



Case Western Reserve Journal of International Law

Volume 11 | Issue 2

1979

China and the International Legal Order: An Historical Introduction

Daniel J. Hoffheimer

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](https://scholarlycommons.law.case.edu/jil)

Recommended Citation

Daniel J. Hoffheimer, *China and the International Legal Order: An Historical Introduction*, 11 Case W. Res. J. Int'l L. 251 (1979)
Available at: <https://scholarlycommons.law.case.edu/jil/vol11/iss2/4>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

China and the International Legal Order: An Historical Introduction

*by Daniel J. Hoffheimer**

INTRODUCTION

DESPITE THE CONTRACTION of the world through technology, education and social and cultural interchange, the People's Republic of China remains in many respects an isolated and enigmatic society, remarkably closed and separate from an increasingly interdependent international legal order. The purpose of this paper is to explore some of the reasons for China's isolation and to speculate upon the manner in which China is becoming a participant in an international legal order and the likelihood that its participation will conform with that of other nation-states. Moreover, this paper will suggest that the historical endurance and momentum of Chinese society will require that the international legal order must accept some Chinese ideas and incorporate some of the practices and demands of China.

China's introspection and isolation since the establishment of the People's Republic in 1949, and its distinctive international political behavior has been attributable primarily to China's international politics. Since the death of Mao Tse-tung, however, China has begun to expand its consciousness and direct its perspective outward. Although it may be a remarkable happenstance that a nation as huge and culturally sophisticated as China has been so introspective and exclusive, it should not be surprising to see China assume an increasingly influential role in the international legal order. In so doing, it is inconceivable that China will not make her own contributions to the evolving style and content of international law. Although it is too early to predict the specific contributions and influences which China may offer, it is appropriate to explore certain attitudes and experiences which reflect China's present relationship with the international legal order. At the very least, such an evaluation may highlight the social, political and legal determinants which have shaped and will continue to shape Chinese attitudes toward international law.

* Member of the Ohio Bar; A.B. (1973), Harvard University; J.D. (1976), University of Virginia.

I. THE TRADITIONAL CHINESE WORLD ORDER

An understanding of modern China's view of the international legal order must commence with an analysis of traditional China's political ideology. Such an understanding cannot be derived from a cursory review of Chinese history, and contemporary sinology is continuously challenging and refining stereotypical notions of "traditional" thought. Nevertheless, certain themes have pervaded Chinese conceptions about world order and China's place in it.¹

The traditional Chinese image of world order conceived of China as a catholic culture which the Chinese termed *T'ien Hsia*—"all under heaven." The universal Chinese emperor was the "Son of Heaven," and he held on earth a cosmic status reflective of the order of the celestial universe.² The Chinese characters for "China" today remain *Chung-Kuo*—"the Middle Kingdom." Thus, China has seen itself not as a nation among many but as world order in itself. This world view was reinforced and refined through centuries of Confucian philosophy, as it became the official ideology of the Chinese Empire. Because of China's ingenious capacity over the centuries to withstand ideological challenges from neighboring peoples and, in most instances, to absorb them, to varying degrees, into the Chinese cultural world, China retained its vision of world order intact until the nineteenth century when the encroachment of the West forced a fundamental readjustment.

Distilled to simplistic terms, traditional China viewed itself as a macrocosmic Confucian family, ruled by the Emperor, with all of the ideological conceptions which comprised Confucian philosophy and political theory in its ever-evolving transformations. Of paramount importance was the fact that China never conceived of itself as a nation-state or political or sovereign subdivision of a larger international legal system. China's view of the international legal order was simply China. All other lands and peoples were barbarians peripheral to the "Middle Kingdom," to which all others paid homage as the cultural and

¹ For good discussions of traditional Chinese ideology relating to world order, see Yang, *Historical Notes on the Chinese World Order*, in *THE CHINESE WORLD ORDER* 20 (J. Fairbank ed. 1968); Schwartz, *The Chinese Perception of World Order, Past and Present*, in *id.* at 276; Schwartz, *The Maoist Image of World Order*, 21 *J. INT'L AFF.* 1 (1967), reprinted in B. SCHWARTZ, *COMMUNISM AND CHINA: IDEOLOGY IN FLUX* 228, 230-32 (1968); I. OJHA, *CHINESE FOREIGN POLICY IN AN AGE OF TRANSITION* 125 (1970).

² For a discussion of the parallelism between traditional Chinese perceptions of world order and cosmic order, see Hoffheimer, *Science and Symbolism in Chinese Astronomy*, *SYNTHESIS*, Jan. 1974, at 24, 27-28.

ideological ruler of the universe of men. Traditional China's conception of legal order, therefore, generally excluded notions of public law assumed in the West. For example, China recognized no legal rules which restrained or regulated political activity between nations or granted rights and obligations to foreign peoples or their governments.

It is not surprising, therefore, that traditional Chinese jurisprudence is virtually devoid of any systematic treatises on comparative and international law. Law was simply another aspect of the Chinese morality which governed all human activity. Nothing similar to Roman law concepts governing international relations, such as *ius gentium* or sovereignty, are to be found. There was no system of sovereign states, but only one China. China's relations with her tributary states and surrounding peoples reflected the familial qualities of Confucianism: China acted like a parent and expected alien peoples to act like her children. It would not be an exaggeration to suggest that traditional China never accepted any notion of an international legal system comprised of different participants, but saw world order as an extension of the Chinese Empire and a reflection of the cosmos.

The foregoing characterizations of traditional Chinese perspectives on world order is painfully inadequate. It ignores both the kaleidoscopic diversity and the contortions of Chinese history, as well as the many divergences between theory and practice. It serves, nevertheless, to emphasize the unique direction from which China entered the modern, interdependent world.

II. CHINA'S WORLD ORDER IN REVOLUTION

The Confucian ethos which had provided the Chinese polity with its legitimacy and self-image for millenia was destroyed by the Chinese Revolution. The central problem of Chinese political life and the fundamental concern of Chinese thought for the past century, and especially since the revolution, has been the creation of a new ideology to replace Confucianism. The intellectual life of modern China has been a prism of theories and exploration and, in the face of external imperialism and internal revolution, it is not surprising that the dynamic model of the Russian Revolution has, since 1917, been of paramount importance. The Russian Revolution, after all, was quickly able to displace the inefficient and inequitable Czarist autocracy. It was further able, after several years of civil war, to establish at least the shell of a modern nation-state capable of withstanding the threats of modern warfare and technology in a hostile international legal system.

It was this system, created and imposed by the West, with which China was finally forced to deal at the end of the nineteenth century. Compared with Russia's revolution, however, the Chinese Revolution was a far more complicated process of salvaging an entire civilization in danger of extinction from external encroachment by powerful nation-states and from internal political and social decay.

The Chinese intellectuals of the late nineteenth and early twentieth century, including the intellectual founders of the Chinese Communist Party, sought to create a new foundation for Chinese civilization. The entropy of China's traditional *Weltanschauung*, or world view, forced China to search out its place in the multi-state international system which had spread out from Europe since the Roman Empire and had solidified following the fragmentation of Christendom after the Renaissance.³ Regardless of the alternatives available at certain points in China's modern history, it is now clear that Chinese Communism was the most attractive and successful ideology. Communism offered China a new political culture with integral ideological, sociological and institutional constituents needed to give China a desirable role in the modern international order. Marxism-Leninism-Maoism meshed well with the Chinese Revolution because it offered a modern, absolute and totalistic doctrine which was largely founded on a scientific critique of Western imperialism, China's primary enemy.⁴ In this, Mao Tse-tung, Sun Yat-sen and Chiang K'ai-shek were agreed: The establishment of national identity and unity through resistance to imperialism, which included eradicating internal weaknesses such as warlordism and political underdevelopment, was the indispensable prerequisite to the continuation of China as a separate cultural entity in the international order.

III. IDEOLOGICAL AND HISTORICAL ORIGINS OF MODERN CHINA'S SELF-IMAGE IN WORLD ORDER

A. *The Impact of Imperialism*

Chinese revolutionaries did not seize upon Marxism-Leninism simply as a rationalization for political power and national development. Above all, they seized upon it because Lenin's theory of imperialism

³ See Schwartz, *The Chinese Perception of World Order, Past and Present*, *supra* note 1, at 284.

⁴ See Hoffheimer, *Law and Modernization in China: The Juridical Behavior of the Chinese Communists*, 7 GA. J. INT'L & COMP. L. 515, 522 (1977).

served as an ingenious explanation for the failure of the colonial, backward areas of the world to throw the spark into the over-loaded mine of world capitalism as Marx had predicted.⁵ Lenin's remarkable little book, *Imperialism*, seemed to explain China's unfortunate predicament of subjugation by Western nation-states. Chinese Marxists, like Lenin, emphasized the voluntarist strain in Marxian theory to seize control over the forces of history, which hitherto had brought China to its knees. Of course, the elevation of political ideology over economic determinism also implied the primacy of party organization over the class base, which was well-suited to a country such as China which had virtually no urban proletariat. In this way, Marxism-Leninism began its transmogrification and sinification to Chinese reality. The Chinese Communist Party, therefore, became a conscious agent of historical and social change, including the agent of strengthening China's self-defense against a hostile international legal system.

Despite its symbolic importance to the development of Chinese Communism, Bolshevism, including its Stalinist contortions, did not provide a realistic model for the creation of a Chinese nation-state or even for the seizure of power by the Chinese Nationalists or the Chinese Communists. Sun Yat-sen's Bolshevik-style putsches had failed in dozens of uprisings; the seizure of Canton in 1911 did not go nearly so far toward winning the revolution in China as Lenin's seizure of Moscow and St. Petersburg had done in Russia. The Bolshevik-type party organization, as adopted by Sun's Chinese Nationalist Party (Kuomintang) after 1924, did not offer the needed solutions to the problems of the Chinese Revolution because the imperialistic threat to China was far greater than it was in Russia.

While the yellow peril was an unfounded myth, the white peril in China was a painful and obvious fact of history. Lenin's theory of imperialism provided not only a simple explanation with which Chinese Communists could manipulate symbols of anti-imperialism and nationalism,⁶ but it articulated China's predicament in a comprehensive world view. Fifteen years before Lenin's *Imperialism* appeared in 1917,

⁵ Marx, *Revolution in China and in Europe*, New York Daily Tribune, June 14, 1853, reprinted in KARL MARX ON COLONIALISM AND MODERNIZATION 73 (S. Avineri ed. 1968).

⁶ Wilbur, *The Influence of the Past: How the Early Years Helped to Shape the Future of the Chinese Communist Party*, in PARTY LEADERSHIP AND REVOLUTIONARY POWER IN CHINA 43 (J. Lewis ed. 1970).

in fact, Liang Ch'i-ch'ao, the greatest Chinese thinker of the late nineteenth century, had carefully defined imperialism as "the industrial power of the citizens of a nation [which] has been fully developed domestically and must flow to the outside. . . ."⁷ Both Liang and Li Ta-chao, the leading founder of Chinese Communism, expressed imperialism in terms of international racial conflict and were able, in dialectical fashion, to focus on China as a distinct nation rather than as a universal culture. Li went so far as to articulate imperialistic exploitation of the Oriental peoples as a class struggle on the international level.⁸ This early emphasis on imperialism, long before 1917, turned the attention of Chinese revolutionaries to the problem of building up the nation. Chinese nationalism thus became indistinguishable from anti-imperialism.

B. *The Impact of Popular Mobilization and Communism*

Nationalism was not just a problem of anti-imperialism, however, but one of anti-localism as well. The revolution was as much a process of reintegrating the fragmented provinces and elevating the loyalties of the people from the family to the national level as it was a defense against imperialism. Long before Stalin gave Chiang K'ai-shek's Northern Expedition against the warlords the stamp of orthodoxy, Mao and other radicals had given it enthusiastic support as a first step toward national unity. For the same reason, Mao in 1926 supported Chiang unequivocally as the "leader" of the nationalist revolution, revealing his belief in the priority of national over social goals.⁹ The Chinese problem of arousing a patriotic citizenry in order to create a nation-state was similar to the problem Lenin encountered in Russia with a slumbering proletariat, but in China the task demanded a far greater leap in the consciousness of all classes.

Both Lenin and Trotsky believed that, with the help of communist parties, the proletariat in colonial countries, miniscule as it was, would develop not nationalism, but greater feelings of class solidarity. Imperialism, they believed, actually intensified class struggle within ex-

⁷ Liang Ch'i-ch'ao, *The Renovation of the People* (1902), in CHINA'S RESPONSE TO THE WEST 221 (S. Teng & J. Fairbank eds. 1954).

⁸ See generally J. LEVENSON, LIANG CHI-CH'AO AND THE MIND OF MODERN CHINA 101-03 (1953); MARXISM AND ASIA 206, 220 (H. d'Encausse & S. Schram eds. 1969).

⁹ See generally S. SCHRAM, MAO TSE-TUNG 81 (1966); THE POLITICAL THOUGHT OF MAO TSE-TUNG (S. Schram ed. 1969).

plotted countries.¹⁰ The urban areas of China had received the greatest imperialist impact in the 1920's, the time of closest Party contact with the proletariat. The difficulty which the Chinese Communists encountered in urban mass organization at that time clearly qualifies the Leninist thesis; in fact, the Chinese Communists had far greater success in mobilizing the rural villages, which had experienced less Western impact.¹¹ In the countryside, after all, it took little effort for peasants to recognize as "unequal treaties" the tenancy and land-holding arrangements which often claimed seventy percent of their crops.¹² The Chinese efforts against "feudal" landlords were hardly akin to Leninist anti-imperialism, yet the liberation of the peasants was certainly crucial to arousing a patriotic citizenry which would value a stake in the political system. Micro-societal reorganization, therefore, was as much a prerequisite to nationalism and a modern nation-state as to liberation from imperialism.¹³

C. *The Role of Leadership in Developing National Identity*

The Leninist conspiratorial party organization provided Chinese Marxists with an instrument for putting their nationalist and socialist aspirations into practice. Chinese rebellions in the past, they realized, had failed because of insufficient organization. Even the largest rebellion in world history, that of the T'ai-p'ings in the mid-nineteenth century,¹⁴ had been crushed by the decrepit Ch'ing regional armies because of their failure to institute effective organization. The Leninist party, therefore, provided both the organizational power for the politically conscious leadership and the rudiments of legitimation for revolutionary authority.

¹⁰ L. TROTSKY, *PROBLEMS OF THE CHINESE REVOLUTION* 27-28 (1932).

¹¹ Hofheinz, *The Ecology of Chinese Communist Success: Rural Influence Patterns 1923-1945*, in *CHINESE COMMUNIST POLITICS IN ACTION* 68-69 (A. Barnett ed. 1969).

¹² H. ISAACS, *THE TRAGEDY OF THE CHINESE REVOLUTION* 221 (1951).

¹³ One scholar has argued that provincialism contributed strongly to the rise of nationalism by fostering political loyalties within provinces and small regions. See Fincher, *Political Provincialism and the National Revolution*, in *CHINA IN REVOLUTION: THE FIRST PHASE, 1900-1913* (M. Wright ed. 1969). Communist village organization later had the same effect. See Hoffheimer, *supra* note 4, at 527-29.

¹⁴ The T'ai-p'ing Rebellion, 1850-1864, was a massive but unsuccessful attempt led by Hung Hsiu-ch'üan to overthrow the Manchu dynasty. The Manchus had in the seventeenth century conquered China and managed to maintain a brilliant and powerful government until about 1800, after which they rapidly decayed in energy and ability. It was not, however, until 1912 that the Manchu, or Ching, dynasty was overthrown.

Lenin's theory of imperialism had demanded national liberation as a prerequisite to socialist revolution. The revolutionary, guerrilla struggle against the Chinese Nationalist Party was one step in this fight for national liberation. Stalin, in one of his more accurate and even Leninist characterizations, described the nature that a revolutionary government would assume in China as being generally similar to the government "that was being talked about" in Russia in 1905, that is, a "democratic dictatorship of the proletariat and peasantry—but with the difference that in China it would have to be first and foremost an anti-imperialist government."¹⁵ The Party's de-emphasis on class struggle by the urban proletariat and its willingness to enter into political alliances with the bourgeoisie were quite easily legitimized by Lenin's theory of imperialism.

The excruciating dilemma of the Comintern in the 1930's, whether to emphasize class struggle or unified national resistance to imperialism, was not really relevant to China. From Stalin's policy of the "four class bloc" only a subtle and relatively natural shift was needed to reach Mao's 1935 speech "On New Democracy," which candidly summarized the realities of class relations in China. This speech legitimized for China what Lenin had called the "joint dictatorship of all revolutionary classes." The Chinese Communists were thus able to ally with the "big" and even the "comprador" bourgeoisie, as well as with the "national" bourgeoisie—so long as they were patriotic.¹⁶ Anticipating the Japanese invasion, the New Democracy created a multi-class alliance for a united front against Japan and astutely provided the theoretical foundation for Communist leadership in any alliance with the Nationalists. No longer would the national bourgeoisie be allowed "leadership" in the revolution as it had been before 1926; too large a section of it had proved itself counter-revolutionary. The divorce of the Communist Party from its theoretical class base, the urban proletariat, actually elevated the symbolic pre-eminence of the proletariat in the alliance of all revolutionary classes.

In articulating the class relations among the Chinese people, Mao was above all, being a nationalist. A major distinction of the Chinese from the Soviet experience was the ability of the former to rely on the example of another socialist state, the Soviet Union, in their own attempts to create one in China. The October Revolution, Mao said, had made the Chinese bourgeois-democratic front, . . . a part of the

¹⁵ Quoted in *MARXISM AND ASIA*, *supra* note 8, at 227.

¹⁶ *Id.* at 251.

proletarian socialist revolution."¹⁷ Because this Chinese version of the European Popular Front was a rural struggle against Japanese imperialism, the peasantry itself became a nationalist, as well as revolutionary, class. The revolutionary civil war was more than a struggle for political power on behalf of the proletariat; the nationalist phase of the revolution, though merged with the socialistic revolution, constituted a united front against domestic "feudalism" and the backwardness of the peasantry.¹⁸

The united front, therefore, was not merely a struggle against an external foe, but the integration of all classes into the nation. With the national revolution considered a part of the proletarian revolution, the peasants were able, in theory, to make the qualitative change into nationalists, and even into socialists. The Party was thereby able to fuse the process of nation-building with its socialist objectives.

"Revolution is impossible," said Lenin, "without a national crisis affecting both the exploited and the exploiters."¹⁹ The Japanese invasion, by threatening all of Chinese society, provided the impetus for unified national resistance. Chiang K'ai-shek believed that the Chinese "state" would be formed as a result of resistance to imperialism.²⁰ Although his concept of the "state" was quite different, Mao also believed that through the dialectic transformation of imperialism from a threat into a force for change, the people could use the war as a means for creating national identity and power.

By the 1930's formalistic and dogmatic subservience to Soviet models had proven irrelevant to China and had to be rejected. "Chinese Communists are Marxian internationalists," Mao said, "but Marxism must be expressed in national form for practical realization." As an historical materialist, he knew that "there is no such thing as abstract Marxism, only concrete Marxism." By 1945, Liu Shao-chi had considered Mao's insights to be "an admirable model for the nationalization of Marxism" in other colonial countries.²¹

At the micro-societal level, the Communists revolutionized north Chinese society by breaking down its "feudal" stasis through conflict

¹⁷ Mao Tse-tung, *On New Democracy*, in 2 SELECTED WORKS 344 (1967).

¹⁸ *Id.* at 341.

¹⁹ V.I. LENIN, *LEFT-WING COMMUNISM: AN INFANTILE DISORDER* 65 (1940).

²⁰ CHIANG K'AI-SHEK, *CHINA'S DESTINY* 29 (1937).

²¹ Mao Tse-tung, *Sixth Plenum of the Central Committee on the Popularization of Propaganda*, in MAO'S CHINA: PARTY REFORM DOCUMENTS 1942-1944, at 253-54 (B. Compton ed. 1952).

and struggle in the villages, and by reintegrating the people in a new political system—a nation-state. Two fundamental stages were utilized for social mobilization and political development. First, there was the destruction of old habits and political alignments, and, second, there was the induction of the politically conscious masses into stable, new patterns of community and organizational commitment.²² Both stages were institutionalized in China by 1942.

Mao's theory and practice of the New Democracy succeeded in realizing the manifesto expounded by its semantic forebear, Liang Ch'i-ch'ao's *New People* of 1902. "A state," he had said, must be formed "by the assembly of its people."²³ For the first time in Chinese history, a large number of the Chinese people has assumed a genuine role in their own government and would be able to provide much of the initiative for political and economic development.

The communists' breakthrough during the 1930's and 1940's in successful nation-building was, above all, the result of the leadership's own behavior. It was the manner in which the Party responded to the crisis of Japanese imperialism and to their own divorce from the proletariat which perpetuated and strengthened the Party's authority. Neither the national crisis nor the social reforms alone gave the Party its mandate. The emphasis of the New Democracy on political alignments over class origins was primarily responsible for the reintegration of the people into the nation. But this process of nation-building, which most Western political scientists see as the ultimate socio-political trend of underdeveloped countries, was to the Chinese Communists only one step toward a much larger vision of socialism and communism. The party's Marxist-Leninist ideology was not, as some have argued, merely an "adjunct" to nationalism useful in mobilizing the people for political and economic goals.²⁴ Even Mao's New Democracy, by stressing political alignments in the process of reintegration, helped to preserve the ultimate class origins in the Party's consciousness. With the Soviet Union as a revolutionary bulwark and with peasants able to make "qualitative leaps," the development of post-colonial China was intended to go beyond nation-

²² Deutsch, *Social Mobilization and Political Development*, in 55 AM. POL. SCI. REV. 493 (1961).

²³ Quoted in CHINA'S RESPONSE TO THE WEST, *supra* note 7, at 220.

²⁴ See generally C. JOHNSON, PEASANT NATIONALISM AND COMMUNIST POWER: THE EMERGENCE OF REVOLUTIONARY CHINA ix, 30 (1962); F. SCHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA 107 (1966).

building to merge the bourgeois-democratic with the proletarian-socialist revolution. Nevertheless, China's new nationalism and widespread political consciousness was a continuing process which placed China squarely, for the first time, in an international legal order on terms commensurate with the West.

IV. CHINA AS A NATION—STATE IN THE INTERNATIONAL LEGAL ORDER

In evaluating the long process of China's emergence as a modern nation-state, several overriding generalizations can fairly accurately be made. Regardless of the traditional and even Confucian language employed by Chiang, Sun and the young Mao, all of the leaders of China since the fall of the Ch'ing dynasty in 1911 have been ardent nationalists. Although Chinese concepts such as "sovereignty," "nation" and "international" are colored by China's past, a fundamental component of Chinese Communism is Chinese nationalism. In their evolving conceptions of China as a sovereign and independent nation, both Chiang and Mao and their successors reflect Grotius and Bodin²⁵ more than Confucius.

Chinese Communist doctrine and practice, particularly since the death of Stalin and the advent of the Sino-Soviet rift in the mid-1950's, illustrate that the tensions between foreign-derived aspects of Chinese ideology and uniquely Chinese aspects have almost always been resolved in favor of the latter. Thus, the Chinese have consistently espoused and supported movements of national liberation, both communist and noncommunist, even when opposed by Moscow.²⁶ At the same time, China's rejection of Soviet ideological hegemony implies an assertion of Chinese orthodoxy—the thought of Chairman Mao—and seems to indicate the reappearance, in a new guise, of the traditional Chinese pattern of emphasizing China's unique role in the world. The new rhetoric and style of Chinese foreign relations, however, has an entirely different content than could be expected from the traditional ap-

²⁵ Hugo Grotius, 1583-1645. To a great extent, twentieth century international law has followed the precepts which the Dutchman Grotius developed in *De Juri Belliac Pacis*, and in several other works on jurisprudence. Jean Bodin, 1529 or 1530-1596, was a French political philosopher whose exposition of the principles of government was influential in Western Europe when feudal systems were being replaced by centralized nation-states.

²⁶ The Chinese position on the Pakistan/Bangladesh problem, although apparently inconsistent with this generalization, should be viewed in light of China's national interests in Tibet and the Sino-Indian border areas.

proach. In post-Mao China, one witnesses the further evolution in Chinese foreign policy of China's participation in the international legal order, but an evolution within the context of China's nationalism and sovereignty.

V. THE BASIC ASSUMPTIONS OF CHINESE PRACTICE OF INTERNATIONAL LAW

Once one understands the direction from which China has become an actor on the modern international stage, China's style of participation in international affairs becomes far more comprehensible. In view of the total annihilation of the traditional Chinese idea of world order by the beginning of the twentieth century, China has had to establish a new place for itself in the world and to justify new goals for its international affairs. Several themes can be seen in China's practice of international law since 1949.

The first and most obvious theme is Chinese nationalism. Because of imperialism and internal decay—and because of China's unique response to these threats—it is not surprising to see nationalism as a fundamental assumption of China's foreign relations and attitudes toward international legal order. China's insistence that Peking alone, and not Taipei, is the seat of Chinese sovereignty, coupled with China's relentless pursuit of free negotiation of treaties on an equal basis and its insistence on equality in all international organizations, are simply reflections of China's demand that it be treated by all nations as a sovereign equal.

Related to the assumption of nationalism is China's implicit faith in and respect for power politics. When Mao said that "power grows out of the barrel of a gun," he meant, among other things, that China had to face the reality that political and legal authority presupposes international physical power. In holding this view, the Chinese have resembled legal positivists. Power politics and *Realpolitik* are, in China's view, the salient characteristics of Western international law. The territorial battles of European nations and their outward expansion in imperialist politics epitomize for China the West's practice of international law. Traditionally, this system did not work for China because China was not an equal participant. For example, Woodrow Wilson's "magnanimous" Fourteen Points²⁷ did not attack

²⁷ In President Wilson's wartime declaration of January 8, 1918, he proposed for the postwar world a new, open diplomacy to replace the alliance system which had led to the First World War.

the unequal treaties which had brought China to its knees. Despite the report of the Lytton Commission²⁸ condemning Japanese imperialism in China, China remained subject to unequal treaties until the mid-1940's. In its weakness, China could only interpret America's flip-flop on China's sovereignty over Taiwan from the Cairo Declaration in 1943 to the official position taken in 1950,²⁹ as one more indication of Western imperialism. The Chinese have gained respect for physical power from these bitter past experiences.

A third theme of China's participation in the evolving international legal order is its moralistic attitude. Perhaps to some degree, China's emphasis on moral principles, such as equality, as fundamental prerequisites for participation in international affairs reflects traditional consciousness, borne into the present by symbolic language and by a predisposition to ideological orthodoxy. It is not surprising, therefore, to see China repeatedly condemn other nations' actions in vehement, absolutist rhetoric. The language of China's attitudes toward international legal order consistently appears as moralistic overstatement. Thus, it is not surprising that the failure until December 15, 1978, of the United States to recognize the People's Republic as the legitimate government of China was met with moral, as well as political, condemnation in Chinese pronouncements.

A fourth, and probably the most important theme that permeates China's ever-changing practice of international law is its pragmatism, its dialectical capacity to turn adversity to advantage and weakness to strength. Despite the continuities of the past and China's bitter distrust of Western international legal rules and ideals, China has, in some important ways, become a zealous believer in some of the basic assumptions of the Western international legal order. No nation more

²⁸ The Lytton Inquiry Commission was organized by the League of Nations in response to Chinese demands for enforcement of the League's sanctions against Japan following the Japanese invasion of Manchuria in 1931. After investigating the situation, the Commission report recommended that sanctions should be employed to force Japan to withdraw. Although the assembly unanimously adopted this report in February 1933, Japan withdrew from the League a month later and no sanctions were ever actually imposed.

²⁹ At the Cairo Conference in 1943, President Roosevelt agreed that Taiwan should be returned to China after the defeat of Japan. Following the outbreak of the Korean War in June 1950, President Truman declared that the future status of Taiwan had not yet been determined, and suggested that there was a possibility that the island might be returned to Japan, which had held it from 1895-1945. Clough, *The Taiwan Issue in Sino-American Relations*, in *CHINA AND AMERICA* 151-53 (W. Barnds ed. 1977).

vociferously defends its national self-interest and sovereignty than China. Logically, therefore, China has exercised admirable skill in treaty negotiation and international diplomacy whenever such activity augments China's standing in world politics and helps it assume equality with other nations. China's attitudes are reactionary, rather than inherently creative. They are reactionary both to China's imperialist past and to the historic hostility of the Western international system. Instead of withdrawal into isolation, however, China has mastered Western techniques and has employed them to pursue its own goals. In this sense, China has embraced the West's own style of power politics. The dramatic achievements of the Chinese Communists in treaty negotiation are perhaps most symbolic of this achievement. Although the Chinese have accepted negotiation, they have been adverse to international adjudication for the reason that commitment of issues to the jurisdiction, for example, of the International Court of Justice, would risk China's subjection to Western power.

VI. CONCLUSION: THE FUTURE

From the basic themes that permeate China's view of international legal order, a tentative assessment can be made regarding the future. First, Chinese perspectives on international order will remain premised upon the politics of self-protection and national defense. China became a nation-state involuntarily as a reaction against Western imperialism and internal disintegration. Its participation in the international legal order will be premised upon China's security from a hostile, predominantly Western world.

Second, because of the totalistic ideological framework of both Confucianism and Marxism-Leninism-Maoism, one should not expect to witness the development of a Chinese jurisprudence of international law. The manifold refinements and legal rules which comprise Western international legal theory are inconsistent with Chinese ideological flexibility. However, in practice the evolution of Chinese attitudes toward the international legal order may become similar to ideas of world public order and human dignity which have been espoused by a leading school of Western international lawyers.³⁰ So long as human rights and other issues are seen by the Chinese as political rhetoric

³⁰ See, e.g., McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387 (1974); Note, *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*, 14 VA. J. INT'L L. 535 (1974).

employed by the West to further its national interests, China will see such concepts as threats to Chinese internal political flexibility and its equality in international affairs.

Third, although China has in most respects become a modern nation-state, as defined by most Western social scientists, one should not expect China to discard its ancient cultural inheritance. China is unlikely to develop a technical appreciation for Western legal institutions and legal rules, including those creating individual rights and obligations. China's goal of international peace will be sought within the confines of China's moralistic self-righteousness and national self-interest which, of course, is no different from the motivation of Western states. In short, China will not sacrifice its political and ideological perspectives and blindly accept the Western international nation-state system without substantial modification.³¹ Hence, China will continue to be a hostile participant in the Western system and will reject the myths and rhetoric of Western diplomacy unless China is permitted to participate on equal terms. This is not to say that China will oppose the basic assumptions of Western international law, including peaceful co-existence, human rights and economic well-being. The distinction will be between the means used by the Chinese and the West to further these goals, rather than in the ends themselves.

Because of these considerations, the international legal order will continue to operate flexibly, fragilely and unpredictably—not as a “system,” but as a fluid and complex interdependence of values and aspirations.³² One should not expect a stable and legitimate international legal order with widespread acceptance to evolve within the few decades ahead. In order to accomplish the shared goals of mankind through international legal order, the West will have to sacrifice some of its traditional and cherished legal rhetoric and mythology.³³ Such a

³¹ See Cohen, *Chinese Attitudes Toward International Law—and Our Own*, in CONTEMPORARY CHINESE LAW 282, 292-93 (J. Cohen ed. 1970); see also Hoffheimer, *supra* note 4, at 550.

³² My use of the concept of “international legal order” is considerably broader than the idea of an “international legal system.” See Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894 (1977). Above all, legal order includes contiguous aspects of the legal system including the political and sociological components.

³³ For a recent and compelling argument for the need for accommodation by the West, and by the United States in particular, in international affairs, see S. HOFFMANN, *PRIMACY OF WORLD ORDER: AMERICAN FOREIGN POLICY SINCE THE COLD WAR* (1978).

concession by Western nations will be difficult and will not be possible without a much deeper and more sophisticated understanding of and respect for the strengths of Chinese values, as well as of the cultures of other non-Western societies. Such understanding is indispensable to a meaningful and legitimate international order in an increasingly complex and interdependent world.