledged. As a result, dialogue on these topics remains in a stalemate.

6.4.1.2 Sovereignty as sovereign equality: On the State Secrets Law

The topic of the State Secrets Law has been given much attention by the CAT Committee and has also been mentioned by the CEDAW and CRC Committees. The Committees' arguments can be summarised as follows: the State Secrets Law[488] (a) prevents the disclosure of information that is essential to the Committee's ability to ascertain whether the state party has been meeting its treaty obligations;[489] (b) 'provides that the determination as to whether a matter is a State secret lies with the public body producing this information';[490] and (c) may deny detainees' access to lawyers.[491] In China's responses, sovereignty has been referred to as the foundation of its position. Before the

[486] CRC/C/SR.299 (1996), 6.
[487] CRC/C/SR.299 (1996), 6.
[488] Formerly the 1988 Law on the Preservation of State Secrets in the People's Republic of China, then replaced by the 2010 Law on Guarding State Secrets. Here, both are referred to as the State Secrets Law.
[489] For this argument, see for instance CAT/C/SR. 846, 36. CAT/C/CHN/Co/4. 16 (a). CAT/C/CHN/Co/4. 16 (b).
[490] CAT/C/CHN/Co/4. 16 (b).
[491] CAT/C/CHN/Co/4. 16 (c).

CEDAW Committee, the Chinese delegation stated that 'data could only be made public if it was in the public interest and did not threaten State sovereignty or national security'.[492] In the CAT Committee, in its follow up report in response to the concluding observation in 2008, China argued that although 'China's legal system differs from that of the West, the ultimate goal of determining whether or not a matter constitutes a State secret is to safeguard national security and interests …', [493] emphasising that 'the Government requires that its citizens guard State secrets in accordance with the law, as do Governments of all other countries in the world'.[494]

As to the first point made by the Committees, China responded that 'information on "detention and custody and ill-treatment … violations of the law or codes of conduct by public security organs" … does not constitute State secrets as defined by law'. As for the failure to provide information requested by the Committees, China attributed this to the 'vast size, population and uneven level of development among regions, and the fact that human and other resources are limited'.[495] Therefore, China did not use the sovereignty argument to justify its failure to provide the requested data and information. Nevertheless, China still invoked particular reasoning.[496]

In terms of the second point, China argued that its legal system was different from those of Western countries.[497] The State Secrets Law provided an 'error-correct system':

> Under that system, if the organ or unit which determined the degree of confidentiality has found that its decision is inconsistent with the relevant provisions governing the scope of secrets, it shall promptly correct the mistake. The organ above it or the security department concerned shall also promptly notify the organ or unit which made the erroneous determination and shall demand an immediate correction.[498]

In this sense, China argued that there is a systemic problem. Unlike the first argument, this argument does invoke sovereignty. The underlying logic here is that because China has a different system than other countries, the problem that the Committee has pointed out, namely that 'the determination as to whether a matter is a State secret lies with the public body producing this

[492] CEDAW/C/SR.1251, 29.
[493] CAT/C/CHN/CO/4/ADD.2, 5. (c).
[494] CAT/C/CHN/CO/4/ADD.2, 5. (a).
[495] CAT/C/CHN/Co/5/Add.1. 14.
[496] This kind of particular reasoning, namely reasoning that invokes particular circumstances (such as being a developing country) to justify the implementation gap regarding a given treaty, will be discussed in Chapter 7.
[497] CAT/C/CHN/CO/4/Add. 2. (c).
[498] CAT/C/CHN/CO/4/Add. 2. (c).

information',[499] is thus not considered a problem. However, China's claim that it has a different system does not automatically refute the Committee's criticism. On the contrary, the way in which the Chinese delegation describes the system simply confirms the Committee's point. In this sense, the burden of argument is still on China's side, although China has already dismissed it. Therefore, this argument is not constructive.

As for the third point, China answered as follows:

> The Criminal Procedure Law provides that a criminal suspect in a case involving State secrets may hire a lawyer only if he/she obtains approval from the investigating body … in practice, the public security bodies allow criminal suspects to employ a lawyer so long as this does not lead to leakage of State secrets. It is illegal for case-management officers to reject lawyers' requests to meet with their clients on the grounds of the need for confidentiality.[500]

Although the delegation claimed that a lawyer cannot be denied access to his or her client on grounds of confidentiality, the delegation did not answer whether a suspect can be denied the opportunity to hire a lawyer on the same grounds, which is a different question from the former. Therefore, the burden of argument is again not met. Without further information, this argument is not constructive.

Considering the justifiability of sovereignty arguments in defence of the State Secrets Law in general, having state secrets is indeed within a state's domestic jurisdiction, which is also in line with the principle that every sovereign state is entitled to independence and autonomy in the sense of uniform legal personality. This equality, as discussed above, is the foundation of the current international legal order. Classifying certain data as state secrets need not be viewed as directly breaching treaty obligations under the relevant provisions. Nevertheless, because the data that has been classified as state secrets might be the very data that could be used to establish a breach of treaty obligation, there is a possibility that such conduct may defeat the purpose of the given treaty. On the other hand, China's arguments would also seem to suggest that, according to the State Secrets Law, sovereignty as national security is used as a benchmark for disclosing national data. When national security is also at issue, it constitutes a purpose beyond protecting human rights. In other words, although it is not the purpose of the relevant human rights treaties, guaranteeing

[499] CAT/C/CHN/Co/4. 16 (b).
[500] CAT/C/CHN/CO/4/Add.2, 11.

national security also needs to be given proper consideration. Hence, a balance of purposes is needed to mitigate the state's domestic legal order and the IHRL. This is to say that although it is a state's right to protect its own security and to classify certain data as state secrets, it is in the mandate of the human rights Committees to take a case-by-case approach to scrutinizing the compatibility of protecting certain types of data and the particular rights that are protected by the given Convention. In this sense, given that different purposes are at issue, the principle of proportionality[501] needs to be considered.

In sum, there are different ideas at work when China uses sovereignty arguments, namely sovereignty as national unity or territorial integrity and as sovereign equality in the international legal order. Arguments based on sovereignty as national unity or territorial integrity are usually unjustifiable if the state indeed breaches its human rights treaty obligations. This is evident in the development of the sovereignty clause in the UN Charter, the VCLT rules, and the relevant world conferences, such as the 1993 World Conference on Human Rights and the 2005 World Summit. On the other hand, when a given sovereignty argument also involves considerations of national security, this means that different purposes (security vs. certain human rights) are at stake and that the balancing of these purposes must be achieved under the principle of proportionality. In this situation, the state has the right to table the security argument and the balancing act in the constructive dialogue, which should further be subject to investigation and inquiry by the relevant human rights Committee. In cases where sovereignty is viewed as sovereign equality and where the argument is that every state has (and should have) certain sovereign rights, this argument must be balanced by the purpose of the treaty, and such balance should also be scrutinised by the Committee. Therefore, in cases where competing values are at issue, given the lack of constructiveness of China's arguments it is nearly impossible for the Committee to decide on the legal justifiability of its arguments. In other words, without knowing which measures China has taken, the Committees cannot decide whether they are justifiable.

[501] The principle of proportionality is understood here as a legal principle that allows for or requires the balancing of competing values. This enables adjudicators to decide whether a measure has gone beyond what is required to attain a legitimate goal and whether its claimed benefits exceed the costs. (https://europeanlawblog.eu/tag/principle-of-proportionality/). In one judgement, for exampole, the ECtHR stated this principle as follows: 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'. See: *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 89.

6.4.2 China's general position on sovereignty in international law

Since returning as a member of the UN in 1971,[502] the Chinese government has maintained a consistent position on invoking sovereignty arguments in international human rights treaty bodies and other international organisations. This position, as some scholars have pointed out, is in line with the traditional Westphalian position, as exemplified by Max Huber in the *Island of Palmas* case (1928) and the PCIJ *Lotus* case. According to this position, sovereignty is associated with exclusive control over territory and the independence and legal personality of states. This view of sovereignty is also considered the classic positive position. In fact, some say that China ought to be considered the 'last bastion of Westphalia'.[503] Even the current Chinese Judge in the ICJ Xue Hanqin is aware of the controversy associated with this position. She states that although she is 'fully aware that in the contemporary discourse of international law, advocacy of respect for sovereignty may not be a very popular theme to begin with',[504] '[o]ftentimes China's adherence to the principle of sovereignty is simply misinterpreted in the West as a disregard of the development of international law, or worse still, considered an excuse to evade its international responsibility'.[505]

It is evident from the above discussion that China usually combines sovereignty arguments with other arguments (such as arguing for no treaty obligation violation or developing country status) in international human rights treaty bodies. In those cases, it is the latter that is justifiable rather than the sovereignty argument. This raises the question of why the Chinese government insists on invoking sovereignty in its international practices. Two Chinese ICJ Judges' opinions on sovereignty may shed light on this question.

Former Chinese ICJ Judge Wang Tieya has opined on the reason for the Chinese government's reluctance to develop its position on sovereignty. In his view, this is

> not only because China has bitter experiences of its sovereignty being ruthlessly encroached upon by foreign powers in the past, but that it also has the conviction that the principle of sovereignty is the *only main foundation* upon which international relations and international law can be established and

[502] On 25 October 1971, the United Nations General Assembly voted to recognise the People's Republic of China (PRC) as the only legitimate representative of China to the United Nations, while expelling the Republic of China (RoC). 2578 (XXVI).
[503] Yongjin Zhang 'Ambivalent Sovereignty: China and Re-imagining the Westphalian Ideal' in Trudy Jacobsen et al. (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (Routledge 2008) 101.
[504] Hanqin Xue, 'Chinese Observations on International Law' (2007) 6 Chinese Journal of International Law 84.
[505] ibid.

> developed. The Chinese put emphasis on sovereignty because it is the *hard-won prize of their long struggles for their lost sovereignty.* They take sovereignty as a legal barrier protecting against foreign domination and aggression.[506]

This idea is furthered by the current Chinese ICJ Judge Xue Hanqin. From her point of view, China believes in sovereignty as one of the most fundamental values in the current international legal order.[507] This position, in her opinion, also represents the views of other post-colonial countries.[508] In other words, due to its long history of struggling for sovereign rights, its identity as a newly established sovereign state, and its inherited mistrust of the international legal system, China has established a position of treating sovereignty as the most fundamental principle in the international legal and political order. In addition, China has kept its foreign policies and practices in line with this 'mind one's own business' approach to sovereignty.[509] Its Five Principles of Peaceful Coexistence foreign policy emphasises 'mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence'.[510] Although some scholars argue that the Chinese interpretation of the Five Principles and the notion of sovereignty enshrined within them have not always been consistent,[511] they are nevertheless the fundamental principles that guide Chinese foreign affairs. In 2009, then Chinese President Hu Jintao reiterated the importance of the Five Principles before the UN General Assembly.[512] As for international practices, for instance, China does not accept the compulsory jurisdiction under Article 36(2) of the ICJ and is not yet a party to the Statute of the International Criminal Court. China has also made reservations to all of the dispute settlement clauses in all of the human rights treaties it has joined, and it does not accept any of the individual petition procedures in these treaties. In its pleading before the ICJ proceedings on the declaration

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[506] Wang, T.Y, *Collected Courses of the Hague Academy of International Law: International law in China: historical and contemporary perspectives* (Volume 221, Nijhoff, Leiden/Boston 1990) 290, italics added.
[507] Xue (n 504).
[508] ibid.
[509] This does not mean that China does not support joint actions taken by the international community or international legal regimes (e.g. climate change agreements and the WTO). What it means, rather, is that China does not interfere in other countries' domestic affairs without its consent and treats this standpoint as a guiding principle of its foreign policy.
[510] See: http://en.people.cn/92824/92845/92870/6441502.html.
[511] See Wim Muller, 'China's Sovereignty in International Law: from Historical Grievance to Pragmatic Tool' (2013) 1 China-EU Law 35, 44–5.
[512] Statement by H.E. Hu Jintao, President of the People's Republic of China, at the General Debate of the 64th Session of the UN General Assembly, New York, 23 September 2009.

of the independence of Kosovo, China stated that, '[a]s the most important subjects of international law and as members of the international community, sovereign States stand on territory as their foundation and the exclusive domain for the exercise of their sovereignty'.[513]

By maintaining a consistent position on protecting the principle of sovereignty, which also includes invoking sovereignty arguments before international human rights treaty bodies, China has therefore made it clear that it views the principle of sovereignty as being of the utmost importance in the current international legal and political order. This position, in China's view, should at least be taken into consideration by other states and international actors and should have an impact on the current international legal and political order.

6.5 Conclusion: Objectivity in the sovereignty argument

Stéphane Beaulac has eloquently opined on the power that resides in the notion of sovereignty:

> Sovereignty provides an ultimate example of a word which, far from meaning anything by itself, constitutes an organic instrument carrying great social power. This linguistic sign, while both representing and creating reality through the human mind within the shared consciousness of society, has undoubtedly constituted a forceful political tool and a rhetorical weapon, similar to construction tools such as hammers and nails or to destruction weapons such as shells and nuclear bombs.[514]

Acknowledging the power of this linguistic artefact, in this chapter I have focused on the constraints that are placed on it. As Beaulac observes, the power of language resides in the fact that words both represent and create reality. In this chapter, I have argued that although sovereignty is what states make of it, it cannot follow that states can interpret the notion of sovereignty any way they wish. Especially when it comes to international law, even when it comes to a linguistic artefact like sovereignty, there is some measure of objectivity. Such objectivity resides in the codification of international laws, in the shared intentions (or commitments) expressed by the international community, and in the purpose and objects of the given legal order. Specifically, the Charter of the United Nations describes sovereignty as a unified form of legal personality that refers to a domestic jurisdiction free from intervention. This account is an important first step towards the objectivity of this concept insofar as it provides the word 'sovereignty' with legal

[513] CR 2009/29, 7 Dec 2009, para 16.
[514] Beaulac (n 394) 30.

substance. This objectivity is further provided by the (customary) rules codified in the VCLT and confirmed by the shared intentions among the international community, expressed during the World Conference on Human Rights in Vienna and later at the World Summit on the subject of RtoP. Consequently, with regard to the view that the principle of sovereignty is the most important principle in the current international community and a buffer for protecting states' sovereign rights when joining international human rights treaties, in this chapter I have argued that such arguments have limited weight. The room for manoeuvre lies in the interpretation of state obligations under a given treaty. This means that in normal circumstances, if it has been established that a human rights treaty obligation has been breached, a sovereignty argument in support of this breach will not be justifiable.

China's position on sovereignty has a long tradition that can be explained by historical and political factors. China has maintained its position on sovereignty and has invoked it in international affairs over the past decades. In a way, this 'consistency' contributes to the non-constructiveness of the arguments provided by China in constructive dialogues before treaty bodies. The non-constructiveness of Chinese arguments in constructive dialogue has also made it difficult to determine their justifiability. Moreover, it can be inferred that this consistent position on sovereignty reveals China's intention to have an impact on the international legal and political order by preserving the relevance of the Westphalian notion of sovereignty. As discussed in this chapter, however, when the codification of the relevant international laws, shared international commitments, and the purpose and object of human rights treaties all point away from Westphalian sovereignty, China's (individual) efforts to preserve Westphalian sovereignty are likely to fall short.

Chapter 7 Particular Reasoning on the Implementation of State Obligations with Regard to Economic, Social and Cultural Rights in Constructive Dialogue between China and International Human Rights Treaty Bodies

Introduction

Particular reasoning on the implementation of state obligations under ICESCR is the last (but certainly not the least) important example of the dynamics at work between the universal rules of

IHRL and the particular reasoning offered by China.[515] I focus on states' economic, social, and cultural rights obligations because the very nature of these rights embodies the tension between the universality and the particularity of human rights, especially when it comes to the implementation of states' IHRL obligations.

The universal demand concerning economic, social, and cultural rights derives from the assumption that these rights are fundamental to a human being's survival and the preservation of human dignity in society, whereas the particularity comes from the recognition that the satisfaction of these rights is to a large extent contingent on the resources available in that society. For instance, according to Article 11 of the ICESCR, everyone has a right to adequate food (among other things). From the wording of this article, the right to adequate food is a universal right. However, it is also acknowledged that the fulfilment of this right requires a number of resources (such as financial support, human resources, and infrastructure, to name a few) that some societies do not have. In other words, the preconditions for fulfilling this right cannot be presumed. This is where particular reasoning usually comes into the picture, the aim of which is to explain and justify lack of implementation in the given situation. The tangled relationship between universality and particularity regarding economic, social, and cultural rights is evident in the *travaux préparatoires* of the ICESCR, where the drafters of the ICESCR compared it with its sister covenant, the ICCPR.[516] This relationship continued to be the focus of later General Comments issued by the committee. Moreover, this relationship has been codified in one of the most important (yet also controversial) provisions of the ICESCR, i.e. Article 2 (1), which regulates the nature of state party obligations under the Covenant and which will be discussed further in the next section. Here it suffices to say that it would be too easy to assume that the rights codified in the ICESCR are the same in nature as the rights codified in the ICCPR and should (or could) be articulated in the same fashion as the latter. In fact, I view Article 2 (1) of the ICESCR as rightly recognising that the implementation of economic, social, and cultural rights does require a closely cooperative social context and must therefore be treated contextually and progressively. That is to say, the tension between universality and particularity regarding the implementation of economic, social, and

[515] It should be noted that recognition of economic, social, and cultural rights is not only to be found in the ICESCR but also codified in other international human rights treaties, such as CERD, CEDAW, and the CRC. Therefore, although this chapter focuses on the texts of the ICESCR, which is the main embodiment of economic, social, and cultural rights, it also refers to the other provisions of the core international human rights treaties when relevant.

[516] See Matthew Craven, *The International Covenant On Economic, Social and Cultural Rights: A Perspective on Its Development* (Clarendon Paperbacks 1995) 7.

cultural rights must be acknowledged in the first place (as in Article 2 (1) of the ICESCR), for this is a precondition for achieving a possible solution. Moreover, the implementation of these rights is usually not an 'on/off' affair, but rather more like a continuum, where the 'degree' of implementation is usually at the centre of the debate. In this sense, arguments for the universality and the particularity of human rights are naturally and innately intertwined in this context. In other words, finding the balance between universality and particularity (rather than focusing on one or the other) is crucial to determining the legal justifiability and constructiveness of arguments regarding the implementation of states' ICESCR obligations.

This chapter focuses on topics in relation to which China has used particular reasoning in arguments regarding the implementation of its ICESCR obligations. These topics include China's 'developing country' status and its impact on China's implementation of ICESCR, gender equality, and the collection and reporting of disaggregated statistics. I start with an analysis of Article 2 (1) of the ICESCR. I then investigate each topic by first reconstructing the relevant arguments and then identifying the main theses of the discussion. I then turn to the relevant provisions of the Conventions and their interpretations, which serve as a basis for identifying the fine line between the universal standards and particular contexts that relate to the given issue. Relevant General Comments will also be introduced, followed by a close look at how they have transformed the terrain of the debates.

7.1 The nature of state parties' obligations under Article 2 (1) of the ICESCR

Article 2 (1) of the ICESCR codifies the nature of state parties' obligations under the Covenant in general. Therefore, it is the most relevant source for the current discussion.

> Article 2 (1):
> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The first thing to note about Article 2 (1) is that the wording of the article has long been criticised for its vagueness and uncertainty,[517] which is thought to hamper the implementation of the Covenant. As Craven points out: 'It is … a fairly unsatisfactory article, with its convoluted phraseology in which clauses and sub-clauses are combined together in an almost intractable manner, making it virtually impossible to determine the precise nature of the obligations'.[518] One of the results of this vagueness, as he further elaborates, is that 'most commentators focus merely upon the phrase "with a view to achieving progressively the full realization of the rights", while ignoring for the most part the other phrases that accompany it'.[519]

In order to give Article 2 (1) a more concrete ground, at its fifth session in 1990 the Committee on Economic, Social, and Cultural Rights (hereafter CESCR) adopted one of its earliest General Comments—General Comment No. 3 on the nature of state parties' obligations (Article 2, Para. 1, of the Covenant), which was intended to give more clarity to this provision. In this General Comment, the committee adopted a binary approach to clarifying the states' obligations under the Covenant. This approach is also seen in the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, as well as most commentaries from the time. This approach is to distinguish immediate realisation obligations from progressive realisation obligations. The former are obligations that states should take up immediately, regardless of the economic, social, and cultural context, whereas the latter are subject to a wider margin of discretion and may be fulfilled over a longer period of time. Since General Comment No. 3 is meant to distinguish between immediate realisation obligations and progressive realisation obligations, one could also say that the Committee approaches economic, social, and cultural rights from a universal and objective stance, while leaving room for accommodating particularities.

In the following sections, I investigate the committee's definition of immediate realisation obligations from three perspectives: a) immediate realisation obligations *as opposed to* progressive realisation obligations; b) immediate realisation requests *within* progressive realisation obligations; and c) progressive concerns within immediate realisation obligations. Taken together,

[517] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 311.
[518] Craven (n 516) 151.
[519] ibid.

these three perspectives provide a more or less comprehensive basis for understanding the committee's binary approach to economic, social, and cultural rights.

7.1.1 Immediate realisation obligations as opposed to progressive realisation obligations

Based on General Comment No. 3, states' immediate realisation obligations concerning economic, social, and cultural rights can be grouped as follows.

Firstly, the committee has set out those provisions in the ICESCR that are 'capable of immediate application by judicial and other organs in many national legal systems'.[520] These provisions include Article 3 (on the equal rights of men and women), Article 7 (a)(i) (on equal pay for equal work), Article 8 (on the right to form and join trade unions), Article 10 (3) (on the prohibition against child labour), Article 13 (2)(a) (on compulsory and free primary education), Article 13 (3) (on the liberty of parents or legal guardians to choose schools for their children), Article 13 (4) (on the liberty of establishing schools or education institutions), and Article 15 (3) (on respect for the freedom indispensable to scientific research and creative activity). The General Comment further argues that 'any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain'.[521] Hence, the obligations mentioned above, according to the committee, should be integrated into the domestic legal systems of the state parties immediately, and absence of relevant legislation counts as non-compliance.

Secondly, the committee has confirmed the existence of a minimum core obligation. It is said that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party'.[522] It goes on to note that 'a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant'.[523]

Unlike the first group, however, the minimum core obligations are to some extent contingent upon the resources available to the states. Therefore, two questions arise: first, are

[520] CESCR General Comment No. 3: The Nature of States Parties' Obligations (Article 2, Para 1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990, Contained in Document E/1991/23, see: http://www.refworld.org/docid/4538838e10.html. 5.
[521] CESCR General Comment No.3, para 5.
[522] CESCR General Comment No. 3, para 10.
[523] ibid.

minimum core obligations subject to the states' own standards? Second, are minimum core obligations subject to 'progressive realisation'? To answer the first question, although it is noted that the resources available within a given country should be taken into consideration, the words that the Committee used to describe this term, such as 'any significant number of individuals', 'essential foodstuffs', 'primary health care', 'basic shelter and housing', 'most basic forms of education', etc., are meant to establish the absolute minimum standards that are necessary for the basic survival of a human being in any society. In this sense, categorising the 'minimum core obligation' as a subjective term, governed by states' own standards, is not plausible. In the committee's own words, 'if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*'.[524] This point was re-emphasised in the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, which emphasised that '[s]uch minimum core obligations apply irrespective of the availability of resources of the country concerned or any other facts and difficulties'.[525] In addition, minimum core obligations are viewed as paramount to the Covenant. If this kind of obligation is subject to states' own standards, the *raison d'être* of the Covenant will indeed be put into question. Therefore, the answer to the first question is negative.

Let us turn to the second question. It is not difficult to see that even for the minimum standard of living essentials, for various reasons (e.g. lack of financial support, resource deficits, social conflict, etc.) some states may still fall short of realising these conditions. That is to say, a state may fail to meet its minimum core standards involuntarily. In this case, the committee says that the state party 'must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[526] Put differently, in justifying failure to meet minimum core standards, the burden of proof is on the states, while it is up to the committee to decide whether such failure is indeed justified given the particular circumstances and efforts that have been made by the states. In this sense, this type of obligation does not fall under the umbrella of 'progressive realisation' in that its implementation

[524] ibid.
[525] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22–26, 1997. para 9. See: http://hrlibrary.umn.edu/instree/Maastrichtguidelines.html.
[526] CESCR General Comment No. 3, para 10.

should be carried out first and foremost, whereas failure to do so must be justified, and the burden of proof is on the state parties.[527]

Third is the obligation to take legislative measures. Taking legislature measures is mentioned in particular in Article 2 (1) and confirmed in General Comment No. 3. It is said that 'in many instances legislation is highly desirable and in some cases may even been indispensable'. The committee also notes that in the fields of combating discrimination, health, education, 'as well as in respect of the matters dealt with the article 6 to 9, legislation may also be an indispensable element for many purposes'. Taking legislative measures, as the committee implicitly suggests both in Article 2 (1) and in General Comment No. 3, can (and should) be undertaken in a relatively short amount of time and to some extent independently of the economic situation of the society at issue. In other words, state parties have little room to justify lack of legislation in a given field when relevant legislative measures are requested by the committee.

7.1.2 Immediate realisation requests within progressive realisation obligations

Although states are granted more leeway in the fulfilment of progressive realisation obligations compared to immediate realisation obligations (in the sense of the speed and measures with which they do so), this is by no means to say that state parties can decide whether or when to fulfil those obligations at liberty. Moreover, the committee, along with other commentators, delimits immediate realisation requests by rights that are considered subject to progressive realisation.

Firstly, there are some restrictions that are added to progressive realisation obligations. Therefore, refraining from overstepping these restrictions should be considered an immediate realisation request. First and foremost, deliberately retrogressive measures are, in most cases, prohibited under the Covenant.[528] Secondly, where there is a resource deficit or constraints, it is the most vulnerable and disadvantaged groups of society that must be prioritised via the adoption of the relatively low-cost targeted programmes.[529] Last but not least, states must guarantee that the 'maximum available resources' have been adopted to satisfy economic, social, and cultural rights.

[527] Sepúlveda (n 517) 367.
[528] As the committee elaborates, 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'. See CESCR General Comment No. 3, para 9.
[529] CESCR General Comment No. 3, para 12. For example, in its concluding observations concerning Iraq in 1995, the committee noted that 'being aware that the embargo imposed on Iraq creates extremely difficult conditions with respect to the availability of food, medicines and medical articles' and recommends that 'the Government take all

In addition to the above restrictions concerning progressive realisation obligations, fully realising economic, social, and cultural rights must be held in mind as the ultimate goal of justifying each step that states take, and 'lack of resources in itself would not allow states to defer indefinitely taking the necessary action to give effect to the obligations under the Covenant'.[530] In other words, steps towards the full realisation of economic, social, and cultural rights must be taken within the reasonably short time following the Covenant's entry into force for the states concerned.[531] According to General Comment No. 3, para. 2, such steps must be 'deliberate, concrete, and targeted' at the full realisation of the rights under the Covenant. States cannot postpone taking the relevant steps indefinitely.[532]

Furthermore, the term 'by all appropriate means' is usually considered to be the place where the margin of discretion is derived.[533] However, even this phrase cannot be interpreted as entirely subjective:

> The phrase 'by all appropriate means' must be given its full and natural meaning. While each state party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the 'appropriateness' of the means chosen will not always be self-evident. It is therefore desirable that states parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most 'appropriate' under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the committee to make.[534]

The above interpretation makes clear that the 'appropriate means' that states take towards the full realisation of economic, social, and cultural rights are subject to the states' own judgements. Nevertheless, states should provide information regarding the basis on which they consider the relevant measures to be 'appropriate'. In addition, the committee reserves the right to determine

necessary measures, to the maximum extent of its available resources, to address the needs of the population, and in particular those of the most vulnerable groups, such as children, the elderly and nursing mothers, in relation to the article 12 of the Covenant'. See Leif Holmström, *Concluding Observations of the UN Committee on Economic, Social and Cultural Rights: Eighth to Twenty-Seventh Sessions, (1993-2001)* (The Raoul Wallenberg Institute Series of Intergovernmental Human Rights Documentation, Nijhoff 2003) 300.

[530] Craven (n 516) 115.

[531] CESCR General Comment No. 3, para 2.

[532] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, no. 21.

[533] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 8.

[534] CESCR General Comment No. 3, para 4.

whether such measures are indeed appropriate in the given context. Moreover, according to Craven, there are some requests that states must meet immediately with regard to 'taking appropriate means', which are derived from textual, methodological, and substantive concerns in relation to the Covenant. From the textual perspective, there are certain provisions in the Covenant that stipulate the method that should be adopted to achieve the full realisation of the given rights. These provisions include Articles 6 (2), 11 (2), 12 (2), 13 (2), and 15 (2).[535] When it comes to these provisions, it is not up to the states to decide on the appropriate means. From a methodological perspective, firstly, disaggregated statistics are required to identify vulnerable and disadvantaged groups that do not enjoy specific rights.[536] This means that it is the first step that states should take when evaluating their situation regarding the Covenant. Secondly, states should establish national 'yardsticks' or 'benchmarks' to set out goals for progressive realisation obligations considering the national contexts and available resources,[537] whereas it remains to the committee to assess whether such national 'yardsticks' or 'benchmarks' satisfy the requests under the Covenant. Finally, a coherent national policy is required to overcome problems and to realise economic, social, and cultural rights under the Covenant.[538]

7.1.3 Progressive concerns within immediate realisation obligations

For the committee and most commentators, it is common to point out the immediate realisation requests within progressive realisation obligations. This is in line with the observation that the committee intends to take a universal and objective stance regarding economic, social, and cultural rights. Nonetheless, it should be noted that immediate realisation obligations are also to some extent contingent on particular contexts, and therefore some concerns relating to progressive realisation need to be addressed. Firstly, when it comes to some of the immediate realisation obligations explicitly listed in General Comment No. 3, such as providing free education and basic living standards, they require basic resources as a precondition for their realisation. Secondly, with regards to taking legislative measures, the legislation process usually demands a thorough study of the situation, financial support and budget reallocation, as well as political and social (re)arrangements. These administrative, political, and legislative procedures require considerable

[535] Craven (n 516) 116.
[536] See CESCR General Comment No. 3, and Craven ibid 117–18.
[537] See CESCR General Comment No. 1, and Craven, ibid 118.
[538] Craven, ibid 119.

time and resources. Therefore, they are not as 'immediately realisable' as the Covenant and the General Comment suggest. Given these considerations, the progressive aspects should also be taken into account when it comes to immediate realisation obligations.

In sum, given the vagueness and openness of the wording of Article 2 (1), it was necessary for the committee to further explain the nature of the state parties' obligations under the Covenant (as in its General Comment No. 3). The committee adopted a binary approach, which distinguishes between immediate realisation obligations and progressive realisation obligations. However, although the committee and the commentators have made an effort to clarify the immediate obligation requests against and within the rights that are subject to progressive realisation, the line between these two types of obligation is not straightforward. It is therefore appropriate to acknowledge that there are both immediate and progressive aspects to the majority issues related to states' obligations under ICESCR. With this in mind, let us move on to the topics in relation to which China has employed particular reasoning in its argumentation.

7.2 Developing country status arguments

The basic point of China's arguments regarding its developing country status is that because it is still considered a developing country, it asks the committee ought to take its current status, national efforts, and progress toward the implementation of economic, social, and cultural rights into consideration, allowing for a certain margin of discretion in acknowledgement of this status.[539]

China's arguments concerning its status as a developing country and the impact of this status on its implementation of economic, social, and cultural rights are mainly found in its justification for the poverty of minority people, people living in rural areas, and the health of women living in poorer parts of Western China, including its high maternal mortality rates. In the case of poverty in minority and rural areas, for instance, the Chinese delegation listed the Chinese government's 'National "8–7" War on Poverty Plan' as a measure it had taken to deal with the situation. According to the plan, the government commits:

> (a) to support poor homes in creating stable conditions on the basis of which to overcome their food and clothing problems; (b) to step up construction of basic facilities in poor areas; (c) basically to resolve problems with the supply of potable water for people and livestock, and to provide road connections between most impoverished villages and markets for farm produce and manufacturing centres; (d) to supply

[539] 2005 State Report E/1990/5/Add. 59, para 13, 109, 174; 2014 ICESCR State report E/C.12/CHN/2, para 5.

> electricity to the great majority of poor homes; and (e) to overcome the prevailing backwardness in education, culture and health, and achieve a universal basic standard of education while eradicating illiteracy among the young and active adult population … as well as promote vocational skills education and skills training for adults; to improve medical and sanitation conditions so as to prevent or reduce the incidence of endemic disease; and to contain population growth within the nationally stipulated range.

As a result of adopting the plan, China claims that

> By the end of 2001, the majority of poor people living in rural areas were properly fed and clothed, while some remaining poor areas with hostile environments or fragile ecosystems were beginning to approach a state of sustainable development.[540]

The right to food and basic living standards for the most vulnerable is considered an immediate realisation obligation given both minimum core obligations and the principle of giving priority to the most vulnerable groups. Nonetheless, as noted above, there are also progressive aspects even in the immediate realisation obligations that, when properly justified, should be given a margin of discretion. In this case, providing food and basic living standards to the least developed areas of China requires resources. In China's arguments, the Chinese government issued a national plan to tackle this problem, which has had positive results. This form of argumentation is in line with the basic requirements under Article 2 (1). Moreover, the arguments also took the dialogue in a constructive direction. Therefore, in the absence of further counter-arguments, it can be considered justifiable and constructive.

The second case concerns the poor health conditions and high maternal mortality rates of women living in the western parts of China. The delegation provided the maternal mortality statistics for these areas, information on the factors that contribute to this situation (which include economic difficulties, lack of qualified health workers, and lack of health care facilities), and the relevant national plans that have been made to tackle this problem.[541] These national plans include the China Women's Development Programme (2001–2010), the China Children's Development Programme, the Tenth 5-Year Plan, and the development strategy for the West for the implementation of policies and strategies aimed at improving women's health in poor areas. The

[540] E/1990/5/Add. 59, para 109.
[541] E/1990/5/Add. 59, Para 174.

delegation also mentioned international cooperation for solving this problem.[542] However, the delegation left out the results of these plans and cooperative efforts. Without results as indicators, it is difficult to tell whether these measures have been effective and appropriate. Therefore, although the Chinese delegation stated that China had taken steps to improve women's health and reduce the high maternal mortality rate in western parts of the country, which is in line with the states' obligations under the Covenant, it did not provide sufficient information to the committee to justify the effectiveness of those measures and to determine whether the state has fulfilled its obligations. Hence, although it can be viewed as constructive in the sense of providing information about the relevant measures, this argument is not justifiable given the lack of important information.

Turning to the committee's side, as a general response to China's requests in the 2005 Concluding Observation, the CESCR outlined the following:

> C. Factors and difficulties impeding the implementation of the Covenant
> 11. The committee, while recognizing the sizeable population in the vast expanse of the territory of the state party, notes that there are no significant factors and difficulties impeding its capacity to effectively implement the Covenant.[543]

It seems that although the committee recognised the size of China's population and territory and did not refute China's status as a developing country, it did not treat China's developing country status as one of the 'significant factors and difficulties' that impedes the state's capacity to effectively implement the Covenant. In other words, the committee did not agree that China's developing country status should be factored in when it comes to its implementation of the ICESCR obligations.

According to the arguments provided by the Chinese delegation, however, firstly, '[a]lthough China's total economic volume is already ranked among the largest in the world, its per capita level is still ranked below 100 in the world'.[544] Secondly, the arguments state that there is an imbalance between urban and rural areas and different regions of China. In addition, 'the per capita resource occupancy rate is low, and economic and social development is still constrained

[542] E/1990/5/Add. 59, para 174.
[543] E/C.12/1/Add. 107, 2.
[544] E/C.12/CHN/2, para 5.

by such bottlenecks as resources, energy and the environment'. Moreover, 'based on China's current poverty alleviation standard (per capita annual income of RMB 1,196), there are still 35.97 million people in the impoverished population'.[545] Therefore, according to this argument, the lack of resources and structural imbalances imply that, as a developing country, China may indeed need more time and resources to implement its economic, social, and cultural rights obligations. In this regard, the committee should either 1) recognise that the conditions identified by the delegation are indeed factors and difficulties that could have impeded the state's capacity to effectively implement the Covenant and grant a margin of discretion with regard to certain aspects accordingly, or 2) elaborate on why China's developing country status does not constitute an impediment to implementing its treaty obligations. In the latter case, the burden of argument is on the committee. Therefore, the above arguments on the part of the committee to simply dismiss China's claim to being a developing country that lacks the necessary resources to implement its treaty obligations is not constructive. Moreover, although the committee did not acknowledge China's developing country status arguments in the 2005 session, China re-raised this argument in the 2014 session with few adjustments. This also shows that the dialogue regarding China's developing country status and its impact on China's implementation of its treaty obligations has not moved forward since the 2005 national dialogue session.

7.3 Arguments on gender equality

Arguments concerning gender equality can be found in constructive dialogue in both the CESCR and the CEDAW Committee. In this section, the dialogues are approached as follows. The first step is to summarise the general attitudes held by both China and the committees on the gender equality issue, which serve as a vantage point for the analysis (7.3.1). The next step is to identify the main sources, especially relevant General Recommendations, as the baseline for justifying the arguments (7.3.2). The third step is to investigate each topic by inquiring whether these arguments are justifiable. The constructiveness of the dialogue will also be discussed (7.3.3–7.3.5).

[545] E/C.12/CHN/2, para 5.

7.3.1 General attitude on gender equality

China's general attitude on gender equality can be encapsulated in the following arguments. These arguments can be taken as China's basic position in defence of its gender policy.

In its State Report in the 2014 ICESCR session, China elaborated its position on gender equality, invoking particular reasoning:

> Owing to the constraints and limitations of such factors as levels of economic and social development, especially in the process of economic structural adjustment, and establishing and perfecting the socialist market economic system, China's promotion of gender equality and women's development faces a number of new circumstances and new problems: social stratification of women's groups is becoming ever more complex, and the demands of women's life, development and protection of rights and interests have diversified; there are relatively marked imbalances between women's development in different regions, different social strata and different groups; outdated gender-unequal customs and practices that have survived from China's history and traditional culture have still not yet been completely eliminated, and violations of women's rights and interests still exist to different degrees in some regions.
>
> To meet the above challenges, China will continue to carry out thoroughly the basic national policy of gender equality, protecting the rights and interests of women in accordance with the law, implementing the target requirements of the Women's Development Programme, and making efforts to promote equal enjoyment of rights by men and women in respect of politics, economics, culture, society and family life.[546]

This argument is largely in line with China's position in the CEDAW Committee. As early as its 1999 session, China indicated its position as follows:

> China is a developing country, hampered by its level of economic and social development as well as by traditional attitudes. In real life, Chinese women's equal rights to political participation, employment and education as well as in marriage and family life have yet to be fully realized. Disrespect for and discrimination against women, and even violations of their rights and interests, are not uncommon, and the overall talents and abilities of China's women also need further improvement.[547]

In the 2006 State Report, China again stated the following:

[546] E/C.12/CHN/2.
[547] 1999 State report CEDAW/C/CHN/3–4, 3.

> Given the constraints stemming from varying levels of economic and social development, the influence of traditional modes of thought, and especially the numerous new phenomena, characteristics and problems emerging as a result of the transition from a planned economy to a socialist market economy, the full realization of equal rights for Chinese women in the political, economic, cultural, social and familial spheres will continue to be a lengthy process. It therefore remains a long-term and arduous task for the Chinese Government and the society as a whole to further improve the social environment for women's development, overcome obstacles and eliminate discrimination against women in all its forms. The Chinese Government and the entire Chinese people together will make unremitting efforts to that end.[548]
>
> China was a feudal society for a long time, so thoroughly changing the old ways men and women behave in social and cultural settings and overcoming misconceptions based on gender discrimination is a long and arduous challenge. At present, women's participation at the decision-making level in the media is still low; elements of gender discrimination and stereotyping persist in media content; some movies, TV programmes, advertisements and print media still distort, derogate and even insult the image of women; and the public lacks sensitivity to or critical awareness of gender discrimination in the media.[549]
>
> Although the situation had improved significantly as a result of those efforts, China remained a developing country with a population of over 1.3 billion and a modest level of productivity and education. There were still many difficulties and problems to be resolved in the lives and work of Chinese women and in the protection of their rights. Women took little part in high-level decision-making. Discrimination against women occurred in employment. The education and health of women needed to be improved. It would be a fairly long process to progress from de jure equality to de facto equality. The Government was committed to pursuing a scientific development concept, building a harmonious society and implementing the National Programme for Development 2006-2010, which would create new opportunities for Chinese women. With support and help from the committee and with promotion and facilitation by the international community, China would achieve more impressive accomplishments in the implementation of the Convention.[550]

On the other hand, the CEDAW Committee has repeatedly emphasised that China has not adopted (sufficient) temporary measures to increase gender equality, especially in the area of political participation. In the 1999 CDEAW session, one committee member commented that, '[d]espite

[548] 2006 State report CEDAW/C/CHN/5–6, 7.
[549] 2006 State report CEDAW/C/CHN/5–6, 17.
[550] 2006 Summary Record CEDAW/C/SR. 743 (B), para 12.

the Government's efforts, traditional attitudes towards women persisted and there had been little progress in establishing a new culture of equality'.[551] In the Concluding Observation of the same session, the committee expressed the following:

> The committee urges the Government to adopt temporary special measures within the meaning of article 4, paragraph 1 of the Convention to increase the number of women at the higher echelons of Government. The women's talent bank of the All China Women's Federation should be used extensively to increase the percentage of women in all public bodies. The Government should also encourage gender-balance in the composition of village committees.[552]

In sum, China's general approach to addressing the issue of gender equality was to explain the difficulties it faced, which include its developing country status, traditional social and cultural stereotypes, and the ongoing process of economic restructuring. These are all examples of particular reasoning, which implies that in China's view, a margin of discretion regarding the implementation of gender equality policies should be granted. The committee, however, was not satisfied with these measures, especially the temporary special measures that China claimed to have taken. Therefore, the committee did not agree that China had fulfilled its state obligations on this issue. In this sense, in order to further grasp the key issues in the debate, it is necessary to investigate the provisions on state obligations to implement temporary special measures in the context of gender equality.

7.3.2 Provisions and General Recommendations on temporary special measures

Adopting temporary measures was first and foremost addressed in Article 4 of CEDAW, which reads as follows:

> Article 4
>
> 1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

[551] CEDAW/C/SR. 420, para 26.
[552] 1999 C.O A/54/38/Rev. 1, p. 30, para 293.

> 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

The original wording codifying temporary special measures in Article 4 is written from a negative perspective. That is, it states that temporary special measures used to accelerate *de facto* gender equality are not a type of discrimination and shall be terminated when the objectives of equality have been achieved. Article 4 (2) indicates that maternity protection measures should not be treated as discrimination or as temporary special measures and should be permanent. Therefore, according to the text of Article 4, there seem to be no positive obligations on states to implement temporary special measures. However, this is not the current position taken by the CEDAW Committee.

In one of its earliest General Recommendations—General Recommendation No. 5, adopted in 1988—the CEDAW Committee stated that because 'there is still a need for action to be taken to implement fully the Convention by introduction measures to promote *de facto* equality between men and women', it recommended that 'state parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment'.[553] Therefore, in spite of its initial negative approach to temporary special measures as mentioned in the Covenant, the committee encouraged states to adopt more temporary special measures. If this General Recommendation can be taken as a first step toward bridging the negation approach represented in the original text of Article 4 and toward a more positive request in practice, then General Recommendation No. 25 is a leap in this direction. General Recommendation No. 25, which was adopted at the thirtieth session in 2004, focuses on Article 4 (1) on temporary special measures. Beginning with the aim of achieving not only *de jure* but more importantly *de facto* equality between men and women,[554] the committee stated that 'pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women'.[555] Following this point of view, which differs from the original wording of Article 4 (1), General Recommendation No. 25

[553] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 5: Temporary Special Measures, 1988.
[554] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, paras 7, 8.
[555] CEDAW General Recommendation No. 25, para 8.

emphasises 'equality of results' as 'the logical corollary of de facto or substantive equality'.[556] It further states that 'the application of temporary special measures in accordance with the Convention is one of the means to realize *de facto* or substantive equality for women, rather than an exception to the norms of non-discrimination and equality'.[557] In its paragraph 24, it interprets CEDAW Article 4 (1) as being 'in conjunction with articles 1, 2, 3, 5, and 24' and as 'need[ing] to be applied in relation to articles 6 to 16'. It stipulated that Article 4 (1) shall be understood as being included in 'all appropriate measures'. Moreover, 'states parties are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's de facto or substantive equality'.[558] The committee also elaborated on specific state obligations regarding temporary special measures, including the burden of justification for failure to adopt temporary special measures, adopting legislative measures, and other measures regarding temporary special measures.[559] Therefore, it suffices to say that the committee is now taking a positive approach to temporary special measures. In other words, it considers adopting temporary special measures a positive obligation on state parties. It is also important to note that, in General Recommendation No. 28 on the core obligations of state parties under Article 2, the committee mentions temporary special measures in particular and views them as falling under the obligation to fulfil.[560] This again confirms that the committee's view on temporary special measures has evolved, shifting from negative to positive state obligations. In short, given the General Comments issued by the committees over the past decades, state parties are now under a positive obligation to take temporary special measures regarding gender equality.

In this regard, the particular reasoning that China has adopted, outlining its relatively low level of economic and social development, its long feudal history and traditional culture, and its economic restructuring, cannot be justified if no temporary special measures are observed on the relevant topics (as the committees have stated) and if China does not offer further arguments justifying its failure to adopt these temporary special measures. In other words, given the development of the committee's stance on temporary special measures, the state parties' obligation

[556] CEDAW General Recommendation No. 25, para 9.
[557] CEDAW General Recommendation No. 25, para 14.
[558] CEDAW General Recommendation No. 25, para 24.
[559] CEDAW General Recommendation No. 25, paras 25–39.
[560] CEDAW/C/GC/28, General Recommendation No. 28 on the core obligations of state parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para 9.

to take temporary special measures now constitutes a positive, immediate, and even core obligation (as addressed in General Recommendation No. 28) under CEDAW. Failure to fulfil this obligation therefore puts a heavy burden of proof on states. In the case of China, the arguments for its general position on gender equality, as shown above, cannot be deemed justifiable in this context, especially since the committee has pointed out in General Recommendation No. 25 that 'such failures may not be justified simply by averring powerlessness, or by explaining inaction through predominant market or political forces'.

However, although the committee has decided to interpret Article 4 (1) in a positive way,[561] taking temporary special measures is by no means a black and white issue. The Special Rapporteur of UNCHR once raised his concern on the issue of affirmative preference:[562]

> Affirmative preference is the most controversial form of affirmative action … Discrimination takes place through the rationing of social goods and this will mean that some members of other groups will no longer be considered for these social goods which are now only in limited supply.[563]

One commentator also opined that setting quota systems, as a form of affirmative action, is more controversial than redistributing social resources (e.g. advising, training, housing, and supplying food) to benefit disadvantaged groups, in that they may serve to 'disadvantage other vulnerable groups that have similar claims to equality of opportunity', which may even contribute to 'hostility and resentment between social groups' or fail to 'take into account the fundamental element of individual choice'.[564] However, these legitimate considerations seem to have little impact on the committee's approach to pressing states to take temporary special measures.

Obliging state parties to take temporary special measures (such as setting quotas for women's participation in economic, political, and social life) may have a rapid and positive effect when it comes to changing gender stereotypes and inequalities in a given society. Nevertheless, as indicated above, there are concerns and difficulties that must be addressed when it comes to taking

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[561] Marsha A. Freeman et al. (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012), 125.
[562] CEDAW General Recommendation No. 25.
[563] UNCHR (Sub-Commission), 'Comprehensive Examination of Thematic Issues Relating to Racial Discrimination, Preliminary report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with sub-Commission resolution 1998/5' (2000), UN Doc E/CN.4/Sub. 2/2000/11, paras, 38 and 78.
[564] Cohen, 'Affirmative Action and the Rights of the Majority', in Charles Fried (ed), *Minorities: Community and Identity* (Springer 1983) 356; Craven (n 516) 187.

temporary special measures, which have not received sufficient attention (or justification) from the committee. Moreover, in spite of the obstacles that may be encountered, taking temporary special measures, especially setting quotas, also requires extensive and inclusive social debate, as well as financial and political rearrangements and commitments. Therefore, although temporary special measures may indeed have a direct impact on society, these measures also require a conducive economic, social, and cultural context. This is to say that by setting temporary special measures as a positive, immediate, and core obligation on the part of state parties, the committee leaves little room for states to defend their actual inability to adopt these measures. The committee's stance, in my view, is a step too far in the universal and objective direction, which may have a negative impact on the interaction between the committees and state parties. In other words, not only should the justifiability of the General Recommendations be subject to further investigation, but they may also hamper the constructiveness of the dialogue between state parties and committees, which is to some extent observed in the constructive dialogue between China and the CEDAW Committee.

The following discussion will consider four specific issues regarding gender equality in relation to which China has advanced arguments that use particular reasoning. These four topics are: women's representation in (high-level) politics, women's employment, domestic violence, and women's health.

7.3.3 Arguments concerning women's representation in (high-level) politics[565]

7.3.3.1 Provisions on women's participation in political and public life

The relevant provisions on women's participation in political and public life are found in Article 7, which reads as follows:

> State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
> (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
> (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

[565] Given the length of the relevant dialogues for 7.3.3 and 7.3.4, I do not include them in these sections. Please refer to the annex for the original arguments.

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Temporary special measures are not mentioned in particular in the text of Article 7. However, as General Recommendation No. 25 establishes, taking temporary special measures is considered under the category of 'all appropriate measures' and therefore should be undertaken under Article 7. This view is also confirmed in General Recommendation No. 23, adopted in 1997 on women's political and public life.

According to General Recommendation No. 23, not only is the CEDAW to be understood in a liberal democratic context and as closely linked with the interpretation and realisation of the ICCPR,[566] but it also establishes the state parties' obligation to introduce temporary special measures regarding women's participation in political and public life.[567] The committee has clarified the temporary special measures that can be applied in order to implement Articles 7 and 8 of the CEDAW, including:

> recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns, directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies.[568]

Moreover, with regard to women's participation in public policymaking in particular, the CEDAW committee stated that:

> States parties have a responsibility, where it is within their control, both to appoint women to senior decision-making roles, and as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women's views and interests.[569]

Measures concerning women's participation in policymaking, especially participation in senior cabinet and administrative positions and as members of government advisory bodies, include the following:

[566] General Recommendation No. 23, paras 6, 14.
[567] ibid, para 43.
[568] ibid, para 15.
[569] ibid, para 26.

> adoption of a rule whereby, when potential appointees are equally qualified, preference will be given to a woman nominee; the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body; a quota for women members of cabinet and for appointment to public office; and consultation with women's organizations to ensure that qualified women are nominated for membership in public bodies and offices and the development and maintenance of registers of such women in order to facilitate the nomination of women for appointment to public bodies and posts. Where members are appointed to advisory bodies upon the nomination of private organizations, state parties should encourage these organizations to nominate qualified and suitable women for membership in these bodies.[570]

The committee's opinions on women's participation in political and public life is therefore in line with the development of its stance on temporary special measures in general. As one commentator indicates, because the committee 'seems to be of the opinion that low overall representation of women indicates a violation of Article 7' and constitutes grounds for 'ask[ing] the state party to comply with or enhance compliance with Articles 7 and 8', it can be concluded that 'a minimum threshold of representation is an immediate obligation of the state'. Nonetheless, 'the obligation to reach parity in political life is seen as a goal to be implemented gradually'. Therefore, 'it is sufficient for the state to prove that all appropriate measures are being taken to increase the ratio of women. The evaluation of the appropriateness of the measures lies with the committee'.[571]

7.3.3.2 The justifiability and constructiveness of the arguments

According to China's arguments, it has achieved *de jure* or formal equality between men and women when it comes to participation in public and political life. The problem arises when *de facto* equality is taken into consideration, given that the ratio of female members in both high-level politics and local village committees is rather low. This issue has been raised in several sessions over past decades, in both the CESCR and the CEDAW Committee. In the 2005 CESCR session, the Chinese delegation noted that 'women accounted for 24 per cent of the members of the National People's Congress … [and that] there was at least one female cadre in the administrations of the

[570] ibid, para 29.
[571] Freeman (n 561) 215–16.

31 provinces, municipalities and autonomous regions'.[572] However, the policy of having 'at least one women in local government leadership at the county level and above' mentioned in the State Report fell short of the requirements of the CESCR.[573] The committee's criticism was not accepted by the Chinese delegation on the grounds that because 'the number of leadership positions was rather small, that quota was already significant'. Hence, it seems that China considered itself to have already met the threshold of the minimum standard, whereas the committee held otherwise.

In the CEDAW session, the committee members stated that 'attributing the situation to gender stereotypes was inadequate'[574] and that 'numbers and quotas should be established'.[575] However, this comment was again not sufficiently acknowledged by the Chinese delegation, who explained that with regard to the 'fairness of the elections', 'there was no special provisions for gender in (villagers' committee) elections'. The delegation further appealed to gender stereotypes (the 'lower status of women in rural areas') as a reason for the lower representation of women in the villagers' committee. In addition, the delegation informed committee members that 'the draft law would ensure that at least one woman was represented on each committee'.[576] So far, China's arguments seem to be un-constructive, given that the delegation still resorted to gender stereotypes and China's developing country status as reasons for the low representation of women in politics—reasons which were clearly rejected by the committee members in the earlier sessions. Moreover, the 'at least one women' principle has repeatedly shown up in different contexts regarding different levels of political representation, which is far from 'adequate' in the view of the committees. In the 2014 CEDAW session, the Chinese delegation mentioned that 'women currently accounted for over 40 per cent of the members of the National People's Congress'.[577] However, the delegation did not address any intention to adopt further legislative measures, especially regarding quota setting.

In sum, the dialogue on women's participation in public and political life, especially regarding *de facto* equality and quota settings, has not moved forward over the past decades. Although China has refrained from appealing to gender stereotypes to explain the low representation of women in its latest CEDAW session, which can be considered progress, it is still

[572] E/C.12/2005/SR.7, para 17.
[573] E/C.12/2014/SR. 17, para 30.
[574] CEDAW/C/SR. 744 (B), para 7.
[575] CEDAW/C/SR. 744 (B), para 8.
[576] CEDAW/C/SR. 744 (B), para 12.
[577] CEDAW/C/SR.1251, para 56.

reluctant to set a more ambitious quota (more than 'at least one female'). Since it has been established in the General Recommendations that states have a positive obligation to ensure women's equal participation in political and public life, adopting temporary special measures in the form of quota setting is required. China's 'at least one female' provision certainly falls short of 'the minimum threshold of representation'. In this sense, China's continuing reluctance to set a reasonable quota without further justification is not justifiable.

7.3.4 Women's employment

7.3.4.1 Provisions on the equal right to work

The most relevant provision regarding women's equal right to work under the CEDAW is Article 11, which reads as follows:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
> (a) The right to work as an inalienable right of all human beings;
> (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
> (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
> (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
> (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
> (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
> 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, states Parties shall take appropriate measures:
> (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
> (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

The General Recommendation that is relevant to Article 11 is General Recommendation No. 13 (1989) on equal remuneration for work of equal value. In this document, the committee recommended the following:

1. In order to implement fully the Convention on the Elimination of All forms of Discrimination against Women, those states parties that have not yet ratified ILO Convention No. 100 should be encouraged to do so;
2. They should consider the study, development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate, and they should include the results achieved in their reports to the committee on the Elimination of Discrimination against Women;
3. They should support, as far as practicable, the creation of implementation machinery and encourage the efforts of the parties to collective agreements, where they apply, to ensure the application of the principle of equal remuneration for work of equal value.[578]

7.3.4.2 The justifiability and constructiveness of the arguments

The main concerns voiced by the committee were about the disproportionate effect on women of economic restructuring and guaranteeing equal pay for work of equal value, as set out in ILO Equal Remuneration Convention (No. 100). The main point of China's argument is that China was going through an economic restructuring period, which had an adverse effect on women in particular. Moreover, it attributed this problem to 'private businesses, and jointly funded, foreign-funded and jointly operated enterprises', which failed to protect women's rights in the workplace.[579] This argument, however, revealed that the state party had failed to implement the obligation to protect

[578] CEDAW General Recommendation No. 13: Equal remuneration for work of equal value, 1989.
[579] CEDAW/C/SR. 419, para 21.

under Article 11 of the CEDAW and is therefore not justifiable. In its 2014 session, this argument was replaced by an argument addressing measures that have been taken to tackle this problem, including, among others, providing 'employment information, career guidance, job referrals and other public services in relation to employment to different women's groups'.[580] Provided they are sufficient (which is for the committee to decide), the measures mentioned form a justifiable argument. That is, China has improved its arguments on this issue over time, and therefore its contributions can be considered constructive.

As for equal remuneration for work of equal value, the Chinese delegation pointed out that there were relevant provisions on 'equal pay for equal work' in its Labour Law, the Labour Contract Law, and the Law on the Protection of the Rights and Interests of Women. The committee stated, however, that lack of legislation on the principle of equal pay for work of equal value was the reason for China's persistent and widening gender gap on this matter.[581] Failure to adopt legislation on the principle of equal pay for work of equal value is *prima facie* not justifiable. This is because the principle of equal pay for work of equal value, according to the wording of Article 11 (d), as well as General Recommendation No. 13, para 1, is the main obligation under Article 11 on the equal right to work. In addition, the obligation to take legislative measures is an immediate realisation obligation. Thus, any particular reasoning that runs against this principle must bear a heavy burden of proof. However, in this context, China did mention that it had enacted several relevant pieces of legislation. Hence, it is the Committee's place to decide whether these legislative measures are sufficient (not to question their existence). In this sense, it seems that the committee did not consider these legislative measures sufficient, given their *de fact*o impact. However, the committee did not address this concern explicitly. Therefore, the committee's arguments are not constructive, for it still bears the burden of explaining why the relevant legislation as mentioned in China's statement was not sufficient.

7.3.5 Eliminating violence against women and protecting women's health

7.3.5.1 Relevant provisions

There is no article in the text of the CEDAW that regulates eliminating violence against women. However, this topic was raised in its General Recommendation No. 12 (1989), which 'require[s]

[580] CEDAW/C/CHN/7–8, 41.
[581] CEDAW/C/CHN/CO/7–8, para 36.

the States parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life' and which

> [r]ecommends to the States parties that they should include in their periodic reports to the committee information about:
>
> 1. The legislation in force to protect women against the incidence of all kinds of violence in everyday life (including sexual violence, abuses in the family, sexual harassment at the work place etc.);
> 2. Other measures adopted to eradicate this violence;
> 3. The existence of support services for women who are the victims of aggression or abuses;
> 4. Statistical data on the incidence of violence of all kinds against women and on women who are the victims of violence.[582]

A number of issues in relation to women's health is also codified in Article 12 of CEDAW:

> Article 12
>
> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
> 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Moreover, in its General Recommendation No. 24 (1999), the CEDAW Committee further clarifies the states' obligations under Article 12 on women's health. This includes state obligations with regard to reporting (especially on data disaggregated by sex), taking health measures that specifically address women, considering their needs and interests, and preventing discrimination in access to health services, among others.

7.3.5.2 Arguments

a) On eliminating violence against women

In the 1999 CEDAW session, the Chinese delegation explained the factors that contribute to violence against women in China:

[582] CEDAW General Recommendation No. 12: Violence against women, 1989.

> First, China had a long history as a feudal society, and patriarchal ideas still had some influence. Women victims mistakenly believed that being beaten by their husbands was a family stigma and endured the abuse in silence. In addition, there were still many women who did not have an independent income, and their fragile economic status and dependence left them powerless. Ideas about family life which had arisen during the transitional period had led in some cases to a lack of responsibility towards the family, which in turn had led to domestic violence. Finally, in remote rural areas, there were still cases of arranged marriages and mercenary marriages; it had been shown that domestic violence occurred more frequently in such marriages.[583]

The delegation followed by listing the measures that had been taken to tackle this problem. It is said in 2014 session that the new legislation to combat domestic violence had been drafted and submitted to the National People's Congress for consideration.[584]

b) On protecting women's health

In the 2006 State Report, China stated that:

> The Chinese Government has also noted that in many rural areas, especially those with high rates of poverty, there remains a serious lack of health-care facilities and medical personnel, and huge inputs are needed to build the infrastructure required; this is a situation that is not easily changed in a short time. In the mountainous areas, the hinterlands and areas of high poverty, the lack of health knowledge and inaccessibility in terms of transportation result in relatively low rates of in-hospital births (45-65 per cent), with comparatively high rates of maternal and infant mortality as a consequence. The incidence of HIV/AICS is also rising rapidly in China. There are still some people who cling to the traditional view of sons as being more advantageous or better than daughters, especially in areas of high poverty. Owing to the low level of productivity and the lack of information in those areas, changing such attitudes will take some time. With these obstacles in mind, the Government has formulated policies to increase inputs into rural health care, strengthen the training of rural health-care personnel, and promote education efforts regarding health and population issues. The efforts of all sectors of society will be needed in working towards a solution to these issues step by step.[585]

[583] CEDAW/C/SR.419, para 42.
[584] CEDAW/C/SR. 1251, para 27.
[585] CEDAW/C/CHN/5–6, 48.

7.3.5.3. The justifiability and constructiveness of the arguments

In the case of domestic violence and women's right to health, China defended its position by adopting particular reasoning to explain the barriers and obstacles it faced with regard to these issues. Nonetheless, the Chinese delegation also supported these arguments with descriptions of the measures it had taken on each topic. Particular reasoning was used to argue for a possible margin of discretion considering the results of these measures rather than to defend non-implementation. In addition, the committee did not express counter-arguments to China's arguments. Therefore, weighing all arguments, my conclusion would be that in the case of adopting general social policies and legislation for combating violence against women and improving women's health, China's particular reasoning was justifiable and constructive.

To sum up, China's arguments on women's representation in politics are not legally justifiable given that the General Recommendations have made taking temporary measures in this context a positive obligation, which China is reluctant to embrace. Nevertheless, by refraining from turning to gender stereotypes to explain the low representation of women in politics, China's arguments were to some extent (up to the point of quota-setting) constructive. With regard to women's right to work and equal pay for work of equal value, China's arguments on both topics are justifiable thus far (pending rebuttal from the committee). With regard to women's right to work, in its earlier sessions China attributed the problem of protecting women's right to work to 'private business, and jointly funded, foreign-funded and jointly operated enterprises'. This argument revealed that the state party had failed to implement the obligation to protect, and it was therefore not justifiable. China did, however, improve its arguments in later sessions by outlining the measures it had taken on this topic. Therefore, China's later arguments on this topic were justifiable and constructive. As for equal remuneration for work of equal value, China pointed out its relevant legislation on guaranteeing equal pay for work of equal value, whereas the committee insisted that there was a lack of legislation in this field without further elaboration. Therefore, according to the committee, China's arguments were not justifiable, and the committee's arguments were not constructive. Finally, regarding eliminating violence against women and protecting women's health, China's arguments via particular reasoning were both justifiable and constructive, all things considered.

7.4 Disaggregated statistics collection and reporting

A lack of information in the form of disaggregated statistics in China's reports has been of concern to several committees and was viewed as a failure to implement the relevant conventions.

The Chinese delegation has expressed different arguments and attitudes to different committees regarding data collection. The arguments involving particular reasoning that hinged on the claim that China is a developing country were mainly invoked in the CAT. This argument has not changed much over the past decades.[586] This reasoning, however, was not taken as the main argument in the other two committees when China's data collection system and statistical information were also questioned. In the CEDAW Committee, the Chinese delegation listed its progress with regard to data collection and its publication system in the latest session,[587] while in the CRC Committee, the main focus was on reliability rather than the absence of data.[588] The committees' arguments, on the other hand, were aligned in requesting that state parties collect and report the disaggregated data.[589] This uniform standpoint across different committees is further revealed by the General Comments adopted by each committee on data collection and reporting.

7.4.1 Sources on the state parties' obligation to collect data

The CAT committee

In its General Comment No. 2 on the implementation of Article 2 by state parties, considering data collection, the CAT Committee stated that:

> 23. Continual evaluation is therefore a crucial component of effective measures. The committee has consistently recommended that states parties provide data disaggregated by age, gender and other key factors in their reports to enable the committee to adequately evaluate the implementation of the Convention. Disaggregated data permits the states parties and the committee to identify, compare and

[586] CAT/C/SR.846, para 3, CAT/C/SR.846, para 36. CAT/C/CHN/CO/4/Add.2, 20. It should be noted that the State Secrets Law and its relationship with the open information was discussed in the former chapter on the sovereignty argument. Therefore, it will not be repeated in the current chapter. Here, I will focus on the 'developing country' side of the arguments.
[587] CEDAW/C/CHN/7-8, para 35.
[588] CRC/C/SR.300, paras 39, 42.
[589] CAT/C/SR.146/Add.4, 2. CAT/C/SR.423/Add.1, paras 12 and 25. CAT/C/SR.844, para 31. CAT/C/CHN/CO/4, paras 2 and 17. CAT/C/CHN/CO/5, paras 6, 24, and 25. C.O A/54/38/Rev.1, para 267, page 28. CEDAW/C/CHN/CO/6, paras 13, 14. 2014. CEDAW/C/SR.1251, para 21. CRC/C/SR.300, paras 38, 40, 41. CRC/C/SR.1062, para 15. CRC/C/SR.1065, para 58.

> take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed. states parties are requested to describe, as far as possible, factors affecting the incidence and prevention of torture or ill-treatment, as well as the difficulties experienced in preventing torture or ill-treatment against specific relevant sectors of the population, such as minorities, victims of torture, children and women, taking into account the general and particular forms that such torture and ill-treatment may take.[590]

In its General Comment No. 3 on the implementation of Article 14 by state parties, the committee again articulated its position that disaggregated data collection and reporting belongs to the state parties' obligation to monitor and report:

> 45. States parties shall establish a system to oversee, monitor, evaluate, and report on their provision of redress measures and necessary rehabilitation services to victims of torture or ill-treatment. Accordingly, states parties should include in their reports to the committee data disaggregated by age, gender, nationality, and other key factors regarding redress measures afforded to victims of torture or ill-treatment, in order to meet their obligation as recalled in General Comment No. 2 to provide continual evaluation of their efforts to provide redress to victims.'[591]

The committee followed by specifically addressing the form and type of data that should be collected and reported under this obligation.[592]

The CESCR

Article 16 of ICESCR reads as follows:

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

General Comment No. 1 (1989) on Reporting by State Parties reads as follows:

[590] CAT General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para 23.
[591] CAT General Comment No. 3: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties, 13 December 2012, para 45
[592] CAT General Comment No. 3, para 46.

> 3. A *second objective* is to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. From the committee's experience to date, it is clear that the fulfilment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged. Thus, the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation. The committee is aware that this process of monitoring and gathering information is a potentially time consuming and costly one and that international assistance and cooperation, as provided for in article 2, paragraph 1 and articles 22 and 23 of the Covenant, may well be required in order to enable some states parties to fulfil the relevant obligations. If that is the case, and the state party concludes that it does not have the capacity to undertake the monitoring process which is an integral part of any process designed to promote accepted goals of public policy and is indispensable to the effective implementation of the Covenant, it may note this fact in its report to the committee and indicate the nature and extent of any international assistance that it may need.

It is evident from General Comment No. 1 of ICESCR that, first, state parties have an obligation to collect and report the disaggregated statistics that reflect the situation of vulnerable or disadvantaged regions or groups. Secondly, in the case of the state's use of particular reasoning (such as arguments about developing status) as a way of justifying its failure to collect disaggregated data, the state should: 1) require international assistance and cooperation, and 2), where international assistance and cooperation cannot help the situation, inform the committee of the nature and extent of any international assistance it may need.

The CEDAW Committee

In its General Recommendation No. 9 on statistical data concerning the situation of women, the CEDAW Committee stated the following:

> Considering that statistical information is absolutely necessary in order to understand the real situation of women in each of the states parties to the Convention,
> Having observed that many of the states parties that present their reports for consideration by the committee do not provide statistics,

> Recommends that states parties should make every effort to ensure that their national statistical services responsible for planning national censuses and other social and economic surveys formulate their questionnaires in such a way that data can be disaggregated according to gender, with regard to both absolute numbers and percentages, so that interested users can easily obtain information on the situation of women in the particular sector in which they are interested.[593]

In its more recent General Comment—General Comment No. 28 on the core obligations of states parties—it stated that it is the state parties' obligation to collect and report disaggregated data:

> … states parties have an international responsibility to create and continuously improve statistical databases and the analysis of all forms of discrimination against women in general and against women belonging to specific vulnerable groups in particular.[594]
>
> …
>
> The policy must be action- and results-oriented in that it should establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals. To this end, the policy must be linked to mainstream governmental budgetary processes in order to ensure that all aspects of the policy are adequately funded. It should provide for mechanisms that collect relevant sex-disaggregated data, enable effective monitoring, facilitate continuing evaluation and allow for the revision or supplementation of existing measures and the identification of any new measures that may be appropriate.[595]

In the same recommendation, the committee also indicated that collecting and reporting disaggregated data is the method by which state parties are to implement their core obligation: '[d]eveloping and establishing valid indicators of the status of and progress in the realization of human rights of women, and establishing and maintaining databases disaggregated by sex and related to the specific provisions of the Convention'.[596]

The CRC Committee

In its General Comment No. 5, the CRC states the following:

[593] CEDAW General Recommendation No. 9: Statistical Data Concerning the Situation of Women. 1989. A/44/38.
[594] General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 10.
[595] Ibid para 28.
[596] Ibid part IV, A (d).

The general measures of implementation identified by the committee and described in the present General Comment are intended to promote the full enjoyment of all rights in the Convention by all children, through legislation, the establishment of coordinating and monitoring bodies - governmental and independent - comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes.[597]

…

in the light of the following articles in the Convention identified by the committee as general principles: Article 2: the obligation of states to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. This non-discrimination obligation requires states actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified.[598]

…

Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation. The committee reminds states parties that data collection needs to extend over the whole period of childhood, up to the age of 18 years. It also needs to be coordinated throughout the jurisdiction, ensuring nationally applicable indicators. States should collaborate with appropriate research institutes and aim to build up a complete picture of progress towards implementation, with qualitative as well as quantitative studies. The reporting guidelines for periodic reports call for detailed disaggregated statistical and other information covering all areas of the Convention. It is essential not merely to establish effective systems for data collection, but to ensure that the data collected are evaluated and used to assess progress in implementation, to identify problems and to inform all policy development for children. Evaluation requires the development of indicators related to all rights guaranteed by the Convention.

49. The committee commends states parties which have introduced annual publication of comprehensive reports on the state of children's rights throughout their jurisdiction. Publication and wide dissemination of and debate on such reports, including in parliament, can provide a focus for broad public engagement in implementation. Translations, including child-friendly versions, are essential for engaging children and minority groups in the process.

[597] General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para 9.
[598] ibid para 12.

> 50. The committee emphasizes that, in many cases, only children themselves are in a position to indicate whether their rights are being fully recognized and realized. Interviewing children and using children as researchers (with appropriate safeguards) is likely to be an important way of finding out, for example, to what extent their civil rights, including the crucial right set out in article 12, to have their views heard and given due consideration, are respected within the family, in schools and so on.[599]

In sum, the committees mentioned above take a uniform and consistent approach to the state party obligation to collect and report disaggregated data. That is, the data collected and reported by state parties, e.g. via the State Reports, must be disaggregated, and this is also considered a core state obligation. The committees view disaggregated data collection and reporting as a core state obligation for the following reasons: first, disaggregated data collection is a necessary step in states' acknowledgement of their current situations and in providing basic information for further effective monitoring. Second, it is also necessary for ensuring that the relevant committees have a relatively accurate picture of the situation and are able to provide their concluding observations accordingly. Third, for most obligations that are subject to 'progressive realisation', chronological disaggregated data is an important indicator for determining whether a state has indeed met the relevant requirements. Fourth, since it has been established that when the resources of the given state party are limited, priority should be given to vulnerable groups and regions, disaggregated data on the situations of vulnerable groups and regions is the only way to decide whether the states have fulfilled such obligations. In short, disaggregated data collection and reporting is a core state party obligation. This is the position taken by all international human rights treaty bodies. Therefore, the burden of argument is on the states if they do not provide such data.

That being said, is this obligation an obligation to be realised immediately or progressively? Put differently, are state parties entitled to a margin of discretion when there is an implementation gap? It is recognised in CESCR General Comment No. 1 that collecting the disaggregated data takes time and resources.[600] Given this consideration, it is fair to say that this obligation is a progressive realisation obligation. However, as discussed earlier in this chapter, this does not mean that the state parties can postpone fulfilling this obligation without providing reasonable justification that is accepted by the committee. Moreover, when it comes to progressive

[599] ibid paras 48–50.
[600] See CESCR General Comment No. 1 (1989), para 3.

realisation obligations, states must utilise the maximum resources available and take steps towards fulfilling their obligations. In addition, where there is a lack of resources, the given state should ask for international assistance. Therefore, only when states do ask for international assistance and prove that such assistance has not helped the situation may they have a margin of discretion with regard to implementing the relevant measures.

7.4.2 The justifiability of the arguments and the constructiveness of the dialogue

In the CAT Committee, China's main argument for its failure to provide disaggregated data was that it was a developing country with limited resources and a large population, and that it did not have sufficient resources or time to collect and report the data as the committee had requested.[601] According to the above discussion, in order for this particular reasoning to be justifiable, China must prove that: 1) maximum effort has been devoted to improving the situation; 2) steps have been taken to fulfil the obligation; and 3) China has invited international assistance. Only if all three criteria are met will this particular reasoning be justifiable. However, not only were none of these points mentioned in China's arguments, but China insisted on using consolidated rather than disaggregated data in cases such as collecting and reporting data on the death penalty (which should be easy to collect in disaggregated form as the number is relatively small). In this regard, China's use of particular reasoning before the CAT Committee regarding its failure to provide disaggregated data is neither justifiable nor constructive.

In the CEDAW session, in reply to the committee's comments on the lack of disaggregated data, the Chinese delegation elaborated on the Chinese government's efforts and progress in data collection and publication.[602] In this case, the Chinese delegation tried to justify the situation by arguing that China has taken sufficient steps towards fulfilling its obligations, which should be viewed as compliance. This argument is therefore already a step forwards in terms of contributing to the constructiveness of the dialogue compared to China's arguments before the CAT Committee, which showed little intention of improving the *status quo*. However, it is still for the committee to decide whether the progress mentioned was sufficient and the obligation fulfilled. After China's report on its progress with regard to data collection, one committee member during the constructive dialogue pointed out that China had failed to provide statistics on things like the

[601] CAT/C/SR.846, para 3.
[602] CEDAW/C/CHN/7–8, para 35.

incidence of rape and that there was a lack of transparency regarding information on women's rights.[603] Therefore, it seems that the committee members did not take China's arguments to be justified in this case.

Finally, in the CRC session, the committee's main concern regarding the data provided by China was its reliability, for there appeared to be a large gap between the statistics provided in the State Reports and those provided by other sources.[604] As a response, the Chinese delegation asked the committee to note that 'all statistics were only relatively reliable'. Moreover, the Chinese delegation argued that China 'had done its best' to collect the data and that the national data collection system 'would improve as the country developed economically'.[605] This argument can be reformulated as follows: 1) China has made the maximum effort on the issue; and 2) it was asking for a margin of discretion regarding its data collection system due to its economic situation. Moreover, in the 2013 session, the Chinese delegation pointed to the annual evaluation of programme implementation and databanks as ways of collecting and reporting the relevant data.[606] Regarding the justifiability of the arguments, however, although China claimed to have made the maximum effort, it had not proved that this was indeed the case, as the disaggregated data requested by the committee was still not made available, with no further justification. Therefore, this reasoning is not in itself sufficient to justify the lack of disaggregated data.

To sum up, although they invoke different reasoning, China's arguments on data collection and reporting in different committees are in general not justifiable. Nonetheless, the arguments in some committees appear to be more constructive than in others. Since the different committees have adopted similar approaches to the obligation to collect and report data, it is China's attitudes that have varied across different committees. A plausible explanation is that China was more willing to collect and report on certain types of data than other types. Taking the above arguments into consideration, it seems that it is China's intention to cooperate, rather than the committee's stance, that has had a significant impact on the direction of the dialogue.

[603] CEDAW/C/SR. 1251, para 21.
[604] CRC/C/SR. 1065, para 58.
[605] CRC/C/SR. 300, para 42
[606] CRC/C/SR.1834, para 2.

7.5 Conclusion

This chapter investigates arguments that use particular reasoning and that concern failure to implement obligations regarding economic, social, and cultural rights. China has argued that due to its developing country status, it has not been able to fulfil these rights immediately and has asked the committee for a margin of discretion. The CESCR did not view China's developing country status as an impediment to its implementation of the Covenant. As discussed above, the dialogue on this topic was not constructive, given that in later sessions China again brought up its developing country arguments with few adjustments, and the committee has still not responded. In this case, China's arguments were justifiable given that no further counter-arguments were provided by the committee. Moreover, since the burden of proof is now on the committee, it seems that it was the committee's stance that prevented the dialogue from moving forward.

With regard to improving gender equality, China argued that because of factors such as economic restructuring, traditional patriarchal ideas and bias towards women, as well as poverty in remote rural areas, it had faced barriers to implementing gender equality nationwide and should therefore be granted a margin of discretion. Nonetheless, it can also be seen from China's arguments that when it came to issues such as employment, domestic violence, and women's health, the government appeared more willing to adopt measures to tackle the problems, whereas when it came to issues such as women's participation in (high-level) politics, the government showed more reluctance to adopt measures. These different attitudes, in my view, are not random. China's approach to tackling the former issues was to adopt general social policies that improve the situation of women, whereas the measures that the committee suggested to China as means of diminishing *de facto* gender inequality in political participation were temporary special measures aimed at accelerating *de facto* and substantive equality.[607] In other words, it seems that the Chinese government was more willing to adopt general social policy measures than to take temporary special measures regarding women's rights. Moreover, within the arguments regarding women's participation in public and political life and employment, the Chinese government was inclined to

[607] 'States parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1, to accelerate the achievement of a concrete goal for women of de facto or substantive equality, and other general social policies adopted to improve the situation of women and the girl child. Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures' (CEDAW General Recommendation No. 25, para 19).

guarantee gender equality of opportunity rather than equality of results. The former can be approached mainly in terms of *de jure* equality, while the latter requires *de facto* equality. That is to say, the committee's push for the adoption of temporary special measures did not receive a positive response from China. This can be seen from the perspective of China's refusal to take temporary special measures despite the fact that the committees had voiced such requests in the past decade. Meanwhile, given the high standards imposed on (and limited leeway given to) the state by the committee with regard to adopting temporary special measures, China's particular reasoning was not justifiable. In this sense, both China's position and the CEDAW Committee's position obstructed constructive dialogue.

As for collecting and reporting disaggregated statistics, this chapter argues that this obligation is a core obligation of state parties insofar as without this information it is impossible for committees to obtain a comprehensive and accurate picture of the situation, and even more difficult to provide useful and relevant concluding observations. China offered different arguments regarding statistics collection and reporting before different committees. In the CAT session, China appealed to its developing country status and showed little intention of further improvement. In the CEDAW session, China argued that it had made progress in data collection, which should be considered sufficient for fulfilling its treaty obligations. In the CRC session, regarding the committee's doubts about the reliability of data, China argued that it had made the maximum effort to collect data and that the situation was constrained by its economic and developmental status. However, none of these arguments are justifiable in their given contexts. As for the constructiveness of the dialogue, China's argument before the CAT Committee was least constructive, while those before the CEDAW and CRC Committees, although not justifiable, did contribute to the dialogue in general. Therefore, it is fair to say that China was willing to collect and report certain types of data and less willing when it came to others. In this case, the quality of the dialogue seems to depend more on China's attitude than the committees'. In other words, it can be assumed that as long as China's attitude towards (certain types of) data collection and reporting does not change, the dialogue will remain more or less where it is.

When it comes to the implementation of states' obligations with regard to economic, social, and cultural rights, the margin of discretion may seem rather wide at first glance. However, it has been shown in this chapter that this margin of discretion is rather limited and has been reduced as a result of the General Comments and new interpretations by the committees regarding states'

implementation obligations over the past decades. In this sense, the committees have demonstrated their universal and objective stance toward implementing economic, social, and cultural rights. This stance is shown not only in the committee's arguments in constructive dialogue with states but also in the development of their interpretations of the Conventions, for example in the General Comments. The tension between the committees' universal stance and states' particular arguments is evident when it comes to issues such as developing country status arguments and the adoption of temporary special measures. With these issues, while the committees have tended to take increasingly universal and objective stances, China has remained reluctant to accept the committees' suggestions, and the dialogues have not been constructive in general. By contrast, when it comes to issues such as taking legislative measures against violence against women and adopting general social policies on women's health and employment, the committees were more willing to grant a margin of discretion, while China appeared to be more accepting of the committee's suggestions and willing to improve the current situation. This is to say that, although with some issues the committees have interpreted the Conventions in a more universal and objective way, which may seem to contribute to making decisions on the justifiability of the arguments, this does not necessarily contribute to the constructiveness of the dialogue. Moreover, with issues such as data collection and reporting, it is not the committee but China's attitude that has had a greater impact on the direction of the dialogue. In this case, the unjustifiable reasoning was due not to the committees' having set the bar too high but to the state party's unwillingness to cooperate. These nuanced dialogical dynamics further prove that constructive dialogue between committees and state parties is not only defeasible (in the sense that the purpose of the dialogue is to decide which side has won or lost in a finite round of discourse) but also transcendental (in the sense that the point of the dialogue is also to seek consensus and cooperation among the interlocutors). In this regard, only arguments that are both justifiable and constructive would contribute to moving the dialogue forward.

Chapter 8 Conclusion: Back to Basics (Legal Argumentation) As a Way Forward

At the beginning of this study, I quoted Ann Kent, who claims that China is the 'least likely to comply' when it comes to international law. Putting aside the question of whether this statement is correct, this observation is clearly based on a specific understanding of 'compliance'. On this understanding, compliance involves changing one's behaviour to coincide with the rules or principles to which one has agreed. At first glance, understanding 'compliance' may be a well-justified starting point for conducting such research. On closer inspection, however, it is almost impossible to apply the literal meaning of compliance to research on international law in general, and on IHRL in particular. This is because any such study faces the difficulty of identifying the 'motives' behind a state's behaviour. In other words, it is a difficult (if not impossible) task to pinpoint the real reasons for changes to state behaviour. This critique is hardly new. Nevertheless, it was for this reason that I decided to take a different route – one that bypasses the technical issues regarding compliance while still making a contribution to our understanding of the relationship between China and IHRL.

Argumentation study thus comes into the picture. To justify an act is to persuade the other side (or sides) that it is right. This process of justification can be conducted under either moral norms or legal rules. In either case, a shared understanding of what constitutes the 'right' act is presupposed. This means that, once argumentation is at issue, we are entering the 'motive' part of the puzzle. That is, by analysing how states justify their actions, we can gain a better sense of why they do what they do. It would be naïve to assume that all of the justifications are given honestly and sincerely. Nevertheless, the term 'lying' presupposes that the 'liar' is fully aware of what is right (or wrong) in the situation, which is why the states at issue often pretend to do the right thing while strategically masking their own wrongdoing. In this sense, analysing how states justify their own actions indeed provides us with another layer of understanding when it comes to the relationship between states and treaty bodies – one that goes beyond merely depicting what those states do, but also what they think they should (or shouldn't) do. We are all too familiar with the adage that actions speak louder than words. However, since the legal world is fundamentally performative, utterances should be considered serious acts in and of themselves—acts which bear

performative force. Thus, I believe it is necessary to go back to the basics of law, to argumentation and its justification, in order to understand the performative force of IHRL.

The decision to use China as a case study in this research was not arbitrary. China, a strong supporter of relativism regarding international legal norms, and a growing international political actor, is a perfect case for illustrating the dynamics between the international human rights treaty regime and its state parties and the performative force of IHRL.

Against this backdrop, the first part of the study maps out the theoretical framework for determining the justifiability of particular reasoning in the context of constructive dialogue. In this part, I argue that constructive dialogue is a process with a dual function, i.e. it is partly legal and partly dialogical (although it is fundamentally legal, with the two elements inter-depending on each other). Based on this characterization, for an argument to be a good one in this context it must be legally justifiable and dialogically constructive. Regarding legal justifiability, the fundamental issue is the interpretation of the relevant articles of the treaty. After examining the theses of the three schools regarding treaty interpretation, and drawing inspiration from Radbruch's ideas on the rule of law, I hold that Articles 31 and 32 of the VCLT constitute a faithful representation of the three approaches to treaty interpretation that have gained prevalence in the current international public legal order. I further propose a practical method for applying these articles to justify treaty interpretation. That is, a justifiable treaty interpretation will not contradict either of the three approaches and must be supported by (at least) one of them.

The second part of this study analyses the justifiability of particular reasoning in the constructive dialogue between China and five human rights treaty bodies on four key topics. Chapter 4 discusses incorporating the core definitions under the CAT into domestic law. I argue that while it is viewed as a positive change of argument on China's part, the particular reasoning adopted by China is not justifiable. Nevertheless, the two cases (i.e. on incorporating the definition of torture and on the definition of DPRK border-crossers) that have been given continuous attention by China and the committees, and are therefore subject to assessment in terms of their constructiveness, are worth contemplating further. When it comes to interpreting and incorporating the definition of torture into domestic law, there is clearly a learning curve on China's part with regard to understanding the Convention and presenting its own arguments under this legal order. As for the case on defining DPRK border-crossers, the fact that China intended to confine its arguments to the 1951 Convention rather than Article 3 of the CAT shows that it was attempting

to manoeuvre its way out of the principle of non-refoulement (under which its arguments are not justifiable) and to direct the discussion to the classification of refugees (wherein the arguments are judged with a broader margin of discretion in the given context). These two examples show not only that China has increased its understanding of its treaty obligations but also that it has developed strategies for justifying its own position under the given treaty.

Chapter 5 investigates China's substantive reservations to Article 8.1 (a) of the ICESCR and Article 6 of the CRC. I hold that both of the reservations and arguments made by China are justifiable, all things considered. However, the reason that these reservations and arguments are justifiable has little to do with the particular reasoning submitted by China and more to do with the compatibility between the reservations and the purposes and objects of the relevant Convention. China has also shown its willingness to cooperate by changing the word 'declaration' with regard to Article 6 of the CRC to 'reservation', as the committee suggested. (However, as I have argued, this is a problematic suggestion.) Therefore, when it comes to what is arguably one of the most technical issues in IHRL, China's arguments are both justifiable and constructive, whereas we cannot say the same for the committees' arguments. As we saw in Chapter 5, neither CESCR nor the CRC Committee responded to China's arguments in a constructive manner.

China has shown the most resistance when it comes to the relationship between sovereignty and the international human rights treaty regime. Chapter 6 illustrates although some arguments under this issue are justifiable, all things considered, they are not constructive in the sense that the two-pronged argument scheme is used to fence off most inquiries from the Committees. By further exploring the historical background of this position, I suggest that the reason for this reluctance is mainly that China wishes to preserve the relevance of the Westphalian notion of sovereignty to the current international (human rights) legal order by confirming its own position on this topic. While some may claim that this position reveals a fundamental mismatch and lack of cooperation between China and IHRL, I suggest that it may say more about China's perception of international (human rights) law-making than about the intention on its part not to comply. By insisting on the Westphalian notion of sovereignty in the international arena, China hopes that more weight will be put on its sovereignty arguments. This logic is partly due to the tragic history of China's colonisation by Western states on the putative basis of international law and treaties from the end of the 19th century until the middle of the 20th century and partly due to China's perception that it is only bound to undertake its treaty obligations in the way it understands them, provided it

insists on this understanding publicly and consistently (which is a (mis)understanding of international customary law-making, and specifically of state practices as a source of international law).[608] In this regard, to the extent that we only view China's behaviour as a form of non-compliance, we may overstep its own logic. That is, China does not think that it has committed itself to limiting its sovereignty under IHRL because it has publicly and repeatedly claimed otherwise.

Finally, Chapter 7 depicts an even more complicated picture of China's relationship with the ICESCR and other relevant provisions of IHRL regarding economic, social, and cultural rights. This chapter examines a case where China's arguments may be justifiable but where the committee is not being constructive (the developing country argument), a case where the committee may have taken a step too far and made the state's reasoning unjustifiable (the General Recommendations on the necessity of taking temporary measures regarding gender equality), and a case where China was un-constructive and refused to provide the requested data. This chapter shows that the delicate balance between states and treaty bodies can easily be shattered by either side's not taking the other's arguments seriously. The flipside of this observation is that making both justifiable and constructive arguments under IHRL takes no less effort than implementing treaty obligations and can make a real contribution to moving the examination process forward. In fact, these two sides, namely argumentation and implementation, are interdependent. On the one hand, states' implementation in the field provides the evidence and materials for making the arguments. On the other hand, a well-formulated constructive argument reveals the obstacles to treaty implementation. In this sense, carefully examining the arguments from both sides can help to identify where the problems possibly lie. As shown in Chapter 7, the problem may not always lie in lack of willingness on the part of states.

In the remainder of this conclusion, I will further elaborate on three implications of this study: first and foremost, the relationship between China and the international human rights treaty regime; second, a perspective from which to approach the debate on the universality vs. the relativity of human rights; and third, the (in)determinacy of international (human rights) law. I will conclude this study by emphasising the role of legal argumentation as the foundation of international human rights legal practice and study.

[608] This understanding of international law making can be particularly seen from China's reaction to the recent South China Sea Arbitration (PCA Case No. 2013–19).

1. China and the international human rights treaty regime

When it comes to the overall interaction between China and the relevant human rights treaty committees, as well as between legal justifiability and the constructiveness of the arguments, the following emerges as a key observation: the committees have a greater impact on China than China has on the committees. Moreover, arguments voiced by the committees that are either legally non-justifiable or non-constructive do prevent the constructive dialogue from moving forward. For instance, the dialogue on incorporating the definition of torture into domestic law was stalled at the point where the committee did not correctly identify the scope of torture codified in China's domestic law. China's 'developing country status' argument, which was dismissed by the CESCR without further justification, was reiterated by China in the following sessions. The problematic suggestion by the CRC Committee that the word 'declaration' ought to be changed to 'reservation' regarding Article 6, although accepted by China, did not prompt China to change its position regarding this arguably most important article of the CRC. On the other hand, when the committee's arguments are legally justifiable and dialogically constructive (such as in the earlier sessions of the CAT, when the committee asked China to incorporate the definition of torture into its domestic law, and when the CDEAW Committee requested that China protect women from domestic violence), China's responses were also more inclined to be constructive. However, this does not mean that as long as the committees keep their arguments legally justifiable and dialogically constructive, China will also be constructive. It is clear from this study that when it comes to certain topics, such as sovereignty and data collection, China has maintained its non-justifiable position, regardless of the committees' input. What this shows is that when it comes to topics on which China does not hold a strongly oppositional position, the legally justifiable and dialogically constructive arguments from the committees are very likely to make a positive impact on the process, whereas un-justifiable or non-constructive arguments do not have this effect, or even affect the process negatively.

Moreover, my analysis reveals that the relationship between China and IHRL is rather complicated and may sometimes seem like it has reached an impasse. Nevertheless, this study shows that there is systemic dialogue between China and international human rights treaty bodies, which has generally improved over time (especially on China's part). The fact that China has made an effort to offer justifiable or constructive arguments implies that it is adapting to the 'rightness'

of the rules and principles of IHRL. Even when China violates its treaty obligations, it tries to avoid being judged as non-compliant rather than simply shutting down the discussion and not 'playing the game' (e.g. the North Korean border-crosser arguments). This adaption to the 'rightness' of the regime is, in my view, a process of institutionalisation. In other words, despite its poor compliance record (as some scholars, NGOs, and states hold), China does consider itself subject to the international human rights treaty regime.

However, this relationship does not run in the other direction. Whether China's arguments are legally justifiable or dialogically constructive has little impact on the committees in general. In other words, the committees have shown little interest in China's arguments. The two reservations that China made to the ICESCR and the CRC, for instance, both grounded in justifiable arguments, have not influenced the committees to reconsider their arguments against China's reservations. The 'developing country status' arguments, as the basis for establishing China's obligation to implement the ICESCR, also failed to attract much attention from CESCR.

Since the process of constructive dialogue is partly legal, partly dialogical, taking the other's arguments seriously is not only a basis for establishing and continuing the entire process but also significant to the 'law-enactment' that resides in this very process. China's arguments in constructive dialogue have generally improved over time. This means that China is at least trying to 'play the game'. However, a less constructive approach on the committees' side may frustrate China's willingness to further engage. Such frustration is clearly shown in China's response to the CAT Committee after concluding the constructive dialogue.[609]

2. The universality vs. the relativity of human rights

Another implication of this study is that, as far as IHRL is concerned, relativism arguments have rather limited scope for justification. Throughout this study, I have investigated the kinds of particular reasoning that are justifiable when it comes to a given topic. One of my vantage points

[609] China made a written comment regarding the concluding observations and recommendations of the CAT 2008 session, in which it states: 'Regrettably, the Committee members designated as country rapporteurs, displaying a strong bias against China, paid no heed to the facts and disregarded the detailed and accurate information and thorough explanations provided by the Chinese Government. … Such acts are contrary to the objectives of the Convention and violate its authority; they not only undermine the basis for cooperation between China and the Committee, but also damage the Committee's image and credibility. The Chinese Government is deeply disturbed by this.' (CAT/C/CHN/CO/4/Add. 1, 17 December 2008).

is that in order for particular reasoning to be justifiable, it must be universalisable. An argument that deviates from this starting point is not justifiable in a legal context.

When it comes to particular reasoning concerning interpretation, justifiable particular reasoning cannot conflict with either textual, intentional (shared rather than subjective intentions), or teleological readings of the law and must be supported by (at least) one of these. As for particular reasoning on making reservations to a given convention, it must be permitted by the given treaty and compatible with the purposes and objects of that treaty. The reasoning according to which sovereignty should be protected against IHRL in most cases cannot hold, for the codification of the relevant international laws, the shared commitments of the international society, and the purposes and objects of the international human rights legal order all direct away from the Westphalian notion of absolute sovereignty. This is based on the idea that since sovereignty is a myth created by a shared consciousness, what states make of it they can also decide either to maintain or to take away, but only collectively. Finally, when it comes to the implementation of treaty obligations, especially concerning economic, social, and cultural rights, it is intuitive to think that the margin of discretion should be quite wide. However, as shown in this study, this margin is also limited and has become even narrower over the past decades due to the new interpretations offered by international human rights regimes. Moreover, concepts such as 'minimum core obligation' and 'immediate realisation obligation' underline the universal and objective requirements upon state parties to promote and protect economic, social, and cultural rights. In sum, once a state enters into an international human rights treaty, it has limited grounds for arguing that because it has a different cultural background (cultural relativism), its own sovereignty concerns (sovereignty relativism), or suspicions about the 'Western' ideal of human rights (post-colonialism relativism), it can simply opt out of its treaty obligations.

Nevertheless, some cases of particular reasoning do hold. For instance, a state can make a reservation to a treaty based on its particular circumstances, but only insofar as this is permitted by the given treaty and the reservation is compatible with its purposes and objects. Also, when it comes to economic, social, and cultural rights, states do have more leeway to decide on their approach to implementing rights that are subject to progressive realisation (along with the pace at which they will do so). Failure to recognise these cases of justifiable particular reasoning may frustrate states' willingness to engage with the treaty bodies and therefore hamper the effectiveness of the treaties.

This is an epistemic (rather than an ontological) approach to the debate on the universality vs. the relativity of human rights. That is to say, this study sets aside the question of whether human rights *are* universal or relative/particular. Instead, it puts the entire debate into the legal context and investigates shared consciousness *qua* codification, (shared) intention, and the purposes and objects of the legal order. Does this approach limit the original debate by putting it in a legal context? It probably does. Have I shifted what has traditionally been an ontological focus on the universality vs. the relativity of human rights to an epistemic inquiry into the justifiability of legal argumentation? Indeed I have. Nonetheless as the original debate was so fundamentally discordant, taking things 'one step at a time' is perhaps preferable. This is not to say that the debate on the universality vs. the relativity of human rights is unsolvable when taken in an ontological sense; rather, it is to say that before we reach that level of concord, it is perhaps desirable to move the debate a step forward even if only from an epistemic perspective. This leads us to the third implication of this research.

3. (In)determinacy and objectivity in international (human rights) law

In 1989, Martti Koskenniemi wrote arguably one of the most widely cited contemporary works on legal argumentation in international law, *From Apology to Utopia: The Structure of International Legal Argument.* In this book, he argues that to reach objectivity in legal argumentation under international law is to ensure concreteness and normativity simultaneously. However, the requirement that argumentation be concrete (in the sense of remaining close to state practices rather than theories of natural justice) and the requirement that it be normative (in the sense of creating distance between law and state behaviour) contradict each other and eventually cancel each other out. As a result, states (as well as other participants, such as lawyers and adjudicators) simply cherry pick either ascending (referring to concreteness) or descending (referring to normativity) arguments in the international legal context, which inevitably leads to stalemate in the sense that ascending arguments are always vulnerable to descending arguments, and vice versa, thus rendering international law useless. His conclusion is that 'anything goes' regarding argumentation in international law. Twenty years later, in *The Politics of International Law*, Koskenniemi reiterated this idea.[610] As I have argued in this study, however, this assertion not only mistakes

[610] Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 38–40.

'determinacy' for there being 'one and only one best answer' regarding international law[611] but also confuses epistemic objectivity *qua* shared consciousness with subjective intentions.

In this study, I agree with Kratochwil when I suggest that 'indeterminacy' is simply an innate characteristic of law—one which has been tackled by different legal systems throughout human history. The 'detrimental' kind of 'indeterminacy', as some CLS scholars suggest, only occurs when there is no rule in a legal system to determine which interpretation or argument is justifiable; a legal system can be determinate (or at least indeterminate in a non-damaging way) even if there is no rule to single out the 'one and only best' decision from the outset. In fact, in most legal systems, the 'one and only best' decision is reached only after the adjudicator has taken everything into consideration and has had his or her final say. As John Bell puts it, in legal judgement, 'giving a decision is an act of authority... As long as the decision meets a threshold of justification …, it is not necessary to show that it is the only right answer'.[612] As long as a legal system contains rules for deciding what counts as a 'justifiable' interpretation or argument, 'indeterminacy' does not damage the core of a legal system.

This is the case in international (human rights) law. The question at issue is not whether one should turn to state practices ('ascending') or to norms ('descending') to justify states' actions, but where to draw the line between states' treaty obligations as regulated by universal rules and the margin of discretion as put forward by states' particular reasoning. To hold IHRL as law is to grant that it (the text of law) is the starting point of the discussion. In other words, the legislation process is complete once the text of law enters into force. It is true that with new interpretations and developing contexts, our understanding of a given law may change over time. However, such change should also have procedural or substantive legitimacy. Treating law as a starting point for discussion means that the justification of certain actions should essentially hinge on interpretation of the relevant legal texts. Thus the interpretation rules come into the picture. As shown in Chapter 2, not only are there rules in international law for deciding on which interpretation is 'justifiable', but there is also a practical approach available when it comes to applying those rules. As I have discussed elsewhere,[613] these treaty interpretation rules also enshrine a perspective of epistemic

[611] Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge Studies in International Relations, Cambridge University Press 2014).
[612] John Bell, 'The Institutional Constraints on Particularism', in Zenon Bankowski and James MacLean, *The Universal and the Particular in Legal Reasoning* (Edinburgh Centre for Law and Society series, Ashgate 2006) 49.
[613] Jingjing WU, 'Particular Reasoning Versus Universal Human Rights: A Case of China' (2016). OSSA Conference Archive.159. https://scholar.uwindsor.ca/ossaarchive/OSSA11/papersandcommentaries/159.

objectivity. In short, parties cannot simply use their own (subjective) intentions to support arguments against interpretations that have been generated by the established rules. In this sense, to claim that because of the 'indeterminacy' of international law 'anything goes' in legal argumentation—a claim which reduces international law to little more than international politics—is to throw the baby out with the bathwater.

4. Final words: Why we should take argumentation (more) seriously in IHRL

In recent decades, only a few researchers have bothered investigating legal argumentation regarding IHRL. Rather, much more focus has been put on the political aspects of it. It is certainly true that law and politics are intertwined in an institutional normative order such as IHRL. It is also true that, in the field of IHRL, politics has played an undeniable role in making, enforcing, and even resisting this legal order. Nevertheless, if we attend primarily to the political side of the story, we risk obscuring the legal nature of this normative order. Like any shared consciousness in human society, IHRL is only as legal as the international actors allow it to be. We have already come a long way to the extent that state parties (including China) and treaty bodies have a formal procedure for exchanging their arguments in dialogue based on IHRL and in a way that has 'law-enacting' consequences. Nevertheless, if all the international actors were to become convinced that IHRL is nothing more than power politics among states and other international players, the 'correctness' and institutional normative power of IHRL would eventually diminish. Therefore, in this study, I have decided to go back to basics by taking the legal characteristics of IHRL and argumentation seriously, because forgetting them is as (if not more) dangerous than lack of imagination.

Annex: Arguments in the summary records of constructive dialogue between China and human rights treaty bodies regarding particular issues[614]

CAT Article 1 on definition of torture

CAT/C/SR.51 (1990) [Committee] 36…she wished to point out that the content of the Convention must become part of positive internal law. Regrettably, no specific definition of torture had been included in Chinese legislation so as to ensure that torture was an offence under criminal law.

CAT/C/SR.51 (1990) [China] 50…Definitions of torture varied, so that what in the Chinese view was positive might be considered negative elsewhere.

CAT/C/SR.143/Add.2 (1993) [Committee] 17. He also raised the question of the incorporation of the definition of torture in domestic law and, taking up Mr. Burns' argument, wondered how, if it were not so incorporated, it was possible, on the one hand, to establish statistics, and on the other, to punish psychological torture.

CAT/C/SR.143/Add.2 (1993) [Committee] 48. He then went back to the fact that in Chinese law there was no definition of torture. Accordingly, acts of torture were not generally punished, and only offences consisting in obtaining confessions from an accused person under torture could be brought before the courts.

CAT/C/SR.145/Add.2 (1993) [China] 12. Several members of the Committee had asked about the definition of the concept of torture in Chinese legislation and the mechanisms provided to punish persons responsible for acts of torture. In that connection, chapters IV and VIII of the Penal Code contained specific provisions guaranteeing the protection of individuals against any violation of their rights; more precisely, article 136 stipulated that any person found guilty of extorting confessions through torture, the definition of which corresponded to that appearing in article 1 of the Convention, was liable to a prison term commensurate with the seriousness of the offence, and, in particularly serious cases, to the death penalty. Article 143 of the Penal Code provided for a three-year prison term for any official who harassed or humiliated a prisoner, a prison term of three to six years if the ill-treatment caused injury or disability, and at least seven years' imprisonment if the ill-treatment resulted in death. Article 145 of the Penal Code laid down a three-year prison term for anyone who inflicted mental torture on an individual. Under article 146 if an official was found guilty of such an offence, the penalty was a minimum of seven years' imprisonment. Under article 188 members of the judiciary guilty of abuses of power were liable to up to 15 years' imprisonment. Finally, in accordance with article 189 of the Penal Code, any staff member of a prison establishment who was found guilty of corporal punishment or ill-treatment of prisoners might be sentenced to up to 10 years' imprisonment. Those were the applicable provisions of the Penal Code, but the Civil Code also contained provisions providing compensation for moral suffering. For example, article 101 of the Civil Code provided that citizens had the right to respect of their reputation and dignity and that any act of slander or delation was punishable by law. Article 105 guaranteed citizens the right to respect of their reputation and the right to compensation for injury to their reputation. Procedures were laid down for the investigation of crimes of torture. Chapter II of the Penal Code set out the procedure to be followed in investigating alleged offences, and chapter III set out the procedure for the trial in the criminal courts of persons charged with acts of torture.
CAT/C/SR.251 (1996) [China] 5… Although China's domestic legislation did not incorporate the definition of torture appearing in article 1 of the Convention, its domestic legislative provisions designated various forms of torture as criminal offences. Consequently, China was in a position to implement the Convention effectively and honour its obligations thereunder.

CAT/C/SR.251 (1996) [Committee] 8. Although China had not yet adopted the general definition of torture contained in article 1 of the Convention, the Government felt that the various categories of acts of torture referred to in legislative or administrative provisions enabled it to comply with that article. However, in the recent amendments to the Criminal Procedure Law, the various prohibitions applied only to the practice of torture to extort confessions, whereas the

[614] This annex mostly includes arguments found in the summary records of the constructive dialogue between China and human rights treaty bodies. It also includes some arguments in the State Reports and Concluding Observations if these arguments are discussed in the study. Some information inquiries and statements are also included if they provide necessary background for comprehending relevant arguments.

definition in article 1 was much broader. In the absence of a criminal classification, the question arose whether accurate statistics on the situation in regard to torture could be compiled. A precise definition of acts constituting the offence of torture was also important for the exercise of universal jurisdiction.

CAT/C/SR.252/Add.1 (1996) [China] 6. Replying to a question that had been asked concerning the definition of torture in Chinese domestic legislation, he said that the National People's Congress had to approve the accession of China to international legal instruments. Once approved, such an instrument was binding upon the Government, which was obliged to incorporate its provisions into domestic law, the international instrument always taking precedence in the event of any discrepancy. When, however, China entered reservations to an international instrument, the relevant provisions were not binding. That general principle held good for the Convention against Torture.

CAT/C/SR.252/Add.1 (1996) [China] 8. In addition, the Criminal Law, which contained a definition of torture that complied with article 1 of the Convention, prohibited and penalized torture. Since the Convention did not, however, set out punishments for particular acts of torture, the relevant organs were obliged to rely on domestic legislation for the determination of appropriate sentences. Hence the absence of the word "torture" from Chinese domestic law.

CAT/C/SR.254 (1996) [Committee] 2.The failure to incorporate a crime of torture into the domestic legal system in terms consistent with the definition in article 1 of the Convention.

CAT/C/SR.416 (2000) [Committee] 14. The State party had attempted to incorporate provisions into its domestic legislation which reproduced the definition in article 1 of the Convention. However, on the one hand, those provisions appeared to apply only to public servants in the strict sense of the term and, on the other, a regulation dating from 1999 stated that torturers could be prosecuted only if their victim was killed or seriously injured: psychological torture, in particular, was not taken into consideration. It would therefore be necessary to fill in those gaps, which were also incompatible with article 2 of the Convention. In that connection, he would like more information on the issue of whether the orders of a superior could be cited as an excuse for acts of torture.

CAT/C/SR.423/Add.1 (2000) [Committee] 18. The Committee recommends to the State party to incorporate a definition of torture into its domestic law that fully complies with the definition contained in the Convention.

CAT/C/SR.844 (2008) [Committee] 30. In connection with article 1 of the Convention, she requested the Chinese delegation to supply additional information on certain points which the definition of torture at present given in Chinese domestic law did not cover in a satisfactory manner, such as discrimination and mental suffering, in particular when inflicted by an agent of the police or any other person acting in an official capacity or at the instigation or with the express or tacit consent of such a person

CAT/C/SR.844 (2008) [Committee] 62. The CHAIRPERSON recalled that the Committee strongly recommended that the definition of torture should appear in the text of a single law rather than in several texts. That made matters much easier for those responsible for applying the law.

CAT/C/SR.846 (2008) [China] 5. Chinese legislation contained no specific definition of torture. All of the elements in the definition set forth in the Convention were, however, provided for under laws covering a variety of offences. The acts of torture punishable by law also included physical and psychological suffering induced by ill-treatment. Hence, article 43 of the Code of Criminal Procedure prohibited not only torture but also the use of threat, blackmail and deception in order to obtain confessions. Under article 238 of the Criminal Code, humiliating treatment constituted an aggravating factor in the illegal deprivation of liberty. The ill-treatment mentioned in articles 247 and 248 of the Criminal Code also included humiliation, which could lead to serious mental suffering. In addition, the rules on the commencement of criminal proceedings for breach of duty and violation of rights in the course of official duties provided that gross breaches and violations that had a detrimental effect on the victim's mental health must be investigated with a view to establishing the criminal responsibility of the perpetrators. The provisions of the current legislation were therefore fully consistent with the spirit of the Convention.

CAT/C/SR.846 (2008) [Committee] 42. Mr. MARIÑO MENÉNDEZ remarked that the Committee's work was complicated by the fact that the State party's legislation included a wide range of criminal offences covering the different aspects of torture, rather than a definition of torture.

CAT/C/CHN/CO/4 (2008) [Committee] 32. While noting the State party's assertion that all acts that may be described as "torture" within the meaning of article 1 of the Convention are criminally punishable in China, the Committee reiterates its previous conclusions and recommendations (A/55/44, para. 123) that the State party has not incorporated in its domestic law a definition of torture that fully complies with the definition contained in the Convention.

CAT/C/CHN/CO/4 (2008) [Committee] 33. The Committee is concerned that the provisions relating to torture refer only to physical abuse and do not include the infliction of severe mental pain or suffering. It is also concerned that article 247 of the Criminal Law, article 43 of the Criminal Procedure Law and the Supreme People's Procuratorate Provisions on the Criteria for Filing Dereliction of Duty and Rights Infringement Criminal Cases restrict the prohibited practice of torture to the actions of judicial officers and officers of an institution of confinement and do not cover acts by "other persons acting in an official capacity", including those acts that result from instigation, consent or acquiescence of a public official. Moreover, these provisions do not address the use of torture for purposes other than to extract confessions (art. 1).

The State party should include in its legislation a definition of torture that covers all the elements contained in article 1 of the Convention, including discrimination of any kind. The State party should ensure that persons who are not judicial officers and officers of an institution of confinement, but who act in an official capacity or with the consent or acquiescence of a public official can be prosecuted for torture. The State party should also ensure that its legislation prohibits the use of torture for all intents and purposes.

CAT/C/CHN/CO/4/Add.2 (2008) [China] 16. Concerning the allegation in paragraphs 32 and 33 of the observations that "the State party has not incorporated in its domestic law a definition of torture that fully complies with the definition contained in the Convention"

Although no law in China is exclusively devoted to the definition of torture, all aspects of torture as defined in the Convention are covered in the relevant Chinese laws. Chinese laws strictly prohibits and punishes any form of torture against anyone, regardless of the perpetuator's intention or purpose and regardless of whether the act is committed with the consent, tacit or not, of an official or a public functionary.

First, the allegation in the observations that the relevant Chinese laws "do not cover acts by 'other persons acting in an official capacity' " is simply not true.

China's Criminal Law is applicable to all criminal acts of torture, irrespective of the identity, intent or purpose of the perpetrators. Furthermore, Chinese legislation has provisions that specifically cover crimes committed by officials and persons in specific capacities. For example, article 238, paragraph 4, of the Criminal Law stipulates that if a public servant of a State organ commits the crime of unlawful detention by exploiting his/her office, he/she shall be punished severely. The provisions of article 247 of the Criminal Law concerning the crime of extorting confessions by means of torture and violence apply to judicial officers who obtain evidence by acts of torture. The provisions of article 248 of the Criminal Law concerning the crime of ill-treatment of detainees apply to supervisors who commit acts of torture against detainees. The establishment of these specific crimes reflects the determination to severely punish crimes committed by government officials and to more effectively protect the legitimate rights and interests of citizens.

Furthermore, China's policies and measures to prohibit torture are applicable to public servants in both the field of criminal justice and the field of administrative law enforcement. If an ordinary person commits an act of torture abetted by or with the consent or tacit consent of a government official or a person exercising authority in an official capacity, under the provisions of the Criminal Law relating to joint offences, the ordinary person shall be considered to be an accomplice and the applicable charges shall be brought against the government official.

Secondly, under the Chinese law, punishable acts of torture include both acts that cause physical pain, such beating or assaulting with instruments of torture, and acts causing mental pain, such as ill-treatment, humiliation and other means. For example, article 43 of the Criminal Procedure Law provides that "it shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means". Of these, "threat" is typically a way of causing mental suffering. The phrase "other unlawful means" includes any means that can cause physical and mental pain. Article 238 of the Criminal Law stipulates that anyone who unlawfully detains another person or deprives another person of his/her personal freedom by other means commits a crime. If a person is found to have assaulted or insulted another person, a heavier sentence shall be imposed. Under articles 247 and 248 of the

Criminal Law, the crimes of extorting confessions by torture, violence and ill-treatment of detainees include those committed by use of violence and also by use of abuse, humiliation and other means or causing severe mental suffering. A public servant who has caused another person mental suffering by humiliating, slandering, illegally searching, illegally intruding into a citizen's home, illegally depriving he or her of his or her freedom of religious belief or infringing the customs of ethnic minorities, when performing official duties, he/she shall be punished according to law.

In short, the provisions of China's legislation dealing with the prohibition and punishment of torture are consistent with the relevant provisions of the Convention.

CAT/C/SR.1368 (2015) [Committee] 18. Mr. Tugushi (Country Rapporteur) said that the definition of torture in the law of the State party was not fully compliant with the definition given in article 1 of the Convention. The definition should cover all the elements provided for in the Convention, including the reference to discrimination of any kind. What steps had been taken to adopt a definition that complied with article 1 of the Convention?

CAT/C/SR.1368 (2015) [Committee] 20. Recent amendments to the State party's criminal law did not address the definition of torture directly and, in its replies to the list of issues (CAT/C/CHN/Q/5/Add.2), the State party had reported that existing provisions of domestic law already covered all aspects of the Convention. Did the State party have any plans to make further amendments to its criminal law in order to broaden the scope of those provisions?

CAT/C/SR.1368 (2015) [Committee] 22. The State party had reported that, where interrogation under torture was not conducted for the purpose of extracting confessions, criminal liability might be incurred under the relevant provisions of the criminal law covering, for example, intentional infliction of bodily harm or unlawful detention. Did the State party have any plans to broaden the definition of torture to include other acts that did not amount to extraction of confessions?

CAT/C/SR.1368 (2015) [Committee] 70. The Chair said that the anti-torture provisions contained in Chinese legislation seemed complex and vague. He emphasized the need for a single definition of torture in order to prevent impunity.

CAT/C/SR.1371 (2015) [China] 4. Mr. Xu Hong (China) said that, despite the cultural and linguistic issues that hindered the full incorporation of the Convention's definition of torture into legislation, China endeavored to ensure that national law was in line with that instrument. The different elements of the definition were covered in various laws dealing with, for instance, the extortion of confessions and the use of corporal punishment or disguised corporal punishment. Protection had also been enhanced for vulnerable groups. Regarding the case of Liu Hong, the court had excluded the written records of four of the six continuous interrogations as evidence obtained through "fatigue interrogation".

CAT/C/CHN/CO/5 (2015) [Committee] 7. The Committee notes that various provisions of the Criminal Procedure Law and the Criminal Law, as amended in 2014, prohibit and punish specific acts that could be considered as torture. However, it remains concerned that those provisions do not include all the elements of the definition of torture set out in article 1 of the Convention. In particular:
(a) While noting the provisions established to prohibit the extraction of confessions under torture or the use of violence to obtain a witness statement (article 247 of the Criminal Law), the Committee is concerned that the prohibition may not cover all public officials and persons acting in an official capacity. Moreover, the provisions do not address the use of torture for purposes other than extracting confessions from defendants or criminal suspects;
(b) The crime of beating or ill-treating detainees, contained in article 248 of the Criminal Law, restricts the scope of the crime to the actions of officers of an institution of confinement or of other detainees at the instigation of those officers. It is also restricted to the infliction of physical abuse only.
8. The Committee appreciates that the Supreme People's Court recognizes as torture the use of other methods that cause the defendant to suffer severe mental pain or suffering (see para. 5 (a) above). However, it remains concerned that the Court's interpretation applies to questions regarding exclusion of evidence rather than criminal liability (arts. 2 and 4).
9. The Committee reiterates its previous recommendations (see CAT/C/CHN/CO/4, paras. 32 and 33, and A/55/44, para. 123) and calls upon the State 3 party once again to consider including a comprehensive definition of torture in its legislation that is in full conformity with the Convention and covers all the elements contained in article 1, including

the purpose of discrimination. The State party should ensure that all public officials and any other person acting in an official capacity or with the consent or acquiescence of a public official can be prosecuted for torture. The Committee draws the State party's attention to paragraph 9 of its general comment No. 2 (2007) on the implementation of article 2 by State parties, in which it is noted that serious discrepancies between the definition in the Convention and that incorporated into domestic law create actual or potential loopholes for impunity.

On 'seriousness' of torture

CAT/C/SR.844 (2008) [Committee] 58. In paragraph 66 of the report, mention was made of "serious and especially serious cases". The fact of distinguishing between acts of torture according to their seriousness was in itself a source of legal insecurity and gave rise to problems in connection with the Convention.

CAT/C/SR.844 (2008) [Committee] 59… Furthermore, the fact of distinguishing serious and especially serious cases of torture amounted to setting aside cases which nevertheless constituted violations of article 1 of the Convention.

CAT/C/SR.844 (2008) [Committee] 64. In connection with the use of torture, the State party's report spoke of "serious or especially serious cases" defined in the light of certain criteria, such as cases leading to serious injury or mental derangement. But torture was by definition a serious crime, and no degree of seriousness could be established in respect of it. The delegation ought to explain why only cases covered by the said criteria were considered serious or especially serious.

CAT/C/SR. 846 (2008) [China] 14… The seriousness of a case was determined on the basis of its circumstances. The most serious cases that were likely to involve the heaviest penalties were referred to an intermediate people's court in the first instance. Appeals were considered by a higher people's court, the decisions of which could be reviewed by the Supreme People's Court, which systematically ruled on all death sentences.

CAT/C/SR. 846 (2008) [China] 19. Concerning the distinction made by judicial bodies between acts of torture constituting minor, serious or particularly serious offences, all acts of torture were prohibited and punished under Chinese law. Given its cultural and legal specificity, however, China believed that minor offences were part of administrative law and should consequently be subject to administrative punishment.

Involuntary/forced disappearance

CAT/C/SR.844 (2008) [Committee] 57… On the subject of forced or involuntary disappearances, the Committee thought that such facts certainly fell within the purview of the Convention; in particular, it could be argued that the families of the persons who had disappeared were victims of maltreatment within the meaning of the Convention.

CAT/C/SR.844 (2008) [Committee] 63. He was surprised that China should think the question of forced disappearances lay outside the purview of the Convention. Article 1 of the Convention referred to any act by which severe pain or suffering was inflicted, and it was difficult to see how forced disappearances escaped that definition. Disappearance occasioned by persons acting in the exercise of their official duties could cause intense suffering; the victim had the impression that he or she did not exist, and felt that those who had made him/her disappear could dispose of him/her as they wished. It was desirable that the delegation should say something on the subject, the more so as, according to some reports, the State party was itself involved in forced disappearances whereas it ought to be punishing the persons participating in such acts.

CAT/C/SR.846 (2008) [China] 6. The Chinese delegation recognized the connection between enforced disappearances and torture. Such disappearances, however, did not fall under the same international instruments or within the purview of the same bodies in the United Nations human rights system, which comprised various mechanisms, each with its own specific mandate to be respected. The Chinese Government nevertheless supported the reform undertaken to strengthen coordination among those mechanisms in the interest of promoting and protecting human rights.

CAT/C/SR.846 (2008) [Committee] 42… In international practice and jurisprudence, enforced disappearance was classed as torture; even if a separate criminal offence was involved, the victim's relatives still endured a form of torture.

CAT/C/CHN/CO/4 (2008) [Committee] 41. The State party should consider ratifying … the International Convention for the Protection of All Persons from Enforced Disappearance…

DPRK Boarder-crosser

CAT/C/SR.844 (2008) [Committee] 36. Turning to article 3 of the Convention, she noted that the State party indicated in its written replies that no refugee or asylum seeker had ever claimed that he or she risked being tortured on expulsion to another neighboring country. Additional information concerning the procedure in place for determining refugee status, as well as an explanation of why the Chinese Government refused to allow UNHCR access to the border with North Korea, where the estimated number of North Korea refugees varied between 30 000 and 300 000, would be welcome. In that connection it would also be useful to know on what grounds the State party referred to all the North Korean citizens in the Chinese border area as "clandestine immigrants"- a stigmatizing description – and claimed that they did not meet the criteria for obtaining refugee status, as they were all economic migrants. Persons who left the People's Democratic Republic of Korea were exposed to criminal prosecution if they returned to their country of origin, and thus became "real" refugees. Did the State party recognize the concept of "refugee surplus"?

CAT/C/SR.846 (2008) [China] 10. China attached great importance to the protection of refugees; it fulfilled its obligations under the 1951 Convention relating to the Status of Refugees and its Protocol, to which it had acceded, and respected the principle of non-refoulement. Since 1978, it had catered to almost 300,000 Indochinese refugees. Its efforts, which had significantly contributed to the maintenance of peace and stability in the region, had been recognized by the Human Rights Council and the international community. The Government had always worked in cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR), which had an office in China and with which it had regular high-level exchanges. The Deputy High Commissioner for Human Rights, Ms. Feller, had visited China, where she had conducted in-depth talks on a wide range of subjects. With regard to the status of North Korean migrants, the Chinese delegation recalled the definition contained in the 1951 Convention relating to the Status of Refugees, pursuant to which the term "refugee" applied to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, was outside the country of his nationality and was unable or, owing to such fear, was unwilling to avail himself of the protection of that country. The North Korean nationals mentioned by Ms. Gaer had unlawfully entered China for economic reasons and had not requested political asylum. They were not therefore refugees in the sense of the 1951 Convention. The Democratic People's Republic of Korea had experienced serious economic difficulties and natural disasters that had prompted various individuals to cross the border illegally. China had always treated them in accordance with its domestic legislation and with international law in a humanitarian spirit. Its position was reasonable, legitimate and conducive to peace and stability in the Korean peninsula. Furthermore, its policy differed little from that of other countries which, since 11 September 2001 in particular, had controlled immigration and organized the return of illegal migrants. The Chinese authorities were currently drafting a bill on refugees, in conjunction with UNHCR.

CAT/C/SR.846 (2008) [Committee] 60. Ms. GAER (Country Rapporteur) continued to ponder the definition of torture. On the subject of refugees, she said that the Committee was not concerned with the implementation of the Convention relating to the Status of Refugees but focused its attention on the matter of compliance with the obligation under article 3 of the Convention against Torture not to return a person to another State where he would be in danger of being subjected to torture…

CAT/C/CHN/CO/4 (2008) [Committee] 22…In addition, the return of border-crossers and refugees from the Democratic People's Republic of Korea is also an area of concern for the Committee with regard to vulnerable groups, as articulated below.

CAT/C/CHN/CO/4 (2008) [Committee] 26. The Committee is greatly concerned by allegations that many individuals have been forcibly returned to the Democratic People's Republic of Korea, without any examination of the merits of each individual case, and subsequently been subjected to torture or cruel, inhuman or degrading treatment or punishment by the authorities. The Committee notes with concern these individuals are referred to by the State party as "illegal immigrants" or "snakeheads" and that such labels presume that these individuals are not deserving of any protection. Similarly, persons extradited to and from neighbouring States do not benefit from legal safeguards against return despite the risk of torture. The Committee is further concerned by the failure of the State party to clarify how it includes in its national laws or practice the prohibition on returning a person to a country where he or she faces a substantial risk of torture, and hence how the State party ensures that its obligations under article 3 of the Convention are fulfilled (art. 3).

Under no circumstances should the State party expel, return or extradite a person to a State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

When determining the applicability of its obligations under article 3 of the Convention, the State party should establish an adequate screening process for status determination in order to determine whether persons subject to return may face a substantial risk of torture, particularly in view of the fact that it is reportedly a criminal offence to depart unofficially from the Democratic People's Republic of Korea, and should provide the Office of the United Nations High Commissioner for Refugees with access to the border region and persons of concern. In the light of the large numbers of citizens of the above State who have crossed into China, the State party needs to be more active in ensuring that the obligations of article 3 are fully met. The State party should also ensure that adequate judicial mechanisms for the review of decisions are in place and sufficient legal defence available for each person subject to extradition, and ensure effective post-return monitoring arrangements.

The State party should provide data on the number of persons expelled or returned to neighbouring States.

The State party should pursue its efforts to adopt appropriate legislation to fully incorporate into domestic law its obligation under article 3 of the Convention, thereby preventing any persons from being expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subject to torture.

CAT/C/CHN/CO/4/Add.2 page 15 [China] (d) On the issue of "non-refoulement" of North Koreans who have entered China illegally

The Chinese public security organs are bound by the Law of the People's Republic of China on Control of the Entry and Exit of Aliens to investigate and process cases involving the illegal entry of aliens, which includes their deportation. In recent years, some North Koreans have illegally entered China for economic reasons. They do not meet the criteria of refugees set in Convention relating to the Status of Refugees and its Protocol. Their illegal entry has violated Chinese law and disrupted the normal order of entry into and exit from China. It is entirely legitimate and necessary for the public security organs to properly handle, in accordance with the relevant laws and regulations, the illegal entry of aliens, including illegal entry by Koreans, in order to safeguard China's national security and maintain its entry and exit order procedures.

As a party to Convention relating to the Status of Refugees and its Protocol, China has always strictly observed the provisions of the Convention and its Protocol and has earnestly fulfilled its obligations under the Convention and the Protocol. The Chinese Government's selfless provision of refuge to more than 300,000 Indo-Chinese refugees for a long time amply demonstrates this statement. The Chinese Government has consistently carefully handled the illegal entry of Koreans in accordance with the domestic law, international law and humanitarian principles. Facts have proved that the Chinese approach is appropriate and effective, and in the interests of all parties.

CAT/C/SR.1368 (2015) [Committee] 62. She enquired whether there was a refugee status determination procedure for persons who entered China illegally. Since the consideration of the country's previous report, United Nations human rights bodies had received over 100 testimonies of North Koreans who had been forcibly repatriated from China. Testimonies of former prison guards had also been received, reporting torture, arbitrary detention and other crimes. Was China continuing the practice of forcible returns despite the mounting evidence of what happened to those people? How many North Koreans were forcibly repatriated each year? How many of them were women? Given the country's obligations under the 1951 Convention relating to the Status of Refugees and its agreement with the Office of the United Nations High Commissioner for Refugees (UNHCR), why did the Government not allow UNHCR representatives to screen persons crossing the border in the north-east of the country? It would also be useful to know why nothing was done to monitor what happened to those people, given the evidence of torture and abuse upon their return. Furthermore, she requested information on the number, sex and age of North Koreans who had been permitted to remain in China on humanitarian grounds since the entry into force of the Exit and Entry Administration Law in 2013. How many of those people still remained in China and what was their status?

CAT/C/SR.1371 (2015) [China] 1. Some of the illegal immigrants from the Democratic People's Republic of Korea were economic migrants and could not therefore be subject to the provisions of the Convention relating to the Status

of Refugees. Furthermore, China, like many other Member States, had expressed reservations concerning the Commission of Inquiry on Human Rights in the DPRK. An informative article entitled "Why do North Korean defector testimonies so often fall apart?" had been published in the British *Guardian* newspaper. While States parties must fulfil their obligations under the principle of non-refoulement, they should not allow it to be exploited by criminals to escape justice.

CAT/C/CHN/CO/5 (2015) [Committee] 46. While welcoming the adoption in 2012 of the Exit-Entry Administration Law (see para. 4 (b) above), the Committee remains concerned that, in the absence of national asylum legislation and administrative procedures, the refugee determination process has to be carried out by the Office of the United Nations High Commissioner for Refugees (UNHCR). The Committee is also concerned at the State party's rigorous policy of forcibly repatriating all nationals of the Democratic People's Republic of Korea on the ground that they have illegally crossed the border solely for economic reasons. In that regard, the Committee takes note of over 100 testimonies received by United Nations sources (see A/HRC/25/63, paras. 42-45), in which nationals of the Democratic People's Republic of Korea indicate that persons forcibly repatriated to the Democratic People's Republic of Korea have been systematically subjected to torture and ill-treatment. In the light of this information, the Committee regrets the State party's failure to clarify, in spite of the questions raised during the dialogue, whether or not nationals of the Democratic People's Republic of Korea are denied access to refugee determination procedures in China through UNHCR, as reported to the Committee by various sources (art. 3).

CAT/C/CHN/CO/5 (2015) [Committee] 47. The State party should:
(a) Adopt the necessary legislative measures to fully incorporate into domestic legislation the principle of non-refoulement set out in article 3 of the Convention, and promptly establish a national asylum procedure, in cooperation with UNHCR;
(b) Immediately cease forcible repatriation of undocumented migrants and victims of trafficking to the Democratic People's Republic of Korea, and allow UNHCR personnel unimpeded access to nationals of the Democratic People's Republic of Korea who have crossed the border, in order to determine if they qualify for refugee status.
48. The Committee reminds the State party that under no circumstance should the State party expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In order to determine the applicability of the obligations that it has assumed under article 3 of the Convention, the State party should thoroughly examine the merits of each individual case, including the overall situation with regard to torture in the country of destination. It should also support effective post-return monitoring arrangements in cases of refoulement, including any conducted by UNHCR.

CEDAW/C/SR.743 (B) (2006) [Committee] 29. Noting that non-citizens, including asylum seekers and refugees, were not entitled to constitutional guarantees or enjoyment of their rights and freedoms, he expressed concern, in particular, about the position of North Korean women in China. Was the Chinese Government planning to adopt legislation to implement the 1951 Convention relating to the Status of Refugees in connection with the determination and protection of refugees, including female refugees?

CEDAW/C/SR.743 (B) (2006) [China] 41. Turning to the question of refugees, he said that China had acceded to the Convention relating to the Status of Refugees and the protocols thereto. From 1978 to 2006, China had provided effective asylum to about 280,000 Indochinese refugees, thus contributing to the safeguarding of peace and stability in the region. In providing for the settlement and protection of refugees, the Chinese Government also paid special attention to the need to protect the rights and interests of female refugees. China had not found any cases where the rights and interests of refugees had been violated.

CEDAW/C/SR.743 (B) (2006) [China] 42. Referring to the situation of Korean women refugees in China, he said that there were many illegal aliens, including women, from the Democratic People's Republic of Korea. They came to China as a result of natural disasters and for economic reasons and could not be regarded as refugees. Sex did not play a role in those migrations. Even though the people coming from DPRK were illegal aliens, China was doing its best to treat them well. Repatriation was also carried out according to the law, and there was no reason to say that their rights or interests were being violated.

CEDAW/C/SR.744 (B) (2006) [Committee] 40. It appeared that many women from North Korea who entered China seeking better economic conditions were trafficked into marriage and lived in semi-slavery. They were unable to escape the situation because they had no official status in China and, if they did manage to flee, they went to South

Korea, which created another series of problems. According to the United Nations Convention on the Status of Refugees, it was the responsibility of the Office of the United Nations High Commissioner for Refugees (UNHCR) to decide whether such women could be categorized as refugees; UNHCR should therefore be allowed access to the border area and to those women.

CEDAW/C/SR.744 (B) (2006) [Committee] 44. Ms. Shin asked whether the Chinese Government was willing to allow UNHCR to visit the border area between China and North Korea to find out if any of the women were eligible for refugee status.

CEDAW/C/SR.744 (B) (2006) [China] 48. Mr. Xu Hong (China) said that, according to the United Nations Convention Relating to the Status of Refugees, individuals who entered another country for economic purposes were not refugees. As a party to the Convention, China had the right to distinguish between refugees and non-refugees in accordance with the provisions of the Convention. Therefore the right to determine who was a refugee was the prerogative of the State party and not of UNHCR. However, China had always enjoyed an excellent collaborative relationship with UNHCR. In March 2006, the United Nations High Commissioner for Refugees had visited China and held useful discussions with the authorities; also, members of UNHCR were already in the border area between China and the Democratic People's Republic of Korea. Since he was not an expert on the issue, he was unable to provide a comprehensive reply, but, if necessary, would obtain further information for the Committee

CEDAW/C/CHN/CO/6 (2006) [Committee] 33. While noting that the State party is also party to the 1951 Convention relating to the Status of Refugees, it is concerned at the lack of laws or regulations for the protection of women refugees and asylum-seekers. The Committee expresses particular concern at the situation of North Korean women, whose status remains precarious and who are particularly vulnerable to being or becoming victims of abuse, trafficking, forced marriage and virtual slavery.

CEDAW/C/CHN/CO/6 (2006) [Committee] 34. The Committee calls upon the State party to adopt laws and regulations relating to the status of refugees and asylum-seekers, in line with international standards, in order to ensure protection also for women. The Committee recommends that the State party fully integrate a gender-sensitive approach throughout the process of granting asylum/refugee status in close cooperation with the Office of the United Nations High Commissioner for Refugees. It specifically encourages the State party to review the situation of North Korean women refugees and asylum-seekers in the State party and to ensure that they do not become victims of trafficking and marriage enslavement because of their status as illegal aliens.

CERD/C/SR.1468 (2001) [Committee] 66. Given that there was currently no legal or administrative provision governing the granting of asylum in China, she would like to know what stage had been reached in the preparation of the draft law on refugees mentioned in the report under consideration.

CERD/C/SR.1468 (2001) [Committee] 79. He noted that China had been a party to the Convention relating to the Status of Refugees since 1982 but that it had not yet adopted relevant domestic laws. In practice, it seemed that refugees were treated in different ways depending on their country of origin, and that refugees from the Democratic People's Republic of Korea faced more difficulties than others. Lastly, China seemed to be opposed to the return of Chinese citizens who had fled the country with the help of criminal organizations. He wondered whether the country's policy in that regard helped those criminal organizations to prosper, since trafficking in human beings was even more lucrative than drug trafficking, and whether China could consider relaxing that policy.

CERD/C/SR.1469 (2001) [China] 3. With regard to the repatriation of North Koreans, large numbers of illegal economic immigrants had entered China, largely as a result of food shortages in North Korea and could not be considered refugees; their repatriation was therefore in compliance with international practice.

His Government took illegal migration very seriously and had adopted an integrated approach which involved careful verification of the identity of migrants before repatriation. A series of procedures and mechanisms had been put in place. China accepted unconditionally any Chinese citizen whose identity had been verified. His Government had recently applied for observer status at the International Organization for Migration (IOM).

CERD/C/SR.1942 (2009) [Committee] 61. Noting that efforts were under way to examine the possibility of establishing a national human rights institution, he asked when such action might be taken. He further asked when the

Government might prepare a bill on refugees and asylum-seekers and whether the United Nations High Commissioner for Refugees would be involved in the process. Was the State party intending to ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness?

CERD/C/CHN/CO/10-13 (2009) [Committee] 16. While noting that the State party is in the process of drafting a refugee law, the Committee reiterates its concern (A/56/18, para. 246) that asylum-seekers from the Democratic People's Republic of Korea continue to be systematically refused asylum and forcibly returned. (art. 5(b))

The Committee recommends that the State party adopt legislation relating to refugee status as soon as possible. Bearing in mind its general recommendation No. 30, the Committee calls upon the State party to take all necessary legal and policy measures to ensure that all asylum-seekers have the merits of their individual cases considered by an independent and impartial authority.

E/C.12/2005/SR.7 (2005) [China] 19. Regarding allegations of the removal of some Tibetan citizens to Nepal, it should first be noted that all 55 of China's ethnic groups lived in harmony and enjoyed the right to participate in social life and the affairs of the State. With the support of the central Government, Tibetans enjoyed fully the right to religious belief and to the development of their traditional culture. In recent years, some Tibetans had succumbed to efforts to promote illegal emigration from China, and a number of separatists had fled to neighbouring countries in order to carry out terrorist activities. Such persons did not fall into the category of refugees. In dealing with neighbouring countries, China had always respected the principle that all countries were equal. As sovereign States, they could deal with the question of illegal immigration in whatever way they saw fit.

E/C.12/1/Add.107 (2005) [Committee] 14. The Committee is concerned that non-citizens, including asylum-seekers, refugees and stateless persons, are excluded from the constitutional guarantees to the enjoyment of rights and freedoms enshrined in the Covenant extended to all citizens in the State party. The Committee notes that some asylum-seekers are excluded by the refugee determination procedure of the State party, in particular those coming from the Democratic People's Republic of Korea, who are regarded by the State party as economic migrants and are thus compelled to return to their countries.

CRC/C/SR.1064 (2005) [China] 12. China paid particular attention to the protection of refugees, and had acceded to the 1951 Convention relating to the Status of Refugees and its Protocol. A large number of Indo-Chinese refugees had settled in China at the end of the 1970s, and the Government was currently making efforts, in cooperation with the Office of the United Nations High Commissioner for Refugees, to resettle them. The question of the citizenship of the remaining refugees would not be addressed until the resettlement programme had been completed. In the meantime, they had been granted permanent residence permits, which gave them the same social protection and economic and social rights as Chinese citizens. Their children enjoyed the right to education, health care and social security. China had recently witnessed an influx of illegal economic migrants from the Democratic People's Republic of Korea; those immigrants were not refugees and were therefore not treated as such.

CRC/C/CHN/CO/2 (2005) [Committee] 80. The Committee notes the efforts made by the State party to allow the approximately 300,000 Indochinese refugees to settle permanently in mainland China. However, it is concerned that the children born in China of these former refugees are not granted Chinese citizenship. It is further concerned that children entering mainland China from the Democratic People's Republic of Korea are categorically considered as economic migrants and returned to the Democratic People's Republic of Korea without consideration of whether there are risks of irreparable harm to the child upon return.

CRC/C/CHN/CO/2 (2005) [Committee] 82… (a) Amend legislation to allow children born in China of former Indochinese refugees in mainland China to obtain Chinese citizenship;
(b) Ensure that no unaccompanied child, including those from the Democratic People's Republic of Korea, is returned to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, for instance through disproportionate punishment for violating immigration laws, in accordance with the Committee's general comment No. 6 (2005) on unaccompanied minors…

CRC/C/CHN/CO/3-4 (2013) [Committee] 81. The Committee welcomes the State party's pledge in 2011 to "endeavour to finally settle the Indochinese refugee issue". The Committee, however, is particularly concerned that:

(a) Children entering mainland China from the Democratic People's Republic of Korea are still categorically considered as economic migrants and returned to the Democratic People's Republic of Korea without consideration of whether there are risks of irreparable harm to the children upon return;
(b) Children whose mothers are from the Democratic People's Republic of Korea lack legal identity and access to basic rights, particularly education, as they are not registered under the hukou system out of fear that their mothers would be identified and forcibly returned to the Democratic People's Republic of Korea;

(c) The State party failed to recognize the Kachin asylum seekers, including children, as refugees despite their circumstances and forcibly returned them to Myanmar in August 2012;
(d) There is an absence of special reception procedures or facilities for unaccompanied and separated refugee and asylum-seeking children and that they lack access to health care, special care and protection.

CRC/C/CHN/CO/3-4 (2013) [Committee] 83. The Committee recommends that the State party:
(a) Respect the principle of non-refoulement and reminds it of its obligation under the Convention to ensure that no accompanied, unaccompanied or separated child, including those from the Democratic People's Republic of Korea, is returned to a country where there are substantial grounds for believing that she or he will suffer irreparable harm, and that this principle applies to all children and their families without distinction and regardless of nationality;
(b) Ensure that Kachin child refugees and their families are provided with temporary protection in view of the ongoing conflict in northern Myanmar; it should also allow the Office of the United Nations High Commissioner for Refugees free and unfettered access to Yunnan Province to conduct refugee status determinations;
(c) Cease the arrest and repatriation of citizens of the Democratic People's Republic of Korea, especially children, and women who have children with Chinese men, and ensure that children of mothers from the Democratic People's Republic of Korea have access to fundamental rights, including the right to identity and education;
(d) Take immediate initiatives to meet the special needs and vulnerabilities of unaccompanied and separated children seeking asylum and provide appropriate care and cater for the special needs of these unaccompanied and separated children.

Reservation on Article 8 (1) (a) of ICESCR

E/C.12/2005/SR.6 (2005) [Committee] 24. M. TEXIER se félicite de l.importance, de la taille et de la qualité de la délégation chinoise. Concernant la déclaration du Gouvernement chinois sur l.article 8.1 du Pacte, il estime que l.existence d.une seule centrale légale constitue non pas une déclaration mais bien une réserve au Pacte. En outre, il constate que sur les 18 principales conventions de l.Organisation internationale du Travail (OIT), la Chine n.en a ratifié que quatre. Compte tenu des changements importants intervenus ces dernières années, surtout au niveau économique, qui rendent ces conventions, notamment celle sur le chômage, peut-être plus pertinentes, la Chine envisage-t-elle de ratifier un plus grand nombre de conventions de l.OIT?

E/C.12/2005/SR.6 (2005) [China] 45. En ce qui concerne l.article 8 du Pacte, M. Sha Zukang explique que pour des raisons historiques, il n.y a en Chine qu.un seul syndicat, issu du mouvement des travailleurs qui s.est développé parallèlement au mouvement communiste. Ce qui importe, cependant, c.est l.activité de ce syndicat, qui est la même que dans tous les autres pays, et non le nombre de syndicats. Quand la Chine a adhéré au Pacte, elle a présenté une déclaration explicative et non une réserve, bien que le Comité la considère peut-être comme telle, indiquant qu.elle respecterait les obligations qui sont les siennes compte tenu de sa situation particulière, l.essentiel étant que les travailleurs chinois soient satisfaits, ce qui est le cas. Compte tenu de l.évolution due à la mondialisation et au développement de l.économie de marché, la Chine pourra peut-être revenir sur cette déclaration à l.avenir, mais la question n.est pas à l.ordre du jour.

E/C.12/2005/SR.7 (2005) [Committee] 3. Mr. KERDOUN, referring to paragraph 73 of the initial report (E/1990/5/Add.50), asked how tripartite labour-relations coordination conferences worked and whether publicly and non-publicly owned enterprises were obliged to set up trade unions. What relationship did Chinese enterprises relocating abroad have with the All-China Federation of Trade Unions? What major challenges did the Federation face in terms of the employment system, the emergence of non-public enterprises, and irregular work.

E/C.12/2005/SR.7 (2005) [Committee] 26. The Committee regrets the State party's prohibition of the right to organize and join independent trade unions in the State party.

E/C.12/2005/SR.7 (2005) [China] 27. China's Trade Union Act provided for the establishment of a single All-China Federation of Trade Unions across the country. Trade unions in various industries and regions were the component parts of the Federation, although they enjoyed a large degree of autonomy concerning their activities. Although it was illegal to organize a trade union outside the context of the All-China Federation of Trade Unions, the Government resolved attempts to do so through dialogue; no punishment had ever been meted out to trade union organizers. Legal proceedings against persons who engaged in criminal activities under the guise of trade union organization had nothing to do with preventing trade union organization.

E/C.12/2005/SR.7 (2005) [China] 33. The Government was encouraging trade unions to play a more active role in ensuring safe working conditions in private companies and those owned by local authorities, where the unions were less active in safeguarding workers' rights than in State-owned enterprises. Trade unions had participated in drafting legislation on safety at work and on the prevention of occupational illness, and had been instrumental in establishing safety inspection committees.

E/C.12/2005/SR.7 (2005) [China] 34. All workers enjoyed the right to join a trade union, pursuant to trade union legislation. Of the 300 million workers in the country, about 130 million were trade union members. State-owned and private companies that employed over 25 workers could establish unions. Workers in companies employing fewer workers had the right to join with workers in other companies for the formation of unions. Any workers who were recruited in China to work abroad had the right to form trade unions in accordance with Chinese legislation, or to maintain any links they had already established with a Chinese union. Those contracted abroad to work abroad had to abide by local laws.

E/C.12/2005/SR.7 (2005) [China] 35. In accordance with the Trade Union Act, all migrant workers had the right to join trade unions. However, since a large number of migrant workers did not realize that trade unions played an important role in protecting workers' rights, many of them had not joined unions. The unions were working to promote trade union membership among rural migrant workers.

E/C.12/2014/SR.17 (2014) 38. Ms. Liu Hua (China) said that, when China had ratified the Covenant, the provisions of its Constitution, the prevailing trade union and labour laws and its unique historical and national circumstances had necessitated a reservation to article 8, paragraph 1. That reservation did not imply that the Covenant provisions were not respected. The All China Federation of Trade Unions was highly effective in conveying the recommendations of its members to Government and monitoring the authorities' work, ensuring respect for the rights of trade union members. The possibility of withdrawing the reservation would, however, be given due consideration

E/C.12/2014/SR.18 (2014) [China] 18. Mr. Ma Hezu (China) said that Chinese labour law provided for the right to engage in collective bargaining. In 2011 trade unions had established eight elements that should be taken into consideration during collective bargaining, such as the cost of labour, the consumer price index and the average wage in the industry concerned. The company's profits were not a key factor in collective bargaining.

E/C.12/2014/SR.18 (2014) [China] 21. The right to strike was not recognized under the law because resorting to such radical measures to resolve labour issues was perceived to conflict with national values and the public interest. Therefore, peaceful means of dispute settlement were encouraged. For example, the Ministry of Human Resources and Social Security, in conjunction with trade unions, had set up an arbitration and mediation mechanism.

Reservation to Article 6 of CRC

CRC/C/SR.298 (1996) [China] 14. With respect to question 1, he cited the following declaration made by China upon ratifying the Convention: "The People's Republic of China shall fulfil its obligations provided by article 6 of the Convention to the extent that the Convention is consistent with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and with the provisions of article 2 of the Law of Minor Children of the People's Republic of China" (see doc. CRC/C/2/Rev.4, p. 14). He said that the declaration had been dictated by the economic and social situation in China and that steps would be taken in due course to adjust it.

CRC/C/SR.298 (1996) [China] 39. Ms. ZHANG Honghong (China) explained that China had made a declaration, rather than a reservation in the strict sense of word, on article 6 of the Convention, and added that during the drafting of the Convention the Chinese Government had repeatedly stated that it was doing everything in its power to ensure that children enjoyed the right to life, development and happiness and that the health of the mother before childbirth was carefully monitored by the family planning services. China faced a problem of over-population which threatened to impede the economic and social development of the country. For that reason, measures had been taken to ensure both the welfare of Chinese citizens and respect for China's obligations as a State party to the Convention.

CRC/C/SR.299 (1996) [China] 43. Ms. WANG Fenglan (China) said that China advocated the use of modern contraceptive methods so that abortions could be avoided. However, in cases where contraception had failed, women had the right to have the pregnancy terminated if they so desired. Abortions were voluntary and carried out in conditions that guaranteed the absolute safety of the health of the woman. Abortions on the grounds of the sex of the unborn child were prohibited under article 37 of the Mother and Infant Health Protection Act. Disciplinary measures, including the withdrawal of medical licences, were taken against doctors found guilty of performing such abortions.

CRC/C/SR.1062 (2005) [China] 26. Abortion was not used as a means of family planning, and pregnant women had the right to decide whether or not to have an abortion. There were strict regulations on abortion and measures to ensure the mother's safety.

CRC/C/SR.1063 (2005) [China] 39. Ms. Yao Ying (China) said that public assistance programmes and common methods of medically assisted procreation were available to couples who had difficulties conceiving. In fact, the one-child policy had been adopted to address challenges unique to China, and a number of communities adopted a flexible approach to its implementation. If the current demographic trend was sustained, the population of China would reach 1.5 billion by the middle of the century.

CRC/C/SR.1063 (2005) [China] 40. New strategies were needed to bring family planning policies into line with present day realities. Therefore, studies were currently being carried out on the ageing of the population, demographic growth, and population structure and distribution. Social welfare had been strengthened to provide better care for older persons.

CRC/C/SR.1063 (2005) [China] 43. Surveys had shown that two spouses who had themselves been an only child wished to have two children, and that in major cities, especially in Beijing, 10 per cent of women, most of them white-collar workers, had no children.

CRC/C/SR.1063 (2005) [China] 48. Ms. Yao Ying (China) said that abortions must be voluntary and legal; any decision in the matter could only be taken with the informed consent of the person concerned. The Government firmly supported the code of ethics of the medical services, and voluntary determination of pregnancies was not considered a family planning method. The forced abortions carried out in certain regions were considered a criminal offence.

CRC/C/SR.1833 (2006) [China] 23. Mr. Jia Guide (China) said that the State party's reservation to article 6 of the Convention was not inconsistent with respect for the right to life. It merely sought to clarify that China intended to fulfil its obligations under article 6, provided that they did not contravene the country's family planning policy. The Law on the Protection of Minors defined the child as any person under the age of 18, which did not include foetuses. The Law on Population and Family Planning and the Law on Maternal and Infant Health Care protected women's right to use contraceptives in order to reduce the number of unwanted pregnancies. Abortions were strictly regulated and performed on the basis of the woman's informed consent. In the event of conflict between domestic law and international instruments, the latter could, in principle, be applied, unless a reservation stipulated otherwise.

CRC/C/CHN/CO/3-4 [Committee] III. Main areas of concern and recommendations
A. General measures of implementation (arts. 4, 42 and 44 (para. 6) of the Convention)
The Committee's previous recommendations
6. The Committee, while welcoming the State party's efforts to implement the Committee's concluding observations of 2005 on its second periodic report (CRC/C/CHN/CO/2), notes with regret that some of the recommendations contained therein have not been fully addressed.
7. Recalling its previous recommendations, the Committee recommends that the State party take all necessary measures to address those recommendations that have not been implemented or not sufficiently implemented, and urges it to:
(a) Immediately withdraw its reservation to article 6 of the Convention in order to promote and safeguard the inherent right to life of every child…

Sovereignty argument: on national unity and territorial integrity

CERD/C/SR.1163 (1996) [China] 16. China had 56 nationalities which lived in harmony and whose equality and unity were guaranteed by the Constitution.

CERD/C/SR.1468 (2001) [China] 3. Promoting equality, unity, mutual assistance and prosperity shared among all ethnic groups was a basic principle applied by the Government of China to manage relations between ethnic communities. That principle was enshrined in the Constitution of the People's Republic of China.

CERD/C/SR.1468 (2001) [Committee] 33. Mr. DIACONU said that the report of China answered most of the questions which the Committee had raised in 1996 when it had considered the country's previous periodic report. He was struck by the emphasis in the report on national unity and the prohibition of all acts or programmes intended to create national divisions or undermine national unity, and by the collective approach of the Chinese authorities with regard to racial discrimination. That strategy was certainly important, given that China had 55 different ethnic minority groups representing 109 million people—just under 10 per cent of the total population—but he wondered nonetheless how the policies in place and the laws adopted to combat racial discrimination were applied when the victim belonged to a minority, and whether protection of the individual was sacrificed to objectives of a general nature. He would like to know how those general objectives were reflected in the protection of each individual against racial discrimination.

CERD/C/SR.1468 (2001) [Committee] 63. Given that the law prohibited "any activities that might … offend the customs and habits of minority people or undermine national unity" and also "any programmes including anything that incites national division and undermines national unity", she would like to know what punishments were imposed in the event of violation.

CERD/C/SR.1469 (2001) [Committee] 44. Mr. de GOUTTES said that it was somewhat intimidating for a small body of experts to carry out an appraisal of so large a country with one of the world's most ancient civilizations. Nevertheless, the Committee had its task to perform. In considering China's seventh periodic report, it had voiced its concern about the apparent comparative benefits for members of the Han population in various autonomous regions and the possible risk of changing those regions' demographic composition, and it had asked whether the authorities could re-examine practices that might lead to such change. At the previous meeting Mr. Diaconu had reiterated the Committee's concern that the movement towards national unity might have an adverse effect on the rights of individual groups. A member of the Chinese delegation had referred to a forthcoming amendment to the law relating to national ethnic minorities, including measures to promote investment in autonomous regions. He would like to know in what ways, and to what extent, the legislation was intended to promote the interests of ethnic minorities.

CERD/C/SR.1942 (2009) [China] 5. The Constitution guaranteed the equality of all ethnic groups, protected their legal rights, and prohibited discrimination against any group as well as acts that undermined the unity of nationalities or instigated their secession. The same principles were enshrined in the Regional Ethnic Autonomy Law and other relevant regulations. All ethnic minority groups enjoyed the right to participate equally in the management of State and local affairs, to use and develop their spoken and written languages, and to preserve or change their customs.

CERD/C/SR.1942 (2009) [China] 15. Violent crimes involving beating, smashing, looting and arson had taken place in Lhasa and neighbouring areas of the Tibet Autonomous Region on 14 March 2008 and in Urumqi in the Xinjiang Uighur Autonomous Region on 5 July 2009, resulting in the loss of many innocent lives and damage to property. There was evidence that the two incidents had been premeditated and masterminded by separatists abroad and carried out by separatists within China with a view to promoting ethnic hatred, disrupting harmonious development in ethnic minority areas and undermining national unity and territorial integrity. The violent crimes perpetrated were also serious breaches of the purposes and principles of the Convention and had been widely condemned by Chinese people of all ethnic groups. The Government had taken prompt action to halt those criminal activities and to protect citizens' right to life and property. Public order had been quickly restored and unity among ethnic groups preserved.

CERD/C/SR.1942 (2009) [Committee] 40. While the State party appeared to blame the unrest on separatists set on undermining its unity and territorial integrity, he noted that the Committee's sole concern was the implementation of the Convention's prohibitions against racial discrimination.

CERD/C/SR.1943 (2009) [China] 28. With regard to whether bilingual education could weaken the language and culture of minorities, he explained that the aim of bilingual education was to encourage the use of ethnic minority languages in parallel to Mandarin, and certainly not to eliminate minority languages in the long-term. The Uygur language, in both its written and oral forms, was used at the administrative and judicial levels, in newspapers and on radio and television throughout Xinjiang and was also one of the Government's working languages. Ethnic minorities were encouraged to speak Mandarin in order to strengthen unity and exchanges among different ethnic groups, bolster the qualifications of ethnic minorities and accelerate progress and development in ethnic minority regions.

CERD/C/SR.1943 (2009) [China] 64. He explained to Mr. Lahiri that the "one country, two systems" principle was a solution which made it possible to settle peacefully problems inherited from the past while reinforcing national unity and preserving territorial integrity. The application that had been made of the principle had been endorsed by 1.3 billion Chinese and could not be modified by an individual proposal. History had shown that the strategy had helped all the minorities living in China to flourish and that it was not at all a source of discrimination.

CERD/C/CHN/CO/10-13/Add.1 (2010) [China] The Chinese Constitution stipulates: "All nationalities in the People's Republic of China are equal. The State protects the lawful rights and interests of the minority nationalities and upholds and develops ties of equality, unity and mutual assistance among all of China's nationalities. Discrimination against or oppression of any nationality are prohibited, as are any action injurious to ethnic unity or causing ethnic divisions." In practice, China's public security authorities handle cases in strict accordance with the relevant laws and regulations, and there are no instances of administrative detention or reeducation through labour being applied "disproportionately" to members of ethnic minorities.

Sovereignty argument: on state secret

CAT/C/SR.416 (2000) [Committee] 27. She noted that, according to paragraph 10(d) of the third periodic report, the Supreme People's Court had issued provisions requiring all cases to be tried in open court except those involving State secrets or personal privacy and those concerning minors. The exceptions cited were a source of concern and raised the general issue of transparency of criminal justice procedures. For example, one nongovernmental organization deplored the fact that information on imprisonment and convictions or even records of court hearings were not systematically published and that official authorization was still required to attend a trial. Were those reports accurate?

CAT/C/SR.844 (2008) [Committee] 33. It was desirable that the delegation should indicate whether the lack of information on widespread and continuing violations of the Convention, and particularly on the extent and nature of those violations, was due to restrictions imposed by the laws relating to State secrets. It would appear that the State Secrets Act applied not only to the divulgation of information concerning health and population, but also to that of statistics relating to detention and the criminal justice system. Further information on the procedure governing the classification of State secrets would be welcome, especially if that procedure allowed the denial of certain legal safeguards essential to the prevention of torture, such as access to legal counsel. The delegation was invited to say whether, in its view, the possibility of having recourse to such a procedure was compatible with the provisions of the Convention, especially since retroactive classification of State secrets, while it might not be authorized by law, was actually not uncommon in practice. In that connection, she referred to the case of Zhang Enchong, a housing rights lawyer, who had faxed a copy of a news article on protests by a group of displaced residents as well as his own account of police action – two documents in the public domain never previously classified as "State secrets" – and who had been tried for "illegally providing State secrets outside the country" and had served a three-year prison sentence. Would the delegation please explain why that did not, in its view, constitute a case of retroactive classification?

CAT/C/SR.844 (2008) [Committee] 34. She thanked Mr. Li Baodong for his explanations on the subject of the law on lawyers adopted in October 2007, which the Committee had received favourably in that it seemed to facilitate detainees' access to a lawyer. The law was, however, contradicted by article 96 of the 1997 Code of Criminal Procedure, which, in cases classified as "State secrets", required detainees wishing to be assisted by counsel to apply for special authorization. The delegation was kindly requested to indicate where the two texts differed, and which of the two had precedence over the other. It might also indicate whether there existed a clear and univocal definition of "State secrets", who was empowered to decide whether a case should be classified as such, and at what moment that decision was taken. It could also explain why certain cases had been classified as "State secrets" while the activities preceding the arrest and detention of the suspect had not been of a confidential nature, cite an example of a case where a decision classified under "State secret" had been annulled following an appeal by a detainee against that decision, and indicate whether that had occurred frequently or not. Lastly, could the delegation please state its view of the recommendation by the China Society for Human Rights Studies urging the State party to strengthen its work on classified statistics and to promote the improvement of its investigating techniques so as to change the stereotyped thinking patterns of law enforcement officials?

CAT/C/SR.846 (2008) [China] 13. Promulgated in 1988, the Law on the Protection of State Secrets contained clear provisions on the definition and scope of State secrets and on the relevant decision-making organs. Article 2 provided that State secrets concerned the security and interests of the State and article 9 provided for three distinct categories of State secrets on the basis of their degree of confidentiality. Such data was usually classified by the originating body or entity and any problems in that regard were dealt with by the departments responsible for keeping State secrets at the central, provincial, regional or municipal levels. Under article 96 of the Code of Criminal Procedure, when a case related to a State secret by virtue of its nature or on account of information used in pretrial procedures, the chosen defence lawyer must be duly approved by the competent authority in order to ensure that the secret was kept.

CAT/C/SR.846 (2008) [Committee] 36. Ms.GAER (Country Rapporteur) said that she gladly welcomed the information received but regretted that the delegation had tended to generalize instead of entering into the details of specific cases. She also regretted the lack of statistics, which the State party justified by its situation as a developing country. It was now almost 20 years since China had become a party to the Convention. Furthermore, contrary to other instruments affording protection to rights that were realized only gradually, such as social, economic and cultural rights, the Convention imposed on States an immediate obligation to end torture. In truth, the problem lay not so much in the lack of statistics as in the fact that they could not be published as a result of the Law on State Secrets. Article 2

of that Law, for instance, classed as confidential a large amount of the information that the Committee needed to know in order to ascertain whether the State party was meeting its obligations. It would nevertheless be useful if the delegation were at least to provide data on matters that were normally made public.

CAT/C/SR.846 (2008) [Committee] 42… With regard to the Law on State Secrets, the delegation should state whether a judicial authority was involved in the decision to classify a given piece of information as confidential and whether a lawyer whose file was withdrawn under that Law was replaced.

CAT/C/SR.846 (2008) [Committee] 45… Lastly, clearer explanations would be welcome on the subject of pretrial detention, the duration of which was evidently still too long, and on the Law on State Secrets, the complexity of which would appear to be beyond the grasp of ordinary citizens.

CAT/C/SR.846 (2008) [Committee] 47. The protection of State secrets was legitimate, provided that it did not restrict the rights of citizens. The difficulty therefore lay in striking the right balance between protection and the risk of abuse. It transpired from the replies of the State party that the body from which certain information originated had the first and last say concerning its degree of confidentiality and its classification as a State secret. A decision of that nature should not be entrusted to a single body, not least an administrative body. Statistics on the enforcement of the death sentence were among the information protected in that manner. Hence, in the event that, for example, a lawyer made use of such data to demonstrate to a court that the death sentence was more frequently imposed on certain categories of person, the question arose as to whether he could be accused of violating a State secret.

CAT/C/CHN/CO/4 (2008) [Committee] 16. While taking note of the oral information from the State party on the conditions of application of the 1988 Law on the Preservation of State Secrets in the People's Republic of China, the Committee expressed grave concern over the use of this law which severely undermines the availability of information about torture, criminal justice and related issues. The broad application of this law raises a range of issues relating to the application of the Convention in the State party:
(a) This Law prevents the disclosure of crucial information that would enable the Committee to identify possible patterns of abuse requiring attention, such as disaggregated statistical information on detainees in all forms of detention and custody and ill-treatment in the State party, information on groups and entities deemed to be "hostile organizations", "minority splittist organizations", "hostile religious organizations", "reactionary sects", as well as basic information on places of detention, information about the "circumstances of prisoners of great influence", violations of the law or codes of conduct by public security organs, information on matters inside prisons;
(b) This Law provides that the determination of whether a piece of information is a State secret lies with the public body producing this information;
(c) This Law prevents any public process of determination as to whether a matter is a State secret and the possibility of appeal before an independent tribunal;
(d) The classification of a case falling under the State Secrets law allows officials to deny detainees access to lawyers, a fundamental safeguard for preventing torture, and such denial appears to be in contradiction with the 2007 amended Lawyers Law (arts.2 and 19).

The State party should review its legislation on State secrets with a view to ensuring that information, including statistics, relevant to the assessment of the State party's compliance with the provisions of the Convention throughout its territory, including in the Special Administrative Regions, is available to the Committee.

The State party should provide information on the criteria used to establish that a piece of information is a State secret and on the number of cases falling under the purview of the legislation on State secrets.

The State party should ensure that the determination as to whether a matter is a State secret can be appealed before an independent tribunal.

The State party should ensure that every suspect is afforded the right to have prompt access to an independent lawyer, where possible of their own choosing, including in cases involving "State secrets".

CAT/C/CHN/CO/4/Add.2 (2008) [China] The Chinese Government believes that this allegation derives from misunderstanding based on a lack of knowledge of the Chinese legal system. The Chinese side wishes to elaborate on the specific issues raised in this paragraph.

(a) Concerning the allegation in the observations that “this Law prevents the disclosure of crucial information”
The Chinese Government attaches importance to making information public and has taken effective measures to ensure its citizens’ access to information about their country and society, and their right to participation and supervision. For example, The Regulations of the People’s Republic of China on Disclosure of Government Information formulated by the State Council establish the scope, ways and procedures for making public government information to ensure that such information usefully informs citizens' productivity, life and economic and social activities. At the same time, the Government requires that its citizens guard State secrets in accordance with the law, as do Governments of all other countries in the world.

According to article 2 of the Law of the People’s Republic of China on the Preservation of State Secrets, "State secrets" refers to information on matters that have been established through proper legal procedures as having a vital stake on State security and national interest and are known only to a limited number of people for a given period of time. Article 8 of the Law contains detailed description of State secrets.

The Law of the People’s Republic of China on the Preservation of State Secrets provides for the preservation of State secrets. However, information on “detention and custody and ill-treatment … violations of the law or codes of conduct by public security organs”, cited in the observations, does not constitute State secrets as defined by law. In practice, the public security organs throughout China abide strictly by the aforementioned Law where the scope of State secrets and their degrees of confidentiality are concerned.

(b) Concerning the claim in the observations that the Law of the People’s Republic of China on the Preservation of State Secrets “provides that the determination of whether a piece of information is a State secret lies with the public body producing this information”
Under the Law of the People’s Republic of China on the Preservation of State Secrets, State organs and units at all levels shall determine, in accordance with the provisions on State secrets and on the specific scope of classified materials, the degrees of confidentiality of all information on matters deemed to be State secrets. Chinese law gives secrets-generating organs and units the power to determine the scope and degrees of confidentiality of State secrets while establishing strict limits and procedures to ensure that such power is exercised properly.

(c) Concerning the claim in the observations that [the Law on the Preservation of State Secrets] “prevents any public process of determination as to whether a matter is a State secret and the possibility of appeal before an independent tribunal”
According to the Law of the People’s Republic of China on the Preservation of State Secrets, the Chinese authorities concerned determine, in accordance with established procedures by law, whether or not a matter constitutes a State secret. In the event of a dispute as to whether a piece of information constitutes a State secret and the degree of confidentiality it should be assigned, the case may be submitted to the appointed authorities for a solution.

The Measures of Implementation of the Law of the People’s Republic of China on The Preservation of State Secrets also provides for an error- correction system. Under that system, if the organ or unit which determined the degree of confidentiality has found that its decision is inconsistent with the relevant provisions governing the scope of secrets, it shall promptly correct the mistake. The organs above it or the security department concerned shall also promptly notify the organ or unit which made the erroneous determination and shall demand an immediate correction. Thus the allegation in the observations concerning the procedures for determining State secrets does not conform to reality.

Moreover detainees have the right to challenge decisions as to whether a matter constitutes a State secret, whereupon the State security department or the body of the provincial People's Government in charge of State secrets shall determine the validity of the challenge.

Though China's legal system differs from that of the West, the ultimate goal of determining whether or not a matter constitutes a State secret is to safeguard national security and interests, regardless of whether the determination is made by executive or judicial means. The Chinese security departments at all levels have identified confidential information in strict accordance with the provisions of the law. There is no systemic problem in China in this regard.

(d) Concerning the claim that “the classification of a case falling under the State Secrets law allows officials to deny detainees access to lawyers”

The Criminal Procedure Law provides that a criminal suspect in a case involving State secrets may hire a lawyer only if he/she obtains approval from the investigating body. This is to prevent disclosure of State secrets, and it is common international practice. In practice, the public security bodies allow criminal suspects to employ a lawyer so long as this does not lead to leakage of State secrets. It is illegal for case-management officers to reject lawyers' requests to meet with their clients on the grounds of the need for confidentiality. If such officers are found to have rejected legitimate requests, they are held responsible for their conduct under the law. The Lawyers Law, as amended in October 2007, also contains provisions on meetings between lawyers and their clients. All these provisions help to ensure the timely intervention of lawyers in such cases and help to safeguard the legitimate rights and interests of the persons concerned.

CAT/C/SR.1368 (2015) [Committee] 34. In general, the Committee had noticed that the State party frequently failed to provide the information requested in questions in the list of issues. Was that because the information was considered a State secret? He would like to know what kind of information was subject to disclosure under the Open Government Information Regulation (OGI): did it include information on police and procuratorial investigations, criminal detention and video recordings of conduct at detention centres?

CAT/C/CHN/CO/5 [2015] [Committee] 30. Recalling its previous recommendations (see CAT/C/CHN/CO/4, paras. 16 and 17), the Committee remains concerned at the use of State secrecy provisions to avoid the availability of information about torture, criminal justice and related issues. While appreciating the State party's assertion that "information regarding torture does not fall within the scope of State secrets", the Committee expresses concern at the State party's failure to provide a substantial amount of data requested by the Committee in the list of issues and during the dialogue. In the absence of the information requested, the Committee finds itself unable to fully assess the State party's actions in the light of the provisions the Convention. Furthermore, the Committee regrets that the same concerns raised in its previous recommendation with regard to the 1988 Law on the Preservation of State Secrets persist in relation to the 2010 Law on Guarding State Secrets. The Committee is also disturbed at reports that a significant amount of information related to torture and the actions of public security authorities under the Criminal Procedure Law remain out of the public domain owing to the State secrets exception of the Regulations on Open Government Information. Furthermore, it notes with concern the limited scope of the Regulations on Open Government Information to information about administrative actions by administrative organs, excluding matters within the criminal law system (arts. 12, 13, 14 and 16).
31. The Committee calls for the declassification of information related to torture, in particular, information about the whereabouts and state of health of detained persons whose cases fall under the scope of the State Secrets Law. The State party should also declassify information on the numbers of deaths in custody, detainees registered, allegations of torture and ill-treatment and consequent investigations, administrative detention and death penalty cases. The State party should ensure that the determination as to whether a matter is a State secret should be the object of an appeal before an independent tribunal.

CAT/C/CHN/CO/5/Add.1 [China] D. Regarding the Law on Guarding State Secrets, the declassification of information related to torture and the provision of relevant data (para. 31)
13. Under the relevant provisions of the Law on Guarding State Secrets, information relating to torture does not fall within the scope of State secrets. Therefore, such information is not the subject of any declassification issues. If the case itself involves State secrets, information may only be declassified if either the period of secrecy established by the Law on Guarding State Secrets elapses or the conditions for declassification are fulfilled. This is based upon the need to ensure State security and public safety and is common practice in all countries of the world.

CAT/C/CHN/CO/5/Add.1 [China] 14. In the material in its response to the list of issues submitted prior to consideration of the report, the Government of China already provided some information on the number of people in custody and data about cases of torture brought to court and tried. However, owing to the country's vast size, large population and uneven level of development among regions, and the fact that human and other resources are limited, the statistics produced by the regions are of different calibres. It is thus difficult in a short time frame to collect and synthesize detailed, analytical data. We will carefully study the recommendations of the Committee so as to improve the capacity and level of production of statistical data as quickly as possible.

CAT/C/CHN/CO/5/Add.1 [China] 15. The Government of China attaches great importance to public access to information and has already adopted practical measures to guarantee the right of citizens to be informed about State and public affairs, fully making use of government data to serve their activities in production and in their lives and

inform their decisions relating to social and financial questions. The Regulation on the Disclosure of Government Information establishes that if citizens, legal persons or other organizations believe an administrative body has infringed upon their legal rights in its specific work related to the disclosure of government information, they are entitled to request an administrative review or to file an administrative legal action against it.

CEDAW/C/SR.743 (B) (2006) [Committee] 37. She urged the Government of China to consider reviewing the legal and regulatory framework relating to State secrets. Information should be available to policymakers in a transparent manner, so that targeted efforts could be made and benchmarks could be set in a disaggregated manner according to various categories of women.

CEDAW/C/SR.743 (B) (2006) [Committee] 44. Finally, on the question concerning the definition of what constituted a State secret, he explained that Chinese laws contained clear-cut definitions.

CEDAW/C/CHN/CO/7-8 (2014) [Committee] 20. The Committee notes the amendment of the Comprehensive Statistics System on the Status of Women and Children in 2012. However, it is concerned that some critical information required to assess the status of women is classified as a State secret under various security regulations, which unduly restricts access to information on women's rights issues. The Committee is further concerned that the system of data collection and sharing remains too weak to enable adequate monitoring and evaluation of the implementation of the Convention.

CEDAW/C/CHN/CO/7-8 (2014) [Committee] 21. The Committee recommends that the State party study the obstacles, including the impediments presented by the State party's State secret law, to the collection, sharing and dissemination of sex-disaggregated data so that the impact and effectiveness of policies and programmes aimed at mainstreaming gender equality and advancing women's human rights can be accessed by all stakeholders. In this regard, the Committee draws the State party's attention to its general recommendation No. 9 on statistical data concerning the situation of women.

CERD/C/SR.1942 (2009) [Committee] 33. Information before the Committee also suggested that the 1988 Law on the Preservation of State Secrets mainly affected members of ethnic minority organizations. During the current review of the Law, the State party should bear in mind that the rights to judicial review and access to a lawyer continued to apply, irrespective of the sensitive nature of offences covered by that Law. It should guard against the possible discriminatory application of the provisions concerned.

CRC/C/SR.1833 (2013) [Committee] 19. It would also be helpful if the delegation could indicate whether steps had been taken to improve disaggregated data collection, and whether data on infanticide and the abduction of children from ethnic minorities were still classified as State secrets in mainland China. The delegation should also indicate whether there were plans to establish, in each of the State party's three regions, independent human rights monitoring mechanisms with the authority to receive complaints from children.

CRC/C/CHN/CO/3-4 (2013) [Committee] 15. The Committee reiterates its concern about the limited public accessibility to reliable and comprehensive statistical data in mainland China in all areas covered by the Convention (CRC/C/CHN/CO/2, para. 22). It is particularly concerned that due to laws and regulations on guarding State secrets in mainland China, disaggregated data and important statistics critical for effective implementation and monitoring of the Convention are often not available in the State party.

CRC/C/CHN/CO/3-4 (2013) [Committee] 16. The Committee recommends that the State party review the secrecy laws and regulations in mainland China in order to ensure that information concerning children, particularly regarding violence against children, infanticide, child labour, juvenile justice, children with disabilities and children affected by migration, is systematically collected, made publicly available and discussed and used for the development of policies and plans on children's rights. In this regard, the Committee further recommends that the State party establish in mainland China an independent review mechanism for the classification of State secrets.

Developing country argument

CEDAW/C/CHN/5-6 (2006) (p.58) [China] While focusing on modernizing China's rural areas, the Chinese Government is also aware of the obstacles that still exist. China is a developing country with a population in excess of 1.2 billion; the rural population accounts for 63.91 per cent of the total population. Generally speaking, agricultural productivity is low and regional disparities are significant. In particular, the mountainous, arid, high-altitude and remote border areas in the central and western regions suffer from adverse natural conditions, insufficient infrastructure, low productivity and very limited access to information. Most of the poverty-stricken population live in these areas, and their level of education tends to be low. A large number of women are illiterate, and the traditional idea that sons are better than daughters is still prevalent, inhibiting women's development. In addition, the acute disparity between China's large population and its resources and level of economic development constitutes yet another obstacle to attempts by China's rural areas to shake off poverty and embark on the path of modernization. A radical change in this situation will require long-term efforts.

CERD/C/SR.1163 (1996) [China] 24. Despite those good results, the country was still developing, and pockets of poverty persisted. Minorities in particular, and virtually the entire poor population, often lived in areas in which harsh natural conditions were hardly conducive to building the infrastructure needed for a satisfactory transport system; education, and primary education in particular, left much to be desired, and on the whole, the mid-west regions were still not as developed as those along the eastern coast. With the ninth five-year plan, adopted in March 1996, it was expected that the gaps would gradually be bridged, especially as the measures to fight poverty would focus primarily on poor areas where national minorities lived.

CRC/C/11/Add.7 (1996) [China] 147. As in many developing countries, acute respiratory infections are common among China's children, pneumonia being the commonest source of death: every year, some 300,000 Chinese children aged 5 and under die of pneumonia. Hence pneumonia prevention and a reduction in pneumonia deaths are important and pressing tasks.

CRC/C/11/Add.7 (1996) [China] 157. China still being a developing country with a relatively weak economic base, large differences in levels of development in the cities and the countryside persist, and thus there are still some problems associated with child health care, the most conspicuous of which is that the rural health care network is incomplete - there are evident gaps in medical facilities and so forth by comparison with the towns. These, added to disparities in living conditions, keep the incidence of disease among rural children relatively high, and standards of nutrition among children in some poor rural areas are below normal.

CRC/C/11/Add.7 (1996) [China] 187. Education for girls is an important problem in efforts to establish universal primary education in many developing countries. China, as a developing country, had 2,610,000 school-age children in 1993 who had not enrolled in school, markedly more of them female than male. In the west of the country, the phenomenon of low female enrolment and high female drop-out rates is quite striking. Beginning in 1989, the National Women's Federation and the Chinese Children's Fund established special funds to help girls enroll in school and enable girls from poor districts to attend compulsory primary education in effect free of charge. In 1992, these were renamed the "Spring Buds Scheme".

CRC/C/SR.298 [China] (1996) 10. It was an arduous task for a developing country with a population of 1.2 billion people to guarantee the health and happiness of its 300 million children. That was why the State did all in its power to improve the situation of children. According to The State of the World's Children 1996 report by UNICEF, China compared well with most developing countries in terms of, for example, mortality rates, nutrition, health care and education. Of course, there was still room for improvement. For example, it was acknowledged that some children in certain regions were not receiving schooling, children were still occasionally being sold or abducted and some parents abandoned their girl children. Those practices could be explained by poverty (65 million people were still living below the poverty line) and by the persistence of feudal and backward thinking. Nevertheless, the Chinese Government believed that economic and social progress would allow those bad practices to be gradually remedied.

CRC/C/CHN/3-4 (2013) [China] 22. The Chinese Government realizes that as a developing country, China still has much to do in order to fully implement the stipulations of the Convention and to promote and realize children's rights. There still exist difficulties and challenges in a whole series of processes from legislation to policy decisions and adoption of concrete measures for effective implementation, whilst continual improvements are needed in respect of

factors such as raising of awareness, capacity building, coordination between organizations, financial support and social mobilization.

CAT/C/SR.416 (2000) [China] 8. He cited some specific examples to illustrate the Chinese Government's efforts in that direction. For example, a hotline set up by the Ministry of Justice provided legal advice and assistance by telephone and a travelling exhibition organized with the assistance of the Supreme People's Procuratorate on the functions and powers of procurators had produced positive social effects in the country. Those measures had led to a substantial reduction in cases of torture over the previous five years. The number of persons convicted of extorting confessions by torture and inflicting physical violence on persons in custody had fallen from 193 in 1998 to 173 in 1999. In conclusion, he pointed out that China was a developing country with a population of 1.2 billion, 900 million of whom still lived in rural areas. The country's economic and social development was therefore uneven. In addition, for historical reasons, China's legal system, especially the system of judicial supervision, still had some weak links which hindered the eradication of torture. Nevertheless, the Chinese Government was making progress in that respect and hoped that the Committee's constructive suggestions would make it possible to do even more to prevent the use of torture in the future.

CAT/C/SR.416 (2000) [China] 51. Mr. LI Baodong (China), referring to the other specific cases that had been mentioned, said that several days would be needed to provide replies to the questions asked. He hoped that the Committee members could give more details of those cases to enable the Chinese authorities to carry out the serious investigations required. The delegation thanked the Committee members who had commended the efforts of the Chinese Government to implement the Convention. During the consideration of China's report, the Committee had made observations and suggestions that were fully relevant and the delegation undertook to transmit them to its Government, which would give them due consideration. Programmes would be elaborated to implement the proposals relating to medium- and long-term objectives. Concerning the technical proposals, the authorities would do their best to coordinate the activities of the departments concerned with a view to their implementation. The prohibition of torture was a delicate task that posed a number of difficulties for China, which was a developing country. It would continue to ensure implementation of the provisions of the Convention and would make significant efforts to strengthen democracy and the rule of law. It attached great importance to its relations with the Committee and would gladly welcome any future opportunity of dialogue with it.

E/1990/5/Add.59 (2005) [China] 13. China is still a developing country. In view of constraints relating to the level of the country's economic and social development, even though the Covenant has come into force in China, not all its articles have been fully realized. The degree of enjoyment of certain rights does not yet reach the requirements of the Covenant. China still has a duty to reduce poverty and the gap between the wealthy and the poor, while it also faces such pressures as population growth and resource depletion. On the foundation of 50 years of development, and in particular the recent 20 years of liberal reforms, however, the Government and people of China are fully capable of overcoming all problems encountered on the road to development, and will continue to enhance the level of enjoyment of human rights and basic freedoms.

E/1990/5/Add.59 (2005) [China] 109. China is a developing country, and great imbalances exist between levels of development in different regions. While the great majority of the people are enjoying the material benefits of development, there are still a few groups, for the most part minority peoples living in small rural communities, for whom life is still difficult. In order to solve the problems of inadequate food and clothing for the rural poor, in March 1994, the Government promulgated the "National '8-7' War on Poverty Plan", which proposed to use the roughly 7-year period between 1994 and 2000 basically to resolve the food and clothing problems of the 80 million persons living in rural poverty nationwide. The concrete objectives of the Plan were: (a) to support poor homes in creating stable conditions on the basis of which to overcome their food and clothing problems; (b) to step up construction of basic facilities in poor areas; (c) basically to resolve problems with the supply of potable water for people and livestock, and to provide road connections between most impoverished villages and markets for farm produce and manufacturing centres; (d) to supply electricity to the great majority of poor homes; and (e) to overcome the prevailing backwardness in education, culture and health, and achieve a universal basic standard of education while eradicating illiteracy among the young and active adult population. The Plan also sought to promote vocational skills education and skills training for adults; to improve medical and sanitation conditions so as to prevent or reduce the incidence of endemic disease; and to contain population growth within the nationally stipulated range. Over the past few years of its implementation, this Plan has achieved great results. By the end of 2001, the majority of poor people living in rural

areas were properly fed and clothed, while some remaining poor areas with hostile environments or fragile ecosystems were beginning to approach a state of sustainable development.

E/1990/5/Add.59 (2005) [China] 126. With reference to the right to food, China has always made of agriculture the very foundation of the national economy. Since the era of liberalizing reforms, the Government has stabilized and perfected the system of family-contract operations, developed rural-community enterprises, progressively adjusted and optimized agricultural structures, increased investment in agriculture, and implemented sustainable-development strategies for farmers. Very effective measures have been taken to increase agricultural output and reduce poverty levels. A developing country with a large population, China has done its duty and upheld the universal right to adequate food, capturing worldwide attention with its accomplishment.

E/1990/5/Add.59 (2005) [China] 174. The funds and resources available to China, a densely populated developing country with limited financial resources, cannot cover the needs of the country's poor areas. Particularly in the poorer parts of the west, women's health still faces many challenges, the most prominent of which is high maternal mortality. In 2000, the maternal mortality rate nationwide was 53 per 100,000; in remote areas, this reached 114.9 per 100,000, and in some areas even exceeded 400 per 100,000. In rural areas, more than 90 per cent of deaths in childbirth occur in backward areas, 40.5 per cent of them during in-home births. A multitude of factors contribute to this situation, foremost among them being that economic conditions in these backward communities prevent women from giving birth in hospitals. Ignorant and backward customs and indifference to health and hygiene also mean that the safety of pregnant women does not command due attention. A second factor is that health workers in these rural communities often possess very rudimentary knowledge, utilize backward techniques and the service they provide may be unsatisfactory. According to a survey conducted in 1998 by the Ministry of Health, only 1.4 per cent of health technicians in rural hospitals had a level of education at the undergraduate level or above, 53 per cent had completed a polytechnic high school, and 36.4 per cent were graduates of a regular senior middle school or lower. The great majority had not undergone any sort of systematic professional training and could not handle an obstetric emergency on their own. As such, they presented a latent risk of maternal mortality. A third factor is that the health-care facilities in these rural areas are often outmoded, and, in many areas, emergency and clinical-transfer services are unavailable. The obstetric facilities available in many rural hospitals are primitive and ill-prepared to deal with emergencies; this is also a contributing factor in maternal mortality. In view of these conditions, the Government of China has legislated in the China Women's Development Programme (2001-2010), the China Children's Development Programme, the Tenth 5-Year Plan and the development strategy for the west for the implementation of policies and strategies aimed at improving women's health in poor areas. It continues to invest a good deal of manpower, material and financial resources in this area, and is developing broad-based cooperative programmes in concert with the World Health Organization (WHO), the United Nations Children's Fund (UNICEF), the Canadian International Development Agency and other international organizations to speed efforts on behalf of women's health in China's poorer regions.

E/C.12/1/Add.107 (2005) [Committee] C. Factors and difficulties impeding the implementation of the Covenant
11. The Committee, while recognizing the sizeable population in the vast expanse of the territory of the State party, notes that there are no significant factors and difficulties impeding its capacity to effectively implement the Covenant.

E/C.12/CHN/2 (2014) [China] 5. Difficulties and challenges facing China
China is still a developing country. Although China's total economic volume is already ranked among the largest in the world, its per capita level is still ranked below 100 in the world. There are imbalances in development between urban and rural areas, and between regions. The per capita resource occupancy rate is low, and economic and social development is still constrained by such bottlenecks as resources, energy and the environment. Based on China's current poverty alleviation standard (per capita annual income of RMB 1,196), there are still 35.97 million people in the impoverished population, whilst the development of various social causes still relatively lags behind; the social security system must adapt to such circumstances as the aging population, accelerated urbanization, diversification of forms of employment, and price inflation; the contradictory situation in which the level of public health development has not adapted to the health requirements of the general public, is relatively pronounced; the guaranteeing of the rights of special groups such as people with disabilities still faces pressures; among state functionaries, in particular local government personnel, awareness of human rights and the level of administration in accordance with the law need to be raised.

E/C.12/2014/SR.17 [Committee] 33. Mr. Abdel-Moneim said that, despite its huge industrial base, the State party remained a developing country and, as such, was entitled to apply article 2, paragraph 3, of the Covenant, subject to

certain limits. Its industrial and agricultural base and economic infrastructure had been achieved precisely because China had been able to exercise its right to development and that right was key to the implementation of all Covenant rights.

Gender equality in general

CEDAW/C/CHN/3-4 (1999) [China] p.3 China is a developing country, hampered by its level of economic and social development as well as by traditional attitudes. In real life, Chinese women's equal rights to political participation, employment and education as well as in marriage and family life have yet to be fully realized. Disrespect for and discrimination against women, and even violations of their rights and interests, are not uncommon, and the overall talents and abilities of China's women also need further improvement.

CEDAW/C/SR.419 (1999) [China] 25. Nevertheless, the inspection had also revealed a number of problems. Women's participation in leading political positions was not commensurate with their participation in social and economic development. The problems of re-employment of laid-off female workers, their unequal access to employment opportunities and inadequate labour protection had become more acute. Many institutions and enterprises set higher standards for the recruitment of women because they viewed women's physiological characteristics as weaknesses. Those and other problems had become a cause of concern at all levels of government, and were the subject of numerous studies aimed at devising solutions.

CEDAW/C/CHN/5-6 (2006) [China] Given the constraints stemming from varying levels of economic and social development, the influence of traditional modes of thought, and especially the numerous new phenomena, characteristics and problems emerging as a result of the transition from a planned economy to a socialist market economy, the full realization of equal rights for Chinese women in the political, economic, cultural, social and familial spheres will continue to be a lengthy process. It therefore remains a long-term and arduous task for the Chinese Government and the society as a whole to further improve the social environment for women's development, overcome obstacles and eliminate discrimination against women in all its forms. The Chinese Government and the entire Chinese people together will make unremitting efforts to that end.

China was a feudal society for a long time, so thoroughly changing the old ways men and women behave in social and cultural settings and overcoming misconceptions based on gender discrimination is a long and arduous challenge. At present, women's participation at the decision-making level in the media is still low; elements of gender discrimination and stereotyping persist in media content; some movies, TV programmes, advertisements and print media still distort, derogate and even insult the image of women; and the public lacks sensitivity to or critical awareness of gender discrimination in the media.

CEDAW/C/SR.743 (B) (2006) [China] 12. Although the situation had improved significantly as a result of those efforts, China remained a developing country with a population of over 1.3 billion and a modest level of productivity and education. There were still many difficulties and problems to be resolved in the lives and work of Chinese women and in the protection of their rights. Women took little part in high-level decision-making. Discrimination against women occurred in employment. The education and health of women needed to be improved. It would be a fairly long process to progress from de jure equality to de facto equality. The Government was committed to pursuing a scientific development concept, building a harmonious society and implementing the National Programme for Development 2006-2010, which would create new opportunities for Chinese women. With support and help from the Committee and with promotion and facilitation by the international community, China would achieve more impressive accomplishments in the implementation of the Convention.

E/C.12/CHN/2 (2014) [China] Owing to the constraints and limitations of such factors as levels of economic and social development, especially in the process of economic structural adjustment, and establishing and perfecting the socialist market economic system, China's promotion of gender equality and women's development faces a number of new circumstances and new problems: social stratification of women's groups is becoming ever more complex, and the demands of women's life, development and protection of rights and interests have diversified; there are relatively marked imbalances between women's development in different regions, different social strata and different groups; outdated gender-unequal customs and practices that have survived from China's history and traditional culture have still not yet been completely eliminated, and violations of women's rights and interests still exist to different degrees in some regions.

To meet the above challenges, China will continue to carry out thoroughly the basic national policy of gender equality, protecting the rights and interests of women in accordance with the law, implementing the target requirements of the

Women's Development Programme, and making efforts to promote equal enjoyment of rights by men and women in respect of politics, economics, culture, society and family life.

Women's participation in government

CEDAW/C/SR.419 (1999) [China] 52. In reply to the questions in paragraph 20, she enumerated the measures taken by ACWF to promote women's participation in decision-making. The Federation had put pressure on government departments to formulate training programmes and set quotas for women's appointment to leading positions. It had contributed to the drafting of the Programme for the Development of Chinese Women, which set targets for women's political participation by 2000. Secondly, it had organized training courses and workshops in women's colleges and schools across the country on improving management skills. Women leaders were also given education in self-respect, self-confidence, self-reliance and self-improvement. Thirdly, the Federation had built an information network of women's talents, on the basis of which women candidates had been recommended to various government departments. Some 20 to 30 per cent were appointed, as a rule. Fourthly, it used the 47 newspapers and magazines of the women's federations to carry out extensive publicity campaigns on gender equality and the significance of political participation by women. The aim was to reach the whole of society, expanding public knowledge, changing social prejudices and creating a favourable environment for women's participation in decision-making.

CEDAW/C/SR.419 (1999) [China] 53. Women represented 16.3 per cent of the membership of the Communist Party. Women deputies to the Fifteenth Congress of the Party in 1997 numbered 344, or 16.8 per cent of the total. There was one female alternate member in the Political Bureau. Among the reasons for the slowness of the increase in the number of women deputies to the National People's Congress was the fact that, with the adoption of a market-oriented economic system, the administrative system had undergone a similar change, including the introduction of competitiveness among personnel. That had affected women's political participation and there were no fixed targets for their future participation. Secondly, women still faced various forms of constraint and discrimination. Traditional notions of male superiority continued to influence the evaluation of women's ability, and promotion tended to go to men rather than women. Thirdly, women lacked self-confidence. The equal competition mechanism was still not good enough.

CEDAW/C/SR.419 (1999) [China] 54. Since the passage of the Women's Law in 1992, more and more women from the national minorities had joined public decision-making bodies. For economic reasons, however, there were few statistics on rural women, including women from the minorities. There were currently 607,600 women from the national minorities in leading positions nationwide, or 26.6 per cent of the total. They included deputies to people's congresses, members of decision-making bodies of governments at every level or judges, prosecutors and lawyers. The President of the People's Court in one province was from the Dai national minority. In the Linxia Autonomous Prefecture of Gansu Province, an area inhabited mainly by national minorities, 33.2 per cent of the 8,864 women leaders of the region (themselves 29.8 per cent of the total of local leaders) were from the national minorities. National minorities provided 48.3 per cent of the 58 women leaders above county level and 54 per cent of women leaders at section level. Of the 19 women promoted to leading positions at county level in 1996, 40 per cent were from the national minorities.

C.O A/54/38/Rev.1 (1999) [Committee] 293. The committee urges the Government to adopt temporary special measures within the meaning of article 4, 'paragraph 1 of the Convention to increase the number of women at the higher echelons of Government. The women's talent bank of the All China Women's Federation should be used extensively to increase the percentage of women in all public bodies. The Government should also encourage gender-balance in the composition of village committees.

CEDAW/C/SR.743 (B) (2006) [China] 7. Turning to the Committee's concluding comments and recommendations concerning the previous report, in particular the recommendation that China should adopt special measures to promote women's participation in high-level decision-making, she explained that the Chinese Government had organized educational and publicity campaigns to enhance public awareness of gender equality and women's participation in decision-making. It had explicitly defined the proportion of female officials in government leadership at all levels so as to further institutionalize mandatory requirements for governmental bodies to be staffed with women leaders. It had selected more outstanding women to serve in leadership at all levels, with priority being given to medium- and high-ranking women cadres and female principals. Measures had been adopted to give women cadres better training so as to enhance their ability and level of political participation. The Government had improved mechanisms for fair competition and management of civil servants in connection with reform of the personnel system so as to provide equal opportunities for women to participate in decision making and management and ensure that preference would

be given to women cadres when all conditions were equal. The fifth national conference on cultivation and selection of women cadres had been convened in August 2006.

CEDAW/C/SR.743 (B) (2006) [China] 8. At present, nine Chinese State leaders were women, five more than in 1999. Of the nine, three were vice-chairpersons of the Standing Committee of the National People's Congress, four were vicechairpersons of the Chinese People's Political Consultative Conference, one was Vice-Premier of the State Council, and one was State Councilor. In the Supreme People's Court, Supreme People's Procuratorate and the State Council ministries, there were 27 women ministers and vice-ministers, and women cadres at and above the ministerial rank totalled 241.

CEDAW/C/SR.744 (B) (2006) [Committee] 7. Ms. Gabr wondered why there had been no increase in the numbers of women engaged in high level political participation in China since the previous report. Attributing the situation to gender stereotypes was inadequate. The report indicated that an amendment of the basic law for political participation in villages was envisaged. Information about when that would be achieved would be appreciated. Representation of women at the ambassadorial level was also insufficient…

CEDAW/C/SR.744 (B) (2006) [Committee] 8. Ms. Popescu asked how political representation of women from ethnic minorities was being handled. She noted that the phrase "an appropriate number" of women deputies appeared in various legislative texts. The meaning of that phrase was unclear, and could be used to mask indirect discrimination, since it was never used in relation to men in political life. Numbers and quotas should be established. The references to the proportion of female officials in government leadership at all levels raised the question of who defined that proportion and whether it was standard for all government bodies, regions and provinces, or differentiated.

CEDAW/C/SR.744 (B) (2006) [Committee] 10. Ms. Belmihoub-Zerdani asked why, in a country where there were approximately 650 million women, it was impossible to find 10,000 women to engage in politics. China was an example to the world and must apply the Convention. From 2002 to 2005, women's political representation had tripled, reaching approximately 11 per cent. If it continued to triple every three years, by 2011 it would approach 50 per cent. China had the resources to become a world leader in representation of women in politics.

CEDAW/C/SR.744 (B) (2006) [China] 11. Mr. Yin Peizhuang (China) said that the revised provisions of the Organic Law of the Villagers' Committees stipulated that at least one woman should be included in each villagers' committee, replacing the rule that each committee should have what was considered to be an appropriate number of women. The National People's Congress would decide whether to adopt the draft law during 2006. In relation to the way the appropriate number of women represented on a villagers' committee was determined, it was important to remember that China was a predominantly rural country. Men performed the majority of physical labour in rural areas and that responsibility determined the status of men in the village and in the family. That high status gave men an advantage in elections, particularly in leadership contests. There were no special provisions for gender in elections because it was essential to respect the fairness of the elections. The appropriate number of women reflected the lower status of women in rural areas but the draft law would ensure that at least one woman was represented on each committee.

CEDAW/C/SR.744 (B) (2006) [China] 12. Mr. Su Yan (China) said that the Government was taking measures to increase the participation of women in public life, and he presented complimentary data to the Committee to show the progress that had been made in increasing the number of cadres in various organs at the provincial, county, municipal and government levels. At the end of 2005, there were 15 million female cadres in total throughout the country, constituting 38.9 per cent of the total number of cadres. That represented an increase of 2.7 per cent as against 2001. However, there was still room for improvement and the Government would take further measures to increase the participation of women.

CEDAW/C/SR.744 (B) (2006) [Committee] 30. Lastly, she took issue with a suggestion made by a member of the Chinese delegation that women were not as valuable as men in leadership positions in rural areas because they were not capable of as much physical labour. Women worked very long hours and were engaged in another kind of physical labour. There was therefore no need to devalue women or deny them decision-making positions. If the community perceived women in such a discriminatory way, it was incumbent on the Chinese Government to change that perception, in accordance with article 5 of the Convention. Such a perception should not be provided as an excuse for discrimination.

CEDAW/C/SR.744 (B) (2006) [China]49. Ms. Jin Chunzi (China) said that, with regard to the representation of women members of ethnic minorities in public affairs, at the end of 2004, there were over two million middle management personnel who belonged to ethnic minorities, and 74 per cent of them were women; also, 32 per cent of the members of the People's National Congress were women.

CEDAW/C/SR.1251 (2014) [Committee] 43. She wished to know whether the Government intended to introduce gender quotas for elected and appointed political positions in order to achieve a minimum participation rate for women of 30 per cent.
CEDAW/C/SR.1251 (2014) [China] 56. Ms. Zhang Li (China) said that, under the Law of the People's Republic of China on the Protection of the Rights and Interests of Women, State bodies and institutions were required to appoint and train a certain number of women, including women from national minority groups. Moreover, women accounted for at least 30 per cent of the candidates standing for election to the people's congresses of the autonomous regions of China. Women currently accounted for over 40 per cent of the members of the National People's Congress…

CEDAW/C/SR.1252 (2014) [Committee] 16. Ms. Pires said that, according to the Working Group on the issue of discrimination against women in law and in practice, which had visited China in December 2013, the percentage of women at high levels of decision-making remained low. Given that China ranked sixty-second among the world's countries in terms of the representation of women in its legislature, perhaps temporary special measures were in order. Had there been an analysis of barriers impeding women's participation in political and public life? How did the State party ensure that women from ethnic minority groups and female candidates who did not belong to the Communist Party were not harassed as they sought to make their views heard?

CEDAW/C/SR.1252 (2014) [China] 17. Ms. Song Xiuyan (China) said that indeed more efforts to boost women's participation were needed and that the Programme for the Development of Chinese Women addressed the issue.

CEDAW/C/SR.1252 (2014) (China) 18. Mr. Shao Yujin (China) said that the regional governments devoted attention to the participation of women from ethnic minorities in public and political life. For example, as of July 2013, some 35 per cent of civil servants in the Tibet Autonomous Region had been women.

E/C.12/2005/SR.7 (2005) [China] 17. Regarding the promotion of women in politics, women currently accounted for 24 per cent of the members of the National People's Congress, ranking China thirty-seventh in the world in terms of the percentage of women parliamentarians. Through affirmative action programmes, the Government actively encouraged women to participate in political elections, and there was at least one female cadre in the administrations of the 31 provinces, municipalities and autonomous regions. Despite those efforts, awareness of gender equality was weak in some areas, the capacity of women to participate in policy-making and management required improvement and many women were constrained by the traditional belief that their place was in the home.
E/C.12/2014/SR.17 (2014) [Committee] 30. The policy objective of ensuring "at least one woman in local government leadership at the county level and above" mentioned in the State party's replies to the list of issues (E/C.12/CHN/Q/2/Add.1) was at best extremely modest and he urged the State party to adopt more ambitious quotas.

Women's employment and equal pay issue
CEDAW/C/SR.419 (1999) [China] 14. With regard to employment, over the past few years more than 7 million new jobs had been created annually, 40 per cent of them held by women. At the same time, many female workers had been laid off. His Government was providing free vocational training and guidance to facilitate their re-employment and guarantee them a minimum standard of living.

CEDAW/C/SR.419 (1999) [China] 20. In addition, the range of employment for women had expanded, so that the number of women employed in new industries such as information technologies, environmental protection, engineering, finance and law was currently five to 10 times the number before the reforms. The number of women entrepreneurs, managers and professionals had also increased. The introduction of the household responsibility contract system had enhanced the autonomy, income and status of rural women. Women's level of education had improved, and women had represented over 30 per cent of those working in scientific and technological fields in 1997. The spread of the mass media and the country's legal education campaign had broadened women's vision and awareness. Between 1978 and 1997, net incomes in rural and urban areas had increased by an average of 8.1 and 6.2 per cent, respectively.

CEDAW/C/SR.419 (1999) [China] 21. The reform's adverse effects on women included an increase in the number of laid-off women workers, which sometimes lowered women's status in the home and even led to domestic violence in some cases. The challenge of market competition was particularly stressful for many women. Some private businesses and jointly funded, foreign-funded and jointly operated enterprises failed to protect women in the workplace from long hours, poor working conditions and violations of their human rights.

CEDAW/C/SR.419 (1999) [China] 22. With respect to changes in social services, the State had reformed the pension, medical care, maternity benefits and housing systems to reflect the principle of socialized pooling, under which the costs of benefits were reasonably shared among the State, enterprises and individuals. The new practice in respect of maternity benefits, which was described in the report (CEDAW/C/CHN/3-4), had improved women's employment environment and the protection of women's health.

CEDAW/C/SR.420 (1999) [China] 2. Ms. Zhang Jianmin, replying to questions raised by the experts, said that more female workers had been laid off than men owing to rigorous structural adjustment programmes in the textile and other female dominated industries. In 1997, however, women accounted for only 45 per cent of a total of 6.31 million laid-off workers. The aim of the Re-employment Project, begun in 1993, was to protect the right of all workers to employment. Policies that specifically targeted women included the creation of job opportunities in the tertiary sector, the development of community services in order to employ laid-off female workers, and the provision of free vocational training and guidance. Moreover, special measures favouring the re-employment of women had been introduced throughout China, and outstanding cases had been publicized in the mass media. In 1998, the reemployment rate of laid-off female workers in 11 provinces had been approximately 50 per cent.

CEDAW/C/SR.420 (1999) [Committee] 27. The report provided little information on the problem of female unemployment during China's transition to a decentralized market economy. The delegation had stated that violation of legislation requiring equal pay for equal work was limited to foreign-funded private businesses, and she asked why those businesses were not subject to Chinese law. She also wondered how, in view of the current economic crisis, the Government could achieve its employment targets for women.

CEDAW/C/SR.420 (1999) [Committee] 42. Ms. Khan said that women seemed to have paid a disproportionate price for China's economic progress, and they were especially affected by cuts in welfare programmes. She would have welcomed more detailed statistics on differences in income between rural and urban women and on the relative numbers of women living in rural and urban areas. She asked whether there were any programmes to help unemployed rural women to learn new skills. Training, education, microcredit and other programmes must be made available to women, especially rural women. In a market economy, it was often difficult to ensure that workers earned at least the minimum wage, and a strong trade-union movement was needed to protect workers' rights.

CEDAW/C/SR.420 (1999) [Committee] 52. In the field of employment, it would be interesting to know in what fields unemployed women were being trained, how and by whom wage levels were determined, and how the jobs for which such women were being trained compared with jobs in other sectors. She was concerned that women might be disproportionately represented in the low-paid tertiary sector. It would be useful to have additional information on arrangements for the long-term monitoring of the programme under which subsidies were granted to companies that hired women. Statistics on length of employment, average age of women employed, types of jobs available to women and programmes to assist the long-term unemployed would also be welcome. Since the work units through which certain workers' rights, including the right to housing and a pension, could be claimed had been disbanded with the advent of the market economy, there was an increasing need to develop alternative mechanisms to protect those rights.

CEDAW/C/SR.743 (B) (2006) [China] 9. The Committee had expressed concern regarding women's employment in China's transition to a market economy. In that regard, the Government had decided to: formulate and implement preferential policies for women's re-employment and provide employment assistance to women; grant tax reduction or exemption to employers that recruited laid-off women workers and provide them with social insurance subsidies; give preference to laid-off women workers in job recommendation and recruitment; offer free job placement services to laid-off workers; organize cooperation between government labour authorities, trade unions and women's federations to provide women with job placement services and skills training to enhance their employability and entrepreneurship; and introduce policies and organize training programmes for business start-ups with a view to encouraging and supporting independent entrepreneurship among women.

CEDAW/C/SR.744 (B) (2006) [Committee] 17. In relation to the 3,188 labour protection and monitoring offices, it was apparent that only a small number of cases were being investigated, and it would be useful to learn if there had been an evaluation of those offices. Even though China had ratified the International Labour Organization Conventions No 100 and No. 111, there was insufficient domestic legislation to ensure that women and men were given equal remuneration. It was important to learn which measures the Government was taking to deal with wage discrimination and which government bodies were responsible for gathering information on wage levels in the different sectors. It would also be useful to know which methodology was being used to ensure that indicative wage levels were established in accordance with the Convention.

CEDAW/C/SR.744 (B) (2006) [Committee] 18. Ms. Shin said that the restructuring of the Chinese economy was creating problems for women because women were often the first employees to be made redundant. Furthermore, women were sometimes forced to accept employment from employers who did not comply with the labour laws, and that meant accepting poor working conditions, low pay and work without insurance. The State party should indicate whether it was aware of that form of discrimination and should provide information on the measures that were being taken in the context of the restructuring of the economy. The Government had established training programmes to assist women who had been made redundant, and there were initiatives to help those women set up their own businesses, but most of the training focused on the informal sectors. It would be useful to learn whether it would be possible to include the formal sectors in those training initiatives.

CEDAW/C/SR.744 (B) (2006) [China] 21. Mr. Guan Jinghe (China), in response to the question raised about equal pay, said that China had ratified the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Convention No. 100). Equal pay for equal work was practiced in China. Men and women working in the same position enjoyed the same benefits and salary. Any difference in pay was owing to differences in job levels and competencies. His Government was concerned, however, that women tended to work in low-paying professions. It was therefore actively engaged in training for women to enhance their ability to compete in the labour market. China was striving to attain the goal of equal pay for work of equal value. It had encountered some difficulties, however, in gauging the value of work done.

CEDAW/C/SR.744 (B) (2006) [China] 22. Economic restructuring in China affected not only women, but also other categories of workers regardless of gender. For example, the elderly, including elderly women, had been affected by the change. In recent years, his Government had held several meetings and developed various policies to promote employment. The measures taken included the retraining of women and provision of information on available jobs. For laid-off workers, his Government provided one-time free training to enhance their ability to find new employment. Unemployment benefits were provided for women workers over 40. Incentives were given to businesses to hire laid-off women workers, including tax breaks and social security subsidies.

CEDAW/C/SR.1252 (2014) [Committee] 26. Regarding the gap between women's and men's pay, he said that, according to information provided to the Committee, the average income of urban women as a percentage of urban men's income had dropped from 78 per cent in 1999 to 67 per cent in 2010. The gap had reportedly also increased in rural areas. Gender-based segregation with regard to types of jobs appeared to be a major factor in the gap. Despite the situation, the State party had not implemented the principle of equal pay for work of equal value. He asked how the State party intended to tackle the pay gap.

CEDAW/C/SR.1252 (2014) 34. Mr. Ma Hezu (China) said that labour legislation in China guaranteed equal rights for men and women and that it was effectively implemented in the workplace. An increasing number of women were availing themselves of legal remedies, in correlation with their growing awareness of their labour rights. Wages were protected under labour law and rates were determined at sectoral level. Efforts would be stepped up to monitor observance of equal pay for equal work. Furthermore, women enjoyed full maternity protection and fines were imposed on enterprises that contravened the law in that respect. The current retirement age for women was 55 years for female cadres and 50 for other women workers. There were plans to raise the retirement age for women, enabling those at senior levels to choose to work up to the age of 70, if so required. Information on any developments in that area would be transmitted to the Committee.

Eliminating violence against women

CEDAW/C/SR.419 (1999) [China] 17. There had been a reduction in the number of cases of forced prostitution and trafficking, while the incidence of rape had remained unchanged and cases of domestic violence against women had increased. Educational and awareness-raising campaigns had been conducted and measures adopted in the localities in order to address that problem.

CEDAW/C/SR.419 (1999) [China] 42…First, China had a long history as a feudal society, and patriarchal ideas still had some influence. Women victims mistakenly believed that being beaten by their husbands was a family stigma and endured the abuse in silence. In addition, there were still many women who did not have an independent income, and their fragile economic status and dependence left them powerless. Ideas about family life which had arisen during the transitional period had led in some cases to a lack of responsibility towards the family, which in turn had led to domestic violence. Finally, in remote rural areas, there were still cases of arranged marriages and mercenary marriages; it had been shown that domestic violence occurred more frequently in such marriages.

CEDAW/C/SR.419 (1999) [China] 43. Violence against women as a universal social issue had become a matter of serious concern in China. The relevant government departments, social organizations and non-governmental organizations were making efforts to reduce and eliminate such violence. The Women's Law, the Criminal Law and the Regulations on Administrative Penalties and Public Security all contained provisions on violence against women. In urban areas, victims of domestic violence could go to the police stations, neighbourhood offices or the neighbourhood committee for help. In rural areas the police station or the Committee for Public Security could offer assistance. Victims could also seek help through legal aid services, hotlines for domestic violence complaints and formal letters of complaint regarding domestic violence and infringement of their personal dignity.

CEDAW/C/SR.420 (1999) [Committee] 19. The Government should consider enacting specific legislation on domestic violence and establishing shelters for victims. China should study other countries' mechanisms for dealing with that problem

CEDAW/C/SR.420 (1999) [Committee] 54. She sought clarification of the legislative provisions under which landowners could pass ownership of land on to their children. She urged the Government of China to demonstrate its concern over the issue of violence against women by inviting the Special Rapporteur on violence against women to visit China.

CEDAW/C/SR.420 (1999) [Committee] 56. The Committee would welcome information on the proposed duration and funding of the educational programme that had been launched in order to eradicate existing stereotypes of the role of women in the family and in society. It would also be useful to know whether special legislation had been adopted to protect women from domestic violence and whether other services, such as shelters and telephone hotlines, were available to them.

CEDAW/C/SR.743 (B) (2006) [China] 2…The amended version of the Marriage Law adopted in April 2001 included provisions such as prohibition of domestic violence and compensation by the guilty party, as well as compensation for unpaid work done by divorced women.

CEDAW/C/SR.743 (B) (2006) [China] 80. Ms. Deng Li (China), responding to the question regarding measures to combat domestic violence, said that up to the end of July 2006, 26 municipalities, provinces and autonomous regions had promulgated anti-domestic violence laws. The question of whether to enact a special law to combat domestic violence or include the issue in separate chapters of existing laws was still under discussion. The Government was making a special effort to collect statistics on efforts to combat domestic violence, and a sample survey had been conducted in 2002. From 2003 to the present, the courts had tried 100,000 cases relating to domestic violence. Cases of humiliation accounted for three per cent, and abduction and trafficking in women, for 5.3 per cent. Those statistics were examples of the type of data that were being collected and analysed. Statistics were published on a regular basis.

CEDAW/C/SR.1251 (2014) [China] 27. Ms. Gao Shawei (China) said that new legislation to combat domestic violence had been drafted and submitted to the National People's Congress for consideration. NGOs and civil society organizations had been invited to comment on the text and their suggestions had been taken into account. The bill would focus solely on violence against women within the family; other acts of violence against women would continue to fall under the provisions of the Criminal Code.

CEDAW/C/SR.1252 (2014) [China] 11. Ms. Gao Shawei (China) said that more than 20 provinces and some 100 cities had centres to assist victims of domestic violence. All coercive sexual conduct was considered rape and therefore a crime.

Women's health

CEDAW/C/SR.419 (1999) [China] 16. The health-care targets had been achieved in all the eastern regions, whereas in the rural western regions indicators such as the rate of child delivery in hospitals had remained low (45 to 65 per cent), leading to relatively high rates of maternal and infant mortality.

CEDAW/C/SR.419 (1999) [China] 33. Women belonging to ethnic minorities in China accounted for 8.05 per cent of the country's total female population. Great improvements had been made in their political, economic and cultural participation; for example, many minority women were deputies to the National People's Congress. Lastly, local governments in areas populated by minorities conducted educational campaigns on maternal and child health. However, the Government imposed no mandatory policies on minority nationalities in that regard.

CEDAW/C/SR.420 (1999) [China] 8. Ms. Hao Linna said that 90 per cent of urban women and 65 per cent of rural women had access to prenatal health services. The major cause of infant mortality was pneumonia. Each year, some 40 million women were screened for common diseases, including cervical and breast cancer. In view of the inadequacy of health-care services and high mortality rates in ethnic minority areas, the Chinese Government attached great importance to developing women's health-care facilities and training midwives, gynaecologists and paediatricians in those areas. Farming communities received visits from mobile medical teams, and free medical and prenatal care for women was provided in Tibet and other remote regions.

CEDAW/C/SR.420 (1999) [Committee] 19. … Furthermore, it was important to enforce the labour protection laws and ensure that women did not suffer discrimination after a change in their marital status. Prostitution should be decriminalized and prostitutes should receive adequate health care, particularly in view of the HIV/AIDS epidemic. Although the Government was endeavouring to address the high incidence of suicide among rural women through the provision of legal assistance and complaint mechanisms, the report made no mention of measures taken in the area of mental health.

CEDAW/C/CHN/5-6 (2006) [China] The Chinese Government has also noted that in many rural areas, especially those with high rates of poverty, there remains a serious lack of health-care facilities and medical personnel, and huge inputs are needed to build the infrastructure required; this is a situation that is not easily changed in a short time. In the mountainous areas, the hinterlands and areas of high poverty, the lack of health knowledge and inaccessibility in terms of transportation result in relatively low rates of in-hospital births (45-65 per cent), with comparatively high rates of maternal and infant mortality as a consequence. The incidence of HIV/AICS is also rising rapidly in China. There are still some people who cling to the traditional view of sons as being more advantageous or better than daughters, especially in areas of high poverty. Owing to the low level of productivity and the lack of information in those areas, changing such attitudes will take some time. With these obstacles in mind, the Government has formulated policies to increase inputs into rural health care, strengthen the training of rural health-care personnel, and promote education efforts regarding health and population issues. The efforts of all sectors of society will be needed in working towards a solution to these issues step by step.

CEDAW/C/SR.743 (B) (2006) [China] 5…The Government had steadily increased its budget for education and health... From 2006 onwards, the Government would move towards full exemption of miscellaneous fees for all rural students receiving compulsory education. In 2003, the Government had initiated the policy of providing free anti-virus drugs to those affected by HIV/AIDS, free anonymous testing for HIV/AIDS, free prevention of mother-to-child transmission and free school education for AIDS orphans, so that persons affected by HIV/AIDS and their families could receive proper care.

CEDAW/C/SR.744 (B) (2006) [Committee] 28. Concerning the health of rural women and access to health services, in rural areas the decentralization of health-care spending and privatization of services had led to problems for women such as the imposition of user fees and the neglect of preventive care in favour of curative care, which was more lucrative. As the successful rural cooperative system had been withdrawn, people were constrained to pay for medical services. The Committee on Economic, Social and Cultural Rights had expressed concern at the reduced expenditure on rural health services. It would therefore be useful to have data on access to services. More information was needed on how access was monitored, especially in rural areas. She would particularly appreciate information on access for the very poor, ethnic minorities, Tibetan women and persons with disabilities.

CEDAW/C/SR.1252 (2014) [Committee] 30. Ms. Pimentel requested information on measures to ensure access for all women, particularly those from vulnerable groups, to health services; on capacity-building and improvement of services for victims of gender-based violence; on compensation for women who had contracted HIV/AIDS through blood transfusions using illegal blood collection; and on guarantees of confidentiality for women living with HIV/AIDS. She asked for details of the fines imposed on persons who carried out forced abortion, forced sterilization and female infanticide, how those funds were used and about measures to address corruption of local officials who enforced birth control. What procedures were in place to ensure access to family planning and reproductive health services for unmarried couples, single women and adolescents? What was being done to monitor the impact of environmental pollution on women's health? What measures were taken to address the alarmingly high rate of Caesarean sections in China? Lastly, she asked whether the Government envisaged developing programmes targeted at men under the project on common gynaecological diseases prevention and control survey.

CEDAW/C/SR.1252 (2014) [China] 36. Ms. Liu Ying (China) said that total health expenditure in China amounted to 5.2 per cent of GDP as at 2013. Various policies had been drawn up to improve women's and children's health, including specific programmes regarding maternal health, particularly for rural women and other vulnerable groups. Programmes had also been developed concerning hospital births, which were subsidized by the State, and treatment for HIV/AIDS and syphilis. The new rural cooperative medical care system covered 99 per cent of the rural population. Contributions could be made to either the urban or the rural health insurance scheme, regardless of the place of residence. Further subsidies for medical treatment and services were granted to women from poor households. Recent efforts on the prevention of sexually transmitted diseases involved awareness-raising campaigns on HIV/AIDS, safe sex and contraception. The rights of persons living with HIV/AIDS were upheld and institutions found responsible in cases of HIV/AIDS contraction through infected blood transfusion were required to pay compensation to the victims.

Collecting and reporting statistics

CAT/C/SR.143/Add.2 (1993) [China] 9. Since 1989 the number of cases of torture referred to the procurators had been steadily declining and had dropped from 472 in 1990 to 407 in 1991, representing a 13.5 per cent decrease, then to 339 in 1992, representing a 16.7 per cent decrease as compared with the previous year. In his speech at the eighth session of the National People's Congress, the Procurator-General of the People's Supreme Procuratorate had reported on the constant progress achieved in the prevention of torture.

CAT/C/SR.143/Add.2 (1993) [Committee] 18. Furthermore, was the Chinese delegation able to provide the information requested by the Committee concerning any judicial decisions handed down against persons found guilty of acts of torture?

CAT/C/SR.143/Add.2 (1993) [Committee] 21. It would also be useful for the Chinese delegation to give statistics on persons convicted for acts of torture and on the number of complaints filed in that connection against public officials, and for it to inform the Committee of the findings of the investigations conducted and the number and nature of the judicial decisions handed down.

CAT/C/SR.143/Add.2 (1993) [Committee] 36. Paragraphs 94 and 95 of the report described the apparently satisfactory conditions existing in Chinese prisons. He nevertheless wished to have information about the number of persons who had died in prison or in reform-through-labour camps and to know whether public officials had already been convicted for causing the death of detainees?

CAT/C/SR.145/Add.2 (1993) [China] 7. The following were the figures relating to complaints filed for acts of torture:

1990: 472 complaints filed
279 prosecutions initiated
270 cases concluded

1991: 407 complaints filed
307 prosecutions initiated
279 cases concluded

1992: 339 complaints filed
189 prosecutions initiated
180 cases concluded.

CAT/C/SR.146/Add.2 (1993) [Committee] 2. "The Committee is nevertheless aware of the obvious difficulties facing the Republic of China. However, the Committee would welcome precise statistical data concerning the number of persons in administrative detention, sentenced to capital punishment and executed.

CAT/C/SR.252/Add.1 (1996) [China] 15. Over the past three years, the Supreme People's Procuratorate had investigated a total of 1,194 allegations of torture. In 1993, it had investigated 373 cases, an increase of 10 per cent over the number investigated in the previous year; in 1994, 409 cases, an increase of 9.4 per cent; and in 1995, 412 cases, an increase of 0.773 per cent. It might be asked why increasing numbers of cases were being investigated. The answer was, first, that Chinese legislation in the matter of torture had been improved, secondly, that the Supreme People's Procuratorate, abiding strictly by the law, had stepped up the number of investigations, and thirdly, that the Government had mobilized citizens to report cases of torture.

CAT/C/SR.252/Add.1 (1996) [Committee] 28. Mr. Dipanda Mouelle had referred to a report published in a legal journal of Yunnan Province, according to which 41 people had died as a result of torture. Such cases would normally be reported to the Ministry of Public Security. He had so far been unable to obtain any information on the matter from that Ministry, but he would pursue his inquiries on returning to China and inform the Committee accordingly.

CAT/C/SR.416 (2000) [Committee] 29…She welcomed the data provided in paragraph 68 of the report regarding investigations by the Chinese inspectorate. She would appreciate receiving a breakdown of the statistics, if possible, by category of crime, region, sex of the perpetrator, sex of the victim, etc.

CAT/C/SR.844 (2008) [Committee] 36. Ms.GAER (Country Rapporteur) said that she gladly welcomed the information received but regretted that the delegation had tended to generalize instead of entering into the details of specific cases. She also regretted the lack of statistics, which the State party justified by its situation as a developing country. It was now almost 20 years since China had become a party to the Convention. Furthermore, contrary to other instruments affording protection to rights that were realized only gradually, such as social, economic and cultural rights, the Convention imposed on States an immediate obligation to end torture. In truth, the problem lay not so much in the lack of statistics as in the fact that they could not be published as a result of the Law on State Secrets. Article 2 of that Law, for instance, classed as confidential a large amount of the information that the Committee needed to know in order to ascertain whether the State party was meeting its obligations. It would nevertheless be useful if the delegation were at least to provide data on matters that were normally made public.

CAT/C/SR.844 (2008) [Committee] [Ms Gaer] 31. With regard to article 2 of the Convention, the Committee appreciated the information on laws for the prevention of torture promulgated by the State party since the consideration of its third periodic report in 2000 (CAT/C/32/Add.2), but deplored the dearth of statistical data, which gave rise to doubts as to the effective implementation of the Convention. In particular, it would wish to know the number of detainees and of complaints, the number of punishments meted out, the whereabouts of detainees, the number of persons executed or awaiting execution, that of persons placed in psychiatric establishments, the legal follow-up of complaints or the number of refugees or immigrants recognized as such, the conditions of detention and state of health of detainees, the number of persons punished for having committed serious acts of violence in connection with the population policy, the follow-up given to complaints from the families of victims of the Tiananmen demonstrations, and the number of cases declared non-receivable on the grounds that proof had been obtained by torture or constraint. The Committee would also wish to see statistics of violent acts among detainees, deaths in detention and condemnations for trafficking, and to know the number of complaints relating to acts of violence perpetrated within the framework of investigations relating to terrorism in particular. The absence of statistics was not a new fact, as the Committee had already noted the dearth of such information in its concluding observations adopted following the consideration of China's third periodic report (A/55/44, paras. 106 to 145). Would the delegation explain the reason for the absence of the requested statistics?

CAT/C/SR.844 (2008) [Committee] 32. Data on detention of persons from ethnic minorities were also lacking, as were those on the prominent events of 2008 – the March protests by Tibetans which had reportedly led to 18 deaths. The State party had failed to provide a list of all persons detained in the context of those incidents, as requested by the Committee under point 2(b) of the list of issues, or to indicate the whereabouts of those persons or the punishments to which they had been sentenced. It had confined itself to stating that 953 persons had been "detained", that 362 had "surrendered" and that 42 had been "convicted", whereas according to the Congressional Executive Commission on China 4434 Tibetans had been arrested and 1249 others had disappeared and several NGOs had published detailed lists of 200 to over 800 Tibetans still missing. Presenting the Chinese delegation with a list of 817 names submitted by a Tibetan group, she asked whether the persons concerned had been detained or released, or whether they had died, recalling that unacknowledged detention or disappearance increased the risk of torture.

CAT/C/SR.844 (2008) [Committee] 34. Lastly, could the delegation please state its view of the recommendation by the China Society for Human Rights Studies urging the State party to strengthen its work on classified statistics and to promote the improvement of its investigating techniques so as to change the stereotyped thinking patterns of law enforcement officials?

CAT/C/SR.844 (2008) [Committee] 37. It was to be regretted that by way of response to question 3(b) of the list of issues requesting statistics of the number and geographical origin of asylum seekers, refugees and immigrants, as well as of expulsions, extradition measures or other repatriations from Chinese territory, the Committee had received just one chart recapitulating the number of persons suspected of a criminal offence who had been returned to their country of origin between 2000 and 2008. It was desirable that the data requested should reach the Committee before the meeting scheduled for the State party's oral replies to those questions

CAT/C/SR.846 (2008) [China] 3. The Chinese authorities had endeavoured to provide the Committee with the fullest possible information. Much remained to be done, however, in the area of statistics. China was a developing country with only limited resources and the task was made no easier by the size of its population. It took time to achieve reform and openness, but the Government would seek to accelerate the process and improve interdepartmental coordination.

CAT/C/CHN/CO/4/Add.2 [China] 6. Concerning the recommendation in paragraph 17 of the observations that "the State party should compile statistical data relevant to the monitoring of the implementation of the Convention at the national level"

The observations contain a request to the State party to provide detailed and complex statistical data, which are very difficult for a large developing country with extremely complicated national conditions such as China to compile within a short period of time, to say nothing of the huge cost involved in the compilation of the requested statistical data. Nevertheless, the Chinese Government attaches great importance to the Committee's observations and will work harder to improve its statistics regarding its efforts to combat torture.

CEDAW/C/SR.420 (1999) [Committee] 5. All labour laws applied throughout China, including its economic development zones. The Labour Law stipulated that each employing unit should establish a system of occupational safety and health, that workers must strictly observe safety regulations and that the State should collect statistics on work related injuries or deaths and occupational diseases and publish its findings.

CEDAW/C/SR.420 (1999) [Committee] 16. In future reports, statistics should be provided consistently either in percentages or in real numbers. The relevant statistics for men should be included, and the information should be arranged in such a way as to facilitate comparison with the previous report.

CEDAW/C/SR.420 (1999) [Committee] 47…More statistical information should be provided on women who were serving time in prison and on the reasons for which they had been sentenced to that form of punishment.

CEDAW/C/SR.420 (1999) [Committee] 49…She requested more statistics on abandoned children; in particular, she wished to know how many of those children were illegitimate.

CEDAW/C/SR.420 (1999) [Committee] 51. Ms. Schöpp-Schilling suggested that, in view of China's size, ethnic diversity and politically decentralized system, it would be helpful if the information submitted in China's fifth report were broken down by province.

CEDAW/C/SR.420 (1999) [Committee] 52…Statistics on length of employment, average age of women employed, types of jobs available to women and programmes to assist the long-term unemployed would also be welcome. Since the work units through which certain workers' rights, including the right to housing and a pension, could be claimed had been disbanded with the advent of the market economy, there was an increasing need to develop alternative mechanisms to protect those rights.

CEDAW/C/SR.743 (B) (2006) [Committee] 70. Although the Chinese Government had provided some information on the trafficking of women, there was still a lack of data on the numbers of internally trafficked women. He was worried about the limited definition of trafficking contained in Chinese criminal law, which only defined trafficking for purposes of prostitution and not for other purposes. He was also concerned about the fact that prostitutes could be held in administrative detention centres and that not many perpetrators of trafficking were being prosecuted.

Finally, he would like to associate himself with the questions that had been posed for the Macao SAR Government.

CEDAW/C/SR.744 (B) (2006) [Committee] 29. There was a need for more data on the economic situation of rural women, as it was related to access to health and other services. That data should include access to land and the technical assistance which rural women received for their livelihoods. She noted that, although women enjoyed equal rights in rural land contracting under the law, at least 70 per cent of women in rural areas did not have access to land in their own name. The report and the statements made before the Committee had mentioned big rural development projects and China's movement towards the West, but there was no information on how women were benefiting from such projects and whether the large expenditures in rural areas went to infrastructure or social spending to improve women's livelihoods, living conditions and access to health.

CEDAW/C/SR.744 (B) (2006) [China] 35. Mr. Deng Li (China) said that about 8.3 per cent of the rural population had no land in their own name. Among them, 70 per cent were women. His Government had taken a series of measures to resolve the land contracting problem for rural women, including those mentioned in the report. The new law on land contracting included specific provisions for such contracting in the event of marriage and divorce. Women could

seek mediation at the village level in cases of violations of their rights or file a complaint with the People's Court. They could also request mediation by the collective. After two years of experience with land contracting, her Government recognized that the issue was difficult. Some additions had therefore been introduced into the amended Law on the protection of the rights and interests of women in that regard to ensure that arbitration by counties and the People's Governments was carried out in accordance with the law. Some collectives had deprived women of their rights in the past by majority vote, especially those who had married outside of the collective. A specific provision had therefore been made for Government intervention in such matters. His Government had reached its intended objectives. In Zhongshan in Guangdong Province, for example, some 80 per cent of such married women had resolved their land issues, and 11 per cent of the complaints had been partially resolved.

CEDAW/C/CHN/7-8 (2014) [China] 35. In order to obtain facts to inform the formulation of policies, efforts have been made to strengthen the work on gender-disaggregated statistics and the survey on the status of women. The Chinese Government attaches great importance to the work on sex-disaggregated statistics; it has made efforts to overcome the difficulties encountered in statistical work and constantly improve the national statistical system, expand the fields and contents of gender-disaggregated statistics, achieving many breakthroughs. In order to enhance understanding of the situation regarding gender equality and to provide an important basis for policy-making, the National Bureau of Statistics (NBS) has edited and released several publications on gender statistics, including Women and Men in Chinese Society, No. 4, published in 2007, and Statistics on the Status of Women and Children, an annual publication since 2008. In addition, the Chinese Government has set up a special evaluation system for the implementation of the Outline for the Development of Chinese Women, and has established statistical index for monitoring the key goals of the Outline.

CEDAW/C/SR.1251 (2014) [Committee] 21. Ms. Hayashi said that there continued to be a lack of statistics, for example on the incidence of rape, and there appeared to be a lack of transparency with regard to information connected to the rights of women.
CEDAW/C/SR.1251 (2014) [China] 24. Ms. Song Xiuyan (China) said the National Working Committee on Children and Women was responsible for preparing, implementing and monitoring the Programme for the Development of Chinese Women. The National Bureau of Statistics collected disaggregated data on each objective under the Programme and published an annual report which summarized the progress made towards gender equality. National and regional teams, comprised of Government officials and independent experts, also carried out unannounced inspections in order to evaluate the implementation of the Programme in both urban and rural areas of the country.
CEDAW/C/SR.1251 (2014) [China] 29. Mr. Chen Jialin (China) said that confidentiality and privacy legislation contained strict provisions regarding data collection. Data could only be made public if it was in the public interest and did not threaten State sovereignty or national security. Regulations regarding Government transparency had been adopted in 2010 in order to strengthen public access to national data and Government ministries that failed to comply with data publication standards could be held legally accountable.
CEDAW/C/SR.1251 (2014) [China] 30. Ms. Xiao Li (China) said that the Government had published data for each of the indicators under the Programme for the Development of Chinese Women. The National Bureau of Statistics had also established a statistics databank on women's development and had recently begun to collect disaggregated data on the number of women in employment
CEDAW/C/SR.1251 (2014) [Committee] 46. Ms. Jahan said that the lack of detailed information in the State party's report made it difficult for the Committee to assess the situation of trafficking in women and girls in China and the special administrative regions. She requested additional information on the root causes of human trafficking in the State party and the measures taken by the Government to address them. She also requested statistical data on the victims of human trafficking disaggregated by sex, age, ethnicity and nationality.
CEDAW/C/SR.1251 (2014) 51. Ms. Wang Ying (China) said that the anti-trafficking unit of the Ministry of Public Security had been set up in 2007 to coordinate efforts to combat human trafficking. A higher number of cases of trafficking in persons were recorded in certain regions of the country on account of the sophisticated and extensive trafficking networks established by traffickers. The number of cases of trafficking involving women and children continued to rise. The public security authorities used the Palermo Protocol to guide their activities to combat human trafficking and to provide the victims with adequate protection. A special databank on human trafficking had also been developed, which had allowed the public security authorities to track down around 2,000 children who had been trafficked a number of years before.
CRC/C/SR.299 (1996) [China] 2…As for the question whether disaggregated statistical data were collected, he said that such work was done by legislative bodies and non-governmental organizations; members of the State Council Committee also exchanged information. The task was complicated, however, by the country's size, the variation in

numbers of children in different regions and the varying statistical methods in use. It was therefore difficult to obtain reliable disaggregated data.

CRC/C/SR.299 (1996) [Committee] 28…What was needed was a comprehensive plan to classify data, review legislation and so on, as described in the Platform for Action of the Fourth World Conference on Women held in Beijing. All United Nations agencies had declared their readiness to help countries implement such measures.

CRC/C/SR.300 (1996)39. Mr. WU Jianmin (China) said that all children admitted to care centres could be registered and that his country's data collection system was reliable.

CRC/C/SR.300 (1996) [Committee] 40. The CHAIRPERSON said that she doubted whether a universal data collection system as described by Mr. Wu, was in fact reliable.

CRC/C/SR.300 (1996) [Committee] 41. Mr. HAMMARBERG reminded Mr. Wu Jianmin that Mr. Wu himself had acknowledged that the data collection system was not extremely accurate.

CRC/C/SR.300 (1996) [China]42. Mr. WU Jianmin (China) replied that all statistics were only relatively reliable, that the specific situation of the country in question had to be considered and that, given the circumstances, China had done its best. The data collection system would certainly improve as the country developed economically.

CRC/C/SR.1062 (1996) [China] 3. In response to the Committee's concluding observations on China's initial report, the Government had formulated the National Programme of Action for Child Development (2001-2010), which contained specific measures to improve children's health, education, legal protection and environment. A standardized system to monitor statistical data had been established, and monitoring and assessment agencies and a reporting and review mechanism were currently in place.

CRC/C/SR.1064 (2005) [Committee] 58. The reporting State should indicate whether it planned to conduct a study on cross-border trafficking and establish cooperation agreements with neighbouring countries. The data on the number of females abducted at the national level should be clarified. The State party should provide statistics on trafficking in children, disaggregated by gender, province and international border.

CRC/C/SR.1065 (2005) [Committee] 58. The Chairperson said that he was surprised to read in the report that children's welfare homes housed 50,000 children with disabilities, abandoned and orphaned taken together since other sources indicated that the problem was graver, with some 100,000 children abandoned each year. A recent study carried out in eight cities in southern China had revealed that between 30 and 50 per cent of abandoned children were healthy girls. He wondered whether the data provided by the State party reflected reality or whether a large number of orphans and children's homes were disregarded, even if the data on the number of domestic adoptions were accurate. Further information was required and the situation must be examined more closely, especially in remote rural areas that might have large traditional overcrowded children's homes with appalling living conditions.

CRC/C/SR.1833 (2013) [China] 6. Between 2009 and June 2013, 180,000 persons had been tried for child rights violations. Some trials had involved serious cases of human trafficking, which had been brought to light following a special anti-trafficking campaign. All sectors of society supported the cause. The Ministry of Public Security, for instance, had set up an antitrafficking microblogging site, which was followed by more than 5 million people and had made it possible to collect a great deal of data. At the same time, China had worked to improve its legal procedures applicable to minors, in particular by developing alternative sentencing to deprivation of liberty and focusing on education.

CRC/C/SR.1833 (2013) [Committee] 19. It would also be helpful if the delegation could indicate whether steps had been taken to improve disaggregated data collection, and whether data on infanticide and the abduction of children from ethnic minorities were still classified as State secrets in mainland China. The delegation should also indicate whether there were plans to establish, in each of the State party's three regions, independent human rights monitoring mechanisms with the authority to receive complaints from children.

CRC/C/SR.1834 (2013) [China] 2…Both the central Government and the local authorities carried out annual evaluations of programme implementation using over 30 quantifiable indicators, and the resulting statistics were used

in reports and integrated into a databank. In addition, major evaluations had been conducted in 2006 and 2011, under the direction of department heads.