

### 3 China, the Convention against Torture, and the Optional Protocol to the Convention against Torture: 1982–2002

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China's conduct as a taker in the drafting and adoption of the Convention against Torture (CAT or the Convention) and later as a constringer during the drafting of the Optional Protocol to the Convention against Torture (OPCAT or the Optional Protocol) illustrates the PRC's evolving posture toward the international human rights regime. The change from the more passive role of taker to an increasingly assertive one was largely the result of Beijing's experience in facing international opprobrium following the 1989 Tiananmen Square crackdown, which resulted in China's distaste for scrutiny of its record. This chapter shows how China benefited from the emergence in the late 1990s of a group of countries that resisted OPCAT and began jointly advancing positions in the drafting group affirming state sovereignty and the importance of each country's particular conditions, history, and traditions in the realization of human rights. Beijing's ability to work with this group and sign group statements helped obscure its resistance to OPCAT.

The Convention and the Optional Protocol are worthy of examination because they illuminate China's behavior in reference to what has been regarded as a peremptory norm involving harm to the person. In addition, they are important pillars of the international movement against torture that resulted from years of vigorous advocacy and prolonged negotiations. CAT, which was hailed as affirming that torture was "no longer acceptable in the eyes of the international community," bound state parties to implementation measures and led to the creation of a committee of experts responsible for reviewing state party compliance.<sup>1</sup> Created nearly two decades later, the Optional Protocol complemented CAT by establishing a body of independent experts who would conduct

<sup>1</sup> UN General Assembly, "93rd Plenary Meeting," December 11, 1984, UN Doc. A/39/PV.93, p. 11. For an analysis of CAT, see Andrew Byrnes, "The Committee against Torture," in *The United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (Oxford: Clarendon Press, 1992), 509–511.

inspection visits to places of detention.<sup>2</sup> Both instruments were created through processes that began with negotiations over a draft by working groups and culminated in adoption by the UN General Assembly.<sup>3</sup> The working groups, which comprised between twenty and thirty government representatives, operated on the basis of consensus, meaning that votes were rarely taken and the discussions were intended to reach broad agreement.<sup>4</sup> Following the working group negotiations, the draft was considered by a series of UN bodies wherein state delegations could offer support, propose changes, or oppose adoption. During the negotiation and adoption process, states in favor of the proposed instrument had to sometimes accept concessions that watered down elements of the original draft.

The first half of the chapter focuses on CAT and the second half on the Optional Protocol. Each section begins with an introduction to the Convention, including a description of the drafting and negotiation process. The section that follows documents China's behavior in the drafting groups and the UN bodies that adopted both treaties. The creation of CAT and OPCAT provides an excellent opportunity to examine the PRC's behavior in smaller drafting groups largely comprising state representatives as well as in a variety of UN bodies, such as the UN Commission on Human Rights (UNCHR) and the General Assembly. Because the PRC signed CAT (but not OPCAT), I briefly address PRC compliance under CAT to underscore its continued tepid acceptance of it.

### **The Convention against Torture: Origins, Drafting, and Adoption**

When the UN General Assembly adopted CAT in 1984, human rights activists and supportive states realized their goal of an international

<sup>2</sup> Malcolm Evans and Claudine Haenni-Dale, "Preventing Torture? The Development of the Optional Protocol to the UN Convention against Torture," *Human Rights Law Review* 4, no. 1 (2004), 20.

<sup>3</sup> J. Herman Burgers (Chairperson-Rapporteur of the Working Group, 1982–1984), interview by author, August 31, 2010, The Hague, Netherlands, and Evans and Haenni-Dale, "Preventing Torture?," 20.

<sup>4</sup> Evans and Haenni-Dale, "Preventing Torture?," 26; J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (London: Martinus Nijhoff Publishers, 1988), 26, and 32; and Burgers, interview. See also Association for the Prevention of Torture and the Inter-American Institute for Human Rights, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (San Jose/Geneva: Inter-American Institute of Human Rights and the Association for the Prevention of Torture, 2005), 52.

convention prohibiting torture.<sup>5</sup> Although the UN had adopted the hortatory Declaration on Torture in 1975, advocates campaigned for a binding instrument with provisions for implementation and monitoring. In support of this goal, in 1977 Sweden proposed that the UN General Assembly convene a working group under the Commission on Human Rights and put forward a draft. In 1978, the diplomats comprising the drafting or working group began meeting on an annual basis for approximately one week prior to the spring UNCHR meeting and made some headway during the first several years. However, numerous areas of dispute remained. The Soviet Union and a number of other countries, including Eastern Bloc nations and some African and Asian states, contested elements of the draft, including the definition of torture and the authority of the proposed Committee against Torture.<sup>6</sup> In 1984, despite ongoing disagreement, J. Herman Burgers, the Dutch chairperson, decided to move the draft forward to the UNCHR. He did so because he believed that the group had “reached the limits of what it could accomplish in trying to find consensus”<sup>7</sup> and unease was growing among supporters of the Convention that delaying the process further might put the entire instrument in jeopardy or result in a weakened Convention.<sup>8</sup>

As the draft Convention moved through a succession of UN bodies in 1984, a number of states resisted it and pressed for changes. The Soviet Union and several other Warsaw Pact countries expressed reservations about Article 19, which addressed the Committee’s authority to comment on state reports, and Article 20, which outlined the Committee’s

<sup>5</sup> Ann-Marie Bolin Pennegard, “Overview Over Human Rights—the Regime of the UN,” in *International Human Rights Monitoring Mechanisms: Essays in honor of Jakob Th. Moller*, eds., Gudmundur Alfredsson, Jonas Grimheden, Bertran G. Ramcharan, and Alfred de Zayas (The Hague: Martinus Nijhoff Publishers, 2001). For a discussion of advocacy efforts, see Matthew Lippman, “The Development and Drafting of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” *Boston College International and Comparative Law Review* 17, no. 2 (1994), 275–335; Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton, New Jersey: Princeton University Press, 2001); and Hilde Reiding, *The Netherlands and the Development of International Human Rights Instruments* (Antwerp: Intersentia, 2007).

<sup>6</sup> There was a need to reconcile a number of NGO- and state-sponsored drafts. Reiding, *The Netherlands and the Development of International Human Rights Instruments*, 79 and 83–84.

<sup>7</sup> UN Commission on Human Rights, 40th Session, “Summary Record of the 32nd meeting,” March 6, 1984, UN Doc. E/CN.4/1984/SR.32, paragraphs 62–65, and Burgers and Danelius, *The United Nations Convention against Torture*, 100.

<sup>8</sup> Reiding, *The Netherlands and the Development of International Human Rights Instruments*, 80–85.

ability to launch an inquiry.<sup>9</sup> Despite their ongoing concerns, these countries did not oppose the draft forward to the Commission on Human Rights, the Economic and Social Council (ECOSOC), and the Third Committee of the General Assembly, which consider these kinds of human rights matters before they are brought to the UN General Assembly. The naysayers did not mount any challenges in the UNCHR or ECOSOC, which adopted the Convention by consensus. However, in the Third Committee, where social, humanitarian, and cultural issues are addressed, the Soviet Union, several Eastern Bloc countries, and a number of African and Asian states persisted in voicing opposition to Articles 19 and 20.<sup>10</sup> The Soviet Union led a number of these countries in proposing amendments to the aforementioned articles, including restricting the Committee's ability to put forward prescriptive comments in response to state reports and not requiring state parties to allow the Committee to launch an inquiry following reports of systematic torture. In order to break the impasse, CAT supporters agreed to several concessions that restricted the Committee to offering only "general comments" in response to state reports and allowed states to opt out of the inquiry procedure.<sup>11</sup> Once agreement on these changes was reached, the UN Third Committee adopted the resolution by consensus and the meeting "broke in[to] spontaneous applause."<sup>12</sup> The compromises made in the Third Committee paved the way for UN member states to adopt CAT by consensus in the UN General Assembly.<sup>13</sup>

The Convention bound state parties to specific responsibilities to prevent and combat torture by taking "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>14</sup> The Convention also established the Committee against Torture, comprising ten experts elected by state parties and

<sup>9</sup> Burgers and Danelius, *The United Nations Convention against Torture*, 101.

<sup>10</sup> Burgers and Danelius, *The United Nations Convention against Torture*, 102–103.

<sup>11</sup> There were also minor changes made to the inquiry procedure, including emphasizing the importance of consultation and cooperation with the state party in the inquiry process. Reiding, *The Netherlands and the Development of International Human Rights Instruments*, 87–88. For the official record, see UN General Assembly, "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Third Committee," December 7, 1984, UN Doc. A/39/708, and UN General Assembly, "Summary Record of the 44th Meeting," November 19, 1984, UN Doc. A/C.3/39/SR.44, paragraphs 48–52, 56, and 60.

<sup>12</sup> Burgers and Danelius, *The United Nations Convention against Torture*, 106. The Soviet Union was particularly concerned that the Committee not be given the authority to determine noncompliance.

<sup>13</sup> *Ibid.* For the official record, see UN General Assembly, "93rd Plenary Meeting," December 10, 1984, UN Doc. A/39/PV.93.

<sup>14</sup> Article 2.

responsible for monitoring implementation of obligations, primarily by reviewing mandatory periodic state reporting and presiding over a public examination with state representatives.<sup>15</sup> Under Articles 21 and 22, states were given the option of allowing the Committee to consider interstate and individual complaints of torture.<sup>16</sup> As noted earlier, at the behest of a group of countries led by the Soviet Union, Article 20, which empowered the Committee to initiate an inquiry in response to reliable reports of systematic torture, was made into a voluntary article.<sup>17</sup>

### **China and the Convention against Torture**

The PRC delegation, which had become a member of the Commission on Human Rights only in 1982, joined the CAT drafting group that same year and continued to participate until the Convention was completed in 1984. The drafting group had been meeting annually since 1978 and had already made some headway by the time Chinese representatives began attending these sessions. Although they were in attendance, PRC diplomats were not active participants in the drafting or adoption process and maintained a low profile as they offered few statements in the drafting group and remained silent during the adoption process. The PRC appeared to be unfamiliar and cautious as it did not voice opinions on a number of contentious issues being debated, including issues that fellow communist countries were challenging. J. Herman Burgers, chair of the working group from 1982 to 1984, noted that “China did not play a very active role, either obstructionist or cooperative.”<sup>18</sup> Documentary sources, including the UN reports of the working group and a detailed account of the drafting process written by the two chairpersons of the working group, confirm this quiescent role.<sup>19</sup>

<sup>15</sup> Article 19.

<sup>16</sup> The reporting requirement and the consideration of individual and interstate complaints were similar to procedures in previous human rights treaties. The interstate procedure outlined in Article 21 is based on reciprocity.

<sup>17</sup> Article 28 allows a state party to declare that it does not recognize the Committee’s competence to undertake an inquiry as outlined in Article 20. This inquiry procedure, which can include an investigative visit if agreed to by the state party, had not been featured in previous human rights instruments.

<sup>18</sup> J. Herman Burgers (Chairperson-Rapporteur of the Working Group, 1982–84), email correspondence with author, April 8, 2010.

<sup>19</sup> UN General Assembly, “Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” March 5, 1982, UN Doc. E/CN.4/1982/L.40; UN General Assembly, “Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” February 28, 1983, UN Doc. E/CN.4/1983/L.2; and UN Economic and Social Council, “Report of the Working Group on a Draft Convention

Initially, Chinese diplomats attended the drafting group sessions without making any statements or voicing support for or disagreement with the issues being discussed.<sup>20</sup> It was not until 1984, the final year of the drafting group, that the Chinese representatives made several statements, such as supporting the inclusion of a list of situations under which torture might be likely to occur, with specific reference to apartheid, racial discrimination, and genocide, which were human rights issues that already aligned with the PRC's existing ideas. Specifically, the PRC delegate stated that "although he agreed to the final text in a spirit of compromise, he would have preferred the listing of examples in paragraph 2, such as a state policy of apartheid, racial discrimination or genocide."<sup>21</sup> The PRC likely raised these points because apartheid, racial discrimination, and genocide were issues that resonated with the developing world. The inclusion of this proposed list would not have strengthened the Convention and Beijing's position appeared to be a maneuver to make common cause with the developing world. It was ultimately not accepted in the final text.

More significantly, at the 1984 session, the Chinese delegation opposed the language on universal jurisdiction.<sup>22</sup> Human rights scholar Jack Donnelly explains that universal jurisdiction meant that

State Parties are required to prosecute alleged torturers who are their nationals, who tortured victims who are their nationals, who committed torture in their territory, or who simply are found in their territory and then are not extradited to a State that has established criminal jurisdiction over the offense. And they may hold any torturer pending further proceedings, whatever the circumstances surrounding the offense.<sup>23</sup>

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," February 20, 1984, UN Doc. E/CN.4/1984/L.2. Because some of the UN reporting does not refer to country delegations by name, interviews and secondary literature, including a monograph by the two chairpersons of the drafting group, were used to supplement these records. As chairpersons of the working group, the authors' description of the drafting process could be considered a firsthand account.

<sup>20</sup> For the 1982 session, see the UN General Assembly, "Report of the Working Group on the Draft Convention against Torture," March 5, 1982, UN Doc. E/CN.4/1982/L.40, and Burgers and Danelius, *The United Nations Convention against Torture*, 77–84. For the 1983 discussion see UN General Assembly, "Report of the Working Group on the Draft Convention against Torture," February 28, 1983, UN Doc. E/CN.4/1983/L.2, and Burgers and Danelius, *The United Nations Convention against Torture*, 84–91.

<sup>21</sup> UN General Assembly, "Report of the Working Group on a Draft Convention against Torture," February 20, 1984, UN Doc. E/CN.4/1984/L.2, paragraph 25.

<sup>22</sup> UN General Assembly, "Report of the Working Group on a Draft Convention against Torture," February 20, 1984, UN Doc. E/CN.4/1984/L.2, paragraph 25, and Burgers and Danelius, *The United Nations Convention against Torture*, 91–99.

<sup>23</sup> Jack Donnelly, "The Emerging International Regime against Torture," *Netherlands International Law Review* 33, no. 1 (Spring 1986), 4.

Proponents of CAT argued that this clause was essential in order to give the Convention implementation powers and ensure that there would be no “safe havens” for torturers and that those who commit torture would be held accountable.<sup>24</sup> In contrast to its more flexible position in favor of an illustrative list of situations in which torture might occur, the Chinese delegation was firmer in its opposition to universal jurisdiction. The PRC representative stated that “it considered the current formulation of the draft articles concerned [on universal jurisdiction] not entirely satisfactory.”<sup>25</sup> Further, according to an account by J. Herman Burgers and Hans Danelius, who served as the chairpersons of the working group, at the 1984 session “all delegations except the Chinese delegation were prepared to accept the current text.”<sup>26</sup> It was uncharacteristic for the novice Chinese delegation to take such a divisive stand, especially when it was the only holdout. PRC diplomats were finally persuaded to accept this clause after informal consultations with the chairperson, which led to their realization that they were the only state disputing this language.<sup>27</sup> Despite China’s concern with this article, it yielded in order to avoid being isolated or hindering progress.

As the draft moved through the UN adoption process, the PRC maintained a low profile, neither blocking nor explicitly supporting it. During debate in the Third Committee when key compromises were negotiated, China’s representatives did not express their positions on a number of controversial and significant issues.<sup>28</sup> When the Soviet Union led a group of countries in successfully pushing to make the inquiry function optional and restricting the kinds of comments the Committee against Torture could make in response to state reports, China remained on the sidelines of these critical discussions.

On balance, the PRC’s posture in the drafting and adoption of CAT was that of a taker. Aside from the single instance when it resisted the universal jurisdiction clause and its suggestion to include a reference to

<sup>24</sup> See UN General Assembly, “Report on the Working Group on the Draft Convention against Torture,” March 5, 1982, UN Doc. E/CN.C/1982/L.40, paragraph 22.

<sup>25</sup> UN General Assembly, “Report of the Working Group on a Draft Convention against Torture,” February 20, 1984, UN Doc. E/CN.4/1984/L.2, paragraph 28.

<sup>26</sup> Burgers and Danelius, *The United Nations Convention against Torture*, 94–95. See also UN Economic and Social Council, “Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” UN Doc. E/CN.4/L.2, paragraphs 26–36.

<sup>27</sup> Burgers, interview.

<sup>28</sup> Burgers and Danelius, *The United Nations Convention against Torture*, 101–106; UN General Assembly Third Committee, “Summary Record of the 44th meeting of the Third Committee,” November 19, 1984, UN Doc. A/C.3/39/SR.44; and UN General Assembly, “Record of the 93rd Meeting of the 39th Session of the General Assembly,” December 10, 1984, UN Doc. A/39/PV.93.

apartheid, racial discrimination, and genocide, Beijing generally participated without seeking to shape the outcome. Even when PRC representatives expressed views against universal jurisdiction, as soon as it became clear that they were obstructing progress, they retreated and allowed the draft to move forward. This guarded acceptance of the Convention continued after CAT became a reality and the PRC became a state party.

The PRC further demonstrated its willingness to accept the regime and act as a taker when it signed CAT in 1986 and then ratified it in October 1988. However, despite its ratification, there were also limits to Beijing's acceptance of this treaty and it exempted itself from key optional provisions that allowed the Committee to launch an inquiry, receive individual complaints, and consider complaints from other states. It is one of only fourteen state parties that have opted out of Article 20, which allows the Committee to initiate a confidential inquiry in response to reports of systematic use of torture. This put the PRC in the company of Afghanistan, Equatorial Guinea, Eritrea, Israel, Fiji, Kuwait, Laos, Mauritania, Pakistan, Saudi Arabia, Syria, the United Arab Emirates, and Vietnam in refusing to grant the Committee this authority.<sup>29</sup> Further, the Chinese government did not enable the other optional clauses as it did not recognize the Committee's authority outlined in Articles 21 and 22, which enable the Committee to receive interstate and individual complaints.<sup>30</sup> The only procedure that it bound itself to was the reporting requirement, which was the one mandatory provision for state parties.

The PRC's degree of compliance with reporting and its conduct during its reviews show that even as a taker, it has exhibited some resistance. Even though it has submitted reports, it has often been late and it has at times been resistant to providing critical data. For example, even though the reporting period is four years, there was a seven-year gap from

<sup>29</sup> This list is accurate as of October 9, 2017. "Committee against Torture, Confidential inquiries under article 20 of the Convention against Torture," UN Office of the High Commissioner for Human Rights, [www.ohchr.org/EN/HRBodies/CAT/Pages/InquiryProcedure.aspx](http://www.ohchr.org/EN/HRBodies/CAT/Pages/InquiryProcedure.aspx), accessed [indicators.ohchr.org](http://indicators.ohchr.org), accessed October 9, 2017.

<sup>30</sup> One hundred states have not accepted the Committee's competence to receive interstate communications outlined in Article 21. Ninety-six other states have not accepted the Committee's competence to receive communications from individuals as outlined in Article 22. As of June 2017, 162 countries had signed, ratified, or acceded to the Convention. UN General Assembly, "Report of the Committee against Torture, 51st–52nd sessions," May 2014, UN Doc. A/69/44, Annex III, and "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en), accessed July 30, 2018.

April 1999 until February 2006, when China finally submitted its third report, which was three years late.<sup>31</sup> Similarly, after its February 2006 report, it did not submit another report until June 2013.<sup>32</sup> Scholar Ann Kent described the PRC delegation's response to its first appearance before the Committee against Torture in the early 1990s by noting in particular that

[t]he Chinese representatives were reported to have been visibly upset by Committee members' reaction to its report, which was subsequently privately described as 'completely inadequate.' They were undoubtedly aware that the request to provide a supplementary report was not a regular occurrence. Their general reaction was astonishment that ten Committee members could question the condition of 1.2 billion Chinese citizens.<sup>33</sup>

Along these lines, PRC officials displayed a "basic failure to understand and accept the norms, principles, rules, and obligations flowing from its accession" and they asked for explanations on procedures and appeared baffled by the Committee's response to its first report.<sup>34</sup> Moreover, the PRC's reviews have involved tough questions and incomplete PRC answers and follow-up, which further indicate that the PRC has not fully embraced this Convention.

More recently and in a similar vein, the PRC's 2015 review was characterized by sharp questioning from UN experts, nonresponsive answers from PRC officials, and lack of follow-up on previous recommendations.<sup>35</sup> For example, Committee member Felice Gaer questioned CCP (Chinese Communist Party) government officials about reported abuses, such as the refoulement of North Koreans and the Hong Kong police's use of force in response to peaceful demonstrations. She also expressed concern about the PRC government's incomplete responses to the Committee's questions and reports that PRC authorities prevented

<sup>31</sup> "Reporting Status for China," UN Office of the High Commissioner for Human Rights, [tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHN&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHN&Lang=EN), accessed October 9, 2017.

<sup>32</sup> *Ibid.*

<sup>33</sup> Kent, *China, the United Nations, and Human Rights*, 95–97. The official UN reporting, particularly the comments and questions from the Committee, demonstrated the inadequacy of China's reporting. See United Nations, "Committee against Torture, Fourth Session, Summary Record of the 51st Meeting," May 4, 1990, UN doc. CAT/C/SR.51, paragraphs 36–52. See also UN General Assembly, "Report of the Committee against Torture, 47th–48th sessions," June 2012, UN Doc. A/67/44.

<sup>34</sup> Kent, *China, the United Nations and Human Rights*, 96 and 105.

<sup>35</sup> See Nick Cummings-Bruce, "China Faces Sharp Questioning by U.N. Panel on Torture," *New York Times*, November 17, 2015, [www.nytimes.com/2015/11/18/world/asia/china-faces-sharp-questioning-by-un-panel-on-torture.html?\\_r=0](http://www.nytimes.com/2015/11/18/world/asia/china-faces-sharp-questioning-by-un-panel-on-torture.html?_r=0), accessed June 2, 2017, and UN Committee against Torture, "Concluding Observations on the fifth periodic report of China," February 3, 2016, UN. Doc CAT/C/CHN/C/5.

seven Chinese citizens from departing the country in order to attend the CAT review in Geneva.<sup>36</sup> Reflecting on this behavior, a Committee member noted:

[W]hen we then look at the substance in the constructive dialogue, it was not as constructive as the start might have indicated ... Because ... a lot of replies [from the Chinese government] were simply not given. A lot of replies to the questions provided were either evaded or they were denied, referring to state secrets. And we had a large number of questions that in terms of statistics—in terms of complaints, executions, and investigations—that were never replied to, or at least not replied in a satisfactory manner.<sup>37</sup>

More importantly, China's substantive conformity with CAT remains problematic. While the Chinese government has taken some steps to combat torture, including making torture illegal under domestic law, providing legal means to seek compensation in instances of state use of torture, and changing criminal laws to exclude evidence obtained through torture, implementation and enforcement are weak, and serious problems remain. Consequently, following a 2005 investigative visit, the UN Special Rapporteur on Torture found that "[t]hough [torture is] on the decline, particularly in urban areas ... torture remains widespread in China."<sup>38</sup> In this vein, scholar Katie Lee asserted that the PRC's ratification of CAT "had some impact on China's de jure compliance but very little, if any, direct impact on de facto compliance."<sup>39</sup> Further, Chinese officials have displayed resistance to normative pressure to comply with the Convention. For example, at the November 2015 review before CAT, Chinese officials not only admitted to the use of interrogation chairs but defended this practice. As a CAT member noted:

<sup>36</sup> United Nations Committee against Torture, "Fifty-sixth session, Summary record of the 1368th meeting," November 20, 2015, UN Doc. CAT/S/SR.1368, paragraphs 59, 63, 64, 89, and 92.

<sup>37</sup> Interview with CAT expert member by author, October 5, 2016, via Skype.

<sup>38</sup> UN Commission on Human Rights, "Report of the Special Rapporteur on Torture, Manfred Nowak, Mission to China," March 10, 2006, UN Doc. E/CN.4/2006/6/Add.6, p. 2. The Rapporteur also noted the necessity of further steps, including broadening the definition of torture under Chinese law to comply with international standards, establishing an independent body to investigate complaints of torture, and making torture by law enforcement officials a specific criminal act under domestic law. He also called for procedural safeguards and noted that "[t]he situation is aggravated by lack of self-generating and/or self-governing social and political institutions including a free and investigatory press, citizen-based independent human rights monitoring organizations, independent commissions visiting places of detention, and independent, fair and accessible courts and prosecutors."

<sup>39</sup> Katie Lee, "China and the International Covenant on Civil and Political Rights: Prospects and Challenges," *Chinese Journal of International Law* 6, no. 2 (2007), 455–456.

[T]he interrogation chairs are present in all police stations where people are being interrogated when they are suspected of a crime. And they are fixated in hands and feet, and they can sit there with no time limitation ... And apparently the [PRC] delegation—I was surprised—they were not even ashamed about it. They acknowledged that this interrogation chair existed, and their argument, which was even more surprising, was that it is to prevent escape—which is ridiculous, from a police station—or suicide—which is also ridiculous in a situation where you have a number of police officers or interrogators interrogating a suspect ... I would have thought that any government would have been ashamed or tried to deny it, or say, “Well, we’ll do something about it, because obviously it’s in conflict with the convention, etc.” But they didn’t.<sup>40</sup>

Thus, despite some efforts toward procedural compliance, such as submitting reports and participating in an examination before the Committee against Torture, a number of PRC government policies and practices contravene the Convention.

Moreover, even though the PRC has not renounced its ratification, it has been resistant to the treaty body’s authority. Beginning in the 1990s Beijing voiced positions that the reviews by treaty bodies, including CAT, should be limited to “an exchange of views on an equal footing.”<sup>41</sup> PRC officials portrayed treaty bodies as advisory bodies rather than being authorized to monitor state compliance. Thus, Beijing’s taker posture could be shifting to one that is defiant toward the regime’s authority. As will be shown in the section that follows, Chinese officials adopted a much more assertive and consequential role when UN member states began discussions over OPCAT in 1992.

### **The Optional Protocol to the Convention against Torture: Origins, Drafting, and Adoption**

The genesis of the Optional Protocol arises from the work of Jean-Jacques Gautier, a Swiss banker and founder of the Swiss Committee against Torture, a nongovernmental organization. During the mid-1970s, in the midst of the discussions over CAT, Gautier began calling for the creation of an international body to conduct preventive visits, which was largely based on the model of the International Committee of the Red Cross, which was premised on opening places of detention to inspection visits.<sup>42</sup> At this time CAT was not yet a reality and as support for this idea grew, several competing approaches were proposed,

<sup>40</sup> Interview with CAT expert member by author, October 5, 2016, via Skype.

<sup>41</sup> Quoted in Kinzelbach, “Will China’s Rise Lead to a New Normative Order?” 316.

<sup>42</sup> Evans and Haenni-Dale. “Preventing Torture?” 22 and 25. Ann-Marie Bolin Pennegard, “An Optional Protocol, Based on Prevention and Cooperation,” in *An End*

including a draft based on Gautier's vision.<sup>43</sup> However, other human rights activists were concerned that including such an ambitious system of visits might complicate and impede passage of CAT. They felt that achieving a convention that first outlawed torture, provided for specific implementation measures, and established a monitoring system was a critical first step toward combating torture. Thus, other activists convinced Gautier to withdraw his draft with the understanding that a system of preventive visits would form the basis of a separate and complementary Optional Protocol after the passage of CAT was secured.<sup>44</sup> Finally, in 1991, based on a draft proposed by Costa Rica, the idea for an Optional Protocol was reintroduced at the UNCHR and a working group convened the following year.

The drafting process involved ten years of prolonged negotiations that spanned 1992 until 2002 and was marked by discord, conflict, and resistance efforts by the "coalition of the unwilling."<sup>45</sup> As with the CAT drafting group, the OPCAT working group usually met for a week or two prior to the annual UNCHR session. The Costa Rican draft, which formed the basis of discussions, proposed to create a Subcommittee that would have a "near unrestricted right of access to places of, and persons in, detention."<sup>46</sup> This novel approach provoked discomfort among some nations, which had misgivings about an international entity with far-reaching visiting authority and about allowing such extensive access.<sup>47</sup> Differences over the proposed Optional Protocol fueled "mounting levels of polarization between States, who supported the establishment of a solid preventive mechanism for visits and those resolved to either weaken its scope or to block it all together" and the drafting process dragged on as nations struggled to reach consensus.<sup>48</sup> In 1999, at the seventh annual session, the protracted negotiations caused the chairperson to stress to the

*to Torture: Strategies for its Eradication*, ed. Bertil Duner (London: Zed Books, 1998), 40–49.

<sup>43</sup> Clark, *Diplomacy of Conscience*, 67.

<sup>44</sup> Pennegard, "An Optional Protocol, Based on Prevention and Cooperation," 41–43.

<sup>45</sup> Claudine Haenni-Dale (APT Secretary General, 1995–2001), interview by author, June 2, 2010, Geneva, Switzerland. Haenni-Dale was a key NGO participant and later advisor to Judge Odio-Benito.

<sup>46</sup> Association for the Prevention of Torture and the Inter-American Institute for Human Rights, *Optional Protocol*, 44.

<sup>47</sup> Haenni-Dale, interview, and Pennegard, interview.

<sup>48</sup> Association on the Prevention of Torture and the Inter-American Institute for Human Rights, *Optional Protocol*, 44 and 52. Ann-Marie Bolin Pennegard (chairperson of the informal working group, 1994–1999), interview by author, August 31, 2010, Brussels, Belgium. From 1994 to 1999, in an effort to achieve greater progress, the working group also convened an informal group under the leadership of Pennegard. See also Evans and Haenni-Dale, "Preventing Torture?" 26–27.

diplomats in the working group “the urgent need to conclude the work on the draft optional protocol without further delay” and the representative for the Association for the Prevention of Torture (APT), a nongovernmental organization, to lament that the “enormous mistrust among the delegations had killed all spirit of cooperation as well as the expectations of the international community.”<sup>49</sup> After seven years, OPCAT supporters were “frustrated that the negotiations had stalled.”<sup>50</sup>

It was also at the seventh session, in 1999, that Cuba, Algeria, Egypt, Saudi Arabia, Sudan, Syria, and China initiated more explicit cooperation in the form of joint statements and written submissions as a group.<sup>51</sup> As will be detailed in the following section, the thrust of these interventions emphasized state sovereignty, including calling for language affirming domestic legislation; the import of cultural, national, and other domestic conditions; and limitations on the proposed Subcommittee’s access and authority. A Western diplomat speculated that these countries may have resorted to strengthened cooperation because “things were not moving in their direction, so in order to influence the outcome they had to cooperate more openly against some aspects” of OPCAT.<sup>52</sup> Another Western European diplomat described this group of countries as “the usual suspects” who seek to hold back the strengthening of the regime.<sup>53</sup> In a similar vein, another diplomat participant described these countries as “a group of spoilers who simply didn’t want OPCAT” to become a reality.<sup>54</sup> In contrast, a former diplomat who represented a country in the group of resisters defended the

<sup>49</sup> For the chairperson’s remarks, see UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment on its Seventh Session,” March 26, 1999, UN Doc. E/CN.4/1999/59, paragraph 22. For the APT’s statement, see UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment on its Seventh Session,” March 26, 1999, UN Doc. E/CN.4/1999/59, paragraph 107.

<sup>50</sup> Cecelia Jimenez (former program officer for the Association for the Prevention of Torture and participant in the Working Group, 1998–2002) interview by author, June 2, 2010, Geneva, Switzerland.

<sup>51</sup> For examples of this group’s position, see UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 2, 1999, E/CN.4/2000/58, paragraph 63. Costa Rican diplomat Christian Guillermet speculated that the joint written submission requiring state consent and limiting the places the Subcommittee could visit was drafted by Saudi Arabia. Christian Guillermet (Costa Rican diplomat, who participated in the working group, 1998–2002), interview by author, June 8, 2010, Geneva, Switzerland.

<sup>52</sup> Pennegard, interview.

<sup>53</sup> Interview with Western European diplomat, June 28, 2011, New York.

<sup>54</sup> Interview with Western European diplomat, July 26, 2010, Copenhagen, Denmark.

actions of these countries and explained that these nations had an “alternate vision” from the “myopic” view advanced by the supporters of OPCAT, which he noted were primarily Western countries.<sup>55</sup> The former diplomat elaborated that this informal group in OPCAT was the precursor to the Like-Minded Group, a more formal group that was active in the Commission on Human Rights.<sup>56</sup> The issues this group of countries first began championing in OPCAT were similar to the themes that the Like-Minded Group rallied around.

As the drafting process entered its ninth year, some proponents of the Optional Protocol had become concerned that further sessions would be fruitless and that the proposed instrument might not be adopted.<sup>57</sup> The discussions were mired by the same intractable differences, and discord permeated the drafting group’s sessions. At this juncture, Mexico disrupted negotiations by introducing a new draft that took a different approach. Mexico’s draft gave primacy to a national-level body and a diminished role for the international Subcommittee, which was relegated to providing support and supervision to the national-level entity. In a nod to the original version, the Mexican draft gave states the option of allowing the international Subcommittee to conduct visits. This dramatically different proposal disarmed some of the resistant countries who had not wanted to see a strong international entity, yet it alarmed a number of the supporters of the original draft, including Sweden, which on behalf of the European Union offered a counterdraft that elevated the importance of the proposed international Subcommittee and granted a more limited role to national counterparts. At this point, the negotiations were “on a knife-edge” and “some [participants] believed that no further progress was possible and the session ended in considerable disarray.”<sup>58</sup>

With the goal of producing a consensus document, at the end of the tenth session Judge Odio Benito, who had served as chairperson for the first session and had resumed this role at the eighth session, put forward a compromise draft. This version blended national and international approaches by establishing an international body, which took the lead in conducting inspection visits, complemented by independent monitoring by national bodies.<sup>59</sup> At around this time, some of the proponents of

<sup>55</sup> Interview of former Middle Eastern diplomat, May 25, 2011, Geneva, Switzerland.

<sup>56</sup> Interview of former Middle Eastern diplomat, May 25, 2011, Geneva, Switzerland.

<sup>57</sup> Association for the Prevention of Torture and the Inter-American Institute for Human Rights, *Optional Protocol*, 49.

<sup>58</sup> Evans and Haenni-Dale, “Preventing Torture?” 27.

<sup>59</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” February 20, 2002, UN Doc. E/CN.4/2002/78, paragraph

Table 3.1 *UN voting on the Optional Protocol to the Convention against Torture*<sup>a</sup>

|                             | For | Against | Abstain |
|-----------------------------|-----|---------|---------|
| Commission on Human Rights  | 29  | 10      | 14      |
| Economic and Social Council | 35  | 8       | 10      |
| Third Committee             | 104 | 8       | 37      |
| General Assembly            | 127 | 4       | 42      |

<sup>a</sup> For voting in the UNCHR, see UN Commission on Human Rights, “Report of the 58<sup>th</sup> Session, Supplement No. 3,” March 18–April 26, 2002, UN Doc. E/2002/23, paragraph 335. For ECOSOC voting, see UN Economic and Social Council, “Provisional Summary Record of the 38<sup>th</sup> Meeting,” November 12, 2002, UN Doc. E/2002/SR.38, paragraph 89. For the Third Committee voting record, see UN General Assembly, “Human rights questions: implementation of human rights instruments,” October 28, 2002, UN Doc. A/C.3/57/L.30. For voting in the General Assembly see UN General Assembly, “Resolution Adopted by the General Assembly, Resolution 57/199 Optional Protocol to the Convention against Torture,” January 9, 2003, A/RES/57/199.

OPCAT also acknowledged that there might be an important role for a national mechanism since an international body lacked the capacity and resources to conduct a sufficient number of worldwide visits per year with the result that some countries might go for long periods of time without a visit.<sup>60</sup> Unlike the Mexican draft, Odio Benito’s draft contained no opt-in clause for visits by the international body and acceptance of both international and national mechanisms was compulsory. Despite continued resistance from some countries, Odio Benito believed that “sufficient ideas and proposals had been put on the table over the past ten years” and pressed to move the draft to the Commission.<sup>61</sup>

In 2002, as the draft made its way through the UN, including the UNCHR, the ECOSOC, the Third Committee, and the General Assembly, the countries most opposed to it attempted to block adoption, forcing a vote rather than the UN’s preferred method of adoption by consensus. Table 3.1 captures the voting outcomes. Aside from Cuba, China, Algeria, Egypt, Syria, and Sudan, the United States also sought to prevent passage and explained that “certain specific provisions conflicted in part with the United States Constitution ...” and “in view of the country’s federal system of government, the regime established by the

78. State parties were required to allow international visits and also establish or maintain an independent national body that would also conduct visits. Evans and Haenni-Dale, “Preventing Torture?” 27–28, and Haenni-Dale, interview.

<sup>60</sup> Haenni-Dale, interview, and Jimenez, interview. <sup>61</sup> Haenni-Dale, interview.

draft would be considered overly intrusive.”<sup>62</sup> At the April 2002 session of the UNCHR, Cuba led a number of countries seeking to squelch the Optional Protocol by calling for continued deliberations and introducing a no-action motion.<sup>63</sup> Following prolonged debate, this effort failed by a vote of twenty-eight against, twenty-one in favor, and four abstaining, and the draft survived.<sup>64</sup> The next hurdle was the ECOSOC where in July 2002 the United States submitted an amendment to reopen discussions on the draft, which was rejected with twenty-nine votes against, fifteen in favor, and eight abstaining.<sup>65</sup> After this hostile amendment was defeated, ECOSOC member states voted in favor of moving the Optional Protocol forward with thirty-five countries voting in favor, eight against, and ten abstaining.<sup>66</sup> In the Third Committee, Japan’s effort to delay the vote for twenty-four hours failed with eighty-five countries against, twelve in favor, and forty-three abstaining.<sup>67</sup> The United States again attempted to stymie passage by introducing an amendment that OPCAT expenses be funded exclusively by the contributions of state parties, which failed as ninety-eight states voted in opposition, eleven voted in support, and thirty-seven abstained.<sup>68</sup> Following this, supporters of OPCAT were able to garner sufficient votes for passage by the Third Committee.<sup>69</sup> Finally, in December 2002 the proponents of the Optional Protocol prevailed and the General Assembly voted to adopt OPCAT.<sup>70</sup> Given that the UN prefers to adopt human rights instruments by consensus, which is thought to convey broad international legitimacy and widespread acceptance, the repeated votes and tense debate indicate

<sup>62</sup> UN Economic and Social Council, “Provisional Summary Record of the 38<sup>th</sup> Meeting,” November 12, 2002, UN Doc. E/2002/SR.38, paragraph 87.

<sup>63</sup> UN Commission of Human Rights, “Report of the 58<sup>th</sup> Session, Supplement No. 3,” March 18–April 26, 2002, UN Doc. E/2002/23, paragraph 335. Cuba withdrew its amendment to continue the working group and then introduced the no-action motion.

<sup>64</sup> Cuba’s no-action motion failed by twenty-eight against, twenty-one for, and four abstentions. China, Cuba, Japan, Libya, Malaysia, Nigeria, South Korea, Saudi Arabia, Sudan, and Syria voted against OPCAT. UN Commission on Human Rights, “Report of the 58<sup>th</sup> Session, Supplement No. 3,” March 18–April 26, 2002, E/2002/23, paragraph 339. See also Association for the Prevention of Torture and Inter-American Institute for Human Rights, *Optional Protocol*, 54.

<sup>65</sup> Association for the Prevention of Torture, *Optional Protocol*, 55.

<sup>66</sup> UN Economic and Social Council, “Summary Record of the 38<sup>th</sup> Meeting, November 2002,” UN Doc. E/2002/SR.38, paragraphs 68–70 and 89.

<sup>67</sup> Association for the Prevention of Torture and Inter-American Institute for Human Rights, *Optional Protocol to the Convention against Torture*, 55.

<sup>68</sup> *Ibid.*, 56.

<sup>69</sup> UN General Assembly Third Committee, “Report of the 57<sup>th</sup> Session of the Third Committee of the General Assembly,” October 28, 2002, UN Doc. A/C.3/57/L.30.

<sup>70</sup> UN General Assembly, Resolution 57/199, “Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 18, 2002, UN Doc. A/RES/57/199.

ongoing resistance to OPCAT. Even though the voting was contentious, OPCAT proponents felt that adoption by vote was preferable to shelving the draft.

When the UN General Assembly adopted OPCAT, it established a system of preventive on-site inspections by national and international bodies. The international body – the Subcommittee on the Prevention of Torture (SPT or Subcommittee) – was given the authority to visit “any place under [the state party’s] jurisdiction and control, where persons are or may be deprived of their liberty.”<sup>71</sup> The ten members of the SPT were to be elected by states and were to serve in their personal capacities, not as state representatives. The Optional Protocol required the SPT to determine visits by lot and produce confidential postvisit reports that addressed areas for improvement. This report was intended primarily for the state in question with a focus on specific steps that could be taken to prevent or halt torture, and would only be made public with the consent of the Committee against Torture, if they felt that this step was necessary in order to elicit state cooperation.<sup>72</sup> OPCAT also mandated that state parties maintain, designate, or establish an independent national-level entity that conducts inspection visits, makes recommendations, and produces an annual report that states are to publish and disseminate.<sup>73</sup>

### **China and the Optional Protocol to the Convention against Torture**

In contrast to its muted conduct vis-à-vis CAT, China adopted the more consequential role of constrainer during the drafting and adoption of OPCAT. PRC representatives attended the annual working group sessions every year, where they proposed specific text and voiced positions on a number of controversial issues. Although the substance of its contributions sought to dilute the draft and other participants recalled Beijing’s attempts to thwart progress, the PRC sought to obscure its resistance and therefore acted with restraint. These efforts paid off as other participants described China as not being among the more uncooperative states and other participants characterized the PRC delegation as “not being excessively vocal,” “somewhat low-key,”<sup>74</sup> “active, yet not

<sup>71</sup> Article 4.

<sup>72</sup> Evans and Haenni-Dale, “Preventing Torture?” 46. Under Article 1, if a state party refuses to cooperate with the Subcommittee or take steps to make improvements, the Subcommittee can request that the CAT make a public statement or publish the Subcommittee’s report. Under Articles 11 and 13, although the SPT may propose a follow-up visit, the state party is not obligated to accept such a visit.

<sup>73</sup> Articles 11, 17, 19, 20, and 23. <sup>74</sup> Pennegard, interview.

always taking the floor,”<sup>75</sup> “not a major actor,”<sup>76</sup> “cautious,” “active, yet not taking the lead,” “not necessarily obstructive,”<sup>77</sup> and “not excessively vocal.”<sup>78</sup> Along these lines, a Western European diplomat noted that although China was against OPCAT “they were certainly not the most active, even in the negative sense. They took the floor at times but were never in the lead against something but rather supported the ideas of other resistant countries.”<sup>79</sup> In a similar vein, an NGO participant noted that although China “may have been in on some of the blocking efforts,” it did not appear to be “spearheading the group” or “to be leading the strategy of this group of countries.”<sup>80</sup> Judge Odio Benito, the chairperson responsible for the final draft, described China as “more passive” and “always maintain[ing] some sort of low profile.”<sup>81</sup>

Even as the substance of its contributions sought to roll back the original vision for OPCAT, the PRC employed a number of strategies to limit damage to its image. First, instead of making lone statements or spearheading opposition, when possible it signed onto statements made by a group of like-minded countries or referenced the position of other countries. As noted earlier, beginning in 1999, during the seventh session, an informal group of countries comprising Cuba, Algeria, Egypt, Saudi Arabia, Sudan, Syria, and China coalesced, and began to issue joint statements.<sup>82</sup> After this group’s emergence, the PRC preferred to affiliate with the group’s stance rather than make its own national-level statements, allowing Chinese diplomats to adopt a more modest profile. Second, when possible, the PRC let other countries take vocal, prominent positions. Beijing benefited from the presence and activism of other countries, such as Cuba, Algeria, and Egypt, which shared similar views and were more strident in their objections.<sup>83</sup> As an NGO participant

<sup>75</sup> Haenni-Dale noted that China did not try to derail the discussions.

<sup>76</sup> Guillermet, interview. He noted that while the PRC was not the most difficult countries, during the later sessions China became more active, expressed disagreement, and urged that torture efforts focus more on CAT, such as relying on the state reporting procedure.

<sup>77</sup> Jimenez, interview.

<sup>78</sup> Interview with Western European diplomat, July 26, 2010, Copenhagen, Denmark.

<sup>79</sup> Interview with Western European diplomat, June 28, 2011, New York.

<sup>80</sup> Haenni-Dale, interview.

<sup>81</sup> Odio Benito, correspondence with author. On a similar note, Debra Long, who served as the APT representative to the OPCAT negotiations, described China as “not that engaged in the negotiations.” Debra Long (APT representative and participant from 2000 to 2002), email correspondence with author, May 11, 2011.

<sup>82</sup> Haenni-Dale, interview.

<sup>83</sup> Pennegard noted that Mexico, Cuba, Nigeria, and Egypt were obstructionist. Pennegard, interview. Jimenez cited Algeria, Cuba, and Egypt and Saudi Arabia as uncooperative. Jimenez, interview. Similarly, Long noted that “other states were more vocal in expressing their disapproval.” Long, correspondence. None of these interview subjects mentioned China as being among the most difficult delegations.

opined, “While China was not generally obstructive and maintained a low profile, this is relative because there were other countries that were definitely much more difficult and obstructive.”<sup>84</sup> Another participant also noted that “China was not in a position that it had to block [because] there were other countries doing it for them.”<sup>85</sup> While there is some speculation that Beijing may have tried to “influence things from behind,” there is no evidence that it organized or led the group’s efforts or that Chinese diplomats had to work to persuade others to adopt these positions.<sup>86</sup> Rather, there appears to have been a meeting of the minds and these countries already had misgivings about the proposed OPCAT. Moreover, their emergence as the Like-Minded Group signifies that aside from skepticism toward OPCAT, they held broadly similar views. The PRC’s third strategy was to act cautiously during the adoption process, especially in UN bodies with larger audiences. Thus, although the PRC voiced misgivings about OPCAT and offered acerbic statements in the UNCHR, it did not sponsor formal action, such as no-action motions or amendments, to derail the Optional Protocol. Moreover, once action moved to larger UN bodies, including the Third Committee and the General Assembly, it adopted a lower profile and no longer voiced opposition.

As will be detailed, despite Beijing’s measured disposition, the substance of its contributions sought to dilute the original draft. Throughout the drafting sessions, PRC representatives expressed views on some of the most divisive elements, taking the following key positions:

- insisting that in addition to ratification prior state consent for a visit to a country was necessary and that states should have leeway to refuse or postpone a visit
- calling for limits on the places the Subcommittee would be authorized to visit within a country and giving states the latitude to refuse access to a particular facility
- seeking to allow states to elect the Subcommittee members and refuse the inclusion of a particular individual expert on a country visit
- challenging the use of additional experts to assist the Subcommittee during country visits
- underscoring the import of state sovereignty and seeking the inclusion of language affirming respect for domestic legislation
- stressing that the state in question should be allowed to make comments and modifications to the Subcommittee’s postvisit report and

<sup>84</sup> Jimenez, interview.      <sup>85</sup> Haenni-Dale, interview.

<sup>86</sup> Interview with Western diplomat, June 28, 2011, New York.

seeking to limit the kinds of recommendations the SPT could put forward, such as by arguing that the recommendations must be “feasible”

- opposing selective attention and arguing for universal monitoring in which the SPT conducts visits on a rotational system rather than focusing on particular countries

The majority of these positions were often at odds with human rights advocates and proponents of a robust OPCAT and paralleled the substance of the contributions from overtly obstructive countries, such as Egypt, Algeria, and Cuba.<sup>87</sup> The essence of its statements caused a member of the UN Committee against Torture who attended the OPCAT working group sessions for a number of years to describe China as “negatively active” and note that it sought to weaken provisions of the original draft.<sup>88</sup> Offering a softer assessment, one of the working group chairpersons observed that “China did not play, at any moment, a positive role during the whole process” and further that it was generally “not very cooperative.”<sup>89</sup>

Among the issues that caused the most acrimony within the working group was the degree of access to be granted to the Subcommittee. Proponents of OPCAT argued that in order to be effective, the SPT needed far-reaching access with little leeway for state parties to refuse access to both the country and the specific places of detention. Yet, some countries, including China, held deep reservations about giving the Subcommittee such a high degree of access, which they characterized as tantamount to an open invitation to conduct inspection visits. The PRC was among the delegations that argued for more restrictive language, preferring to constrain the SPT’s visiting authority while giving states greater control.<sup>90</sup> As a participant noted, the PRC had issues with the “places to be visited ... very difficult for China was the article on when the Sub-Committee was visiting how freely it could move around, including for interviews with detainees.”<sup>91</sup>

More specifically, under discussion were the questions of whether prior consent from the state was required, the kinds of places to be visited, and reasons that a state could use to delay or refuse a visit. Some participants

<sup>87</sup> Haenni-Dale, interview and Jimenez, interview.

<sup>88</sup> Bent Sorensen (former member of the Committee against Torture) interview by author, July 26, 2010, Copenhagen, Denmark.

<sup>89</sup> Judge Elizabeth Odio Benito (Chairperson of the Working Group, 1992 and 2002–2002), correspondence with author, June 23, 2010.

<sup>90</sup> Pennegard described this as one of China’s main concerns. Pennegard, interview.

<sup>91</sup> Pennegard, interview.

were concerned that too much prior notification would diminish the effectiveness of the visits while resisters used arguments such as allowing states sufficient time to make preparations in order to provide the Subcommittee the requisite information, resources, and access to place limits on the SPT's access. China and other countries insisted that ratification did not equal a standing invitation and urged that explicit state consent be required prior to a visit.<sup>92</sup> At the fifth session in 1997, the PRC representative, along with Mexico and Cuba, argued that explicit state consent beyond ratification should be required before a visit. The PRC delegate stated that "while recognizing the importance of the Sub-Committee being allowed to exercise its functions ... [it] felt that the principles of non-intervention and prior consent were ... important and must have their place in the text."<sup>93</sup> By invoking the term "non-intervention," Beijing's diplomats framed their arguments as protecting state sovereignty, a principle that they contended was at risk of being violated. Several years later, in 1999, Beijing reiterated this point insisting that "all missions or visits should be conducted only with the prior consent of the State concerned."<sup>94</sup> At the same session, Chinese representatives also sought to give the government in question greater leeway by putting forward a broad range of loosely defined acceptable reasons to postpone a visit, arguing that "the list of exceptional circumstances [in which a visit might be delayed] should be comprehensive and even exhaustive" and proposed adding considerations such as the "health status of the person to be visited, urgent interrogation for a serious crime, and serious natural disaster."<sup>95</sup> Yet, these situations, especially health concerns and interrogation, are instances in which external monitoring can be useful to ensure adequate protections of detained individuals. Moreover, there was concern that countries could invoke these situations as excuses to delay or refuse an unwanted visit. China along with a handful of other countries were dogged in their opposition, and also clarified that states should be able to reject an entire visit to the country as well as visits to particular areas and places of detention. At the session in 1999, China

<sup>92</sup> Guillermet, interview.

<sup>93</sup> UN Economic and Social Council, "Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," December 23, 1996, UN Doc. E/CN.4/1997/33, paragraphs 31–32 and 34.

<sup>94</sup> UN Economic and Social Council, "Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," December 2, 1999, UN Doc. E/CN.4/2000/58, paragraph 65.

<sup>95</sup> UN Economic and Social Council, "Report of the Working Group on the Draft Optional Protocol to the Convention against Torture," March 26, 1999, UN Doc. E/CN.4/1999/59, paragraph 60.

signed onto a joint statement and a written submission by Cuba, Egypt, Saudi Arabia, Sudan, and Syria. The joint statement “underlined that the objections ... [to a visit by the SPT] were to be decided by the State Party and should apply to a particular part of a visit but also, as appropriate, to a whole visit.”<sup>96</sup> On the related issue of the places the SPT would be allowed to visit within a country, China sought to limit the Subcommittee’s access and worked with other countries to advance this position. During the eighth session in 2000, China associated with a statement made by Cuba on behalf of Algeria, Egypt, Saudi Arabia, Sudan, and Syria that argued for greater limits on the kinds of places the Subcommittee could visit and proposed restrictive language.<sup>97</sup> These countries insisted that the scope of places included in the draft was “too wide, controversial and undefined, and raised many problems relating to national security and domestic affairs.”<sup>98</sup>

The final version of the Optional Protocol reflected a compromise. States were not specifically allowed to reject or postpone a visit to a country but were permitted to object to a visit to a particular place of detention “on urgent and compelling grounds of national defense, public safety, natural disaster, or serious disorder.”<sup>99</sup> In an attempt to prevent misuse of this clause, it was noted that a state of emergency “shall not be invoked ... as a reason to object to a visit.”<sup>100</sup> At the same time, accession to OPCAT functioned as prior consent and the SPT was allowed to visit “any place under [the state’s] jurisdiction and control where persons are or may be deprived of liberty” with no exceptions for states to defer or refuse a visit to the country. Further, “deprived of liberty” was defined broadly as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will by order of any judicial, administrative or other authority.”<sup>101</sup>

Beijing also sought to strengthen state influence over the composition of the Subcommittee.<sup>102</sup> As a participant in the drafting group put it, the PRC insisted “that states should ... select the SPT experts and took positions to make the state as forceful as possible.”<sup>103</sup> Specifically, the PRC objected to allowing the Committee against Torture to select the Subcommittee members, arguing that other treaties granted states this

<sup>96</sup> Ibid. and UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 2, 1999, UN Doc. E/CN.4/2000/58, paragraph 52.

<sup>97</sup> UN Economic and Social Council, “Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 2, 1999, UN Doc. E/CN.4/2000/58, paragraph 63.

<sup>98</sup> Ibid., paragraph 63.

<sup>99</sup> Article 14.

<sup>100</sup> Article 14.

<sup>101</sup> Article 4.

<sup>102</sup> Pennegard, interview.

<sup>103</sup> Sorenson, interview.

authority. Along these lines, in 1997, the Chinese representative asserted that “the method of election of the proposed body should adhere to the general procedures followed by other human rights bodies. Accordingly, he felt that it was not appropriate for the Committee against Torture to be involved in the composition of the Subcommittee” and that instead states should elect the Subcommittee.<sup>104</sup> This position was incorporated into the final document and thus states nominate and elect SPT members.<sup>105</sup> Although state selection of SPT members sounds innocuous, it can allow states to veto individuals who they suspect would favor vigorous monitoring or be willing to spotlight states for serious violations.

The PRC also opposed the use of non-SPT experts to assist Subcommittee members on visits and sought to restrict their ability to serve on country visits. In particular, the PRC challenged the necessity of experts, sought to give states influence over the selection process, and attempted to restrict the immunities and privileges to be granted to experts.<sup>106</sup> While OPCAT supporters as well as members of the Committee against Torture maintained that non-SPT experts were needed because their specialized knowledge could be useful and would augment the Subcommittee’s capabilities, this was among the litany of issues that the PRC countered.<sup>107</sup> In reaction to the original draft, which allowed the Subcommittee to select experts to serve on missions without state involvement, the PRC pressed for enhanced state control. During the 1994 discussions, Beijing proposed text for Articles 10 and 11 that gave state parties greater say over the use and selection of experts, including giving states veto power over particular individuals. The proposed text read, “In exceptional cases, the Subcommittee may, after full consultations with, and having obtained permission of the State Party concerned, invite advisers in the personal name of members of the Subcommittee who will carry out the missions/visits to assist them in the missions/visits.”<sup>108</sup> During the 1995 session, the Chinese

<sup>104</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,” December 23, 1996, UN Doc. E/CN.4/1997/33, paragraph 57.

<sup>105</sup> Articles 6 and 7. <sup>106</sup> Pennegard, interview.

<sup>107</sup> For the views of Amnesty International, which supported the use of experts, see UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 12, 1994, UN Doc. E/CN.4/1995/38, paragraphs 39–44.

<sup>108</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 12, 1994, UN Doc. E/CN.4/1995/38, page 19. See also UN Economic and Social Council, “Report of the Working Group

representative even argued that “the need for experts to assist a mission was dubious.”<sup>109</sup> In 1997, the PRC again reiterated a similar position that “the number of experts should be limited and that experts should only be used in exceptional cases after permission had been obtained from the State concerned. Experts proposed by the State Party to be visited should be considered on a priority basis when selecting experts from the list.”<sup>110</sup> The PRC continued to press that “it was important for the State Party concerned to be able not only to oppose the inclusion of a specific expert in a mission, but also to express its objection to the number of experts.”<sup>111</sup> Reflecting the hostility the PRC harbored toward the use of outside experts, Chinese diplomats also expressed “reservations on the facilities, privileges and immunities provided to the advisers” serving as experts with the SPT on a country visit.<sup>112</sup> During the drafting session in 1997, the PRC argued that “experts on missions should not enjoy the same privileges and immunities as members of the Subcommittee.”<sup>113</sup> The inclusion of immunities, which is similar to the immunities extended to diplomats, was intended to protect the Subcommittee and privileges were meant to give the Subcommittee the kind of access and treatment that would facilitate a visit. China was not alone and Mexico and Cuba delivered similar comments at the same session suggesting that states should be able to unconditionally reject an expert.<sup>114</sup> Beijing’s efforts to influence the final draft met with some success and OPCAT “leans toward the sensibilities of states since experts can be excluded [by states] without any particular justification being

on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” January 25, 1996, UN Doc. E/CN.4/1996/28, paragraphs 23 and 26.

<sup>109</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,” January 25, 1996, UN Doc. E/CN.4/1996/28, paragraph 26.

<sup>110</sup> UN Economic and Social Council, “Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 2, 1997, UN Doc. E/CN.4/1998/42, paragraph 48.

<sup>111</sup> *Ibid.*, paragraph 52.

<sup>112</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” January 25, 1996, UN Doc. E/CN.4/1996/28, paragraph 132.

<sup>113</sup> UN Economic and Social Council, “Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 2, 1997, UN Doc. E/CN.4/1998/42, paragraph 137.

<sup>114</sup> *Ibid.*, paragraph 49.

given” and experts were not explicitly granted immunity and privileges in the final text.<sup>115</sup> This compromise and the limiting of immunities and privileges to members of the Subcommittee reflected PRC preferences.

China also opposed selective attention by the SPT and insisted on universal, nonselective human rights monitoring. In this regard, the PRC delegation opposed allowing the SPT to focus on particular states and insisted on a regular rotational schedule for country visits.<sup>116</sup> In 1999, China signed on to a statement made by Cuba on behalf of Algeria, Egypt, Saudi Arabia, Syria, and Sudan, which insisted that “the protocol should be based on non-discriminatory regular visits to all State Parties, avoiding any possibility of selectivity.”<sup>117</sup> OPCAT advocates hoped that the SPT might be given the authority to conduct follow-up, ad hoc visits in cases where a routine visit revealed serious concerns. Yet, the PRC was among those delegations opposing any follow-up, ad hoc visits. These views shaped the final text, which precluded selective attention by requiring that regular visits be established by lot. Further, while the SPT can propose an additional trip subsequent to a regular visit, the state in question is not required to accept such a visit.

Throughout the negotiations, the PRC, along with other countries, pushed for the inclusion of the language referencing respect for domestic law, framing their arguments as upholding state sovereignty.<sup>118</sup> Some human rights advocates were concerned that inclusion of this language might be used to interfere with the SPT’s work or that incorporating such a reference could be used by states to resist the Subcommittee’s recommendations or findings. The PRC and other nations issued a salvo of insistent statements. In 1997, following an Egyptian proposal to include reference to national legislation, China “expressed full support for the proposal [made by Egypt], stating that nothing should interfere with

<sup>115</sup> Evans and Haenni-Dale, “Preventing Torture?” 30.

<sup>116</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 2, 1999, UN Doc. E/CN.4/2000/58, paragraph 64.

<sup>117</sup> *Ibid.*, paragraphs 63–67.

<sup>118</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,” March 26, 1999, UN Doc. E/CN.4/1999/59, paragraphs 35–49, and UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,” December 2, 1999, UN Doc. E/CN.4/2000/58, paragraph 58.

State sovereignty.”<sup>119</sup> During the same session, the PRC, along with Cuba and Egypt, “expressed the opinion that national laws must be respected.”<sup>120</sup> Again, in 1999, China joined Algeria, Cuba, Egypt, Saudi Arabia, Sudan, and Syria in submitting a shared position statement that read:

The importance of referring to national legislation has to be clearly and positively reflected in the following legal context: (i) national legislation is absolutely necessary to complement and implement the provisions of the protocol ... (iii) in the absence of a clear reference to national legislation ... [the] Subcommittee may be seen as a ‘supranational’ body ... so that it could enjoy a situation of party and judge at the same time, or at least, exercise a unilateral faculty of interpretation of the State’s national legislation.<sup>121</sup>

During this same session, the Chinese representative also proposed language for Article 12 that read, “The provisions of this Protocol shall be applied in accordance with domestic law consistent with international obligations of states.”<sup>122</sup> At the following session, held in 2001, China signed onto a statement delivered by Cuba on behalf of the Algeria, Cuba, Egypt, Saudi Arabia, Sudan, and Syria, which again argued for an article affirming national legislation.<sup>123</sup> Despite these efforts, OPCAT does not include such a reference.

Again reflecting positions that sought to elevate the state and constrain the Subcommittee, China also sought to strengthen state influence in the preparation of the Subcommittee’s postvisit report and limit the kinds of recommendations and comments the Subcommittee could issue.<sup>124</sup> While proponents of a robust version of OPCAT contested that this

<sup>119</sup> UN Economic and Social Council, “Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,” December 2, 1997, UN Doc. E/CN.4/1998/42, paragraph 69.

<sup>120</sup> *Ibid.*, paragraph 75.

<sup>121</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” March 26, 1999, UN Doc. E/CN.4/1999/59, paragraph 49.

<sup>122</sup> *Ibid.*, paragraphs 36 and 43. During the same session, Egypt proposed language similar to China’s. *Ibid.*, paragraph 38.

<sup>123</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,” December 2, 1999, UN Doc. E/CN.4/2000/58, paragraph 64.

<sup>124</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,” March 26, 1999, UN Doc. E/CN.4/1999/59, paragraphs 71–79, and UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,” February 20, 2002, UN Doc. /CN.4/2000/58, paragraphs 46–50.

might open the door to state interference with the SPT's independence and authority, the PRC put forward a variety of positions to strengthen state influence. For example, in 1996, it proposed specific text for Article 14 that would allow states to "make comments and modifications" to the SPT report and asserted that in "its preparation of its report, the Subcommittee shall give fair and equitable consideration to the comments and modifications offered by the State Party concerned."<sup>125</sup> Beijing persisted and several years later supported language that restricted the Subcommittee to making only "feasible" recommendations.<sup>126</sup> While this adjective might sound harmless, it could potentially be used to reject SPT recommendations based on the premise that they did not meet this standard. These views were not incorporated into OPCAT, which does not require the SPT to consult with the state over the report and does not restrict the kinds of recommendations the SPT can suggest.<sup>127</sup> Further, under Article 1, if a state party refuses to cooperate with the Subcommittee or take steps to make improvements in conformity with the SPT's recommendations, the Subcommittee can request that the Committee against Torture make a public statement or publish the Subcommittee's report.

In 2001, when Mexico presented its controversial draft that favored national mechanisms over the international Subcommittee, China and a number of other countries endorsed it and praised the prominent role accorded national bodies and the much diminished mandate for the international body.<sup>128</sup> For example, China, the United States, and Egypt argued that "national and regional mechanisms should take the leading role in visiting places of detention."<sup>129</sup> According to a diplomat in the working group, the PRC responded positively to the Mexican draft

<sup>125</sup> UN Economic and Social Council, "Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," January 25, 1996, UN Doc. E/CN.4/1996/28, paragraph 39.

<sup>126</sup> UN Economic and Social Council, "Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," March 26, 1999, UN Doc. E/CN.4/1999/59, paragraph 78.

<sup>127</sup> Evans and Haenni-Dale, "Preventing Torture?," 49.

<sup>128</sup> Haenni-Dale, interview and UN Economic and Social Council, "Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," March 13, 2001, UN Doc. E/CN.4/2001/67.

<sup>129</sup> UN Economic and Social Council, "Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," February 20, 2002, UN Doc. E/CN.4/2002/78, paragraph 39.

because it reflected the PRC view that “human rights [should be treated] as a national issue to be dealt with by the Chinese people themselves.”<sup>130</sup> As has been noted previously, the PRC contests approaches that elevate the authority and role of the international human rights regime and seeks to relegate international mechanisms to providing capacity-building and advisory services. The PRC – along with Cuba, Egypt, and Syria – voiced support for the approach embodied in the Mexican draft and attempted to demote the international body to a lesser role by arguing that “the main function of the international mechanism should be to provide technical and financial support to national mechanisms. The visiting functions should mainly be entrusted to the national mechanism.”<sup>131</sup> In this vein, the PRC delegation “suggested that the international mechanism could participate in the visits to places of detention carried out by the national mechanisms but should not have the leading role.”<sup>132</sup>

In response to the chairperson’s compromise draft, which retained a robust role for the international Subcommittee while also establishing national-level bodies that would undertake complementary activities, China expressed opposition and called for continued discussions.<sup>133</sup> The PRC representative offered platitudinous words, noting the chairperson’s hard work and the headway the working group had made. Yet, the PRC attempted to stymie progress by “questioning the necessity of setting up a global mechanism” since interested states could become party to the European Convention on the Prevention of Torture, which was a regional mechanism that employed a similar approach of investigative visits by experts. The PRC elaborated that

the Chairperson’s draft reflected 10 years of hard work ... States still held differing views, such as on the mandate of the subcommittee ... There had been little change with regard to the role of national legislations (sic); the differences had not been reconciled. The delegation suggested that the Chairperson should seek compromises on the issues with which some States still had difficulties ... The delegation reiterated its support for an effective mechanism to prevent torture ... Noting its willingness to cooperate with the Chairperson and other delegations, the delegate of China called for further consultations.<sup>134</sup>

The PRC closed its statement by noting that the positions of Egypt, Russia, Saudi Arabia, and the United States, which all offered resistance

<sup>130</sup> Guilermet, interview.

<sup>131</sup> UN Economic and Social Council, “Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment,” December 2, 1999, UN Doc. E/CN.4/2002/78, paragraph 16.

<sup>132</sup> *Ibid.*, paragraph 22.      <sup>133</sup> *Ibid.*, paragraph 76.      <sup>134</sup> *Ibid.*, paragraphs 74–76.

to OPCAT, to some extent also reflected China's views.<sup>135</sup> Despite the objections from China and these other countries, the chairperson proceeded to move the draft to the UNCHR.

During 2002, when the draft was considered in the smaller UN bodies, such as the fifty-three-member Commission on Human Rights and the fifty-four-member UN ECOSOC, the PRC's strategy of varying its behavior based on the audience and size of the venue was evident. In these smaller UN bodies, China firmly opposed the draft and spoke out against it. At the same time, it did not spearhead its own blocking efforts but instead supported the actions of other resistant nations. Thus, when Cuba introduced a no-action motion in an attempt to delay action in the Commission, PRC Ambassador Sha Zukang joined Saudi Arabia in endorsing Cuba's proposition and disparaged the chairperson's decision to move the draft forward as "arbitrary" and the text as "unbalanced." He claimed that the PRC was not opposed to the Optional Protocol in principle, yet he warned that there would be "negative consequences" if the proposed draft were pushed through.<sup>136</sup> China matched its acerbic words by joining twenty other countries voting in favor of Cuba's unsuccessful no-action motion, which failed when twenty-eight countries voted against it.<sup>137</sup> When OPCAT came up for a vote in the Commission, the PRC along with ten other countries voted against it, while twenty-nine states voted to adopt and fourteen abstained.<sup>138</sup> In ECOSOC, China backed a US amendment aimed at blocking adoption by reopening discussion on the proposed text.<sup>139</sup> PRC representative Zhang Yishan declared that the Optional Protocol should be "the product of consensus" and that "the concerns of some [States] had been ignored and a controversial vote on the Optional Protocol had been forced through."<sup>140</sup>

<sup>135</sup> *Ibid.*, paragraphs 74–76.

<sup>136</sup> UN Commission on Human Rights, "Report of 50<sup>th</sup> meeting of the 58<sup>th</sup> Session," July 30, 2002, UN Doc. E/CN.4/2002/SR.50, paragraph 18 (translated from French). The Cuban delegation proposed both an amendment seeking to extend the mandate of the working group and a no-action motion.

<sup>137</sup> Other countries that voted in favor of Cuba's motion include Bahrain, Cuba, India, Indonesia, Japan, Libya, Malaysia, Nigeria, Pakistan, South Korea, Russia, Saudi Arabia, Sudan, Swaziland, Syria, Thailand, Togo, Uganda, Vietnam, and Zambia. Cuba's motion was rejected by twenty-eight votes against and twenty-one for, with four abstentions. UN Commission on Human Rights, "Report of the 58<sup>th</sup> Session," March 18–April 26, 2002, Supplement No. 3, UN Doc. E/CN.4/2002/23, paragraph 337.

<sup>138</sup> Other countries voting against the resolution include Cuba, Japan, Libya, Malaysia, Nigeria, South Korea, Saudi Arabia, Sudan, and Syria. *Ibid.*, paragraph 339.

<sup>139</sup> UN Economic and Social Council, "Provisional Summary Record of the 38<sup>th</sup> Meeting," November 12, 2002, UN Doc. E/2002/SR.38, paragraphs 68–70 and 85. China was among the fifteen countries voting in favor of the US amendment, which failed with twenty-nine countries voting against and eight abstaining.

<sup>140</sup> *Ibid.*, paragraph 78.

Zhang called for continuing negotiations to reach a version “that would be acceptable to all” and along with fourteen other countries voted in favor of the failed US amendment.<sup>141</sup> As shown in Table 3.3, when the chairperson’s draft came up for a vote, China joined seven other countries in voting against what turned out to be a successful resolution that enjoyed the support of thirty-five ECOSOC member states.<sup>142</sup>

Once action shifted to the more expansive UN bodies, particularly the Third Committee and the General Assembly, both of which comprise all UN members states, Chinese representatives shifted tactics and played a less visible role. As a Western European diplomat noted, “China was one of the countries that was opposed” to the Optional Protocol and during the adoption process it belonged to the “difficult camp along with Cuba, the U.S. and Japan” but once the resolution reached the larger New York-based UN bodies “China was no longer out in front” and was “not particularly difficult.”<sup>143</sup> Along these lines, the PRC refrained from making statements in opposition, but still voted in favor of other countries’ attempts to prevent passage of OPCAT. The PRC may have adopted this subtler position as it saw that the active blocking efforts of other countries were futile. Moreover, by backing away from resistance, the PRC benefited from being able to appear more moderate and cooperative than the countries that continued to oppose OPCAT, including the United States and Japan. As a Western European diplomat noted, at this stage, “Apart from its voting positions, China did not go out and lobby against” OPCAT.<sup>144</sup> In the Third Committee, the PRC was among twelve countries that voted in favor of Japan’s unsuccessful motion to defer action on the resolution for twenty-four hours but abstained on the failed US amendment to require that OPCAT expenses be financed only by the contributions of state parties.<sup>145</sup> The Chinese delegation joined Cuba, Israel, Japan, Nigeria, Syria, the United States,

<sup>141</sup> For quote, see *ibid.*, paragraph 78. For vote, see *Ibid.*, paragraphs 68–70 and 85. China was among the fifteen countries voting in favor of the US amendment to extend the mandate of the working group, which failed with twenty-nine countries voting against and eight abstaining. Aside from China, the other countries voting in favor of the US amendment included Australia, Cuba, Egypt, Ethiopia, India, Iran, Japan, Libya, Nigeria, Pakistan, Russia, Sudan, Uganda, and the United States.

<sup>142</sup> *Ibid.*, paragraph 89. Australia, Cuba, Egypt, Japan, Libya, Nigeria, and Sudan also voted against the resolution, which was adopted by thirty-five votes with ten abstentions.

<sup>143</sup> Interview with Western European diplomat, May 26, 2011, Geneva, Switzerland.

<sup>144</sup> Interview with Western European diplomat, May 26, 2011, Geneva, Switzerland.

<sup>145</sup> UN General Assembly, “Fifty-seventh Session, Report of the Third Committee,” December 3, 2002, UN Doc. A/57/556/Add.1, paragraphs 6–18.

and Vietnam in voting against OPCAT in the Third Committee.<sup>146</sup> Once the Optional Protocol reached the General Assembly and the draft gained even more backers, China abandoned overt opposition efforts. The PRC likely pursued this strategy of tempering its remarks and refraining from initiating blocking action because they saw that the active efforts of other states, including Cuba and United States, to sabotage OPCAT were failing and therefore surmised that continued opposition was fruitless and would only earn it a blemished image. The PRC no longer spoke in opposition and abandoned even voting in support of efforts to delay or block OPCAT. Rather than voting against as it did earlier, Beijing abstained while the Marshall Islands, Nigeria, Palau, and the United States voted against the resolution.<sup>147</sup>

The PRC's persistent efforts to shape OPCAT shows that the PRC sought to act as a constrainer of this part of the human rights regime as it attempted to roll back the proposed draft offered by Costa Rica and then sabotage adoption. However, even as the PRC endeavored to constrain the regime it did so with restraint. Although the Chinese delegation took firm positions on a range of issues and argued for its views to be incorporated, it was careful to avoid the appearance of being obstructive, especially once more expansive UN bodies began to consider the draft. As a result of this restrained opposition, other participants described the PRC as not being among the most difficult countries. For example, Judge Odio Benito described the Chinese delegation as "more passive as they always maintained some sort of low profile."<sup>148</sup> As noted previously, the PRC's opposition was obscured by more visible detractors as well as the emergence of a group of countries offering similar resistance. This group of countries, which initially comprised Algeria, Cuba, Egypt, Syria, Sudan, and China, has been described as the precursor to the more formal Like-Minded Group, which stresses greater respect for state

<sup>146</sup> United Nations, "General Assembly to be asked to Adopt Protocol on Torture Convention, Setting Up Inspection Regime for Implementation of Its Terms," press release, November 7, 2005. For a summary of the meeting see UN General Assembly, "Human Rights Questions: Implementation of Human Rights Instruments," December 3, 2002, UN Doc. A/57/566/Add. 1, paragraphs 7–9. Japan's motion to defer action was rejected by a vote of eighty-five to twelve, with forty-three abstentions. The Third Committee adopted OPCAT by a vote of 104 in favor, 8 against, and 37 abstentions.

<sup>147</sup> UN General Assembly, Resolution 57/199, "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," December 18, 2002, A/RES/57/199.

<sup>148</sup> Odio Benito, correspondence.

Table 3.2 *PRC and other states voting on the Optional Protocol to the Convention against Torture*<sup>a</sup>

| UN Body                     | Number of country participants | For | Against    | Abstain    |
|-----------------------------|--------------------------------|-----|------------|------------|
| Commission on Human Rights  | 53                             | 29  | 10 (China) | 14         |
| Economic and Social Council | 54                             | 35  | 8 (China)  | 10         |
| Third Committee             | All UN members                 | 104 | 8 (China)  | 37         |
| General Assembly            | All UN members                 | 127 | 4          | 42 (China) |

<sup>a</sup> For voting in the UNCHR, see UN Commission on Human Rights, “Report of the 58<sup>th</sup> session, Supplement No. 3,” March 18–April 26, 2002, UN Doc. E/2002/23, paragraph 335. For ECOSOC voting, see UN Economic and Social Council, “Provisional summary record of the 38<sup>th</sup> Meeting,” November 12, 2002, UN Doc. E/2002/SR.38, paragraph 89. For the Third Committee voting record, see UN General Assembly, “Human Rights Questions: Implementation of Human Rights Instruments,” October 28, 2002, UN Doc. A/C.3/57/L.30. For voting in the General Assembly, see UN General Assembly “Resolution Adopted by the General Assembly, Resolution 57/199 Optional Protocol to the Convention against Torture,” January 9, 2003, A/RES/57/199. Also, see Association for the Prevention of Torture and the Inter-American Institute for Human Rights, *Optional Protocol*.

sovereignty over international monitoring, the importance and salience of cultural and national particularities, and the use of dialogue and cooperation as opposed to more selective attention, such as country-specific action.<sup>149</sup>

In the final denouement, Beijing’s effort to act as a constrainer of the regime and influence OPCAT met with only partial success and this outcome was achieved only because of a chorus of similar views coming from Algeria, Cuba, Egypt, Syria, and Sudan. Despite the combined efforts of China and these other countries to dilute the draft or derail adoption, these states had only modest success and the final version of OPCAT provided for a more robust visiting mechanism than they preferred. For example, states cannot reject a Subcommittee visit but can only deny access to a particular facility on “urgent and compelling grounds of national defense, public safety natural disaster or serious disorder.”<sup>150</sup> The main intent of OPCAT – to establish an international monitoring body to undertake preventive visits – was preserved to the displeasure of the PRC and other like-minded states. Further, despite the

<sup>149</sup> Jimenez, interview.      <sup>150</sup> Article 14.

high priority China and other countries placed on sovereignty, they failed to secure reference to respect for national legislation or strengthen state influence over the content of the postvisit report. However, Beijing and the position of other resisters on the use of experts was partially reflected in the Optional Protocol. While experts can be included in missions, they were not granted the immunities and privileges enjoyed by the SPT, and states are allowed to reject an expert. Of the issues raised by the Chinese delegation, only their preference on giving states the authority to elect the Subcommittee and monitoring based on universality, specifically non-selective visits, were accepted without modification. On all of these issues, China consistently associated with the same group of countries whose diplomats trumpeted similar positions and the impact that these countries had on the final text reflect their joint efforts. Because of the divergence between the PRC's preferences and OPCAT, it has not become a signatory. China has good company as the Optional Protocol has been ratified or acceded to by only eighty-three countries. Further, two other P5 members, the United States and Russia, have not signed the Protocol.<sup>151</sup> In the context of OPCAT's relatively low accession rate, Beijing's has not been a significant outlier and its absence has not detracted from the work of the Subcommittee.

### Conclusion

The PRC evolved from a quiescent novice acting as a taker during the CAT negotiations to a more consequential participant attempting to dilute the draft of the Optional Protocol. When China entered the CAT negotiations in 1982, it had also become a new member of the UNCHR that same year. Given its limited skills, diplomatic relationships, and expertise, the PRC likely determined that it was most prudent to adopt the safe and less controversial role of taker. Moreover, it was a latecomer to the talks as the CAT discussions had already been going on since 1978. As a result, Chinese diplomats attending the discussions in the 1980s were reserved and tentative in their participation. While a number of divisive issues remained open to debate, the PRC delegation offered no statements during its first two years and it was not until 1984 that Chinese diplomats made interventions, particularly on universal jurisdiction. Despite its reservations when it became aware that it was the lone holdout it dropped its opposition and allowed CAT to proceed.

<sup>151</sup> "Optional Protocol to the Convention against Torture (OPCAT) Subcommittee on the Prevention against Torture," UN OHCHR, [www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx](http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx), accessed October 16, 2017.

As the draft Convention was debated in various UN bodies and the Soviet Union led a group of nations seeking to make various elements voluntary, Chinese delegations remained silent and offered neither support nor opposition as the UN finally adopted the Convention by consensus.

In contrast, when states began considering the draft Optional Protocol in the early 1990s, Beijing experienced the fallout from the 1989 Tiananmen square crackdown, and Beijing was much more inclined to attempt to constrain the regime. This changed role was evident in not only the frequency of PRC interventions but also its tone and specificity. Chinese diplomats made numerous interventions, speaking in the working group every year, suggesting specific text to the articles under discussion, and articulating clear arguments. Yet, whenever possible Beijing tended toward a low-profile role to obscure its opposition and limit reputational damage. Along these lines, Chinese diplomats showed dexterity within the drafting group as they worked with and through other nations to advance their views. The thrust of Beijing's positions, which were shared by a handful of other countries that were described as resisters of OPCAT, sought to limit the SPT's access, enable the state to postpone or object not only to a visit to the country but to specific areas and facilities, and tip the balance of control toward states by allowing them to select the Subcommittee and exercise influence over postvisit reporting. Because only some of its positions were accepted, as the OPCAT draft moved through the UN bodies, Chinese diplomats continued to express deep reservations. However, Beijing's representatives also showed restraint as they never initiated overt blocking attempts and once the draft moved to the UN's larger bodies, they no longer offered strong verbal opposition.

An important aspect of China's evolution within the human rights regime was its realization that it behooved them to work with other countries. While Chinese diplomats remained aloof from other delegations in the CAT working group in the 1980s, in the OPCAT drafting group they affiliated themselves with Cuba, Algeria, Egypt, Saudi Arabia, Sudan, and Syria and with these countries attempted to prevent passage of OPCAT and circumscribe the Subcommittee's remit. Given their shared views, these countries began making collective statements in the OPCAT working group in the late 1990s and China signed onto every statement. The presence of these other nations allowed Beijing to deploy a number of strategies that helped it limit damage to its international image. First, in the drafting group when other countries were already voicing similar concerns, Chinese diplomats toned down their opposition. Second, the PRC preferred to cooperate with Cuba, Algeria, Egypt, Saudi

Arabia, Sudan, and Syria in putting forth joint statements and once it signed onto these statements it often did not make national-level statements. Third, as adoption proceeded and OPCAT was taken up by a range of UN bodies, the PRC moderated its conduct and muted its opposition of the draft. At this stage, as other states persisted in their resistance, the PRC took a different tactic. It did not initiate action but sometimes supported other countries' attempts to sabotage passage of OPCAT.

These different roles were partly a function of its growing familiarity as well as the impact of Tiananmen, which left Beijing with strong reservations about a strengthened regime. The PRC's changed roles also reflect key differences in the approaches contained in CAT, which relies on state reporting, and OPCAT, which would authorize the Subcommittee to undertake preventive visits with broad access to domestic facilities. While the PRC and its human rights allies were only modestly successful in shaping the final outcome, as the following chapter will show they became much more organized and coalesced as the Like-Minded Group and have been active in the UNCHR and the UN Human Rights Council.