

THE HIGH COMMISSIONER, OHCHR, AND CHINA 1998–2005: CHALLENGES AND ACHIEVEMENTS

Stephanie T. Kleine-Ahlbrandt

INTRODUCTION

The UN, and especially the High Commissioner for Human Rights, faces a dilemma in its need to hold governments accountable for performance on human rights issues while maintaining good relations to keep channels open for diplomacy and influence. The High Commissioner is mandated to be both the voice for victims of human rights violations around the world, and to also engage in dialogue with governments.¹ On both of these counts, the People's Republic of China (hereafter, China) represents a particularly daunting challenge.

A permanent member of the Security Council with burgeoning economic and political clout, China welcomed certain parts of the UN and vigorously opposed others. China ratified six of the nine core international human rights treaties and invited in special rapporteurs and working groups for fact-finding visits. It held activities in support of regional frameworks and world conferences on human rights. In 2004, China revised its constitution to include a reference to human rights.

At the same time, not only was China's own record – particularly on civil and political rights implementation – problematic, but it also firmly rejected any public criticism of its domestic policies. Notwithstanding some progress on economic and social rights,² human rights violations committed by China have consistently been brought to the attention of the UN's monitoring mechanisms – mostly in the areas of freedom of expression, religion and assembly, due process rights, and participation rights.³ But the Commission on Human Rights was always heavily divided

¹ UN General Assembly, Resolution 48/141, "High Commissioner for the Promotion and Protection of All Human Rights," UN Doc. A/RES/48/141, December 20, 1993.

² China reduced the incidence of poverty (using the World Bank's \$1 a day definition) from 49% in 1990 to 6.9% in 2002, but it faced major challenges in realizing all economic, cultural, and social rights. While it ratified the ICESCR, it filed a reservation against Article 8 on freedom of association.

³ See UN Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak / Mission to*

in response to efforts to condemn China.⁴ Partly this was due to the robust diplomacy China carried out to re-orient the Commission away from its 'adversarial' concern with violations in specific states towards one emphasizing dialogue and cooperation.⁵

The High Commissioner could not ignore China; nor engage on China's terms. Mary Robinson's approach as High Commissioner (1997–2002) was to initiate a two-pronged strategy of systematically raising human rights problems with the government, while at the same time engaging in a technical cooperation program to help improve the human rights situation.⁶ By the time Robinson's five-year term ended in 2002, she had visited China seven times, each time combining both public and private criticism of the authorities with engagement with them on issues of concern. In itself this was no small achievement, given the reluctance of the Chinese government to issue invitations to human rights officials to visit the country, let alone carry out workshops on the issue of human rights.

During this time, the Office of the High Commissioner for Human Rights (OHCHR) established the first UN-led dialogue and technical cooperation program on human rights with the Chinese government.

China, UN Doc. E/CN.4/2006/6/Add.6, March 10, 2006; UN Committee on the Rights of the Child, "Concluding Observations: China," UN Doc. CRC/C/CHN/CO/2, November 24, 2005; UN Committee Against Torture, *Report of the Committee Against Torture*, A/55/44, 2000; UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak / Follow-up to the recommendations made by the special rapporteur / visits to China, Georgia, Jordan, Nepal, Nigeria, and Togo*, UN Doc. A/HRC/10/44/Add.5, February 17, 2009; UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention / Mission to China*, UN Doc. E/CN.4/2005/6/Add.4, December 29, 2004; Commission on Human Rights, *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1994/18*, UN Doc. E/CN.4/1995/91, December 22, 1994; UN Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/56/18 (SUPP), October 30, 2001.

⁴ See Sonya Sceats and Shaun Breslin, *China and the International Human Rights System*, (London, UK: Chatham House, October 2012).

⁵ As part of the Asian Group's emphasis on 'constructive' approaches, it pressed the Commission to undertake an overall review of the special procedures in 1998. Philip Alston, "Hobbling the Monitors: Should UN Human Rights Monitors be Accountable," *Harvard International Law Journal* 52, no. 2 (Summer 2011): 584.

⁶ "My approach is two-fold – that I'm working very closely and deepening the working relationship through our memorandum of understanding with the Chinese authorities. But I must, and do, retain a critical voice. I have to speak out. I spoke yesterday evening about the issue of torture. ... I'm pressing for a visit by the special rapporteur on torture, Nigel Rodley, and it's very important that the Chinese have accepted that I operate very firmly in raising human rights issues as well as discussing how we can move forward constructively." See "Q&A: Mary Robinson on China's Human Rights Record," *CNN.com*, February 26, 2001.

The program was designed to capitalize on OHCHR's expertise in helping to prepare governments to ratify and implement the two main international human rights covenants. Indeed, during the initial years of the program, China signed and ratified the International Covenant on Economic Social and Cultural Rights (ICESCR) and signed the International Covenant on Civil and Political Rights (ICCPR). This gave rise to a certain momentum and belief that OHCHR could play a role in seeing through China's ratification of the ICCPR while supporting the changes needed for implementation of both covenants. Technical cooperation was also designed to support reform-minded individuals and institutions to tackle some of the country's most pressing human rights issues.

The High Commissioner was able to help keep certain issues on the agenda in China through regular and high profile visits and both public and private outreach. But the balance between engagement and criticism with China was so delicate as to prove impossible to sustain. While Mary Robinson's successor, Louise Arbour, was able to continue to both criticize and engage China, the technical cooperation program essentially came to an end by 2007. The program faced numerous practical challenges, alongside the larger political impediments of an increasingly restrictive environment and the government's growing defensiveness on human rights.

This chapter first describes a selection of the activities implemented by OHCHR in the course of its technical cooperation program with China, to familiarize readers with the objectives and its impact. It then identifies challenges faced both by the High Commissioner and OHCHR in carrying out the program and discusses how these were tackled. It concludes with an analysis of the High Commissioner's performance in balancing the responsibility to both engage with and criticize the Chinese government.

BACKGROUND

In early 1998, Mary Robinson held a series of meetings with the Chinese Ambassador to the UN in Geneva, Wu Jianmin, which led to the signing of a Memorandum of Intent (MOI) to pursue a program of technical cooperation in late 1998.⁷ The MOI was followed by a two-week OHCHR

⁷ In those days, the Ministry of Foreign Affairs (MFA) had more influence within the Chinese bureaucracy than is the case at present. See International Crisis Group, *Stirring up the South China Sea (I)* (Brussels, Belgium: International Crisis Group, 2012), 14–16.

Needs Assessment Mission (NAM) to China in March 1999 to identify cooperation projects. The NAM recommended that OHCHR focus on the administration of justice, human rights education, and legislative reform; identified short, medium, and long-term objectives; and recommended activities with the ministries of justice, public security, and education, the Supreme People's Procuratorate (SPP), the Supreme People's Court (SPC), and various academic institutions which met a "minimum threshold" for meaningful cooperation (i.e. would justify OHCHR's involvement in China). The program envisaged working with these institutions in reviewing Chinese training practices and incorporating additional content based on international standards and UN materials.

In September 2000, following consultations with Chinese ministries regarding proposed project activities, OHCHR undertook another mission to China to negotiate the text of a Memorandum of Understanding (MOU) with the MFA. Mary Robinson signed the MOU, which provided for a two-year cooperation program, during her second visit to China in November 2000. The various references in the MOU to international human rights treaties and to China's international obligations under them reflect the outcome of difficult negotiations between OHCHR and the MFA. While OHCHR pursued discussions with the MFA to establish an OHCHR project officer in Beijing, these were fraught and ultimately unsuccessful.

SELECTED ACTIVITIES IMPLEMENTED UNDER THE TECHNICAL COOPERATION PROGRAM

Re-Education through Labor

One of the areas targeted under the program was reform and abolition of Re-Education Through Labor (RETL). A widely discredited system, RETL is a measure administered by the police which can entail imprisonment for up to four years for those accused of minor offences that do not fall under Chinese criminal law.⁸ The UN Working Group on Arbitrary Detention

⁸ Those subject to RETL had no access to a lawyer, no opportunity to defend themselves in an independent hearing, and no right of appeal. RETL could be applied to a range of vaguely defined offences ranging from low value theft to drug addiction, prostitution, and membership of Falun Gong. Although the measure was targeted at minor crimes, many of those sentenced received harsher punishments than those found guilty of criminal offences. For the police, RETL had become an important mechanism of crime control largely outside any external regulation.

found that RETL led to violations of Article 9 of the ICCPR in its 1997 report and follow-up report of 2005.⁹ Reform of RETL was on the legislative plan of the National People's Congress (NPC) in 1999, and OHCHR's approach was therefore to complement and strengthen research underway in China on alternative ways of punishing minor crimes in order to contribute to the debate and possible legislation on reform.

The first activity, a workshop in Beijing in February 2001, attracted significant international and domestic attention as the first workshop to be held in China on this relatively sensitive issue with UN participation. It focused on the requirements of international human rights law, particularly the guarantees regarding detention and a fair trial provided by Articles 9 and 14 of the ICCPR, and drew on the conclusions of the Working Group on Arbitrary Detention. Participants considered comparative experiences of punishment of minor crimes in conformity with international law in other countries and their relevance to China. Working groups identified a number of issues for further study, including research on the implications of international law for Chinese penal policy and comparative treatment of minor offenders. The conference report concluded that OHCHR should follow up by publishing the workshop proceedings online, holding an expert meeting in Geneva, and forming an informal consultative group to produce recommendations for revising Chinese law.

The second activity was a round-table meeting in September 2001 in Geneva. While a necessary next step, it did not meaningfully take forward the debate on RETL reform. By then, reform of RETL had hit a roadblock in China – the legislative reform process in the NPC had been suspended – and this was immediately evident in the more difficult implementation of technical cooperation activities.

In the end, and after two changes of date, a one-day workshop on Alternatives to Incarceration in the Punishment of Minor Crimes took place in Beijing in March 2003, attended by two international experts, three UN professionals, six Chinese experts and two representatives from the MFA. Although debate at the workshop was open and many of the national participants voiced criticisms of the RETL system, there was almost no discussion of the more substantial reform challenges. While Chinese participants provided information on the ways in which RETL sentences were being carried out, the discussion would have benefited

⁹ *Report of the Working Group on Arbitrary Detention / Mission to China*, UN Doc. E/CN.4/2005/6/Add., para 74.

from visits by participants to pilot projects, as had been requested by the UN.

The various workshops demonstrated Chinese academic and official interest in both international law and the practical implications of reform to RETL, but the suspended government commitment to reform the system inevitably affected the project. It became clear that without high-level political commitment, further activities in this area were not worthwhile. It was also clear that discussions regarding potential collaboration should be held with the Ministry of Public Security (MPS), the agency with most responsibility in this area.

Police Training

Police training was another key area of activity under the MOU. The NAM had highlighted that many human rights-related problems linked to the administration of justice fell within the purview of the MPS, in particular torture, unlawful and prolonged detention, and substantial, largely unregulated police powers regarding administrative penalties. OHCHR sought to develop a human rights training program for basic level police, outlining a step-by-step approach, from translating UN materials into Chinese for workshops to the setting up of pilot training courses in several locations and using them to train trainers.

A workshop on Human Rights and the Police in July 2001 brought together international experts with representatives of the MPS and recommended designing a work plan to incorporate human rights into existing Chinese police training. A meeting following up on this recommendation took place in January 2002 in Geneva.

In cooperation with the MFA and MPS, OHCHR then organized a scoping mission to China on 8–16 March 2003 to determine the training materials being used by police training academies in China; to understand the methodology of police training in China and how best to develop and deliver additional training; and to agree with the MPS on co-designing and delivering a course and materials on human rights. The OHCHR delegation visited Zhengzhou People's Police Training School in Henan Province and was provided with police training materials for analysis against international standards.¹⁰ The school also indicated that it would welcome the opportunity to host an OHCHR-sponsored pilot training scheme on

¹⁰ "Training Materials for Investigative Police, Zhengzhou Peoples' Police Training School, December 30, 2002."

human rights, but it was clear that the MPS had little interest in a program outside of Beijing that it could not directly control, so OHCHR was never able to follow-up on this possibility.

A course to train 12 Chinese police trainers from around the country was held at the UK Police Staff College in Bramshill from 20 November to 12 December 2003. The aim of the course was to jointly develop a training module and training materials on the prevention of abuse of power in arrest, detention, and custody reflecting international standards. It was expected that international experts would be invited back to China to launch the pilot training scheme at a Chinese police-training academy.

Prior to the course, participants visited key organizations in the English criminal justice system, observing first-hand how international human rights standards had been incorporated into operational policing and the administration of justice. Participants then engaged in a combination of practical exercises involving human rights issues and training methodology, and information and discussion on human rights standards in relation to Chinese laws.

The course provided participants with information on international standards relating to law enforcement and made clear the value of training for all levels of police officers and leadership in setting standards of behaviour and conduct. It also emphasized the importance of understanding where domestic law fell short of human rights standards. Participants discussed problems encountered on the ground, including the lack of detailed guidance on police action in China and the difficulty of halting the process of detention and arrest of a suspect once the police and prosecution machinery engaged.

The training program greatly benefited from having been organized directly with the MPS. This was the first time that OHCHR had been able to work directly with a line ministry without involving the MFA as a conduit for communications. The MPS later confirmed that the study visit and training course had been useful in clarifying police powers in relation to arrest and detention through detailed implementing regulations. The visit also provided simple, practical examples of how detainees could be informed of their rights, such as through the use of posters, which were then introduced in police stations in China. The project also laid the foundation for a working relationship between OHCHR and the MPS, a ministry central to improving human rights protection and one with which foreign organizations had almost no history of engagement on the issue of human rights.

Yet the challenges inherent in strengthening the human rights component in Chinese police training were substantial. It was unrealistic to expect participants in a two-week overseas course to achieve not only a sufficient understanding of international standards and their implications for police training, but also to thrive with training methodologies with which they were unfamiliar and sceptical. Indeed, the flexible, participatory, self-critical training approach employed in the course significantly differed from Chinese training methods, which rely on large group lectures. The methodology was challenging for some trainees. There was also sensitivity over whether China's record was being attacked during some of the sessions. The successful transfer of a more participatory training model to the Chinese context would have required significant investment in training trainers and in developing appropriate teaching materials, as well as a commitment from the MPS to ensure that funds would be available for smaller training groups. In the short term, resource constraints – human and financial – made this very challenging to achieve. However, it was thought that the small group of very active participants could be potential project champions in a position to advocate for a stronger human rights component in police training within the MPS – for example, one of the most enthusiastic participants was a high-ranking MPS officer in Beijing.

While the police had a stated commitment to improving human rights protection and awareness, conflicting incentive structures meant that putting human rights into practice was very difficult for a local police officer under pressure to break cases. Further revision of the law, independent monitoring, credible reporting, and reparation mechanisms would also be necessary. Furthermore, any successful work in this area would need to be based on an understanding that international standards should be translated not only into national laws, but also into codes of conduct that would ensure implementation in practice. In meetings with the MPS it seemed that future collaboration along these lines was possible.

Prison Administration

In early discussions with OHCHR, the Ministry of Justice acknowledged the need to improve the protection of prisoners' rights. UN human rights mechanisms consistently expressed concern regarding harsh treatment of prisoners including torture, the denial of medical care, and the use of forced labor.¹¹ OHCHR recommended working with the Ministry to

¹¹ See, e.g., *Report of the Committee Against Torture*, UN Doc. A/55/44, paras. 106–145.

incorporate international standards into the training of prison officials and to examine the relevance of such standards for legislative and institutional reform.

The first activity was a two-day workshop in Beijing in June 2002. Workshop participants acknowledged the need for prison reform and proposed follow-up activities such as further workshops on inspection and monitoring; study visits to countries offering examples of good practice; the establishment of a committee of experts comprising international and Chinese resource persons; the training of trainers; and the distribution in China of a Chinese version of OHCHR Professional Training Series No. 9 *Human Rights and Prisons* and *Pocket Guide* (a translated version was made available to all participants).

A follow-up to the workshop took place in Switzerland from 29 September to 2 October 2003, comprised of a round-table and a program of visits to the Swiss prison system for a delegation of 15 senior Chinese prison administrators, trainers, legislators, and MFA officials. International experts from New Zealand, Switzerland, and the U.S. attended both the Beijing workshop and the Geneva round-table, providing continuity. Discussions involved the treatment of prisoners and the recruitment, training, and responsibilities of prison officers.

An independent evaluation found that participants were satisfied with the activities, with the main regret being insufficient time for discussions. While specific recommendations for prison reform had not been clarified, Chinese participants were interested in continuing cooperation.

Given capacity issues at OHCHR and the strong role of Switzerland in these activities, it was agreed that the Swiss government would undertake further activities with the Chinese in this area. As the MOU had expired, this was a practical response to ensure that potentially valuable cooperation continued. While useful in the circumstances, when initiatives are handed over for funding and implementation to other governments or agencies, the instigating agency naturally loses the ability to have any real influence over future outcomes.

Judges and Lawyers

The Needs Assessment Mission had identified the need to promote examination of international human rights standards for the administration of justice and highlighted concerns within China regarding corruption and other interference with law enforcement. While the mission also rightly recognized that fundamental reform would require difficult political decisions, it determined that technical cooperation activities could encourage

greater understanding of and attention to the relevance of these decisions to China's international obligations.

In August 2002, High Commissioner Mary Robinson and China's Vice Foreign Minister Wang Guangya opened a high level workshop on judges and lawyers, with a focus on the independence of the judiciary and comparative training approaches. The two-day workshop, held in Beijing, brought together Chinese senior officials and practitioners with international experts. As a high level activity, it drew significant attention to the issue in China and was widely covered in the press. But there was not a clear follow-up agenda.

This is another area where successful technical cooperation depended on political decisions. The underlying problems were already well understood by Chinese scholars and reform-minded officials, and proposals by Chinese scholars for substantial legal revisions that would have increased judicial independence reportedly had been shelved. It was decided that there was little necessity for further technical assistance in the absence of a political breakthrough and a request from the Supreme People's Court for assistance with the reform process.

Human Rights Education

In meetings between OHCHR and the Ministry of Education, discussions took place regarding the training of primary, secondary, and university-level teachers on human rights. OHCHR believed there was a joint commitment to train teachers on human rights education as had been reflected in the MOU. It developed an incremental approach, envisaging an initial workshop to introduce UN materials (the UN publication *The ABCs of Human Rights* and a Resource Kit of UN human rights education material for schools, which was translated into Chinese), followed by activities to integrate international material with existing Chinese materials to strengthen teacher training in human rights education.

Vice Premier Qian Qichen and High Commissioner Mary Robinson opened a national workshop on human rights education in primary and secondary schools in Beijing in November 2001. The workshop sought to develop a common understanding of human rights education in schools, as defined in human rights instruments; to identify key components for the effective incorporation of human rights education in the Chinese school system; to present relevant experiences from other countries, particularly in Asia; and to develop a strategy for strengthening such teaching in China. A study visit to the Philippines then took place in September

2002 to introduce Philippine practice in incorporating human rights in primary and secondary school curricula, but it was not able to elicit common ground or a strategy for continued cooperation.

Overall, these activities were not successful in taking forward the stated aim of jointly developing teacher-training materials for human rights education. This was in large part because of a key difference in how the two sides defined human rights education. In meetings with the Ministry of Education, officials were keen to present China's experience in teaching legal education, but appeared to have little interest in joint collaboration on teacher training. China was clearly proud of its own efforts in this area and provided copies of primary and middle school legal education textbooks to OHCHR which showed material with reference to specific rights protected by Chinese law. But not all the rights discussed were human rights and the emphasis was more on encouraging respect for national law rather than international human rights law. OHCHR made clear to the Chinese side that while legal education activities may provide a good foundation for human rights education, the two were not the same. OHCHR decided that there was little scope for further collaboration with China on this issue without a clearer political commitment from the government.

Human Rights Support to Academic Institutions

OHCHR assisted in the publication of a *Chinese Yearbook on Human Rights* with the Chinese Academy of Social Sciences (CASS) Institute of Law.¹² CASS is an influential government-affiliated research institution with high standing in China's academic community and is also home to one of the first human rights centers in China. Given that the publication was dually edited by OHCHR and CASS and published by Brill, content selection and quality control was rigorous. The bilingual publication included both Chinese and international authors' articles on key human rights issues of relevance to China.

Human Rights Fellowships and Study Tours

Human rights fellowships for government officials and academics relevant to the technical cooperation program were listed as an agreed activity

¹² Sun Shiyan and Stephanie Kleine-Ahlbrandt, eds., *Chinese Yearbook of Human Rights*, Vol. 4 (Leiden, Netherlands: Brill, 2006), <http://www.brill.com/chinese-yearbook-human-rights-volume-4-2006>.

in the MOU. Several were provided in 2002 at the International Institute of Human Rights in Strasbourg and in 2004 at the Åbo Akademi Institute for Human Rights in Finland. These courses were highly appreciated by the MFA officials who attended. On completion of the course, participants were required by the MFA to write a report, which, according to one participant, was later published in the Ministry's internal publication.

Despite expressed Chinese interest in continued workshops and study tours, it was decided that general human rights training for MFA officials was not the best use of available funding. OHCHR decided not to provide future fellowships unless recipients could contribute new insights and understanding to the implementation of the program, since the OHCHR mandate was to encourage structural change in Chinese law, policy, or practice.

Disability Rights

OHCHR cooperated with UNDP in a Project on Disability Rights, in which OHCHR provided expertise.¹³ OHCHR also participated in the development of a handbook on best practice, *Protecting the Rights of Persons with Disabilities: International and Comparative Law and Practice*, the first publication of its kind in Chinese, which was launched in Beijing on the International Day of Disabled Persons 2003. The China Disabled Persons Federation (CDPF) distributed the publication to its offices at the provincial, city, and county level and carried out local trainings of trainers utilizing the publication and the OHCHR-UNDP disability rights training methodology.¹⁴

CHALLENGES TO THE PROGRAM

Commitment of the High Commissioner and the Chinese Leadership

The success of technical cooperation depends on political will to use project outcomes. In a field as sensitive as human rights, it was difficult to

¹³ For example, OHCHR provided expert trainers for workshops on disability rights held in Chengdu (2002) and Xi'an (2003).

¹⁴ The China Disabled Persons Federation (<http://www.cdpf.org.cn/english/>) is one of the key Government-supported non-governmental organizations in China. Deng Pufang, President of the CDPF (himself a victim of the Cultural Revolution, when he became paralyzed from the waist down), the elder son of Deng Xiopang, was a recipient of the 2004 UN Human Rights Prize.

keep government partners active in implementing activities at the working level unless they knew that they were obliged by a high-level agreement. The personal commitment of both High Commissioners and the Chinese leadership was essential. As long as the High Commissioner was travelling regularly to China and meeting with high level officials, momentum was created at the working level to ensure project implementation. When High Commissioners subsequent to Mary Robinson inevitably travelled less to China, it was not surprising that technical cooperation also encountered difficulties. But in the end, nothing could make up for a lack of political will from the Chinese side to implement and follow-through on projects, which became clearer as time went on.

Lack of an OHCHR Presence in China

The lack of a field presence in China was another significant challenge to the effective implementation of the technical cooperation program. While the MFA could understand the technical reasons for OHCHR's request to place a staff member in Beijing, it had strong reservations about the proposal, arguing that the 'public perception' of an OHCHR presence would confuse technical cooperation with monitoring. The Ministry also pointed out that OHCHR did not provide human rights technical assistance to any Western country nor to many other countries in the Asia-Pacific region.

As a second-best option, OHCHR tried to secure the appointment of a human rights advisor to work within the UN country team. The advisor's responsibilities would have included advising the country team on integrating human rights throughout all UN programming, a stated goal of the UN. But the government never agreed to such a presence, mostly out of fear that it would facilitate monitoring and reporting on human rights. Unfortunately, there was also resistance to the idea from certain members of the UN country team on the ground, who made their views known to the government.¹⁵

With a program so large and complex, establishing strong and sustained contacts with Chinese partners in the interest of more effective project management was not a task that could be undertaken successfully

¹⁵ Several UN agencies on the ground were highly supportive of OHCHR's activities and wanted access in-country to a human rights expert. However, the UN Resident Coordinator at the time refused to support the establishment of an OHCHR presence. But this was hardly a consistent UNRC approach; his predecessor had been very supportive of OHCHR's work in China.

from Geneva. A focused program of activities with clear and shared objectives unquestionably required a project office in China. Yet even though the NAM identified failing to achieve a presence in China as a risk, the program's goals were never reassessed in light of the fact that a field office was impossible to establish.

MFA "Gate Keeper" Resulted in Limited Access to Line Ministries

One of the factors responsible for delays in the implementation of activities was the MFA's role as the main implementation partner and coordinator of the program. There were constant shortages of available project staff given other priorities in the MFA, and it would have been inappropriate for OHCHR to subsidize staff positions within a Chinese ministry. In order to minimize the administrative burden, OHCHR recommended signing an overall framework agreement with the MFA but working more closely with the other relevant line ministries for day-to-day project implementation. The MFA never agreed to this arrangement, even though in some cases, direct relationships with line ministries were established anyway.¹⁶ The insistence for the MFA to be a 'gatekeeper' seemed to be an attempt to control access to the program and attempt to maintain its own position vis-à-vis other ministries. On several occasions, the MFA went too far, trying unsuccessfully to assert influence over OHCHR's choice of international staff in Geneva to manage the program.¹⁷

Bureaucracy

While having to work through an understaffed Chinese MFA slowed implementation considerably, things were almost as slow on the UN side, due to bureaucratic constraints in the organization's headquarters in Geneva. OHCHR, which is administratively part of the UN Secretariat, does not have the ability to administer its own programs, and instead

¹⁶ This was the case with the Ministry of Public Security, in part because it far outranked the foreign ministry.

¹⁷ The MFA pressured OHCHR to hire a "Chinese candidate" for the program management team in Geneva, and then provided the office with a list. Of course this meant a candidate selected by the Chinese Government, as there were several Chinese nationals already working in OHCHR, whom they did not want to take the position. This was part of a larger effort by China to get more of its candidates into the UN system. They would often say to OHCHR that it "had too few Chinese." OHCHR repeatedly explained to the MFA that there were established recruitment procedures and that any interested candidates should apply through them.

depends on the UN's Geneva Office to do so. Every single action – for example a consultant's contract – had to go through lengthy processes in two separate UN bureaucracies, neither of which showed much flexibility. For example, it was necessary to get pre-approval of all expenses weeks in advance of all travel and activities, with no expense facility outside the multiple step authorization process in Geneva. Trying to implement technical cooperation between OHCHR and the Chinese MFA was therefore like being stuck between two dinosaurs. Whenever it was possible to get one to move, the other held things up. On several occasions, opportunities that presented themselves on the Chinese side were impossible for OHCHR to grasp because the bureaucracy moved so slowly.

Similarly, OHCHR's ambition with its program with China was far greater than the resources devoted to it. The original vision for technical cooperation with China was to engage in meaningful cooperation on the key human rights challenges facing the country. As such, assigning only one staff member to be responsible for the program was a mismatch – particularly when that person was simultaneously given numerous other responsibilities both in China and in the Asia-Pacific region.¹⁸ Although China did not want an OHCHR staff member permanently based in Beijing, it facilitated the program officer spending significant periods of time working from Beijing without any problems. But it soon realised that OHCHR did not intend to devote significant resources to the project – in contrast with other organizations looking to cooperate with the MFA. This led to its decision to give the OHCHR program less importance.

A related issue was the lack of a Chinese language website to bring together all existing UN human rights standards, reports, treaty body documentation, and training materials. Given the keen demand in China for more easily accessible UN documents concerning China, this was an obvious project. But in the absence of an in-house capacity to develop this, the China program officer had to personally manage such translation and dissemination of relevant reports and training materials.

Clash in Methodologies

Beijing made clear early on its principles of cooperation: mutual trust, mutual benefit, equality, and a step-by-step 'building blocks' approach.

¹⁸ The China program manager also served as China Desk Officer, which meant that she supported the monitoring and reporting work of the treaty body and special procedure systems as it related to China, including by accompanying the visit to China in November-December 2005 of the Special Rapporteur on torture, Manfred Nowak, and

This incremental approach was supposed to allow for the development of productive working relationships, mutual learning, and adaptability to changing circumstances. On the one hand, this approach was understandable as both sides did need to build trust, especially since this was the first experience of a UN agency undertaking a project with the MFA on human rights.

But on the other hand, the need to go slowly made it difficult for OHCHR to advance quickly to more meaningful activities. For example, China insisted on agreeing to a 'Memorandum of Intent' before proceeding to a 'Memorandum of Understanding.' Then, as soon as an MOU expired, either a new MOU or an Agreed Note was always necessary, which took weeks and sometimes months to negotiate. According to OHCHR project methodology, MOU and MOI agreements are not necessary for technical cooperation activities and can risk over-politicizing them. On the other hand, the utility of such a document in the Chinese context lay in its ability to provide high-level cover to partners working with OHCHR on sensitive topics. It also helped to lock in Chinese partners; they felt the pressure of needing to implement MOU activities or face criticism. But the difficulty of negotiating these documents slowed down implementation of program activities.

Another example of the different approaches preferred by each side was the organization of workshops. These were designed as initial activities in each area, in order to foster discussion on subsequent project activities – since it was difficult to get detail for projects from OHCHR visits to Beijing alone. But particularly in the very beginning, the workshops served as platforms for each side to reiterate their views without enough time allotted for meaningful discussion of the issues. OHCHR was able to negotiate a methodology for workshops that moved quickly past the plenary stage into smaller working groups with time to discuss specific issues and work on recommendations. This allowed for some very lively and frank discussion on current problems and next steps for cooperation. Meanwhile, OHCHR strived to ensure continuity with international experts and pushed the Chinese side to do the same.

It was also challenging to try to ensure that workshops and trainings were not standalone activities, but integrated into a more focused approach with agreed outcomes to improve, via pilot projects, specific areas of criminal justice practice. In the Chinese context, there was

assisting in the drafting of his reports to the Commission on Human Rights and the General Assembly.

reluctance to agree to a long list of outcomes as opposed to initial, exploratory activities.

Another difference in approach was that of emphasis on the different types of human rights. The MFA periodically raised concerns that far fewer events took place in the domain of economic, social, and cultural rights when compared with civil and political rights. However, OHCHR believed that technical cooperation should draw on its comparative advantages and focused its efforts to make the most effective use of its limited resources in a large country. OHCHR felt that economic, social, and cultural rights could best be promoted by supporting and drawing on the resources in the wider UN system (UNDP, ILO, UNICEF, etc.). Yet these agencies did not always use the normative or rights-based approach in their work.¹⁹

China's Growing International Clout

At the beginning of cooperation in the early 2000s, China saw OHCHR as a relatively neutral and effective way to get the expertise that it wanted, in contrast with working directly with Western governments or organizations. When engagement started, Chinese institutions were working on several potentially significant legal reforms. In contrast to Western government partners, which generally pushed their own legal systems, OHCHR could bring points of view from experts from various countries who would focus on best practice in different countries in trying to meet the requirements of international law. It also helped that there was a strong body of material from treaty bodies and special procedures that could be used in designing technical cooperation.

Another reason China engaged in technical cooperation with OHCHR was for the image value it provided. When China commenced technical cooperation with OHCHR, there was still a credible effort in the then-Human Rights Commission to adopt a country resolution against China.

As the years went on, however, concerns about its international reputation became less important for Beijing. Chinese diplomats knew that China was widely perceived as a serious human rights abuser and a

¹⁹ An OHCHR-supported "Human Rights Strengthening" Mission visited China from August 9–20, 2004 to begin a dialogue with UNDP China about applying a human rights-based approach to its development programs. While UNDP had policy on human rights (Integrating Human Rights with Sustainable Human Development), getting the organization to apply the human rights based approach on the ground was a continual challenge, especially in China.

protector on the international stage of other human rights abusing states. While they were uncomfortable with this image, they were increasingly far less comfortable with being seen domestically as caving in to international pressure.²⁰

As China started to gain more international clout, it also started to take a less cooperative attitude towards the international community on human rights. Even during its early days of technical cooperation, OHCHR was often reminded that it did not have technical cooperation in other P5 or Western countries. As China's economic clout rose, Western countries became even less supportive of giving attention to human rights in China. The progressive weakening of the bilateral human rights dialogues of Western countries was a demonstration of this fact.²¹ In one example, China applied pressure to bring to an end the so-called 'Berne process' of dialogue between Western countries maintaining bilateral human rights dialogues with China.²² China completely halted technical cooperation with OHCHR in 2007.

THE HIGH COMMISSIONER'S CONFLICTING ROLES: ENGAGING AND CRITICIZING GOVERNMENTS

The High Commissioner needs to fulfil the obligations of a UN official accountable to Member States, while also being the chief global

²⁰ In recent years, the MFA has been increasingly criticized by nationalist elements from the Chinese public and harder-line agencies, which accuse it of selling out China's interests. Members of the public have reportedly long sent calcium pills to the ministry in allusion to a weak spine, with others calling it the 'ministry of traitors' (外交部 to 卖国部). See International Crisis Group, *Stirring Up*, 16. See also Susan Shirk, *China: Fragile Superpower* (Oxford, UK: Oxford University Press, 2007), 101.

²¹ See Campbell Clark, "China Turns Chilly on Human Rights Dialogue," *The Globe and Mail*, August 22, 2012.

²² Starting in 2001, the Swiss Government led a series of informal consultations of representatives of governments which participated in bilateral dialogues with China on human rights issues, referred to as the 'Berne Process.' The meetings often involved around 25 participants from 10 Western countries as well as the EU Commission and EU Council Secretariat. Consultations were held in April 2001 (Berne), March 2002 and March 2003 (Geneva, Palais Wilson) (addressed by then-High Commissioners Mary Robinson and Sergio Vieira de Mello), February 2004 (Berne), January 2005 (London), December 2005 (Brussels) and June 2006 (Berne). Participants discussed how to render more effective their bilateral dialogues with China and shared information on technical cooperation projects in the interest of better coordination and avoiding overlap. In later years, the meetings focused on developing benchmarks to evaluate the progress of the human rights dialogues, as well as sharing information on effectively raising individual cases and key thematic issues with Chinese authorities. Starting in 2006, the Chinese Government expressed

spokesperson for human rights.²³ Particularly in the Chinese context, the personal style of the High Commissioners became important in their approach and how the Chinese reacted to them and to OHCHR.

Crucial to the establishment of OHCHR technical cooperation with China was the level and terms of engagement set by Mary Robinson. During her seven visits between 1997 and 2002, she engaged in a ‘two-pronged’ strategy of continually raising human rights problems with the authorities while at the same time engaging in technical cooperation to help improve the human rights situation. This was not an easy balance to strike, not least because China’s practice was to hold out dialogue and engagement as a reward only for countries that refrained from criticizing its human rights record. Robinson enjoyed the political clout that came from being a former head of state – which helped her secure meetings with China’s top leadership – and she leveraged this to the maximum into a true exchange with China’s leaders.²⁴ In doing so, she parted ways with the previous High Commissioner, José Ayala Lasso, who favoured quiet diplomacy.²⁵

By being a credible and consistent voice for human rights victims, High Commissioners arguably create more power for themselves to go up

displeasure with the group and its meetings. One participating government was told that China would suspend indefinitely their bilateral rule of law programs in China if the process were not abandoned. The ‘Berne process’ name as such was discarded but participants affirmed that they had the right to hold any discussions they chose amongst themselves as a part of normal international diplomacy.

²³ In doing so, that individual needs to punch above his or her weight, as OHCHR has never received more than three per cent of the total UN budget. International Service for Human Rights, “High Commissioner Calls 3% UN Budget for Human Rights ‘Scandalous’, in Third Committee Dialogue,” October 19, 2011.

²⁴ Mary Robinson met with the following high-level officials, among others: 1st visit (6–15 Sept.1998) President Jiang Zemin, Vice Premier Qian Qichen, Governor of the Tibetan Autonomous Region Mr. Lek Chok, and Vice Mayor of Shanghai Mr. Zhou Muyao; 2nd visit (19–21 Dec.1999) President Jiang Zemin and the Foreign Minister; 3rd visit (29 Feb.–2 Mar. 2000) Chief Executive of the Hong Kong Special Administrative Region, Mr. Tung Chee-hwa, Vice Premier Qian Qichen, and Vice Foreign Minister Wang Guangya; 4th visit (20–21 Nov. 2000) President Jiang Zemin, Vice Premier Qian Qichen; 5th visit (25–27 Feb.2001), Mr. Li Tiejing, member of Politburo, State Counsellor, Foreign Minister Tang Jiaxuan, Minister of Justice Mr. Zhang Fu-Sen, and Mr. Deng Pufang; 6th visit (8–10 November 2001), Vice Foreign Minister, President Jiang Zemin; 7th visit (18–20 August 2002), Vice Foreign Minister, Minister of Justice and Vice Premier.

²⁵ Robinson’s predecessor, José Ayala Lasso, said that the proof of success of his low-key approach to China was that he received an invitation to visit. He also stated, “I’m not convinced that simply speaking out is the best way of obtaining results. We have a history of countries speaking out, U.N. institutions speaking out. I’m asking if the results obtained have been enough.” Elif Kaban, “UN Rights Chief for Quiet Diplomacy in China, Cuba,” *Reuters*, March 5, 1997.

against problem governments and certain corners of the UN that are not always human-rights friendly. High Commissioners are bolstered significantly by the existing treaty body and special procedures systems serviced by OHCHR which engage in reporting and monitoring. High Commissioners have consistently drawn on this body of work when engaging the Chinese authorities on human rights. Mary Robinson started the practice of presenting the Chinese authorities with an Aide-Memoire summarizing the conclusions, observations and recommendations of the treaty bodies and special rapporteurs, to serve as background to discussions during her visits.

At the end of every visit, she gave press conferences and spoke openly about several of the human rights issues she raised in private meetings, something that the government disliked but tolerated.²⁶ These press conferences ended up being significant events with a massive presence of both Chinese and foreign journalists, none of whom were accustomed to hearing a UN official publicly criticize China – let alone from within a UN building in Beijing. It was uncomfortable and unprecedented for most UN officials based inside the country, some of whom tried to distance themselves from her positions in meetings with Chinese officials.

Chinese officials certainly did not like Robinson's criticism – especially her practice of bringing long lists of individual cases and both privately and publicly raising them – but they came to respect her for it. On her last visit to China, the authorities tried to give her less time during her highest-level meetings in an effort to prevent her from raising as many individual cases, but she just read her list twice as fast.²⁷ They also strongly criticized her meeting with the Dalai Lama in August 1999 and during her subsequent visit lectured her on the differences of being a president and a UN official. In addition to mainland China, Robinson also focused attention on the situation in Hong Kong, travelling there during the height of tensions over the highly controversial Right of Abode case and met top officials including the Chief Executive to discuss a number of issues of concern to the Human Rights Committee in its review of Hong Kong's periodic report four months earlier.

Robinson also used her clout to hold conferences in China on sensitive issues that otherwise would not have been addressed – and certainly not

²⁶ In her memoirs, Robinson describes how she strived for balance in those press conferences between recognising progress made and criticizing on-going violations of human rights. Mary Robinson, *Everybody Matters* (London, UK: Hodder & Stoughton, 2012), 226.

²⁷ Afterwards, MFA officials commented that they didn't like it, but "we are used to her ways by now."

at such high levels in the Chinese bureaucracy. The conferences that her office organized were never attended by less than the Vice Minister level, and she also managed to get Politbureau member Qian Qichen to open a conference with her on the highly sensitive issue of Re-Education Through Labor.

Sergio Vieira de Mello continued in this vein. Early in his tenure he established good relations with the Chinese MFA, yet also sent personal letters on various cases of alleged human rights violations. Once, just after signing such a letter, Sergio wondered out loud: “we’ll see if they still want me to visit now.”²⁸ Vieira de Mello had a long history of cooperation with the Chinese, including when China sent peacekeepers to East Timor while he was the head of that operation, and he intended to carry on both engaging and criticizing China.

When Louise Arbour took over, she continued to engage without shying away from criticizing China, though understandably with a different personal approach. Unlike Mary Robinson, she did not meet the Dalai Lama and saved some of her harshest criticism for her private meetings with government officials, but she never shied from the protection aspect of her mandate.²⁹ The rank-conscious Chinese had to adjust to a High Commissioner who they considered lower in political seniority in comparison with Robinson. But Louise Arbour was taken very seriously by the Chinese, as a formidable and trustworthy interlocutor who was absolutely solid on the issues. She quickly gained the respect of the MFA with her commitment to engaging with them while also being quite tough on several human rights issues. For example, she regularly raised with the authorities issues such as the need for judicial review of all decisions regarding deprivation of liberty and the extensive use of the death

²⁸ Vieira de Mello sent a personal letter on behalf of Tenzin Deleg Rinpoche to Ambassador Sha Zukang dated 13 December 2002 in which he expressed concern at “reports that the trial of Tenzin Deleg Rinpoche and Lobsang Dhondup had been unfair, that the two men did not have access to a lawyer, and that the evidence linking them to the crimes they allegedly stand accused of was vague and unsubstantiated.” The late High Commissioner sent a strongly worded follow-up letter dated 23 January 2003 following Lobsang Dhondup’s execution.

²⁹ In an interview, Arbour acknowledged that she had taken a more diplomatic approach to promoting human rights in places such as China and Russia than elsewhere, saying she had chosen a strategy of private engagement “that is likely to yield some positive results” over one that “would make me and a lot of others feel good.” She said that as a UN official she was constrained by the reality of the organization’s power centers, including China, Russia and the Group of 77, a bloc of more than 130 developing countries. In that context, she said, “naming and shaming is a loser’s game.” Colum Lynch, “U.N. Human Rights Chief to Leave Post,” *Washington Post*, March 3, 2008.

penalty, including for offences that do not meet the international standard of the most serious crimes. She also raised a number of individual cases illustrative of the changes that needed to be made as China prepared to ratify the ICCPR.

During her visit to China in 2005, Louise Arbour was successful in securing meetings with some genuinely independent NGOs, in addition to the usual government-sponsored NGOs that Beijing insisted high-level officials must meet. This was the first time that a High Commissioner was able to meet with genuine civil society organizations, and it was the result of significant negotiation between the two sides. Arbour also met with academics playing a role in advancing human rights in the country through pilot projects (for example, providing lawyers and videotaping police interrogations) and public interest law cases.

Arbour placed a lot of emphasis on ICCPR ratification, which she consistently raised with the authorities. For example, in a meeting with one high-ranking official during her 2005 visit, she said that a target date of the 2008 Beijing Olympics would provide the opportunity to showcase China and leave a unique and positive legacy. In response, this official suggested that rather than linking ICCPR ratification to a specific sporting event, the focus should instead be to bring China's law and practice up to standards to the maximum extent possible before ratification in order to minimize reservations. Arbour then urged the authorities to take concrete, tangible steps that would indicate their seriousness in preparing for ratification, and said that OHCHR would offer support and expertise in this regard. Eight years later, China still has not ratified the ICCPR.

Louise Arbour also asked – for her second visit – to visit Tibet.³⁰ While the Chinese responded that the “timing was not convenient,” her request provided a future High Commissioner with the possibility to follow-up by repeating the request for a visit.³¹

CONCLUSION

In the end, the demise of OHCHR's program in China was the result of combined factors. But a key, overriding reason was the increasingly

³⁰ Stephanie Nebehay, “Tibet: China Blocks ‘Inconvenient’ Visit,” *The Guardian*, April 11, 2008.

³¹ Unfortunately, High Commissioner Navi Pillay had not visited China by mid-2013, despite having visited nearly 40 countries in the first three years of her mandate. China was the first country to request that she visit.

restrictive atmosphere in which OHCHR struggled, no matter the level of administrative support or personal clout of the High Commissioner. The golden years of technical cooperation were from the mid-1990s to early-to-mid-2000s, before the Chinese government began to focus in 2005–2006 on ensuring a successful 2008 Olympics. Then the environment became much more restrictive, with a more sophisticated level of human rights abuse and control and a more defensive and hubristic attitude towards the international community, alongside a number of concrete setbacks which included the removal of the head of the Supreme People's Court.

It is impossible to know now whether an appropriate level of administrative, financial, or political support would have enabled the OHCHR program to continue or whether Beijing would have curtailed it anyway. It is likely that with a more supportive arrangement, OHCHR might have been able to accomplish a more meaningful program that might have lasted a few more years. But the differing priorities, goals, and methodologies of each side meant that the program was unlikely to operate successfully over a significant period of time.

