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China and International Law:

History, Theory, and Practice

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The current contours of China's economic growth and political influence have given rise to interests in and concerns about China's global profile as well as its strategies of International Law. China's stance and tactics in International Law are, however, rooted in its unique historical development and the consequent theoretical framework, which provide guidance to its practice in international affairs, transactions, and interstate relations. This paper aims at providing an overview of China's approach to International Law with respect to the history, theory, and practice.

Introduction

The emergence of International Law as a regulatory framework of interstate relations has come together with the political history of humankind,[1] while the name "Public International Law" as such came into being several centuries ago.[2] However, different countries may cherish different opinions and standpoints regarding the interstate relations and world order that lie at the heart of International Law.[3] Compared with the jurisprudence of most industrialized countries, the legal system of the People's Republic of China (PRC) including its international rules, together with its legal theories, is seen generally as a field to be improved and pruned by learning from the former. Nevertheless, the situation has changed dramatically in the past decades and it is of both theoretical and practical value to think about how China looks at the system, status, and functions of International Law.

The Historical Development of International Law in the PRC

Between the founding of the PRC (1949) and the beginning of the Reforms and Opening-up (1978), China remained isolated from the system of International Law. This was attributable to two factors. First, China fell behind the development of other Western powers and became a weak country during the nineteenth century when it suffered several major military defeats as a result of "foreign invasion". Most Chinese citizens developed a sense of victimhood and viewed International Law, a corollary of "Western civilizations", as shackles that restricted China's development with the imposition

of numerous "unequal treaties" on the Chinese state and nation. Secondly, from an ideological point of view, China was influenced by Marxism and Leninism to the extent that law was regarded as a tool of the ruling class, which meant to the Chinese that International Law was pure embodiment of the wills and policy goals of capitalist countries. Thus, it was impossible for a socialist country like China to accept such a body of rules or the legal framework.

For these reasons, China remained an outsider to the system of International Law during that time. Indeed, China exhibited strong opposition to International Law, because such historical trauma, coupled with the memory of China's glorious historical status as a central power of the world, was apt to spur hostility under certain circumstances. Moreover, the prevalent ideological tide of the Chinese society at that time was class struggle, and the confrontation between the socialist bloc and the capitalist bloc, was seen as the extension of such a philosophy. Later, China acclaimed the theory of "Three Worlds".[4] As early as in the 1950s, China advocated the application of "Five Principles of Peaceful Coexistence". Yet, the coverage of these principles was largely political in that they aimed merely at maintaining peaceful coexistence between developing and developed countries. China was not interested in developing any specific technical approach to International Law then, since any economic exchange and cooperation with the rest of the world were out of the question.

> ***China's approach to International Law was purely instrumental and based on an economic analysis of cost and benefit.***

With the end of the Cultural Revolution, however, China's leadership had no other choice than to part with the ideological struggle and introduce the policy of Reform and Opening-up to find a way out of the country's economic predicament. This marked a dramatic turn of China's approach to international law, especially to international economic law, as well as its counterpart rules in domestic laws, because these rules were essential to promoting China's economic reform and opening. As such, active engagement with International Law was seen as consistent with the Chinese government's economic policies. Thus, China became a member of the international community and a proactive participant in the system and practice of International Law, particularly international economic law. In that sense, China joined the club it used to disapprove and the tensions between China and most Western countries over International Law began to ease.

Gradually, Beijing turned from an opponent to a recipient of International Law, albeit with some reservation and distrust. Therefore, China's approach to International Law was purely instrumental and based on an economic analysis of cost and benefit. Indeed, China would leverage rules that were advantageous to its development and eschew rules that could bring disadvantages. A most distinct example is that even today, despite China's impressive economic growth, the country insists on its status as a "developing country" in the World Trade Organization (WTO) with which China seeks to receive special and differential treatment rather than simply differentiate itself from Western countries in its political identity.

The Theoretical Framework of International Law in the PRC

The question of whether China needs International Law becomes increasingly urgent as the country's development enters a new era. As China becomes a significant economic power and the country envisions an unprecedented rise, it is essential for the Chinese leadership to consider enhancing China's image of a responsible modern state by taking International Law seriously, though China's official voice now also calls for the other way around.[5] In the eyes of the Chinese government, International Law is an indispensable tool for states to elaborate and justify their national policies. Thus, it is far more beneficial than harmful for China to engage with International Law more actively in practice.

China's leadership is aware of the fact that many countries remain partly or totally uninformed about the political, administrative, and cultural system of the PRC and are often concerned about the potential menace a socialist country like China may pose to the international legal order. One of the key misgivings is whether China would implement its various commitments to the rule of law and, in particular, to International Law. This issue is decisive not only for foreign companies that are interested in investment in China and, thus, need to predict their commercial profitability and success, but also for foreign governments that intend to cooperate with China as trade partners in the long run. As the Chinese leadership declares that China has "stood up, grown rich, and becomes strong",[6] China is often expected to be committed to being a state with a strong profile in International Law.

In 2014, the ruling Communist Party of China (CPC) announced that it would lead the Chinese government in promoting the project of "governing the country in accordance with the law"(yi fa zhi guo/依法治国).[7] The CPC stated that "the overall target is to build a system of socialist rule of law with Chinese characteristics […] and facilitate the modernization of the national governance system, as well as "building a comprehensive system of socialist legal theories, subjects, and courses with Chinese characteristics." The Central Committee of the CPC also emphasized the need to "imbibe the essence of Chinese legal culture and learn those experiences from foreign countries to [their] benefit, but that [they] shall never copy the ideal and model of the rule of law entirely from those countries."[8]

> ***"The political mission of China's mainstream theory on International Law is to reshape International Law into an instrument for realizing the CPC's policy goals in both domestic and international affairs.***

Obviously, the CPC's theory of "socialist rule of law with Chinese characteristics" as mentioned here is meant to cover also domestic theories of International Law that should live up to the standards defined by the CPC. Accordingly, the political mission of China's mainstream theory on International Law is to reshape International Law into an instrument for realizing the CPC's policy goals in both domestic and international affairs. To this end, the prevalent Chinese scholarship on International Law has tried to reconcile International Law with the CPC's political needs based on some inherent features of International Law. The following observations of International Law endorsed by mainstream Chinese scholarship are, to large extent, components of the theories of International Law also embraced by many international law scholars across world, though they are not necessarily indicative of the entire trends and developments of International Law.

Above all, it is almost a consensus – both in and outside of China – that, in contrast to the domestic legal system, International Law is a fragmented system of rules characterized by the lack of both the requisite fundamental norms and the corresponding normative hierarchy.[9] It is a vision rather than a

reality to expect all countries in the world to enforce the same set of rules in the same way, since states are not always willing to subject their sovereignty to an interstate arbitrary or adjudicatory institution.[10] Even the International Court of Justice runs only on the condition of state consensus, whereas other effective institutions such as the WTO dispute settlement mechanism may not interpret the whole body of International Law in the same or even coherent way, but would be awarded with only the power and mandate to interpret a specific body of rules such as the WTO Law. Therefore, the current system of International Law is still an evolving body of rules that will take a long time for all nations in the world to accept and materialize.

> ***China's practice of International Law is directed by a realist and instrumentalist framework of state sovereignty.***

On top of that, many Chinese scholars embrace the view that, since International Law does not come from a substantial political entity as it is the case in a sovereign state, International Law is not law but merely consists of some moral and ethical norms that lack the binding force that national law has in a real state.[11] Thus, what really matters in International Law is, in fact, power, rather than law.[12] Indeed, a prevalent Chinese saying with regard to International Law and interstate relations is that "weak states have no foreign relations" (ruo guo wu wai jiao/弱国无外交), which reminds ordinary Chinese of the historical fact that only powerful Western states could dominate the world while weak states like ancient China had no other choice than to subject themselves to International Law. This view corresponds to China's standpoint in the past which buttressed its earlier opposition to engagement with International Law.

Moreover, International Law often fails to provide as much predictability as national law does: the outcome of interpreting certain rules of international agreements, conventions, and treaties is affected by external and political factors invariably.[13] Indeed, in the post-war period, there were no appropriate rules of International Law that were immediately applicable to suspects of war crimes and the international community needed to create some applicable and effective norms for the purpose of prosecuting those criminal suspects. That was exemplary of how modern international law came into being in the beginning. Albeit established on temporary grounds, such a framework of international rules should not be viewed as only vulnerable but progressive in the sense that it facilitated the normative development of political and historical justice in a post-war era. Hence, there is a need for states to be bound by such an evolving body of rules based primarily on state consensus.

Today, China's official scholarship in face of various challenges in International Law is not to disengage with International Law entirely but to take it as a dialectic means of dealing with international affairs. This means that, generally, China accepts the reality of such a mixture of flawed but evolving aspects of International Law, and that China is willing to adopt the basic tenet that International Law should be the fundamental framework of regulating interstate relations and state behavior. However, it is no secret that China always makes certain reservations in defense of its self-defined domains of inalienable sovereign interests, where the country's administration feels necessary to do so.

The Practice of International Law in the PRC

Overall, China's practice of International Law is directed by a realist and instrumentalist framework of state sovereignty, which, in particular, aims at creating a "new model of major power relations".[14] In that sense, China tends to safeguard against the ideational trend of International Law that places the rule of law above political power and highlights the status of individuals and multinational corporations in a post-modern state of global governance. Precisely speaking, such an approach focuses on the state's interests defined

and backed by state power. This applies most often in those areas that China deems "politically sensitive". For example, based on such doctrines, China has always maintained its strong opposition to the view that "human rights outweigh state sovereignty" and labelled it as a "new interventionist tide".[15] For that reason, China ratified only the International Covenant on Economic, Social and Cultural Rights, leaving the International Covenant on Civil and Political Rights open without a schedule of ratification despite criticism and requests from Western countries.

In the area of international trade law, however, China upholds a far more cooperative approach. As early as in the 1990s, China started to make and amend laws and regulations in the economic sphere in compliance with the requests of the WTO law, covering a wide range of legal systems including intellectual property (IP) law, administrative law and even the judicial system. The most visible influences lie in the area of IP law which has undergone several amendments in recent years. The principle of legal transparency under the WTO law has had an important impact on the project of modernizing the government's system and deepening the judicial reforms in accordance with the law.

Most importantly, China's accession to the WTO has greatly changed the conventional view on International Law in China. China is a most frequent actor and participant in the WTO dispute settlement mechanism as claimant, respondent or third party. In face of unfavorable rulings, China has taken an active approach to the adjustment of domestic legal policies in terms of the rulings. For example, China revised its Copyright Law promptly after the WTO ruled against that law and referred to the censorship threshold under that law as a trade barrier. Such a seemingly proactive approach at the WTO, along with China's economic growth, helps reinforce China's status in international trade negotiations. Nonetheless, even economic and trade law issues may cloak ideological conflicts from time to time. For instance, recently, observers have been concerned about the regional influence that China may exert and extend through the trade pact of the Regional Comprehensive Economic Partnership with 15 Asian countries.[16] Moreover, the EU-China Comprehensive Agreement on Investment has sparked controversies and a wave of debates on the EU's (and, in particular, Germany's) stance concerning their conventional values vis-à-vis China's ideological influence via economic ties.[17]

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There is another field of International Law that can be seen as neither purely political nor purely economic, but that may be associated with both to some extent, for example, international law of sport or culture. Since the regulation of these subjects is oriented primarily or only by technical standards, they are apt to galvanize optimism about the future of International Law and global governance. However, even such a regulatory framework is not completely free from political or commercial influence, to the extent that the judicial interpretation of the rules can be harmonized without any problem. For one thing, the decision made by the Court of Arbitration for Sport to ban China's famous swimmer Sun Yang for doping for eight years was overturned by the Swiss Federal Tribunal.[18] The case involved both the interpretation of sport rules and some debates on human rights, which created controversy among international sport fans.

Conclusion

China's approach to International Law is evolving and developing quickly, in particular, in international business, commercial and trade areas due to the frequency of daily transactions. It is impossible to circumvent the exchange of goods and services with other nations and, thus, the common rules that govern those activities. With regard to issues that China defines as "political", it is extremely hard to expect China to change its standpoints that rely heavily on the defense of the traditional doctrine of state sovereignty. While International Law is evolving under the tide of globalization and harmonization, the current Chinese administration has developed a stronghold on its role of reforming the international legal order in a new era by "stepping into the center of the world" through

various influential trade and business programs such as the "Belt and Road Initiative" – a huge investment project that aims at winning over strategic partners in support of China's stance in International Law. Whether and to what extent these moves would produce opportunities, challenges or conflicts in the international legal order remain to be seen in the next decade. ■

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