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International Law Summary

China and International Law: 60 Years in Review

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INTRODUCTION

This is a summary of an International Law Discussion Group meeting held on 8 March 2013. The views expressed by the speaker were her personal views and not those of any of the organizations for which she works or has previously worked.

China is well-known for its support for the principles of sovereignty and non-interference in international law. Less well known or appreciated are the reasons for China's attachment to these two principles, and for its approach to international law generally. The exploration of these issues served as the basis of the discussion at this meeting.

Roughly speaking, the 60 years since the People's Republic of China (the PRC) was founded can be divided into two phases. The first phase started from its founding in 1949 to 1978 when China embarked on economic reforms and adopted the opening-up policy. For most of that period, the PRC was deprived of its seat in the United Nations. It was virtually precluded from all major international law-making processes, and this had an impact on its attitude to international law.

The second phase, from 1978 to 2011, has witnessed China being restored to its seats in most multilateral fora and gradually becoming an active participant in them and contributor to international law.

Domestic legal reconstruction in China also had a substantial impact on its attitude towards international law. Since late 1978, when Chinese universities resumed legal education, which had been abandoned during the Cultural Revolution, international legal studies have made steadfast progress in China, responding to the growing demand for expertise in international law. On the occasion of the 60th anniversary of the PRC in 2009, the Chinese Society of International Law conducted national surveys of international legal education at law schools and universities which indicated dramatic change. Currently there are approximately 600 universities in China that offer courses on international law, 64 university law schools and legal institutes that have masters' degree programmes on international law and 16 that have doctoral degree programmes. This development evinces a significant change of China's attitude and practice in international law.

Reforms in China's economic and social life in the last three decades have also changed how it views international law because many domestic reforms require international negotiations and cooperation in various fields, further deepening China's participation in international law-making.

THE FIRST 30 YEARS: 1949–78

China's attitudes towards international law in the first 30 years after its founding bear two distinct features: critical rejection and positive construction. On the one hand, China was very critical of traditional international law that it understood to primarily protect the interests of the colonial and imperialist powers to the detriment of most developing states. China was perceived as 'an opponent, a challenger and a revolutionary' vis-à-vis the existing legal order. But it is important to understand that China did not opt to be an 'outlaw'. Although precluded from taking its seat, China expressly endorsed the purposes and principles of the UN Charter and principles of sovereign equality, peace and mutual respect. Its attitudes and practice towards international law manifest both realism and idealism.

A new foreign policy

China's position on sovereignty

In pursuing its independent foreign policy, China literally built up its foreign relations from scratch. This 'start anew' policy, characterized by a Chinese metaphor as 'clean the house first before guests are invited', was aimed at abolishing all the vestiges of imperialist influence and privileges in China and restoring the country's sovereignty and independence. Thus, even during the early days when relations between the China and the Soviet Union were still in their heyday, China remained

resolute about its sovereignty. At China's insistence, the Soviet Union agreed to hand over to China all Soviet rights over the Chinese Eastern Railway no later than 1952 and to evacuate its Port Arthur military base and renounce its privileges in the port of Dairen, China.

The role of legal counsel

When the new government was set up, prominent international jurists, including some who had served in the previous government, were invited to join the Ministry of Foreign Affairs as legal counsel. These jurists were highly regarded and respected. They were often consulted on the legal aspects of foreign affairs, even at the highest level of the state leadership. For instance, in 1958 when China was about to proclaim their declaration on the territorial sea, legal counsel were consulted by Chairman Mao.

China established its foreign policy on three basic principles: equality, mutual benefit, and mutual respect for sovereignty and territorial integrity. Its provisional constitutional document, the Common Programme, provided that the PRC should establish diplomatic relations with foreign countries on the basis of equality, mutual benefit and mutual respect for territorial sovereignty, subsequently incorporated into the first constitution of the country. They formed the basis of the Five Principles of Peaceful Coexistence in the 1950s.

The question of recognition

The complexity of recognizing China was primarily due to the separation of the country. Within the Western bloc, generally speaking, recognition of China posed rather a political question than a legal issue. Due to the Taiwan issue, China's practice on recognition bears a few distinctive features. First, China does not consider that granting recognition is a privilege for the recognizing state under international law; the political and social system of the nascent state should not be subjected to the political scrutiny of other states. Secondly, in establishing diplomatic relations with another state, China would always ensure that the PRC was recognized as the sole legitimate representative of the country in international relations. Thirdly, once recognition is granted, China places emphasis on the legal effect of recognition.

For example, in the 1980s, China and Japan had a dispute over state property in Tokyo known as the Khoka-ryo student dormitory case. The Japanese courts granted legal standing to the Taiwanese authorities in the name of 'the Republic of China' as a de facto government and recognized its entitlement to China's state property located in Japan. China invoked Japan's international responsibility, alleging that Japan had breached its international obligation under the one-China principle. Since Japan had already recognized the PRC as the sole legitimate government of China, it should not have given Taiwan legal standing as the Republic of China. The Khoka-ryo student dormitory case has raised a series of legal issues with regard to recognition and succession in international law, which were seriously debated by international lawyers from both China and Japan. The case went up all the way to the Supreme Court of Japan, where on 27 March 2007 the Supreme Court of Japan rendered its decision, reversing the lower courts' judgment on the basis of the applicant's loss of standing upon the shift of recognition by Japan.

THE SECOND 30 YEARS

The second period, from late 1978 onwards, has witnessed dramatic changes in China, both at home and in its foreign relations. Since late 1970s, China has joined almost all major inter-governmental organizations and become party to over 300 multilateral conventions. From a defiant challenger to an active participant, it is now taking part in the international law-making process in all fields.

In 2001 China joined the World Trade Organization (WTO). In the course of the 15-years negotiations that ultimately led up to its membership, China repealed, revised, amended and

adopted more than 3,000 national laws, regulations and decrees, establishing a comprehensive legal framework on the basis of market economy, including adaptation of numerous international rules and practices into Chinese domestic laws. This process is ongoing. But as Chinese scholars have pointed out, WTO negotiations were not simply a process for China. They have manifested, in a way, China's growing trust in the international legal system. They also demonstrate how international rules and regulations have affected China's domestic legal development in ways that go far beyond the areas of trade and economy.

The WTO process is thought to be the most important indicator for foreign scholars to study the changing role of China in international legal order. After 10 years of participation, it was observed by Chinese scholars that China was 'no longer an outsider, but not yet an equal,' pointing out that China joined the WTO in 2001 under exceptionally unfavourable, non-reciprocal and asymmetric terms of membership.

Hong Kong and Macao

After years of negotiations and transition, China successfully resumed its sovereignty over Hong Kong and Macao in 1997 and 1999 respectively. In doing so, it did not simply assume the territories' succession to treaties and international organizations as might be expected under international law. Instead, most of the treaties that applied to the two regions through the United Kingdom and Portugal continue to apply in the territories after the handover. Treaties to which China is not yet a party but which are already applicable in the two regions continue to apply in the two regions. The central government may authorize or assist the regional governments to make special arrangement for the application of certain treaties. Such treaties may not extend to apply in the other parts of China. Until 2009, the central government had handled nearly 100 treaty ratifications with Hong Kong Special Administrative Region government, and over 80 with the Macao Special Administrative Region government. Pursuant to the arrangements made by the Chinese central government with the relevant organizations, the two regions retain or obtain their membership in some specialized international organizations. Hong Kong and Macao attend international conferences either jointly with the Chinese delegation or by itself.

This unique practice was adopted on account of two considerations. One is China's basic position on unequal treaties. The other consideration is that for the purposes of maintaining the stability and prosperity of Hong Kong and Macao, China has adopted the principle 'one country, two systems' for the two regions, which means that while the central government is in charge of foreign and defence affairs, the two areas, as Special Administrative Regions, enjoy a high degree of autonomy in their own affairs so that their legal systems and life-style would remain basically intact for 50 years. This arrangement did not come out of diplomatic negotiations between China and the United Kingdom or Portugal, but was adopted upon China's own initiative. The continued stability and prosperity in the two regions since the handover shows the success of the peaceful settlement of the historical issue between China and other countries.

PROGRESS IN SOME OTHER AREAS

Human rights

As a Western scholar has pointed out, 'No issue in the relations between China and the West in the past decades has inspired so much passion as human rights.' China is of the view that promotion of human rights is both a cause and a process. This means that as an objective for social progress, human rights should be relentlessly pursued at all times. As part of social development, nevertheless, human rights progress is a long process. Individual rights and freedoms cannot be substantiated without particular social conditions, nor can they be taken out of social context for examination.

Three areas which are most pertinent to human rights are: constitutional law, criminal law, and administrative law. These are addressed in turn.

Constitutional law

Since 1949 China has had four constitutions (1954, 1975, 1978, 1982). There have been four amendments to the 1982 constitution. The last two amendments, adopted in 1999 and 2004 respectively, bear special significance for human rights protection in China. The 1999 amendment establishes the principle of the rule of law by incorporating the phrase 'governing the country in accordance with law' into the constitution.

The 2004 amendment directly deals with human rights protection by inserting the clause that 'the state respects and protects human rights' to Article 33 of the constitution. The significance of this constitutional amendment lies in the fact that protection of human rights has become a fundamental principle in the Chinese legal system.

Administrative law

In the last decade since the adoption of the constitutional amendment on the rule of law in 1999, China's administrative law has made substantial headway in promoting good governance and protecting citizens' rights. In 1989, the Law on Administrative Litigation was adopted by the National People's Congress, meaning that for the first time, standards on the legality of administrative activities were formally provided for by legislation. As a supplement, the Law on State Compensation was adopted in 1994. In 2003 the Law on Administrative Licensing was adopted, followed by the Law on Administrative Punishment and the Law on Administrative Review in 1997 and 2010 respectively.

Administrative tribunals have been established at every level of China's judicial system. Administrative cases cover various types of administrative acts involving nearly all governmental agencies. It was reported that since the adoption of the 1989 Law until 2004, there were about 910,000 administrative lawsuits filed at the first instance. In the year 2001 alone, over 100,900 cases were received, among which were nearly 25,000 cases for state compensation. Many of these cases have been won by private parties.

In addition, the State Council has launched special efforts to promote good administration and law-based governance. Initially driven by the demand of market economy for predictable, efficient, transparent and responsible administration, the government adopted and revised a series of laws and regulations with a view to streamlining its functions and controlling public power.

More efforts are being pursued to enhance the implementation and enforcement of these regulations.

Criminal law

China started the drafting of its criminal law in 1950. Due to historical reasons, however, it was not promulgated until 1979. This does not mean there was no criminal justice in China. There were other laws with provisions on criminal responsibilities. Some basic principles of criminal law also applied. But when the law was adopted in 1979 it was regarded as ending an abnormal situation in the criminal law system.

Criminal law was substantially amended in 1997. Some old criminal offences were revised or redefined, for instance, counter-revolutionary crimes. The long controversial system of detention and investigation was also abolished.

One significant development in the criminal law was the adoption of Amendment VIII. Adopted on 25 February 2011, it has had substantial impact on the criminal system in three aspects: the standardization of sentencing, community correction, and further improvement of leniency system for special groups – juveniles and the elderly.

In order to control and reduce capital punishment, in 2007 the Supreme People's Court issued the decision that all sentences of capital punishment delivered at lower courts must be subject to its review and approval. In Amendment VIII to the Criminal Code another highlight is that 13 offences for non-violent crimes are eliminated from the list of capital offences. Capital punishment is a sensitive and core issue in the human rights cause. As is observed by criminal law experts, death penalty reform is closely related to the change of public attitude towards the concept of human rights. The role of public opinion in the application of the death penalty in China is beyond doubt. The public remain very much in support of the death penalty.

Issues relating to criminal justice, such as capital punishment, torture, defendant's rights protection, are now constantly under public debate via the media and internet, which show more balanced views towards rule of law and human rights protection.

Land boundaries

China has about 22,000 kilometres of land boundaries with 14 states. When the PRC was founded in 1949, there was no single boundary that was clearly demarcated. On the whole, the country's boundaries were delimited by three types of lines: boundaries under old treaties concluded by the previous Chinese governments, traditional borders and actual control lines.

Border issues are extremely sensitive and China has consistently pursued a cautious approach in settling border disputes with neighbouring countries. In 1957 on the question of China-Burma boundaries, Premier Zhou Enlai stated that

> on border issues, boundaries that were delimited under formal treaties should in principle be respected in accordance with the established international norms. This principle, nevertheless, does not preclude the governments of two friendly countries from seeking equitable and reasonable solutions to border issues through peaceful negotiations.

The first boundary treaty was concluded with Burma in 1960. Thereafter, China settled boundaries with Nepal, Mongolia, Pakistan and Afghanistan. These covered nearly half of its boundaries.

The border conflict between China and India in 1962 seriously damaged bilateral relations between the two countries. In 1969 the two sides showed the goodwill to improve bilateral relations and to seek resolution of the boundary disputes between the two countries. They agreed that the border issues should not stand in the way of the development of friendly relations in other fields. In 1993, following the visit of Prime Minister Rajiv Gandhi to China in 1988, the two governments reached an agreement in principle to settle their border issues through friendly consultations. To date this is the only area where China has not resolved its border disputes but dialogues between the two states have nevertheless further strengthened mutual confidence and understanding.

From the 1990s to the early 2000s, China settled almost all of its boundaries with neighbouring countries. China concluded boundary treaties with Laos in 1991, Viet Nam in 1999 and Russia in 1991, 1994 and 2004. In fact, almost all border issues with Russia were resolved in 1991 but following the dissolution of the Soviet Union, China received three new neighbours in Central Asia northwest to China, namely, Kazakhstan, Kyrgyzstan and Tajikistan. China soon concluded boundary treaties with each one of the three newly independent countries in the 1990s.

The most important factor in settling boundaries has been the existence of political will and strong leadership. To date, China has successfully resolved border issues and concluded boundary treaties and agreements with 12 neighbours. These boundary treaties are not only examples of peaceful settlement of international disputes between states, but more importantly, they have greatly improved peace and security in the region, paving the way for economic cooperation and trade between the neighbouring countries and peoples.

Maritime boundaries

Recently China has experienced problems in the South China Sea and the East China Sea. In the East China Sea, there is dispute between China and Japan over the Diaoyu Islands. The Chinese leader Deng Xiaoping once said that if a solution to the territorial dispute (Diaoyu Islands) was not forthcoming at present, it may be better to leave it to future generations to resolve. This actually was the understanding the two countries reached when they normalized their relations in 1972. China applies this policy, 'while shelving the differences over territorial sovereignty, seek ways for joint development' to all disputed areas including the South China sea.

China concluded fishery agreements with Japan in 1997 and with the Republic of Korea in 2000 as provisional measures before maritime delimitation. In the South China Sea, on 25 December 2000 China delimited its first maritime boundary with Vietnam regarding Beibu Bay – on the territorial sea, exclusive economic zone and continental shelf. This was the result of extensive negotiations, and could not have been achieved without the political will of the leadership on both sides.

Although conflicts of maritime claims have occasionally caused tensions in the region, China has consistently held the position of peaceful settlement of territorial disputes through negotiations and proposed to seek provisional measures for cooperation, while putting aside territorial disputes for future settlement. In the course of negotiations, China has reached common understandings on maritime issues with most of the neighbouring countries.

Since the territorial and maritime disputes between China and some of the countries in the South China Sea often gave rise to tension, affecting stable relations between the states in the region, in 2002 China and ASEAN countries adopted the Declaration on the Conduct of Parties in the South China Sea (DOC), with the aim of gradually building up dispute settlement mechanisms based upon mutual confidence, mutual restraint and cooperation. With the objective of promoting a peaceful, friendly and harmonious environment in the South China Sea between China and ASEAN for the enhancement of peace, stability, economic growth and prosperity in the region, the parties reaffirmed their commitment to the basic norms of international law and committed themselves to exploring ways for building trust and confidence.

Under the DOC, state parties to the disputes undertook to 'resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea.'

As the follow-up action to the declaration, the China-ASEAN Senior Officials' Meeting on the implementation of the DOC decided to establish a joint working group on the implementation of the DOC in 2004. The main task of the joint working group was to study and recommend measures to translate the provisions of the DOC into concrete cooperative activities that would enhance mutual understanding and trust. Given the complicated historical factors and geographic situation in the South China Sea, the dialogues within the joint working group were often tangled with differences among the claimant states over their maritime disputes. China maintained that the joint working group should concentrate on practical measures, starting from noncontroversial areas to enhance mutual cooperation so as to build up political confidence in the region. With respect to territorial disputes, they should be left to the state parties concerned, as stated in the DOC, for the solution or the disputes through peaceful negotiations. Otherwise, such disputes would become constant impediments to cooperation among the state parties, contrary to the spirit and principles of the DOC.