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PEOPLE'S REPUBLIC OF CHINA COUNTRY REPORT

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Country Report on International Maritime Crimes: People's Republic of China

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Part I: Treaty Ratification and Implementation

1. China's General Practice

The rule of law within a nation State is dependent upon the development of international law in the world community and participation in the process of law-making at the global level. Once a State has signed and ratified an international treaty, it is bound by that treaty and has to implement it at the domestic level. In Chinese practice, a treaty is superior to municipal law in application, though the Chinese Constitution has no express provision on the relative status of treaties and laws.[1] The 1986 General Principles of Civil Law provide that if any treaty concluded or acceded to by China contains provisions different from those in the civil laws of China, the provisions of the international treaty shall apply, unless they are ones to which China has made reservations.[2]

The problem is how to implement international treaties in China. China has to make necessary domestic laws or guidelines to implement the relevant international treaties to which it is a party. Take the UN Law of the Sea Convention for example. As previously mentioned, China attended the whole process of making this convention. In 1996 China ratified it. At the domestic level, China promulgated the Law on the Territorial Sea and the Contiguous Zone and Law on the Exclusive Economic Zone and the Continental Shelf in 1992[3] and in 1998 respectively.[4] In 1996, it also adopted its *Ocean Agenda 21* following the 1992 Rio world document *Agenda 21*, and, more significantly, for the first time in 1998 issued a white paper on the development of marine affairs.[5] All these domestic commitments are ways of implementing the UN Convention. It is necessary for domestic laws and regulations to be consistent with the relevant international treaties. If they are not yet, they must be revised or amended to bring them into line with the treaties being implemented. This paper attempts to examine the recent practice of China in the

[1] See Wang Tieya, "International Law in China: Historical and Contemporary Perspectives" [1990-II] *Recueil des cours* 330.
[2] Article 142 of the General Principles of Civil Law, in *The Laws of the People's Republic of China* (1983-1986), at 291.
[3] The full text may be found in Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State, *Straight Baselines Claim: China*, Limits in the Seas, No.117, 1996, 11-14.
[4] The full text of the Law on the Exclusive Economic Zone and the Continental Shelf is annexed to Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Leiden: Martinus Nijhoff, 2005), 342-345.
[5] See *China Daily*, 29 May 1998.

implementation of international law at the domestic level, with special reference to the implementation of international human rights law.

2. Procedure for Treaty Accession and Ratification

According to the Chinese Constitution, the Standing Committee of the National People's Congress possesses the power "to decide on the ratification and abrogation of treaties and important agreements concluded with foreign states".[6] The President of China, in pursuance of decisions of the Standing Committee of the National People's Congress, ratifies and abrogates treaties and important agreements concluded with foreign states.[7] The State Council has the power to conduct foreign affairs and conclude treaties and agreements with foreign states.[8]

On 28 December 1990, China promulgated the Law on the Procedure of the Conclusion of Treaties in accordance with the relevant provisions contained in the Chinese Constitution. The law is "applicable to bilateral or multilateral treaties and agreements and other instruments of the nature of a treaty or agreement concluded between the People's Republic of China and foreign states" (Art.3).[9] The Ministry of Foreign Affairs, under the leadership of the State Council, administers the specific affairs concerning the conclusion of treaties and agreements with foreign states.

According to the Law, the decision to negotiate and sign treaties and agreements should following these procedures:

(1) in the case of a treaty or agreement to be negotiated and signed in the name of the People's Republic of China, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation and draw up a draft treaty or agreement of the Chinese side and submit it to the State Council for examination and decision;

(2) in the case of a treaty or agreement to be negotiated and signed in the name of the Government of the People's Republic of China, the Ministry of Foreign Affairs or the department concerned under the State Council shall make a recommendation and draw up a

[6] See Article 67 of the Chinese Constitution. The text is available at http://english.peopledaily.com.cn/constitution/constitution.html (accessed 5 January 2011).
[7] Article 81 of the Chinese Constitution.
[8] See Article 89 of the Chinese Constitution.
[9] Text is available at http://www.fmprc.gov.cn/chn/gxh/zlb/tyfg/t70826.htm (accessed 5 January 2011).

draft treaty or agreement of the Chinese side and, after consultation with the Ministry of Foreign Affairs, submit it to the State Council for examination and decision. In the case of an agreement concerning a specific line of business, its Chinese draft shall, with the consent of the State Council, be examined and decided upon by the department concerned under the State Council or when necessary in consultation with the Ministry of Foreign Affairs;

(3) agreements to be negotiated and signed in the name of a governmental department of the People's Republic of China concerning matters within the scope of functions and powers of the department concerned shall be decided upon by the department itself or after consultation with the Ministry of Foreign Affairs. In the case of an agreement relating to matters of major importance or matters falling within the functions and powers of other departments under the State Council, the department concerned shall submit it by itself or after consultation with the other departments concerned under the State Council, to the State Council for decision. The draft agreement of the Chinese side shall be examined and decided upon by the department concerned or when necessary in consultation with the Ministry of Foreign Affairs.

When major modification in the Chinese draft of a treaty or agreement already examined and decided upon by the State Council are necessary as a result of negotiation, the revised draft shall be submitted to the State Council for examination and decision. [10]

Article 6 sets forth the procedures to appoint representatives for negotiating and signing treaties or agreements:

(1) In the case of a treaty or agreement to be concluded in the name of the People's Republic of China or the Government of the People's Republic of China, the Ministry of Foreign Affairs or the department concerned under the State Council shall submit a report to the State Council for the appointment of a representative. The full powers of the

[10] Article 5 of the Law.

representative shall be signed by the Premier of the State Council, but may also be signed by the Minister of Foreign Affairs.

(2) In the case of an agreement to be concluded in the name of a governmental department of the People's Republic of China, a representative shall be appointed by the head of the department concerned.

The letter of authorization for the representative shall be signed by the head of the department. Where the head of a department signs an agreement concluded in the name of the governmental department, and where the contracting parties agree that it is necessary for the head of the department to produce full powers, the full powers shall be signed by the Premier of the State Council, but may also be signed by the Minister of Foreign Affairs.

The following persons shall dispense with full powers for negotiating and signing treaties and agreements:

(1) the Premier of the State Council, the Minister of Foreign Affairs;

(2) the head of a diplomatic mission of the People's Republic of China who negotiates and signs treaties and agreements concluded between China and the state to which he is accredited, unless it is otherwise agreed by the contracting parties;

(3) the head of a governmental department of the People's Republic of China who negotiates and signs the agreements concluded in the name of his department, unless it is otherwise agreed by the contracting parties;

(4) the person, dispatched to an international conference or accredited to an international organization by the People's Republic of China, who is at the same time the representative for negotiating treaties or agreements in that conference or organization,

unless it is otherwise agreed by the conference or otherwise provided for in the constitution of the organization.

The following treaties and important agreements should be referred to the Standing Committee of the National People's Congress for ratification:

(1) treaties of friendship and cooperation, treaties of peace and similar treaties of a political nature;

(2) treaties and agreements relating to territory and delimitation of boundary lines;

(3) treaties and agreements relating to judicial assistance and extradition;

(4) treaties and agreements which contain stipulations inconsistent with the laws of the People's Republic of China;

(5) treaties and agreements which are subject to ratification as agreed by the contracting parties; and

(6) other treaties and agreements subject to ratification. [11]

After the ratification of a bilateral treaty or an important bilateral agreement, the Ministry of Foreign Affairs shall execute the formalities for the exchange of the instruments of ratification with the other contracting party. After the ratification of a multilateral treaty or an important multilateral agreement, the Ministry of Foreign Affairs shall execute the formalities for the deposit of the instrument of ratification with the depositary state or international organization. The instrument of ratification shall be signed by the President of the People's Republic of China and countersigned by the Minister of Foreign Affairs. [12]

[11] Article 7 of the Law.
[12] Ibid.

For other treaties and agreements, the Ministry of Foreign Affairs or the departments concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall submit them to the State Council for approval (Art. 8).

For the accession to multilateral treaties, the Law provides the following procedures for the Standing Committee of the NPC:

(1) to accede to a multilateral treaty or an important multilateral agreement listed in Paragraph 2, Article 7 of this Law, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council for examination and verification; the State Council shall then refer it to the Standing Committee of the National People's Congress for decision on accession. The instrument of accession shall be signed by the Minister of Foreign Affairs, and the specific formalities executed by the Ministry of Foreign Affairs;

(2) to accede to a multilateral treaty or agreement other than those listed in Paragraph 2, Article 7 of this Law, the Ministry of Foreign Affairs or the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council for decision on accession.

The instrument of accession shall be signed by the Minister of Foreign Affairs, and the specific formalities executed by the Ministry of Foreign Affairs.[13]

Article 12 further provides that the decision to accept a multilateral treaty or an agreement shall be made by the State Council. “In the case of a multilateral treaty or agreement containing clauses of acceptance which is signed by the Chinese representative or does not require any signature, the Ministry of Foreign Affairs or the department

[13] Article 11 of the Law.

concerned under the State Council in conjunction with the Ministry of Foreign Affairs shall make a recommendation after examination and submit it to the State Council for decision on acceptance".

Since the Law was promulgated in the early 1990s, amendment has been suggested. For example, the provisions of Article 7 (2) was too general, leading to the unclear demarcation between the power of the NPC Standing Committee to ratify a treaty and the power of the State Council to approve a treaty, thus negatively affecting the timely deliberations of relevant treaties and important agreements by the NPC Standing Committee.[14]

3. Legislation on Maritime Crimes Including Piracy

In China's legal system, there is no such definition as "piracy".[15] According to its Criminal Law, certain crimes, particularly those endangering public security, are relevant to piracy so that piracy can be punishable under its law.[16] The Criminal Law further provides that "for the crimes defined in international treaties, concluded or acceded to by the People's Republic of China, which are under the jurisdiction of the People's Republic of China within the framework of the treaty obligations, this Law shall apply".[17] It thus establishes the universal jurisdiction of China over some kinds of international crimes including piracy. While there is no such word as "piracy" in the Chinese law, China uses the term "robbery at sea"[18] which can be deemed as "piracy" in the sense of international regulations. On the other hand, it seems that China has begun to accept the term "piracy". In a note to IMO, China stated that it would take all necessary effective measures to prevent and suppress *piracy* and other

[14] "Hainan Delegation submitted a proposed bill to amend the Law on the Procedure of the Conclusion of Treaties", 14 March 2008, available at http://www.hainan.gov.cn/data/news/2008/03/47925/ (accessed 16 March 2008).

[15] In Hong Kong, due to the British colonial legacy, law of piracy exists.

[16] For example, Article 116 on, *inter alia*, sabotage of vessels; Article 117 on, *inter alia*, sabotage of navigation lanes; and Article 267 on robbery. The Criminal Law of the People's Republic of China, which was adopted on 1 July 1979 and amended on 14 March 1997, can be found in *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* (in Chinese), 1997, No.2.

[17] Article 9 of the Chinese Criminal Law.

[18] This term can be found in Ministry of Foreign Affairs *et al*, "Opinions on Strengthening the Safety of Navigation and Fishery in the East China Sea", 27 May 1993, in Wang Huai'an *et al* (eds.), *Compendium of Laws of the People's Republic of China, Supplementary Volume* (Jilin: Jinlin People's Publishing House, 1994) (in Chinese), at 786.

unlawful acts committed at sea (italic added).[19] In judicial practice, Chinese courts still use traditional criminal charges, such as murder, robbery, to punish pirates (see below).

In view of the seriousness of smuggling and robbery at sea in the East China Sea, several ministries of the Chinese government jointly issued the "Opinions on Strengthening the Safety of Navigation and Fishery in the East China Sea" in 1993. As a quasi-law in nature, it is particularly related to the piracy at sea. It obligates the coastal regions and departments concerned to take close attention to the safety of navigation and fishery. The Department of Public Security is responsible to combat criminal activities such as robbery at sea. If necessary, the Department of Public Security may request the navy to assist.[20] Vessels of law enforcement must have clear identity and personnel of law enforcement should show their identity certificates on their own initiative. Except warships and authorized governmental vessels, no vessel shall exercise state jurisdiction such as visit and hot pursuit. On the high seas, the exercise of state jurisdiction should be based upon compelling reasons and in strict compliance with China's laws and regulations as well as international regulations. If there is a jurisdictional dispute with other countries, it should be reported immediately to the competent authority which should report to the Ministry of Foreign Affairs timely. The law enforcement personnel should comply with the regulations on use of weapons when exercising hot pursuit on the high seas; and when exercising the right of visit, the use of weapons should be avoided as far as possible.[21] Another regulation issued by the Ministry of Public Security in February 2000 which is related to the suppression of piracy is the Regulations on the Management of Coastal Vessels for Border Public Security.[22] In addition to general provisions, three specific clauses should be mentioned: when a vessel is lost, stolen or hijacked, it must be reported immediately to the adjacent department of public security or the department of public security which issued the sea-going license (art.16); any vessel or person on board must not intercept, forcedly anchor, collide or steer other vessels without permission (art. 19); and it is strictly prohibited to use a vessel for smuggling, drugs trafficking, smuggling of weapons, or transport of humans across borders, and or other criminal activities (art. 22).

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[19] See IMO, "Piracy and Armed Robbery against Ships: South China Sea, Report on IMO's Fact-Finding Mission Note by the Secretariat", MSC 63/INF.15, 25 March 1994, at 2.

[20] As expressed, Chinese armed forces will strengthen its cooperation with the armed forces of other countries and gradually and selectively participate in multilateral joint military exercises which target non-traditional security threats. See Major General Zhan Maohai, "China's Security Policy and Military Doctrine", presented to the IISS Shangri-La Dialogue on Asian Security, 31 May- 2 June 2002, Singapore. (on file with the author)

[21] Ministry of Foreign Affairs *et al*, *supra* note 41, at 787.

[22] The Regulations came into effect on 1 May 2000. Text is available in http://www.msa.gov.cn/flfg.nsf/all/04EFEC7FE780942A48256C70003CB274?OpenDocument (accessed 21 July 2003).

In addition, some other Chinese laws in respect to the maritime affairs contain stipulations relevant to piracy, such as the 1983 Law on Maritime Traffic Safety, the 1992 Law on the Territorial Sea and the Contiguous Zone[23] and the 1998 Law on the Exclusive Economic Zone and the Continental Shelf.[24] The provisions in the above laws relating to "security", "safety", and "hot pursuit"[25] are relevant, though they are not specifically related to maritime crimes including piracy.

4. Extradition and Judicial Assistance

It is recalled that in the *Petro Ranger* incident, the Royal Malaysian Police considered to request the Chinese government to extradite the pirates to stand trial in Malaysia.[26] However, extradition requires an agreement between the two countries concerned, or may be executed under an international treaty to which both countries concerned are the parties. China began to negotiate with foreign counterparts treaties on judicial assistance and/or extradition in 1985. As of June 2093, China signed 107 such treaties with 63 countries and among them 75 treaties have come into force.[27] Out of them, some are relevant to the suppression of crimes, most likely including sea piracy, such as the Extradition Treaty with Russia; and the Treaty on Criminal Judicial Assistance with South Korea (for details, see Appendix). The treaty on mutual judicial assistance in civil and criminal matters signed between China and Indonesia in 2000 is particularly meaningful since many pirates who were caught in China were from Indonesia. However, the Sino-Indonesian treaty has some

[23] Text in Bureau of Oceans and International Environmental and Scientific Affairs, United States Department of State, *Limits in the Seas: Straight Baseline Claim: China*, No.117, 9 July 1996, 11-14.
[24] Text in *People's Daily* (in Chinese), 30 June 1998.
[25] Article 14 of the Law on the Territorial Sea and the Contiguous Zone provides that "[t]he competent authorities of the People's Republic of China may, when they have good reasons to believe that a foreign ship has violated the laws or regulations of the People's Republic of China, exercise the right of hot pursuit against the foreign ship. Such pursuit shall be commenced when the foreign ship or one of its boats or other craft engaged in activities by using the ship pursued as a mother ship is within the internal waters, the territorial sea or the contiguous zone of the People's Republic of China. If the foreign ship is within the contiguous zone of the People's Republic of China, the pursuit may be undertaken only when there has been a violation of the rights as provided for in the relevant laws or regulations listed in Article 13 of this Law. The pursuit, if not interrupted, may be continued outside the territorial sea or the contiguous zone until the ship pursued enters the territorial sea of its own country or of a third State." Article of 12 of the Law on the Exclusive Economic Zone and the Continental Shelf provides that "[t]he People's Republic of China shall have the right to take necessary measures against violations of the laws or regulations of the People's Republic of China in its exclusive economic zone and the continental shelf, and to investigate according to the law those who are liable and may exercise the right of hot pursuit".
[26] IMB Piracy Reporting Centre, *Piracy and Armed Robbery against Ships*, Report for the Period of 1 January - 30 June 1998, Kuala Lumpur, July 1998, at 7. The IMB-PRC regards this as an effective deterrent against piratical attacks.
[27] See "Information on the conclusion of treaties on judicial assistance between China and foreign countries", available at http://www.moj.gov.cn/sfxzws/content/2009-08/26/content_1144120.htm?node=7382 (accessed 7 January 2011).

limitations in that it is not concerning extradition and it has not yet come into force (as of July 2003). Domestically, China promulgated its Extradition Law in December 2000 which enables China to deal with extradition cases even without the necessary conclusion of extradition treaties.[28]

The Extradition Law is applicable to extradition conducted between the People's Republic of China and foreign states. China pledges to cooperate with foreign states in extradition on the basis of equality and reciprocity (art 3), and communicate with foreign states through diplomatic channels for extradition. The Ministry of Foreign Affairs is designated as the communicating authority for extradition (art 4). However, where in an extradition treaty there are special provisions to govern the communicating authority, the provisions there shall prevail. The following conditions should be met when a foreign state requests for extradition:

(1) the conduct indicated in the request for extradition constitutes an offence according to the laws of both the People's Republic of China and the Requesting State; and

(2) where the request for extradition is made for the purpose of instituting criminal proceedings, the offence indicated in the request for extradition is, under the laws of both the People's Republic of China and the Requesting State, punishable by a fixed term of imprisonment for one year or more or by any other heavier criminal penalty; where the request for extradition is made for the purpose of executing a criminal penalty, the period of sentence that remains to be served by the person sought is at least six months at the time when the request is made (art 7).

For China, when requesting a foreign state to grant extradition or transit for extradition, the adjudicative organ, procuratorate organ, public security organ, state security organ or prison administration organ responsible for handling the case concerned in a province, autonomous region and municipality directly under the Central Government should submit its written opinions accompanied by relevant documents and material with certified correct translation respectively to the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice. After the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice have, respectively in conjunction with the Ministry of Foreign Affairs, reviewed the opinions and approved to

[28] English Text is available at http://www.gov.cn/english/laws/2005-09/22/content_68710.htm (accessed 7 January 2011). For further details, see Hu Qian & Chen Qiang, "China's Extradition Law of 2000", *Chinese Journal of International Law*, Vol.1 (2), 2002, 645-654.

> make the request, the request should be submitted to the foreign state through the Ministry of Foreign Affairs.[29]

Part II: Implementation of Global Conventions

In China's practice, there are usually three ways to implement international treaties: (1) express incorporation into the domestic laws of the provisions of international treaties and rules; (2) general stipulations on application of international treaties; and (3) correspondent revision and/or amendment of international treaties which China has ratified or acceded to.[30] As we know, it is unclear whether international law is part of the Chinese legal system since the Chinese Constitution does not touch upon the relationship between international law and municipal law. However, China has accepted the general rule of international law that a State is bound by a treaty it has acceded to and thus has the obligation thereto. China acceded to the 1969 Vienna Convention on the Law of Treaties and it obliges China to comply with its treaty obligations and to prevent it from evading its obligations by using its domestic laws as a justification. A typical example to reflect the Chinese position on the implementation of international law is an oft-quoted provision contained in the General Principles of Civil Law promulgated in 1986, Article 142 of which provides that

> "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions".[31]

Though the above is often quoted, the first law to contain such a clause is in fact the 1982 Law on Civil Procedure. This clause has been used by the Chinese scholars to demonstrate that international treaties can be directly applicable in China.[32] Second, in case there is a conflict between treaty law and domestic law, the treaty law should prevail except for those China has made reservations. Finally, the above clause reveals that China recognises the validity of international customary law to

[29] Article 47 of the Extradition Law.
[30] See Li Shishi, "The Relationship between the Chinese Legislation, Treaties and International Law", *Chinese Yearbook of International Law* (in Chinese), 1993, 264-266.
[31] English text is available at http://www.law-bridge.net/english/LAW/20065/1322572053247.shtml (accessed 23 March 2009).
[32] See Wang Tieya, *Introduction to International Law* (in Chinese), 1998, at 208. An evidence of direct application of international treaties in China is the Provisions on the Use of Red Cross Signs issued jointly by the State Council and the Central Military Commission in 1996, article 23 of which provides that "If there is anything concerning the protective use of Red Cross signs not covered in these Provisions, the relevant provisions of the Geneva Conventions and their Additional Protocols shall apply".

certain extent as it provides that international practice may be applied to subject-matters when no applicable law could be found in either Chinese law or any treaty that China has concluded or acceded to. However, it is unclear whether China recognises the application of all norms and rules of international customary law. According to some observations, it only refers to customary rules of international trade based on China's judicial practices.[33]

From the above, we may draw some brief general observations: first, there is no doubt that China respects international law. Secondly, international law can be applied in China but limited to those treaties to which China is a party. Thirdly, in case there is a conflict between a treaty China has acceded to and China's relevant domestic law, that treaty should prevail. However, this may not lead to a conclusion that China recognises the prevailing force of international law over its domestic law since treaties are only part of the body of international law. According to one observation, "treaties acquire prevailing force over domestic law only when the relevant domestic law includes an explicit stipulation to that effect. In other words, conflict rules operate only to the extent of the specific laws concerned".[34] Fourthly, the picture about the application of international customary law is not clear. It seems that China's courts will apply some customary rules governing international trade such as the Hague-Visby Rules. The Contract Law also contains a clause which permits the parties to a contract with foreign elements to choose applicable law for the settlement of their disputes arising from the contract; and they may choose a customary rule of international trade as the applicable law.[35]

In addition to the application of the treaties to which China is a party, China in practice has transformed some treaties into domestic laws. This practice is well manifested by the promulgation of the two domestic laws concerning diplomatic and consular affairs. They are the 1986 Regulations concerning Diplomatic Privileges and Immunities and the 1990 Regulations concerning Consular Privileges and Immunities.[36] As we know, China joined the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations respectively in 1975 and 1979. China incorporated the main contents of the two Conventions into its Regulations. China's second practice to endorse international law is to adopt relevant international norms and rules in its domestic law. This can be seen from the promulgation of the Chinese laws on the law of the sea: the

[33] See Xue Hanqin and Jin Qian, "International Treaties in the Chinese Domestic Legal System", *Chinese Journal of International Law*, Vol.8 (2), July 2009, at 303.
[34] Xue and Jin, *ibid*., at 305.
[35] See Article 126 (1) of the Contract Law of the People's Republic of China.
[36] English texts of these two regulations may be found at http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/tfsckzlk/xggnlf/t70823.htm and http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/tfsckzlk/xggnlf/t70824.htm (accessed 24 March 2009).

1992 Law on the Territorial Sea and Contiguous Zone and the 1998 Law on the Exclusive Economic Zone and Continental Shelf, which incorporated relevant provisions of the 1982 UN Convention on the Law of the Sea. There is a difference between the above two categories: while the former two regulations just follow the two treaties on diplomatic and consular affairs, the latter two laws only incorporated parts of the UN Law of the Sea Convention.

Another way of implementing international law at the domestic level is to maintain relevant domestic laws in line with the treaties that China has joined or is expected to join. If there is any inconsistency, relevant domestic laws should be amended or even annulled. In preparation for joining the World Trade Organization (WTO), China launched the overall review process of its laws and regulations as early as 1999. Many administrative regulations and measures either by the State Council or ministries were annulled before the end of 2000.[37] Since its entry into the WTO, China has quickened its pace of revising its existing laws and regulations. According to a statistic, as of the end of 2002, China had revised 14 laws and 37 administrative regulations, annulled 12 administrative regulations, suspended 34 relevant documents, and changed more than 1,000 departmental rules and measures.[38] Meanwhile, new laws have to be timely adopted to cope with the changed situation. As one Justice of the Supreme Court commented, the biggest change after the WTO entry would be in the legal environment.[39]

In the Report of the Working Party on the Accession of China, China expressed its official position on the implementation of the WTO laws and regulations:

> The representative of China stated that China had been consistently performing its international treaty obligations in good faith. According to the Constitution and the Law on the Procedures of Conclusion of Treaties, the WTO Agreement fell within the category of "important international agreements" subject to the ratification by the Standing Committee of the National People's Congress. China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations. For this purpose, China had commenced a plan to systematically revise its relevant domestic laws. Therefore, 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.

[37] For details, see State Council, "Decision on Annulling Partial Administrative Regulations and Measures Promulgated before the End of 2000", available at http://www.npcnews.com.cn/gb/paper228/1/index.htm (accessed 23 November 2001).
[38] See "Fulfilling the promise for the WTO entry in the legal system, China has achieved a remarkable achievement in checking up laws and regulations", 4 December 2002, available at http://www.npcnews.com.cn/gb/paper228/1/class022800001/hwz224162.htm (accessed 16 September 2003).
[39] Comments of Justice Li Guoguang, available at http://www.npcnews.com.cn/gb/paper228/1/index.htm (accessed 23 November 2001).

> The representative of China confirmed that administrative regulations, departmental rules and other central government measures would be promulgated in a timely manner so that China's commitments would be fully implemented within the relevant time frames. If administrative regulations, departmental rules or other measures were not in place within such time frames, authorities would still honour China's obligations under the WTO Agreement and Draft Protocol. The representative of China further confirmed that the central government would undertake in a timely manner to revise or annul administrative regulations or departmental rules if they were inconsistent with China's obligations under the WTO Agreement and Draft Protocol.[40]

After having entered into the WTO in 2001, China has repealed, revised and adopted more than 3,000 domestic laws, administrative regulations and rules which are related to the principles and rules of the WTO.

In August 2002, the Supreme Court issued the Decision on Certain Issues of Handling Administrative Cases of International Trade, which was the first such regulation relating to the handling of trade cases in line with the WTO regulations. Article 9, particularly relevant to the implementation of international law in China, provides that when there are two reasonable interpretations in a particular applicable rule from a national law or administrative regulations in the handling of administrative cases of international trade, if one of the interpretations is in conformity with international treaties China concluded or acceded to, the interpretation in conformity should be applied, except for those on which China has made reservations.[41] Here the rule of conformable interpretation is used as an alternative to implement relevant international treaties so as to fulfil China's corresponding treaty obligations.

As mentioned above, the Ministry of Foreign Affairs (MFA) is the most important governmental department in charge of the implementation of the treaties China acceded to and ratified. However, due to the particular areas which are beyond the expertise of the Ministry of Foreign Affairs, the implementation in question will be assigned to a relevant governmental department. As for the implementation of the LOS Convention, several ministries are involved since the management of ocean affairs in China is fragmented. They include MFA (overall supervision), Ministry of Environmental Protection (for marine environmental protection), Ministry of Agriculture which has the Bureau of Fishery Management (for marine fishery), Ministry of Land and Resources which has the State Oceanic Administration (SOA) (for marine space zoning, marine scientific research),

[40] Paragraphs 67-68 of the Report of the Working Party on the Accession of China, 10 November 2001, available at http://www.cecc.gov/pages/selectLaws/WTOimpact/wkptrptPRCWTO.php (accessed 24 March 2009).
[41] See "Decision on Certain Issues of handling Administrative Cases of International Trade", 27 August 2002, available at http://www.court.gov.cn/lawdata/explain/executive/200303240002.htm (accessed 27 March 2009).

Ministry of Public Security (for maritime policing) and Ministry of Transport which has the China Maritime Bureau (for maritime shipping). This fragmented system sometimes causes problems in terms of implementation of an international treaty due to the lack of coordination as well as the conflict of departmental interests. As the national contact in China with the IMO is the China Maritime Bureau, it becomes the main governmental organ to implement international treaties adopted under the auspices of IMO. Since maritime crimes including piracy are subject to the jurisdiction of the Ministry of Public Security, the Maritime Security Administration, which is under that Ministry, is the responsible governmental unit. It has the functions of (1) maintaining the security and order at sea, (2) safeguarding the normal operations of marine activities, and (3) preventing smuggling and border violations. The coastal areas are equipped with mobile patrol forces with more than 50 patrol vessels and 2,000 personnel, thus forming the force of maritime police.[42] For the implementation of the UN Convention on Transnational Organized Crime, the designated ministries for implementation at the central level are the Ministry of Public Security and the Ministry of Justice.[43] However, as for the maritime law enforcement, in addition to civilian law enforcement brigades such as China Maritime Surveillance (under SOA), Chinese navy also play an active role in maintaining the safety of navigation at sea. The most visible example is its despatch to the Somali coast for the crackdown on piracy there.

Finally, it is worth mentioning the role played by the Chinese courts handling cases of international maritime crimes. The People's Court is founded in accordance with the Chinese Constitution.[44] The Court, as mandated by the Constitution, is the judicial organ of the State, and includes the Supreme Court, courts at various local levels, military courts, and other special courts such as maritime courts and railway transport courts. It has four levels: the Supreme Court, the higher courts at the provincial level (a total of 31), intermediate courts at the prefectural level (389), and primary courts at the county level (3,067). The Supreme Court,[45] which is the highest judicial organ, supervises the administration of justice by local and special courts. Courts at a higher level supervise those at a lower level. A two-level trial system is applied in Chinese courts, whereby a case is finally decided after two trials, first by a lower

[42] See Lu Shouben (ed.), *The Marine Legal System* (Beijing: Guangming Daily Publishing House, 1992) (in Chinese), 234-235.
[43] See "Information on the conclusion of treaties on judicial assistance between China and foreign countries", available at http://www.moj.gov.cn/sfxzws/content/2009-08/26/content_1144120.htm?node=7382 (accessed 7 January 2011).
[44] Arts 123-135 of the 1982 Constitution, reprinted in Bureau of Legislative Affairs of the State Council of the PRC (ed.), *Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters*, Vol. I (Beijing: China Legal System Publishing House, 1991), 299-300.
[45] The People's Supreme Court was established in October 1949 just after the founding of the PRC; see He Lanjian and Lu Mingjian (eds.), *Judicial Work of Contemporary China*, Vol.1 (Beijing: Contemporary China Publisher, 1993), 23-24.

court, then by a higher court if there is an appeal. In criminal cases, the procuratorate may present a protest to the higher court when it is dissatisfied with the decision made by the lower court.

Chinese courts have jurisdiction over cases with foreign elements but in these cases, the relevant courts may not handle them by invoking international law. In practice, cases which international law is directly applied are rare in China and in most cases, the applicable rules in international law are related to commercial and maritime subject-matters. One paper written by legal officers in the Chinese Foreign Ministry describes several commercial and maritime cases which international treaties are directly invoked. The treaties include, *inter alia*, the 1980 UN Convention on Contracts for the International Sale of Goods, the 1929 Warsaw Convention on the Unification of Certain Rules Relating to International Carriage by Air, the 1955 Hague Protocol to the Warsaw Convention, the 1974 UN Convention on a Code of Conduct for Liner Conferences, the 1972 Convention on the International Regulations for Preventing Collisions at Sea, and the 1974 International Convention for the Safety of Life at Sea.[46]

Besides multilateral international treaties, courts sometimes invoke bilateral agreements to determine cases. For example, in the *Twentieth Century Fox Film Corporation v. Beijing Superstore for Cultural and Arts Publications and AV Products Inc* case in 1996, the First Intermediate People's Court of Beijing ruled that the plaintiff's movie products were protected under Chinese law, even if the copyrights were obtained in the United States because China was a party to the Berne Convention and the MOU on the Protection of Intellectual Property signed between China and the United States on 17 January 1992.[47]

In 1995 the Supreme People's Court, along with the Supreme People's Procuratorate, Ministry of Foreign Affairs, Ministry of Public Security, Ministry of National Security and Ministry of Justice, jointly issued the Provisions on Certain Questions in Regard to Cases with Foreign Elements, in which Article 3 of Chapter 1 provides that:

> In the handling of cases with foreign elements, on the basis of the principle of reciprocity and mutual benefit, international treaty obligations undertaken by China should be strictly observed. In case domestic laws or internal regulations are in conflict with China's treaty obligations, the relevant provisions of international treaties shall prevail, except for those provisions to which

[46] For details, see Xue Hanqin and Jin Qian, *supra* note 29, 310-313.
[47] See Xue and Jin, *ibid*., at 313.

China has made reservations. The competent authorities shall not invoke domestic laws or internal regulations as a justification for the refusal to perform treaty obligations.[48]

There provisions are given to lower courts as guidance to apply international treaties. Although the provisions only mention "foreign elements" without specifying what treaties are included, it is generally understood that it refers to the treaties in the maritime and commercial domain. In 2002, the Supreme People's Court issues the Opinions on Certain Issues in the Application of the Civil Procedure Law, which clarifies the term "civil relations and cases with foreign elements" as it means civil relations and cases in which (a) one party or both parties to the dispute are foreign nationals, stateless persons, foreign enterprises or organizations; (b) the legal facts that establish, modify or terminate the civil legal relations between the parties arise in foreign territories; or (c) the disputed object of the lawsuit is located in a foreign country.[49] It is to be noted that this Provisions were issued before China's entry into the WTO, it may not apply to the WTO regulations.

As for maritime crimes, Chinese courts did have tried several piracy cases in recent years. The trials began after China was criticized by the world community of releasing the suspects of piracy who were arrested because they hijacked the oil tanker *Petro Ranger* in 1998.[50] The Chinese law does not have a specific legal rule punishing piracy since there is no such definition as "piracy" in the criminal law. However, this definitional loophole does not prevent China from bringing pirates into courts. Certain crimes subject to the Chinese penal code are relevant and in fact some pirates were tried, as shown below, under the charge of these crimes such as murder, robbery, etc. On the other hand, China enjoys universal jurisdiction over piracy by acceding to relevant international treaties including the LOS Convention and the SUA Convention.

The first one is the case of the *Tenyu*. The *Tenyu* was hijacked on 27 September 1998 and all 16 crew members were missing. The ship reappeared in Zhangjiagang in December that year with a

[48] Text is available at http://www.chinalaw.gov.cn/jsp/contenpub/brower/moreinfo.jsp?page=2&id=co5022565624; cited in Xue and Jin, *supra* note 29, 315-316.
[49] Text is available at http://www.chinalaw.gov.cn/jsp/jalor_en/disptext.jsp?recno=83&&ttlrec=291; cited in Xue and Jin, supra note 29, at 304.
[50] The oil tanker *Petro Ranger* was mysteriously missing in the South China Sea for several days and suddenly reappeared offshore the coast of the Hainan Island in China. It was proven late that the vessel was hijacked by a group of Indonesians in waters adjacent to Malaysia and Vietnam on 16 April 1998. The ship was identified and arrested by Chinese police while it was discharging its cargo into another tanker on 26 April 1998. After the initial investigation, the Chinese public security authority released the vessel and crew members two days later. According to China, it was evidential that the *Petro Ranger* was a smuggling vessel and dealt with as a smuggling case so that the gas oil and kerosene on board were confiscated. The hijackers were expelled from China due to the lack of clear evidence that they were pirates. China's undertaking not to punish the suspects of piracy was sharply criticized by IMB as well as the victim shipping company.

new name. After a careful and detailed investigation, the ship was confirmed to be the missing *Tenyu*. The Chinese authorities, therefore, detained the ship and submitted the case to the court. The Zhangjiagang court finally made the decision to return the ship to the real owner, a Panamanian shipping company. Meanwhile, the Department of Public Security began to investigate the case of the missing crew who was most likely to have been murdered. The men on board the hijacked ship were Indonesians who were finally released on the ground that they were not pirates. The *Tenyu* case was the one that for the first time Chinese judicial organs like the maritime court had intervened and ordered to return the foreign ship within the Chinese territory to the relevant ship owner. By recalling that in the case of *Petro Ranger* the Chinese police treated the ship hijacked by the pirates as a smuggling ship and then had it confiscated, China realized the existence of piracy at sea. However, the real pirates committed the crime were even not arrested and punished.

In the second case --- the case of the *Cheung Son*, China tried the pirates in accordance with the relevant Chinese criminal law. On 12 November 1998, the *Cheung Son*, which belonged to a Hong Kong shipping company, disappeared in the South China Sea on the way to Malaysia from the Shanghai Harbor. Several days after some bodies of crew members of that ship were floated on the sea adjacent to the Guangdong Province. The public security department of the province registered the case as “Case 9901” and began to investigate it. The police finally found that it was a maritime hijack case designed by an Indonesian with Chinese collaborators. They killed all the 23 crew members and robbed the whole ship. As of 8 August 1999, China arrested all suspected pirates involved. The Intermediate Court in Shanwei, a port city in Guangdong Province handled the case. On 10 January 2000, 13 pirates (one Indonesian and 12 Chinese) received death penalty and the rest 24 pirates life sentence or long-term imprisonment under the charge of robbery and murder.

In the case of the *Marine Fortuner*, China invoked relevant international treaties. On 8 June 1999, a Honduran freight ship named *Nuevo Tierra* sailed into the Fangchenggang to the Gulf of Tonkin. After a check, the inspectors of the harbor superintendency department found that it was a phantom ship. Its original name was "Marine Fortuner", a Panamanian registered ship which was hijacked in the Sea of Adaman on 17 March 1999 on the way from China to India (The crew were put in 9 crafts and adrift on the sea until they were rescued by Thailand fishermen). The department of public security of the Guangxi Autonomous Region decided to investigate the case according to Article 27 of the LOS Convention (on criminal jurisdiction on board a foreign ship). On 4 August 1999, all the 14 Burmese suspects were arrested and the ship was finally returned to the owner. International treaty was specifically applied to the case. In February 2000, the Chinese court in

Guangxi sentenced 14 pirates, one of them to death, for raiding the ship. The ship was returned to the Taiwanese shipowner.

The case of the *Siam Xanxai* has some similarities to the above that the pirates were tired and the hijacked ship was returned to the owner. On 9 June 1999 ten Indonesian nationals hijacked the Thai registered ship *Siam Xanxai* at the time when it was on route from Singapore to Thailand, laden with 2,200 tonnes of diesel oil. Two days after the boarding, 16 of the vessel's seafarers were put on a speedboat, while one Thai crew was held hostage. Those men cast adrift were later rescued by a Malaysian fishing boat. Chinese officers intercepted the ship off Shantou on 17 June, as the oil was being illegally supplied to a Chinese vessel. The ten alleged pirates were arrested and punished severely under the Chinese law. In 2003, the Chinese court in Shantou sentenced the pirates to imprisonment respectively from 10 to 15 years. The ship and the goods on board were returned to the owner. China's commitment has been gratefully appreciated by the shipowner.

The fifth case is the case of the *MT Global Mars*. The *Global Mars*, a Panamanian flagged vessel carrying a cargo of 6000 metric tonnes of palm oil products, was hijacked by a band of pirates (11 Philippine and 9 Myanmar nationals) barely a day after setting sail from Malaysia on 24 February 2000. The pirates blindfolded the crew of eight Koreans and ten Myanmar nationals and set them in a small fishing boat adrift with only basic provisions. The crew managed to get to Surin Island in Thailand. The hijacked vessel had been renamed "*Bulawan*" purportedly under the Honduran registry and sailed to the Chinese coast where it was detained and investigated by the Chinese police. The Global Mars was returned to the Japanese owner.

These cases have shown that China has gradually formulated a set of judicial procedures to try piracy cases and rendered harsh punishment on pirates including death penalty and long-term imprisonment. In comparison with trials in other countries, the punishment imposed by Chinese courts is the most severe.[51] It is interesting to mention the case of the *MV Alondra Rainbow* which was handled in India. The *MV Alondra Rainbow*, a Panama registered vessel belonging to Japanese owners was hijacked by pirates in September 1999. In the following month the Indian Coast Guard and Navy captured the pirate-hijacked ship and in February 2003 the Mumbai Sessions Court tried the 15 pirates and imposed on them the imprisonment of seven years and varying fines. However,

[51] For example, an Indonesian court sentenced a band of hijackers to from only two to four years' imprisonment. See "Pirate attacks have tripled in a decade, IMB report finds", available at http://www.iccwbo.org/home/news_archives/2003/stories/piracy-quarter-1.asp (accessed 19 July 2003).

on 18 April 2005 the Mumbai High Court overruled the lower court's decision and acquitted all the accused. This move was critically discussed in India.[52]

It seems that the practice relating to the invocation of international law in Chinese courts is not consistent. Sometimes, Chinese courts even invoked treaties to which China is not yet a party. For instance, in a case concerning the foreign vessel detention in 1985, the Maritime Court in Qingdao established its jurisdiction over the case by invoking Article 28 (3) of the 1982 UN Convention on the Law of the Sea (LOS Convention), in addition to Article 27 of the Civil Procedure Law and an international custom.[53] At that time China was not a party to the LOS Convention, though it signed it in 1982.

Apart from the above judicial practice, the question arises as to whether China allows its courts to directly apply international treaties in non-commercial and maritime cases, particularly when Chinese courts deal with human rights cases. The picture is not clear. The cases in that category are very rare. There is a reported case on the trial of sea pirates. The department of public security of the Guangxi Autonomous Region decided to investigate the case according to Article 27 of the LOS Convention (on criminal jurisdiction on board a foreign ship). Chinese courts once applied relevant international treaties to try aircraft hijackers because no applicable law could be found in the Chinese Criminal Law.

Part III: Non-Party to Global Conventions

As we know, China has acceded or ratified all the relevant international treaties concerning maritime crimes except for the 2005 SUA Protocol. There is no official source to explain the reason, but to me, there might be some considerations behind. First, since there are only a few ratifications for the Protocol and none of the East Asian countries has ever ratified it, China feels no urgency to ratify this legal document right now. Second, while China has no objection to the expansion of the definition on acts threatening the safety of maritime navigation, China may not feel happy with the newly introduced legal arrangement of shipboarding regime which was initiated by the United States and borrowed from the Proliferation Security Initiative (PSI). China's feeling towards PSI is complex. As stated by a Chinese diplomat, maritime security is of vital importance for the welfare and economic

[52] For details, see Commodore RS Vasan In, "Alondra Rainbow revisited, A Study of related issues in the light of the recent judgment of Mumbai High Court", available at http://www.southasiaanalysis.org/%5Cpapers14%5Cpaper1379.html (accessed 19 January 2009).
[53] See "Qingdao maritime court handles a case concerning foreign vessel detention", available at http://www.ccmt.org.cn/hs/news/show.php?cId=49 (accessed 20 March 2009).

development of the region, and regional cooperation is indispensable for maritime security.[54] However, China has the doubts whether principles embodied in international law including the UN Charter "would be or could be strictly observed in real actions against maritime threats. Extreme care and sensitiveness is need when it comes to military involvement.[55] The official position of China is reflected in the remarks made by its Foreign Ministry spokesperson that

> We agree with the objective of PSI. But the Chinese side thinks that relevant measures under PSI should be taken within the reign of international law in accordance with relevant principles of the UN Charter. We hold reservation on the PSI's possibility of taking coercive interception beyond the reign of international law.[56]

At the same time, China did not close its door to PSI by stating that "we would like to exchange views with relevant countries on this point".[57] For some reasons, China might support military interdiction or naval inspection in future and ratify the 2005 Protocol.

Appendix Table: Bilateral Judicial Assistance/Extradition Treaties between China and Other East Asian Countries

Country	Type of Treaty	Signing	Coming into force (dd/mm/yy)
Cambodia	Extradition	09/02/99	13/12/00
Indonesia	Civil & criminal	24/07/00	28/07/06
Japan	Criminal	01/12/07	23/11/08
Laos	Civil & criminal	25/01/99	15/12/01
	Extradition	04/02/02	13/08/03

[54] Zhao Jianhua, "The Straits of Malacca and Challenges Ahead: China's Perspective", paper presented to the Conference on "Straits of Malacca: Building a Comprehensive Security Environment", 11-13 October 2004, Kuala Lumpur (on file with the author).
[55] Zhao Jianhua, *ibid*., p.4.
[56] Foreign Ministry Spokesperson Zhang Qiyue's Press Conference on 4 November 2004, available at www.fmprc.gov.cn/eng/xwfw/s2510/t169072.htm (accessed 29 October 2005).
[57] Ibid.

Mongolia	Civil & criminal	31/08/89	29/10/90
	Extradition	19/08/97	10/01/99
North Korea	Civil & criminal	19/11/03	21/01/06
Philippines	Criminal	16/10/00	28/04/01
	Extradition	30/10/01	12/03/06
Singapore	Civil & Commercial	28/04/97	27/06/99
South Korea	Criminal	12/11/98	24/03/00
	Extradition	18/10/00	12/04/02
	Civil & Commercial	07/07/03	27/04/05
Thailand	Civil & Commercial	16/03/94	06/07/97
	Extradition	26/08/93	07/03/99
	Criminal	21/06/03	20/02/05
Vietnam	Civil & Criminal	19/10/98	25/12/99

Source: prepared by the author.