

# International Law, Domestic Courts, and the Rise of China

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Abstract: There is a trend that, since the 1990s, domestic courts have been more actively applying international law, highlighting their role in rule of law, national and/or international. The application of international law may be influenced by, and serve to enhance, particular public policies in different countries at different time. In this process, national factors which may be political, economic and ideological, and international factors which, for instance, include how international law is applied in other states are variables of different weights. In past three decades, China's fundamental public policy or grand strategy is to seek its rise as a new great power. This significantly contributes to the approach, methodology, structure of the application of international law by Chinese courts and their future development.

## Introduction

Since the 1990s, domestic courts have been highlighting their presence in public affairs, especially in transitional states. They often voice on great constitutional controversies, significantly influencing national political process.<sup>1</sup> They also exhibit their role through more application of international law, especially human rights treaties which were regarded to signify 'New Civilization'.<sup>2</sup> In particular, they are more aggressive against the executive branch than before.<sup>3</sup> This trend inspires some theorists to propose a new field of comparative international law.<sup>4</sup>

Wholly speaking, Chinese courts follow this trend. Although those treaties which are the focus of Western international lawyers (e.g. human rights treaties) have hardly been applied by Chinese courts, which makes Nollkaemper place Chinese courts and courts of Afghanistan, Cuba, Iran and North Korea in a group and derides that they 'play no role whatsoever in fulfilling' the protection of the international rule of law,<sup>5</sup> increasing applications of international law by Chinese courts could and should be developed as a new, indispensable reservoir for comparative international law. Actually, it has been increasingly attracting attention of international lawyers. Unfortunately, these published works concern themselves with purely textual analysis or case description at random. More importantly, they fail to explore the public policy underlying the judicial policy of structural application of international law by Chinese courts.<sup>6</sup> Putting it in the context of the rise of China which is

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<sup>1</sup> See generally Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan eds., *Consequential Courts*, Cambridge University Press, 2013.

<sup>2</sup> See Jack Donnelly, *Human Rights: A New Civilization?*, 74 *International Aff.*1(1998).

<sup>3</sup> See David Sloss eds., *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge University Press, 2009; Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, 2014.

<sup>4</sup> See Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 *ICLQ* 57(2011).

<sup>5</sup> André Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, 2011, pp.13, 55.

<sup>6</sup> See Dai Ruijun, *The National Implementation of International Human Rights Treaties* (in Chinese), Social Sciences Academic Press, 2013, Chapter 7; Zheng Sophia Tang, *International Treaties in Chinese Private International Law*, 42 *Hong Kong L.J.*311(2012); Sanzhuan Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 *Chinese J. Int'l L.*161(2009); Jie Huang, *Direct Application of International Commercial Law in Chinese Courts*, 5 *Manchester J. Int'Econ. L.*105(2008); Xiao Yongping and Long Weidi, *Selected Topics on the Application of the CISG in China*, 20 *Pace Int'l L. Rev.* 61(2008); Wang Guanxian, *Theory and Practice against Torture*(in Chinese), Shanghai Century Publishing Group, 2007; Gong Renren, *Implementing International Human Rights Treaties in China*, in Errol P. Mendes and Anik Lalonde-Roussy eds., *Bridging the*

significantly reshaping international relations in this century,<sup>7</sup> and employing internal and external perspective,<sup>8</sup> however, we may have a quite different understanding.

In addition to Introduction and Conclusion, this article is divided into four parts. Part I first categorizes international law, establishing the analytical framework for further review on the application of international law by Chinese courts. Then, the Part examines Chinese context in which Chinese courts apply international law, establishing the ideological framework for that review. Part II introduces the methodology of applying international law by Chinese courts, its merits and demerits. Part III reviews the structure of international law applied by Chinese courts, exploring its relationship with and implications on the rise of China. Part IV examines a pending but far-reaching case, showing that Chinese courts have begun to be involved, in a subtle manner, in foreign relations through applying international law. The core argument of this article is that China's grand strategy to pursue its rise as a great power and its ideological approach, Beijing Consensus, significantly contributes to the approach, methodology, structure of the application of international law by Chinese courts and their future development.

## I. Chinese Judicial Policy toward International Law: International Experience and Chinese Context

### A. International Experience

From the perspective of domestic judicial application, Sloss distinguishes three types of treaty provisions: (a) horizontal provisions regulating relations between states; (b) vertical provisions regulating relations between states and private parties, and (c) horizontal provisions regulating relations between private parties across national boundaries.<sup>9</sup> I agree with Sloss that the first type of provisions is rarely applied by domestic courts and, therefore, it is not worthwhile to be examined separately.<sup>10</sup> As will be readily discerned, however, there is remarkable difference between vertical provisions. Thus, I would like to refine international law as four categories: (a) Category A, under which a State may be challenged by aliens at foreign courts. The United Nations Convention on Jurisdictional Immunities of States and their property (hereinafter, 'State Immunity Convention') is grouped into this category; (b) Category B, in accordance with which a State may be brought a claim by its own nationals. Human rights treaties are the very case; (c) Category C, upon which a State can rely to exercise authority toward private parties. Rules on piracy in Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter, 'Navigation Safety Convention') and United Nations Convention on the Law of Sea (hereinafter, 'UNCLOS'), for instance, may be included in it; and (d) Category D, in accordance with which individuals can sue against other individuals. The United Nations Convention on the International Sale of Goods (hereinafter, 'CISG') belongs to it.

Traditionally, neither Category C nor Category D was a major concern in the application of international law by domestic court because: (a) for Category C, the exercise of the public authority toward private parties is of

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Global Divide on Human Rights, ASHGATE, 2003, pp.99-110; Li Zhaojie, The Role of Domestic Courts in the Adjudication of International Human Rights, in Benedetto Conforti and Francesco Francioni eds., *Enforcing International Human Rights in Domestic Courts*, Martinus Nijhoff Publishers, 1997, pp.329-354.

<sup>7</sup> See Congyan Cai, *New Great Powers and International Law in the 21<sup>st</sup> Century*, 24 EJIL 755(2013).

<sup>8</sup> As to the two perspectives, see Anthea Roberts, Paul Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Defining the Field*, in Anthea Roberts, Paul Stephan, Pierre-Hugues Verdier & Mila Versteeg ed., *Comparative International Law*, Oxford University Press 2015(forthcoming).

<sup>9</sup> David Sloss eds., *The Role of Domestic Courts in Treaty Enforcement*, Cambridge University Press, 2009, p.1.

<sup>10</sup> *Id.*

little relevance because private parties have long been marginal in international affairs; and (b) for Category D, disputes between private parties have nothing to do with public authority. Some changes happen. As individuals such as pirates and terrorists are posing serious challenges threatening security of individual States and that of international community as a whole, Category C is of increasing importance.<sup>11</sup> Therefore, domestic courts are expected to be more employed to cope with these threats, e.g., piracy.<sup>12</sup>

Category D is widely treated as transnational private law rather than public international law as generally understood. Thus, international lawyers like Louis Henkin have hardly published works on CISG, even though it is a treaty as defined in Vienna Convention of the Law of Treaties (hereinafter, 'VCLT').<sup>13</sup>

In contrast, Categories A and B highly relate to the challenge of public authority. Category A has long been a major source of controversies in international law and, upon its emergence in the second half of 20<sup>th</sup> century, especially its boom since the end of Cold War, Category B has become a new major concern.

Category A is readily involved in traditional foreign relations, namely, state-state relations. Since foreign relations are 'much less capable to be directed by antecedent, standing, positive laws' than domestic affairs, the power to conducting foreign affairs defined by Locke as *the Federative Power* should be left to the executive branch, 'the Prudence and Wisdom of those hands it is in, to be managed for the publick good'.<sup>14</sup> Domestic courts always avoided being involved in foreign relations. In particular, they defer to executive authority, which is defined as Deference Approach.<sup>15</sup> The adoption of State Immunity Convention in 2004, however, indicates that there is global consensus that domestic courts are expected to play a larger role in foreign relations. Several states go further. In *Grundlagenvertra Case*, for instance, a Greek local court decided that Germany could not invoke immunity for the killing and rape committed by German SS in Greek village in 1944 because they violated *jus cogen*. This decision was affirmed by Greek Supreme Court. Upon enforcement proceeding, however, Greek Ministry of Justice refused to seize German property and, interestingly, this position was supported by the Supreme Court.<sup>16</sup> Some Greek claimants later initiated enforcement proceeding in Italy where several similar judgments were made out of justifications relied upon by Greek courts. As a response, Germany sued Italy before International Court of Justice (ICJ). The Court held that Italy violated the right of sovereign immunity of Germany under international law.<sup>17</sup> Similar controversies were raised in other jurisdictions, for instance, Spain.<sup>18</sup> In one word, there are sharp disagreements how far domestic courts should go further as to Category A.

With the end of Cold War, a new Check Approach emerged.<sup>19</sup> Under this approach, domestic courts, in applying international law, may deviate from or challenge executive authority. This new approach appears being understood to compete with the Deference Approach. However, it mainly applies to Category B rather than Category A. For transitional states Category B is of special significance because, generally speaking, the judicial

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<sup>11</sup> See, e.g. UNSC Resolution 1816 of June 2008.

<sup>12</sup> M.D. Saiful Karim, Prosecution of Maritime Pirates, 32 Wis. Int'l L.J. 37(2014).

<sup>13</sup> In his general report, Sloss mentions this international law (David Sloss eds., *supra*, p.1), but national reporters hardly touches it.

<sup>14</sup> John Locke, *Two Treatises of Government*, Cambridge University Press, 14<sup>th</sup> reprint, 2003, pp.365,366.

<sup>15</sup> Eyal Benvenisti, Judicial Misgivings Regarding the Application of International Law, 4 EJIL 159(1993).

<sup>16</sup> See Kerstin Bartsch and Bjorn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 German L.J. (2003).

<sup>17</sup> *Jurisdictional Immunity of State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012.

<sup>18</sup> Mugambi Jouet, Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond, 35 GA. J. INT'L & COMP. L.495(2007).

<sup>19</sup> See Shaheed Fatima, *Using International Law in Domestic Courts*, Hart Publishing, 2005; David Sloss eds., *supra note*; André Nollkaemper, *supra note*.

check against executive authority is crucial for rule of law, especially in an era of ‘administrative state’;<sup>20</sup> specifically speaking, many transitional states are in the process of moving from authoritarian or dictatorial regimes to democratic regimes. An encouraging development in past two decades is that judiciaries of transitional states like India apply human rights treaties more actively than before.<sup>21</sup> As will be seen, nevertheless, this trend does not occur in China, also as a transitional state.

#### B. Chinese Context

The Chinese context refers to the judicial policy toward international law pursued by China in past three decades. In this author’s opinion, there are two main variables upon which China rely to devise that judicial policy: Socialist regime; the rise of China.

Deng Xiaping, the ‘Chief Designer’ of China’s reform and opening-up policy, once argued that

‘[T]he greatest advantage of the socialist system is that when the central leadership makes a decision, it is promptly implemented without interference from any other quarters. When we decided to reform the economic structure, the whole country responded; when we decided to establish special economic zones, they were soon set up. We don’t have to go through a lot of discussion and consultation, with one branch of government holding up another and decisions being made but not carried out. From this point of view, our system is very efficient. The efficiency I’m talking about is overall efficiency. We have advantage in this respect, and we should keep it -- we should retain the advantages of the socialist system.’<sup>22</sup>

Deng’s words reflect the institutional environment where Chinese courts administer the justice. According to current Constitution (1982), the Chinese Communist Party (CCP) is the sole ruling party.<sup>23</sup> Through its Party Committees at different levels, CCP can control the operation of legislative, executive and judicial organs because almost all of their heads are leaders of Party Committees. It is rightly observed that ‘the CCP’s influence and control is ubiquitous; it penetrates every aspect of society,’ so ‘there is no such thing as government policy independent from the CCP’.<sup>24</sup> As the result, all state organs could thus be effectively motivated to pursue public policy set by CCP. It is logical that China’s executive branch is empowered with much broader authority than that in states such as U.S and that its executive authority is awarded with more shields than that in states such as U.S. where the executive authority is the main target of checks and balances.<sup>25</sup> Any coin has two sides, of course. The more authority the executive branch has, the more risky it would be abused, thereby threatening the rule of law. Of course, Socialist states are enshrined with some other attributes that have important influence on their judicial policy toward to international law. For instance, what Socialist States are concerned with is ‘collective rights’ rather than ‘individual rights’, which is taken for granted as the genesis of human right in the Western world.

Closely related to China’s Socialist identity is the rise of the China. In the late 1970s, China was at the edge of economic collapse, political paralysis, and social turmoil after ten years of ‘Cultural Revolution’ (1966-1976).

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<sup>20</sup> See A. M. Gulas, *The American Administrative State*, 28 *Duq. L. Rev.* 489(1989-1990).

<sup>21</sup> See Neha Jain, *The Democratizing Force of International Law: Human Rights Adjudication by the Indian Supreme Court* (included in this volume).

<sup>22</sup> *Selected Works of Deng Xiaoping, Volume III*, Foreign Language Press, 1993, pp.187-188.

<sup>23</sup> China’s Constitution (1982, as amended in 2004), Preamble.

<sup>24</sup> Zhu Suli, *Political Parties in China’s Judiciary*, 17 *Duke J. Comp. & Int’l L.* 533,535,538,(2006-2007).

<sup>25</sup> Indeed, there is ‘no universally accepted system for achieving the separation of powers’, which depend on a variety of factors including conception of democracy, social, political and economic forces, and the history of governmental institutions. K O’Regan, *Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution*, 8 *Potchefstroom Elec. L.J.* 1,2(2005). However, the divergences among judicial checks and balances against the executive branch appear far less than legislative checks and balances against the executive branch in Western states. Therefore, it is safe here to ignore the difference among the former systems.

It is marvelous that China took less than three decades to develop itself as a new great power. The ideological approach for China's rise is labeled as Beijing Consensus, which is regarded alternative to Washington Consensus proclaimed by Western states.<sup>26</sup> Beijing Consensus has two core elements: (a) the priority is economic growth rather than political democracy and social justice. This echoes P. Kennedy's argument that economic power is fundamental to the rise of great powers;<sup>27</sup> and (b) an authoritarian regime, especially executive branch, is maintained to pursue public policies as efficiently as possible, albeit not always legitimate.

Because of two variables examined above, the respect for and the shield executive authority from challenge is a key element of Chinese judicial policy. While international lawyers hardly touch this issue, it has been much debated among national law scholars. For instance, Administrative Procedure Law (APL, 1990) and State Compensation Law (SCL, 1994), two key laws to control the abuse of executive power, were blamed of not well being done and enforced in practice: what the APL (1990) seeks is to 'support' rather than 'supervise' the executive branch,<sup>28</sup> and remedies available to victims of executive misconducts are too rigid under the SCL (1994).<sup>29</sup> Furthermore, Chinese courts often convince themselves or are required to respect, coordinate with, and assist the executive branch to pursue their economic policies, tolerating executive authority,<sup>30</sup> enhancing the 'Chinese Great Rejuvenation' or 'Chinese Dream'.<sup>31</sup> It cannot be denied that the respect for executive authority often goes too far. The executive branch frequently unduly interferes in the administration of justice, seriously damaging judicial independence and integrity.<sup>32</sup>

Some observers assumed that Beijing Consensus challenges conventional Western wisdom, posing serious challenges to Washington Consensus and providing a new option for states at early-stage development, while some other people consider it is too early to conclude that Beijing Consensus is long-term viable.<sup>33</sup> Anyway, what are happening now is that, as waves of governmental scandals are exposed, social instability deteriorates, and the public lose their confidence on judiciary mechanism,<sup>34</sup> China is adjusting its traditional strategy of national development, highlighting closer surveillance of public power.<sup>35</sup> In particular, in 2014 the CCP adopted the first decision exclusively dealing with rule of law.<sup>36</sup> Some important measures have been taken. For instance, APL (1990) was amended in December 2014, stressing to 'supervise' the exercise branch, repealing the word 'support',<sup>37</sup> and including provisions that discourage the executive interference and enhance courts to administer justice. The question, however, is whether the positive trend is reflected in China's judicial policy toward international

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<sup>26</sup> Bradley Klein, *Democracy Optional: China and the Developing World's Challenge to the Washington Consensus*, 22 *UCLA Pac. Basin L.J.* 89(2004).

<sup>27</sup> P. Kennedy, *The Rise and Fall of the Great Powers*, Vintage Books, 1989, xv, xxii.

<sup>28</sup> See *Administrative Procedural Law of China* (1990), article 1; Ji Weidong, *The Judicial Reform in China: The Status Quo and the Future Direction*, 20 *Ind.J. Global Legal Stud.* 185, 196(2013).

<sup>29</sup> See Ying Songnian and Yang Xiaojun, *Some Theoretical and Practical Issues on State Compensation Law* (in Chinese), 1 *Chinese Legal Science* 3(2005).

<sup>30</sup> Hou Meng, *A Study on the Supreme People's Court of China* (in Chinese), Law Press, 2007, pp.67-71.

<sup>31</sup> See, e.g., Zhou Qiang (Chief Judge and President of SPC), *Report on the Work of the Supreme People's Court Delivered at the Second Session of the Twelfth National People's Congress on March 10, 2014*, available [http://news.xinhuanet.com/legal/2014-05/09/c\\_126481178.htm](http://news.xinhuanet.com/legal/2014-05/09/c_126481178.htm) (last visited August 20, 2014). In that report, Chinese courts are required to 'make new and greater contribution to achieve... the Chinese Dream of great rejuvenation of the Chinese nation!'

<sup>32</sup> Randall Peerenboom, *China's Long March Toward Rule of Law*, Cambridge University Press, 2002, 302-309.

<sup>33</sup> *Id.*, at 147.

<sup>34</sup> See Ji Weidong, *supra note*, at 208-209.

<sup>35</sup> See *The Decision on Major Issues Concerning Comprehensively Deepening Reforms* adopted by the CCP's Central Committee (November 16, 2013), Parts IX and X, at [http://www.sn.xinhuanet.com/2013-11/16/c\\_118166672.htm](http://www.sn.xinhuanet.com/2013-11/16/c_118166672.htm) (last visited August 22, 2014)

<sup>36</sup> See *The Decision of Major Issues Concerning Comprehensively Governing State by Law* (October 23, 2014), at [http://news.xinhuanet.com/2014-10/28/c\\_1113015330.htm](http://news.xinhuanet.com/2014-10/28/c_1113015330.htm) visited November 10, 2014).

<sup>37</sup> See *Administrative Procedural Law* (as amended in 2014), article 1.

law, which will be examined later.

## □. Methodology of the Application of International Law by Chinese Courts

There are two methods of application of international law by domestic courts: automatic incorporation and transformation. As a rule, the automatic incorporation empowers courts to give effect to international law. International law, under transformation, may not be directly invoked by courts to adjudicate disputes, but it does not mean that they cannot be applied totally. There is a principle of Consistent Interpretation, in accordance with which national law is interpreted in conformity with international law.<sup>38</sup>

### A. Finding

In contrast with most countries, China's Constitution, from the first (1954) to current one (1982, as amended in 2004), is silent on the status of treaties in national legal system. Rather, it treats this issue on a case by case basis.

#### 1. Automatic Incorporation

From 1978 to 2004, there are more than 100 provisions in nearly 80 laws which, to different extent, embrace automatic incorporation.<sup>39</sup> For instance, article 72 of APL (1990) provides that 'if a provision of an international treaty which China has concluded or acceded to is different from that of the present law, the treaty provision shall apply, unless China has made reservation to the provision.' A more important is Article 142 of General Principles of Civil Law (hereinafter, 'GPCL(1986)'), providing that if any international treaty concluded or acceded to by China contains provisions differing from those in 'civil laws' of China, the treaty provisions shall apply, unless China has announced reservations. Its significance lies in that it refers to plural 'civil laws' instead of singular 'civil law', therefore it should be interpreted to apply not only GPCL itself but also all laws to be enacted subsequently, which, by their nature, could be clarified as 'civil laws'.<sup>40</sup>

Most Chinese international lawyers agree that the Constitution's silence does not deprive treaties of direct effect in China.<sup>41</sup> Professor Wang went further to argue that automatic incorporation would be a general principle;<sup>42</sup> if a treaty to which China is a party contains provisions inconsistent with Chinese laws, treaty provisions should prevail, unless China has made reservations.<sup>43</sup>

#### 2. Transformation

Transformation is the most common way for China to implement its treaty obligation.<sup>44</sup> However, it is until China's accession to World Trade Organization (WTO) in 2001 that it had begun to be taken seriously. Most Chinese international lawyers once proposed that at least some WTO rules could be directly applied by Chinese courts.<sup>45</sup> They are disappointed by Rules on Issues Concerning Adjudication of Administrative Cases of International Trade issued by the SPC in 2002 (hereinafter, 'Judicial Interpretation (2002)'). Judge Li Guoguang,

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<sup>38</sup> André Nollkaemper, *supra note*, at 73-81.

<sup>39</sup> Wang Yong, *Fundamental Theory of the Application of Treaties in China* (in Chinese), Peking University Press, 2007, p.146.

<sup>40</sup> Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, *Recueil des cours*, Vol.221, 1990, at 332.

<sup>41</sup> Dinah Shelton, *International Law and Domestic Legal Systems*, Oxford University Press, 2011, at 168.

<sup>42</sup> Wang Tieya, *supra note*, at 328-329.

<sup>43</sup> Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., *National Treaty Law and Practice*, Martinus Nijhoff Publishers, 2005, p.164.

<sup>44</sup> Xue Hanqin and Jin Qian, *International Treaties in the Chinese Domestic Legal System*, 8 *Chinese J. Int'l L* 299, 308(2009).

<sup>45</sup> See Cai Congyan, *Private Structural Participation in the Multilateral Trade System* (in Chinese), Peking University Press, 2007, at 265-268.

then SPC's Deputy President, explained that, according to Articles 7 and 8,<sup>46</sup> WTO rules could not be directly applied in disputes between private parties and executive organs. This means that private parties cannot invoke WTO rules to bring a claim or defend themselves in courts and that courts shall not directly use WTO Agreements as the legal basis for adjudication.<sup>47</sup> In *Shengzheng Chengjie'er Trade Co., Ltd Case* (2012), the respondent, Tianjin Customs authority, detained the imported goods of Plaintiff, Chengjie'er. The Plaintiff argued that the detention was so prolonged that breached Article 55 of Agreement On Trade-related Aspects of Intellectual Property Right (hereinafter, 'TRIPS Agreement').<sup>48</sup> The court in Tianjin decided that, according to Judicial Interpretation (2002), Chinese laws instead of TRIPS Agreement should be applied.<sup>49</sup> In *Longines Watch Co. Ltd. Case* (2012), the court in Beijing did not refer to that judicial instrument, but it affirmed that the defendant, the Trademark Appeal Board of State Administration of Industry & Commerce of China, was justified not to rely upon TRIPS Agreement because its provisions "have been included in the current Trademark Law."<sup>50</sup>

While excluding the direct effect of WTO rules, Judicial Interpretation (2002) includes the Principle of Consistence Interpretation. There are rare countries whose laws explicitly provide the Principle,<sup>51</sup> one of which is China. Article 9 of Judicial Interpretation (2002) provides that 'If there are two or more reasonable interpretations for a provision of the law or administrative regulation applied by a people's court in the hearing of an international trade administrative case, and among which one interpretation is consistent with the relevant provisions of the international treaty that the PRC concluded or entered into, such interpretation shall be chosen, unless China has made reservation to the provisions.' In *Chongqing Zhengtong Pharmaceutical Co. Ltd. Case* (2007), the SPC for the first time referred to this provision. It held that the meaning of 'agent' referred in Article 15 of China's Trademark Law can be interpreted in accordance with 'agent' and 'representative' referred in Article 6 of Paris Convention on the Protection of Industrial Property (1883).<sup>52</sup> Judicial Interpretation (2002) is the sole Chinese law providing the Principle. This shows that the WTO regime is so profound as to prompt China to establish this

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<sup>46</sup> Article 7: According to Paragraph 1 of Article 52 of the Administrative Procedure Law and Paragraphs 1 and 2 of Article 63 of the Legislation Law, a people's court shall, in the hearing of international trade administrative cases, follow the laws and administrative regulations of the People's Republic of China, as well as the local regulations, which relate to or affect the international trade, enacted by the local legislatures within the statutory legislative authority.

Article 8: According to Paragraph 1 of Article 53 of the Administrative Procedure Law and Articles 71, 72 and 73 of the Legislation Law, a people's court shall, in the hearing of international trade administrative cases, refer to the departmental regulations, which relate to or affect the international trade, enacted by the departments under the State Council within their respective authority in accordance with laws and the administrative regulations, decisions and orders of the State Council, and shall refer to the regulations of local governments, which relate to or affect the international trade, enacted by the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government, cities where the people's governments of the provinces and autonomous regions are located, cities where the special economic regions are located, and relatively large cities approved by the State Council in accordance with the laws, administrative regulations and local regulations.

To support his argument, Li also cited Paragraph 67 of the Working Party Report of China, which states that "the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.

See Li Guoguang, Speech at the Press Briefing related to Brief on Rules on Issues Concerning Adjudication of Administrative Cases of International Trade, August 29, 2002, at <http://www.lawxp.com/statute/s898388.html> (visited August 10, 2014).

<sup>47</sup> Id.

<sup>48</sup> Article 55 of TRIPS Agreement provides that 'If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days...'

<sup>49</sup> China Applied Law Institute of the Supreme People's Court ed., *Selected Cases of People's Court*, People's Court Press, 2013, pp.365-368.

<sup>50</sup> See Pkulaw.cn, [Citation Code] CLIC.1447190.

<sup>51</sup> André Nollkaemper, *supra note*, at 143, 147.

<sup>52</sup> Gazette of the Supreme People's Court of the People's of Republic of China, No.11, 2007, pp.29-30.

sophisticate judicial policy. Furthermore, the Principle is sometimes employed to interpret Chinese laws which do not include this method. In *Nangning XX Service Co. Ltd. Case (2012)*, for instance, there was disagreement on the meaning of ‘workplace’. Regulation of on Work-Related Injury Insurance of China (2010) fails to provide a definition. The court finally accepted the argument that the Regulation should be interpreted in conformity with Article 3(c) of the Convention concerning Occupational Safety and Health Convention and the Working Environment to which China a Contracting Party, providing that ‘the term workplace covers all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer’.<sup>53</sup>

Consistent Interpretation might be more used in a subtle manner. In searching on the Pkulaw.cn(北大法宝), a leading legal database in China, it can be found that international law often mentioned in case reviews by judges who are colleagues of judges hearing the cases. It might be assumed that, while not appearing in judgments, the Principle is employed in judicial reasoning. This supports the presumption that the Consistent Interpretation is of particular importance for international law to be applied by transformation.

#### B. Comments

Two reasons may be proposed to explain the silence of China’s Constitution on the status of international law in its domestic legal system. One is the influence of Soviet international legal theory. Soviet states once criticize that international law was historically manipulated by a handful of Western states. Therefore, the Soviet Union and other Socialist states never mentioned international law in their constitutions. As a matter of fact, China’s Constitution (1954) was modeled on Soviet Union’s Constitution (1936). The other is China’s own history of one-century humiliation since the Opium War (1848). China concluded many ‘unequal’ treaties with Western powers under undue duress. Thus, China was hostile to international law most of time in past two centuries.<sup>54</sup>

The silence of China’s Constitution contributes to the fragmentation and less predictability of the application of international law in China, which has long been noticed by Chinese international lawyers. Almost all of them proposed that this issue be clarified at constitutional level.<sup>55</sup> However, it appears that China’s government still has no intention to do that. The latest development is that, during debates on the amendment of Legislation Law in 2014, some members of National People’s Congress (NPC), highest legislature in China, suggested that the would-be new Law include provisions clarifying the status of treaties in Chinese legal system. Some other NPC members, however, maintain that these provisions might be too rigid, damaging the integrity of Chinese legal system.<sup>56</sup> Finally, the new Law amended in March 2015 remains the issue intact.

Examined from another angle, the fragmentation and less predictability imply flexibility. For a rapidly rising state in this ever changing world, like China, flexibility rather than stability often matters more. Flexibility can grant China more margins to pursue a public policy. As examined in Part III, the application of international law at Chinese courts is the very case. Interestingly, China, in some sense, coincide with the recent trend that states tend to incorporate international law in national legal systems in a more flexible manner than before in order to balance concerns of effectiveness in terms of international law and legitimacy in terms of domestic governance.<sup>57</sup>

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<sup>53</sup> Pkulaw.cn, [Citation Code] CLI.C.1065351.

<sup>54</sup> Wang Tieya, *supra note*, at 250-262.

<sup>55</sup> See Zhu Xiaoqing and Huang Lie ed., *Relations between International Treaties and Domestic Law* (in Chinese), World Knowledge Press, 2000, at 17, 40, 159.

<sup>56</sup> ‘The application of treaties in China should be clarified’, at [http://www.legaldaily.com.cn/index/content/2014-11/16/content\\_5844527.htm?node=20908](http://www.legaldaily.com.cn/index/content/2014-11/16/content_5844527.htm?node=20908)(visited March 1, 2015).

<sup>57</sup> See Pierre-Hugues Verdier and Mila Versteeg, *International Law and National Legal Systems: An Empirical Investigation*,



### III Structure of International Law Applied by Chinese Courts and Its Implication on China's Rise

#### A. Finding

##### 1. Category A

Absolute state immunity is a long policy for China. Chinese courts neither have exercised jurisdiction over acts of foreign States, nor have they enforced any decisions involving public property of foreign States.<sup>58</sup> However, it was of great importance for China because it had been often relied upon by China to prevent from being exercised jurisdiction, including the famous *Jackson Case* (1979).<sup>59</sup>

On September 14, 2005, China signed the State Immunity Convention (2005), signaling clearly that China would shift its traditional absolute immunity to relative immunity. This provides Chinese courts to apply Category A with international legal basis. Indeed, since China has not ratified it so far, it still strategically uses its traditional policy in several occasions including *Morris Case* (2005)<sup>60</sup> and *Democratic Republic of the Congo and Others Case* (2010).<sup>61</sup> Furthermore, other factors, for instance, the doubt on professional capability of judges and the lack of national enabling law, may discourage Chinese courts to apply state immunity law.<sup>62</sup> It is almost certain, however, that Chinese courts would hear claims against foreign states sooner or later. The major reason is that Chinese private parties have been tremendously expanding their engagements with foreign states at home and abroad as China is rising as a great power. For instance, more Chinese are employed by or contract with foreign diplomatic bodies in China and more Chinese trade and invest abroad. Actually, there are many reports showing rights and interests of Chinese are infringed by host governments. In 2014 China declared a new state strategy of 'protecting the legal rights and interests of Chinese nationals and corporate abroad in accordance with laws', making it an important component of rule of law.<sup>63</sup> This policy has two features. First, China's government will attach more importance to the protection of expanding private interests, which obviously are an important constituent of the rise of China. Second, China would more rely upon legal rather than diplomatic means than before, depoliticizing affairs between Chinese individuals and foreign states.

A provoking issue is whether a foreign state would be sued in China because of its activities infringing *jus cogen*. In China, a number of international lawyers contend that Chinese courts is justified to do so against Japan for its activities such as lethal bacteria use and indiscriminate bombing in China during World War II, arguing that Japan cannot invoke state immunity.<sup>64</sup> And several lawsuit initiatives have been proposed against Japan's government. For instance, In September 2012, some Chinese victims of Chongqing Grand Bombing, which was conducted by Japanese air force during World War II, brought claims against Japan's government before Chongqing High People's Court.<sup>65</sup> Again, in March 2014 some forced workers and their descendants filed cases against Japan's government and several Japanese companies before Tangshan Intermediate People's Court.<sup>66</sup> In

<sup>58</sup> Xue Hanqin, Chinese Contemporary Perspective on International Law, 355 *Recueil des courts* 41, 100,101(2011)

<sup>59</sup> *Id.*, at 101-102. See also Jill A. Sgro, China's Stance on Sovereign Immunity, 22 *Colum. J. Transnat'l L.* 101(1983-1984).

<sup>60</sup> See Marvin L. Morris, Jr. v. The People's Republic of China, F. Supp. 2d, 2007 WL 851217 ( S. D. N. Y. ) ; 2006 WL 2581974 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Further Support of the People's Republic of China's Motion to Dismiss ( Aug. 11, 2006).

<sup>61</sup> *Democratic Republic of the Congo and Others v . FG Hemisphere Associates LLC* , FACV 5,6 & 7 /2010 .

<sup>62</sup> Dahai Qi, State Immunity, China and Its Shifting Position, 7 *Chinese J.Int'l L* 307(2008).

<sup>63</sup> See the CCP, The Decision on Major Issues Concerning Comprehensively Deepening Reforms(2014), Part VII(7).

<sup>64</sup> See, e.g. Xiao Mingqing, Are National Immunity Rights Applicable to Bacteria War Lawsuit?(in Chinese), 1 *Journal of Hunan University of Arts and Science* 23(2005).

<sup>65</sup> 'Victims of Chongqing Grand Bombing bring lawsuit against Japan and the biggest claim reaches RMB 80 million', at [http://www.scoprs.gov.cn/shgj/shkx/201209/t20120911\\_181769.html](http://www.scoprs.gov.cn/shgj/shkx/201209/t20120911_181769.html)(visited January 10, 2015)

<sup>66</sup> 'Private Lawsuits against Japan- Following up lawsuits brought by Chinese labors against Japanese government and enterprises', at <http://cn.nikkei.com/politicsaeconomy/politicsasociety/8622-20140327.html>(visited August 14, 2014).

Memorials,<sup>67</sup> plaintiffs in both cases argue that Japan's government cannot invoke state immunity because its wrongs were in breach of *jus cogen*. Both courts neither nodded nor rejected to exercise jurisdiction so far, making two cases pending. This indicates that on the one hand, China so far is cautious to exercise jurisdiction; on the other hand, the possibility for Chinese courts to do some day so remains.

## 2. Category B

In retrieving Pkulaw.con(北大法宝), we find that Category B has been applied by Chinese courts, albeit occasionally only. The important thing is that human rights treaties, which is the core of Category B and which, as indicated above, has been playing an increasing role in enhancing rule of law especially in transitional states, have never been given into direct effect in China.

China has ratified many human rights treaties, including most of all Core Conventions, e.g., International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment(hereinafter, 'CAT'), International Covenant on Economic, Social and Cultural Rights(hereinafter, 'ESCR Covenant'). China assented to grant direct effect to CAT at least. China's representative once stated '...according to the legal system of China, as soon as the Chinese government approves or participate in any related international treaty it becomes effective in China and the Chinese Government will be responsible for the respective obligation. In other words, the Convention against Torture has become directly effective in China. Acts of tortures, as defined by the Convention, are strictly prohibited according to the laws of China.'<sup>68</sup> This statement was widely regarded as important evidence that treaties can be directly applicable in China.<sup>69</sup> More importantly, China once explicitly agreed that CAT could be invoked 'before the Chinese courts.'<sup>70</sup> Unfortunately, the fact is that, although the torture in China was serious and China's Criminal Law does not include the Crime of Torture,<sup>71</sup> Chinese courts have never given CAT into direct effect as China's representative promised at international level. Interestingly, however, Ministry of Public Security (MPE) once ordered that its local branches 'strictly abide by the relevant provisions' of CAT.<sup>72</sup>

ESCR Covenant has a similar story in China. Noting that not all Covenant provisions have been incorporated in Chinese laws, the ESCR Committee suggested the all rights under the Covenant are directly enforceable in China.<sup>73</sup> Although China recognized 'the enjoyment of certain rights still cannot meet the requirements of the Covenant', it recently explained that human rights treaties 'do not directly function as the legal basis for the trial of cases in Chinese courts, ...; rather, they are applied after being transformed into domestic law through legislative procedures.'<sup>74</sup> This argument is not totally convincing. First, as indicated above, China at least recognized the direct effect of CAT. Second, according to Article 72 of APL (1990), it is justified for Chinese

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<sup>67</sup> These Memorials are on the author's file.

<sup>68</sup> See UN Committee against Torture, 4<sup>th</sup> Session, Summary Record of the 51<sup>st</sup> meeting, Geneva, 27 April 1990, UN Doc.CAT/C/SR.51(4 May 1990), 2.

<sup>69</sup> See, e.g., Li Zhaojie, [supra note](#) at 341; Sanzhuan Guo, [supra note](#) at 165.

<sup>70</sup> Summary record of the 419<sup>th</sup> meeting : China, Poland. 12/05/2000 CAT/C/SR.419. (Summary Record) , p.5.

<sup>71</sup> Wang Guanxian, [supra note](#), at 273-274; Dai Ruijun, [supra note](#), at 273; Consideration of Reports Submitted by States parties under Article 19 of the Convention, Concluding observations of the Committee against Torture: China, CAT/C/CHN/CO/4, 12 December 2008, para.11.

<sup>72</sup> Ministry of Public Security, Note on Strictly Implementing Provisions in International Conventions Related to Public Security, March 24, 1989, [89]Gongfazhi 33.

<sup>73</sup> Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, E/C.12/CHN/CO/2, 13 June 2014, para.9.

<sup>74</sup> Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: China, E/C.12/CHN/2, 6 July 2012, at 9.

court to give direct effect to ESCR.

However, Article 72 of APL (1990) was deleted in its amendment in December 2014, without giving any explanation.<sup>75</sup> This is the first time for China to repeal provisions of international law in its laws. Chinese courts, according to the amended Law,<sup>76</sup> thus have to exclusively invoke national laws to decide claims against executive organs and international law at best could be used for interpretative purpose. This development is very negative. Generally speaking, it would be assumed that Chinese judicial policy toward international law tends to be more conservative as China signs more and more treaties. More specifically, this repeal creates a big trouble for China to honor its relevant treaty obligations. For instance, all Chinese investment treaties provide that foreign investors have a right to bring claims against China's government, but Chinese courts, according to the APL (2014), could not decide investor-state disputes based upon a Chinese investment treaty.

A likely reason for that repeal might be proposed. Article 72 in practice is not often invoked so that it is not necessary to remain. This assumption might be reasonable, considering that Category B has not been often applied by Chinese courts as indicated above. There might be another assumption, albeit seemingly less likely. China is alert to the prospect that Chinese courts might be more aggressive to apply Category B to check executive authority since the judicial independence would be strengthened arising from the ongoing judicial reform as mentioned above. Therefore, China seeks to shield its executive authority from potential judicial challenges through depriving courts of directly invoking Category B. Anyway, one thing is clear that Category B has been very marginal in Chinese courts.

### 3. Category C

Before the 1980s, there was no Chinese law relating to the exercise of jurisdiction according to Category C. In 1987, in order to honor the obligation to exercise jurisdiction toward crimes prescribed in several treaties to which China acceded,<sup>77</sup> China enacted a law requiring courts 'within the scope of its treaty obligation, exercise criminal jurisdiction over crimes prescribed in the international treaties' to which China is a party.<sup>78</sup> This requirement later was incorporated in Criminal Law (1997).<sup>79</sup>

Perhaps because of the lack of knowledge of international law,<sup>80</sup> Chinese authorities failed to exercise jurisdiction in some occasions to which they should have done. In *M.V. Petro Ranger Case* (1998), for instance, M.V. Petro Ranger, a Malaysian Cargo ship, was hijacked by twelve Indonesian pirates at South China Sea and renamed as *Wilby* with Honduran flag. The ship was later detained in China being suspected of smuggling. Chinese authority was informed that all persons other than crew were pirates. However, all suspects were not prosecuted because Chinese authority explained that there was no convincing evidence. This inaction was criticized by the International Maritime Bureau (IMB).<sup>81</sup>

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<sup>75</sup> Report by the Legal Committee of National People's Congress on the Amendment of Administrative Procedural Law (draft), at [http://www.npc.gov.cn/npc/lfzt/2014-08/31/content\\_1876868.htm](http://www.npc.gov.cn/npc/lfzt/2014-08/31/content_1876868.htm) (visited January 10, 2015).

<sup>76</sup> See APL (2014), article 65.

<sup>77</sup> For instance, Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention), Convention on the Psychotropic Substances and Single Convention on Narcotic Drugs.

<sup>78</sup> Decision of SCNPC Regarding Exercising Criminal Jurisdiction over the Crimes Prescribed in the International Treaties to Which the People's Republic of China is a Party or Has Acceded, June 23, 1987.

<sup>79</sup> China's Criminal Law (1997), article 9.

<sup>80</sup> The SPC on several occasions urged that local judges increase their knowledge of international law. See SPC, Note Concerning Some Issues related to the adjudication of foreign-related civil and commercial cases and the Enforcement of Judgments, April 17, 2000.

<sup>81</sup> See Tong Weihua, *Terrorist Crimes at Sea and Criminal Regulation on the Crime of Piracy* (in Chinese), Law Press, 2013, at 8-9.

In several occasions, Chinese courts exercise jurisdiction in accordance with international law. For instance, in June 1999, ten pirates hijacked *Siamxanxai*, an oil tanker flagging Thailand, at the sea adjacent to Malaysia. Later, the hijacked tanker entered into Chinese territorial sea and was arrested by Chinese police. A Chinese court held that these pirates infringed treaties to which China is a Party, including UNCLOS and Navigation Safety Convention. Since China's Criminal Law does not prescribe the crime of piracy, the court finally held that they conducted the crime of robbery in accordance with the Law.<sup>82</sup>

#### 4. Category D

What Chinese courts apply most is Category D. Some cases studies have been done as to the application of CISG, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, 'New York Convention'), Paris Convention for the Protection of Industrial Property (hereinafter, 'Paris Convention'), Berne Convention for the Protection of Literary and Artistic Works (hereinafter, 'Berne Convention'), International Convention on Civil Liability for Oil Pollution Damage (hereinafter, 'CLC').<sup>83</sup> For the mandate of this article, it is not necessary to introduce more cases here. Rather, it suffices to provide several figures. On searching on the Pkulaw.cn, so far CISG has been applied in over 100 cases; New York Convention, over 40; Paris Convention, over 100; Berne Convention, over 450; CLC, over 15. Although there are some drawbacks in their applications,<sup>84</sup> the policy of SPC is firm: these treaties should be applied in good faith in China. The SPC established the reporting and reviewing mechanisms to guide and supervise the treaty application by local courts.<sup>85</sup> As an empirical study shows, these mechanisms effectively remedy legal errors occurring at local courts level.<sup>86</sup>

Interestingly, treaties obviously aiming to regulating relations between Contracting Parties are sometimes used to adjudicate disputes arising between privates. A prominent example is the TRIPS Agreement, which, as said above, lacks direct effect in claims against executive organs. As indicated by Pkulaw.cn, the TRIPS Agreement has been applied in several dozens of disputes happening between privates. In *Beijing XX Information Technology Co.Ltd. Case (2011)*, for instance, the plaintiff got the exclusive license from HIM International Music Inc, a company in Taiwan, to distribute MTV products in Mainland of China. The plaintiff accused that the defendant's use of these products infringed his exclusive right. The court noted that Taiwan and Mainland of China both are Contracting Parties of TRIMPS Agreement and that, according to the national treatment obligation under the Agreement, Mainland of China should apply to HIM China's Copyright Law. The defendant finally was held liable for his infringements.<sup>87</sup> However, the WTO obligation to award national treatment is not imposed upon individuals but WTO Members while that infringement occurred between two individuals, not between an individual and a WTO Member.

#### B. Comments

Firstly, there are several factors for the lack of judicial application of Category A in China so far: (a) legal

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<sup>82</sup> Pkulaw.cn, [Citation Code] CLI.C.235055.

<sup>83</sup> See Zheng Sophia Tang; Jie Huang; Xiao Yongping and Long Weidi, all see *supra* note 5.

<sup>84</sup> Xiao Yongping and Long Diwei, *supra* note at 101-102.

<sup>85</sup> See SPC, Notice Concerning the Establishment of Reporting Mechanism toward Important Economic Disputes (hereinafter, Judicial Interpretation(1989)), January 31,1989; Notice Concerning Issues of Dealing with Foreign-related Arbitration and Foreign Arbitration by People's Court, August 28, 1995; Notice Concerning the Revocation of Foreign-related Arbitral Awards, April 23, 1998.

<sup>86</sup> Yang Honglei, Field Report of the Review of Judicial Review on Foreign-related Arbitration by People's Courts, 9 International Law Review of Wuhan University 304, 311(2009).

<sup>87</sup> Pkulaw.cn, [Citation Code] CLI.C.1338513. See also *Beijing Tianyu Simultaneous information technology Co., Ltd.Case*, [Citation Code] CLI.C.821508; Chen Tizhong Case, [Citation Code] CLI.C.456642; *Chaozhou Grant Clothing Co., Ltd. Case*, [Citation Code] CLI.C.166449.

factor. This, in particular, refers to the conception of sovereignty of Socialist states and developing states. For a long time these states maintained the view of absolute state immunity and China is not an exception. Of course, China can also invoke the conception of sovereignty as legal justification in lawsuits against it at foreign courts; (b) factual factor. It is until one or two decades ago that Chinese private parties had begun to increasingly engage in foreign-related activities involving a foreign state, for instance, trading and investing abroad and working for foreign diplomatic bodies in China; and (c) political factor. At the early stage of reforming and opening-up, maintaining friendly political state-state relationship is of special important for China,<sup>88</sup> which helped increase confidence of private investors and traders on China. If Chinese courts would apply Category A, it would be highly risky of provoking diplomatic confrontations between China and other states, especially Japan, discouraging other states and their nationals to invest in and trade with China.

As China is rising, however, it becomes more powerful against other states than before and it has begun to take seriously the protection of dramatically expanding Chinese private interests against foreign states. As a matter of fact, China recently has refined its traditional conception of sovereignty, including signing State Immunity Convention. Sooner or later, therefore, Chinese courts would adjudicate disputes arising between its nationals and foreign states.

Secondly, there is a salient feature in the application of Category B in China. On the one hand, China embraces many treaties which may be used to contain executive authority, especially human right treaties. It is well known that, since the late 1980s, especially Tiananmen Square incident in 1989, there were fierce confrontations between China and Western states. China was accused of systematic violations of human rights.<sup>89</sup> More embracement of human rights treaties helps China better integrate into international community, which clearly is significant for a state having ambition to rise as a new great power in the era of human rights,<sup>90</sup> on the other hand, China seeks to alleviate the international pressure on its executive authority through neutralizing, in the judicial process, the application of treaties. In particular, China in practice rejected the automatic incorporation of those treaties under which the executive authority might be systematically challenged. The CAT is the very case. As the result, China's executive branch can take advantage of its Socialist efficiency advantage. The amendment of APL in 2104 appears to confirm that China would continue its unique road.

Thirdly, Chinese courts sometimes were reluctant to exercise their jurisdiction under Category C. As China more extensively engages with the globalization, activities such as piracy, transnational organized crimes, international terrorism, which have been within the reach of international law, are threatening ever expanding economic interest and security of China and interest of international community as a whole. These threats are defined by China as 'non-traditional security'. China has expressed its firm position. For instance, Huang Huikang, a chief legal official of Ministry of Foreign Affairs (MFA) of China, argued that there is no legal hindrance for Chinese courts to exercise universal jurisdiction toward Somali pirates.<sup>91</sup>

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<sup>88</sup> It is well known that 'Keeping low profile' proposed by Deng Xiaoping has been a basic principle of Chinese foreign policy in past three decades.

<sup>89</sup> See generally Rosemary Foot, *Rights beyond Borders*, Oxford University Press, 2000; Ming Wan, *Human Rights and Chinese Foreign Relations*, University of Pennsylvania Press, 2001; Katrin Kinzelbach, *The EU's Human Rights Dialogue with China*, Routledge, 2015; Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, E/C.12/CHN/CO/2, 13 June 2014, para.30.

<sup>90</sup> See Theodor Meron, *International Law in the Age of Human Rights*, Martinus Nijhoff Publishers, 2004.

<sup>91</sup> Huang Huikang, *Fighting Somali Pirates by Naval Escort: Legal Basis and Judicial Procedure*, 1 *Annual of Chinese Maritime Law* 1, 5(2009).

Fourthly, a major strategy for China to resume its collapsing economic after ten years of Cultural Revolution is to attract capital and technology from Western states. However, on the one hand, China's Command Economy and the corresponding legal regimes would chill investors and traders who operate in market economy; on the other hand, China could not create fledged market economy-rooted legal regimes in a short time. Therefore, it is expedient for China to incorporate international legal regimes, for instance, the CISG and Paris Convention, into domestic legal system, which effectively increases foreign confidence on China and which do not seriously derogate executive authority. Thus, huge foreign capital and technology flow to China,<sup>92</sup> contributing to the marvelous economic growth of China.

There is close relationship between the structure of international law applied by Chinese courts interacts with the rise of China. Initially, China, for the pursuit of economic rise, strongly stressed the application of Category D, rejected to exercise jurisdiction under Category A, and paid little attention to Category C. As China has been recognized as a new great power, it has begun to adjust its traditional judicial policy toward international law, mainly referring to potential exercise of jurisdiction under Category A and more exercises of jurisdiction under Category C. But little change so far has happened to Category B, especially human rights treaties and, as indicated by the amended APL (2014), no meaningful progress can be expected in the near future. This implies that China still seeks to maintain its Socialist advantage, especially strong executive authority, through neutralizing the judicialization of Category B.

#### IV Case Study: International Law in a Lawsuit against Japanese Companies at Chinese Court

##### A. New Role of Chinese Courts' Application of International Law

Among all four Categories of international law, the application of Category A by domestic courts is especially susceptible to disagreements and has long been the focus for international lawyers. The reason is simple. This category relates to the traditional foreign relations, namely, state-state affairs. From *Jackson Case* to *Grundlagenvertra Case* and to *Jurisdictional Immunity of State Case*, diplomatic disputes arise in almost all cases against a sovereign state. In recent years, there is a trend that domestic courts, at least American courts which were once aggressive in traditional foreign relations, have begun to shift judicial activism to judicial passivism.<sup>93</sup>

If we can say that domestic courts like American courts once went too far, Chinese courts stay at the other extreme. They have no say in foreign affairs. It is not surprised that they are reluctant to exercise jurisdiction in lawsuit initiatives against Japan's government brought by Chinese victims during World War II.

As China is rising as a new great power, it is inevitable for Chinese courts to increase, more or less, their role in foreign relations. Wang E'xiang, then Vice-President of the SPC, suggested that the role of Chinese courts in foreign relations should be enhanced, including empowering them to decide whether a treaty is self-executing or non-self-executing.<sup>94</sup> While it is hardly possible for Chinese courts to play a prominent role like that by American

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<sup>92</sup> Therefore, this incorporation, for the most part, is selective since these treaties can only be applicable in 'foreign-related' circumstances of civil and commercial nature. See, e.g., *General Principles of Civil Law* (1986), Article 142.

<sup>93</sup> See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *Yale L.J.* 2347(1990-1991); Anne-Marie Slaughter and David Bosco, *Plaintiff's Diplomacy*, 79 *Foreign Affairs* 102(2000); John Norton Moore, *Foreign Affairs Litigation in United States Courts*, Martinus Nijhoff Publishers, 2013; Curtis A. Bradley, *Supreme Court Holds that Alien Tort Statute Does not Apply to Conduct in Foreign Countries*, *ASIL Insights*, Vol.17, Issue.12, 2013.

<sup>94</sup> Wang E'xiang eds., *A Study on the Relationship between International Law and National Law*(in Chinese), Peking University Press, 2011, pp.476-481,.

courts, a larger role of Chinese courts in foreign affairs may be expected, which is evidenced by a pending case discussed below.

#### B. Judicial Wisdom of Chinese Court in a Lawsuit against Japanese Companies

In March 2014, the Beijing First Intermediate People's Court registered a case filed by 37 Chinese forced workers and their descendants against two Japanese companies, arguing that Japanese companies should be liable for their involvement in forced working program during World War II. This is the first time that Chinese courts exercise jurisdiction over disputes arising from the aggression of Japan to China.<sup>95</sup>

At first glance, this case is not different from other transnational private disputes. However, it is concerned with the application of a Communiqué signed between China and Japan in 1972 (hereinafter, China-Japan Joint Communiqué), which deals with the war compensations arising from Japan's aggression and which is a key issue of almost all claims brought by Chinese victims against Japan's government and nationals in Japan. Paragraph 5 of that Communiqué provides that '[T]he Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan.'

Since the mid 1990s, some Chinese war victims and their descendants had begun to file lawsuits in Japan, accusing that Japan's government and some Japanese companies should be liable for their wrongs, for instance, forced labor and 'comfort woman'/ sexual slavery, during World War II. Chinese plaintiffs won in none of cases. One of justification for Chinese courts is that China's government waived the right of China's government and nationals to claim compensation.<sup>96</sup> Among all cases, *the Nishimatsu Construction* case and the *Second Chinese "Comfort Women" case*<sup>97</sup> are decisive. In two judgments both done on 27 April 2007, Japan's Supreme Court (JSC) held that '[i]t should be out of doubt that, all claims arising from the war, including the claims by private individuals, are abandoned mutually'.<sup>98</sup> This was the first time that JSC came to such a definite conclusion. As the result, the window for Chinese victims to seek justice in Japan was closed. Immediately, the spokesman of China's MFA condemned that JSC's interpretation was 'void, invalid' and requested that Japan's government 'take Chinese concern seriously and resolve this issue properly'.<sup>99</sup>

Actually, China and Japan disagree with the meaning of Paragraph 5 of China-Japan Joint Communiqué. On several occasions, Chinese leaders clarified what was waived in that Communiqué confined to the right of China's government, not of its nationals.<sup>100</sup> China's government, however, has never taken serious legal actions. Even upon JSC's judgments in 2007, it still stopped at oral protest, without taking further actions, especially allowing Chinese victims to bring claims at Chinese courts.

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<sup>95</sup> 'Court Accepts Chinese WWII Forced Labors Lawsuit', at <http://english.cri.cn/6909/2014/03/19/3521s818167.htm>(last visited August 15, 2014.)

<sup>96</sup> Zhang Xingjun, *Evolution of Compensation Claims by Chinese War Victims in Japanese Courts and the Response of China's Government*(in Chinese), 4 *Tsinghua L.J.*96 (2007); Guang Jianqiang, *Equity, Justice, and Dignity—Legal Foundation of Claims against Japan by Chinese Victims of Japan's Aggression to China* (in Chinese), Shanhai People's Press, 2006.

<sup>97</sup> For the description of the two cases, see Masahiko Asada and Trevor Ryan, *Post-War Reparations between Japan and China and the Waiver of Individual Claims: Japan's Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese "Comfort Women" Case*, 19 *Italian Y.B. Int'l L.* 207 2009.

<sup>98</sup> 中国人強制連行広島訴訟等上告審判決, 平成 17 年 (受) 第 1735 号, 平成 19 年 4 月 27 日.

<sup>99</sup> 'China Opposes Japan's Supreme Court's Arbitrary Interpretation of the Relevant Provisions of China-Japan Communiqué', at [http://news.xinhuanet.com/mrdx/2007-04/28/content\\_6039307.htm](http://news.xinhuanet.com/mrdx/2007-04/28/content_6039307.htm)(last visited August 15, 2014).

<sup>100</sup> Se 'Experts advise Chinese WWII laborers to file class action', *People's Daily Online*, (15 January 2002); Xing Aifeng and Li Tianzhi, *War Reparation and Civil Reparation* (in Chinese), 9(1) *International Forum* 57, 60(2007).

Entering the second ten years of 21<sup>st</sup> century, more confrontations happen between China and Japan. For instance, in September 2012 Japan's government decided to 'buy' the Diaoyu Islands toward which both two States claim their sovereignty from a Japanese family who, under Japanese law, is the owner. China has taken successive responses, including issuing a Whitepaper on Diaoyu Islands,<sup>101</sup> establishing the East China Sea Air Defense Identification Zone (ADIZ),<sup>102</sup> and publicizing confessions by forty five Japanese war convicts.<sup>103</sup> China, a new great power, and Japan, an old great power, are falling into strategic confrontations.<sup>104</sup>

Judicial wisdom in this case is interesting. First, it is expected that two Japanese defendants will invoke two judgments of SPC in 2007 to defend themselves. The court in Beijing thus has an opportunity to clarify the meaning of Paragraph 5 of China-Japan Joint Communiqué and it must affirm the established position of China's executive branch, refuting the SPC's judgments. Second, in contrast with lawsuit initiatives in Tangshan or Chongqing, Japan's government is not listed as a defendant in this pending case. The risk of diplomatic confrontations can thus be significantly reduced. According to Judicial Interpretation (1989) and another instrument to which SPC and MOF are two co-issuers,<sup>105</sup> it is impossible for the Beijing Court to hear the case without SPC's consent and MFA's support. The judicial administration Beijing court actually can be regarded as one of measures taken by China against Japan. Therefore, it is assumed that Chinese judiciary has come to be involved in foreign relations through applying international law in a subtle manner.

## Conclusion

Since the end of Cold War, domestic courts have been more actively applied international law. Generally speaking, more application of international law by domestic courts helps enhance national rule of law and international rule of law. For different states, however, the application of international law may be influenced by, and seek to enhance, more specific public policies. In this process, political, economic, cultural regimes and ideology and international identity of their own are variables of different weights.

For China in past three decades, the fundamental public policy or grand strategy is to rise as a new great power, including economic rise in particular. To this end the basic approach is Beijing Consensus, which argues for an authoritarian regime, especially referring to executive authority, and places its priority on economic growth rather than political freedom and social justice. Chinese judicial policy toward international law aims itself to enhance the rise of China within the ideological framework of Beijing Consensus.

The Soviet international legal theory and practice and China's own history of 'unequal' treaty-making contributed to the silence of China's Constitution on the status of international law in its legal system, which has to be dealt with on case by case basis. This means fragmentation. It may reduce the predictability of the application of international law and damage the role that international law could have played in enhancing

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<sup>101</sup> State Council Information Office of the People of Republic of China, Diaoyu Dao, an Inherent Territory of China, September 2012, at [http://www.chinadaily.com.cn/china/2012-09/25/content\\_15782158.htm](http://www.chinadaily.com.cn/china/2012-09/25/content_15782158.htm)(last visited August 10, 2014).

<sup>102</sup> 'Defense Ministry spokesman on China's air defense identification zone', available at [http://news.xinhuanet.com/english/china/2013-12/03/c\\_132938762.htm](http://news.xinhuanet.com/english/china/2013-12/03/c_132938762.htm)(last visited August 10, 2014).

<sup>103</sup> 'Confessions of Japanese War Criminals', available at [http://www.chinadaily.com.cn/china/2014-07/07/content\\_17651495.htm](http://www.chinadaily.com.cn/china/2014-07/07/content_17651495.htm)sited August 10, 2014)

<sup>104</sup> See Kent E. Calder, China and Japan's Simmering Rivalry, 85 Foreign Aff. 129(2006).

<sup>105</sup> MFA, SPC, the Supreme People's Procuratorate (SPP), Ministry of Public Security (MPS), Ministry of State Security (MSS), the Supreme of Justice (MOJ), Rules on Concerning Resolving Foreign-Related Cases, June 20, 1995.



national rule of law and international rule of law. From another angle, however, this implies flexibility. It makes China more expedient to decide the methodology to apply a specific treaty.

In context of the rise of China, the structure of international law actually applied by Chinese courts in past three decades-- namely, no application of Category A and parts of Category B (especially human rights treaties and WTO Agreements), rare application of Category C, and frequent application of Category D--can be well explained. Furthermore, it is assumed that, as China continues its rise, Category A and Category C will be more applied by Chinese courts and that, since China still is inclined to maintain an authoritarian regime, which is the essence of Beijing Consensus, it is dim for human rights treaties to be given into direct effect at Chinese courts.

It should be admitted that, the main purpose of this research is not to appraise the legitimacy of the strategic, structural applications of international law by Chinese courts and to further join debates between Beijing Consensus and Washington Consensus. Rather, it is just aimed to discern the strategic and structural nature of such applications and to inform people that this judicial policy does enhance the rise of China. This suffices to make China judicial practice as a new, indispensable reservoir for comparative international law.