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China's Approaches to International Law since the Opium War

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Abstract

International law is an amalgam of the past, present, and future. The past is important in itself not only because the vast majority of rules and principles of international law have come into being through decades, if not centuries, of deviation, crystallization and consolidation, but also because the past, and one's perspectives of the past, underlie, inform and explain a state's perspectives of a particular order or particular norms or values, and its approaches to the perspectives and actions of other states. The importance of understanding China's historical approaches to international law cannot be understated. China's interactions with international law began to take place in the context of its interactions with Western powers that culminated in the Opium War. This article then examines China's approaches to international law during its republican, communist, and contemporary socialist-market eras.

Key words

approach to international law; China; imperialism; international history; Opium War

1. Introduction

International law is an amalgam of the past, present, and future. The vicissitudes of international relations and our desires for progressive development of international law compel us to focus on the present upon which future may be built, while the past is rationalized, distorted, or simply forgotten. The past is important not only because the vast majority of rules, principles, and norms of international law, including those codified in treaties, have come into being through decades, if not centuries, of deviation, crystallization and consolidation, but also because the past, and one's perspectives of the past, underlie, inform and explain a state's perspectives of a particular order or particular norms or values and its approaches to the perspectives and actions of other states. As Avery Goldstein maintains,

> [H]istory, especially the interpretation of history, affects every country's contemporary interaction with the outside world. History not only bequeaths some of the substantive

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> issues on the foreign policy agenda … It also affects foreign policy decision-making when leaders draw lessons from past experience or invoke analogical reasoning that compares the country's current circumstances to those it faced before.[1]

Progressive development of international law does not always mean that change to longstanding principles of international law must ensue; in appropriate cases, maintenance of the stability and integrity of such principles represents the progressiveness one should desire.

In ignoring or distorting the historiography of international law, past mistakes are revived only to masquerade in different clothing. For instance, the 'standard of civilization', a defining factor in international law that justified colonialism, remains in important international legal sources[2] and has metamorphosed into contemporary discourses of human rights, democracy and self-determination, which many argue should be enforced through humanitarian intervention akin to the *mission civilisatrice* two centuries ago. Susan Marks has noted that

> when we treat international law as a redemptive force that could save the world if only it were properly respected and enforced, we obscure the possibility that international legal norms may themselves have contributed to creating or sustaining the ills from which we are now to be saved. We also mischaracterize the processes of emancipatory change as redemption or deliverance. And we weaken our capacity to criticize international law, and make it more useful to those by whom liberatory processes are actually carried forward.[3]

In consequence, not only are discourses of human rights, democracy and self-determination rejected by many non-Western states and their peoples, but also are the conceptual validity, normative applicability, and empirical implementation of human rights, democracy, and self-determination questioned and manipulated, and international peace and security submerged in murky waters.

Mikhaïl Xifaras stresses that

> the justification of international law must take responsibility for the historical meaning of international law for non-Western peoples, and not simply content itself with affirming its own legitimacy in terms of its conformity with principles that have their origins in Western thought.[4]

China's historical experience with international law illuminates the role of international law in legitimating Western powers' oppression of non-Western states,

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1 A. Goldstein, 'Parsing China's Rise: International Circumstances and National Attributes', in R. S. Ross and F. Zhu (eds.), *China's Ascent: Power, Security, and the Future of International Politics* (2008), 55, 74–5.

2 The most notable example is embodied in Art. 38(1)(c) of the Statute of the International Court of Justice, which states that '[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply the general principles of law recognised by civilised nations'.

3 S. Marks, 'State-Centrism, International Law, and the Anxieties of Influence', (2006) 19 LJIL 339, 347.

4 M. Xifaras, 'Commentaire sur "Les Ambivalences Imperials" de Nathaniel Berman', in E. Jouannet and H. Ruiz-Fabri (eds.), *Impérialisme et Droit International en Europe et aux Etats-Unis: Mondialisation et Fragmentation du Droit: Recherches sur un Humanisme Juridique Critique* (2007), 183, as quoted in E. Jouannet, 'Universalism and Imperialism: The True–False Paradox of International Law?', (2007) 18 EJIL 379, 406.

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peoples, and cultures, including a state and civilization as old as China, during the nineteenth and early twentieth centuries; how China's adaptation to Western international law faced resistance from within and externally; how China has used international law to protect and advance its state sovereignty and national interests since the 1860s; and how China's simultaneous resistance to and use of international law have contributed to the development of international law.

This article explores how the Opium War (1839–42) transformed China's approaches during the last century of the Qing dynasty (1644–1912) to international law and international legal order. While China signed its first treaty with a Western power, the Treaty of Nerchinsk with Russia, in 1689, to be followed by the Treaty of Kiakhta in 1727 also with Russia, both with equal status and reciprocal terms, '[n]o formal procedural aspects of ... international law as it was practised in Europe at this time were mentioned in these treaties.'[5] China's interactions with international law began to take place in the context of its increasing contacts with Western powers that culminated in the Opium War and the signing of the Treaty of Nanjing in 1842. The Opium War is a useful starting point not only because '[w]hether Chinese or Western, radical or conservative, scholars have invariably taken it as a starting point in the study of modern China',[6] but also because the concept of an international society to be regulated by international law emerged during the nineteenth century. China's defeats in the Opium War and subsequent military conflicts with Western powers and Japan fundamentally shaped its perspectives of international law ever since, and its approaches to international law during the dying years of its last imperial dynasty were a harbinger of its contemporary use of international law to defend its state sovereignty and define and attain its political objectives. This article then examines the evolution of China's approaches to international law during the republican period (1912–49); the period from 1949 to 24 October 1971 during which the People's Republic of China ('PRC') government was not recognized by the United Nations and other states as the representative government of China; the period between 25 October 1971 and 1984 when the PRC government replaced the authorities on Taiwan as the representative government of China in the United Nations and began to adapt to international legal order; and since 1984 when China began to undergo extensive political and economic reforms, accept law as a basis of governance and reconcile its laws, policies, and practices with international legal norms and standards, and embrace the role of international law in the conduct of international relations as well as the roles it may play in shaping the development of international law and the workings of international organizations.

5 R. Svarverud, 'Re-Constructing East Asia: International Law as Inter-Cultural Process in Late Qing China', (2011) 12 *Inter-Asia Cultural Studies* 306, 310.

6 H.-P. Chang, *Commissioner Lin and the Opium War* (1970), ix.

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2. International law in Qing China since the Opium War[7]

The Qing dynasty was not a Han Chinese dynasty but one ruled by Manchus, a Tungusic people from Manchuria that is now one of the 55 officially recognized

7 The starting premise, when it comes to China's historical interactions with international law, invariably relates to how China, self-identified as the Middle Kingdom, did not possess any conception of law governing relations among states. In his 1990 Hague Academy of International Law Lectures, Wang Tieya noted that international law, in the sense of law among nations, in fact had been operative in ancient China during the Spring and Autumn (BC 722–476) and Warring States periods (BC 476–221) before China became a unified state under the Qin dynasty in BC 221: 'International Law in China: Historical and Contemporary Perspectives', (1990–II) 221 *Recueil des Cours* 195, 205–13; see also Y. Zhang, 'System, Empire and State in Chinese International Relations', (2001) 27 *Review of International Studies* 43. Adherents to the English School of international relations rely on ancient China during the two periods and its resemblance to the modern state-based international system to support their argument that an international society existed since ancient times: see X. Zhang, 'China in the Conception of International Society: The English School's Engagements with China', (2011) 37 *Review of International Studies* 763, 765–8.

China for millennia was the ruling centre of an international system that J. K. Fairbank and his colleagues, in *The Chinese World Order: Traditional China's Foreign Relations* (1973), call 'the Chinese world order', which A. B. Bozeman finds to have 'proved to be more enduring and successful than the comparable order of any other historical nation': *Politics and Culture in International History* (1960), 143. While the door to the 'family of nations' remained closed to China even after the First World War, imperial China embraced inclusion of any 'barbarians' into the Chinese world order so long as they acknowledged the superiority of Chinese civilization and assimilated themselves into Chinese culture. The Westphalian notion of sovereign equality of states was alien to the Chinese world order politically and culturally, but it was the clash of empires, not of civilizations as S. P. Huntington has argued ('The Clash of Civilizations?', (Summer 1993) 72 *Foreign Affairs* 22; *The Clash of Civilizations and the Remaking of World Order* (1996)), between China and Western powers that rendered military conflicts inevitable: see A. J. Bacevich, *American Empire: The Realities and Consequences of US Diplomacy* (2002); U. Beck and E. Grande, *Cosmopolitan Europe* (2007); L. Chen, 'Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter', (2011) 13 *Journal of the History of International Law* 75; H. C. d'Encausse and M. Rodinson, *Islam and the Russian Empire: Reform and Revolution in Central Asia* (2009); N. Ferguson, *Colossus: The Price of America's Empire* (2004); C. A. Ford, *The Mind of Empire: China's History and Modern Foreign Relations* (2010); H. James, *The Roman Predicament: How the Rules of International Order Create the Politics of Empire* (2006); D. Lieven, *Empire: The Russian Empire and its Rivals* (2002); L. H. Liu, 'The Desire for the Sovereign and the Logic of Reciprocity in the Family of Nations', (1999) 29:4 *Diacritics* 150; L. H. Liu, *The Clash of Empires: The Invention of China in Modern World Making* (2004); C. S. Maier, *Among Empires: American Ascendancy and its Predecessors* (2006); A. Peyrefitte, *The Immobile Empire* (1992); E. H. Pritchard, *The Crucial Years of Early Anglo-Chinese Relations, 1750–1800* (2000); T. Ruskola, 'Raping Like a State', (2010) 57 *UCLA Law Review* 1477; R. Terrill, *The New Chinese Empire* (2003); J. Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (2006). As Zielonka explains, '[t]he study of empire demands a focus on the scope and structure of governance, the nature of borders, centre–periphery relations and respective civilising missions. Studies of hegemony take power seriously, but are less interested in the actors, their individual features and complex relationships. Studies of empire, on the other hand, show that interdependence between periphery and centre often works to the former's advantage (regardless of all material or normative asymmetries). Peripheries are also able to drag the centre into their parochial conflicts. Besides, empires often try to "civilise" and "institutionalise" their peripheries, rather than simply attempting to conquer or exploit them, as is sometimes assumed by scholars of hegemony': 'Empires and the Modern International System', (2012) 17 *Geopolitics* 502, 506. *Contra*, see J. Rosenau, 'The Illusion of Power and Empire', (2005) 44 *History and Theory* 73.

Ruskola, ibid., 1487, maintains that '[f]rom this perspective, China's historic status in international law is especially ironic. Because it conceptualized political community in terms of kinship, it was ultimately excluded from the Family of Nations. Evidently, the real ground for China's exclusion was not that it made a primitive category mistake – confusing the logics of politics and kinship – but the simple fact that it belonged to the *wrong* political family' (emphasis in original). The Chinese world order was one in fact once considered by European powers to be 'a political superior': ibid., 1503. As E. Hayot puts it, 'modern Europe encounters China as the first contemporaneous *civilizational* other it knows, and not as a "tribe" or nation whose comparative lack of culture, technology or economic development mitigated the ideological threat it posed to progressivist, Eurocentric models of world history': *The Hypothetical Mandarin: Sympathy, Modernity, and Chinese Pain* (2009), 10 (emphasis in original). Similarly, J. A. Hobson opined that Asia was the 'great test of Western imperialism' because Asian civilizations, as opposed to Africa that was more easily colonized as 'savages or children', were 'as complex as our own, more ancient and more firmly rooted by enduring custom': *Imperialism: A Study* (1902), 182.

minority nationalities in China, whom the Ming dynasty (1368–1644) sought to control and later defend China from. Soon after taking control of China proper in 1644, in order to consolidate its control over Han Chinese, the Qing court imposed its own customs and styles on pain of death. However, it also adopted Chinese power structures and cultural norms – in particular the emperor's position and mandate as Son of Heaven, the omnipotent Confucian principle of filial piety to legitimate and reinforce its rule, and the study of Chinese classics as the only route of entry to bureaucracy. John Fairbank explains that Chinese culture was Sinocentric and would not accommodate 'barbarian' ideas or institutions, while the Chinese power structure was synarchic, in which 'barbarians' – Manchus during the Qing period and Mongols (now another official minority nationality) during the Yuan dynasty (1279–1368) – could partake.[8] Mongol and Manchu reigns thus 'did not create a marked break or change in the continuity and unity of Chinese culture and civilization'[9] but proved its longevity.[10] According to Li Zhaojie, 'the Confucian view conceived the world as *being*, which is by definition different from *becoming*. Process, change, competition, and progress were therefore all concepts unnatural to Confucianism'.[11] Resistance to foreign ideas posed the greatest hindrance to Qing China's relations with Western powers and its receptiveness to international law. Like all Chinese dynasties preceding it, the Qing dynasty enjoyed its periods of affluence and decline, with its decline exacerbated by its reluctant yet increasing trade with Western powers that the latter eventually compelled by force.

Nevertheless, claims about imperial China's isolation or self-isolation from other states are untrue,[12] as European diplomatic and religious missions had been received by China's imperial court since the sixteenth century.[13] From an economic standpoint, China stood as the centre of the largest trading system in the world through its tribute system;[14] Kenneth Pomeranz argues that 'eighteenth-century China (and perhaps Japan as well) actually came closer to resembling the neoclassical ideal of a market economy than did Western Europe'.[15] The real discord between imperial China and Western powers lay in the former's reluctance to purchase Western goods and its insistence on the latter's observance of diplomatic protocols in their interactions with the imperial court that were standard in the Chinese world order.

8 J. K. Fairbank, 'The Early Treaty System in the Chinese World Order', in Fairbank, ibid., 257, 273.
9 Zhang (2001), *supra* note 7, 56.
10 M. Mancall, 'The Persistence of Tradition in Chinese Foreign Policy', (1963) 349 *Annals of the American Academy of Political and Social Science* 14, 17. Ch'ien Mu argues that unlike dynasties ruled by Han Chinese when power concentrated among scholars, during the Yuan and Qing dynasties power was invested primarily among the Mongols and the Manchus, respectively, as tribal groups. However, the Qing court did not openly reject scholars whose apparent centrality in the bureaucracy was still preserved. The traditional examination system was retained as 'a mere propaganda device' and 'a special favour to those Chinese who sided with the alien regime': *Traditional Government in Imperial China: A Critical Analysis* (trans. C. Hsüeh and G. O. Totten) (1982), 126–35.
11 Z. Li, 'Traditional Chinese World Order', (2002) 1 *Chinese Journal of International Law* 20, 39 (emphasis in original).
12 See, generally, V. Hansen, *The Open Empire: A History of China to 1600* (2000); J. Waley-Cohen, *The Sextants of Beijing: Global Currents in Chinese History* (1999).
13 See, e.g., J. E. Wills, Jr., *Embassies and Illusions: Dutch and Portuguese Envoys to K'ang-Hsi* (1984).
14 A. G. Frank, *ReORIENT: Global Economy in the Asian Age* (1998), 126.
15 K. Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (2000), 70.

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Seeing international society as an extension of Chinese society that was hierarchical, imperial China adopted the tribute system in its relations with neighbouring states (and Western states), and the frequency of a state's ability to pay tribute to China, as China would permit, represented the degree of the tribute state's assimilation to Chinese culture and reflected the position of the tribute state in the Chinese world order. Western powers abhorred the tribute system for violating their Westphalian conception of world order based on the principles of state sovereignty and sovereign equality of states, and 'regarded it as a hierarchical regional order and an abnormal case of historical states systems'.[16] While acknowledging the tribute system as a regional system, Adam Watson accentuated its 'hegemonial or imperial' elements, with China as 'suzerain' exercising 'direct authority over the Heartland; and around this empire extended a periphery of locally autonomous realms that acknowledged the suzerain's overlordship and paid his tribute.'[17]

Western powers misconstrued the culturally dictated tribute system as a mechanism by which imperial China subjugated other states to perpetual inferiority and submission. As Prasenjit Duara, John Kelly, and Martha Kaplan have noted, nation-states in the nineteenth century were essentially imperialist in character and their being equal, and equally sovereign, political units is a post-Second World War notion.[18] International law endured profound conceptual shifts during the nineteenth century in order that colonialism, and notions of the 'family of nations' and the 'standard of civilization', could be accommodated.[19] Randle Edwards argues that substantive equality, reciprocity, and territorial integrity were in fact observed by Qing China in its relations with tribute states, even if such relations still manifested a hierarchy in which China was unquestionably leader and protector.[20] The tribute system was adopted not only by imperial China vis-à-vis neighbouring states, but also by the latter *inter se*[21] and, as a marker of their own legitimacy, internally;[22]

16 Zhang (2011), *supra* note 7, 768. Ruskola, *supra* note 7, 1485, argues that '[i]n historical analysis, periodization is inevitable but never innocent. Evidently there is no single date that constitutes the objective point of origin of international law. Yet the choice of 1648 and the Treaty of Westphalia – like any other date – has vital political and ideological consequences. With a historical perspective focusing on 1648, the official story of international law becomes a history of the emergence of the liberal norm of sovereign equality among secular nation-states. This story is not necessarily untrue, but it is misleading insofar as it concerns only Europe. If we instead follow Carl Schmitt, for example, and date our account of modern international law from 1492 and Europe's "discovery" of the New World, the story changes significantly. From this perspective, the narrative becomes not simply one of increasing inclusion and equality *within* Europe, but also of violent exclusion of others *outside* Europe, on the basis of religious, civilizational, and racial difference' (emphasis in original; internal citations omitted). Ruskola, ibid., fn. 18, adds that 'it is important to note that, at a minimum, it is an exaggeration even as a story about Europe. For example, many of the aspects of modern international law that are attributed to the Peace of Westphalia did not in fact emerge even in Europe until later' (internal citation omitted).

17 A. Watson, *The Evolution of International Society: A Comparative Historical Analysis* (1992), 3.

18 P. Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (2003), 9 and 19; J. Kelly and M. Kaplan, *Represented Communities: Fiji and World Decolonization* (2001), 1–4.

19 Liu (2004), *supra* note 7.

20 R. Edwards, 'The Old Canton System of Foreign Trade', in V. H. Li (ed.), *Law and Politics in China's Foreign Trade* (1977), 360; R. Edwards, 'Imperial China's Border Control Law', (1987) 1 *Journal of Chinese Law* 33; R. Edwards, 'China's Practice of International Law – Patterns from the Past', in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994), 243.

21 Mancall, *supra* note 10, 19.

22 K. Herrick, 'The Merger of Two Systems: Chinese Adoption and Western Adaptation in the Formation of Modern International Law', (2005) 33 *Georgia Journal of International and Comparative Law* 685, 693. D. C. Kang

tribute states regarded the tribute system as akin to a 'universal kingship linked to a widely shared sense of participation in a high culture'.[23] Imperial China, seeing itself as the civilization that had no competitor, was indifferent to exporting its ideals and values, and 'allowed surrounding peoples and polities to contest, modify and adapt Chinese ideas to their own ends'.[24] Importantly, Zhang Yongjin and Barry Buzan point out

> as the Chinese conception of the world is civilizational, the tributary system is open to anyone who wishes to participate on terms defined largely by Imperial China. By implication, any participant can exercise agency to withdraw its participation, and this was not uncommon in practice … The tributary system, thus, has open access and is also inherently elastic.[25]

Instead of a means by which China subjugated other states to submission, the tribute system served the function of translating its moral authority into 'normative pacification' within the Chinese world order.[26] Tribute visits entailed a major burden on China's finances as the Qing court, having to be always benevolent and generous, had to provide gifts to tribute missions and defray their expenses. Larisa Zabrovskaia calculated that about one-thirteenth of Qing China's annual budget was spent on receiving tribute visits.[27]

Imperial China's interactions with Western powers, as early as the seventeenth century with Russia, and later the Netherlands, were modelled on the tribute system in order that basic Chinese cultural assumptions were not disturbed.[28] However, no compromise could be achieved between the Qing court and the British. Of the seventeen missions led by Western powers between 1655 and 1793, only the one from Great Britain led by Lord Macartney in 1792 refused to follow the Chinese

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observes that the three most Sinic states – Korea, Japan, and Assam (Vietnam) – 'were centrally administered bureaucratic systems based on the Chinese model. They developed complex bureaucratic structures and bear more than a "family resemblance" in their organization, cultures, and outlooks. This form of government, along with the calendar, language and writing system, bureaucracy, and education system, was derived from the Chinese experience, and the civil-service examination in these countries emphasized a knowledge of Chinese political philosophy, classics, and culture': *East Asia before the West: Five Centuries of Trade and Tribute* (2010), 33. Of the three Sinic States, Japan under the Tokugawa gradually withdrew from the Sino-centric tribute system and reproduced a Japanese-centric tribute system in which Japan sought to replace China as the virtuous and supreme civilization vis-à-vis its neighbours: see S. Suzuki, *Civilization and Empire: China and Japan's Encounter with European International Society* (2009).

23 B. I. Schwartz, 'The Chinese Perception of World Order: Past and Present', in Fairbank, *supra* note 7, 276, 277.

24 Kang, *supra* note 22, 25. Moreover, Y. Zhang and B. Buzan maintain, '[w]ithout social recognition or rejection, social acceptance or contestation, the ideas and practices of the Chinese world order and Chinese cultural assumptions of superiority would have no substantive social existence in East Asian international relations. They would play no significant structuring role in shaping the norms of legitimate and acceptable behaviour for, and social identity of, not just Imperial China, but, equally, other constituent states. Ideas, beliefs, norms and values central to the constitutional nature of Imperial China's own imagining become intersubjective to varying degrees (or not) among Imperial China and others only through a long and tumultuous historical and social process of assertion, imposition, contention, contestation, rejection, acquiescence and acceptance': 'The Tributary System as International Society in Theory and Practice', (2012) 5 *Chinese Journal of International Politics* 3, 16–17.

25 Zhang and Buzan, ibid., 19.

26 Zhang (2001), *supra* note 7, 53. See also R. B. Hall, 'Moral Authority as a Power Source', (1997) 51 *International Organization* 591.

27 L. V. Zabrovskaia, 'The Traditional Foreign Policy of the Qing Empire: How the Chinese Reacted to the Efforts of Europeans to Bring the Chinese into the Western System of International Relations', (1993) 6 *Journal of Historical Sociology* 351, 352–3.

28 Mancall, *supra* note 10, 20–1.

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ritual of kowtow, and his mission inevitably failed its aim.[29] While opium was the *casus belli* of China's first military conflict with a Western power, at the fundamental level it was the incongruity between the Chinese world order and Western powers' Westphalian vision of state sovereignty, and the clash of Chinese and Western empires, that a series of military conflicts ensued.

Immanuel Hsü notes that international law was referred to by Lin Tse-hsu, the Imperial Commissioner in charge of halting the opium trade in Canton, in his letter to Queen Victoria requesting that her subjects cease their trading of a noxious product in Chinese territory.[30] Although Hsü suggests that 'the initial effect of international law in China was a strengthening of Lin's determination to take a firm stand against the English',[31] Lin's letter made no mention of international law and was more a request that Great Britain proscribe its subjects bringing opium into China. Lin's letter was ignored (or perhaps not received), and the war that followed his open burning of opium ended with the Treaty of Nanjing under which China ceded Hong Kong Island to Great Britain in perpetuity and agreed to open five ports for trade. Similar to British conception of the First World War as 'the war to end all wars', the Chinese regarded the Treaty of Nanjing as the 'Treaty of Eternal Peace'.[32] Subsequently, China concluded the Treaty of the Bogue (1843) with Great Britain, the Treaty of Wanghia (1844) with the United States, and the Treaty of Whampoa (1844) with France that conferred the three states extraterritorial jurisdiction over their nationals accused of crimes committed in China. While later a cause of great resentment among the Chinese, concessions such as extraterritoriality[33] were made out of expediency and 'as an expression of the emperor's traditional benevolence toward all men from afar, regardless of their culture or nationality'.[34] Western powers justified their incursions into China's state sovereignty on the basis that China at the time did not consider state sovereignty to be an international legal principle.[35] Excluded from the terms of these treaties was permanent foreign diplomatic representation in the Chinese capital, something Western powers considered a matter of course in the conduct of international relations but which China could not countenance as it would directly challenge the central and superior place of the emperor and the tribute system,[36] and

29 J. K. Fairbank, *Trade and Diplomacy on the China Coast* (1953), 14. For a discussion of the historical event and the significance of kowtow in imperial China, see J. L. Hevia, *Cherishing Men from Afar: Qing Guest Ritual and the Macartney Embassy of 1793* (1995).

30 See I. C. Y. Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858–1880* (1960), 123–5.

31 Ibid., 125.

32 G. W. Gong, *The Standard of 'Civilization' in International Society* (1984), 144.

33 China had in fact extended foreign merchants a limited guarantee against private debts of Chinese merchants to compensate for their lack of access to officials in the Chinese capital or to diplomatic protection in China, with the proviso that a Westerner who violated Chinese law against another Westerner should be deported to and punished by his home country, while one who contravened Chinese law against a Chinese person was to be dealt with under Chinese law: Chen, *supra* note 7, 90–2.

34 Gong, *supra* note 32, 145.

35 Ruskola, *supra* note 7, 1531–2.

36 As Hsü has stated, '[t]he international relations of the Far East were regulated by a product of *li*, the tributary system. No foreign resident ministers were ever received in the Chinese capital, and no Chinese resident ministers were ever sent abroad. To demand a resident minister at the capital was to disrupt the tributary system externally and to pre-empt the concept of *li* internally, thereby shaking the very foundations of Chinese society. The question involved was not ritual formality, as it might appear on the surface, but the

which was agreed to only after the burning of the Summer Palace by Great Britain and France and China's signing of the Treaty of Tianjing with the two states in 1858.

Although the Qing court resented the treaties and foreign intrusions, it found solace in these treaties as they formalized and restrained Western powers' demands on China. As Mary Wright has noted,

> [B]efore 1860 the treaties had represented the minimum privileges that foreigners could expect – a line from which they could press forward in the further opening of China. During the 1860s the minimum became the maximum – a line behind which the Chinese government could find security.[37]

Yet, Fairbank observes, 'the early treaties in themselves did not remake the Chinese view of the world. To China they represented the supremacy of Western power, but this did not convey the Western idea of the supremacy of law. When Western diplomats extolled the sanctity of the treaties, their Chinese listeners could see the treaty documents as written compacts, but not the institution of law that underlay them.'[38] Li Hongzhang, an influential Chinese official and reformer at the time, noted that 'when China signed treaties with Britain and France before, it was under the threat of force. We were threatened and deceived. Those beyond the pale of the protection of international law often suffer huge losses from these treaties'.[39] China's signing of these treaties should not be construed as signifying its acceptance of international law, as treaty obligations operated between the parties only and were not to form part of the corpus of general international law, particularly when treaties that China entered into with foreign powers during the nineteenth century were all bilateral.[40]

Interest in international law in China increased only when *Zongli Yamen*, China's first foreign ministry, was established in 1861 and supported a translation of Wheaton's *Elements of International Law* by W. A. P. Martin, an American missionary, to be presented to the imperial court. In his memorial to the imperial court proposing the establishment of *Zongli Yamen*, Prince Gong stated thus:

> Your servants have surveyed the current situation, and believe that dealing with the barbarians is similar to that of how the kingdom of Shu dealt with the kingdom of Wu. The kingdoms of Shu and Wu were sworn enemies. However, when Zhuge Liang took control of policy, he sent ambassadors and established diplomatic relations and fought the kingdom of Wei together. But how could it forget about [its future plans] of swallowing up the kingdom of Wu? … The barbarians take advantage of our weak

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basic fabric of Chinese society and government. Therefore, the demand had to be resisted to the bitter end': *supra* note 30, 112.

37 M. C. Wright, *The Last Stand of Chinese Conservatism: The T'ung-Chih Restoration, 1862–1874* (1962), 243.

38 Fairbank, *supra* note 8, 262.

39 H. Li, 'Tuochou Qiuan Zhe', *Li Hongzhang Quanji: Zougao*, Vol. 3 (1998), 1541, as quoted in S. Suzuki, 'China's Perceptions of International Society in the Nineteenth Century: Learning More about Power Politics?', (2004) 28 *Asian Perspectives* 115, 132.

40 As J. L. Brierly has stated, '[t]he ordinary treaty by which two or more states enter into engagements with one another for some special object can very rarely be used even as evidence to establish the existence of a rule of general law; it is more probable that the very reason of the treaty was to create an obligation which would not have existed by the general law, or to exclude an existing rule which would otherwise have been applied. Still less can such treaties be regarded as actually creating law': *The Law of Nations* (6th ed. rev. Humphrey Waldock) (1963), 57.

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> position and try to control us. If we do not restrain our rage but continue the hostilities, we are liable to sudden catastrophe. On the other hand, if we overlook the way they have harmed us and do not make any preparations against them, then we shall be bequeathing a source of grief to our sons and grandsons. The ancients had a saying: 'resort to peace and friendship when temporarily obliged to do so; use war and defense as your actual policy'. This is truly a well-founded statement.[41]

As Gerrit Gong puts it, 'Wheaton's was not merely a commentary on international law; it was international law in the Chinese mind'.[42] Qing officials regarded Wheaton's *Elements of International Law* as 'a diplomatic reference book with which the Ch'ing officials might restrain "wild" foreign consuls and avoid diplomatic mistakes'.[43] The United States embassy in China was concerned that Martin's work might enable the Chinese to 'endeavour to apply [international law] to their intercourse with foreign countries' and appreciate 'how greatly the principle of extraterritoriality contained in their treaties modifies the usage in force between the Western and Christian powers'.[44] The *chargé d'affaires* of the French legation in China was incensed: 'Who is this man who is going to give the Chinese an insight into our European international law? Kill him – choke him off; he will make us endless trouble'.[45] When China through reference to international law successfully defended its territorial waters and demanded compensation after Prussia seized three Danish merchant ships as war prize in violation of China's neutrality, the utility of international law was underscored within the Qing court.[46] Wright observes that the Qing court in the 1860s 'accepted and succeeded in using the principles and practices of Western diplomacy and succeeded in using them as the main bulwark of Chinese sovereignty'.[47] The capacity of international law to change the behaviour of the Qing court should not be overestimated, however. As Gong observes, '[t]he Middle Kingdom's size, inertia, and adherence to its own standard of "civilization" made China slow to implement the European standard'.[48] Instead of conceiving and applying international law to change its normative world-view, the Qing court used it as a practical tool to protect China and Chinese interests from further foreign onslaught until an opportunity presented China to reassert itself.

Such normative rejection of international law was partaken in not only by China, but also by Western powers seeking to deny China a place, let alone an equal place, in international society. Western powers, supported by their legal theorists whose work justified colonialism and Western legal norms and principles, devised the notion that only they constituted the 'family of nations' from which China, alongside other ancient kingdoms such as Japan, Siam, and the Ottoman Empire, must be excluded on account of their inferior standards of civilization. The extension of international law (including the principle of state sovereignty), and of an international legal

41 As quoted in Suzuki, *supra* note 39, 135–6.
42 Gong, *supra* note 32, 154.
43 Hsü, *supra* note 30, 145.
44 Ibid., 136–7.
45 Ibid., 138.
46 Ibid., 132–4.
47 Wright, *supra* note 37, 231.
48 Gong, *supra* note 32, 146.

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order of which states were primary subjects and actors, beyond Europe into the Americas was possible only after 'completely recasting all non-Western political entities into the mould of modern European states, which in turn required the irreparable destruction of all traditional forms of polity in existence'.[49] The standard of civilization 'is not just a historical curiosity, but forms an important thread in the social, legal, and institutional fabric of contemporary international society'.[50] While Western powers and legal theorists conceded the existence of the Chinese state and Chinese civilization, they questioned whether the Chinese state, with its level of civilization, was capable of inclusion in the 'family of nations'; Lassa Oppenheim asserted that '[s]tatehood alone does not include membership of the Family of Nations'.[51] Even a recognized state may be denied membership in the 'family of nations', should its level of civilization be found by Western powers to be wanting. Oppenheim noted that

> [T]here are States in existence, although their number decreases gradually, which are not, or not fully, members of that family because their civilisation, if any, does not enable them and their subjects to act in conformity with the principles of International Law.[52]

Martti Koskenniemi argues that the ambiguity of 'civilization' was deliberate and 'an important aspect of its value':

> It was not part of some rigid classification but a shorthand for the qualities that international lawyers valued in their own societies, playing upon its opposites: the uncivilized, barbarian, and the savage. This provided a language for attitudes about social difference and for constructing one's own identity through what the historian Hayden White has called 'ostensive self-definition by negation' – a reflexive action pointing towards the practices of others and affirming that whatever we as Europeans are, at least we are not *like that*.[53]

Gong asserts that the 'standard of civilization', and with it the 'family of nations', was fundamentally racist,[54] and 'European military superiority left non-European societies no choice but to come to grips with the European standard of "civilization"'.[55] There was some dissension over whether an ancient non-European civilization, such as China or Japan,

> with an old and stable order of its own, with organised force at the back of it, and complex enough for the leading minds of that country to be able to appreciate the necessities of an order different from theirs … must be recognised as being civilised, though with other civilisation than ours.[56]

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49 Jouannet, *supra* note 4, 382.
50 Gong, *supra* note 32, 93.
51 L. Oppenheim, *International Law: A Treatise* (1905), 109.
52 Ibid., 108.
53 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), 103 (emphasis in original), quoting H. White, *Tropics of Discourse: Essays in Cultural Criticism* (1978), 151–2.
54 Gong, *supra* note 32, 50.
55 Ibid., 98.
56 J. Westlake, *Collected Papers of John Westlake* (ed. L. Oppenheim) (1914), 103, as quoted in Gong, ibid., 59.

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Worse still, 'extraterritoriality had been the main form of legal imperialism in both, indexing their intermediate status on the scale of civilizations. When the point of reference for China's racial identity began shifting to Africa, not only was there a growing preference for territorial forms of control such as leases, but the West was also increasingly willing to resort to pure violence'.[57]

Western legal theorists stressed the case of Japan, which was forced to enter into unequal treaties with Western powers and adopt Western legal, educational, and military models, and whose admission to the 'family of nations' took place only after it attained military victory over Russia in 1905, to show the racial heterogeneity of the 'family of nations'.[58] According to Oppenheim,

> Persia, Siam, China, Korea, Abyssinia and the like, are civilised, but their civilisation has not yet reached a point to enable them to carry out rules of international law … the example of Japan can show them that it depends entirely upon their own efforts to be received as full members into that family.[59]

However, the rejection of Japan's demand at the Paris Peace Conference in 1919, that the peace treaty with Germany contain a racial equality clause, demonstrated that modernization under Western terms, a military victory over a Western power, and an alliance with a Western power (Great Britain since 1905) did not suffice.[60] As 'the existence of a language of a standard still gave the appearance of fair treatment and regular administration to what was simply a conjectural policy',[61] Koskenniemi points out that 'the non-European community could never really become European, no matter how much it tried, as Turkey had always known and Japan was to find out to its bitter disappointment.'[62] The standard was impossible to meet, given that

> if there was no external standard for civilization, then everything depended on what Europeans approved. But the more eagerly the non-Europeans wished to prove that they played by European rules, the more suspect they became … In order to attain equality, the non-European community must accept Europe as its master – but to accept a master was proof that one was not equal.[63]

As China was considered incapable of appreciating and respecting international law, its capacity to conclude treaties, even unequal ones, with Western powers could not be reconciled other than by further distortion of international law and normative logic. Thus, Hall explained, Western powers

> acquire rights by way of protectorate over barbarous or imperfectly civilised countries, which [do] not amount to full rights of property or sovereignty, but which [are] good as against other civilised states, so as to prevent occupation or conquest by them, and so as to debar them from maintaining relations with the protected states or peoples.[64]

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57 Ruskola, *supra* note 7, 1525.
58 Gong, *supra* note 40, 164. Indeed, Japan proceeded to colonise Korea by asserting that Korea was uncivilized: see A. Dudden, *Japan's Colonization of Korea: Discourse and Power* (2005).
59 Oppenheim, *supra* note 51, 33–4.
60 See, e.g., P. G. Lauren, 'Human Rights in History: Diplomacy and Racial Equality at the Paris Peace Conference', (1978) 2 *Diplomatic History* 257; N. Shimazu, *Japan, Race, and Equality: The Racial Equality Proposal of 1919* (1998).
61 Koskenniemi, *supra* note 53, 135.
62 Ibid.
63 Ibid., 135–6.
64 W. E. Hall, *A Treatise on International Law* (8th ed. A. Pearce Higgins) (1924), 130.

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Hall further noted that uncivilized or semi-civilized states were 'subject to a law of which they [have] never heard, their relations to the protecting state [are] not therefore determined by international law'.[65] Protection that international law might afford, including respect for state sovereignty, would be unavailable to non-members of the 'family of nations', as international law applied vis-à-vis a non-member only in relations between the protecting state and other civilized states.

3. International law in republican China, 1912–1949

Imperial Chinese rule finally collapsed in 1912. William Kirby asserts that 'Chinese history during the era of the first Republic was defined and shaped – and must ultimately be interpreted – according to the nature of its foreign relations'.[66] By the end of the First World War, Sun Yat-sen, regarded as the founding father of modern China, declared that nationalism was only half-complete. Han Chinese must 'sacrifice the separate nationality, history, and identity that they are so proud of and merge in all sincerity with the Manchus, Mongols, Muslims, and Tibetans in one melting pot to create a new order of Chinese nationalism',[67] and the importance previously placed on the superiority of Chinese culture must now give way to China's national territory.[68] Kirby maintains that

> the amazing fact of the Republican era is that this space was not only redefined, as 'Chinese' and as the sacred soil of China, but also *defended* diplomatically to such a degree that the borders of the PRC today are essentially those of the Qing, minus only Outer Mongolia. The Qing fell but the empire remained. More accurately, the empire became the basis of the Chinese national state.[69]

By refusing to ratify the 1914 Simla Convention with Great Britain and Tibet (as it refused to recognize that Tibet was capable of entering into an international treaty on an equal basis as a state), by emphasizing its suzerainty over Tibet, by insisting that proclamations of the Dalai Lama were always subject to the approval of the Chinese government, and by extending the concept of suzerainty to Xinjiang even though Xinjiang had become 'a virtual territorial extension of the Soviet Union'[70] and performing a 'delicate surgical procedure'[71] to install its own regime in Xinjiang that John Garver argues 'saved Xinjiang for the Chinese nation',[72] China managed to retain Tibet and Xinjiang within the realm of China even though China at the time had no real power or authority within the two territories and was struggling

65 Ibid., 131.
66 W. C. Kirby, 'The Internationalization of China: Foreign Relations at Home and Abroad in the Republican Era', (1997) 150 *China Quarterly* 433, 433.
67 J. L. Wei, R. H. Myers, and D. G. Gillin (eds.), *Prescriptions for Saving China: Selected Writing of Sun Yat-sen* (1994), 225.
68 R. S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', (2005) 15 *Journal of World History* 445, 482.
69 Kirby, *supra* note 66, 437 (emphasis in original).
70 A. D. W. Forbes, *Warlords and Muslims in Chinese Central Asia: A Political History of Republican Sinkiang* (1986), 157.
71 M. Mancall, *China at the Center: 300 Years of Foreign Policy* (1984), 250.
72 J. W. Garver, *Chinese–Soviet Relations, 1935–1945* (1988), 178.

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within China proper from endless warlord conflicts, communist guerrilla attacks, and aggression from Japan.[73]

In respect of Manchuria, republican China showed not only its adept diplomacy but also its willingness to fight Russia in 1929 and Japan from 1931 to 1945.[74] It was Manchuria that prompted the United States to introduce a new rule of international law – Stimson Doctrine – under which recognition of a territory that came into being as a state through the threat or use of force would thenceforth be unlawful. Brook Gotberg argues that Manchuria served as the 'acid test' of the effectiveness and legitimacy of the League of Nations.[75] As China invoked Article XI of the Covenant of the League of Nations[76] (predecessor to Chapter VII of the United Nations Charter), Japan argued that as China was mired in warlord conflicts, it could not be ascribed the qualities of a state (similar to the present-day notion of a failed state) and thus could not invoke the Covenant.[77] When the League of Nations accepted the Stimson Doctrine as 'a statement of the course of action to which the parties to the Covenant and the Pact [of Paris of 1928] are legally obliged by their ratification of those instruments',[78] Japan withdrew from the League of Nations. Thus, while struggling from within and externally, China was able to utilize international law and the international legal order of the day not only to defend its state sovereignty de jure, but also to have substantive influence on the development of international law.

A discussion of republican China's approaches to international law cannot omit the demands that Japan imposed on China during the First World War and the complicity of other states. Japan, which had already been ceded Formosa (Taiwan) after its victory in the First Sino-Japanese War (1894–95), seized control of Shandong when the First World War broke out, on the premise that the province, over which Qing China had given concessions to Germany, was now enemy territory, despite the fact that both China and Japan were allies against Germany and China entered the war on condition that all concessions China had given Germany be returned or abrogated. Japan additionally made 'Twenty-One Demands' on China in 1915 that China agree, inter alia, to confirm Japan's acquisition of Shandong, to expand Japan's sphere of influence in southern Manchuria and eastern Inner Mongolia, and not to make any further coastal or island concessions to any other foreign power. The fact that the Treaty of Versailles of confirmed that Germany's rights over Shandong be

73 Kirby, *supra* note 66, 437–8.
74 Ibid., 438.
75 B. Gotberg, 'The End of Conquest: Consolidating Sovereign Equality', in W. Sandholtz and K. Stiles (eds.), *International Norms and Cycles of Change* (2008), 55, 65.
76 Article XI of the Covenant of the League of Nations stated that '(1) Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency shall arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council. (2) It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.'
77 Gotberg, *supra* note 75, 65–6.
78 Ibid., 69.

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transferred to Japan, together with Western powers' ignoral of China's request that all concessions Qing China had given foreign powers, especially extraterritoriality, be abrogated, led China to refuse to sign the treaty and set off the May Fourth Movement in 1919 that Zhidong Hao argues contributed to the Chinese communist movement and its eventual success in 1949.[79]

Apart from aggression from foreign powers and power struggles within China, the problem of extraterritoriality had yet to be resolved. Miles Lampson, the United Kingdom's representative to China, considered China to suffer from an 'extraterritoriality complex'.[80] Nineteen states secured extraterritoriality from Qing China.[81] While the focus of the 1921 Nine-Power Washington Conference was on naval disarmament, China's demand that the extraterritoriality that Qing China had conceded be abrogated was the subject of heated debate. The Chinese delegation presented a series of statements of principles, including that '[t]he Powers engage to respect and observe the territorial integrity and political and administrative independence of the Chinese Republic',[82] and that '[i]mmediately or as soon as circumstances will permit, existing limitations upon China's political, jurisdictional and administrative freedom of action are to be removed.'[83] On 10 December 1921, the Nine Powers adopted a resolution establishing a Commission on Extraterritoriality to explore if, how, and when China might progress towards attaining the requisite standard of civilization. The Powers agreed 'to give every assistance towards the attainment by the Chinese government of its expressed desire to reform its judicial system and to bring it into accord with that of Western nations', and indicated their willingness 'to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warranted them in so doing'.[84] Article I of the 1922 Nine-Power Treaty stated that

> The Contracting Powers, other than China, agree:
>
> (1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;
> (2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government;
> (3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China;
> (4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States.[85]

79 Z. Hao, 'May 4th and June 4th Compared: A Sociological Study of Chinese Social Movements', (1997) 6:14 *Journal of Contemporary China* 79.
80 As quoted in Kirby, *supra* note 66, 440.
81 H. S. Quigley, 'Extraterritoriality in China', (1926) 20 AJIL 46, 51.
82 As quoted ibid., 46.
83 As quoted ibid.
84 As quoted in W. W. Willoughby, *China at the Conference* (1922), 118–19.
85 Treaty between the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal, signed at Washington, D.C., on 6 February 1922, Art. I.

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When Germany in 1921 and Russia in 1924 had their extraterritorial jurisdiction in China abrogated by agreement, they did not find Chinese laws and courts objectionable, which Harold Scott Quigley described as a 'remarkable' development.[86]

When China negotiated revision of treaties with foreign powers that it considered to have been concluded by Qing China under duress, it invoked the doctrine of *rebus sic standibus*, which has since been affirmed as a rule of customary international law and incorporated in the Vienna Convention on the Law of Treaties.[87] On 16 April 1926, China sent a note to Belgium demanding that the treaty of amity, commerce and navigation Qing China concluded with Belgium in 1865 be revised and eventually terminated. In its note, China stated that

> [T]he aforesaid Treaty which still regulates the commercial relations between the two countries was concluded as long as 60 years ago. During the long period which has elapsed since its conclusion, so many momentous political and commercial changes have taken place in both countries, that, taking all circumstances into consideration, it is not only desirable, but also essential to the mutual interests of both parties concerned, to have the said Treaty revised and replaced by a new one to be mutually agreed upon.[88]

No agreement was reached and China issued a declaration unilaterally terminating the treaty on 6 November 1926.[89] In a note of 16 November 1926, China indicated that its termination was in accordance with Article 19 of the Covenant of the League of Nations and the doctrine of *rebus sic standibus*, and rejected Belgium's proposal that the matter be referred to the Permanent Court of International Justice on grounds that it was 'political in character and no nation can consent to the basic principle of equality between States being made the subject of a judicial inquiry'.[90] The matter was settled with the conclusion of a new treaty of 22 November 1928 that included a conditional abrogation of Belgium's rights of extraterritoriality, although Belgium rejected China's position that China was entitled to terminate the treaty unilaterally.[91] On 7 July 1928, the Chinese Ministry of Foreign Affairs declared that

> (1) All unequal treaties between the Republic of China and other countries which have already expired shall *ipso facto* be abrogated and new treaties shall be concluded.
> (2) The Nationalist Government will immediately take steps to terminate, in accordance with proper procedure, those unequal treaties which have not yet expired and conclude new treaties.

86 Quigley, *supra* note 81, 64.
87 The International Court of Justice in *Fisheries Jurisdiction Case* (*Federal Republic of Germany v. Iceland*), *Judgment*, ICJ Rep. (1973), 49, 63, stated that '[i]nternational law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.'
88 As quoted in Wang, *supra* note 7, 346–7.
89 Ibid., 347.
90 As quoted ibid., 348.
91 Ibid. See *Denunciation of Treaty of November 2nd, 1865, between China and Belgium* (*Belgium v. China*), PCIJ Ser. A, No. 8, (1927) 6.

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(3) In the case of the old treaties which have already expired but have not yet been replaced by new treaties, the Nationalist Government will promulgate appropriate regulations to meet the exigencies of the new situation.[92]

As its negotiations with most Western states for revision of treaties stalled, China on 17 May 1931 declared that 'all unequal treaties previously imposed upon China by various countries would not be recognized by the Chinese nationals'.[93]

Eventually, due to the outbreak of the Second World War, notwithstanding Western concern about the 'absence of written laws, the different conceptions of jurisprudence between the Western world and the East (e.g., the doctrine of responsibility)' and 'the apparent lack of independence of the Chinese judiciary',[94] China on 9 December 1941 unilaterally abrogated extraterritoriality in China vis-à-vis Germany, Italy, and Japan. China concluded treaties with major allies and neutral countries between 1943 and 1947, under which the latter relinquished their special rights and privileges in China. Praise for the normative roles and utility of international law should not be sung too quickly, however, as it was the diminution of European powers and the rise of the United States and its opposition to colonial rule, as well as the need for a military alliance with China and use of its military bases during the war, that enabled China to secure revision or termination of treaties that conferred foreign powers extraterritorial jurisdiction.[95] As William Callahan has commented,

> the unequal treaties that exploited China were not abrogated until the height of the Second World War in 1943 – when the Chinese demands were not as much of a concession from Britain and America since Japan controlled the treaty ports covered by these treaties. Thus China actually entered International Society not as the result of a gradual process of ethical civilizing to European norms but through pragmatic diplomacy that was spurred by the contingency, uncertainty and violence of war.[96]

4. International law in communist China, 1949–1971

The communist forces prevailed in the Chinese civil war (1947–49) and the PRC government became the effective government of China on 1 October 1949, while Nationalist leaders and followers fled *en masse* to Taiwan. The communist regime, 'a grave threat to the international society',[97] was not recognized by the United Nations as the representative government of China until 25 October 1971. Indeed, as the Cultural Revolution (1966–76) was raging in China, Coral Bell regarded China as 'the most determined and implacable revolutionary enemy of the existing international order'.[98]

92 As quoted ibid., 261.
93 As quoted ibid.
94 S. Turner, 'Extraterritoriality in China', (1929) 10 *British Year Book of International Law* 56, 61.
95 See C. Ku, 'Change and Stability in the International System: China Secures Revision of the Unequal Treaties', in Macdonald, *supra* note 20, 447.
96 W. A. Callahan, 'Nationalizing International Theory: Race, Class and the English School', (2004) 18:4 *Global Society* 305, 321.
97 Zhang (2011), *supra* note 7, 773.
98 C. Bell, 'China and the International Order', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (1984), 255, 255.

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A brief clarification as to foreign recognition of states and governments is in order here, as it helps explain not only the rejection of the PRC government as the representative government of China by the United Nations and other states and communist China's approaches to international law and international organizations, but also the continual impasse over the legal status of Taiwan.[99]

The 1933 Montevideo Convention on the Rights and Duties of States[100] sets out what is considered a rule of customary international law that '[t]he State as a person of international law *should* possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.'[101] However, government does not necessarily denote sovereignty and many territories that lack sovereignty, such as Hong Kong, satisfy the four criteria. The criterion vis-à-vis a capacity to enter into relations with other states is also undefined, and such capacity is not confined to states alone. The criterion is also circular insofar as in relating a territorial entity to other states it presupposes the entity being a state already existent.

The PRC government began to be recognized by the majority of foreign states in the 1970s. However, China as a state under international law has always subsisted. As John Moore in his formulation of a general principle of international law stated,

> [C]hanges in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted with constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired.[102]

Foreign recognition constitutes evidence, but is not a precondition, of a territory's statehood; otherwise, statehood would be rendered a matter of Realpolitik and be rid of its legal objectivity. While it might be argued that foreign recognition of Kosovo as a state in February 2008 independent of Serbia might have set a precedent for foreign recognition to be a controlling factor in determining statehood, a *fait accompli* imposed by powerful states does not equate legality or legal validity. Russia's retaliatory recognition of Abkhazia and South Ossetia in August 2008 as states independent of Georgia should serve as a stern warning of the importance of legality and the dire consequences of ignoring legal rules and principles that apply to statehood. As Article 3 of the Montevideo Convention states, '[t]he political existence of the State is independent of recognition by the other States'.[103]

Quincy Wright has stated that 'international law forbids premature recognition of an insurgent or revolutionary government and, apart from the Stimson

99 For a detailed discussion of the legal status of Taiwan and the legality of the use of force in a cross-Taiwan Strait conflict, see P. C. W. Chan, 'The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict', (2009) 8 *Chinese Journal of International Law* 455.

100 Signed at Montevideo on 26 December 1933.

101 Ibid., Art. 1 (emphasis added).

102 J. B. Moore, *Digest of International Law*, Vol. 1 (1906), 249.

103 Montevideo Convention on the Rights and Duties of States, Art. 3.

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doctrine, forbids continued non-recognition of a firmly established government.'[104] The authorities on Taiwan once sought to invoke the Stimson Doctrine against other states' recognition of China as represented by the PRC government as a state, on grounds that the communist forces' success in the Chinese civil war had been brought about by the military intervention of the Soviet Union. The United Nations General Assembly refused to accept the argument and passed a resolution calling for respect for the independence of China in accordance with the United Nations Charter and general principles of international law. The consensus of the General Assembly was that '[t]he acquisition of control by the [Chinese] Communist government was in its opinion a manifestation of the self-determination of the Chinese people rather than a manifestation of aggression by the Soviet Union.'[105] As Nicholas Tsagourias argues,

> non-recognition reveals the international society's powerlessness when confronted with facts. Non-recognition is not the negation of a fact to the extent that recognition is not the creation of a fact. Non-recognition is the denial of formal rights. It is a half measure between the maxims *ex injuria jus non oritur* and *ex factis jus oritur*.[106]

Early communist Chinese foreign policy focused on endorsing and supporting any national independence movement. Liu Shaoqi, a leading Chinese Communist Party figure, stated in a national broadcast in 1948 that

> Communists must be the staunchest, most reliable and most able leaders in the movement for national liberation and independence of all oppressed nations; they must be the firmest defenders of the rightful interests of their own nation; they must unconditionally aid the liberation movements of all the world's oppressed nationalities, and certainly cannot conduct aggression on any other nation or oppress national minorities within the country.[107]

Arthur Steiner has identified six major premises of early communist Chinese foreign policy stemming from its basic doctrine of anti-imperialism:

(1) 'imperialism' is the greatest enemy of the Chinese people and the Chinese revolution;
(2) the United States, the most advanced capitalist country and the 'necessary' leader of the 'world imperialist camp', is by nature the major enemy among the nations of the world;
(3) the Soviet Union, leader of the states of the 'new democracy', whose policies are necessarily antithetical to those of the United States, is the leader of the 'world revolutionary front against imperialism', and hence the chief friend of the Chinese people and the Chinese Communist Party;

104 Wright, *supra* note 37, 324.
105 Ibid., 327–8; the quoted passage appears at 328.
106 N. Tsagourias, 'International Community, Recognition of States and Political Cloning', in S. Tierney and C. Warbrick (eds.), *Towards an International Legal Community?: The Sovereignty of States and the Sovereignty of International Law* (2006), 211, 227, citing, inter alia, R. Y. Jennings, 'Nullity and Effectiveness in International Law', in D. W. Bowett (ed.), *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965), 64, 74: '*Ex factis jus oritur* is an expression of truth that no law can ignore save at its peril'.
107 Liu Shaoqi, 'On Internationalism and Nationalism', broadcast by North Shensi Radio, 9 November 1948, reprinted in (14 December 1948) 5:4 *China Digest* 6, as quoted in H. A. Steiner, 'Mainsprings of Chinese Communist Foreign Policy', (1950) 44 AJIL 69, 74–5.

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(4) China does not stand alone in her struggle against American 'imperialism': while waging her own battle for 'Chinese national liberation', China must struggle in common with the 'international united front' of all revolutionary and anti-imperialistic peoples;
(5) the countries of the 'international united front' must resist the counter-revolutionary policies of the 'imperialistic states' by a political, economic and ideological counter-attack, waged in a militant, offensive spirit; and
(6) incessant struggle must be sustained until the inevitable proletarian victory is complete on all fronts and the foundations of the new world order are firmly secured.[108]

That China was reduced by imperialism during the 'century of humiliation' since the Opium War to a semi-colonial entity[109] was – and remains – 'a cardinal principle of the Chinese Communist faith'[110] and widely shared among the Chinese people. The PRC government focused on the social dynamics and consequences of imperialism, and decried international law for abetting imperialism. Steiner notes that, as early as February 1947, the Central Committee of the Chinese Communist Party issued a declaration indicating that certain foreign loans and agreements concluded by the Nationalist government were 'completely contrary to the will of the Chinese people and ... have plunged and will continue to plunge China into civil war, reaction, national disgrace, loss of national rights, colonialism and to ultimate crisis in chaos and collapse'.[111] The Committee declared that the Communist Party

> will not now [or] in the future recognize any foreign loans, any treaties which disgrace the country and strip it of its rights, and any of the ... agreements and understandings reached by the Kuomintang Government after January 10, 1946, nor will it recognize any future diplomatic negotiations of the same character which have not been passed by the [Chinese People's] Political Consultative Conference or which have not been agreed to by this Party and other parties and groups participating in the Political Consultative Conference. This Party furthermore will absolutely not bear any obligations for any such loans, treaties, agreements or understandings.[112]

On 29 September 1949, the Chinese Communist Party indicated in Article 55 of the Political Consultative Conference Common Programme that '[t]he Central People's Government of the People's Republic of China must study the treaties and agreements concluded by the Kuomintang government with foreign governments and, depending on their contents, recognize, annul, revise or re-conclude them'.[113] The PRC government relied on the doctrine of *rebus sic standibus* to argue that all treaties concluded by imperial or republican China were now void since communist China possessed a radically different class character.[114] Significantly, at a Security Council

108 Steiner, ibid., 77.
109 For a discussion of semi-colonialism and its relationship to concepts of informal empire in China, see J. Osterhammel, 'Semi-Colonialism and Informal Empire in Twentieth Century China: Towards a Framework of Analysis', in W. H. Mommsen and J. Osterhammel (eds.), *Imperialism and After: Continuities and Discontinuities* (1986), 290.
110 Ibid., 80.
111 As quoted ibid., 93.
112 As quoted ibid.
113 As quoted in Wang, *supra* note 7, 348.
114 T. Chen, 'The People's Republic of China and Public International Law', (1984) 8 *Dalhousie Law Journal* 3, 22.

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meeting on 28 November 1950, the PRC government's special representative indicated that 'without the participation of the lawful delegates of the People's Republic of China, the people of China have no reason to recognize any resolutions and decisions of the United Nations.'[115] The PRC government's position should demonstrate the fallacy of the notion that non-democratic states should be not recognized or de-recognized, or excluded from membership or participation in international organizations.

The concept of unequal treaties was not adopted in the Vienna Convention on the Law of Treaties. Humphrey Waldock, as special rapporteur, stated before the United Nations International Law Commission in 1963 that

> [W]hile accepting the view that some forms of 'unequal treaties' brought about by coercion of the State must be regarded as lacking essential validity, the Special Rapporteur feels that it would be unsafe in the present state of international law to extend the notion of 'coercion' beyond the illegal use or threat of force.[116]

The principle of the intertemporal law entails that a treaty comprising terms that were lawful and valid at the time when it was concluded must continue to be treated as lawfully concluded, valid and binding notwithstanding subsequent developments in international law. Otherwise, all treaties would be at risk of being unilaterally treated as nullities that would lead to widespread international conflicts. The principle of the intertemporal law is not absolute, however, as any treaty that conflicts with a peremptory norm of international law, even if the norm matured after the treaty was concluded, becomes void and terminates.[117] Thus, instead of arguing that certain treaties that imperial or republican China entered into with foreign powers were 'unequal treaties', China might be better placed to rely on the peremptory norm of international law – the prohibition of the use of force in the conduct of international relations – to argue that such treaties should be considered void. Nonetheless, China was not in a position to argue that a fundamental change of circumstances (regarding the fundamental change of its regime, governance or society) would enable it to amend, repudiate, terminate, or withdraw from any treaty which established a boundary,[118] although the fact that it was able to terminate the 1842 Treaty of Nanjing and the 1860 Treaty of Beijing under which China ceded to Great Britain in perpetuity Hong Kong Island, Kowloon Peninsula, and Stonecutters Island meant that China eventually was able to shape to its advantage, through diplomacy or disguised or actual threat of force, the interpretation of a customary norm embodied in a widely ratified treaty often taken as codification of the law of treaties.

The PRC government did not wholly reject international law as an imperialistic or Western tool to contain or exploit China. In line with Soviet teaching that 'international law, in addition to being a body of principles and norms which must be observed by every country, is also, just as any law, a political instrument; whether

115 S/PV.527, 28 November 1950, 4.
116 (1963) *Yearbook of the International Law Commission* Vol. II, 52.
117 Vienna Convention on the Law of Treaties, Art. 64.
118 Ibid., Art. 62(2)(a).

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a country is socialist or capitalist, it will to a certain degree utilize international law in implementing its foreign policy',[119] international law for communist China was a means to attain socialist revolution as well as modernization for the state, and Chinese scholarly writing at the time reflected such a view. For example, Chu Li-lu argued that

> [I]nternational law is one of the instruments of settling international problems. If this instrument is useful to our country, to socialist enterprise, or to the peace enterprise of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to socialist enterprises or to peace enterprises of the people of the world, we will not use it and should create a new instrument to replace it. Today we have a majority of the old international law jurists who still adhere to the purely legalistic viewpoint by restricting themselves to the limited area of international law and thus they subject themselves to the disposal of imperialism.[120]

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119 F. Chou, (1958) No. 3 *Chiao Hsiieh Yii Yen Chin* [*Teaching and Research*] 52, as quoted in H. Chiu, 'Communist China's Attitude toward International Law', (1966) 60 AJIL 245, 248.

120 L. Chu, 'Refute the Absurd Theory Concerning International Law by [Chen T'iqiang]', *People's Daily*, 18 September 1957, as quoted in Chiu, ibid., 248–9. (Chiu notes, ibid., fn. 15, that Chen had a doctorate in international law from the University of London and until he was purged in 1958 had been Head of Division of International Law of the Institute of International Relations at the Chinese Academy of Sciences.) Similarly, Liu Fengming maintained that '[s]o far as our country is concerned, [modern international law] is an indispensable legal means to realize socialist modernization and construction. For instance, in order to explore resources near our coast, we must study the legal status of the continental shelf, fishing zone and exclusive economic zone and international norms and customs between states in delimiting these regions. In order to introduce foreign advanced technology, we must immediately confront the problems of international patent, protection of trademarks, intellectual property and others. In order to create a safe and peaceful international environment for our socialist modernization construction, we must actively join international legislative activities and strengthen the struggle within the United Nations so as to form the broadest international united front for anti-hegemonism for the purpose of preventing and delaying the outbreak of World War': *Xiandai Guoji fa Gangyao* [*Essentials of Modern International Law*] (1982), 5, as quoted in H. Chiu, 'Chinese Attitudes toward International Law in the Post-Mao Era, 1978–1987', (1987) 21 *International Lawyer* 1127, 1129. Such a policy-oriented approach to international law, espoused also by many Western scholars, was strongly criticized by Pan Baocun, who maintained in 1985 that [t]he "policy-oriented" theory considers power as the nucleus of international politics and international law. They regard policy as the determining factor [in formulating international law] and the latter is the concrete expression of the external policy of a state. It is true that international political relations have comparatively significant influence on the formulation of international law and each state's attitude toward international law is based on its external policy; however, international law is a matter of superstructure and it is, in the final analysis, decided by international economic relations. It is possible that imperialist big powers may impose their will on the international community and thus influence the enactment of international law. However, the international community has its own objective rules of development which cannot be diverted by will of imperialist big powers and the development of international law cannot be separated from the [objective] rules of the development of the international community. Therefore, we cannot just observe the phenomenon at a given moment in the international community and mix up the power politics of big powers, external policy and international law': 'On the Scientific Nature of International Law', (1985) 5 *Studies in Law* 84, as quoted in Chiu, ibid., 1130, fn. 9. Wei Min likewise criticized the policy-oriented approach as '[mixing] law and policy and [attempting] to make international law to follow the change of policy of certain big powers. … It considers the external policy [of states] as the basis of international law and even to consider external policy as international law. To view law and policy as the same is baseless': M. Wei, (ed.), *Guoji Fa Gailun* [*Introduction to International Law*] (1986), 38, as quoted in Chiu, ibid. Wei believed that an objective yet realistic approach should be taken: 'How should one correctly explain the function of international law in international relations? First, international law serves as a criterion for identifying fundamental issues of right and wrong in the international [community]. … Second, it serves as legal forms of self-restraint and mutual restraint on the basis of equality among countries in order to establish normal international order. … Third, it serves as legal forms for establishing certain concrete international rights and duties for countries in the process of their mutual intercourse. … The above three roles of international law are interrelated and reciprocally supplemented, i.e., one cannot emphasize one role to the exclusion of the others. One should view the three roles as an integrated one to observe and study the function of international law': ibid., 15–18, as quoted in Chiu, ibid., 1,131, fn. 12.

When discussing the relationship between China and international law, reference must be had to the Five Principles of Peaceful Co-existence that China set out in a bilateral treaty with India in 1954, particularly as the Principles remain a cornerstone of contemporary China's approach to international law and Chinese foreign policy. In the 1954 treaty, China and India stated that the Principles should guide their bilateral relations. These Principles are, namely, 'mutual respect for territorial integrity and sovereignty', 'mutual non-aggression', 'mutual non-interference', 'equality and mutual benefit', and 'peaceful co-existence'. The Principles were subsequently expanded by the 1955 Bandung Conference to ten guiding principles, namely, 'respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations', 'respect for the sovereignty and territorial integrity of all nations', 'recognition of the equality of all races and of the equality of all nations large and small', 'abstention from intervention or interference in the internal affairs of another country', 'respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations', 'abstention from the use of arrangements of collective defence to serve any particular interests of the big powers', 'abstention by any country from exerting pressures on other countries', 'refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country', 'settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations', 'promotion of mutual interests and cooperation', and 'respect for justice and international obligations'. It is noteworthy that China referred to the Five Principles when it called on the Soviet Union to cease suppression of the Hungarian revolt in 1956 before the Sino-Soviet split in the early 1960s, thereby affirming that for China these Principles were of normative universal applicability.[121]

Albeit a creation in a bilateral treaty between China and India, the Five Principles did not reflect a novel or peculiarly Chinese (or Indian) perspective of international law or of international legal order. James Chieh Hsiung has characterized the Principles 'as having received their legal basis from pre-existing fundamental principles (e.g., sovereignty, non-intervention, etc.), to which the United Nations Charter has only given new expression, and as forming a body of peremptory norms necessary for the international ordre public'.[122] Russell Fifield argued in 1958 that the inclusion of the Principles in a General Assembly declaration in October 1957 without

121 In his meeting with the Prime Minister of India on 21 December 1988, Deng Xiaoping stated that '[t]he general world situation is changing, and every country is thinking about appropriate new policies to establish a new international order. Hegemonism, bloc politics and treaty organizations no longer work. Then what principle should we apply to guide the new international relations? … Two things have to be done at the same time. One is to establish a new international political order; the other is to establish a new international economic order. … As for a new international political order, I think the Five Principles of Peaceful Co-Existence, initiated by China and India, can withstand all tests. … We should take them as norms for international relations. If we want to recommend these principles as a guide to the international community, first of all, we should follow them in our relations with each other and with our other neighbours': as quoted in J. Y. S. Cheng and W. Zhang, 'Patterns and Dynamics of China's International Strategic Behaviour', (2005) 11:31 *Journal of Contemporary China* 235, 243.

122 J. C. Hsiung, *Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice* (1972), 29.

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objection constituted 'a significant step in the evolution of the Five Principles since their formal inception in 1954'.[123] Wang holds the view that the Principles constitute fundamental principles not 'of a special branch of international law, but of the whole system of international law',[124] and adds that the PRC government and Chinese scholars do not regard the Principles as the *only* fundamental principles of international legal order, but 'the core, or at least the main part, of the fundamental principles of international law'.[125]

5. International law in communist China, 1971–1984

25 October 1971 marked the turning point in the relationship between China and international legal order, when the PRC government, by a majority vote of the General Assembly, replaced the authorities on Taiwan as the representative government of China in the United Nations. The PRC government soon also replaced the authorities on Taiwan in other international organizations, and recognition by other states of the PRC government as the sole legitimate government of China quickly followed. However, the PRC government continued to hold hostility towards the United Nations.[126] Hedley Bull argued in the early 1970s that 'China disavows entirely the role of a great power, and views itself as the champion of the Third World nations in their struggle against "super power hegemonism"',[127] until it warmed during the 1980s to the roles it may play through the United Nations in shaping the conduct of international relations, including the development of international law. In a communication to the Secretary-General of the United Nations in 1977, China stated that

> (1) With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.
> (2) As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of 'China' are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to.[128]

Given the emphasis in international legal literature on compliance, as China is a leading power in East Asia and beyond, but which possesses a legal system that has only recently been regarded by its own state apparatuses and populace as a tool,

123 R. H. Fifield, 'The Five Principles of Peaceful Co-existence', (1958) 52 AJIL 504, 504.
124 Wang, *supra* note 7, 274.
125 Ibid., 276.
126 See N. G. Lichtenstein, 'The People's Republic of China and Revision of the United Nations Charter', (1977) 18 *Harvard International Law Journal* 629.
127 H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977), 286.
128 Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accession, etc., as at 31 December 1976, St/Leg/Ser. D/10 (1977), iii–iv.

forum, and refuge through which rights may be vindicated and wrongs redressed, a discussion as to China's position on sources of international law is useful as it illustrates China's approaches to international law, international organizations, and international adjudication, as well as the relationship between international law and municipal law in the Chinese legal system.

In line with Soviet thinking, China emphasized that only treaties and customs could be considered sources of international law. According to the Soviet view, treaties formed the cornerstone of international law. Customs enjoyed only a subsidiary role, contrary to the Western position that a norm of customary international law became binding on a state even if the state refused to ratify a treaty that contained the same norm.[129] In his Hague Academy Lectures in 1958, Grigory Tunkin stated that for a custom to become a binding legal norm, it must have been accepted by all states. While Tunkin accepted that customs had played a large role in the formation of international law during the nineteenth century, he argued that their importance since then had subsided,[130] and that

> [T]he doctrine according to which customary norms recognised as such by a considerable number of States are binding upon all the States implies a considerable danger in the epoch of coexistence. This point should be specifically emphasised in view of the fact that this doctrine is widely accepted by western writers, and some judgments of the International Court of Justice may be interpreted in favour of this doctrine.[131]

The Soviet perspective placed emphasis on strict observance of treaties, embodied in the principle *pacta sunt servanda*, in legal relations among states, although 'Soviet jurists would retain for themselves, so to speak, a unilateral right of repudiation or denunciation of those treaties that they themselves do not particularly like'.[132] Meanwhile, China maintained that only resolutions adopted by the General Assembly that were of a normative character relating to the rights and obligations of states, interpretations of the United Nations Charter or fundamental principles of international law, or declaratory of existing international law, might be capable of constituting a subsidiary source of international law.[133]

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129 E. McWhinney, '"Peaceful Coexistence" and Soviet–Western International Law', (1962) 56 AJIL 951, 955.

130 G. I. Tunkin, 'Co-existence and International Law', (1958–III) 95 *Recueil des Cours* 1, 23.

131 Ibid., 20.

132 McWhinney, *supra* note 129, 956–7.

133 T. Wang and M. Wei (eds.), *Guoji Fa* [*International Law*] (1981), 35, stated that '[t]here are divergent opinions on the effect of the resolutions of the United Nations General Assembly. According to the provisions of the Charter of the United Nations, the function of the United Nations General Assembly is generally one of deliberation and recommendation. Except for resolutions relating to organizational and financial questions [which are legally binding], the resolutions of the General Assembly are in the nature of recommendations and do not possess legally binding force. However, one cannot infer from this fact that there would be no legal consequence of resolutions adopted by the General Assembly. Some resolutions of the General Assembly were adopted by unanimous or overwhelming majority votes of member states. Therefore, these resolutions not only have a certain binding force on those members who voted for their adoption, but also have general significance in international relations. In the meantime, some declarations included in certain resolutions may in whole or in part reflect existing or formative principles, rules, regulations or institutions of international law. Thus, these declarations undoubtedly become subsidiary means to determine principles, rules, regulations and institutions of international law. Consequently, one should consider resolutions of international organizations, especially certain kinds of resolutions of the United Nations, as parallel to judicial decisions and writings of publicists. [They have] become "subsidiary means for the determination of rules of law", though [these resolutions] are not direct sources of international law. Moreover, in view

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Unlike their Soviet counterparts, scholars in China rejected general principles of law and awards or decisions of international tribunals as sources of international law, unless these principles and awards or decisions had been or have since been recognized in treaties or as customs.[134] Zhu Lisun has written that '[f]irst, in reality there are only two legal systems, i.e., municipal law and international law, and there exists neither an abstract law nor a legal system above the municipal law and international law. Therefore, there will be no general principles of law in abstract. Second, the general principles of law advocated by Western legal scholars are municipal law principles. However, since international law and municipal law are two different legal systems, the principles of municipal law cannot be applied to international law.'[135] The standard textbook on international law in China at the time argued that the important point about whether general principles of law constituted a source of international law

> is the requirement of being "recognized". Obviously, any general principles of law which have not gone through the recognition of various states cannot become sources of international law. ... Since [general principles] must be recognized and states explicitly or implicitly express their recognition through international treaties or international customs, then the general principles of law, in this sense, are merged together with these two principal sources of international law – international treaties and international customs. Therefore, they are not an independent source of international law.[136]

Article 38 of the Statute of the International Court of Justice itself is not a source of international law; it is a provision that enumerates sources to which the Court may refer in its decisions and advisory opinions. Constituting one facet of the Court's specific procedures, the provision cannot be taken to represent a codification, or general recognition among states, of what constitutes international law. Article 59 of the Statute, which states that a decision of the Court has binding force only *inter partes* and in respect of the particular case, shows that the legal significance of a decision of the Court does not go beyond the scope of the decision and metamorphose into the general corpus of international law.[137] In respect of teachings of jurists which

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of their international character, their [priority as subsidiary means] should be higher than that of judicial decisions and writings of publicists': as quoted in Chiu, *supra* note 118, 1142–3. Similarly, Liu Ding asserted that '[a]ccording to international law, an international organization does not have legislative power and the resolutions it passes generally do not have binding force upon its members. ... However, resolutions of international organizations of significant importance, which are consistent with generally recognized guiding principles of international law, do possess legal validity and should be considered as a source of international law. The Declaration on the Establishment of a New International Economic Order and its Programme of Action adopted by the Sixth Special Session of the General Assembly of the United Nations on May 1, 1974, and the Charter of Economic Rights and Duties adopted by the Twenty-Ninth Session of the General Assembly of the United Nations on December 12, 1974, which confirm the permanent sovereignty over natural resources of states, sovereign equality of all states, the undeniable rights of all states to participate equally in resolving world economic problems and other principles, should have the validity of international law': *Guoji Jingji Fa* [*International Economic Law*] (1984), 14–15, as quoted in H. Chiu, 'Chinese Views on the Sources of International Law', (1987) 28 *Harvard International Law Journal* 289, 304.

134 Chiu, *supra* note 118, 1140–1.

135 L. Zhu, *Guoji Gong Fa* [*Public International Law*] (1985), 10, as quoted in Chiu, ibid., 1141, fn. 47.

136 Wang and Wei, *supra* note 132, 32, as quoted in Chiu, ibid., 1141–2.

137 Not all scholars in China reject the possibility that a decision of the International Court of Justice may have wider legal effects. For example, Zhou Xiaoling maintains that '[a]s the principal judicial organ of the United Nations and the only existing universal judicial organ, the judgments and advisory opinions of the

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Article 38(3)(d) of the Statute recognizes as a subsidiary source of international law, scholars in China held the view that Western jurists' interpretations of international law merely reflected the bourgeois and imperialistic nature of international law and should be rejected, and only jurists trained in 'the proletarian science of international law can correctly apply or interpret rules of international law'.[138]

Samuel Kim suggested in 1978 that China's frequent non-participation and abstentions as a Permanent Member within the Security Council in the 1970s were indicative of its lack of a 'principled stand' on many legal issues.[139] However, Kim later argued that through non-participation in Security Council decision-making processes during the 1970s, China managed to maintain 'both passive opposition based on China's "principled stand" and passive cooperation based on China's refusal to obstruct the majority (Third World) will'.[140] Calling China a 'Club of One' within the United Nations, Ann Kent argues that instead of posing as a leader of developing states, China sought to balance its own fundamental interests and at the same time advocate those of developing states.[141] Even after China started to participate more actively in international organizations in the aftermath of the Cultural Revolution and following the onset of political reform that Deng Xiaoping initiated in 1982, many remained unconvinced by its motives. Bell, for instance, was adamant that '[p]resent Chinese concepts of the world order as-it-should-be presumably continue to embody the vague Marxist notion of the eventual withering-away of the state, a

International Court of Justice have significant influence on the development of international law. Although Article 59 of the ICJ Statute provides that a judgment of the Court is binding only on the parties and in respect of the particular case, … because of the status of the ICJ in the area of international judiciary, the judgments and advisory opinions of the Court have always been considered as the authoritative expression and interpretation of the questions involved in the case. For instance, significant influences have been produced by the judgments of the ICJ in the *Nottebohm* case and the *Barcelona Traction* case toward the question of nationality and diplomatic protections, the *Anglo-Norwegian Fisheries* case and the *North Sea Continental Shelf* cases toward the width of the territorial sea and the nature of continental shelf and the *Advisory Opinion on the Reservation to the Genocide Convention* toward the international rules on the question of reservation to multilateral conventions': 'The United Nations and International Law-Making', (1985) 4 *International Studies* 29, as quoted in Chiu, ibid., 1144–5.

138 Chiu, *supra* note 117, 261.

139 S. S. Kim, 'The People's Republic of China and the Charter-Based International Legal Order', (1978) 72 AJIL 317, 325. For example, at the height of the Six Days' War between Israel and Egypt, Jordan and Syria in 1967, the PRC government decried the General Assembly emergency session as 'an ugly farce' and a 'spurious show': 'What kind of thing is the U.N.? It is the tool of U.S. imperialism, number one overlord, and the Soviet revisionist ruling clique, number two overlord, to press ahead with neocolonialism and big-nation power politics. … The aggressors get protection as usual and the victims of aggression have to put up with it. Such a U.N. can only be a refuge for imperialists, revisionists, and counterrevolutionaries, and a chain binding the oppressed nations hand and foot. … In order to safeguard their independence and defeat the aggression by U.S. imperialism and its flunkey, the Arab people must rely on their own struggle. Pinning their hopes on the Soviet revisionists and the U.N. is like asking the tiger for its hide, and that will only bring on more catastrophes': *Renmin Ribao*, 8 July 1967, as quoted in B. S. J. Weng, *Peking's U.N. Policy: Continuity and Change* (1972), 157. Following the Yom Kippur War between Israel and a coalition of Arab countries led by Egypt and Syria in 1973, Huang Hua, China's Ambassador to the United Nations, warned about the 'infinite evil consequences' of dispatching United Nations peacekeeping force and stated: 'What "United Nations emergency peacekeeping force"? To put it bluntly, this is an attempt to occupy Arab territories. Is not South Korea a living example?': S/PV.1750, 25 October 1973, 6–7.

140 S. S. Kim, 'Whither Post-Mao Chinese Global Policy', (1981) 35 *International Organization* 433, 442.

141 A. Kent, 'China's International Socialization: The Role of International Organizations', (2002) 8 *Global Governance* 343, 349. See also T. R. Chai, 'Chinese Policy toward the Third World and the Superpowers in the UN General Assembly 1971–1977: A Voting Analysis', (1979) 33 *International Organization* 391.

development which (if it ever occurs) will obviously make the notion of a society of states obsolete'.[142]

Other scholars were concerned about the apparent incompatibility between China and international legal order in which human rights began to assume a primary place, as the Chinese conception of rights emphasizes collective rather than individual rights.[143] Kim argues that China allowed its insistence on state sovereignty to take a back seat due to its increasing dependence on the international system between the end of the Cultural Revolution and the international uproar following its suppression of dissent on Tiananmen Square in June 1989. He finds that

> [I]n the post-Tiananmen period the old conception of state sovereignty has returned with a vengeance to the Chinese leadership afflicted with a siege mentality that goes back to the semi-colonial period of unequal treaties. A tendency to carry the logic of state sovereignty to a self-serving protective but untenable extreme makes China the odd man out in the post-Cold War quest for a new world order.[144]

Meanwhile, China avoided, and continues to avoid, international mechanisms of a judicial character, as it considers that interstate disputes should be resolved by negotiations and not by legal proceedings. In a letter to the International Court of Justice of 5 September 1972, China as represented by the PRC government stated that it 'does not recognize the statement made by the defunct Chinese Government on 26 October 1946 ... concerning the acceptance of the compulsory jurisdiction of the Court'.[145] Similarly, in its participation in the negotiations for the eventual 1982 United Nations Convention on the Law of the Sea, China opposed vesting compulsory jurisdiction in the International Tribunal for the Law of the Sea as contrary to the principle of state sovereignty.[146] Even though as a Permanent Member of the Security Council its candidate would have been automatically elected, China did not nominate any candidate to the bench of the International Court of Justice between 1971 and 1984, largely due to its inexperience with international law and, during the Cultural Revolution, hostility to any notion of law, and its rejection of any international tribunal as an appropriate forum to settle disputes between states. It was not until 1984 that China nominated Ni Zhengyu to the bench.

As time went on, the PRC government began to accept China's capacity to play major substantive roles in resolving international disputes, particularly after the *Nicaragua* decision[147] in which the Court sided with a developing state and not the United States. China's Ambassador Huang Jiahua stated in 1987 that

> in recent years, the International Court of Justice has undergone some changes with the development of the international situation and changes within the United

142 Bell, *supra* note 98, 265.
143 See P. C. W. Chan, 'Human Rights and Democracy with Chinese Characteristics?', (2013) 13 *Human Rights Law Review* 645.
144 S. S. Kim, 'Sovereignty in the Chinese Image of World Order', in Macdonald, *supra* note 20, 425, 432.
145 *Report of the International Court of Justice* (August 1972–July 1973), 28 GAOR. Supp. No. 5, 1.
146 *Third United Nations Conference on the Law of the Sea Official Records*, Vol. V (1976), 24.
147 *Military and Paramilitary Activities in and against Nicaragua* (*Merits*) (*Nicaragua v. United States of America*), *Judgment*, ICJ Rep. (1986), 14.

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> Nations. Its composition, applicable law and rules of procedure have all witnessed some positive progress. On the whole, the role and impact of the Court have been gradually increasing. This is reflected in the fact that the number of cases submitted to the Court for adjudication has increased, and that some important international treaties and agreements all contain provisions for submitting disputes to the Court for settlement. This shows that the international community is attaching greater importance to the Court.[148]

China is not alone in its hostility to international dispute settlement by judicial means. The United States has painstakingly refused to submit to, or otherwise withdrawn from, compulsory jurisdiction of international tribunals, including the International Court of Justice and the International Criminal Court, precisely in the name of state sovereignty and in its confidence in the quality of its municipal laws and legal system and their conformity with international law. In fact, among the five Permanent Members of the Security Council, only the United Kingdom accepts the compulsory jurisdiction of the International Court of Justice. Kim argued in 1999 that all the changes in Chinese foreign policy since China began to undergo domestic reform and participate more actively in international organizations should be 'better seen as adaptive/instrumental learning rather than cognitive/normative learning at the basic level of worldview and national identity'.[149] However, Kim believed that in continuing to deepen its participation in international organizations, China's choices would be constrained and many of its foreign policy policies, practices, and principles would require readjustment.[150]

As law was regarded during the Cultural Revolution as a tool of exploitation of the masses, a large number of judges, cadres, and legal scholars were purged without recourse to formal process, and legal education in China was entirely abolished until order was restored. In China until the reform era during the 1980s, law was not to protect rights and freedoms between individuals or against the state, but served as

> an instrument of social engineering, to be used for the transformation of Chinese society and its members in accordance with the revolutionary ideology. Either in a formal or informal style, law is seen as an important agent of political socialization and mobilization to inculcate the people with the new socialist morality.[151]

Even the PRC government's representation of China in the United Nations since October 1971 did not rejuvenate international law as a field of study or an element of policy-making.[152] However, since 1974, as the Cultural Revolution was coming to an end, legal education, including instructions and research on international law, was reintroduced at Chinese universities, many of which focused on different aspects of public and private international law.[153] Since then, universities offering degrees and courses, and students trained, in international law have proliferated.

148 China's Ambassador Huang Jiahua's speech at New York University School of Law, 11 March 1987.
149 S. S. Kim, 'China and the United Nations', in E. Economy and M. Oksenberg (eds.), *China Joins the World: Progress and Prospects* (1999), 42, 80.
150 Ibid., 81.
151 S.-C. Leng, 'The Role of Law in the People's Republic of China as Reflecting Mao Tse-tung's Influence', (1977) 68 *Journal of Criminal Law and Criminology* 356, 366.
152 Kim, *supra* note 138, 318.
153 Chiu, *supra* note 118, 1159–60.

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The Chinese Society of International Law was established in 1980 and the *Chinese Yearbook of International Law* began to be published in 1982, which has since been complemented with the publication of the *Chinese Journal of International Law* by Oxford University Press.

6. International law in socialist-market China since 1984

From communist China's perspective, the applicability of international law in the municipal sphere was a matter for the state, and conflict between international law and municipal law simply could not arise. Various Chinese scholars, following the footsteps of their Soviet counterparts, explained how international law and municipal law were always reconcilable. Soviet scholar Feodor Kozhevnikov explained in 1957 that

> [P]roceeding from one and the same supreme authority, both the rules of International Law and those of domestic origin should have the same binding force for all organs and nationals of the countries concerned. By concluding an international agreement a governing authority undertakes, if necessary, to bring its domestic legislation into line with the international commitments it has assumed. On the other hand, by promulgating a law clearly contrary to International Law, the government concerned commits a violation of International Law, for which the State concerned is responsible under International Law. Therefore, International Law and Municipal Law must not in their very nature either contradict each other or have primacy one over the other.[154]

Zhou Gengsheng stated that

> Looking at the question of the relationship between international law and municipal law as a practical question, in the final analysis this is a question of how a state implements international law in its municipal sphere, i.e., a question of performing its obligation assumed under international law. International law by its nature is binding on a state and is not directly binding on its organs or people. Even if a municipal law is contrary to international law, the court of that state still has to execute that law, but the state will assume responsibility for violating international obligations. As states have recognized the norms of international law, they have the obligation to make their municipal law consistent with obligations assumed under international law. With respect to the question of how to fulfil this requirement, it is within the discretion of various states. … As long as states themselves seriously perform their international obligations, the relationship between international law and municipal law can always be reconciled.[155]

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154 F. I. Kozhevnikov (ed.), *International Law: A Textbook for Use in Law School* (1957; trans. 1961), 15, as quoted in Chiu, *supra* note 117, 259–60.

155 G. Zhou, *Guoji Fa* [*International Law*] (1981), 20, as quoted in Chiu, *supra* note 118, 1146. Interestingly, Zhou's analysis of the relationship between international law and municipal law in a municipal legal order (not necessarily a Chinese or socialist one) was identical to the holding of the United States Supreme Court in *Medellin v. Texas*, 552 US 491 (2008), that even the United Nations Charter is a treaty binding on the United States at the international level only and has no legal effect in the United States legal order without implementing legislation enacted by the United States Congress, unless the Charter constitutes a self-executing treaty which the Court found not to be the case.

While Zhou rejected the monist theory of international law as an imperialist notion, Wang and Wei in their textbook regarded it as an attempt to undermine the principle of state sovereignty by using '"world law" to substitute international law' and '"world government" to substitute sovereign states, which is theoretically illogical and also contrary to the reality'.[156] They explained that

> International law and municipal law are two systems of law or one may say that international law is a special system of law which is different from domestic law. … However, because municipal law is enacted by states and international law is enacted through the participation of states, there are close connections between these two systems – mutual infiltration and mutual supplementation. In principle, when states enact municipal law, they should take into consideration the requirement of international law. [Similarly] when states participate in enacting international law, they should also consider it from the standpoint of municipal law. In practice, there are various methods to resolve or avoid the conflict between international law and municipal law. If a state enacts a law which is obviously contrary to principles, rules, regulations or institutions of international law and thus infringing on the legitimate right and interest of another state, then it becomes an international illegal act and the question of incurring international responsibility will arise. This is not a question of the basic contradiction between international law and municipal law.[157]

As Liu put it,

> [S]o far as our socialist state is concerned, in the principle the question of conflict between modern international law and municipal law will not arise … we will neither accept any international obligation which is contradictory to our municipal law principles, nor promulgate any municipal law and regulations which are contradictory to the international obligations we assumed.[158]

Notwithstanding these views espoused by Chinese scholars, and although China's 1982 Constitution is silent on the status of international law vis-à-vis municipal law, Articles 18, 32, and 50 guarantee that in certain areas international law takes precedence over municipal law.[159] In addition, Article 238 of the Law of Civil Procedure,[160]

156 Wang and Wei, *supra* note 132, 43–4, as quoted in Chiu, ibid.
157 Wang and Wei, ibid., 44, as quoted in Chiu, ibid., 1146–7.
158 Liu, *supra* note 118, 9, as quoted in Chiu, ibid., 1147.
159 Art. 18 of the 1982 Constitution states that '[t]he People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China. All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.' Art. 32, ibid., states that '[t]he People's Republic of China protects the lawful rights and interests of foreigners within Chinese territory, and while on Chinese territory foreigners must abide by the law of the People's Republic of China. The People's Republic of China may grant asylum to foreigners who request it for political reasons.' Art. 50, ibid., states that '[t]he People's Republic of China protects the legitimate rights and interests of Chinese nationals residing abroad and protects the lawful rights and interests of returned overseas Chinese and of the family members of Chinese nationals residing abroad.'
160 Adopted by the Fourth Session of the Seventh National People's Congress on 9 April 1991 and promulgated by Order No. 44 of the President of the People's Republic of China. Art. 238 states that '[i]f an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from those of this Law, the provisions of the international treaty shall apply, unless the provisions are the ones on which China has announced reservations'.

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Article 142 of the General Principles of the Civil Law,[161] Article 16 of the Income Tax Law concerning Joint Ventures Using Chinese and Foreign Investment,[162] Article 28 of the Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises,[163] Article 6 of the Law on Foreign-related Economic Contracts,[164] and Article 36 of the Law of Succession[165] provide that China's treaty obligations override any inconsistent municipal laws or regulations save those on which China has declared reservations. Taken together, these municipal laws 'should be regarded as a valid and accountable expression of China's general position as to the issue of validity of treaties in general … within the Chinese legal system'.[166]

A treaty, to be binding on and enforceable in China, must have been entered into by China in accordance with the Law on the Procedures of the Conclusion of Treaties promulgated in 1990; such a treaty, except for provisions on which China has made reservations, is binding on municipal courts and takes precedence over municipal

161 Adopted at the Fourth Session of the Sixth National People's Congress on 12 April 1986 and promulgated by Order No. 37 of the President of the People's Republic of China on 12 April 1986. Art. 142 states that '[t]he application of law in civil relations with foreigners shall be determined by the provisions in this chapter [i.e., Chapter VIII: Application of Law in Civil Relations with Foreigners]. 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'.

162 Adopted at the Third Session of the Fifth National People's Congress and promulgated on 10 September 1980. Art. 16 states that '[i]ncome tax paid by a joint venture or its branch in other countries may be credited against the assessed income tax of the head office as foreign tax credit. Where agreements on avoidance of double taxation have been concluded between the Government of the People's Republic of China and the government of another country, income tax credits shall be handled in accordance with the provisions of the related agreements.'

163 Adopted at the Fourth Session of the National People's Congress on 9 April 1991 and promulgated by Order No. 45 of the President of the People's Republic of China on 9 April 1991. Art. 28 states that '[w]here the provisions of tax agreements concluded between the government of the People's Republic of China and foreign governments are different from the provisions of this Law, the provisions of the respective agreements shall apply'.

164 Adopted at the Tenth Session of the Standing Committee of the Sixth National People's Congress on 21 March 1985 and promulgated by Order No. 22 of the President of the People's Republic of China on 21 March 1985. Art. 6 states that '[w]here an international treaty which is relevant to a contract, and to which the People's Republic of China is a contracting party or a signatory, has provided differently from the law of the People's Republic of China, the provisions of the international treaty shall prevail, with the exception of those clauses on which the People's Republic of China has declared reservation.'

165 Adopted at the Third Session of the Sixth National People's Congress on 10 April 1985 and promulgated by Order No. 24 of the President of the People's Republic of China on 10 April 1985. Art. 36 states that '[f]or inheritance by a Chinese citizen of an estate outside the People's Republic of China or of an estate of a foreigner within the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply. For inheritance by a foreigner of an estate within the People's Republic of China or of an estate of a Chinese citizen outside the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply. Where treaties or agreements exist between the People's Republic of China and foreign countries, matters of inheritance shall be handled in accordance with such treaties or agreements.'

166 Z. Li, 'The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problems in China', in B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (1997), 329, 341, referring to *Legal Status of Eastern Greenland* (*Denmark v. Norway*), *Judgment*, PCIJ. Ser. A/B, No.53 (1933), 22.

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law.[167] In China, a treaty does not automatically become part of national law and must go through the process of implementation through administrative measures or transformation through national legislation, although a particular treaty may be directly applied by municipal courts in pursuance of particular enabling national legislation or Article 142 of the General Principles of the Civil Law and Article 238 of the Law of Civil Procedure.[168] Xue Hanqin and Jin Qian have noted that China is now party to over three hundred multilateral treaties and about seventy municipal laws touch upon its treaty obligations.[169] As it was about to join the World Trade Organization ('WTO') in 2001, China stated in the *Report of the Working Party on the Accession of China* as part of its agreement with the WTO thus:

> 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 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.[170]

Xue and Jin note that 'China has repealed, abrogated, revised, enacted and promulgated more than 3000 domestic laws, administrative regulations and administrative orders to ensure compliance with WTO rules.'[171]

7. Conclusion

Western powers created, interpreted, and manipulated international law to suit their needs and interests, and expected non-Western states to follow it. Japan, Siam, and the Ottoman Empire modernized their legal systems and adapted to international law during the nineteenth century in their attempts to gain admission to the 'family of nations' and be treated as equal members. Yet only Japan managed and even then its demand at the Paris Peace Conference that the peace treaty with Germany contain a racial equality clause was rejected. Siam, a major ancient kingdom in Southeast Asia with its own tribute system, had to enter into treaties with foreign states conferring foreign diplomatic representation in the Siamese capital, extraterritoriality, and foreign access to the Siamese market. The Ottoman Empire, realizing that it would never be accepted as a member within the 'family of nations', decided to react against

167 H. Xue and Q. Jin, 'International Treaties in the Chinese Domestic Legal System', (2009) 8 *Chinese Journal of International Law* 299, 300.
168 Ibid., 306–13.
169 Ibid., 303.
170 *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001.
171 Xue and Jin, *supra* note 166, 308.

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the international system and align itself with Germany in the First World War, with the result that the entire empire disintegrated.[172]

Qing China's approaches to international law were at variance with those of Japan, Siam, and the Ottoman Empire, as it resisted international law and foreign intrusions into Chinese territory, although it did occasionally utilize international law to defend its state sovereignty and sovereign rights and attempt to re-negotiate concessions it had been forced to make. Revision and eventually abrogation of such concessions, through reference to international legal norms and principles such as *rebus sic standibus*, succeeded during the republican era, which also witnessed China's use of international law and the League of Nations to defend its state sovereignty and territorial integrity vis-à-vis Manchuria from Japan that resulted in the emergence of a new and enduring norm of customary international law, under which recognition of a territory that comes into being as a state through the threat or use of force is unlawful. Communist China initially objected to international law as an imperialistic tool oppressing weak states and hindering worldwide communist revolution, until the PRC government gradually realized after 1971, through increasing socialization with international organizations, the roles China may play in the conduct of international relations through international law and international organizations. With China's rise as arguably one of the two most important actors in international legal order, it is imperative that one understands the influence of international law on China's approaches to human rights, democracy, self-determination, and international peace and security, and how China's approaches may contribute to the understanding and development of international law and the direction in which international legal order may proceed.

172 For a discussion of how Siam and the Ottoman Empire adapted or reacted to international law and the international system before the First World War, see Horowitz, *supra* note 68. See also M. Aksakal, 'Not "by those Old Books of International Law, but Only by War": Ottoman Intellectuals on the Eve of the Great War', (2004) 15 *Diplomacy and Statecraft* 507.