

A Comment on the ESCR Committee's Consideration of the Second Chinese Report

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Abstract: The ESCR Committee considered China's second Report on the Implementation of ICESCR on May 8, 2014. During the last reporting period, China had made tremendous achievements in such areas as the formulation of a National Human Rights Action Plan, abolition of the Re-education Through Labor (RTL) system, implementing the right to social security and free compulsory education. In the consideration, the ESCR Committee raised old issues such as establishment of a national human rights institution, direct domestic application of the ICESCR and trade union rights as well as new ones such as human rights protection in international development or investment projects in developing countries. Nevertheless, the ESCR Committee also made a few recommendations that are not entirely appropriate, including abolition of the household registration system and family planning policy. Meanwhile, the Chinese delegation committed a few inaccuracies in describing the Chinese legal system.

Keywords: ICESCR ∪ ESCR Committee ∪ implementation of ICESCR ∪ China

On May 8, 2014, The Committee on Economic, Social and Cultural Rights (hereinafter referred to as "the Committee") considered the second periodic report of China on the implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the Covenant" unless specified otherwise) in its 52nd session. I was lucky to be present at the session as an observer. In this article, I will make an introduction and comment on the consideration process with a view to better fulfilling the Covenant for China. I will offer some basic information on this consideration in the first part of the paper. Then I will try to evaluate the main achievements made by China (mainly by Mainland China). In the third part I will make an analysis of some old as well as new issues raised during the consideration. Lastly, I will further discuss some controversial issues arising from the consideration.

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I. Basic Information on the Chinese Report and Consideration

The International Covenant on Economic, Social and Cultural Rights took effect in China on June 27, 2001. According to articles 16 and 17 of the Covenant and relevant provisions of the Committee, state parties shall submit their initial reports to the Committee via the Secretary-General of the United Nations within two years of the entry into force of the Covenant and submit their following periodic reports every five years afterwards. The Chinese government submitted its initial report on the implementation of the Covenant as scheduled on 27 June 2003, and the Committee considered China's report from 27 to 29 April 2005. On 30 June 2010, China submitted its second report as scheduled on the implementation of the Covenant, but the Committee did not consider it until 8 May 2014. The Committee issued its concluding observations on China on 23 May. Since it usually takes a long time for the Committee to consider the reports of the state parties after they are submitted, the consideration of the Committee will unavoidably involve the status of implementation of the Covenant after the submission of the reports. For this reason, what the Committee considered on 8 May 2014 actually was the status of implementation of the Covenant in China for the nine years from the date of the consideration of the initial report to 8 May 2014, not just the status of implementation in the five years prior to 2010.

In order to take part in the consideration of the implementation of the Covenant, the Chinese government sent a large delegation, which impressed almost all of the Committee members. The Chinese delegation was headed by newly appointed ambassador Wu Hailong of the Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland and was composed of officials from the Chinese central government, and the Hong Kong and Macao special administrative regions. There were 31 members of the Chinese delegation, among which 24 were from the Chinese central government and seven from Hong Kong and Macao, respectively. Such a composition of the delegation with officials from different departments of the central governments as well as the Hong Kong and Macao governments showed that the Chinese government attached great importance to this consideration and was willing to have professional dialogue with the Committee.

In this consideration session, almost all of the members of the Committee actively took part in the interaction with the Chinese delegation apart from the experts from Suriname, Colombia and China. The questions and comments of the Committee touched upon extensive issues, from general ones concerning the Chinese attitude and position towards the Covenant, such as the reservation of Article 8 of the Covenant, domestic application of the Covenant, consultation in the process of report writing and the dissemination of the concluding observations of the initial report, to concrete ones such as the establishment of a national human rights institution, and formulating an anti-discrimination law and anti-domestic violence law. Some members of the Committee expressed their concern over possible problems in respect to protection of rights defenders, the household registration system, forced eviction, housing projects in ethnic

minority areas, while some other members presented their compliments on the achievements made by China in areas like poverty alleviation, infrastructure construction and the persistent stance the Chinese government took in adopting an approach regarding the right to development in implementing the Covenant. Generally speaking, the issues that the Committee raised in the consideration session touched upon most areas in the protection of economic, social and cultural rights in China and the Committee took full notice of recent reforms being carried out in China. On the whole, the concluding observations made by the Committee are very constructive and enlightening in assessing objectively the status of implementation of the Covenant and enhancing the level of the protection of Covenant rights in China.

From the Chinese report on the implementation of the Covenant and the consideration and concluding observations by the Committee, we can see an obvious difference in perspective and approach. Like most other state parties, the Chinese government apparently adopted a historical approach in describing its implementation of the Covenant in its report. The report focused on the development and progress made rather than problems still existing in implementing the Covenant during the reporting period. The problems existing in implementing the Covenant were touched on but barely specified. On the contrary, the Committee apparently took a much more normative approach. It mentioned some "positive aspects" the state party had in the implementation of the Covenant, but it mainly concentrated on the "concerns" and "recommendations" it thought needed to be addressed to the state party. Apparently, a historical approach is necessary, taking into consideration Article Two of the Covenant, which permits state parties' "achieving progressively the full realization of the rights recognized in the present Covenant." But it is equally undeniable that the normative approach is critically important, since the Covenant is a legally binding international treaty that imposes on the state parties some obligations that should be fulfilled immediately and includes some provisions that can be implemented immediately.¹ Based on such an understanding of the Covenant, a combination of both historical and normative approaches maybe is a more desirable and objective way to evaluate the status of implementation by the state parties.

II. Major Achievements Made by China in Implementing the Covenant

Since the submission of the initial report by China to the Committee in 2003, China has witnessed tremendous economic and social development. China has leaped to become the second largest economy in the world now from seventh in 2003. Along with rapid economic development, great progress has been made in almost all aspects of the protection of economic, social and cultural rights. As Wu Hailong, the head of Chinese delegation, said, "Between 2003 and 2012, the economy had grown by an average of 10 per cent per year, and the disposable income of the urban population and net income of people living in rural areas had both increased significantly. China had become the first country to reach the poverty reduction objective of the Millennium Development

1. For this issue, see Huang Jinrong, *The Limitation in Judicial Protection of Human Rights: A Study of the Justiciability of Economic and Social Rights*, Beijing: Social Sciences Academic Press, 2009, at 175-181.

Goals, and it had done so ahead of schedule.”² In order to implement the Covenant rights, China has made or adopted a series of laws, policies and administrative measures, which have helped China achieve considerable progress both in the range as well as the level of protection of the Covenant rights.

Both the Chinese report on the implementation of the Covenant and the oral interaction with the experts impressed the Committee very much. The Committee experts expressed their admiration for China’s achievements in the period under review, particularly in lifting so many people out of poverty, providing nearly universal primary education and improving healthcare facilities.³ We can see such positive assessment of the Committee from its concluding observations. The concluding observations listed a lot of “positive aspects.” For instance, the Committee welcomed the State party’s ratification of such treaties concerning the Covenant rights as the Convention on the Rights of Persons with Disabilities, The ILO Convention No. 111 (1958) concerning Discrimination in Respect of Employment and Occupation and the United Nations Convention against Corruption in the period under review. The Committee also took note with appreciation of the State party’s adoption of the Law on Social Insurance, the Employment Promotion Act, the National Human Rights Action Plan (2012–2015), the 12th Five-year Social and Economic Development Plan (2011–2015), the New Outline for Development-Oriented Poverty Reduction Program for China’s Rural Areas (2011–2020) and the first National Employment Promotion Plan (2011–2015). Furthermore, the Committee also “welcomes the State party’s contribution to the accomplishment of various targets of the Millennium Development Goals, such as the eradication of extreme poverty, the achievement of universal primary education and the reduction of maternal mortality.”⁴

The progress made in the respect of economic, social and cultural rights protection in China can also be noticed by the fulfillment of the suggestions made by the Committee in 2005. In the concluding observations following the initial Chinese report, the Committee put forward a lot of “principal subjects of concern” and “suggestions and recommendations” for China. From China’s report this time, we can find that many problems and suggestions have been solved or fulfilled in the reporting period, among which there are at least the following four major aspects:

1. National Human Rights Action Plans were adopted.

In the concluding observations in 2005, the Committee recommended that China adopt a National Human Rights Plan of Action.⁵ China fully followed the recommendation of the Committee in this regard. In April 2009, China adopted the first National Human Rights Action Plan (2009–2010) and specifically established a joint meeting

2. E/C.12/2014/SR.17, para. 4.

3. Committee on Economic, Social and Cultural Rights Considers Reports Of China and Hong Kong and Macao Special Administrative Regions, <http://insurancenewsnet.com/oarticle/2014/05/08/committee-on-economic-social-and-cultural-rights-considers-reports-of-china-and-a-501619.html#.VFS4rdlYCq8> (visited Sep. 25, 2014).

4. See E/C.12/CHN/CO/2, paras. 3–5.

5. E/C.12/1/Add.107, 13 May 2005, para. 41.

mechanism for the plan that is responsible for its implementation, supervision and evaluation. Furthermore, the second National Human Rights Action Plan (2012-2015) was also adopted and implemented smoothly afterwards.

2. The system of Re-education through Labor was abolished.

The system of Re-education Through Labor had been a major concern both at home and abroad. It was related to both the right to a fair trial enshrined in the International Covenant on Civil and Political Rights and the forced labor issue in the International Covenant on Economic, Social and Cultural Rights. In its concluding observations in 2005, the Committee "is gravely concerned about the use of forced labor as a corrective measure, without charge, trial or review, under the 'Re-education Through Labour (laodong jiaoyang)' programme." So it "recommends the State party to abolish the use of forced labor as a corrective measure, and to amend or repeal the relevant provisions of its legislation to bring them into line with the provisions of Article 6 of the Covenant."⁶ On 28 December 2013, A Decision of the Standing Committee of the National People's Congress formally repealed the legislation concerning Re-education Through Labor. The abolishment of Re-education Through Labour thus became one of the most significant developments in human rights protection in China in the reporting period.

3. Comprehensive coverage of social security for all populations has been realized.

In the first concluding observations for China in 2005, the Committee expressed its concern over significant persistence of disparities between the urban and rural populations in the safeguard of the right to social security. It claimed that in China, "many of the reforms in the formal welfare system have not been extended to the countryside," so it "urges the State party to extend non-contributory social assistance to the rural areas that are presently not covered as a means to combat poverty among the rural populations."⁷ Admittedly, China has spared no efforts to change this scenario and the eventual results are very inspiring. The Committee itself did not deny the positive result either. It especially "welcomes the efforts made by the State party to grant universal access to social security, including basic old-age pensions, basic medical care and the minimum living standard scheme (di bao)."⁸

In the written reply by China regarding the list of issues of the Committee, the Chinese government elaborated, inter alia, some main achievements. (a) The Social Insurance Law was promulgated on 28 October 2010. The following years have witnessed continuous expansion of the scope of coverage: The system covers various types of urban enterprises and their employees, privately or individually owned businesses, and persons engaged in flexible employment. (b) Major progress has been made in establishing pension insurance systems for urban and rural residents. By 2012, the coverage of urban and rural residents in China by the social pension insurance system had been essentially complete. (c) The basic medical insurance system

6. Ibid., paras. 22 and 51.

7. Ibid., paras. 27 and 56.

8. E/C.12/CHN/CO/2, 13 June 2014, para. 24.

has achieved full coverage for urban and rural residents. (d) In the respect of social assistance, a Subsistence Security (minimum living standard or “di bao”) system has been established and the construction of temporary assistance systems also has been boosted considerably.⁹

4. Free compulsory education has been realized.

Insufficient educational expenditure had been a persistent problem in China, which made, *inter alia*, free compulsory education difficult to realize for a long time. In 2003, the UN Special Rapporteur on the right to education, Katarina Tomasevski, when visiting China, criticized China for its insufficient spending on education and the worse situation of the protection of the right to education on the part of the children of migrant workers.¹⁰ In the concluding observations in 2005, the Committee also asked China “to eliminate all school-related fees to make compulsory primary education truly free for all children,” and “further urges the State party to increase public expenditure on education in general.”¹¹

The Chinese government attached great importance to the suggestions of the international treaty body in this regard and was prompt in taking measures that eventually made free compulsory education really come true. In 2006, the revised Compulsory Education Law stipulates clearly that “compulsory education should be provided free of tuition charges and sundry expenses.” Beginning from 2006, the State gradually eliminated tuition and expenses for compulsory education first in the rural and later in the urban areas, realizing free compulsory education nationwide. The State also provided free textbooks to students at the compulsory education stage and allowances for boarding school students who were from families with financial difficulties. Starting from 2003, a lot of administrative measures have been adopted to ensure that children of rural migrant workers in cities can receive compulsory education in public schools in cities, making the persistent and acute issue that had nagged rural migrant workers and their children for a long time solved to a large extent. What’s more, the long-sought goal that State fiscal expenditures on education funding should account for 4 per cent of GDP was eventually achieved in 2012 when the figure reached 4.28 per cent.¹² The Committee also welcomed the efforts made by the State party to reach the goal of 4 per cent of gross domestic product (GDP) expenditure on education and the establishment of nine years of free compulsory education in its concluding observations in 2014.¹³

Apart from the abovementioned, there are also quite a few laws and policies that have been adopted in China in order to promote equal employment, ensure salary payment and safety at work and guarantee the right to housing. Considerable progress has

9. E/C.12/CHN/Q/2/Add.1, 11 February 2014, paras. 63-72.

10. “Right To Education: China Fails To Make The Grade,” <http://www.countercurrents.org/hr-hrf081003.htm> (visited Sep. 28, 2014).

11. *Supra* note 5, para. 66.

12. *Supra* note 9, paras. 215-221.

13. E/C.12/CHN/CO/2, 13 June 2014, para. 35.

been made in all of these areas.

III. Old and New Issues for the Committee

In this consideration session, the Committee reiterated some old issues mentioned in the first consideration of the initial Chinese report, and also paid attention to some new issues that may be arising from recent development in China. In answering these questions, the Chinese government either reaffirmed its long-standing stance on the grounds of national particularity, or informed the Committee of the latest developments or future measures to be taken on these issues. There are four major concerns, *inter alia*, which have been mentioned in both of the two concluding observations of the Committee:

1. Establishment of a national human rights institution.

In the concluding observations in 2005, the Committee recommended that China consider establishing a National Commission for Human Rights on the basis of the Paris Principles.¹⁴ In 2014, the Committee once again recommended that China “establish an independent national human rights institution with a broad mandate to promote and protect human rights,” and claimed that other government institutions could not replace such an institution.¹⁵ But what the Chinese government insisted on was that “China has still not yet established a national human rights institution as defined by the Paris Principles, but numerous departments bear similar responsibilities.” Nevertheless, the Chinese government also indicated that “the issue of establishing a national human rights institution as defined by the Paris Principles is something that China is willing to study further.”¹⁶

2. Direct domestic application of the Covenant.

Direct domestic application of the Covenant is also the issue of justiciability of Covenant rights. The Committee has paid close attention to any development on this issue in state parties. In the concluding observations in 2005, the Committee urged China to promote “the use of the Covenant as a source of law in domestic courts.”¹⁷ In 2014, the Committee remained concerned that the Covenant was not directly applicable by national courts and tribunals and once again recommended “that the State party guarantee the direct applicability of all rights under the Covenant in its domestic legal order.”¹⁸ However, the Chinese government still reaffirmed its old position since 2005, insisting that

specific, detailed provisions regarding the economic, social and cultural rights that Chinese citizens should enjoy are contained in many Chinese laws and regulations . . . When trying cases involving the economic, social and cultural rights of citizens, the people's courts apply Chinese law, and are able

14. *Supra* note 5, para. 41.

15. *Supra* note 13, para. 8.

16. E/C.12/CHN/2, 6 July 2012, at 9.

17. *Supra* note 5, para. 42.

18. *Supra* note 13, para. 9.

19. *Supra* note 9, para. 18.

to provide effective protection for the those rights, thus ensuring that the spirit of the Covenant is realized.¹⁹

Since direct domestic application of the Covenant has not been a reality in most state parties so far, it's not surprising and out of question in international law that the Chinese government should take such a position.

3. Trade union rights.

The issue of trade union rights provided in Article 8 of the Covenant is also a repeatedly mentioned one in both of the two consideration sessions. This issue arises from a statement made by the Chinese government when ratifying the Covenant, which states that the Chinese Government shall deal with Article 8, paragraph 1 (a), of the Covenant according to China's Constitution, the Trade Union Act and the Labor Act. But the Chinese government did not make it clear whether the statement was an interpretative statement or a formal reservation. In the first consideration in 2005, the Committee "strongly urges the State party to consider withdrawing its declaration on Article 8.1 of the Covenant."²⁰ In the second consideration in 2014, it once again "strongly urges the State party to consider withdrawing its declaration on Article 8, paragraph 1, of the Covenant."²¹ But the Chinese government has been persistent on this issue and insists that the right to organize and take part in trade union in China has been fully guaranteed by Chinese laws. When answering the Committee's written questions, the Chinese government stated for the first time that "when it ratified the Covenant in 2001, China entered a reservation regarding trade union rights."²² This is the clearest attitude on the part of Chinese government towards the legal nature of the statement made when ratifying the Covenant.

4. Enforced dismantling and resettlement.

The protection of the right to housing in the process of enforced dismantling and resettlement is always one of major concerns of the Committee. It has issued two General Comments on the right to housing, one of which particularly focuses on the issue of "the right to adequate housing: forced evictions." In 2005, the Committee expressed its concern over forced evictions in China. It "recommends that the State party take immediate measures to enforce laws and regulations prohibiting forced evictions and ensure that persons evicted from their homes be provided with adequate compensation or offered alternative accommodation, in accordance with the guidelines adopted by the Committee in its General Comment No.7 on forced evictions."²³ The Chinese government has been very concerned about the problems arising from enforced dismantling and resettlement and has taken a lot of measures. The Chinese government in its report conceded that in the process of carrying out building expropriations, demolitions and relocations prior to January 2011, there were a number of representative cases of violations of laws and regulations in which a minority of demolition and

20. Supra note 5, para. 55.

21. Supra note 8, para. 23.

22. Supra note 9, para. 12.

23. Supra note 5, para. 61.

relocation personnel resorted to unlawful means to execute enforced demolitions and relocations, resulting in serious injury to house owners' persons and damage to their property. But the Regulation on the Expropriation of Houses on State-owned Land and Compensation which took effect in 2011 has forbidden enforced administrative housing expropriation, demolition and relocation and well defined provisions concerning enforced compensation decisions related to housing expropriation.²⁴ So, in the opinion of the Chinese government, the situation of enforced dismantling and resettlement has changed considerably since the Regulation and other measures were implemented. However, probably because the Committee keenly noticed some sensational sporadic cases on forced evictions due to poor enforcement of the law, the Committee in this consideration still "is seriously concerned about" the issue, and "urges the State party to immediately take all necessary measures to cease all expropriations that do not fully comply with the established international human rights standards."²⁵

Apart from the above issues, the Committee also expressed its concerns over issues like household registration, implementation of the non-discrimination principle and domestic violence in both the two concluding observations. But in these areas, China either has adopted laws and policies or has started working on these issues. For instance, in response to the concern of the Committee on domestic violence in 2005, an anti-domestic violence provision was soon added to the revised Law on the Protection of Women's Rights in the same year after the consideration, and the National People's Congress of China also has formally decided to formulate a Law on Anti-domestic Violence in the near future in 2013.

In this consideration, the Committee also raised a few issues that had not been noticed in the last consideration. Among these issues, most noteworthy is the one on international business and economic, social and cultural rights protection. As we know, the problems arising from Chinese investment in some developing areas, Africa in particular, have been a hot topic hyped by Western media in recent years. In the consideration on 8 May 2014, quite a few Committee experts made inquiry on this issue. The Chinese delegation introduced a few measures that have been taken to the Committee either in written or oral form. For instance, in recent years, the Chinese government has adopted a lot of regulations and policies with a view to regulating overseas Chinese enterprises such as the China Interim Measures for the Administration of Overseas State-owned Property Rights of Central Enterprises, Guiding Opinions on Strengthening the Prevention of Legal Risks in Internationalizing the Management of Central Enterprises, Social Responsibility Guide for [Chinese] International Contractors, and Environmental Protection Guidelines for Overseas Investment and Cooperation.²⁶ However, the Committee still expressed its concern over some cases that reportedly resulted in violations of economic, social and cultural rights in the receiving countries. So it "calls upon

24. Supra note 9, para. 176-181.

25. Supra note 13, para. 30.

26. Supra note 9, paras. 3-6.

27. Supra note 13, para. 12.

the State party to adopt a human rights-based approach to its policies of international cooperation," and suggested "undertaking a systematic and independent human rights impact assessment prior to making funding decisions."²⁷ In addition, the Committee also paid particular attention to issues that had not been well noticed in the first consideration like judicial independence, the anti-corruption campaign, protection of human rights defenders, family planning, and legislation to combat sexual harassment.

IV. Some Disputable Issues in the Consideration

It is of vital importance for the Committee to consider the reports of the state parties in the spirit of the Covenant on the basis of adequate knowledge of the legal system as well as the practice of the state parties. The Committee should be very cautious in making recommendations and suggestions to state parties unless it is pretty sure of them. It is more advisable for it to refrain from doing so if the suggestions could be controversial. On the other hand, as one of main sources of information for the Committee to consider, the reports of state parties should also accurately and faithfully describe their positions and real circumstances in implementing the Covenant. Generally speaking, most recommendations and suggestions made by the Committee on China in this consideration are correct and thus should be taken seriously by China in implementing the Covenant in the future. But it is undeniable that the Committee has made a few rash recommendations and suggestions that are seemingly not so appropriate. In addition, there are also a few cases where the Chinese delegation did not accurately state the true situation of its legal system and practice.

What's worth mentioning is that the Committee also made inappropriate comments on China's report in 2005. In the concluding observations on China in 2005, the Committee "urges the State party to adopt legislation that specifically criminalizes the trafficking of human beings." It seemed to the Committee that China had not criminalized the trafficking of human beings by 2005. But it's apparently an accusation made on false information, since it's long been a fact that there is a "crime of trafficking in women and children" punishable by the death penalty in Chinese criminal law.

In the concluding observations in 2014, there are, *inter alia*, three main assertions or suggestions that are seemingly inappropriate or rash:

1. The assertion that compulsory education is not free in China.

As mentioned above, compulsory education is one of areas in which China has achieved the most considerable progress in implementing the Covenant. As demonstrated in the Chinese report with solid facts and data, "at the end of 2011, China had implemented universal free compulsory education in urban and rural areas throughout the country, achieving the goal of every child having a school to attend."²⁸ Beginning from 2006, the State gradually eliminated tuition and expenses for compulsory education first in the rural and later in the urban areas, realizing free compulsory education nationwide. The State also provided free textbooks to students at the compulsory education stage and allowances for boarding school students who were from families

28. *Supra* note 9, para. 217.

with financial difficulties. But in the concluding observations this time, the Committee surprisingly concluded that "the Committee is also concerned that compulsory education is still not free and is often unaffordable for children in rural areas and poor urban areas."²⁹ We don't know how the Committee reached the conclusion under such a circumstance that no reason was given. In any case, it is really a shame that the Committee jumped to such a conclusion.

2. Suggestion to abolish the household registration system.

The household registration system is also a major concern both at home and abroad. It is well known that a lot of discriminatory practices that contravene the Covenant are related to the system. For this reason, the household registration system and related discrimination have been one of major concerns in both consideration sessions. In the initial consideration of the Chinese report, the Committee only "notes with deep concern" the de facto discrimination against internal migrants that indirectly results from the restrictive national household registration system.³⁰ But in the consideration in 2014, the Committee further "calls upon the State party to strengthen its efforts to abolish the household registration system (hukou) and to ensure that all rural-to-urban migrants are able to enjoy the work opportunities, as well as social security, housing, health and education benefits, enjoyed by residents in urban areas."³¹ Admittedly, it is justifiable to an extent for the Committee to suggest that China abolish the household registration system on the basis of its legitimate concern about discrimination issues. But legally speaking in a strict sense, the household registration system and the discrimination based on it are two different issues. The former itself does not necessarily lead to the latter. So it would be more appropriate and more in line with the spirit of the Covenant for the Committee to recommend the state party to eliminate discrimination based on household registration rather than to abolish the household registration system. It is also the general trend of the reforms of the household registration system under way in China.

3. Recommendation on the abolishment of the family planning policy.

The enforcement of the family planning policy often involves human rights issues that draw attention at home and abroad. But unlike in the first consideration when the Committee only expressed its deep concern on reports of forced abortions and forced sterilization imposed on women, the Committee in this consideration not only paid attention to reported instances of the use of forced abortion and forced sterilization and called on harsher punishment for such activities, but also focused more on the overhaul of the family planning policy. While the Committee expressed "welcoming the decision to revise the 'one-child policy' by allowing couples to have a second child when one of the parents is an only child," it "remains concerned that there continue to be restrictions on the opportunity for persons to freely decide on the number of children they have," and thus "recommends that the State party take all necessary measures, including the

29. Supra note 13, para. 35.

30. Supra note 15, para. 15.

31. Supra note 13, para. 15.

32. Ibid., para. 25.

revision of its family planning policies, to ensure that everyone can freely and responsibly decide on the number and spacing of their children.”³² It’s indisputable that the Committee suggested China take measures to prevent forced abortions and forced sterilizations,³³ but it’s questionable both in law and in feasibility for it to suggest that China “ensure that everyone can freely and responsibly decide on the number and spacing of their children,” which amounts to abolishing the current family planning policy in China. The family planning policy that restricts the freedom of parents to decide on the number and spacing of their children was adopted on reasonable grounds to control the overly large scale of the Chinese population, and has also gained much support from the general public in China. It’s true that this strict policy should be further reformed and loosened as time goes on. It’s also true that a few declarations of UN human rights conferences and UN Assembly Resolutions proclaim that everyone has the right to freely and responsibly decide on the number and spacing of their children. Nevertheless, this right has not been enshrined in any UN human rights conventions so far. So, legally speaking, the current family planning policy does not contravene any international human rights conventions that are effective in China. Since this issue is not directly related to the Covenant rights, it would be advisable for the Committee to leave it to the state party to decide. From this perspective, the recommendation the Committee made for China on this issue is rather frivolous.

Disputes did not only exist on the side of the Committee, they also arose on the side of the Chinese government. The most obvious issue is the position taken by the Chinese government on the practice of the domestic application of international treaties in China. In response to the recommendation of the Committee that the Covenant should be directly taken as a source of law in domestic courts in China, the Chinese delegation claimed that

in accordance with the conventional practice of applying international treaties in China, such treaties do not directly function as the legal basis for the trial of cases in Chinese courts, and international human rights treaties are no exception; rather, they are applied after being transformed into domestic law through legislative procedures.³⁴

However, it’s not carefully phrased in law, since it does not fully conform to the actual situation of treaty application in China.

There is no unified provision on the method of application of treaties either in the Chinese Constitution or the Legislation Law. However, based on quite a few provisions in different laws, it’s definitely not true that international treaties can’t be applied directly in China. For instance, the third paragraph of Article 20 of the Patent Law of China stipulates that “the patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.” This provision means the state agencies and courts can invoke international

33. *Ibid.*, para. 26.

34. *Supra* note 16, at 9.

treaties on patent directly. There are more laws that have similar provisions to Article 97 of the Marine Environment Protection Law, which provides that "if an international treaty regarding environmental protection concluded or acceded to by the People's Republic of China contains provisions differing from those contained in this law, the provisions of the international treaty shall apply, unless the provisions are ones which the People's Republic of China has announced reservations." The General Principles of Civil Law, Civil Procedure Law, Administrative Procedure Law and Maritime Law all belong to such laws. In sum, the position taken by the Chinese delegation claiming that it is conventional practice that "treaties do not directly function as the legal basis for the trial of cases in Chinese courts" is neither precise nor appropriate in law.

V. Concluding Remarks

Since the first consideration by the Committee of the Chinese report on implementation of the Covenant in 2005, tremendous progress has been made in terms of economic, social and cultural rights protection in China. The Chinese government has also increasingly showed a positive attitude and self-confidence in taking part in the consideration activities of the international treaty bodies. As the head of the Chinese delegation Wu Hailong said in his opening remarks at the beginning of the consideration, "There is always room for improvement in the promotion and protection of human rights."³⁵ This consideration of the Committee shows that despite obvious progress made during the period under review, many efforts still need to be made on the part of China in the future, especially in respect to enhancing the protection level and equal enjoyment of the Covenant rights and ensuring those elements of Covenant rights closely related to civil and political rights. We are hoping we can expect more in the next consideration of the Committee on the Chinese implementation of the Covenant.

35. E/C.12/2014/SR.17, 16 May 2014, para. 14.