

Chinese Observations on International Law
Speech at the International Criminal Law Network (ICLN)
Aula of Campus, The Hague, November 1, 2006

Excellencies,
Ladies and gentlemen:

It is a great honor for me to be invited to give the Fall Lecture by the International Criminal Law Network (ICLN) at the Grotius Centre. At the outset, I wish to express my sincere appreciation to ICLN for providing me with this valuable opportunity to exchange views on issues of international law with such a distinguished group of legal experts, and for their general interest in China.

Being the Chinese Ambassador to the Netherlands, I cannot fail but to notice that there has been so much discussion about China these days in Europe. “Where does China see itself in ten years’ time” is one of the most frequently asked questions I have received from people in this country. Even when I believe that for large part, China’s development has been considerably overestimated in Europe, and oftentimes unfairly treated, nevertheless, given its size and potential impact, I do understand the concern about the role China is going to play in the world affairs, politically, economically and legally. Therefore, I hope that today’s lecture will serve in a way to promote our mutual understanding.

How does China perceive the current development of international law? This is a very broad question. In order to manage the topic, I shall narrow it down to address a few aspects.

I. The Notion of Sovereignty and the Westphalian System

I am fully aware that in the contemporary discourse of international law, advocacy of respect for sovereignty may not be a very popular theme to begin with, but as I have also observed that oftentimes China’s adherence to the principle of sovereignty is simply misinterpreted in the west as a disregard of the development of international law, or worse still, considered as an excuse to evade its international responsibility, I think it is pertinent to explain why China still attaches great importance to the principle. More importantly, our differences over the notion to certain extent reflect our perceptions on the changing nature of the international legal system.

The basic structure of the Westphalian system was a horizontal system of sovereign states, where balance of power was maintained, the nature of domestic politics, economics, and society was in large part not a concern of diplomacy and the law of nations. Sovereign equality and non-intervention in the domestic affairs of other states was, thus, a structural and substantive component of the Westphalian system.¹

¹ David Fidler, “Revolt Against or From within the West? TWAIL, The Developing World, and the Future Direction of International Law
In Chinese Journal of International Law, 2003, vol. 2, No. 1, pp. 35-36

The modern international legal system basically succeeded such a structural arrangement of power balance and substantive tolerance of domestic autonomy, but on a global basis. Even after WWII, when international cooperation in the economic, social and technological fields was greatly expanded and international protection of human rights enhanced, the legal order remained essentially the same.

The rapid change of international relations in the post cold-war era has given rise to serious debates on the changing nature of international legal order among politicians, international lawyers and social scientists in general. With the end of cold war, instead of a long term peace as people generally envisaged, came a much more complex world. Increasing unilateralism in international relations and proliferation of international actors and special legal regimes seem directly challenging the traditional structure of international legal order. At the core of the issue is the role of the state. As part of the responses, the role of the collective security system is being seriously reviewed and the substantive UN reforms are urgently called for. What has been changed and what is changing of the existing international legal order is certainly not a theoretical issue, but a profound social inquiry of the changing world today. It may not be an over-exaggeration to say that never before has the existing international legal order faced with so many complicated issues and with so diverse dimensions; the system itself indeed needs to be reviewed. Such questions, as “has the Westphalian system already been dead? “Have we entered the post-Westphalian era?” are naturally raised as the starting point for this social debate.

Last year when the European Society of International Law discussed this issue on the relevance of the Westphalian system during its annual session in Geneva, I said at the panel that for Europeans, the system by now is over 360 years old, but for non-European countries, particularly the Asian and African countries, it is applicable to them for only 60 years. In the past 60 years, Europe has undergone a profound process of integration, through which it has achieved economic prosperity and more than half a century of peace. As more and more competences are being transferred from national jurisdiction to the regional domain, the concept of sovereignty is undeniably changing, but not diminishing. This is so evidently manifested in the referenda on the EU Constitution last year. Nevertheless, European integration process has contributed greatly to the current debate.

From the viewpoint of the developing countries, however, international law is based on a foreign legacy. After their independence from colonial rule, mostly after WWII, these new states accepted international law as the normative framework to conduct their international relations. They did so not only because as a condition for recognition they had to, but also because they did consider fundamental principles of the legal system as enshrined in the UN Charter reflected certain values they had been fighting for: sovereignty, equality, democracy, and self-determination. International law entitled them to maintain political independence and territorial integrity, and empowered them to establish the political system of their own choice, which are of fundamental importance to these new nations.

Today when sovereignty issue may be a matter of little concern in the west, it still relates to almost everything under the agenda of the developing countries, from foreign policy to internal development plan. It should be noted that either during or after the cold war, controversy over the principles of sovereignty and non-intervention often occur between countries of different ideology, political system, religious belief or cultural background, particularly in the areas where western liberalism and values dominate. More often than not, international law provides the last resort for the developing countries to defend their political system, economic policy or social stability. Of course, this does not mean that international law is perfect. On the contrary, the legal system in practice often fails to live up to the expectations of states. As is analyzed, "sovereignty is a concept to describe a pre-existing reality, a scheme of interpretation, used to organize and structure our understanding of political life"². International legal system was not and cannot be designed; it is only the result of international reality. If we understand that such political life is built upon the diversity of autonomous political communities, the concept of sovereignty is not only meaningful but also essential. If, however, we come to understand that such political life should exist only in one single social model, the notion then becomes pointless and irrelevant.

As a developing country, China attaches great importance to the role of international law and believes that international law will contribute to peace, stability and development. In its international relations, China strongly upholds the principle of sovereignty, because it believes in diversity and mutual respect in international political life. This position rests both upon its historical past as well as its vision of the future world order. It is well known that ever since the founding of the People's Republic of China, China has adopted a foreign policy of independence and peace. Based upon the Five Principles of Peaceful-Co-existence as proclaimed by China together with some other Asian countries in the 1950s, this position has never been changed in China's foreign relations. The Five Principles of Peaceful Co-existence, which by and large reiterate the fundamental principles of international law as provided in the Purposes and Principles of the UN Charter, always serve as the political and legal basis for China to establish diplomatic relations with other countries and to conduct its foreign affairs. Of the five principles, the essence is the principle of sovereignty.

Today international law has definitely undergone profound changes, but given what have happened in Asia and in Africa in the past 15 years, we have to admit that the role of the state remains at the centre for any success of economic development and social progress. I think that the current change is mainly twofold, namely, multiplicity of international actors and fragmentation of international law. In this regard, the post-Westphalian theory holds that as economic and social sectors through economic globalization and proliferation of NGOs across national borders keep bypassing their governments and increasingly challenge the authority of decision-making by states, the

² Wouter. G. Werner, "State Sovereignty and International Legal Discourse", in *Governance and International Legal Theory*, edited by Ige F. Dekker and Wouter G. Werner, Martinus Hijhoff Publishers, (2004), p. 155

traditional form of diplomacy with states at the center is being gradually replaced by “overlapping and competing competencies, ...Legal pluralism is said to be the logical corollary of this situation.”³ Consequently, the notion of sovereignty is getting less relevant, if not obsolete.

On the multiplicity of actors, we agree that the business sector with transnational corporations in particular and the civil society with NGOs as the main forces have directly entered the world stage. Their participation in the treaty negotiations and implementation are now well accepted, generally respected and sometimes even called for by states. I remember when I first in the Chinese delegation presented our national implementation report to the U.N. experts committee on the prevention of discrimination against women in the early 1980s, the NGOs only stayed behind in the so-called “shadow”, but now the experts committee listens to their views in session meetings. I also recall that I brought our peasants as the grass-roots representatives to the U.N. conferences on the Convention on Combating Draughts and Desertification and they were warmly received by the delegates. We all know that NGOs are one of the driving forces in the negotiations on the Climate Change Convention and the Rome Statute. These new players have indeed greatly influenced the decision-making process, both domestically and internationally. However, to what extent such influence has changed the basis of decision-making is questionable. What we have seen is that national interests remain a determinate factor for international cooperation. This is even true for the most integrated region, for example, the EU, where the communal interests of the Union are greatly substantiated, but, if I understand it correctly, national interests in the final analysis are still decisive in the policy-making of the Union. Globalized economic relations and the cross-border civil actions have intensified enormously contacts and interactions between states, but not fundamentally changed the state centric pattern of international politics. The legal system reflects this fact. With regard to the emerging legal pluralism, it is related to a topic currently very popular among scholars—the fragmentation of international law.

II. The Fragmentation of International Law

During the current term of the UN International Law Commission, a study group was established by the Commission with Mr. Martti Koskenniemi, the Finnish member, as its chairman. It conducted in-depth studies from several aspects to examine the issue of fragmentation, such as conflicts between special law and general law, conflicts between successive norms, hierarchy in international law and systemic integration of treaty interpretation. The outcome of the study is as thick as a big book, well elaborating on the subject. As a collective piece of work, I would place emphasis on the conclusions of the work of the study group.⁴

³ Jorg Friedrichs, “The Neomedieval Renaissance: Global Governance and International Law in the New Middle Ages”, in *Governance and International Legal Theory*, edited by Ige F. Dekker and Wouter G. Werner, Martinus Hijhoff Publishers, (2004), p.3

⁴ See UN Document A/CN.4/L.682/Add.1.

In review of the presumably conflicting rules under specialized regimes, the study group felt that international law requires a systemic examination. Today as a result of the rise of specialized legal regimes on trade, environment, human rights and so on, answers to legal questions very much depends on whom you ask and what legal regime you focus on. Meanwhile, there is a proliferation of international legal institutions, which give rise to concerns of forum-shopping and conflict of international jurisprudence. The study recognizes that given the nature of international law, normative conflicts are inherently unavoidable, and new rules and legal regimes emerge as responses to new preferences, and sometimes out of conscious effort to deviate from preferences as they existed under old regimes. In its conclusion, the study holds the view that the emergence of special treaty-regimes has not seriously undermined legal security, predictability or the equality of legal subjects, but the deepening complexity of the social changes both at national and international levels did undermine the homogeneity of the nation-State. The real concern over fragmentation is the continued viability of traditional international law. In addressing the question of the coherence of international law, the study focuses on the techniques of legal reasoning as proposed solutions to potential normative conflicts.

Personally I think that the study is a very useful and timely effort and share the conclusions reached by the study group. Here I would like to add a few remarks on the question of fragmentation.

First of all, we recognize that the proliferation of special treaty regimes concluded by states as responses to the growing demand for international cooperation and coordination in the areas such as trade, environment, human rights, public health, etc, is a positive development of international law. With more and more issues being addressed at global level, States are more than ever interdependent and as a result, the traditional domain for strictly domestic autonomy is narrowed down; national governments in attending their domestic affairs have to constantly take their international aspects into account. Take China for example, since the launch of its economic reforms in late 1970s, China has become party to over 300 multilateral treaties, covering most of the special regimes in various areas. In regard to international operations, since 1990, in Africa alone, China has taken part in 12 UN peace-keeping operations, sending out over 4000 people. At the moment, there are still around 1300 people involved in 6 operations there. In its opening process, while defending its national sovereignty to choose its own course of development, China has aligned substantially its national laws and regulations with international standards, either under treaty obligations, or by general practice of states. Through our experiences, however, we feel that the emerging legal pluralism does not mean that such special regimes are completely separate legal systems with no link between each other. On the contrary, they are still operating within the framework of the legal system; where fundamental principles of international law, customary international law and general principles of law continue to apply. However proliferating special regimes are, they still bear the feature of the law of nations, which relies largely on governments' initiative and implementation.

Even though the idea of global governance is very popular nowadays, its legal connotation is rather vague. The advocacy of legal pluralism, in my opinion, does not seem to menace the viability of traditional international law as such, but its fundamental principles as its basis.

On the substantive side, we may say that the current legal pluralism to varying degrees is the result of western liberal influence on international law, as, by and large, it is driven by the growing force of non-state actors, and reinforced in the wake of the cold war. For instance, human rights law is an outgrowth of Western liberal constitutionalism, ⁵such liberal substance, is also contained, if not dominant, in any other special regime as well. According to the Yearbook of International Organizations, out of more than 16,000 NGOs, over 80% of them come from European and the North American regions. Therefore, some scholar commented that instead of being called the international civil society, it may be better called the transatlantic civil society. On the other hand, we also notice that today international law-making process has changed a great deal, very different from the traditional pattern of treaty making. Their fragmented approach has become even more difficult for the developing countries to make an impact on the process. Taking climate change for instance, unlike the past practice, where negotiation process would come to an end with the signing of the Convention, negotiations on climate change are an ongoing process throughout the entire implementation stage. Thanks to the financial assistance from many developed countries, developing countries, with the least developed countries in particular, are often sponsored to take part in the process. However, as we observe, even if being present, many developing countries are lack of necessary technical capacity and human resources to back up their negotiations. While we may well appreciate that international law has become more specialized and focused, we tend to ignore one simple fact, that is, specialists are not just available for each and every country. For any society that can afford such specialized human resources, it requires a sophisticated level of social science studies and advanced scientific and technological capability. We may say that this has always been the case with international law-making, but the situation may be getting even worse with the fragmentation of international law. Even though differentiated responsibilities are provided for in some cases to take care of the concerns of the developing countries, and legal substances of special regimes are generally shared by all states, due respect for the special needs and social conditions of developing countries is not sufficient. Therefore, I would say instead of fragmented law, perhaps we should worry more about the fragmented interests.

III. The Responsibility to Protect

Any discussion on the notion of sovereignty would be incomplete if without mentioning the new concept “the responsibility to protect”.⁶ Instead of sovereign rights,

⁵ Footnote 3, p.31.

⁶ *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, 2001, Synopsis, pp. XI-XIII; *Failing States, A Global Responsibility*, Report of the Advisory Council on International Affairs (AIV Report), the Netherlands, No. 35, May 2004.

today we hear more about sovereign responsibility, a term that I have carefully chosen to distinguish it from the traditional concept of state responsibility. It is logical to say that if a state enjoys sovereign rights, as a corollary, it should also bear responsibility. Traditionally this understanding was never being questioned or challenged, but now we have to inquire more. What responsibilities states owe? To whom such responsibilities are owed? In its report on Threats, Challenges and Change submitted to the U.N. Secretary-General, the High-level Panel pointed out, "In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept their responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of state sovereignty, today it clearly carries with it the obligations of a State to protect the welfare of its own peoples and meet its obligations to the wider international community."⁷ As a political statement, the assertion is very clear in its policy objective. In legal terms, however, it could lead to different interpretations.

By the notion of sovereignty, a state, internally, is accountable for the economic and social development of the country as well as the welfare of its citizens, and at the same time, externally it must fulfill its international obligations to which it has committed itself under international law. This understanding has never given rise to any doubt. The challenge we face now is that if a state could not fulfill such responsibilities, or if the state concerned turned into a so-called "failed or failing state", what would be the responsive actions on the part of the international community, or on the part of other states, individually or collectively? Recent research studies and policy papers conducted by European institutions have quite a focus on the issue.

In a normal situation, if a state breaches its international obligation, state responsibility rules would apply. Although some of the articles on state responsibility as adopted by the ILC are considered as progressive development of international law and may still need the test of state practice, they present little problem as secondary rules. More complicated is the situation where there is no breach of specific international obligations on the part of the state, but the internal situation of the country is seriously deteriorating or facing great difficulties, either in terms of its political stability, or economic and social development; or where the country is in total chaos, with its government paralyzed or out of control, the so-called "failing" or "failed" state. Under this kind of circumstances, should international action be taken, who should take such action, what legal procedure for the approval of such action is necessary and on what legal ground such action should be placed? This is a hot issue at the UN, an issue whether the United Nations, especially the Security Council, has the legal responsibility to protect. In the ILC, we also came across the topic while considering the responsibility of international organizations. I notice some studies suggest that in case of failed or failing state, human rights conventions could serve as the legal basis for constructing grounds for international action, for instance, Article 2 of the International Covenant on

⁷ "A More Secure World", Report of the High-level Panel on Threats, Challenges and Change, U.N. General Assembly Document, A/59/565.

Economic, Social and Cultural Rights, because under these conventions, states have an obligation to endeavor to prevent human rights violations.⁸ This is a very general ground.

However, we must be careful with the proposition in legal terms. This is because, first, should the responsibility to protect derive from the notion of sovereignty, it would be tantamount to say that any state or states could individually or collectively take measures to prevent or redress human rights violations wherever it occurs. In other words, any state could step in and take action against another state when, in its opinion, constitutes a violation of human rights in the territory of the latter state. Obviously this would be even more intrusive than the traditional theory of humanitarian intervention. Secondly, should international action mean those actions that are authorized either by the UN organs under the Charter or by the relevant regional organization, such notion of responsibility to protect then does not add much to the existing law. Thirdly, even if certain categories of situations are defined as deserving international protection, procedural guarantee should always be first provided for to ensure proper actions. Any unduly broad and unlimited claim for responsibility to protect may only result in undesired intervention.

Responsibility to protect is a novel concept. It calls on state governments, especially the leadership to be more conscious of its accountability for the welfare of its people and also implies more proactive international interventions be taken in troubled areas. In principle, the concept bears a number of positive aspects. In practice, nevertheless, a cautious approach is still necessary.

Generally speaking, international actions should be subject to the decisions undertaken through multilateral mechanisms. Of course, this does not mean that international organizations, particularly the Security Council, have the legal duty to exercise protection in each and every case. As is rightly observed, multilateral institutions normally operate alongside national, regional and sometimes civil society actors, and are most effective when their efforts are aligned to common goals. Therefore, the decision should be made collectively through multilateral mechanism, and whenever possible, in consultation with the state and other parties directly concerned in the event. The question that whether a particular state is failing or failed should not be left to the individual judgment of a state or state group to decide, even if it bears the responsibility to protect under human rights treaties. Only within such legal embrace, can the responsibility to protect be a tenable claim under the notion of sovereignty.

IV. International Criminal Jurisdiction

Lastly, I would like to say a few words about international criminal law, an area that this institution focuses on.

The current development of international criminal law is the continuous efforts of international community for many decades in pursuing law and justice against most serious international crimes. Such efforts gained great momentum after WWII with the

⁸ Footnot 8, AIV Report, p. 30

two international military tribunals recognizing individual criminal responsibility for most serious crimes in international law, but they suffered serious setback due to the cold war. Consequently, for a long time international criminal law is mainly developed to coordinate different national jurisdictions against crimes that a single state cannot cope with under its jurisdiction, with a view to preclude “safe heaven” for criminal fugitives. In the past twenty years or so, China has concluded about 70 bilateral and multilateral treaties on mutual legal assistance in criminal matters and on extradition with other countries. In fight against terrorism, out of 13 relevant conventions, China has joined 11 of them. The latest entry is the Convention against Financing of Terrorism. Through our experience, we feel that in fighting against international crimes, international efforts in this field should be further enhanced.

We all know that criminal jurisdiction is one of the most important and sensitive areas of national sovereignty. Differences in penal philosophy and concerns about sovereignty often constitute the main obstacles for international cooperation in criminal matters. Such classified jurisdictional bases as territorial, national, protective, *sui generis*, and universal, represent different aspects of state sovereignty, whereas requests for judicial assistance, extradition, transfer of sentenced persons equally involve the sovereign rights of other states. The creation of the two *ad hoc* criminal tribunals by the Security Council for former Yugoslavia and Rwanda respectively and the establishment of the International Criminal Court have opened a new chapter in international law development. This development, however, also poses fundamental challenges to the existing legal order. By exposing their domestic criminal justice systems to the external review and possible intervention by the ICC⁹, states no longer enjoy absolute sovereignty in deciding how to pursue criminal justice against certain most serious crimes. With Article 12 (2) of the Rome Statute, ICC may exercise jurisdiction over nationals of non-state parties under some circumstances. Although certain state has over-reacted to the article, disregard of state’s consent is most likely to cause conflicts between states and the court, and thus impede judicial proceedings. This potential concern is not negligible. In fighting against impunity, we believe jurisdictional sovereignty of states should be strengthened rather than compromised.

Today human rights protection has become one of the pillars of the United Nations, alongside security and development. It is the common task of the international community as a whole to put a stop to atrocities and other forms of grave and massive violation of human rights. On many an occasion, China makes it very clear that it supports the efforts to build a just, impartial and effective international criminal court. It hopes that such a legal institution will meet its objectives in promoting peace, justice and the rule of law in international relations. It is in this spirit that China appreciates the dialogue that has been carried out between its jurists and these institutions in the field of international criminal law.

⁹ Rod Jensen, “Globalization and the International Criminal Court: Accountability and A New Conception of State”, in *Governance and International Legal Theory*, edited by Ige F. Dekker and Wouter G. Werner, Martinus Hijhoff Publishers, pp. 159-183.

At the moment, one of the most controversial issues with international criminal law is the question of universal jurisdiction. Under traditional international law, states establish universal jurisdiction over certain international crimes by treaty terms except for one case, piracy. In other words, regardless of general jurisdictional grounds on territory, nationality, protection and so on, states establish national criminal jurisdiction over certain offences simply by the physical presence of the alleged suspect. In exercising such criminal jurisdiction, not only judicial assistance is assured between the state parties under the relevant treaty, rules of sovereign immunity are also respected under general international law. The early conventions on human rights are vague on the point, but state practice and international court decisions support this position. In the “Pinochet case”, although the British House of Lords declined to embrace one Lord’s opinion grounding extradition on international custom regarding universal jurisdiction, its ruling did affect the doctrine of act of state as practiced in the past. By pronouncing what constitutes or does not constitute an act of state of another state, or by national legislation to establish absolute universal jurisdiction, national courts would likely exercise jurisdiction over cases that may lead to international disputes by unduly encroaching upon the domestic affairs of other states. So far state practice shows over-extended national jurisdiction, either civil or criminal, is not conducive to promoting international efforts in suppressing international crimes, nor to maintaining international peace and stability.

The universal jurisdiction established by ICC is different from that by national courts. Based on positive law, its terms are clear and specific. Even so, we should still emphasize the importance of the complementarity principle, under which ICC would not exercise jurisdiction unless the state concerned is unable or unwilling to prosecute. On this point, we do see eye to eye with the state parties that such a principle would definitely enhance the role of states in effectively combating international crimes. Indeed, without such a provision, it is hard to imagine how many states would be ready to ratify the Rome Statute.

As ICC has already started its substantial work, we may wish to point out that the ultimate success of the court does not lie in the number of cases it tries, but in the effectiveness and fairness it demonstrates. To pronounce a state unable or unwilling to prosecute worse crimes may not be a simple statement of facts, but a judgment on its political and legal systems. We appreciate the cautious approach so far the court and its prosecutor are taking and sincerely hope that its role in promoting peace and justice will eventually win the confidence of all states.

In conclusion, I would like to emphasize that China attaches great importance to the role of international law in international relations. Despite the differences we have, with shared responsibilities, we stand together to face the challenges and opportunities of the new era, and with our common interests, together we stand to build a better world.