

TORTURE IN THE UNITED STATES AND CHINA: COMPARING AMERICAN AND CHINESE EXCEPTIONAL- ISM WITH RESPECT TO THE UNITED NATIONS CONVEN- TION AGAINST TORTURE

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The United States and China (PRC) share a common behaviour of non-compliance with the United Nations Convention Against Torture. Both states rest their claims of noncompliance on the explanation of exceptionalism. Despite the broad similarity of noncompliance, there is contrast in both the exceptionalism espoused to and the behaviour observed in China and the US. The following article examines these forms of exceptionalism in a comparative case study. Within the context of the UN Convention Against Torture, American exceptionalism has been a double-edged sword as the US-led efforts to draft and construct the treaty were based on its exceptional position as a hegemonic leader. But then the US has committed strong reservations hamstringing the treaty while ratifying it and also limited compliance after ratification due to security concerns. On the other hand, Chinese exceptionalism can be linked to a weak level of participation in the early drafting of the treaty due to its explicit and stated position of being outside the Western construction of international order. Despite nonparticipation in the drafting of the Convention, China did ratify the treaty due to an overwhelming perceived need to pursue an image of good international behaviour, opening the study to a hypothesis that sociological elements can deter or otherwise contain tendency towards exceptionalism. Ultimately, China has shown limited compliance with the Convention Against Torture in a large part due to limits of capacity arising out of its exceptional status. Whether, for both states, exceptionalism is a reality or an excuse does not alter the linkages drawn and issues discussed in the cases.

Introduction

The study of exceptionalism in international treaty behaviour includes a variety of issues but focuses on the prominent debate over compliance. Exceptionalism can lead to noncompliance. In a moment of noncompliance arising out of exceptionalism, a state does not adhere to a treaty due to the fact that it considers itself outside the group of complying countries because of exceptional or extraordinary circumstances unique to that country. Exceptionalism and noncompliance often go hand-in-hand; it is the role of the international

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relations and international law scholar to unpack the nature of exceptionalism with its linkages to noncompliance.

American exceptionalism and noncompliance is at the centre of the overall discussion of exceptionalism and compliance. Perspectives on American exceptionalism range from scholars who believe that the United States (US) is exceptional in its treaty behaviour and those who do not, to commentators who are highly critical of American exceptionalism and those who find positives in its “double-edged sword”.¹ While this study rests on the commonly held assumption that American exceptionalism is a reality, the author hopes to consider the qualities of American exceptionalism in a different light through the lens of comparison. With the goal of using the tool of contrasting exceptionalism case studies, the following article will examine American exceptionalism in comparison with Chinese exceptionalism in treaty behaviour with regards to the United Nation Convention Against Torture (UNCAT).

Both American and Chinese exceptionalism have led to noncompliance with the UNCAT (Wright 2008, Sklar 1998); however, the different forms of exceptionalism have led to different types of noncompliance. The broad similarity of noncompliance due to exceptionalism overshadows significant differences. American exceptionalism, as a true double-edged sword, leaves open the potential for leadership and constructive engagement in treaty regimes as the single great world power, much more so than Chinese exceptionalism which lends itself to absenteeism and hesitant integration. On the other hand, American exceptionalism and noncompliance are difficult to remedy in contrast to Chinese noncompliance as a lack of capacity that could be resolved through a managerial approach to compliance. In the end, the comparison of differing forms of exceptionalism illuminates specific qualities of American and Chinese exceptionalism in reference to the UNCAT and within the broad theme of compliance with international treaties.

The paper will commence with a broad examination of the scholarship on exceptionalism and compliance in international treaty behaviour. While this section of the article does not offer a comprehensive understanding of either concept or the scholarly debate thereof, it does point to specific issues concerning exceptionalism that deserve attention in the context of the study. Following the section on exceptionalism and compliance, the different forms of exceptionalism, American and Chinese, will be discussed. Next, there will be a brief synopsis of the history and content of the CAT. The study will delve into a discussion of the impact of American and Chinese exceptionalism on the life of the treaty, beginning with negotiation, then ratification, and, finally, compliance. For each of these three stages, there will be two sections dealing with the US and Chinese involvement in the UNCAT. For example, the first section

¹ Consider the ongoing debates between Jack Goldsmith and Antonia Chayes or the negative and positive perspectives on American exceptionalism as a dialogue between Michael Ignatieff, Harold Koh, and Seymour Martin Lipset.

on negotiation and US involvement discusses the potential for US leadership due to its exceptional qualities as the world hegemon and international leader. Finally, the author will summarise the involvement of the US and China in the UNCAT with the goal of limiting noncompliance due to exceptionalism. The article will conclude by looking at ways to mitigate noncompliance arising out of exceptionalism.

American and Chinese Exceptionalism

With respects to international treaty behaviour, exceptionalism can lead to noncompliance. The notion of exceptionalism as an excuse for noncompliance is beyond the scope of this study and would be a difficult yet intriguing thesis to test. What is central to the current study is the concept of differing forms of exceptionalism. A comparison of American and Chinese exceptionalism with respects to a specific body of international treaty law, the UNCAT, allows for a deeper understanding of not only the specific forms of exceptionalism but also the linkages between compliance and exceptionalism.

The seminal definition of American exceptionalism depends on three major elements or characteristics:

“American exceptionalism has at least three separate elements. First, the United States signs on to international treaties and then exempts itself from their provisions by explicit reservation, nonratification or noncompliance. Second, the United States maintains double standards: judging itself and its friends by more permissive criteria than it does its enemies. Third, the United States denies jurisdiction to human rights law within its own domestic law, insisting on the self-contained authority of its own domestic rights tradition”. (Ignatieff 2005, 3)

American exceptionalism exists in several stages: The US ratifies treaties with heavy reservations (assuming it does ratify the treaty). Then the US does not comply with the said treaty typically deferring to the superiority of domestic law and national protection of human rights. Also, the US sets criteria that downplay it and its allies’ noncompliance.

There are potential positive elements in American exceptionalism. The greatest potential positive of American exceptionalism is leadership in developing treaties:

“The United States, historically, has been exceptional in its international leadership and activism. And it alone holds the power to forge solutions to global problems....When [the US] refuses to ratify or fully implement certain provisions, the United States is at least being candid with the world, unlike other na-

tions that join treaty regimes and fail to comply.” (Koh 2003, 1483)

This is the double-edged sword of American exceptionalism (Lipset 1996, Chayes 2007). On the one hand, the US can be an exceptional leader in the international treaty; on the other hand, the US considers its exceptional position as superior to that of the rest of the world to the point where the US either undermines or does not comply with international law. American exceptionalism has many names including à la carte multilateralism, extreme unilateralism, and benevolent hegemony, but regardless of the name, the character of American exceptionalism falls into either on extreme of strong leadership or destructive noncompliance. (Gerson 2000)

Chinese exceptionalism is a less explored subject than American exceptionalism; however, with the growing importance and role of China on the global level, Chinese exceptionalism requires serious attention. The basic premise behind Chinese exceptionalism is the concept that China is a large country with an overwhelming and unique need to develop along with a huge population that requires a different approach to domestic governance. Also, China considers itself unique amongst nations as a thriving communist country with a long civilisational history that contrasts that of the West and democratic states.

Chinese noncompliance due to its position on exceptionalism is based on both a priority of economic development over human rights protection and a disagreement or divergence from Western, democratic values and the “Western system of law”. (Chan 2006) While many consider this functional and “moral” exceptionalism as an excuse by China to avoid compliance with legitimate international laws, there is a certain truth to the idea that China is exceptional in being such a large, non-Western, communist country. It is interesting also to look at moments of Chinese noncompliance arising out of exceptionalism as the Chinese Government espouses a doctrine of rationalism and national interest in foreign policy decisions. With such a priority on national interest and *Realpolitik*, it is difficult to pinpoint Chinese exceptionalism influencing compliance with international law.

When considering international human rights law, Chinese exceptionalism comes into focus. The Chinese leader of the 1980s, Deng Xiaoping, questioned the origins of an international human rights treaty regime: “What are human rights? Are they the human rights of the majority? Are they the human rights of a minority? Or are they the human rights of the entire citizenry? The meaning of human rights as spoken of by the Western world and as spoken of by us are two different things”. (quoted in Chan 2006, 173; Chang 1998, 4) In this way, China has an exceptional and explicitly non-Western concept of human rights. The exceptional Chinese concept of human rights depends on the

promotion of rights by the state, these rights not being natural in origin. As one commentator describes it:

“Under China’s political structure and culture, human rights are granted by the state and can easily be taken away by the state. If individual human rights run against state interests, the latter will usually prevail. The Chinese Government’s defence of its human rights record rests on the doctrine of exclusivity and cultural relativism based on concepts which promote subsistence, development, and collective over individual rights”. (Chan 2006, 177)

China has continually stated its need to develop economically and peacefully through the power of the state and that it will not submit to Western values or the Western definitions of human rights as inalienable. Chinese exceptionalism is evident in the belief that China is unique in the demands placed on it due to the need to feed and care for its large population despite low availability of arable land. Chinese exceptionalism leads to both nonparticipation, due to differences with the majority, Western-constructed international system, and a divergent domestic approach when there is involvement in treaties.

Chinese exceptionalism has both functional and moral aspects. (Chan 2006) It is also doubtful that Chinese exceptionalism will fade even with recent exponential increases in participation in the global scene. One scholar finds that “although China’s increasing compliance with the rules of the existing international treaty system has helped to move the world as a whole towards greater convergence in values and identities, divergence will no doubt continue to exist in the foreseeable future”. (Chan 2006, 218) That having been said, Chinese exceptionalism, like American exceptionalism, can be seen as a double-edged sword, with the negative consequence of noncompliance or non-involvement contrasting the positive prospective of leadership in the non-Western, developing world.

The United Nations Convention Against Torture – UNCAT

Before examining relevant American and Chinese actions with respect to the UNCAT, the origins and substance of the Convention deserves attention. The UNCAT, often described as the Torture Convention, exists within the body of international human rights law supported by the United Nations (UN). The text of the UNCAT was adopted by the UN General Assembly in December of 1984.² It came into force in 1987 after the twentieth state signed the treaty. Currently, there are 142 nations that are party to the UNCAT with nine nations that have signed it but have not yet ratified the treaty. The UNCAT must

² All information on the UNCAT and the articles of the UNCAT were accessed online from www.unchr.ch. Text of the Convention against Torture from: [www.unhchr.ch/tbs/doc.nsf/0/1b299ed549b81872c1257096004ba3da/\\$FILE/G0543204.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/1b299ed549b81872c1257096004ba3da/$FILE/G0543204.pdf).

also be understood in conjunction with the Geneva Conventions on the treatment of prisoners of war as both treaties work to limit torture, particularly torture during periods of conflict.

The UNCAT specifically defines and outlaws torture. According to Article 1.1, torture is understood as: “Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. (Convention Against Torture, Article 1) Notably, the definition of torture includes intentional physical or mental pain or suffering enacted by a public official or with the consent of a public official. Torture as a government activity in the form of inappropriate investigation is completely illegal under international law.

In the examination of exceptionalism, Article 2 of the UNCAT is extremely important. Not only is there a negative right whereby torture cannot be a pursuit of states party to the treaty, but also the signatories have a duty to prevent torture that may occur in that state: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 4 of the UNCAT finds that torture is an offense under domestic criminal law. Additionally, Article 2.2 requires that states take action to deal with torture domestically, stating that there are “no exceptional circumstances” that would allow torture to be permitted. While there are no exceptional circumstances limiting state-authorized torture, reservations to the treaty are permissible.

The UNCAT requires that each state report on internal progress on outlawing or dealing with torture and the UNCAT sets up a Committee Against Torture (CAT) to monitor compliance. The specific details of the country self-reportage are as follows: “Under Article 19 state parties must report to the CAT within a year of ratification and then once every four years. The initial report should extensively describe the way in which the state part meets the requirements of the Convention and subsequent reports should inter alia describe any changes that have occurred since the earlier report”. (Burns 2005, 5) These reports are given to the CAT. The CAT is composed of independent human rights experts to monitor the implementation of the Convention by signatories to the treaty. The CAT can even examine complaints from individuals according to Article 22.1 complement to Article 13, assuming the state has agreed with the relevant article.³ The CAT offers the only form of recourse in instances of noncompliance and violation of the UNCAT through its

³ Here it should be noted that it is a rare case that individual complaints or cases are examined by the Committee.

reportage function. Noncompliance with the UNCAT includes the “punishment” of publishing information on a state’s illicit activities or allowing torture to occur within its territory.

Exceptionalism as Leadership in U.S. Efforts to Negotiate the Convention Against Torture

The development of international law and international treaties occurs through the Putnam two-level game complicated by the additional role of non-governmental organisations. Government officials negotiate a treaty at the international level limited by the domestic preferences of a state, thereby seeking a treaty that will work in both international and domestic “win sets” for the parties involved. (Putnam 1988) The UNCAT was negotiated through several deliberations by the UN Commission on Human Rights Working Group. (Burgers and Danelius 1988) In the nascent development of the UNCAT, it was the efforts of the United States, an exceptional leader amongst states, in active support of the treaty that helped bring the UNCAT into existence.

The US participated in all the meetings of the Working Group in the drafting history of the UNCAT. Meeting annually from 1977 to 1984, the Working Group was a combination of Western and non-Western states. (Burgers and Danelius 1988, viii) The Working Group was composed of a variety of states but only a small number made a consistent commitment to the process:

The Working Group’s meetings were mostly attended by only some twenty to thirty delegations of members and observers. Often half of them came from Western Countries. Sweden always participated, together with Australia, France, the United Kingdom and the United States.... On the non-Western side, Argentina and Brazil as well as the Soviet Union always participated, whereas India, Senegal, Uruguay and Yugoslavia as well as Byelorussia, the German Democratic Republic and the Ukraine played an active role in several sessions. (Burgers and Danelius 1988, 32)

It is obvious that American efforts were prominent in the drafting of the treaty text particularly in the small, Western-oriented group of states involved. At moments, the US even sought compromise with its geopolitical rival, the Soviet Union, on sensitive issues. (Burgers and Danelius 1988, 87) The US became a leader in the negotiation of UNCAT; leading the Working Group, and abating the concerns of many states: “The United States delegate showed himself a highly articulate advocate of the inclusion of universal jurisdiction in the Convention”. (Burgers and Danelius 1988, 78) Within the Working Group, the US took on the role as leader whose efforts held sway

due to its exceptional position as the world's leading democracy and powerful hegemon.

American support was a significant driving force particularly in crucial moments towards the end of the negotiations. However, American support in the negotiation of the UNCAT was active but it did not match the level of activity of the Swedish delegation. The US delegation often questioned the text of the treaty with constructive criticisms. In assuming the role of a challenger to the original Swedish treaty text, the US was able to play a constructive role in the development of many of the pertinent definitions in the UNCAT such as the definition of torture and the reference to public activities concerning torture with alternative text proposals for Article 1.1 and 1.2. (Burgers and Danelius 1988, 41-42) In fact, the US pushed hard for a specific elaboration of the definition of torture to be an act that is "deliberate and malicious" during the early formative meetings of the Working Group. (Burgers and Danelius 1988, 46) Symbolic of the US using its exceptional level of power and influence in the negotiation of the UNCAT, the delegation from the US led other states in support of the creation of the treaty by "express[ing] no reservations with regard to the newly adopted *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*" at the end of the negotiation of the treaty. (Burgers and Danelius 1988, 106)

In the negotiation of the UNCAT text, the positive elements in the double-edged sword of US exceptionalism came to the forefront. This is the ability of the US in being an exceptionally powerful state with a strong democratic and human rights tradition to lead the call for greater protection from torture in the negotiation of the UNCAT. The US State Department, although not an unbiased source, describes the US performance on international human rights and torture treaties as an exceptional leader:

The United States has long been a vigorous supporter of the international fight against torture. United States representatives participated actively in the formulation of the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1975, and in the negotiation of the Convention Against Torture. The United States continues to be the largest donor to the United Nations Voluntary Fund for Victims of Torture, having contributed over USD 12.6 million. (United States of America Comment 2000)

Not only does the US support and lead the drafting and negotiation of the torture treaties, but it also offers voluntary financial support for the UN fund to aid victims of torture. American exceptionalism in treaty negotiation can be seen as a positive of leadership and initiative due to the unique position of the US in world affairs.

Exceptionalism as Absenteeism in Chinese Negotiation of the CAT

Positives of American exceptionalism were on display in the examination of US efforts to lead the negotiation of the UNCAT. In contrast, Chinese exceptionalism can be linked to a lack of involvement in treaty negotiations, specifically the negotiation of the UNCAT. Chinese exceptionalism leads to absenteeism during the treaty negotiation stage in the development of international law. In fact, Chinese exceptionalism as divergence from the rest of the international community can be seen as absenteeism in a variety of treaties, international organisations, and even UN Security Council votes.

Chinese official statements exalt Chinese participation in the negotiation of the UNCAT; China “[claims] to have taken a leading role in helping to draft” the UNCAT. (Kent 1999, 91) However, China did participate but only in the final development of the treaty. China joined the negotiations of the UNCAT in 1984, coming in late to the creation of the treaty text and in the context of the imminent emergence of the treaty. (Burgers and Danelius 1988, 94) It should be noted that China only joined the UN Human Rights Commission in 1981 (Kent 1999, 5), meaning that prior to 1981 China would not have been able to send a delegation to the Working Group. This does not serve as an excuse for Chinese absenteeism; rather, it is another prominent corollary example showing Chinese non-involvement in the international organisation and treaty regime based on exceptionalism.

When it did join in the negotiation of the UNCAT, the Chinese delegation immediately expressed its exceptional quality of being apart from the majority of democratic international actors involved in Western-style treaty regime building: “At the end of the pre-sessional meetings all delegations except the Chinese delegation were prepared to accept the current text”. (Burgers and Danelius 1988, 95) After this point, Chinese activity in drafting the UNCAT decreased even more and the Chinese were not involved in the large final debate on the treaty text. (Burgers and Danelius 1988, 101) The lack of Chinese involvement in creating the UNCAT contrasts the exponential increase of Chinese involvement in international treaties and law.

Chinese absenteeism in treaty negotiations, specifically in the drafting of the UNCAT, can be seen as directly emerging out of Chinese exceptionalism as divergence from the international community and Western, democratic views of individual human rights. Perhaps Chinese lack of engagement with the UNCAT would not be considered a unique position as few other developing and non-Western nations, much less the very limited number of communist states, were involved in the negotiations. However, when examining the non-Western states that were involved in the treaty negotiations—such as India, Brazil, Argentina, Senegal, and the USSR, Chinese absence is conspicuous.

Furthermore, China maintains that its approach to human rights runs counter that of the US and the majority of states leading the drafting of the UNCAT. In taking this exceptional stance, Chinese officials could only negotiate on a limited set of principles. The Chinese divergent approach and vision of human rights are fundamentally inconsistent with those of the major creators of the UNCAT text including “Western” concepts of individual human rights and the protection of rights. With regard to the issue of torture, this is a particularly salient difference in viewpoints, as the Chinese vision of human rights finds that human rights come from liberties granted by the government and that individual rights can be subverted for the sake of the state and the collective. Therefore, it is not hard to infer the linkages between Chinese absenteeism in the negotiation of the CAT and Chinese exceptionalism.

Exceptionalism and US Reservations to the Ratification of the CAT

Despite American leadership in developing the Convention, US ratification took a turn towards negative exceptionalism through US reservations to the UNCAT. Upon ratification President Ronald Reagan exalted the US effort in the negotiation of the UNCAT:

The United States participated actively and effectively in the negotiation of the Convention [Against Torture]. It marks a significant step in the development during this century of international measures against torture and other inhuman treatment or punishment. Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today. (Reagan 1988)

President Reagan’s statement of support disguises the approach of the US to the UNCAT as an “expressive” Convention that will display already exceptional level of protection of human rights and opposition to torture. The UNCAT is seen then not as a treaty with little functional purpose but of significant symbolic value for the US in exalting existing American exceptional human rights practices. Furthermore, the US may have played an exceptional role in leading the drafting of the UNCAT but upon ratification, the US attached significant and weakening reservations to the treaty.

American exceptionalism with respect to treaty behaviour has typically centred on not signing onto a treaty or, if ratifying the treaty, creating a damaging collection of RUDs while signing onto a treaty so that it has had an integral role in negotiating. Many commentators cite the hypocrisy of supporting the negotiation of the treaty as an exceptional leader in the international community and the undermining of international law as negatives of the US

exceptional treaty behaviour. Other commentators find that the US is not particularly exceptional in its use of reservations as other countries do so as well.

The US RUDs are directly linked to American exceptionalism as a form of exemption. (Chayes 2007) In the case of the UNCAT, the RUDs were put in place by the US for reasons beyond national interest. The US reservations towards the UNCAT were created due to the fact that the US considered itself exceptional in its high level of democracy and already strong ability to protect human rights domestically. As with many other human rights treaties, US reservations to the CAT state that the US will prevent torture as enshrined by the protection of human rights in the constitution and US domestic law; this is a moment of exceptionalism as hubris. The pride of the US in its own system—as being exceptional or above and beyond the rest of the international community—leads the US to limited participation in international human rights treaties. In the case of UNCAT, the effects of exceptionalism are greater than limited participation as the US reservations run contrary to the very treaty that the US itself helped to draft. At the moment of ratification of the UNCAT, there is observable American exceptionalism as domestic constitutional superiority, which overwhelms the strength of the treaty.

The reservations to the UNCAT reveal the nature of US reservations as American exceptionalism. Unique to the US list of reservations is the quantity of reservations. While many states issues reservations to the UNCAT, the US collection of reservations was by far the longest. (United Nations Secretary General Comments 2007) The US was certainly not the only country that made significant reservations to the UNCAT—at least 35 countries made reservations, but it did make the largest number of reservations despite being one of the most proactive states in creating the treaty text. Furthermore, the US reservations contrast those of other states in that none of the other reserving states are in the exceptional position of power as the US.

Beyond the sheer quantity of US reservations to the UNCAT, the substance of these reservations expresses US exceptional treaty behaviour. No other country made reservations of the same quality as that of the US. The key to the substantial reservations by the US is the primacy of domestic constitutional law over international law. For example, the US Senate finds that “the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States”. (UN SG 2007) Ignoring the suggestion that the US will only consider torture to be defined by the same word in another documents, the obvious priority on domestic law over international law is a moment of American exceptionalism based on the belief that the US domestically protects human rights better than any other state or even international law. This major reser-

vation appears grossly counter-intuitive to the notion that international law should have some impact on the behaviour of states. In placing primacy on domestic law, the US appears to argue that international law has no meaning or function. The US goes further by saying that any new law made by the UNCAT does not have the power of direct effect, thereby insulating American domestic law against international law.⁴ In the end, these reservations are so intense that: "in ratifying the Torture Convention, the United States, in effect, reserved the right to inflict inhuman or degrading treatment (when it is not punishment for a crime), and criminal punishment when it is inhuman and degrading (but not 'cruel and unusual')". (Henkin 1999, 342) The exceptional reservations to the UNCAT defeat the purpose of the very Convention the US had a leading role in helping develop.

Interestingly, treaty ratification presents a complicated moment in the emergence of an international agreement through the Putnam two-level game. At the moment of ratification, a state must return to the domestic level with the treaty that its officials have negotiated for scrutiny by domestic actors. At the complex moment of the ratification of the UNCAT by the US with significant reservations, we see the origins of American exceptionalism as a domestic condition whereby the strong voice of the domestic conservative minority and the federal structure of the US tend towards the support of exceptional international treaty behaviour. (Moravcsik 2005) The use of extreme reservations as an element in US exceptionalism can be somewhat explained in this brief examination of the origins of exceptionalism. Despite the domestic origins of American exceptionalism, the reservations to the CAT reveal negative aspects of exceptionalism as domestic bias, constitutional superiority, and disdain for international law.

Exceptionalism and Image as China Ratifies the CAT

Like the US, China created reservations to the UNCAT when it ratified the treaty; however, these reservations do not have the same overwhelming negative consequence in part due to the structural situation where China is not the world's single superpower. The Chinese reservations can be directly linked to Chinese exceptionalism, but Chinese ratification of the UNCAT is an interesting tug and pull story between exceptionalism and image. The Chinese ratification of the UNCAT was a moment where exceptionalism could have caused

⁴ From "Multilateral treaties deposited with the Secretary General: The Convention Against Torture": "On 3 June 1994, the Secretary-General received a communication from the Government of the US requesting, in compliance with a condition set forth by the Senate of the United States of America, in giving advice and consent to the ratification of the Convention, and in contemplation of the deposit of an instrument of ratification of the Convention by the Government of the United States of America, that a notification should be made to all present and prospective ratifying Parties to the Convention to the effect that: ... nothing in this Convention requires or authorises legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

non-ratification but the desire to improve its international image took precedent and moved China towards signature and ratification.

China came late into the dialogue and negotiation of the CAT. In light of Chinese absenteeism during the drafting of the treaty, China was fairly quick to ratify the UNCAT, signing it in 1986 and ratifying the treaty by 1988. China did issue two reservations to the UNCAT:

- (1) The Chinese Government does not recognise the competence of the Committee against Torture as provided for in Article 20 of the Convention.
- (2) The Chinese Government does not consider itself bound by Paragraph 1 of Article 30 of the Convention. (UN SG 2007)

The key element in these reservations is the priority on national sovereignty. There is an obvious linkage between Chinese exceptionalism as being uniquely separate from the international community and the desire to not allow internal investigations. The reservations effectively require that China make the commitment of periodic reports on progress towards dealing with torture issues: “having refused to recognise the competence of the Committee with respect to Article 20 and remained silent for Articles 21 and 22, China is only subject to the Convention’s reporting requirements”. (Kwong 2005) China is willing to be a part of the international community but deems itself exceptional in being a non-Western, non-democratic power and would be not only suspicious of outside parties investigating issues within its territory. Chinese exceptionalism links directly with a reservation that would limit “interference” particularly for a state that explicitly finds its own values to be contrasting those of the international treaty regime.

The majority of reservations by states acceding to the UNCAT were in respect to the competences of the Committee described by Article 20. Chinese reservations with their roots in exceptionalism became a moment of inclusion. It is important to explain why China would make similar reservations to the UNCAT as other countries but for reasons based on its exceptional nature. Here we see a battle between Chinese exceptionalism, as the belief that China is separate from the international community due to its extreme, unique differences, and the desire by Chinese for a good “image” at the international level. Chinese exceptionalism in the case of ratifying the UNCAT did not lead to absenteeism or non-involvement as it did during its negotiations. This suggests that there is another element in play influencing the decision making of Chinese officials, the element of image and social pressure to sign onto a prominent human rights treaty and join the international community in its condemnation of torture.

The idea that image matters to China even to the degree where it would limit concerns from the exceptional trend in Chinese treaty behaviour is grounded

in novel scholarship on Chinese foreign policy. The recent scholarship of Johnston (2007) on the impact of image and social constraints on Chinese treaty behaviour offers an innovative explanation of Chinese ratification of the UNCAT. Johnston observes Chinese treaty behaviour with regards to the Comprehensive Nuclear-Test Ban Treaty (CTBT), finding that China acted outside rational self-interest in ratifying the CTBT due to social pressures. While this study does not presume to have made the same level of inquiry as Johnston, it is reasonable to suggest that China ratified the UNCAT with the goal of improving its international image despite pressures against ratification due to Chinese exceptionalism. The power of social pressures is exemplified by the fact that Chinese reservations mimic those of many other states.

In concluding the discussion of Chinese ratification of the CAT, there must be a discussion of Putnam's two-level game, which dictates the structure for treaty ratification where a state's international officials return to the domestic level with a negotiated treaty for ratification. In China, the domestic actors do not have the same vocal power than that of the US. In further contrast to the US, we see difference in the "origins" of exceptionalism in that American exceptionalism arises out of a constraining domestic situation combined with great international power, while Chinese exceptionalism tends to be a product of official stance and state rhetoric, a product of more centralised control opposite the decentralised power in American exceptionalism. Necessarily, for America it was the domestic constraints that weakened commitment to the UNCAT during ratification with the creation of extreme reservations. On the other hand, Chinese ratification of the UNCAT was not affected by the same level of bottom-up influence or pressure as treaty ratification in China depends more on high level official decision making. Despite China's exceptional position, the state ratified the UNCAT and made reservations of great similarity to the rest of the international community. One would have to note the influence here of image, particularly since Chinese treaty ratification depends less on domestic pressures. It can be hypothesised that Chinese ratification of the CAT by high-level officials was highly influenced by external pressures from NGOs such as Amnesty International and other diplomats, building on the increasing importance to Chinese officials of the desire for better image and the susceptibility to social pressures.

Extreme Exceptionalism in US Noncompliance with the UNCAT

Moving from the negotiation and ratifying of the UNCAT to compliance with the treaty moves the study from the impacts of exceptionalism in the formative stages of treaty behaviour to the impact of exceptionalism on compliance. American exceptionalism leads to extreme levels of noncompliance with respect to the UNCAT. Not only does the US violate the treaty by practicing torture both domestically and abroad, but the US has also tried to supplant international and domestic law outlawing torture. The key moment in the US violation of the UNCAT emerges from interrogations of terrorist subjects during which torture was practiced or supervised by US officials. (Heymann and

Scott 2006) The US found that, in a moment of extraordinary exceptionalism, it was unique in its hegemonic position under attack by terrorist groups such that the situation required the use of torture to extract information that could pre-empt terrorist acts. The US noncompliance with the UNCAT arises out of the American exceptional belief that it is superior to both international law and the international community; therefore, it follows a different set of rules. The US noncompliance with the UNCAT has been well documented in a series of Kennedy School of Government (KSG) case studies on “Defining torture in the war on terror”. (Heymann and Scott 2006) Central to the US non-compliance with the UNCAT and Geneva Conventions was the treatment of prisoners of war and the use of torture, specifically water boarding. What was particularly exceptional about the treatment of the prisoners of war was the fact that the US had upheld its priority on domestic law superseding international law by avoiding international legal adjudication of the claims of the terrorist suspects.⁵ The extreme element in American exceptionalism as non-compliance with the UNCAT goes beyond the actual breaking of the law and the priority on domestic protective legislation over international law. The US did not comply with the UNCAT and even went to the point of avoiding, re-defining, and subverting international, and, in the process, domestic law.

Officials from the US sought to develop “possible defence that would negate any claim that certain interrogation methods violate” international law. (Bybee 2001, 1) In a memo from the Offices of Legal Counsel (OLC) for the US Government and the President, Bybee (2001) provided a series of “defences” as to why the President can authorise torture of terrorist suspects. The flagrant disrespect for international law is obvious whether it is expanding the definition of torture from the UNCAT to the “most extreme” forms of torture—the very definition the US had an integral role in shaping and drafting—or perverting rule of law by avoiding both international and domestic legal courts or institutions. (Bybee 2002, 2) The efforts by the OLC can be explained only by the extreme belief that the US is so exceptional and so unique in its position as the world’s superpower under attack by terrorists that it must be judged by different standards.

In fact, the US has not tried to limit the scope of international law as was seen in the instance of US reservations to the UNCAT; rather, the US has sought to redefine or subvert international law. This situation comes out of and feeds into the extreme exceptionalism of behaviour with regards to avoiding domestic legislation in order to conduct torture interrogations of suspected terrorists. Some commentators would suggest this divergence is due more to the current political administration in power; however, it is impossible to ignore the influence of American exceptionalism in the case of noncompliance and violation of the CAT through torturing terrorist subjects.

⁵ In a landmark decision, the US Supreme Court actually ruled against the US in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Whether this has or will decrease *de facto* violation of the UNCAT remains to be seen.

Capacity and Exceptionalism in the Case of Chinese Violation of the UNCAT

Chinese compliance with the UNCAT has focused on attaining *de jure* requirements of the treaty. China has been quick to place important safeguards against torture in its legal system. This has been no small task, requiring significant levels of increased legislation, reforming the code of laws, and even changing the Chinese Constitution. The major mechanisms for monitoring compliance in the UNCAT include the Committee site visits and country self-reporting. China issues a human rights white paper as its first signal of compliance with the UNCAT; however, China's focus on dealing with torture has been mostly *de jure* with weak levels of *de facto* or on-the-ground compliance. (Kent 1999) China's torture record as noncompliance with the UNCAT due to *de facto* violations emerges out of Chinese exceptionalism as having a unique, explicitly non-Western concept of collective rights over individual rights along with the nature of China as being exceptionally populous, the largest country in the world.

De jure compliance, however, does not equate to *de facto* compliance. The Chinese human rights record is continually criticised by observers. Specifically, the area of torture remains a point of limited on-the-ground protection in China. China is even willing to admit torture as can be seen from its white paper from December 1989 to the UNCAT: "[a]s with other criminal offences, so torture, an act which endangers society, has yet to be eliminated completely in China". (Kent 1999, 93) Torture continues to exist, an obvious violation of the UNCAT, but the noncompliance of China in allowing torture comes out of the "weak sense of legal system", "rather low professional among some State functionaries", and, in general, inability to control all issues related to torture in such an exceptionally large country.

One commentator describes Chinese *de facto* noncompliance with the UNCAT as emerging out of its exceptional circumstance as the largest country in the world that is still developing:

In a country like China, which is vast in size but has a centralised government system, it means the Beijing must by clear direction advise all national and provincial institutions of its commitment to the Torture Convention [including] the PLA command, and the Executives of the police, prison. Conduct in breach of the Torture Convention's obligations must be swiftly and effectively dealt with. Administrative detention is still reported to occur in China, and few detainees get access to counsel within 48 hours, notwithstanding the profound Criminal Procedure Reforms of 1997. Torture still occurs, but the most

heartening feature is that some prosecutions may take place as a result of more vigorous procuratorial policy. (Burns 2005, 11)

There are huge logistical concerns unique to China, which limit compliance and allow for continued violations. Despite noncompliance with the UNCAT, there was optimism that many of the Chinese criminal reforms from the 1990s would increase the rights of detainees and people who seek legal recompense. Chinese compliance to the UNCAT has failed due to its exceptionally complex and vast domestic situation, but there is some hope for the future as *de facto* compliance could fall into line with the revamped Chinese legal system, as the capacity to comply increases.

Conclusion: Inducing Compliance in the Face of Exceptionalism

American exceptionalism contrasts Chinese exceptionalism in several salient ways that are revealed by the behaviour of both states with respects to the Convention Against Torture. American exceptionalism led to a positive leadership role in the drafting and negotiation of the CAT, while Chinese exceptionalism caused absenteeism in the development of the treaty text. American exceptionalism as exemptionalism supported damaging reservations during its ratification of the UNCAT, while Chinese exceptionalism met head-to-head with Chinese image consciousness to allow for ratification and a moment of cohesion with the international community. Finally, American exceptionalism as extreme noncompliance with the UNCAT in the government practice of torturing terrorist subjects and desire to avoid both international and domestic law constraining the practice of torture contrasts Chinese *de jure* compliance but *de facto* noncompliance with the UNCAT due to logistical, capacity issues arising from China's exceptional position of the world's most populous country. In the end, both China and the US have violated the UNCAT due to being exceptional states. What is truly interesting is not the end product of exceptionalism – that of noncompliance, but the differences in treaty behaviour related to the differences in exceptionalism.

It is only fitting to conclude by examining the ways to deal with or mitigate noncompliance by both states arising out of exceptionalism. In a twist of conventional knowledge, this study finds that Chinese noncompliance due to exceptionalism may be easier to limit than US noncompliance arising out of exceptionalism. To begin, from the discussion of Chinese ratification of the UNCAT it appears that image matters more to China than ever before and even more so than for the US. In other words, if a treaty can be structured to place social or image pressures on China then it will be likely to induce compliance despite Chinese exceptionalism. The UNCAT does have significant reportage capacities that have already caused China to send in several reports and even has played a part in causing a change of Chinese domestic law. Furthermore, Chinese *de facto* noncompliance with the UNCAT appears to be an issue of capacity. Treaty compliance as dependent on capacity has its roots in the

managerial school of compliance. (Chayes and Chayes 1995) Chinese compliance with the UNCAT, and, potentially other important international treaties, can be induced through an attention to improving capacity in the face of Chinese exceptionalism.

American exceptionalism and noncompliance does not offer the same high level of possibility for remedy as with the potential improvement of capacity of Chinese compliance. To begin with, American noncompliance has a much more hypocritical dimension due to the American propensity to be an exceptional leader in the drafting of international treaties but failing to comply with the very treaty it has helped develop. Even US exceptionalism emerging out of extreme American international power as the world's sole hegemon works against the possibility of inducing compliance through either capacity or enforcement mechanisms; the US could just ignore a treaty or law with little repercussion. The true question in seeking to induce compliance through mechanisms of reportage or shaming, typical of human rights treaties, is to what degree the US is susceptible to international opinions and image. One would hope that image does matter and that, in this case, the US can learn something from the "bending" of Chinese officials to some social pressures.

There is a second possibility of mitigating American exceptionalism through international pressure beyond the power of opinions and image. For example, the US had to change its exceptional and protectionist leanings after rulings against it by the World Trade Organisation (WTO). In fact, the European Union has placed the tariffs during WTO dispute resolution on goods that would pressure the conservative government in the US, hoping to loosen the conservative power hold, indirectly limiting exceptional action. It is significantly more difficult to develop this kind of reciprocity to limit American exceptional treaty behaviour with respect to human rights treaties. The negative forces of American exceptionalism will only come to an end either when the US loses its hegemonic power position or when the US realises that "current American treaty behaviour is not in the national interest; it is unbecoming to a world leader and is anachronistic in an era of globalisation and interdependence". (Chayes 2007, 1) It will take either a structural or an ideational change to deal with American exceptionalism and fully reap the benefits from positive exceptionalism.

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