

Cultural Element in International Law

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It is my great honour and privilege to be invited to give the Melland Schill Lecture this year at the University of Manchester. The topic of my lecture is: cultural element in international law.¹

The relationship between culture and law is not a novel topic for international legal studies.² Indeed, early cultural studies movement that started from this country — Great Britain — in the mid-twentieth century and later spread to many other countries contributed a great deal to the inter-disciplinary approach to cultural studies and enriched research areas of many academic disciplines of social sciences and the humanities. As is commented by one distinguished anthropologist, “‘culture’ is increasingly a prized intellectual commodity, aggressively appropriated by other disciplines as an organizing principle.”³

At the national level, legal scholars have long realized that the events of life and law do not exist in the abstract but in the concrete patterns of everyday experience.⁴ In Britain, common law reflects customs and usages; in German early jurisprudence, the historical school views law as a product of a nation’s culture and as embedded in the daily practices of its people. In the American jurisprudence in the 1980s, the constitutive theory assumes that law plays the role of forming culture, thus constitutive of people’s minds, practices and social relations.⁵ These legal studies, on whatever theories they are based, all recognize that law is an inseparable dimension of social relations.

For the purpose of the following discussions, the notion “cultural element” I have in mind primarily refers to such factors as tradition, custom, religion, gender, ethnicity and

¹ There are different definitions on the term of culture. It generally refers to the context—historical, sociological, political and economical—in which one lives and on the basis of which one forms ideas and establishes social relations.

² Menachem Mautner, “Three approaches to Law and Culture”, *Cornell Law Review*, Vol. 96, 2011, p. 839.

³ Annette B. Weiner, “Culture and Our Discontents”, Presidential Address of the 92nd Annual Meeting of the American Anthropological Association (November 1993), in *American Anthropologist*, Vol. 97, 1995, p. 15.

⁴ Lawrence Rosen, *Law as Culture: An Invitation*, Princeton University Press, 2006, Preface, xiii.

⁵ Menachem Mautner, *op. cit. supra* footnote 2, p.841.

language, to which international rules, principles and institutions may relate. I am not going to discuss these factors *per se* in relation to law, but focus on their dimension in the legal relations between States. To begin with, I wish to highlight a few general observations. First, cultural element is an increasingly important aspect for international law in the globalized world. With economic globalization and IT revolution, social connectivity among States and peoples has greatly changed the cultural dimension of international relations. Secondly, general recognition of cultural diversity does not automatically transform it into normative and institutional principles in international law. Legal advocacy remains necessary. Thirdly, cultural element of the existing laws and legal institutions requires constant review and reflection. I shall deal with these points from international as well as national perspectives.

In international law, cultural element is often embedded in technical terms. Family laws, for instance, vary greatly from State to State; this is because such civil matters as marriage, parent-child relations and maintenance, to a large extent, reflect local tradition and custom. Private international law, in addressing conflict of laws, normally gives deference to such tradition and custom. If a man with his family works and lives abroad, the validity and effect of his marriage shall be governed not by the law of the residing State, but by his national law, or the law of the place where his marriage was registered. By recognizing his marriage, the residing State thus respects the tradition and custom to which the man is subject, notwithstanding that such recognition is limited by the public order of the residing State.

In practice, we often encounter much more complicated situations. Supposing a State intends to send a diplomat with his same-sex partner or spouse to a country where such partnership or marriage is not recognized or valid under its law, or a State wishes to send a diplomat with two wives to a country where polygamy is not accepted. There is clearly an issue of conflict of laws between the two countries. Beneath the conflict of laws is the cultural difference. For the receiving country, the matter may not be just about diplomatic protocol; it could have negative impact on the residing society. The receiving State may decline the nomination on the basis of public order. As international lawyers, how should we handle such a matter? If you were the legal advisor to the government of the sending State, would you advise it to insist on its nomination as a matter of human rights, or would you advise it to approach the matter from a cultural angle? By my experience, I can tell that if one takes the former approach, it would most likely give rise to tension between the sending and receiving States. If it is otherwise treated as a matter of cultural difference, the

States in question may be more willing and patient to listen to the specific concerns that they each have with regard to the nomination and try to seek a proper solution that both feel comfortable to live with.

A cultural element can be immaterial and even trivial in one legal context, but highly sensitive and penetrating in another. To analyse an issue, therefore, one has first to understand its context. I shall take language for example and give you three cases to illustrate my point.

The first case is the language policy of the European Union (EU). In the European integration, member States of European Union (formally the European Community) have formed common policies in a broad range of areas, political, economic, financial and social. However, they are quite categorical that there is no integral Union policy on culture, but for respect of cultural diversity.⁶ Under the policy, language is a sensitive issue. There is no common language that has been chosen for the operation of the Union; each member uses its own national language. All the EU laws, regulations and directives are delivered to the member States in their national languages and directly take effect at the national level. It is clear that to maintain the normal operation of the EU in over twenty different languages, the financial burdens and technical complexity of translation are considerable, but not to do so, the potential loss of valuable cultural heritage as represented by the national language of each member State during the integration process could equally be serious. Being an exclusive regional integration organization, this language arrangement, good or bad, is supposedly to ensure that no one language would be given superior position over any other language. As an institutional arrangement, language is linked with cultural diversity.

In contrast, the Association of Southeast Asian Nations (ASEAN) offers a different case. This sub-regional organization adopted its Charter and became an integrated regional organization in 2008. Respect for cultural diversity is also one of its fundamental principles. However, it decided to use English as its working language. This decision may be explained by a number of considerations. First, ASEAN has not yet reached the same level of integration as the EU does. Its policies have to be implemented through national legislation and measures. Therefore, translation can be done subsequently at national level. Secondly, ASEAN is an inclusive, rather than exclusive, sub-regional organization. It has

⁶ Of course, that does not mean cultural rights are not protected at the Union level. See Evangelia Psychogiopoulou, "The European Union and Cultural Rights", in Ana Filipa Vrdoljak (ed.), *The Cultural Dimension of Human Rights*, Oxford University Press, 2013, pp.169 -185.

established various kinds of partnership with countries both from the region and outside. A commonly used working language is much more convenient and economical for communication. Lastly, technically speaking, translation among various national languages of the ten member States is just out of the question, regardless of its financial cost. Moreover, English language does not carry the cultural implication for any particular member State. It is primarily taken as a tool of communication within ASEAN, but not perceived as a cultural element that falls under the principle of cultural diversity, as is the case with EU.

That said, we should not overlook the fact that ASEAN's choice of English as its working language, to a certain extent, does reflect the British and American cultural influence in the region, historically and contemporarily, and ASEAN member States' ties with these major powers. Institutionally, nevertheless, the common language used does not present a sensitive policy issue to ASEAN.

My third case relates to the office I am now working for, the International Court of Justice (ICJ). I shall discuss it in more detail.

The ICJ, being one of the six major organs of the United Nations, is the only organ that uses French and English as its official languages;⁷ the rest of the UN organs use six official languages, with the addition of Arabic, Chinese, Russian and Spanish.⁸ This is because the ICJ has inherited the practice of its predecessor, the Permanent Court of International Justice (PCIJ). According to Article 92 of the UN Charter, the ICJ Statute is based on the PCIJ Statute.⁹ Paragraph 1 of Article 39 of the PCIJ Statute, which provided the official languages of the Court, was adopted into the ICJ Statute. Considering the nature of the Court's judicial work, translation between two official languages is obviously far more manageable and economical than that among six. The choice of the official languages was, however, not purely out of technical and pragmatic considerations.

If we recall the history of the PCIJ, we can see that in the wake of WWI, when the first World Court was established, both Britain and France were the great colonial powers in the world. The PCIJ adopted French and English as its official languages, the languages

⁷ Article 39 of the Statute of the Court.

⁸ The six languages are: Arabic, Chinese, English, French, Russian, and Spanish.

⁹ Article 92 of the UN Charter. When the PCIJ Statute was adopted, it was suggested that candidates for the election to the Court should, among other things, "be at least able to read both the official languages of the Court and to speak one of them." Ole Spiermann, "The Legacy of the Permanent Court of International Justice—on Judges and Scholars, and also on Bishops and Clowns", in Malgosia Fitzmaurice, Christian J. Tams (eds.), *Legacies of the Permanent Court of International Justice*, Martinus Nijhoff Publishers, 2013, p. 410, citing *League of Nations Records of the Assembly: Plenary Meetings 1929*, pp. 119-121.

of the two principal legal systems in the world: the European continental law (civil law) and the English common law. Technically, this bilingualism reflects the state of affairs of international legal order at that time; language serves as a symbol of political domination. A large number of countries that were still under colonial rule or foreign domination, did not fall within the category of “civilized nations”, therefore, they had little role to play in the formation and practice of international law.¹⁰ By adopting the provisions of the PCIJ Statute, the ICJ, not only by design, continues the jurisprudence and tradition of the PCIJ, but also as a consequence, maintains the Court culture that is largely shaped through an interaction of the two legal traditions, in the process of which, language is an effective medium. In this regard, two observations can be made.

First, language, albeit a tool of communication, has a restrictive effect on the access to information of State practice in the field of international law. To be accessible, State practice has to be presented in either of the official languages of the Court, whether in its original form or properly translated. With fifteen Judges from five continents on the bench,¹¹ one may argue that the Judges are not restrained by this linguistic barrier, as they are supposedly representing the main forms of civilization and the principal legal systems of the world. That may be true; that representation, however, does not by itself automatically guarantee a wide access to, and sufficient knowledge of, State practice. For the Court as a whole, any evidence that it wishes to take account of must be readable and understood by all Judges. State practice, for instance, national legislation and judicial decisions of the United Kingdom are readily available for research by the Court without much difficulty, while materials of national laws and judicial decisions of countries such as China, Russia, Indonesia, Egypt, Brazil, to name a few, are hard to find in English. To search for State practice on an international law issue, what is decisive is often dictated by what is generally available in popular languages for study. Those that are not accessible in the two official languages may seldom come to the attention of researchers.

Secondly, bilingualism facilitates the shaping of the Court culture in a number of aspects. The two principal legal systems — civil law and common law — have much

¹⁰ For a critique on this point by a distinguished international law scholar, see Onuma Yasuaki, “A Transcivilizational Perspective on International Law”, *Recueil des cours*, Vol. 342, 2009, pp. 220-232. Professor Onuma Yasuaki takes the view that in the 20th century, international law with a universal validity was generally considered in terms of customary international law. However, many norms of such customary international law were the products of a small number of powerful Western States, thus lacking global representative legitimacy. Therefore, he argues that to take those listed in paragraph 1 of Article 38 of the ICJ Statute as the sources of international law is questionable.

¹¹ Among the fifteen members, three from Asia, three from Africa (one from North Africa, one from francophone Africa and one from Anglophone Africa), two from Latin-America, two from Eastern Europe and Russia, five from the West and others.

influence on the practice of the Court, both procedurally and substantively. By analogy, general rules and principles as practised in these systems, have gradually found their way into the practice and jurisprudence of the Court, for example, *estoppel*, *res judicata*, good faith, essential parties rule, act of State doctrine, etc., are all borrowed from either of the two legal systems.¹² It is not surprising that most of the counsels that appear before the Court come from, or have been trained, in these legal systems, as they not only have the best command of language skills to articulate legal arguments, but also, by training, are sensitive to trends in law and able to assess correctly the relative weight of law's many elements to make persuasive legal arguments before the Court. When the parties come from different legal systems, it proves all the more important for them to employ such foreign counsels in their legal teams. They not only have to employ foreign counsels, but also have to include counsels from both legal systems, both English and French speaking, if the case is adjudicated in its normal fashion.¹³

In the discussions of the Court's work for reform, bilingualism is often blamed as one of the causes for excessive documentation of written proceedings and delays in the proceedings due to translation. Some scholars, however, take the view that the tradition of bilingualism presents certain attraction for French-speaking States. Moreover, it has the advantage of providing a control language, both during deliberation and in the drafting of orders and judgments. Apart from these technical considerations, to which I agree, more important I think is the value of cultural and legal diversity that the Court is supposedly to possess and preserve.

As said before, to litigate before the Court, the ability to fully appreciate the Court culture and the competence to deal skilfully with the procedural and evidential details are just as crucial as the merits of the case. That brings me to another dimension of cultural element in the judicial practice.

The Rules of Court initially were based on the Rules of the PCIJ. They were substantially updated in 1978 and further amended subsequently. In 2001 the Court adopted Practice Directions as guidance for use by States appearing before the Court in contentious cases.¹⁴ Procedural and evidential rules and practice, nevertheless, are the

¹² The Court's practice with regard to evidence and expert testimony largely reflects the common law practice.

¹³ By agreement of the parties, the case may be conducted in one language, for instance, French.

¹⁴ Practice Directions have been revised and amended in 2002, 2004, 2006, 2009 and 2013.

areas where cultural differences of different legal systems tend to emerge and even clash. I shall take the *Whaling* case for example.¹⁵

Australia filed an Application against Japan, alleging that Japan's scientific whaling program (JARPA II) had breached its obligations under the International Convention for the Regulation of Whaling ("the Whaling Convention") and its other international obligations for the preservation of marine mammals and the marine environment. Australia claimed that the catches of whales with the special permits issued by Japan under JARPA II were over excessive, revealing that the actual purpose of JARPA II was for commercial whaling rather than scientific research. Japan, for its part, argued that its issuance of special permits to catch whales under JARPA II was in conformity with Article VIII, paragraph 1, of the Whaling Convention. During the process, New Zealand intervened as a non-party under Article 63 of the Statute. Notwithstanding Japan's request for a second round of written pleadings, the Court decided to have just one round. As the case was scientific evidence intensive, experts were appointed by the parties and later were cross-examined during the oral hearings. In its Judgment, the Court found, *inter alia*, that the special permits granted by Japan in connection with JARPA II did not fall within the provisions of Article VIII, paragraph 1, of the Whaling Convention and therefore Japan should revoke the extant special permits in relation to JARPA II, and refrain from granting further permits under the programme concerned.

During the proceedings, Japan did not conceal its sentiment of being culturally prejudiced against by the West with regard to its whaling tradition. Procedurally it was apparently unhappy with the Court's decision not to have a second round of written pleadings and the way in which New Zealand handled its intervention, as it had allegedly coordinated its position with Australia. More than that, compared with the Applicant, the Japanese team looked uneasy about the way in which the cross-examination of experts was conducted.

After the delivery of the Judgment, although Japan stated that it would respect the decision of the Court, it continued the scientific whaling activities by reducing the number of target catches of whales.

On 7 October 2015, a year and half after the delivery of the Court's Judgment in the *Whaling* case, Japan deposited with the Secretary-General of the United Nations in his capacity as depositary, a declaration of its acceptance of the compulsory jurisdiction of the

¹⁵ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226.

Court under Article 36, paragraph 2, of the Statute, which in effect adds one paragraph to Japan's original declaration, excluding from the Court's jurisdiction, "any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea." Clearly, this new reservation will prevent any future legal actions in the Court against Japan for whaling activities.

In my view, even if Japan's presumed concerns had been taken care of, it would not have in any event altered the outcome of the Court's decision. There are, however, some cultural elements which may emerge in other contexts as well.

First of all, whaling is a highly sensitive issue in the environmental field. Japan has long been put on the defensive in the public for its whaling activities. Against that background, Japan was very likely more sensitive to the fairness of procedural decisions of the Court. Although under the Rules of Court, it is up to the Court to decide whether there shall be a second round of written pleadings, Japan reacted strongly to the Court's decision not to have a second round. Linguistically it is understandable that Japan might have felt more confident with written arguments than oral. A second round would have provided it with another opportunity to strengthen its position. However, Japan, as the respondent State, had the last words during the written phase. It should have taken that into consideration before it raised its request.

Secondly, Japan was displeased with New Zealand's intervention. Even though New Zealand intervened as a non-party under Article 63 of the Statute for the purpose of giving its own interpretation to the Whaling Convention, because of its like-mindedness with the Applicant on whaling, its intervention reinforced Japan's impression that the case was culturally biased.

Moreover, as the case involved substantial scientific evidence, cross-examination of the experts appointed by the Parties proved crucial.¹⁶ Although technically the examination was conducted by its foreign counsels who are skilful with the procedure, culturally Japan was apparently less familiar with the technique of cross-examination than the Applicant, which may amplify its scepticism towards the judicial process.

Lastly, Japan's decision to exclude future legal actions on whaling from the jurisdiction of the Court not just shows its reservation to the decision of the Court in the *Whaling* case, but also reveals a deep-rooted mentality towards lawsuits that Asian culture

¹⁶ President Peter Tomka stated that "it is a procedure that is particularly useful in cases with major scientific content, or where the factual background is a particularly complex one." Speech by H.E. Judge Peter Tomka, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 2014, UN doc. A/69/PV.33.

generally shares; namely, try to avoid confrontation in the courts. While the English saying goes, if you cannot beat it, join it, Asian culture teaches us that, if you cannot beat it, leave it or avoid it.¹⁷

Of course, Japan is not the only country that withdraws its acceptance of the Court's jurisdiction after it loses a case. The *Whaling* case, nevertheless, presents a good example demonstrating a clash of cultural differences in the judicial settlement of international disputes. Missing its cultural element, one would not be able to understand why third-party settlement cannot be deemed a purely technical process.

As on the international plane, cultural element equally influences State practice of international law at the national level. In 2011 during the summer courses of the Hague Academy of International Law, at the end of my special course on Chinese Contemporary Perspectives on International Law, one student asked me that as all States should supposedly apply international law equally, how come there could be different national perspectives. One commentator on my Hague Lectures further commented that my Lectures did not give much discussions on the cultural aspect of China's international law theory and practice. Perhaps this is a good opportunity to address these observations.

It is true that as one legal system, international law should apply in the same way to all States. That does not mean, however, States would take the same positions on all international law issues, or they would adopt the same attitude towards the legal order. Otherwise, how can we explain that the composition of the ICJ is required under the Statute to represent the main forms of civilization and the principal legal systems of the world, when the Judges are expected to serve in their individual capacity, independent of their governments? How can we explain the legal debates among States in the U.N. Human Rights Committee, on the issue of legality of the use and threat of use of nuclear weapons, or with regard to sovereign immunity of a State and its property in relation to war crimes?

We are constantly being reminded that international law is more than a given body of rules and obligations. As is pointed by Oscar Schachter, international law involves purposive activities undertaken by governments, directed to a variety of social ends. "These activities are conditioned and limited by constraints on the voluntary choices of the government — constraints related to factors of power, resources, ideology, felt needs. Underlying these factors are the less perceptible societal conditions, especially those that

¹⁷ The Chinese version goes: “惹不起，躲得起；打不过，躲得过。 *re bu qi, duo de qi; da bu guo, duo de guo.*” In ancient China, there is another proverb saying: “Avoid litigation; for once you resort to law there is nothing but trouble.”

mark historical transformations....”¹⁸ In other words, States’ positions on international law are affected by various factors that go deep into international relations, well beyond the body of law. For any State, its cultural tradition and environment that often provides the social context for its legal system, likewise, influences its decisions on international legal issues.

China’s case is very special and unique. China is the largest developing country, a permanent member of the Security Council, now the second largest economy in the world. And yet, the People’s Republic of China was kept outside the international legal system for nearly 30 years during the Cold War period. Its legitimate seat in the U.N. was not restored until 1971; and China did not take full part in the work of the Sixth Committee (Legal Committee of the U.N. General Assembly) and other U.N. legal organs until 1978, when its internal Cultural Revolution was over. Today even when China is a fully-fledged participant in the field of international law, its action is still often perceived and portrayed as “breakaway” from the existing legal order. Take a recent case for example, its initiative in setting up the Asian Infrastructure Investment Bank (AIIB) was regarded as a defiance or rebellion to the existing international financial institutions, the World Bank and the International Monetary Fund. It is necessary to bridge some cultural differences here.

The Chinese is a peace-loving people. Deeply-rooted in its tradition and culture are the values of peace and harmony. The ancient philosophies such as Confucianism, Taoism, Mohism and Legalism all advocated peace and the virtue of mutual respect.¹⁹ Among them, Confucianism has the most enduring influence on the Chinese society till this date. One of the essential values of Confucianism is benevolence and mutual respect as a guideline to treatment of civilizations.

From its inception, the Government of the People’s Republic of China made clear that it adhered to a foreign policy of peace, respecting the basic norms of international relations as enshrined in the Purposes and Principles of the U.N. Charter. As I discussed in the Hague Lectures, in 1954 China, together with India and Myanmar, formulated the Five Principles of Peaceful Coexistence, namely, mutual respect for sovereignty and territorial integrity, mutual non-aggression, mutual non-interference in internal affairs, equality and mutual benefit, and peaceful coexistence, which were subsequently embraced in the “Bandung Ten Principles” adopted at the first Asian-African Conference held at Bandung,

¹⁸ Oscar Schachter, “International Law in Theory and Practice: General Course in Public International Law”, *Recueil des cours*, Vol. 178, 1982, p. 23.

¹⁹ “Virtue of mutual respect” in Chinese: “礼尚往来” (*li shang wang lai*).

Indonesia in 1955. Notwithstanding the political changes in the Cold War and afterwards, China has ever since consistently applied these Five Principles in its international relations with all States, East and West, North and South. It is well-known that China adamantly advocates full respect for the principles of sovereignty and non-interference in internal affairs.

For the Chinese, the period since the first Opium War in 1840 till the founding of the new People's Republic was the most miserable and humiliating time in its modern history. As I pointed out in my Hague Lectures, China was virtually deprived of all the basic attributes of a sovereign State. Largely due to that one hundred years' historical experience (1840-1949), China is very sensitive to issues bearing on its sovereignty, or interference in its internal affairs. Confucius' *shu dao*, forgiveness, is often termed in the following phrase: "do not do to others what you do not want others to do to you."²⁰ For China, it means it would not allow itself to go through the same experience again and at the same time, it would not do the same things to other countries. The Five Principles underscore that position. I will not dwell on the idea here as I have given a sufficient account on the topic in my Hague Lectures.

The values of benevolence and mutual respect in the Chinese culture are also manifested in China's foreign policy of good-neighbourliness. As the Chinese saying goes, a good neighbour is better than a distant relative.²¹ Let alone, these neighbours will never move away. Frankly speaking, when the People's Republic of China was established, it was confronted with very difficult and complicated boundary matters. The boundaries were either traditional borders, actual control lines or governed by old treaties with unclear terms. Boundary disputes were inevitable. While greatly dictated by domestic politics, boundary matters also involved world geopolitics. Despite some border armed conflicts in the 1960s and 1970s, step by step, China settled its boundary disputes with almost all its land neighbours. Its cultural pragmatism is best illustrated by its position enunciated by Premier Zhou Enlai to the effect that China respected formal boundary treaties in accordance with established international norms, which, nevertheless, did not preclude the governments of two friendly countries from seeking equitable and reasonable solutions to border issues through peaceful negotiations.

²⁰ In Chinese: "己所不欲，勿施于人，是恕道。" (*ji suo bu yu, wu shi yu ren, shi shu dao.*) The philosophy "an eye for an eye, a tooth for a tooth" is called "straightway". (In Chinese: "以牙还牙，以血还血，是直道。" *yi ya huan ya, yi xue huan xue, shi zhi dao.*)

²¹ In Chinese: "远亲不如近邻。" (*yuan qin bu ru jin lin*)

This good-neighbourliness policy is carried on to its relations with the Northeast and Southeast Asian countries. At the moment, there are two major issues with China that have given rise to a lot of tension in the region, one is the history issue with Japan, the other is the maritime disputes with the adjacent coastal claimant States. In the long run, I am quite confident that with Asian wisdom and vision, like we did with our land neighbours, these countries can and will ultimately sit down to negotiate with a view to finding reasonable and equitable solutions to their disputes. At the moment, the questions are much more complicated than they look. A Chinese saying can best describe the situation, namely, 树欲静而风不止 (*shu yu jing er feng bu zhi*). In English, it reads, the trees wish to stand still, but the wind keeps blowing. It means that stability does not depend on one side's wish. We need patience and perseverance. As I discussed in the Hague Lectures, to resolve such complicated matters, the best way is to start with easy matters and gradually build up mutual confidence and trust. Little by little, we can approach the more difficult matters, paving the way for a final solution. This is what we call "when water flows, a channel is formed", or "when conditions are ripe, success will come", in Chinese, "水到渠成 (*shui dao qu cheng*)".

Currently a lot of attention has been attached to the third-party settlement. As a Judge, I am not going to discuss anything relating to a particular case. What I wish to point out on a general basis is that, albeit a political decision, the choice of means of dispute settlement is in essence a matter of culture. That is to say, what the parties envisage from a mechanism, what they understand about the institution of third-party settlement, and how they appreciate its process and evaluate the final outcome, all much depend on their understanding of the legal culture that the dispute settlement mechanism embraces.

ASEAN's dispute settlement mechanisms are generally conciliatory and consultative in nature. African Court on Human and People's Rights does not design its procedures in the same way as those of the European Court of Justice and the European Court of Human Rights. The legal culture in these three continents varies greatly. It is hard to pass on value judgment on each one of them as to which is the best choice, or which is better than the other. These mechanisms have evolved in their particular cultural context.

In Chinese culture and tradition, litigation in courts was not considered positive. Dispute settlement in China always militated in favour of non-adversarial methods,

because according to Confucius' teaching,²² in order to maintain social harmony, the optimal resolution of most disputes should be achieved not by the exercise of legal power but by moral persuasion. Enforcement by outside force would only induce compliance in the external behaviour of individuals, but it could not transform the inner character of members of the society.²³ In modern times, although litigation in courts is no longer regarded as negative to maintaining harmonious relations, it is still in most cases taken as the last resort for the dispute settlement.

In international relations, China has invariably resorted to negotiations for the settlement of disputes. Its lack of confidence and trust in the third-party settlement can be attributed, in my view, to three factors. First of all, on matters that bear on national sovereignty and territorial integrity, China firmly believes that the best way to handle a dispute is to conduct direct talks between the countries concerned, because the parties are in the best position to understand the historical background, the factual situation, and the overlapping claims of the parties. Whatever out of the negotiations is predictable. It is also believed that during the negotiations both sides must take into consideration the positions of the other party and be ready to compromise. This call for mutual understanding and mutual accommodation was long reflected in the ancient Chinese culture, i.e., Confucian philosophy of *li* (rituals) and *ren* (concession or yielding); namely, to settle disputes through persuasion and concession. This attitude advocated by China has already proved effective and fruitful in resolving the land boundary disputes with its neighbours.

Secondly, China's attitude towards third-party settlement also relates to its historical experience and its memory of international law as practiced by colonial powers against it in early days. Moreover, after 1949 for several decades the People's Republic of China was not involved in the development of international law. Politically and ideologically, it remains sceptical about the impartiality and fairness of the third-party settlement mechanisms.

²² The core of Confucianism is composed of the following concepts: harmony (和为贵, *he wei gui*); moderation in everything (middle way) (中庸, *zhong yong*); concession or yielding (忍让, *ren rang*); and avoidance of litigation (息诉, *xi su*). Despite the ideological differences, all major schools of traditional Chinese philosophies shared one common theme — the pursuit of harmony, which is considered to be paramount to maintaining social stability. Different schools of philosophy propose divergent ways to eliminate disputes: Confucianism by way of moral persuasion through *li* (礼, rituals); Legalists deterred people from having disputes by punishment; and Taoism by self-restraints and inactiveness. Thus, for the common goal of harmony, litigation was the last resort because it signified the breakdown of social harmony. Kun Fan, *Arbitration in China: A Legal and Cultural Analysis*, Hart Publishing, 2013, p. 196.

²³ *The Analects of Confucius*: "Lead them by political maneuvers, restrain them with punishments: the people will become cunning and shameless. Lead them by virtue, restrain them with ritual: they will develop a sense of shame and sense of participation." See Kun Fan, *Arbitration in China, A Legal and Cultural Analysis*, Hart Publishing, 2013, p. 194.

The last factor is technical. So far China does not have much practical experience with the third-party settlement. Things are improving in the trade dispute settlement within WTO and commercial arbitrations, but not yet in the field of public international law. Cultural elements such as language and knowledge of the legal culture of international courts, are not negligible factors for confidence-building.

Finally, I would like to briefly discuss the cultural element in the fields of human rights with regard to China.

On human rights, we have to make it clear at the beginning that there are certain international standards of fundamental human rights and freedoms that any nation, whatever culture and tradition it has, must observe. Any cultural discourse cannot override such standards.

In my Hague Lectures, I started the chapter on human rights with the remark that as part of social development, human rights progress is a long process. Individual rights and freedoms cannot be substantiated without particular social conditions, nor can they be taken out of social context for examination. Human rights and law are the products of historical development. In hindsight, China has made tremendous progress in its social development, greatly improving the well-being of its people, including their civil and political rights, particularly in the past 35 years. Internationally, there are basically three issues that hinder effective dialogues on human rights between China and the West: (1) relationship between political system and human rights (whether only a certain kind of political system can guarantee human rights?); (2) relationship between civil and political rights and economic and social rights (whether there is a sequence or priority in human rights promotion?); and (3) relationship between individual rights and collective social interests (how to coordinate the two?).

This is not the place to specifically deal with human rights issues, but I wonder how many of you can tell what it really means for the human rights cause by taking hundreds of millions of people out of poverty and providing them with food and shelter; what it really means for the human rights cause to provide 1.3 billion people with basic health care and education.

On the social model of development, I would like to invoke a Chinese proverb, which was derived from an ancient book in the Spring and Autumn period (770-476 BC). The story goes that in the Southeast of China, there is a river called Huai River. Peasants find that orange trees on the southern bank of the River bear very sweet and tasty oranges, but if such trees are planted on the northern bank, they would bear a kind of fruit which

look like oranges but taste bitter and sour, which peasants call *zhi*. At first they could not understand it, because the trees look the same with the same leaves and branches. Finally they discover that because the water, soil and climate on the northern bank are different from those on the southern side of the River, the fruit from the trees, as a result, change their flavour and taste, albeit still looking like orange.²⁴ So there comes the proverb 南橘北枳 (*nan ju bei zhi*), literal translation: southern orange, northern *zhi*, or orange changes with the climate. This proverb, although over 2000 years old, is still often invoked in our daily life, teaching us that when introducing something new to a place, it is always important to see whether it fits into the local conditions. This is also true for human rights efforts. The Chinese tend to use the term “Chinese characteristics” to indicate that every policy must suit specific circumstances and situations of the country. This is essential for such a huge country as China.

In the past three decades, we have witnessed a number of democracy movements, in the Middle East, Africa, and Eastern Europe. Some of them proved quite successful, while some others were quite turbulent. One could observe that in many a case, a good model of democracy in one country, once “transplanted” to another country, quickly changed its flavour. Instead of advancing democracy, it led to social chaos, corruption, and even armed conflicts. These are hard lessons.

As the largest developing country, China will steadfastly continue to promote its human rights cause in line with its socioeconomic development. Of course, it welcomes dialogues and exchange of views with other countries so that it can learn from outside. It is in our culture to be modest and always learn from others.²⁵

In preparing this lecture, I have come across many recent writings on law and culture, or law as culture. General endorsement of cultural diversity within and across national boundaries manifests a changing world, a growing sense of interconnectivity as well as self-identity, either as a State, as a people, as an entity, or as an individual. Cultural element, from a blurring notion, is gradually becoming a significant dimension of international legal studies. The direction of such studies should ultimately lead to more mutual understanding among, and deeper respect for, different cultures and peoples. Only on that basis, can we proceed to meaningful global governance.

²⁴ The original story is recorded in 《晏子春秋·内篇杂下》(*Tales of Yanzi: Nei Pian Za Xia*).

²⁵ According to Confucius' teaching, “be modest and always learn from others.”(三人行，必有我师。*san ren xing, bi you wo shi*)