CHINA'S EXERCISE OF SOVEREIGNTY AND THE INTERNATIONAL LEGAL ORDER: APPRAISAL OF A SYMBIOTIC RELATIONSHIP

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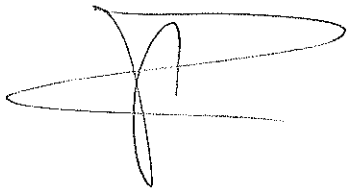
DECLARATION

I hereby declare that this thesis is my original work and it has been written by me in its entirety. I have duly acknowledged all the sources of information which have been used in the thesis.

This thesis has also not been submitted for any degree in any university previously.



CHAN CHING WAI PHIL

21 November 2013

for Paul Serfaty,

whose enduring love and faith, even in face of my many flaws,
helps me strive to be a better person and encourages me to believe I could contribute to society

for Simon Chesterman,

whose kindness, understanding, expertise and guidance are critical to this thesis materialising as an intellectual reality

and for my mother and late grandmother,

having endured poverty and mistreatment in China and fled to Hong Kong,
for their forbearance, at the expense of their comfort, of my pursuit of scholarship

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Non-Western authors are cited in this thesis in the name order as they are published.

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Summary

China's rise has aroused apprehension about the likelihood that China is set to revise the legal and political rules of the current international order to pursue and reflect its power and status. Inherent in such apprehension is the assumption that, in its exercise of State sovereignty, China is unlikely to comply with international law that underlies and governs this order. Such an assumption overlooks the empirical and normative influence of international law on China's exercise of State sovereignty, and ignores and ultimately undermines the legitimacy, authority and normative values of the current international legal order. In caricaturing China's approaches to international law and the current international legal order as merely manifestations of its revisionist strategies, the assumption furthermore deprives the development of international law and improvement of the current international legal order of important substantive and normative input.

This thesis explores the extent to which China's exercise of State sovereignty has shaped and contributed to the legitimacy and development of international law and the direction in which the current international legal order may proceed. It also examines how international law within a normative–institutional framework has moderated China's exercise of State sovereignty and helps mediate differences between China's and other States' approaches to the principle of State sovereignty that has undergone oscillating interpretations, such that the locus in which the principle resides in the current international legal order, and international law generally, may be better understood.

Chapter I explains how the relationship between China and international law has been overlooked in existing research literature other than through the lens of compliance, and the research framework and methods this thesis adopts in demonstrating why one should understand the symbiosis between China's exercise of State sovereignty and the current international legal order in their mutual impact,

moderation, conciliation and development. Chapter II presents a critique of dominant Western discourses of international law and State sovereignty that typically frame and confine analyses of the relationship between China and the current international legal order. Chapter III explores China's approaches to international law, including how international law has shaped China's conception of State sovereignty, since the Opium War during China's last imperial dynasty and its republican, communist, and contemporary regimes. Chapters IV and V discuss the roles international human rights law has played in China's recognition and implementation of human rights, democracy and self-determination in its territory, and the extent to which China's exercise of internal sovereignty has influenced the understanding and development of international human rights law. Chapter VI examines the roles of international law in China's exercise of external sovereignty through its voting behaviour and argumentation within the United Nations Security Council, and the extent to which China's actions have contributed to the maintenance of international peace and security.

Chapter VII concludes this thesis by emphasising the importance of objective appraisal of China's contribution to international law in our understanding of the current international legal order, including the locus in which State sovereignty resides and its continuing significance and implications.

Chapter I: Introduction

I. Research question

China's rapid rise (or, in Chinese minds, revival) to superpower capability – economically, politically, militarily if not also culturally[1] – has aroused apprehension about the likelihood that China is set to revise the legal and political rules of the current international order in order to pursue and reflect its power and status. Inherent in such apprehension is the assumption that, in its exercise of State sovereignty, China is unlikely to comply with international law that underlies and governs this order. Such an assumption overlooks the empirical and normative influence of international law on China's exercise of State sovereignty, and ignores and ultimately undermines the legitimacy, authority and normative values of the current international legal order. In caricaturing China's approaches to international law and the current international legal order as merely manifestations of its revisionist strategies, the assumption furthermore deprives the development of international law and improvement of the current international legal order of important substantive and normative input.[2]

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[1] 'Chinese culture belongs not only to the Chinese but also to the whole world … We stand ready to step up cultural exchanges with the rest of the world in a joint promotion of cultural prosperity': President Hu Jintao's address to a joint sitting of the Parliament of Australia, 24 October 2003, http://www.australianpolitics.com/news/2003/10/03-10-24b.shtml.

[2] Joshua Cooper Ramo, who coined the term 'Beijing Consensus' in 2004, has described China as 'marking a path for other nations around the world who are trying to figure out not simply how to develop their countries, but also how to fit into the international order in a way that allows them to be truly independent, to protect their way of life and political choices in a world with a single massively powerful centre of gravity': *The Beijing Consensus* (London: Foreign Policy Centre, 2004), 4. Ramo, ibid., adds that the Beijing Consensus 'replaces the discredited Washington Consensus, an economic theory made famous in the 1990s for its prescriptive, Washington-knows-best approach to telling other nations how to run themselves. The Washington Consensus was a hallmark of end-of-history arrogance; it left a trail of destroyed economies and bad feelings around the globe. China's new development approach is driven by a desire to have equitable, peaceful high-quality growth. Critically speaking, it turns traditional ideas like privatisation and free trade on their heads. It is flexible enough that it is barely classifiable as a doctrine. It does not believe in uniform solutions for every

This thesis explores the extent to which China's exercise of State sovereignty has shaped and contributed to the legitimacy and development of international law and the direction in which the current international legal order may proceed. It also examines how international law within a normative–institutional framework has moderated China's exercise of State sovereignty and helps mediate differences between China's and other States' approaches to the principle of State sovereignty that has undergone oscillating interpretations, such that the locus in which the principle resides in the current international legal order, and international law generally, may be better understood.

II. China and international law: Beyond compliance

While a substantial amount of research has explored the interrelationship between international law and international relations[3] and the roles of international law in the

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situation. It is defined by a ruthless willingness to innovate and experiment, by a lively defence of national borders and interests, and by the increasingly thoughtful accumulation of tools of asymmetric power projection. It is pragmatic and ideological at the same time, a reflection of an ancient Chinese philosophical outlook that makes little distinction between theory and practice.'

[3] See, *e.g.*, Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999); Jack Goldsmith, 'Sovereignty, International Relations Theory, and International Law', 52 *Stanford Law Review* (2000), 959; Jack L. Goldsmith and Eric A. Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', 31:S1 *Journal of Legal Studies* (2002), S115; Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 *European Journal of International Law* (2005), 369; Onuma Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society', 14 *European Journal of International Law* (2003), 105; Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, eds., *Handbook of International Relations* (London: Sage, 2002), 538; John K. Setear, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', 37 *Harvard International Law Journal* (1996), 139; Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *American Journal of International Law* (1993), 205; Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *American Journal of International Law* (1998), 367; Richard H. Steinberg and Jonathan M. Zasloff, 'Power and International Law', 100 *American Journal of International Law* (2006), 64.

exercise of State sovereignty by European powers and the United States,[4] compliance has by and large been the primary focus. In particular, the majority of Western scholars regard the exercise of State sovereignty by European powers and the United States to be generally in compliance with, and possessive of a normative and controlling role in the development of, international law.[5] Non-compliance, where it occurs, is taken as random or justified by necessity, as a result of *faits accomplis* or political realities, or as reiteration of the legitimacy of Western systems, values and norms.[6] This one-way direction is not surprising, as it was European powers and later

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[4] See, *e.g.*, T. Alexander Aleinikoff, 'International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate', 98 *American Journal of International Law* (2004), 91; Bardo Fassbender, 'The Better Peoples of the United Nations? Europe's Practice and the United Nations', 15 *European Journal of International Law* (2004), 857; Jürgen Habermas (trans. Ciaran Cronin), 'The European Nation-State: On the Past and Future of Sovereignty and Citizenship', 10 *Public Culture* (1998), 397; Paul W. Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', 1 *Chicago Journal of International Law* (2000), 1; Robert O. Keohane, 'Ironies of Sovereignty: The European Union and the United States', 40 *Journal of Common Market Studies* (2002), 743; Andreas L. Paulus, 'From Neglect to Defiance? The United States and International Adjudication', 15 *European Journal of International Law* (2004), 783; Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)', 47 *Harvard International Law Journal* (2006), 327; Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *European Journal of International Law* (2004), 885; William Wallace, 'The Sharing of Sovereignty: The European Paradox', 47 *Political Studies* (1999), 503.

[5] See, *e.g.*, Theodor Meron, *The Implications of the European Convention on Human Rights for the Development of Public International Law* (Strasbourg: Council of Europe, 2000); J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed. (Manchester: Manchester University Press, 1993); W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law* (1990), 866; Anne-Marie Slaughter, 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995), 503. *Contra*, see, *e.g.*, José E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', 12 *European Journal of International Law* (2001), 183; James C. Hathaway, 'America, Defender of Democratic Legitimacy?', 11 *European Journal of International Law* (2000), 121; Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?', 18 *European Journal of International Law* (2007), 379; Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', 16 *European Journal of International Law* (2005), 113.

[6] See, *e.g.*, Adeno Addis, 'Economic Sanctions and the Problem of Evil', 25 *Human Rights Quarterly* (2003), 573; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004); Allen Buchanan, 'Reforming the International Law of Humanitarian Intervention', in J.L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), 130; Allen Buchanan and Robert O. Keohane, 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', 18 *Ethics & International Affairs* (2004), 1; Antonio Cassese, '*Ex Iniuria Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *European Journal of International Law* (1999), 23; Lois E. Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of

the United States that shaped the development of international law.[7] The views, interests and concerns of Asian and African States and their peoples are relegated to secondary or little importance, or regarded as hindrances or threats to the stability of the international system and the development of international law.[8]

Humanitarian Assistance to Restore Democracy', 5 *Duke Journal of Comparative and International Law* (1994–1995), 329; W. Michael Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *European Journal of International Law* (2000), 3; W. Michael Reisman, 'In Defense of World Public Order', 95 *American Journal of International Law* (2001), 833; W. Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense', 100 *American Journal of International Law* (2006), 525; Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment', 43 *Harvard International Law Journal* (2002), 1; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977); Michael Walzer, *Arguing about War* (New Haven: Yale University Press, 2004); Adam Winkler, 'Just Sanctions', 21 *Human Rights Quarterly* (1999), 133. *Contra*, see, *e.g.*, Michael Byers and Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law', in Holzgrefe and Keohane, ibid., 177; Christine Chinkin, 'The State that Acts Alone: Bully, Good Samaritan or Iconoclast?', 11 *European Journal of International Law* (2000), 31; Jean L. Cohen, 'Whose Sovereignty? Empire versus International Law', 18 *Ethics & International Affairs* (2004), 1; Martti Koskenniemi, 'The Lady Doth Protest Too Much: Kosovo and the Turn to Ethics in International Law', 65 *Modern Law Review* (2002), 159; Ruti G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', 35 *Cornell International Law Journal* (2002), 355.

[7] See, *e.g.*, José E. Alvarez, 'Hegemonic International Law Revisited', 97 *American Journal of International Law* (2003), 873; Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5 *Social & Legal Studies* (1996), 321; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999), 1; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Michael Byers and Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002); Martti Koskenniemi, 'International Law and Imperialism', in David Freestone, Surya Subedi, and Scott Davidson, eds., *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures* (The Hague: Kluwer Law International, 2002), 197; Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Review of International Affairs* (2004), 197; Detlev F. Vagts, 'Hegemonic International Law', 95 *American Journal of International Law* (2001), 843.

[8] As illustrated quintessentially in the universalism/cultural relativism debate: see, *e.g.*, Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999); Daniel A. Bell, 'The East Asian Challenge to Human Rights: Reflections on an East–West Dialogue', 18 *Human Rights Quarterly* (1996), 641; Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights', 19 *Human Rights Quarterly* (1997), 703; Josiah A.M. Cobbah, 'African Values and the Human Rights Debate: An African Perspective', 9 *Human Rights Quarterly* (1987), 309; Jack Donnelly, 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly* (1984), 400; Jack Donnelly, 'The Relative Universality of Human Rights', 29 *Human Rights Quarterly* (2007), 281; Wolfgang Friedmann, 'The Position of Underdeveloped Countries and the Universality of International Law', 2 *Columbia Journal of Transnational Law* (1961–1963), 78; Mary Ann Glendon, 'Foundations of Human Rights: The Unfinished Business', 44 *American Journal of Jurisprudence* (1999), 1; Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention

Much Western research literature on China *vis-à-vis* international law or international organisations has focused similarly on compliance, on the premise that China is unlikely to comply with international law. For example, in her introduction of *Beyond Compliance: China, International Organizations, and Global Security*,[9] Ann Kent argues that 'China constitutes a least-likely case of compliance by virtue of its history, cultural traditions, and power. It has historically considered itself to be the "Middle Kingdom", unconstrained by international society; it lacks a tradition of the rule of law; and it is powerful enough to ignore its international obligations. … If it is nevertheless reasonably compliant with its international obligations, it helps validate the notion that all states, even non-liberal ones, comply with the norms and rules of the international system.'[10]

While Kent's strong assertion was placed in the introduction of her book, she already had done substantial work previously on China's compliance with international law, international organisations, and international regimes.[11] However,

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on the Rights of the Child', 25 *Human Rights Quarterly* (2003), 130; Rhoda E. Howard, 'Cultural Absolutism and the Nostalgia for Community', 15 *Human Rights Quarterly* (1993), 315; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Robert D. Sloane, 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights', 34 *Vanderbilt Journal of Transnational Law* (2001), 527; M. Sornarajah, 'The Asian Perspective to International Law in the Age of Globalization', 5 *Singapore Journal of International and Comparative Law* (2001), 284; Bassam Tibi, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations', 16 *Human Rights Quarterly* (1994), 277; Kamala Visweswaran, 'Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work', 26 *Human Rights Quarterly* (2004), 483.

[9] Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford: Stanford University Press, 2007)

[10] Ibid., 2.

[11] Ann Kent, 'The Limits of Ethics in International Politics: The International Human Rights Regime', 16 *Asian Studies Review* (1992), 26; Ann Kent, *Between Freedom and Subsistence: China and Human Rights* (Oxford: Oxford University Press, 1993); Ann Kent, 'China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989–1994', 17 *Human Rights Quarterly* (1995), 1; Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999); Ann Kent, 'China's International Socialization: The Role of International Organizations', 8 *Global Governance* (2002), 343; Ann Kent, 'Human Rights in Chinese Foreign Relations: Defining and Defending National Interests', *China Journal* (2002), 134; Ann Kent, 'China's Growth Treadmill: Globalization, Human Rights and International Relations', 3 *Review of International Affairs* (2004), 524; Ann Kent, 'Influences on National Participation in International Institutions: Liberal v Non-liberal States', in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, eds., *The Fluid State: International Law and National Legal Systems* (Sydney: Federation Press, 2005), 251.

in reaching the above conclusion at the introductory stage of her recent book and then using case studies only as 'an important test of the effectiveness of international organizations and their treaties in achieving compliance with their norms, principles, and rules',[12] Kent has reduced opportunities for her readers – and herself – to explore the underlying or continuing validity of her previous research and the normative values of China's approaches to international law. As Peter Katzenstein has noted, we

> use the concept of norm to describe collective expectations for the proper behavior of actors with a given identity. In some situations norms operate like rules that define the identity of an actor, thus having 'constitutive effects' that specify what actions will cause relevant others to recognize a particular identity. In other situations norms operate as standards that specify the proper enactment of an already defined identity. In such instances norms have 'regulative' effects that specify standards of proper behavior. Norms thus either define (or constitute identities or prescribe or regulate) behavior, or they do both.[13]

In construing norms as merely defining, constituting, prescribing or regulating identities or behaviours, one neglects that identities, behaviours, and norms evolve over time. China's potential to influence and shape the substantive content of international norms and the direction in which international norms may develop is often overlooked or misunderstood. In fact, China's rise and its construction of a 'harmonious world order' may evidence revival of imperial China's role as the 'Middle Kingdom', the tribute system, and the dichotomy between Chinese and

[12] Kent, *supra* n.9, 32.
[13] Peter Katzenstein, 'Introduction: Alternative Perspectives on National Security', in Peter Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), 1, 5.

Western approaches to international affairs, including the development of international law.

Every State has its own national characteristics, traditions, and pretensions. In deducing China's non-compliance with international law from its historical-cultural self-identification as the 'Middle Kingdom', Kent has failed to explore the underlying basis or continuing relevance of such Chinese mentality or explain its implications for the international order from a historical or contemporary standpoint, a shortcoming she previously acknowledged – even though she suggested that China's historical circumstances were a concern primarily of Chinese scholars.[14] Antecedent Western research on China that explored whether Chinese perceptions of world order might have endured the collapse of the Chinese imperial system or the foundation of the Chinese communist state, and how they might resurface if China regained its central place in the international order, does exist. For example, Benjamin Schwartz argued that as a result of China's military defeats in the past two centuries and its struggles for survival by ceding parts of its territory and some of its sovereign rights, 'however real the Chinese perception of world order may have been in the past, it *was* fundamentally undermined in the twentieth century; we should be extremely sceptical of assertions that assign it great causal weight in explaining present or future Chinese policies.'[15] Conversely, Mark Mancall believed that the pace of the breakdown of the *institutions* of the Chinese world order in the nineteenth century did not bring about the collapse of Chinese *assumptions* about how international society should operate or China's place in it.[16] China's historical-cultural orientation was one that was not only held by China but also shared by neighbouring States, and it constituted the foundation of an international system

[14] Kent, 'China's Growth Treadmill', *supra* n.11, 525.
[15] Benjamin I. Schwartz, 'The Chinese Perception of World Order: Past and Present', in John King Fairbank, ed., *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press, 1968), 276, 284 (emphasis in original).
[16] Mark Mancall, 'The Persistence of Tradition in Chinese Foreign Policy', 349 *Annals of the American Academy of Political and Social Science* (1963), 14.

antecedent and later parallel to the European State-based international system, one which European powers in fact considered 'a political superior'.[17]

Wholesale dismissal of China's historical-cultural orientation and its national role conception not only does not help one understand China's approaches to the current international legal order; it perpetuates the Western-centric nature of international law. China's compliance with international law, where it occurs, does not at all causally prove that all States comply with international law; it only shows that *China* does, and only on those occasions of compliance. By 'the norms and rules of the international system', Kent is referring, naturally, to the norms and rules of the international system as created and interpreted by Western powers. The potential of China's non-compliance as positive or desirable change to these norms and rules, if not also to the international system itself, is discounted. As Allen Buchanan has suggested in relation to the NATO intervention in Kosovo in 1999, 'a person who breaks the law with the aim of improving the legal system thereby shows that he values the contribution that a system of law can make to justice.'[18]

Many international relations scholars rationalise China's compliance with international law and international decision-making as part of its grand strategy for power and status. Kent argues that China's membership in international organisations provides 'a source of international prestige, status, and domestic legitimacy'.[19] In particular, by joining the World Trade Organisation in 2001, China 'has taken unprecedented steps to renegotiate the terms of its own sovereignty'[20] – even though Kent fails to explain what terms of sovereignty China has renegotiated. Marc Lanteigne contends that the United States' dominance precludes China from pursuing

[17] Teemu Ruskola, 'Raping Like a State', 57 *UCLA Law Review* (2010), 1477, 1503.
[18] Allen Buchanan, 'From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform', 111 *Ethics* (2001), 673, 675.
[19] Kent, 'China's International Socialization', *supra* n.11, 346, citing Yoichi Funabashi, Michel Oksenberg, and Heinrich Weiss, *An Emerging China in a World of Interdependence* (New York: Trilateral Commission, 1994), 55.
[20] Ibid., 355. Kent, ibid., 356, further asserts that China 'clearly hopes accession might facilitate better relations with Taiwan', when such causality is non-existent and China and Taiwan maintain their own bilateral trade agreements.

power through 'traditional' means of military, political and economic dominance (by 'traditional' he means war), and that it compels China to resort to participation in international organisations as alternate paths to pursue power.[21] Probabilities that China may benefit, augment and improve the work of international organisations, the development of international law and the maintenance of the current international order are reflexively dismissed.

Discourses of international law and international organisations that many Western scholars engage in are significantly influenced by their training in international relations and used to validate the prevalence of international relations theories over the normative values of international law. These scholars often overlook that international organisations are created, maintained and *bound* by international legal agreements, mistake what under international law States or governments should do or not do (*lex ferenda*) with what they can or *must* do or not do (*lex lata*), and blur the meanings, distinctions and significance of an array of international legal concepts, rules and principles. In the process, China is reduced to the role of a passive object of international legal concepts, rules and principles – or in Kent's view 'a "most-likely" case study' to 'destabilize the underlying consensus that gives legitimacy to these formal and informal constraints'[22] – non-compliance with any of which is then taken as evidence that China is a threat, a non-status quo power, or a power intent on revising the current international order underpinned by the United Nations Charter and international law. China's agency as a major international actor is ignored, undermined or distorted, while the 'underlying consensus' and 'legitimacy' to which Kent alludes are taken as self-evident.

Assumptions of incompatibility between China, as a State and as an illustration of a particular system of governance, and the current international order are illuminated and reinforced by Francis Fukuyama's declaration that liberal

[21] Marc Lanteigne, *China and International Institutions: Alternate Paths to Global Power* (London: Routledge, 2005).
[22] Kent, *supra* n.9, 32.

democracy has triumphed, by which all other systems of governance must and will be replaced;[23] Samuel Huntington's thesis that the international system is characterised and divided by competing and mutually incompatible cultural ideologies;[24] and assertions by Thomas Franck, Anne-Marie Slaughter and others that there is an emerging, crystallised or fundamental right to democratic governance in the post-Cold War international order, under which the development of international law should be guided by 'liberal internationalism' applicable to all States.[25] Many

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[23] Francis Fukuyama, 'The End of History', *National Interest* (Summer 1989), 16; Francis Fukuyama, 'A Reply to My Critics', *National Interest* (Winter 1989), 18; Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

Notwithstanding the re-emergence of China and Russia as leading powers since the end of the Cold War, Fukuyama has continued to defend his 'end-of-history' thesis. Writing in *The Washington Post*, Fukuyama argued that '[d]espite recent authoritarian advances, liberal democracy remains the strongest, most broadly appealing idea out there. Most autocrats, including Putin and Chávez, still feel that they have to conform to the outward rituals of democracy even as they gut its substance. Even China's Hu Jintao felt compelled to talk about democracy in the run-up to Beijing's Olympic Games': 'They Can Only Go So Far', http://www.washingtonpost.com/wp-dyn/content/article/2008/08/22/AR2008082202395.html, 24 August 2008. As Chapters II, IV and V illustrate, Western-style liberal democracy is generally taken as devoid of flaws; the implementation of democratic practices, or the lack thereof, in China does not seem to have entered Fukuyama's calculus that democracy, whatever rhetoric as might have been uttered by the Chinese leadership, is not entrenched within Chinese state apparatuses and the Chinese populace; and regression of democratic practices, including in the form of universal suffrage, in Hong Kong that was (and still is) entitled under international law to the right to self-determination has been willfully ignored and undermined by the practices of Western States and the international community. Fukuyama noted that the only real competitor to democracy is radical Islamism; if it is indeed the case, it only shows that his notion of history 'ended' only when the Berlin Wall was demolished. The communist ideology and regime in China continues to pervade all segments of Chinese society. Fukuyama's 'end-of-history' thesis is not progress in or for human understanding, but an epitome of an oasis.

[24] Samuel P. Huntington, 'The Clash of Civilizations?', 72 *Foreign Affairs* (Summer 1993), 22; Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

[25] Thomas M. Franck, 'United Nations Based Prospects for a New Global Order', 22 *New York University Journal of International Law and Politics* (1990), 601; Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990); Thomas M. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992), 46; Thomas M. Franck, 'Democracy as a Human Right', in Louis Henkin and John L.H. Hargrove, eds., *Human Rights: An Agenda for the Next Century* (Washington, D.C.: American Society of International Law, 1994), 73; Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995); Anne-Marie Burley, 'Revolution of the Spirit', 3 *Harvard Human Rights Journal* (1990), 1; Anne-Marie Burley, 'Toward an Age of Liberal Nations', 33 *Harvard International Law Journal* (1992), 393; Anne-Marie Burley, 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* (1992), 1907; Anne-Marie Slaughter, 'Law and the Liberal Paradigm in International Relations Theory', *Proceedings of the American Society of International Law* (1993), 180; Slaughter, *supra* n.5; Christina M. Cerna, 'Universal Democracy: An International Legal Right or a Pipe Dream of the West?', 27 *New York University Journal of International Law and Politics* (1995), 289; Gregory H. Fox, 'The Right to Political Participation in International Law', 17 *Yale*

Western scholars do not discern any problem with their assumption that Western systems, values and norms are superior, even when it is akin to the notion of 'civilised'/'uncivilised' nations that justified colonialism. Thus, Jack Donnelly argues, '"[i]nside" and "outside", in international no less than national societies, are defined not simply by geography or even by a history of interaction, but by cultural values that make insiders different from, and in many ways superior to, outsiders.'[26] Tim Dunne is emphatic that human rights have become a new standard of 'right conduct' and 'a new standard of legitimacy in international society',[27] while Gregory Fox and Brad Roth find criticism of international law as Western-centric to be misplaced as non-Western States have benefited substantially from international law, without which 'decolonisation, the delegitimization of apartheid, the strengthening of norms against intervention, special dispensations in costly environmental regulatory schemes, and others' would not have taken place.[28]

As David Strang reminds us, colonisation 'took place within and was carried forward by a collective delegitimation of the sovereignty of non-Western polities. … Western witnesses participated in a status degradation ceremony, where Asian and African polities were publicly denounced as outside and in opposition to a self-

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International Law Journal (1992), 539; Gregory H. Fox and Georg Nolte, 'Intolerant Democracies', 36 *Harvard International Law Journal* (1995), 1; Gregory H. Fox and Brad R. Roth, 'Democracy and International Law', 27 *Review of International Studies* (2001), 327; Fernando R. Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992), 53. *Contra,* see Thomas Carothers, 'Empirical Perspectives on the Emerging Norms of Democratic Governance', *Proceedings of the American Society of International Law* (1992), 261; Martti Koskenniemi, '"Intolerant Democracies": A Reaction', 37 *Harvard International Law Journal* (1996), 231; Susan Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *European Journal of International Law* (1997), 449.

[26] Jack Donnelly, 'Human Rights: A New Standard of Civilization?', 74 *International Affairs* (1998), 1, 2.

[27] Tim Dunne, 'Fundamental Human Rights Crisis after 9/11', 44 *International Politics* (2007), 283, 286.

[28] Fox and Roth, *supra* n.25, 339. Brad R. Roth in *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), 430, has also noted that '[t]he inviolability of the collectivity can be, and has been, understood not as the negation of the rights of individuals, but as a prerequisite to the realization of the values that all other rights seek to further. This characterization of sovereignty makes little sense, of course, if foreign interventions (armed or unarmed) are assumed to be benevolent and wise rather than predatory or misguided, but it is not clear why such benevolence and wisdom should be readily assumed, even where powerful states announce, as their end, the furtherance of human rights and democracy.'

referentially valid progress … complete with moralizing motives, pragmatic analyses, and more than a touch of crowd hysteria.'[29] Assumption of Western systems, values and norms as superior serves to deny the 'outsider' legitimacy in transnational discourses and in the 'outsider's' domestic governance itself. Any criticism by the 'outsider' of the flaws or failings of the 'insider' is automatically dismissed. Yong Deng argues that such '[a]ttribution of a negative identity to the "other" affirms and magnifies the superior distinctiveness of the in-group identity. Inter-group prejudice explains the persistence of international conflict at both the interstate- and intertransnational-group levels.'[30] As the nature of power/legitimacy imbalances dictates that for a system, value or norm to be held out as superior, there must be a target audience in the 'outsider' who accepts its ascribed inferiority,[31] a number of Chinese scholars have accepted that the absence of democratisation in China is disadvantageous to its international status and grand strategy.[32] *Both* compliance and non-compliance with a Western system, value or norm are taken as reflecting and

[29] David Strang, 'Contested Sovereignty: The Social Construction of Colonial Imperialism', in Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996), 22, 43-44.

[30] Yong Deng, *China's Struggle for Status: The Realignment of International Relations* (Cambridge: Cambridge University Press, 2008), 102.

[31] As the late developmental psychoanalyst Erik H. Erikson in *Identity: Youth and Crisis* (London: Faber & Faber, 1968), 59, observed, '[t]herapeutic as well as reformist efforts verify the sad truth that in any system based on suppression, exclusion, and exploitation, the suppressed, excluded, and exploited unconsciously accept the evil image they are made to represent by those who are dominant.'

[32] See, *e.g.*, Liu Jianfei, 'Zhongguo minzhu zhengzhi jianshe yu Zhongmei guanxi' ['The Construction of Democratic Politics in China and Sino-American Relations'], 2 *Zhanglue Yu Guanli* (2003), 76; Ye Zicheng, *Zhongguo Dazhanlue* [*The Grand Strategy of China*] (Beijing: Zhongguo shehuishexue chubanshe, 2003). Yuan Weishi has gone so far as to argue that the absence of democratisation in China, along with the onset of the Cultural Revolution, was the reason for the breakdown of negotiations in the 1960s between the People's Republic of China government and the authorities on Taiwan and a liberal rule-of-law order in Mainland China would have brought the negotiations to success, and that the disagreements that continue to prevail in China's relations with Japan are ultimately traceable to its failure to accept liberal-democratic norms. Yuan concludes that 'a pluralistic culture taking freedom, democracy, and the rule of law as its basis is the system that any country must select in order to achieve long-term domestic peace and order. It is also the source of "soft power" most effective for a country to use in winning the respect of other countries and strengthening internal cohesion': 'Kang Zhan: Wenming de jinzhan yu Zhongguo de fansi (xia) ['The War of Resistance: The Progress of Civilization and China's Reflection (Part 2)'], 484 *Gaige Neican* [*Internal Reference Materials on Reform*] (2005), 38, 41, as quoted in Daniel C. Lynch, 'Envisioning China's Political Future: Elite Responses to Democracy as a Global Constitutive Norm', 51 *International Studies Quarterly* (2007), 701, 707-8.

reaffirming the legitimacy of the Western system, value or norm that itself escapes scrutiny.

An appreciation of how non-Western States engage with Western systems, values and norms, and how the latter may be improved and better understood through mutual learning, is essential to generating compliance with, and ensuring the legitimacy of, international rules, processes, and organisations. In their conception of a 'management model' of compliance, Abram Chayes and Antonia Handler Chayes argue that 'the interpretation, elaboration, application and ultimately enforcement of international rules [are] accomplished through a process of (mostly verbal) interchange among interested parties'.[33] Franck believes that international organisations, with the deliberations, compliance and enforcement that they embody, enable and exemplify, confer international rules procedural and substantive legitimacy that in turn enhances the legitimacy and effectiveness of decisions these organisations make.[34] States are required to justify their actions or inactions through international legal norms and principles, even if they might have ulterior motives that might be readily apparent, and notwithstanding their raw power or their power imbalances *inter se*. Oscar Schachter notes that even powerful States 'generally base their legal case on grounds that are logically independent of their own interests and wishes'.[35] The current international legal order enables weak States to buttress their State sovereignty while strong States have fundamental self-interests in maintaining its stability as they hold disproportionate influence. States justify their conduct so that reciprocal compliance may be expected and 'good standing in the regimes that make up the substance of international life' preserved.[36] While States remain primary actors in international organisations, their deliberative discourses in public settings allow

[33] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998), 118.
[34] Franck, *Fairness in International Law and Institutions*, *supra* n.25.
[35] Oscar Schachter, 'International Law in Theory and Practice', 178 *Recueil des cours* (1982–V), 1, 59.
[36] Chayes and Chayes, *supra* n.33, 32.

non-governmental actors, transnational corporations and the media, etc., to form part of an 'interpretive community' and play a significant role in ensuring and enhancing compliance with and development of international law. Additionally, interactions that States have *inter se* and with inter-governmental and non-governmental organisations shed light on the meanings of international norms that they may internalise domestically.

III. Research significance

For these reasons, it is of pivotal importance to understand how China has engaged with international law and international organisations to justify and advance its exercise of State sovereignty, and how in the process international law and international organisations may be transformed and, perhaps, improved.

Henry Nau discerns that States disagree in their approaches to foreign policy, including international law, because '[w]e simplify. We approach the world with labels and models that direct us toward a particular slice of reality. We can't see it all, so we use our learning, experience, and judgment to select a direction, to look for certain facts that are important to us in terms of how we believe the world works.'[37] Discourses of empirical and normative developments of international law suffer the same defect of prejudgments and preconceptions. A scholar trained in a particular legal or international relations tradition, and who tends to be aligned with the foreign policy approach of the State in which he or she operates, is predisposed to look for facts that confirm his or her assumptions. Consequently, discourses of international law and the international order continue to be unbalanced, genuine dialogues precluded, and the maintenance and development of international law marred by disagreements over its content, universality, generality and, ultimately, legitimacy

[37] Henry R. Nau, 'Why We Fight over Foreign Policy', 142 *Policy Review* (April/May 2007), 25, 26.

and authority. Jurisprudence must be approached through addressing the many factors and issues that are extrinsic as well as those that are intrinsic to it: 'The way you characterize these problems, the intellectual tools you use to research them and the information you think relevant for answering them will all be determined by your conception of law. Your conception will influence the role you assume, the method you use, the ethics you adopt and the outcome.'[38]

Samantha Besson argues that '[a]s an *essentially contestable concept*, sovereignty is at once a state of affairs, a question pertaining to the nature and justification of that state of affairs and a justification of it. The correct use of the concept sovereignty and hence the correct exercise of authority it implies consists therefore in constantly reflecting and contesting one's use of the concept and hence one's exercise of sovereignty. … Sovereignty's use is both dynamic and reflexive and implies mutual learning and progress in the protection of the values it encompasses'.[39] In understanding international law, it is not only legal rules and decisions that matter, but also how we reach them, how they affect us, and how we may improve them. With China's rise and its increasing influence in the shaping of international law, the workings of international organisations and the conduct of international relations, its approaches to the principle of State sovereignty, the reasons and rationales underlying such approaches, and the argumentation it proffers in justifying and advancing its exercise of State sovereignty play a determinant role in the direction in which the current international legal order may develop.

IV. Research framework and methodology

[38] W. Michael Reisman, 'The View from the New Haven School of International Law', 86 *Proceedings of American Society of International Law* (1992), 118, 119.
[39] Samantha Besson, 'Sovereignty in Conflict', in Stephen Tierney and Colin Warbrick, eds., *Towards an International Legal Community?: The Sovereignty of States and the Sovereignty of International Law* (London: British Institute of International and Comparative Law, 2006), 131, 176 (emphasis in original).

As I have noted, scholars of international law and of international relations must look through and pierce the veil of superiority of Western values, systems and norms in the formation, applicability, application, development and understanding of international law when exploring China's, or for that matter any State's, roles in the international system and its compliance with and contribution to international law. This thesis draws on primary research materials to explore the symbiotic relationship between China's exercise of State sovereignty and the current international legal order. Given the dominant influence of Western conceptions and discourses of certain relevant issues in critiques of China's exercise of State sovereignty, this thesis also engages research literature through basic international legal analysis to identify their merits and flaws and examine their applicability to our understanding of the limits and potential of China's exercise of State sovereignty, its engagement with international law, and the room to which the current international legal order may expand or otherwise be confined.

Chapter II presents a critique of dominant Western discourses of international law and State sovereignty that typically frame and confine analyses of the relationship between China and the current international legal order. It discusses the interrelationship between the disciplines of international law and of international relations, the universality and generality of international law, with particular reference to Western discourses of liberal democracy, and the question of whether State sovereignty is an essential requirement for, or an impediment to, the development of international law, the protection of human rights, the promotion and implementation of democracy and self-determination, the maintenance of international peace and security, and the stability of the current international legal order.

In appraising China's approaches to international law and the current international legal order, one need be cognisant of China's historical experience. As Lucian Pye puts it, 'China is not just another nation-state in the family of nations.

China is a civilization pretending to be a state'.[40] The New Haven School of International Law holds that '[i]t is important to correlate past decisions with conditions that influenced them and to note whether that context of conditions has changed in a material and pertinent way.'[41] Western research literature on China and international law or the current international legal order typically lacks such an appraisal either entirely or in detail, or proceeds from the premise that China's history – its former self-identification as the 'Middle Kingdom' and subsequent victimisation by Western powers and Japan – necessitates that it will take, continue or resume a negative approach to international law and the current international legal order when it attains the capability to do so.[42]

While there might be elements of truth to this premise, China's historical experience with international law is more complicated than the caricature suggests. Chapter III examines the historical interactions between China and international law since the Opium War (1839–1842). The Opium War is a useful starting point as China's interactions with other States deepened and its international position deteriorated significantly thenceforth, and additionally as '[w]hether Chinese or Western, radical or conservative, scholars have invariably taken it as a starting point in the study of modern China'.[43] As 'learning is essentially an evolutionary process in which selection through negative learning plays a fundamental role',[44] this chapter discusses how China's approaches to international law and the current international legal order have been heavily influenced by military events and international agreements since the Opium War, which have resulted in an enduring mentality on the part of China, the Chinese leadership and the Chinese people that China has been

[40] Lucian Pye, 'China: Erratic State, Frustrated Society', 69:4 *Foreign Affairs* (1990), 56, 58.
[41] Reisman, *supra* n.38, 124.
[42] Kent, *supra* n.9, 2. See also Warren I. Cohen, 'China's Rise in Historical Perspective', 30 *Journal of Strategic Studies* (2007), 683.
[43] Hsin-Pao Chang, *Commissioner Lin and the Opium War* (Cambridge, MA: Harvard University Press, 1970), ix.
[44] Tang Shiping, 'From Offensive to Defensive Realism: A Social Evolutionary Interpretation of China's Security Strategy', in Robert S. Ross and Zhu Feng, eds, *China's Ascent: Power, Security, and the Future of International Politics* (Ithaca, NY: Cornell University Press, 2008), 141, 146.

a victim of international law and an imposed international order, from which it must guard itself externally and internally. As China regarded itself as the centre of civilisation and non-Chinese peoples as barbarians, and '[a]n overriding concern of Confucian China's "foreign policy" was to maintain the cultural basis of its superiority over other societies',[45] this chapter explores how China since the 'century of humiliation' – through the last century of the Qing dynasty (1644–1912), the republican era (1912–1949), the period during which the communist regime was not recognised by the United Nations and other States as the legitimate government of China, the period between 1971 and 1984 when China endured significant political and legal upheavals, and since 1984 when China began to embark on extensive political, economic and legal reforms and to interact with an international legal order that consists in formal and customary rules and principles conceived and determined by Western powers, and how it might now shape the development of international law and the current international legal order.

Having dissected Western discourses of international law and State sovereignty and China's historical experience with international law, this thesis then turns to how China has exercised its State sovereignty and how its exercise illuminates the relationship between China and international law and international organisations. Roxanne Lynn Doty argues that '[s]overeignty becomes not so much an ontological problem that questions what sovereignty is. Rather, it becomes a question of determining what issues, uncertainties, and transformations elicit responses in discursive practices that attempt to fix meanings and social/political identities. It is also a question of what … the consequences of these practices are.'[46] The most fundamental disagreements between China (and many non-Western States) and Western powers inhere in the conceptions, protection, implementation and violations of human rights, democracy and self-determination, and how international

[45] Deng, *supra* n.30, 281.
[46] Roxanne Lynn Doty, 'Sovereignty and the Nation: Constructing the Boundaries of National Identity', in Biersteker and Weber, *supra* n.29, 121, 142.

peace and security ought to be maintained. Chapters IV and V focus on China's exercise of internal sovereignty in the contexts of human rights, democracy and self-determination, whereas Chapter VI explores China's exercise of external sovereignty in the context of its roles in the maintenance of international peace and security. While Neil MacCormick distinguishes the internal and external aspects of State sovereignty and considers that the two can exist independently of each other;[47] Besson argues that 'conceptually at least, they cannot be separated logically … Without external sovereignty, the internal sovereign cannot define the latter and without internal sovereignty in the constitutional determination of competences, there cannot be an external sovereign and no human rights limitations in particular'.[48]

Chapter IV examines how international law has influenced China's exercise of internal sovereignty in terms of its acceptance, implementation and violations of human rights and democracy, and the impact of China's approaches on the development and understanding of international human rights law. China relies on the principles of State sovereignty and of non-intervention in other States' internal affairs to shield its domestic policies and practices from foreign criticism or interference. Meanwhile, Western States, often without reflection on their own approaches, assert that international human rights law possesses a universal character on the basis of the Universal Declaration of Human Rights, customary international law, a myriad of international human rights treaties (whether or not China has acceded to them), and above all the normative and moral values of human rights. China (and most non-Western States with exceptions such as Japan, the Philippines, and South Africa) and Western States disagree over whether liberal democracy possesses universal

[47] Neil MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason* (Oxford: Oxford University Press, 1999), 129.
[48] Besson, *supra* n.39, 151-52. Similarly, Thomas J. Biersteker and Cynthia Weber observe that '[n]eorealists tend to combine population, territory, authority, and recognition – the principal constitutive elements of sovereignty – into a single, unproblematic actor: the sovereign state. This conflation of state and sovereignty enables them to abstract from, or simply ignore, problems in the domestic domain and to leave the assessment of problems of internal sovereignty to others': 'The Social Construction of State Sovereignty', in Biersteker and Weber, *supra* n.29, 1, 5.

applicability and its merits. Such disagreement is not confined to the Chinese government but is discernable among many Chinese people. Understanding how human rights and democratic norms are conceived, understood, implemented and violated in China *from a Chinese perspective* is important also because international human rights law, as much as it might be able to redress violations and consequences, is unable to address the structural and institutional causes of human rights violations and resistance to democratic practices. Since the Chinese government's suppression of calls for democratic reform on Tiananmen Square in June 1989, issues of human rights and democracy have played major roles in China's state behaviours internally, in its relations with other States and in its approaches to international law and the current international legal order. Simultaneously, the same issues shed light on the behaviours of many Western States and the international community, on their approaches and commitment to international human rights law, and on the schisms within international law.

Differences between China and Western States in their conceptions and implementations of international human rights law are particularly heightened in territories with contested claims to statehood on the basis of self-determination. As Doty has put it, '[w]hen it is no longer clear who makes up the nation, a state's internal sovereignty and the existence of the state itself is threatened.'[49] Chapter V examines how self-determination has evolved as a principle and a right under international law and in Chinese laws and practices, including the manners in which it may be exercised as well as its ambiguity and fragility. In particular, it explores certain issues of self-determination Hong Kong, Taiwan and Tibet, as well as China's approaches to Kosovo and East Timor, have raised and illuminated. The chapter discusses how China, other States and the international community have facilitated or undermined self-determination in these territories, and the roles international law has played in creating the situations in which these territories and their peoples now find

[49] Doty, *supra* n.46, 122.

themselves.

The roles that China plays in international affairs, especially in the maintenance of international peace and security, exemplify the potential and limits of its interactions with the current international legal order as it acquires greater recognition and influence as a rising power. China being a Permanent Member of the United Nations Security Council with veto power, the Security Council is a quintessential forum for observations as to how China has exercised its State sovereignty through international law and international organisations that may in the process be strengthened or stymied. Chapter VI explores the role of international law in China's voting behaviour and argumentation within the Security Council, and how China has thus illustrated its potential as a power that may maintain, revise, undermine or augment the aims and ideals of the current international legal order. Equally fundamentally, an appreciation of how China deploys legal argumentation to buttress its positions helps advance 'our understanding of the law, and thus … the identity, objective, and principles of the community'.[50]

The United States is generally regarded as the most influential State in shaping the behaviours of other States and the development and understanding of international law. This thesis shows that China has served important contributions, an objective appraisal of which is essential to our understanding of international law, including the locus in which the principle of State sovereignty resides in the current international legal order, and its continuing significance and implications.

[50] Martti Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1995–1996), 455, 480.

Chapter II: A Critique of Western Discourses of International Law and State Sovereignty through Chinese Lenses

I. Introduction

Notwithstanding the purposes, principles and ideals of the United Nations Charter and non-Western States' increasing influence in international organisations since the Second World War, the current international legal order continues to be circumscribed by layers of Western-centrism. From the nineteenth-century *mission civilisatrice* to its contemporary face as promoter and protector of human rights, democracy, self-determination and world peace, international law in its formulation, development, applicability, application and understanding is beset with undue ascription of objectivity, authenticity and universality to what Western States and scholars say or do, while actions of non-Western States and opinions of non-Western scholars are frequently dismissed or denigrated as subversive, dangerous, biased, apologist, distorted, irrational or simply uninformed.[1] The United States' post-Cold

[1] Many non-Western scholars who work in Western countries and critique the Western-centric nature of international law or international relations scholarship are denied authenticity in their work. For example, in his response to Lily Ling's critique of his discussion about the current international system (Georg Sørensen, 'What Kind of World Order?: The International System in the New Millennium', 41 *Cooperation and Conflict* (2006), 343) as illustrative of 'the academy's complicity with power' (L.H.M. Ling, 'Global Presumptions: A Critique of Sørensen's World-Order Change', 41 *Cooperation and Conflict* (2006), 382, 383), Georg Sørensen finds that 'despite her attempts to cast herself as a marginalized outsider, LL is none of that; like most of us, she is a Western academic pursuing her work and publishing it in journals and books. Nor does she, in any larger sense, represent or speak for the oppressed peoples of the world': 'What Kind of World Order? A Response to Critics', 41 *Cooperation and Conflict* (2006), 393, 400. Being in the same shoes as Ling's, I proffer that the fact that many non-Western scholars must work in Western countries and publish in Western journals in order to obtain an audience and a semblance of respectability illustrates the marginalisation of both non-Western scholarship and non-Western scholars. It is, accordingly, with much regret that I need to use English-language research materials primarily, and not the abundance of Chinese-language research materials, in this thesis, lest this thesis be accused of Chinese biases or dismissed as lacking rigorous informed analysis. It is also hoped that my use of English-language research materials primarily in this thesis will enable this thesis to reach a wider audience unfamiliar with Chinese language but whose understanding of the symbiotic relationship between China's exercise of State sovereignty and the current international legal order is imperative to a proper understanding of China, the principle of State sovereignty, the

War dominance and the advent of the European Union – conferred by its Member States with powers often erroneously taken as overriding their individual State sovereignty – are superficially referred to by many Western scholars to argue that the principle of State sovereignty has now become obsolete and that sovereignty of a non-liberal State, such as China, impedes the development of international law and the stability of the current international legal order. At the same time, many actions of Western States, however inconsistent with international law, are reflexively taken as reflecting or enhancing normative universal values, precisely on the basis of their inconsistencies, in the name of the progressive development of international law.

This chapter explores how dominant Western discourses of international law and State sovereignty that typically frame and confine analyses of the relationship between China and the current international legal order are pregnant with inconsistencies, contradictions and problems, in order 'to expose the interests served by the production and maintenance of particular truths, and the processes that enable some forms of knowledge to be accepted as complete and legitimate while other forms are labelled partial and suspect',[2] and the ramifications that ensue for a proper understanding of China's exercise of State sovereignty and the current international legal order. It examines the interrelationship between the disciplines of international law and of international relations, the universality and generality of international law, particularly in respect of whether liberal democracy constitutes a requirement or a rule for a State to possess internal and external legitimacy for its exercise of sovereignty, and whether State sovereignty impedes the proper functioning of the current international legal order.

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state and legitimacy of international law, and the direction in which the current international legal order may and should proceed.

[2] Tony Evans, 'International Human Rights Law as Power/Knowledge', 27 *Human Rights Quarterly* (2005), 1046, 1049.

II. International law and international relations: Conjoint twins or estranged bedfellows?

Like siblings in rivalry, the disciplines of international law and of international relations have always viewed each other with contempt and misunderstanding, and yet cannot thrive without the contributions of each other. Scholars of international relations generally regard international law and international organisations to be at best political tools for a State to enable and justify its pursuit of power or its attempt to constrain another State's pursuit of power, or at worst simply irrelevant on the premise that compliance with international law, in want of effective enforcement mechanisms, ultimately depends on raw power and power asymmetry. Meanwhile, scholars of international law tend to consider international relations discourses, particularly those rooted in realism, to suffer excessive foci on empirical calculations of power, power imbalances and struggles for power among States as the overriding framework and determinants in the conduct of international affairs without due regard for the need for a normative framework that regulates, influences and shapes state behaviours both internally and externally.

Rémi Bachand and Thierry Lapointe argue that international law and international relations are in fact co-constitutive at three levels – in legal forms, in legal constraints, and in argumentation; 'power structures and dynamics in the international system never exist (and cannot be conceptualized) outside or independent of the legal relationships that crystallize their existence and that, in some way, institutionalize them.'[3] The primary actors in international relations – States – are created, and separated from each other, by international law. International relations scholars who argue that international law is irrelevant ignore the fact that 'weak countries generally think twice before committing an internationally wrongful

[3] Rémi Bachand and Thierry Lapointe, 'Beyond Presentism: Rethinking the Enduring Co-constitutive Relationships between International Law and International Relations', 4 *International Political Sociology* (2010), 271, 272.

act in their relations with stronger states. It is the latter that usually violate their obligations vis-à-vis the former, and with impunity.'[4] Even the United States endeavours to have its foreign and domestic policies and actions validated by reference to international law. As Andrew Hurrell has argued, 'states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community.'[5] In turn, international law galvanises and augments the legitimacy of actions taken by powerful States and of positions they hold. Nonetheless, empirical general acceptance, even where it exists, by itself cannot explain or reflect the normative legitimacy of international law or the reasons States accept it. After all, colonialism was justified by all major Western powers with the support of international legal doctrines their legal scholars propounded.[6]

The concomitance of the rise of Western powers and the consolidation of international law in the international order during the nineteenth century might lead one to suggest that international law is not Western-centric but in fact power-centric, both externally *vis-à-vis* other States and within the domestic structure of a State. The emphasis on raw power, power imbalances and struggles for power is illuminated by the notion of the 'China threat', that it is not whether but when China will seek to revise the current international order and the legal and political rules that underlie and regulate it. The envisaged revision by China is presumed to be a negative one (with

[4] Hans Peter Neuhold, 'The Foreign-Policy "Cost-Benefit Analysis" Revisited', 42 *German Yearbook of International Law* (1999), 84, 95.
[5] Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', in Volker Rittberger, ed., *Regime Theory and International Relations* (Oxford: Oxford University Press, 1993), 49, 59.
[6] See, *e.g.*, Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5 *Social & Legal Studies* (1996), 321; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999), 1; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002); Martti Koskenniemi, 'International Law and Imperialism', in David Freestone, Surya Subedi, and Scott Davidson, eds., *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures* (The Hague: Kluwer Law International, 2002), 197.

the only question as to how negative it will be). John Mearsheimer has contended that 'a policy of engagement is doomed to fail. If China becomes an economic powerhouse it will almost certainly translate its economic might into military might and make a run at dominating Northeast Asia. Whether China is democratic or deeply enmeshed in the global economy or autocratic and autarkic will have little effect on its behavior, because democracies care about security as much as non-democracies do, and hegemony is the best way for any state to guarantee its own survival.'[7] Samuel Kim argues that China's rapid development of military capabilities, especially in terms of aircraft, missiles, and blue-water naval power, 'would not be so alarming, and China would not be seen as Asia's least satisfied revisionist power, according to the realist received wisdom, if the country did not harbor an acute historical grievance and if it did not have so many territorial disputes and irredentist claims on so many of its neighbors, if it did not have a deeply rooted *para bellum* strategic culture, if it did not have a repressive authoritarian regime defying the democratic peace theory, and if it did not embrace hypernationalism as a substitution ideology'.[8]

Such realist thinking is not confined to the discipline of international relations. Eric Posner and John Yoo, both scholars of international law with significant misgivings about the formulation, development, applicability, application, effectiveness, binding nature and normative values of international law,[9] have argued

[7] John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton, 2001), 4. Similarly, David Shambaugh argues that 'China today is a dissatisfied and non-status quo power which seeks to change the existing international order and norms of inter-state relations. Beijing is not satisfied with the status quo, sees that the international system and its rules were created by Western countries when China was weak, and believes that the existing distribution of power and resources is structurally biased in favor of the West and against China. It does not just seek a place at the rule-making table … it seeks to alter the rules and existing system': 'Containment or Engagement of China? Calculating Beijing's Responses', 21:2 *International Security* (1996), 180, 186-87.

[8] Samuel S. Kim, 'Chinese Foreign Policy in Theory and Practice', in Samuel S. Kim, ed., *China and the World: Chinese Foreign Policy Faces the New Millennium* (Boulder, CO: Westview Press, 1998), 3, 5.

[9] For the minefield of scholarship on which Eric Posner and John Yoo critique international law, see Jack L. Goldsmith and Eric A. Posner, 'A Theory of Customary International Law', 66 *University of Chicago Law Review* (1999), 1113; Jack Goldsmith and Eric A. Posner,

that international law and international organisations have little relevance to China (or to the United States) and to any military conflict between China and the United States.[10] Gregory Fox, Thomas Franck, Georg Nolte, Anne-Marie Slaughter, and Fernando Tesón ostensibly reflect the other end of the spectrum in international legal scholarship, which recognises and advocates the roles international law and international organisations play at both interstate and domestic levels.[11] As this

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'Further Thoughts on Customary International Law', 23 *Michigan Journal of International Law* (2002), 191; Jack L. Goldsmith and Eric A. Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', 31:S1 *Journal of Legal Studies* (2002), S115; Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005); Eric A. Posner, 'Do States Have a Moral Obligation to Comply with International Law?', 55 *Stanford Law Review* (2003), 1901; Eric A. Posner, 'A Theory of the Laws of War', 70 *University of Chicago Law Review* (2003), 297; Eric A. Posner, 'Terrorism and the Laws of War', 5 *Chicago Journal of International Law* (2005), 423; Eric A. Posner and Miguel F.P. de Figueiredo, 'Is the International Court of Justice Biased?'. 34 *Journal of Legal Studies* (2005), 599; Eric A. Posner and Alan O. Sykes, 'Optimal War and *Jus Ad Bellum*', 93 *Georgia Law Review* (2005), 993; John C. Yoo, 'The Dogs that Didn't Bark: Why were International Legal Scholars MIA on Kosovo?', 1 *Chicago Journal of International Law* (2000), 149; John C. Yoo, 'UN Wars, US War Powers', 1 *Chicago Journal of International Law* (2000), 355; Robert J. Delahunty and John C. Yoo, 'The President's Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them', 25 *Harvard Journal of Law and Public Policy* (2002), 487; John Yoo, 'International Law and the War in Iraq', 97 *American Journal of International Law* (2003), 563; John C. Yoo, 'The Status of Soldiers and Terrorists under the Geneva Conventions', 3 *Chinese Journal of International Law* (2003), 135; John C. Yoo and James C. Ho, 'The Status of Terrorists', 44 *Virginia Journal of International Law* (2003), 207; John Yoo, 'Transferring Terrorists', 79 *Notre Dame Law Review* (2004), 1183; John Yoo, 'Using Force', 71 *University of Chicago Law Review* (2004), 729; Robert J. Delahunty and John Yoo, 'Statehood and the Third Geneva Convention', 46 *Virginia Journal of International Law* (2005), 131; Robert J. Delahunty and John Yoo, 'Executive Power v. International Law', 30 *Harvard Journal of Law and Public Policy* (2006), 1; John C. Yoo, 'Force Rules: UN Reform and Intervention', 6 *Chicago Journal of International Law* (2006), 641; John C. Yoo and Will Trachman, 'Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations', 5 *Chicago Journal of International Law* (2005), 379; Glenn Sulmasy and John Yoo, 'Counterintuitive: Intelligence Operations and International Law', 28 *Michigan Journal of International Law* (2007), 625; Robert J. Delahunty and John C. Yoo, 'Peace through Law? The Failure of a Noble Experiment', 106 *Michigan Law Review* (2008), 923.

[10] Eric A. Posner and John Yoo, 'International Law and the Rise of China', 7 *Chicago Journal of International Law* (2006), 1.

[11] See, *e.g.*, Gregory H. Fox, 'The Right to Political Participation in International Law', 17 *Yale International Law Journal* (1992), 539; Gregory H. Fox and Georg Nolte, 'Intolerant Democracies', 36 *Harvard International Law Journal* (1995), 1; Gregory H. Fox and Brad R. Roth, 'Democracy and International Law'. 27 *Review of International Studies* (2001), 327; Thomas M. Franck, 'United Nations Based Prospects for a New Global Order', 22 *New York University Journal of International Law and Politics* (1990), 601; Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990); Thomas M. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992), 46; Thomas M. Franck, 'Democracy as a Human Right', in Louis Henkin and John L.H. Hargrove, eds., *Human Rights: An Agenda for the Next Century* (Washington, D.C.: American Society of International Law, 1994), 73; Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995);

chapter discusses in greater detail below, even their positions – that, in the post-Cold War era, there is an emerging right in international law to democratic governance;[12] liberal internationalism is universally applicable to all States;[13] and States which do not subscribe to liberal democracy within their jurisdictions should have their membership in international organisations revoked[14] or their statehood de-recognised,[15] or should simply be invaded[16] – stem from the same underlying premise that the proclaimed values of the United States are normatively universally applicable and which, if not adopted voluntarily, should be enforced, diplomatically or by force.

Anne-Marie Burley, 'Revolution of the Spirit', 3 *Harvard Human Rights Journal* (1990), 1; Anne-Marie Burley, 'Toward an Age of Liberal Nations', 33 *Harvard International Law Journal* (1992), 393; Anne-Marie Burley, 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* (1992), 1907; Anne-Marie Slaughter, 'Law and the Liberal Paradigm in International Relations Theory', *Proceedings of the American Society of International Law* (1993), 180; Anne-Marie Slaughter, 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995), 503; Fernando R. Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992), 53.

[12] Franck (1992), ibid.

[13] Slaughter (1995), *supra* n.11.

[14] Franck (1992), *supra* n.11, 78, argues that '[t]he Charter limits UN membership to states that are "peace-loving" (Article 4(1)) and enjoins governments to respect the "equal rights and self-determination of [their own] peoples" (Article 1(2)). The Genocide and Racism Conventions certainly do qualify as rules of deportment imposed on all states by the community of nations. Having become customary as well as treaty law – if not also rules of *jus cogens* – these Conventions may be said to exemplify the principle that states collectively have the authority to determine minimum standards of conduct from which none may deviate without eventually endangering their membership in the club.' In *The Power of Legitimacy among Nations*, Franck, *supra* n.11, 92, acknowledges that '[a] self-proclaimed regime may be denied validation only if it does not exercise effective control. A new state should be denied membership only if its existence is still precarious or if it does not want to, or cannot, assume the duties of membership … For example, it is not permissible to vote to deny membership on the ground … that the government has come to power in a coup.'

[15] Fox and Roth, *supra* n.11, 342-43, argue that '[s]ome international organizations limit membership to "liberal democracies" and therefore inquire into the democratic *bona fides* of new state applicants. The clearest application of democratic legitimacy criteria occurs in decisions to declare or refuse recognition of new states and governments, to open or break diplomatic relations, and to accord, withhold or suspend states' memberships in, or deny their governments' credentials to, intergovernmental organizations. On occasion, these measures may go so far as to express a collective *opinio juris* holding that the ruling apparatus lacks legal standing to assert rights, incur obligations, and confer immunities on behalf of the sovereign state entity – that is, legal, as distinct from merely political, non-recognition. Not to recognize an undemocratic regime that nonetheless exercises effective control over the national territory represents (or at least affects) a profound affirmation of democratic principles. It affirms a willingness to forgo any sort of meaningful relationship with the state in the hope that "legitimate" leaders might someday return to office.'

[16] Tesón, *supra* n.11, 90, argues that 'force will sometimes have to be used against nonliberal regimes as a last resort in self-defense or in defense of human rights. Liberal democracies must seek peace and use all possible alternatives to preserve it. In extreme circumstances, however, violence may be the only means to uphold the law and to defend the liberal alliance against outlaw dictators that remain nonmembers. Such, I believe, is the proper place of war in the Kantian theory.'

Oona Hathaway has noted that '[i]nterest-based models often fall back on normative insights in order to explain otherwise inexplicable state behavior in the human rights arena, and norm-centered accounts do not deny the power of rational interest to motivate state behavior.'[17] As Slaughter has admitted, '[p]ower in a nuclear era and in an interdependent global economy is also about influence, about our ability to lead and to persuade others to shape the world the way we want to shape it … We must work to shape [international rules] so that they conform to United States interests. That is what we did in 1945. That is what we need to do in 2000.'[18] Michael Reisman argues that the United States' military capability empowers and compels it to decide and enforce its perceptions of world order.[19]

Just as a natural person has an array of reasons to (not) comply with the law (or to do, or to not do, anything), the efficacy of international law cannot be causally dismissed because other, oftentimes competing, motivations influence or underlie a State's compliance. Undue foci on power dynamics neglect the influence that the internal structures and identities of a State may bring to bear on the State's approaches to the international order, including those to international law, as constructivist international relations scholars highlight. As Paul Stephan has argued, state behaviours may be guided not by the rational interests of the State but by the personal preferences of the state leadership and the powerful groups that influence it.[20] This is no truer than in China where the people regard the leadership as a primary source and manifestation of moral authority and legitimacy, as Chapter IV discusses. As much as domestic factors and constraints constitute determinants of how a State behaves internationally, international causes influence and shape domestic decision-making. While Harold Koh argues that in a 'transnational legal process' by which

[17] Oona A. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law', 72 *University of Chicago Law Review* (2005), 469, 477, fn.17.
[18] Anne-Marie Slaughter, 'Building Global Democracy', 1 *Chicago Journal of International Law* (2000), 223, 225.
[19] W. Michael Reisman, 'The United States and International Institutions', 41:4 *Survival* (1999), 62.
[20] Paul B. Stephan, 'Accountability and International Lawmaking: Rules, Rents and Legitimacy', 17 *Northwestern Journal of International Law and Business* (1997), 681.

'public and private actors – nation states, corporations, international organizations, and non-governmental organizations – interact in a variety of fora to make, interpret, enforce, and ultimately internalize rules of international law',[21] Chih-Yu Shih believes that 'the moral search for international justice can start from *within* each nation'.[22]

Realist theories also undervalue the empirical and normative values of liberal discourses, dialogues and co-operation that international law and international organisations generate;[23] even Posner and Yoo acknowledge that the likelihood of direct military confrontation between China and the United States rests on 'not the nature of distribution of power, but on the quality of information that states have about each other's interests and capabilities'.[24] In their report for the Council on Foreign Relations in 1999, Elizabeth Economy and Michel Oksenberg concluded that 'when intensive, high-level, strategic dialogue with China's leaders was conducted … progress was made in shaping Chinese thinking. Over time, Chinese perceptions can be influenced through dialogue, provided the Americans in turn are willing to listen carefully to Chinese views. … the dialogue cannot be a lecture'.[25] Responding to United States pressure in respect of China's human rights record, Qian Qichen, then China's Foreign Minister, stated in 1997 that 'we stand ready to have dialogue with

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[21] Harold Hongju Koh, 'On American Exceptionalism', 55 *Stanford Law Review* (2003), 1479, 1502.

[22] Chih-Yu Shih, *China's Just World: The Morality of Chinese Foreign Policy* (Boulder, CO: Lynne Rienner, 1993), 2 (emphasis in original).

[23] See, *e.g.*, William D. Coplin, *The Functions of International Law: An Introduction to the Role of International Law in the Contemporary World* (Chicago: Rand McNally, 1966); Richard A. Falk, *The Status of Law in International Society* (Princeton: Princeton University Press, 1970).

[24] Posner and Yoo, *supra* n.10, 8. Yet, not conceding too much (or at all) to international law, the authors immediately argue, ibid., that 'a state that rigidly insists on the distribution of rights and obligations under international law may hasten war rather than avoid it', and that 'states need to treat international law flexibly and consistent with the existing balance of power'.

[25] Elizabeth Economy and Michel Oksenberg, *China Joins the World: Progress and Prospects* (New York: Council on Foreign Relations, 1999), 18. David M. Lampton similarly observes that 'before one can effectively address particular problems with the Chinese it is necessary to first establish a framework of interest, principles and intention against which they can assess particular issues. This frame of reference has several components that, in the aggregate, the Chinese call "mutual understanding"': *Same Bed, Different Dreams: Managing US–China Relations, 1989–2000* (Berkeley: University of California Press, 2001), 371.

others in order to better understand each other and seek common ground while shelving differences. However, the prerequisite for such dialogue is let there be no confrontation … the dialogue must take place on the basis of equality and mutual respect.'[26] Of course, speaking openly may actually exacerbate conflict and reduce the likelihood of mutual understanding about a given issue or about the participants.[27] The United Nations Security Council quintessentially illustrates the processes, values, and problems of deliberative discourse, as Chapter VI examines.

Power and legitimacy are in fact intertwined. Tony Evans has noted that 'liberal concern that power can be defined in terms of legitimacy and illegitimacy misses the important point that even the legitimate exercise of power also excludes, marginalizes, silences, and prohibits alternatives'.[28] The concept of legitimacy is itself pregnant with power asymmetry and calculus, in terms of who sets the standards, the processes of reaching them, and their contents and reach. As China's experience with international law since the Opium War, discussed in Chapter III, illustrates, 'international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia'.[29] International law was the tool with which Western powers, and later Japan, legitimated their subjugation of China to a semi-colonial entity;[30] it was through international law that China ultimately attained emancipation. As Steven Lukes has observed, 'is it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions, and preferences in such a way

[26] Press briefing with United States Secretary of State Madeleine Albright, Kuala Lumpur, 26 July 1997, as quoted in Marc Lynch, 'Why Engage? China and the Logic of Communicative Engagement', 8 *European Journal of International Relations* (2002), 187, 194-95.
[27] Jack Knight and James Johnson, 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy', 22 *Political Theory* (1994), 277, 286.
[28] Evans, *supra* n.2, 1050.
[29] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 *European Journal of International Law* (2005), 369, 371 (emphasis in original).
[30] For a discussion of semi-colonialism and its relationship to the concept of informal empire in China, see Jürgen Osterhammel, 'Semi-Colonialism and Informal Empire in Twentieth Century China: Towards a Framework of Analysis', in Wolfgang H. Mommsen and Jürgen Osterhammel, eds., *Imperialism and After: Continuities and Discontinuities* (London: Allen & Unwin, 1986), 290.

that they accept their role in the existing order of things?'[31] It is a misconception that international law, to be law, must be devoid of power considerations; our ability to advance normative reasoning through and on the basis of international law might well be the ultimate power international law offers.[32]

To disregard the impact of politics (both international and domestic) on international law thus undermines the understanding and development of international law. While legal rules and principles must be interpreted without reference to the identity of the relevant actor or actors, a positivist approach alone prevents international law from constituting a dynamic framework under which international affairs and, one would hope, domestic policies are conducted and regulated. A positivist approach also does not address whether and why a particular rule or principle of international law is normatively valid, or remedy the substantive imbalances of the effects of formally universal rules and principles on different States. As E.H. Carr explains, '[r]ules, however general in form, will be constantly found to be aimed at a particular state or group of states; and for this reason, if for no other, the power element is more predominant and more obvious in international than in municipal law, whose subjects are a large body of anonymous individuals. The same consideration makes international law more frankly political than other

[31] Steven Lukes, *Power: A Radical View* (London: Macmillan, 1975), 24.

[32] Michael Barnett and Raymond Duvall explain that as 'rivals to realism have juxtaposed their arguments to realism's emphasis on power, they have neglected to develop how power is conceptualized and operates within their theories. It could have been otherwise. These theoretical approaches draw from distinct social theoretic traditions that offer critical insights into the forms and effects of power. Although neoliberal institutionalists have tended to highlight how international institutions produce cooperation, they could just as easily have emphasized how institutions shape the bargaining advantage of actors, freeze asymmetries, and establish parameters for change that benefit some at the expense of others. Although liberals have tended to limit their claims to the liberalism of "progress", they could have developed the liberalism of "fear" that is more centrally concerned with power. Although constructivists have emphasized how underlying normative structures constitute actors' identities and interests, they have rarely treated these normative structures themselves as defined and infused by power, or emphasized how constitutive effects also are expressions of power. A consequence of this failure to develop alternative conceptualizations of power has been to reinforce the discipline's gravitation toward the default conception as defined by realism': 'Power in International Politics', 59:1 *International Organization* (2005), 39, 41.

branches of law.'[33] While avoidance of international anarchy requires that international affairs be conducted under the framework of international law, the legitimacy, authority, force and normative values of international law lie not in its independence but in its distinctness from politics. As Dencho Georgiev argues, '[t]he objectivity of law, as a requirement of the rule of law, does not have to imply independence from politics generally but only the theoretical and practical possibility of the separate existence of a set of obligatory rules – i.e. law – which is not mere political opinion and which could be applied against political behaviour. The interdependence of such rules and politics does not mean that they do not have a separate existence'.[34] A political approach to international law is not the same as 'politically oriented jurisprudence'.[35]

Prior to the Sino-Soviet split in the early 1960s, China generally deferred to the Soviet Union on matters of communist ideology, including the place of law in society and that of international law in international society.[36] The concept, power and repercussions of the state were the drivers of Soviet ideology and foreign policy, and the place of the state within the international order was of central concern to Soviet scholars. In Soviet ideology, the state unified, embodied and personified its people. The class structures and struggles that existed in non-communist States were reflected in the international order, including in international law, and relations with non-communist States simply could not take place. Evgeny Korovin stated that 'the theory of class structure of the contemporary state is not only a very instrumental hypothesis for understanding the mutual relations between Soviet Russia and the world of imperialistic colossuses and pygmies, but also the official doctrine of the

[33] Edward Hallett Carr, *The Twenty Years' Crisis 1919–1939* (London: Macmillan, 1939), 228.
[34] Dencho Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law', 4 *European Journal of International Law* (1993), 1, 4.
[35] R.A. Müllerson, 'Sources of International Law: New Tendencies in Soviet Thinking', 83 *American Journal of International Law* (1989), 494, 497.
[36] For a brief discussion of why communist China voluntarily assumed a junior role to the Soviet Union, see H. Arthur Steiner, 'Mainsprings of Chinese Communist Foreign Policy', 44 *American Journal of International Law* (1950), 69, 84-89.

U.S.S.R. which is consistently realised by the government in building up the structure of the republic as well as in its international relations.'[37] Unlike in China where communist ideology was (and remains) moderated by Confucianism, an enduring precept that Chapter IV discusses in detail, in the Soviet Union the state leadership 'does not personify the semi-mythological personality of the state-Leviathan but is no more and no less than the plenipotentiary of the ruling class in the republic'.[38]

Soviet ideology dictated that post-war international law was merely 'international law of the transitional epoch':

> The deeply rooted fundamental difference of the legal and social order of capitalist society on one hand and socialist order on the other entails a manifold and substantial alteration of legal norms governing mutual relations between the bourgeois countries and the socialist ones. … The historic limit for the international law of the transitional epoch would not be the day when the state machinery is handed over to the 'museum of antiquities', but the day of victory of the proletarian revolution in the countries of the capitalist West.[39]

The Soviets claimed to champion sovereignty. Sovereignty in Soviet ideology referred to a form of popular sovereignty, 'a weapon in the struggle of the progressive-democratic forces against the reactionary-imperialistic ones. Under contemporary conditions sovereignty is destined to act as a legal barrier protecting against imperialistic encroachment and securing the existence of the most advanced social and state forms – socialist and those of a people's democracy; it is a guarantee of the liberation of the oppressed peoples in colonies and dependent territories from

[37] *Mežđunarodnoye pravo perekhodnogo vremeni*, 32, as quoted in Mintauts Chakste, 'Soviet Concepts of the State, International Law and Sovereignty', 43 *American Journal of International Law* (1949), 21, 24.
[38] *Sovremennoye mežđunarodnoye publichnoye pravo*, 82, as quoted in Chakste, ibid.
[39] Ibid., 8, as quoted in Chakste, ibid., 26.

the imperialistic yoke'.[40] The Soviet conception of sovereignty is thus interestingly akin to the one espoused by modern critics of State sovereignty; it was, after all, the Soviets who first insisted upon the withering of the state as prerequisite to true liberation and freedom. The importance of the principles of State sovereignty and of non-interference was well illustrated when the Soviet Union expanded its sphere of actual power to Eastern European States after the Second World War, whose State sovereignty was nominally preserved but with their internal and external functions, competences and powers subsumed by Moscow in accordance with the Soviet conception of sovereignty and the principle of proletarian dictatorship.

Although it initially accepted the role of a junior partner to the Soviet Union in worldwide communist revolution, China did not blindly accept all Soviet perspectives of international law or of the international legal order. China's departure from Soviet teaching was especially pronounced after the Sino-Soviet split. The Soviet Union became for China yet another, perhaps even more dangerous, world power intent on global hegemony, which for strategic reasons ultimately became the *raison d'être* for the normalisation of relations between China and the United States and other Western States, recognition of the PRC government as the representative government of China in the United Nations and other international organisations, and communist China's formal entry into the current international legal order.

Scholars in communist China tended to be of the view that the notion of international law as a legal basis for the conduct of international relations masqueraded the reality that 'bourgeois international law as a "science" … is … a theoretical instrument to defend the aggressive or colonial policy of the strong capitalist countries, to do its best to maintain the capitalist "world order" and to oppose legal principles of socialism',[41] and 'in the Western capitalist world,

[40] Evgeny Korovin in a lecture before the Social Science Academy of the Russian Communist Party in May 1947, as quoted in Chakste, ibid., 31.
[41] 'A Criticism of the Reactionary Viewpoint of [Chen Tiqiang] on the Science of International Law', *Cheng-fa yen-chiu* [*Studies in Political Science and Law*], No.6 (1967),

suppression of the weak by the strong and the eating of small fish by big fish are not only tacitly condoned by bourgeois international law but also are cloaked with a mantle of "legality".'[42] State consent assumed central importance in communist Chinese thinking, and the notion of international legal personality capable of ascription to non-State actors or to individuals was treated with derision. China also rejected the Soviet view that international organisations could be ascribed international legal personality, however limited in scope.[43]

The symbiotic relationship between international law and politics, as between domestic law and politics and indeed between the international and the domestic, thus needs to be properly understood. A one-sided approach to the understanding of international law in terms of power or of compliance, or to the basis, substance and normative values of international law of which Western States assume for themselves the role of guardian or leader, merely allows Western States to characterise their own disregard or violations of international law as random or demanded by necessity or exceptional circumstances, or as the results of *faits accomplis* or political realities imposed by non-Western/non-liberal States such as China. Such an approach simultaneously enables non-Western/non-liberal States to justify their disregard or violations of international law on grounds that they have had no input in the development of international law that is thus unrepresentative of their norms and values. As subsequent chapters demonstrate, the treatment by Western States and the international community of human rights, democracy, self-determination, and

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35, as quoted in Hungdah Chiu, 'Communist China's Attitude toward International Law', 60 *American Journal of International Law* (1966), 245, 249.

[42] Ying T'ao, 'Recognize the True Face of Bourgeois International Law from a Few Basic Concepts', *Kuo-ehi wen t'I yen-chiu* [*Studies in International Problems*], No.1 (1960), 42, 44, as quoted in Chiu, ibid., 250.

[43] Chiu, ibid., 251. According to Chou Keng-sheng, '[t]he United Nations Organization is one form of international organization of sovereign states. Its resolutions in general have only the character of a recommendation (with the exception of Security Council decisions to maintain peace, taken under Chapter VII of the Charter). Such resolutions cannot *ipso facto* bind member countries. The United Nations definitely does not possess legislative power. Even the legal drafts prepared by the International Law Commission and adopted by the General Assembly must still go through the procedure of an international conference and the conclusion of a treaty before they acquire binding force': *Trends in the Thought of Modern English and American International Law* (Beijing, 1963), 67, as quoted in Chiu, ibid., 259.

international peace and security has all been marred by an unbalanced approach to international law.

At a fundamental level, this thesis explores whether China harbours 'a longer view of national interest [or] a narrower, more immediate approach to interest gratification'[44] through its position on the principle of State sovereignty in the current international legal order. As Franck has pointed out, 'both long-term and short-term approaches have an equal claim to be operating within a theory of rational choice. The former, however, takes fully into account the power of legitimacy, while the latter focuses only on the legitimacy of power.'[45] Important questions that should be asked include whether, how and why China may converge with or diverge from other States in its approaches to the current international order, including the principle of State sovereignty; the conditions underlying China's approaches; as well as the ways in which 'China's history, strategic culture, and domestic politics affect its perspectives on multilateralism; how and to what extent past experience in multilateral settings has influenced and shaped China's attitudes and behaviors; and, finally, if there [is] more than one "script" or version of Chinese multilateralism.'[46] Kim poses six questions that he considers essential in understanding Chinese foreign policy:

> (1) How constant or changeable is Chinese foreign policy over a period of time, especially in the transition from the Cold War to a post-Cold War era, and why? (2) How unique and particularistic or general and common is Chinese foreign policy behavior compared with that of other countries, and why? (3) How wide is the gap

[44] Thomas M. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', 100 *American Journal of International Law* (2006), 88, 106.
[45] Ibid.
[46] Jing-dong Yuan, 'Chinese Perspectives on Multilateralism: Implications for Cooperative Security in Asia Pacific', in Stuart Nagel, ed., *Policymaking and Peace: A Multi-National Anthology* (Lanham, MD: Lexington Books, 2003), 103, 118.

> between ideals and reality, between policy pronouncements (principles) and policy performance (behavior), and between intent and outcome in Chinese foreign policy, and why? (4) What is the relative weight of domestic (societal) and external (systemic) factors in the shaping of Chinese foreign policy, and what domestic and international consequences obtain? (5) How do global systemic structures – economic, military, normative, and behavioral – impact upon and shape China's national role and identity? (6) How are the global structures themselves affected by the rise of China in the post-Cold War world?[47]

A State's image of the international order and its 'image gap' between the realistic and the ideational 'mirror the state's fundamental relationship with world order on the one hand, and shape the state's basic attitude toward world order on the other, although they are certainly not the only or the final determining factors.'[48] An important task in reconciling a State's self-image with its image gap *vis-à-vis* the international order is to identify its tendency in the long run rather than at a given time.[49] It is, thus, imperative to explore how China's views of international law and the international order comport or conflict with the nature of international law that Western States conceive, a task the next chapter undertakes.

III. The universality and generality of international law

In the vision of Lon Fuller, the inner morality of law consists of eight *desiderata*,

[47] Kim, *supra* n.8, 10.
[48] Zhongqi Pan, 'China's Changing Image of and Engagement in World Order', in Sujian Guo and Jean-Marc F. Blanchard, eds., *'Harmonious World' and China's New Foreign Policy* (Lanham, MD: Rowman & Littlefield, 2008), 39, 40.
[49] Ibid., 42.

including universal and general application.[50] Notwithstanding dramatic changes in its identity and structure in the past century, the international legal order continues to be premised on the principles of State sovereignty and sovereign equality of States, and international law depends on its universality and generality for its legitimacy and authority.

By the end of the Second World War, the United States had become a power with unrivalled military, political and economic capabilities ultimately unconstrained by the current international legal order it was to devise in San Francisco. It is United States power that has given rise to and illuminated disagreements about whether power is the ultimate controlling factor in international relations and whether international law, requiring and yet incapable of demanding compliance of States for its legitimacy and authority, is simply irrelevant. The United States and scholars trained in United States traditions tend to regard United States values and interests to be identical to those of the international community.[51] Apart from the fact that United States values and interests are not universal, the legitimacy and substance of many United States values and interests are taken for granted by United States scholars, and many opportunities for understanding and improving United States values and interests, perhaps so that they might become universal, have been missed.

As international relations theories inform theories of international law,

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[50] Lon L. Fuller, *Morality of Law*, rev. ed. (New Haven: Yale University Press, 1964).

[51] Robert Jervis, 'Understanding the Bush Doctrine', 118 *Political Science Quarterly* (2003), 365, 378. Onuma Yasuaki cautions that theories expounded by United States scholars, including their foci on power dynamics and the distortion or dismissal of international law in international relations theories, should not be taken at face value: 'In the fields of both international law and international relations, there has been a tendency to regard those theories as general theories to be followed (or even imitated) by other scholars and to be applied universally. However, if US scholars construct their theories by unconsciously assuming the US as an actor in international society, such a theory cannot claim general validity precisely because the US is an exceptional, not an ordinary, nation. A far larger number of nations cannot so easily enjoy the luxury of ignoring international law. One of the reasons why the claim of the irrelevance of international law has been predominant is that the study of international relations itself has been carried out most actively in the US and has been accepted by international relations scholars in other nations without elaborate critical examinations of the *US-centric nature* of the discipline': 'International Law in and with International Politics: The Functions of International Law in International Society', 14 *European Journal of International Law* (2003), 105, 119 (emphasis in original).

problems equally inhere in discourses of international law engaged in by United States scholars as they assert, yet unconsciously undermine, the universality and generality of international law. Slaughter's much-cited article 'International Law in a World of Liberal States'[52] is an exemplar, through which this section now addresses certain relevant issues.

Noting that 'how states behave depends on how they are internally constituted',[53] Slaughter argues that liberal States constitute 'a world of peace, democracy, and human rights'[54] and that '[l]iberal international relations theory applies to *all* states. Totalitarian governments, authoritarian dictatorships,[55] and theocracies can all be depicted as representatives of some subset of actors in domestic and transnational society, even if it is a very small or particularistic slice.'[56] A survey of United Nations membership should disabuse Slaughter of her generalisation, as totalitarian, authoritarian, and theocratic States are numerically significant and liberal States exist only in Europe (excluding Russia, Belarus, Moldova, and States in the Caucasus), the Americas, Australia, New Zealand, South Africa, India, Israel, Japan, South Korea, and the Philippines. Moreover, the fact that everyone or almost everyone agrees on the validity of a particular matter does not mean that the matter must therefore be valid. At a normative level, the number of liberal States, even if overwhelming, does not by itself prove the validity of liberal international relations theory, much less as a universally applicable theory. Slaughter's reliance on the fact that liberal democracies and totalitarian, authoritarian, and theocratic States agree *sometimes*[57] is logically insufficient to substantiate her broad claim that liberal international relations theory thus applies to all States. As Michael Doyle has pointed

[52] Slaughter (1995), *supra* n.11.
[53] Ibid., 537.
[54] Ibid., 514.
[55] An authoritarian dictatorship is a misnomer. An authoritarian government relies on inculcation in its people of certain beliefs, norms and values in order to maintain and exercise control, and not on overt coercion as a dictatorship does. In addition, an authoritarian government may be a democratically elected one, as many Western governments evidence.
[56] Slaughter (1995), *supra* n.11, 509 (emphasis in original).
[57] Ibid.

out, liberal and non-liberal States are not just relatively different, but 'fundamentally different',[58] a qualification Slaughter herself has used as she acknowledges the 'fundamental difference in the nature of relations among liberal States as compared to relations between liberal and non-liberal States'.[59] As the schisms across the Atlantic – and within both North American and European continents – over the invasion of Iraq in 2003, among other issues, have shown, differences equally exist among Western liberal States.[60] Hurrell is critical of the notion that human rights are universal by nature or in their origins, and argues that diverse cultural and religious ideologies render consensus on human rights immensely difficult,[61] while Adam Roberts stresses the importance of understanding and respecting foreign States and cultures.[62] To turn a blind eye to differences among States does not serve the purposes, principles and ideals of the current international order as they are encapsulated in the United Nations Charter.

At a more fundamental level, as Slavoj Žižek has argued, '[w]e should … be very careful not to fight false battles: the debates about how evil Saddam was, even about the cost of the war, and so forth, are red herrings. The focus should be on what actually transpires in our societies, on what kind of society is emerging *here* and *now* as the result of the "war on terror". The ultimate result of the war will be a change in our political order.'[63] The systemic regressions of civil liberties in the United States and the United Kingdom in the name of the 'war on terror' well illustrate Žižek's

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[58] Michael Doyle, 'Kant, Liberal Legacies and Foreign Affairs', 12 *Philosophy and Public Affairs* (1983), 205, 235.
[59] Slaughter (1995), *supra* n.11, 537.
[60] See, *e.g.*, Carsten Hoppe, 'Implementation of *LaGrand* and *Avena* in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation', 18 *European Journal of International Law* (2007), 317; Meghana V. Nayak and Christopher Malone, 'American Orientalism and American Exceptionalism: A Critical Rethinking of US Hegemony', 11 *International Studies Review* (2009), 253; Guglielmo Verdirame, '"The Divided West": International Lawyers in Europe and America', 18 *European Journal of International Law* (2007), 553.
[61] Andrew Hurrell, 'Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World', in Tim Dunne and Nicholas J. Wheeler, eds., *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999), 277.
[62] Adam Roberts, 'International Relations after the Cold War', 84 *International Affairs* (2008), 335, 337.
[63] Slavoj Žižek, *Iraq: The Borrowed Kettle* (London: Verso, 2004), 19 (emphasis in original).

observation. In focusing on promotion or transplantation of human rights and democracy abroad, liberal States portray their human rights and governance practices as perfect, while their violations and malpractices escape international scrutiny (with any scrutiny within the State taken as part of their perfection). It simultaneously allows a non-liberal government enormous room to defend its human rights and governance practices from foreign criticism in the name of protector of the State, thereby enhancing its internal legitimacy. For the same reason, democratisation, and a desire to be seen within the State to be pursuing it, whether genuine or contrived, may in fact encourage the state leadership to initiate or continue an adversarial foreign policy.[64]

In her analysis of how liberal international relations theory is normatively of universal applicability, Slaughter makes the qualification, or perhaps augmentation, that to the extent the theory 'shapes our expectations of how law operates among liberal States, it will also generate a corollary set of expectations concerning legal relations between liberal and non-liberal States. These twin sets of expectations will in turn provide the conceptual tools to grasp the differential significance of apparently universal phenomena.'[65] On the contrary, the expectations or manners in which liberal States operate *inter se* do not logically generate any set of expectations in behaviours between liberal and non-liberal States, let alone within non-liberal States

[64] See, *e.g.*, Edward D. Mansfield and Jack Snyder, 'Democratization and the Danger of War', 20:1 *International Security* (1995), 5. For discussions of how China may use nationalistic arguments to justify its foreign policy approaches, see Chen Zhimin, 'Nationalism, Internationalism and Chinese Foreign Policy', 14 *Journal of Contemporary China* (2005), 35; Erica Strecker Downs and Phillip C. Saunders, 'Legitimacy and the Limits of Nationalism: China and the Diaoyu Islands', 23:3 *International Security* (1998), 114; Avery Goldstein, 'Great Expectations: Interpreting China's Arrival', 22:3 *International Security* (1997), 36; Avery Goldstein, *Rising to the Challenge: China's Grand Strategy and International Security* (Stanford: Stanford University Press, 2005); Baogeng He and Yingjie Guo, *Nationalism, National Identity and Democratization in China* (Aldershot: Ashgate, 2000); Chih-Yu Shih, *Navigating Sovereignty: World Politics Lost in China* (Basingstoke: Palgrave Macmillan, 2003); Suisheng Zhao, *A Nation-State by Construction: Dynamics of Modern Chinese Nationalism* (Stanford: Stanford University Press, 2004); Suisheng Zhao, 'Chinese Nationalism and Pragmatic Foreign Policy Behavior', in Suisheng Zhao, ed., *Chinese Foreign Policy: Pragmatism and Strategic Behavior* (Armonk, NY: M.E. Sharpe, 2004), 66; Yongnian Zheng, *Discovering Chinese Nationalism in China: Modernization, Identity, and International Relations* (Cambridge: Cambridge University Press, 1999).

[65] Slaughter (1995), *supra* n.11, 515.

internally, or in their legal relations absent an international tribunal to whose jurisdiction all liberal and non-liberal States have acceded. The International Court of Justice ('ICJ'), which Slaughter analogises to the European Court of Justice to substantiate her broad normative claim,[66] is definitely not such a tribunal when numerous States, including China and the United States, do not submit to its compulsory jurisdiction. As Slaughter admits, such a model, which is descriptive, cannot by itself support normative claims.[67] While it may be true that 'it will be more attractive to use the model to generate a universal set of concepts and norms, applicable to liberal and non-liberal States alike',[68] a universal set of concepts and norms cannot be generated if other voices are denigrated or dismissed.

In order to validate her claim that liberal international relations theory is universally applicable, Slaughter makes a further retreat:

> In many cases we are likely to find that relations between liberal and non-liberal States display some of the features of the model but not others. This congruity is to be expected to the extent that non-liberal States display some of the political, economic, and social attributes [of a liberal State] but not others. In such cases, it may be preferable to accept the necessary fiction inherent in applying a positive model and its corollary norms to States that only partially fit the model than to sacrifice the principle of universality.[69]

Slaughter presents us with two stark choices: liberal internationalism 'normatively applicable to all States even if positively descriptive of only some',[70] or '[sacrifice] to the realism of recognizing that States in the international system inhabit very different

[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid., 538.
[70] Ibid.

worlds'.[71]

In imposing a flawed descriptive model of liberal international relations theory on non-liberal States in order to generate normative congruity, the principle of universality is already sacrificed. The principle of universality, in international law, does not mean that every State should or must follow the same systems, values and norms; it entails that the same international legal rules and principles apply to all States. Customary international law, on the basis of the preponderance of State practice accompanied by the requisite *opinio juris* that cannot be presumed, has clearly not evolved to the extent that liberal internationalism is universally applicable and that only liberal States may validly or legitimately exercise sovereignty. Furthermore, do we not have any choice other than submit to imposed liberal internationalism (and how liberal is imposed liberal internationalism)?[72] As Phillip Trimble points out in his review of Franck's *Fairness in International Law and Institutions*, international law embodies and represents a particular national political culture and 'fairness will have to be explained and decisions justified in terms of their own traditions'.[73] The United States' often contradictory approaches to international law stem equally from cultural relativism as it believes in the legal and moral righteousness of its interpretations of law, including international law (hence its courts' noted unwillingness to apply international law or interpret United States law

[71] Ibid.

[72] As John Rawls notes in his application of a principle of legitimacy to the notion of an international order, 'not all regimes can reasonably be required to be liberal, otherwise the law of peoples would not express liberalism's own principle of toleration for other reasonable ways of ordering society nor further its attempt to find a shared basis of agreement among reasonable peoples. Just as a citizen in a liberal society must respect other persons' comprehensive religious, philosophical, and moral doctrines provided they are in accordance with a reasonable political conception of justice, so a liberal society must respect other societies organized by comprehensive doctrines, provided their political and social institutions meet certain conditions that lead the society to adhere to a reasonable law of peoples': 'The Law of Peoples', in Stephen Shute and Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), 42, 43.

[73] Phillip R. Trimble, 'Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy', 95 *Michigan Law Review* (1997), 1944, 1956. Trimble reminds us that '[b]ecause non-Western traditions use quite different philosophical frameworks to judge fairness, the reality of interdependence requires that those frameworks be acknowledged': ibid., 1957.

in accordance with international law),[74] and guards itself from any legal challenge from other States. In contrast to other Western States, the United States is singularly hostile to recognition and enforcement of economic, social and cultural rights and has not ratified the International Covenant on Economic, Social and Cultural Rights. Abolition of capital punishment in the United States *in toto* remains a virtual impossibility; imposition of capital punishment on juveniles, a major reason underlying the United States' refusal to ratify the Convention on the Rights of the Child,[75] had been deemed constitutional until the decision of the United States Supreme Court in *Roper* v. *Simmons*[76] in 2005. Even European Convention on Human Rights jurisprudence has recognised through its doctrine of margin of appreciation that a contracting State due to its national circumstances may be justified in derogating from what the Convention prescribes.[77] It is thus useful to keep in mind that '[s]ometimes there is unexpectedly subtle and refined communication across radically different cultures. … sometimes there is insurmountable bafflement and

[74] The United States' confidence in the righteousness of its municipal law and municipal courts and its hostility to international law and the ICJ were quintessentially illustrated in *LaGrand* (*Germany* v. *United States of America*), *Judgment*, *ICJ Reports* 2001, 466, and *Avena and Other Mexican Nationals* (*Mexico* v. *United States of America*), *Judgment*, *ICJ Reports* 2004, 12. On 7 March 2005, shortly after the ICJ's decision in *Avena* in 2004, the United States gave notice to withdraw from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, for 'when we signed up to the optional protocol, it [was] not anticipated that … the optional protocol would be used to review cases of domestic criminal law': John R. Crook, 'Contemporary Practice of the United States relating to International Law', 99 *American Journal of International Law* (2005), 479, 489-93; the quoted passage appears at 490. The Supreme Court of the United States in *Medellin* v. *Texas*, 552 US 491 (2008), decided that judgments of the ICJ are not automatically binding on or directly enforceable in United States courts, on grounds, *inter alia*, that Article 94(2) of the United Nations Charter, which provides for referral to the Security Council in case of non-compliance with a judgment of the ICJ, constitutes evidence that judgments of the ICJ are not automatically binding on or directly enforceable in a State's municipal courts, and that as the United States holds veto power within the Security Council, the executive and legislative branches of the United States government must be understood to never have consented to automatic enforceability of judgments of the ICJ in United States courts when the United States ratified the Charter of which the Statute of the ICJ forms part.

[75] Article 37(a) of the Convention on the Rights of the Child states that 'States Parties shall ensure that '[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'.

[76] 543 US 551 (2005).

[77] *Handyside* v. *United Kingdom* (1976) 1 EHRR 737. For a discussion of how the doctrine of margin of appreciation may or may not be capable of developing as a doctrine in international law generally, see Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* (2005), 907.

systematic misunderstanding between relatively close cultures. For the most part, however, we live in the interesting intermediate grey area of partial success and partial failure of interpretation and communication. The grey area is to be found at home among neighbors as well as abroad among strangers.'[78] In labelling a State as 'cultural-relative' or non-liberal and not in conformity with a purportedly universal standard of human rights or governance, the State's particular cultural attitudes to human rights, governance, law, etc., are at once denigrated, de-legitimated and dismissed. As assimilation never succeeds even in a domestic context, attempts at assimilation of differences, let alone fundamental differences, among States lead only to conflicts and never to peace or co-operation.

While Slaughter believes that liberal international relations theory contributes to and sustains 'liberal peace' among liberal States[79] and argues that the theory, and 'liberal peace', is thus normatively applicable to non-liberal States, her position is not empirically supported when peace between a liberal State and a non-liberal State is not at all guaranteed by the existence of a controlling democratic framework within the liberal State. The democratic framework of a liberal State in fact may necessitate the liberal State to not pursue peaceful relations, or to resort to military intervention or confrontation, with a non-liberal State so as to not confer legitimacy on the non-liberal State or to prevent a non-liberal State from being capable eventually of challenging the liberal framework or threatening the liberal State. The position taken by Tesón that use of force against non-liberal States may be justified[80] should show that liberal internationalism or liberal democracy and peace are by no means correlated. An increase in the number of democratic States by itself is insufficient for world peace to be maintained, considering the belligerency of existing democratic States that believe that their values must be transplanted in other States. The

[78] Amélie Oksenberg Rorty, 'Relativism, Persons, and Practices', in Michael Krausz, ed., *Relativism: Interpretation and Confrontation* (Notre Dame, IN: University of Notre Dame Press, 1989), 418, 418.
[79] Slaughter (1995), *supra* n.11, 509-14.
[80] Tesón, *supra* n.11, 90.

'democratic peace' thesis merely draws on the fact that democratic States do not use force against each other; it does not prescribe or evidence that they abstain from force. Furthermore, as Brad Roth maintains, 'to transform such an empirical thesis into a guide to action would be, rather preposterously, to blame a democratic state's aggression on the internal characteristics of the victim state, and to propose that peace requires the victim to remake itself in the image of the aggressor.'[81] Finally, Slaughter's account of 'liberal peace' among liberal States overlooks the fact that, except for conflicts between or within African States, peace has generally been sustained among non-liberal States and reinforced by close political and economic co-operation.

IV. Liberal democracy: A rule of legitimate sovereignty?

A major part of the broad claim that Western political, economic, social, cultural and juristic systems, values and norms are normatively of general applicability to non-Western States consists in the claims that liberal democracy is normatively superior and of general applicability, that liberal democracy sustains international peace and security, and that a right in customary international law to democratic governance is emerging, has crystallised or should constitute the foundation of the post-Cold War international order. It is therefore pertinent to examine the process by which such normative claims, which are not uncontested even within Western research literature, are developed and deployed.

According to Francis Fukuyama, the end of the Cold War marked 'the triumph of the West':[82] 'What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such; that is, the end point of mankind's ideological evolution and the

[81] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), 427-28.
[82] Francis Fukuyama, 'The End of History', *National Interest* (Summer 1989), 16, 18.

universalization of liberal democracy as the final form of human government.'[83] Liberal democratic States must safeguard the collective security of the international order 'from threats arising from the non-democratic part of the world'[84] and 'to expand the sphere of democracy, wherever possible and prudent'.[85] Fox and Roth argue that 'the sovereignty upheld by international law is popular sovereignty, rather than the sovereignty of power holders *tout court.*'[86] Reisman regards sovereignty that underpins contemporary international law to be 'the people's sovereignty rather than the sovereign's sovereignty',[87] from which he concludes that when the people's 'confirmed wishes are ignored by a local caudillo who either takes power himself or assigns it to a subordinate he controls, a jurist rooted in the late twentieth century can hardly say that the invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty'.[88]

As Georg Sørensen reminds us, '[v]isions of order, including the foreign policies based on such visions, have to be seen as inputs to the debate about the appropriate world order; they are not in themselves the substance of such an order.'[89] It is thus alarming that many international legal scholars partake in make-believe exercises in which both what *is* law and *why* a particular matter should or should not crystallise as a legal norm are answered by distorted reasoning through selective application or disregard of facts and law, all in the name of advancing the development of international law, but which results in the undermining of the integrity of international law and the notion of an international order.

James Crawford in 1994 argued that a right to democratic governance could be discerned from various United Nations instruments such as the Universal

[83] Ibid., 19.
[84] Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992), 283.
[85] Ibid., 280.
[86] Fox and Roth, *supra* n.11, 346.
[87] W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law* (1990), 866, 869.
[88] Ibid., 871.
[89] Sørensen, 'What Kind of World Order?: The International System in the New Millennium', *supra* n.1, 344.

Declaration of Human Rights and the International Covenant on Civil and Political Rights.[90] Crawford pointed to 'vast changes … in the democratic balance' in the international order after the Cold War as democratisation occurred on all surfaces of the globe including in East Asia,[91] while failing to provide any example of democratisation taking place in the region and as if East Asia, a region comprising more than half of the world's population, were an inconvenient afterthought.[92] To substantiate his claim that there was now 'a new stress on democracy as a value, even a dominant value, in national and international affairs',[93] Crawford referred only to two decisions of the High Court of Australia and the House of Lords (as it was then called).[94] Glaring examples of democratisation being suppressed or distorted, such as in Hong Kong,[95] were left entirely unaddressed. Crawford's omission to reconcile the case of Hong Kong with his argument that there was a right to democratic governance, based on self-determination or popular sovereignty, is endemic in Western international legal literature, as texts of reference on self-determination do not discuss Hong Kong at any length. In his seminal work on self-determination,[96] Antonio Cassese mentions Hong Kong only thrice, twice in two footnotes to state that Hong Kong was not really a case for self-determination,[97] as the Hong Kong people

[90] James Crawford, 'Democracy and International Law', 64 *British Year Book of International Law* (1994), 113.
[91] Ibid., 121-22.
[92] Convenient oversight of an inconvenient fact is, of course, common also in Western political science literature. For example, in arguing that there is an emerging right to democracy (and in the process conflating any such right with 'an established norm that "military coups against democratically elected governments by self-appointed juntas are not acceptable"' (289) and mistaking the legal capacity of a State or the international community to withhold recognition of an undemocratic government as signifying 'a fundamental shift in the understanding of sovereignty' (309)), Alix van Sickle and Wayne Sandholtz discuss in detail the democratic transitions in Africa, Latin America, and Eastern and Central Europe during the 1980s and 1990s while the lack or regressions of democracy in Asia are comprehensively ignored: 'The Emerging Right to Democracy', in Wayne Sandholtz and Kendall Stiles, eds., *International Norms and Cycles of Change* (New York: Oxford University Press, 2008), 289.
[93] Crawford, *supra* n.90, 122.
[94] Ibid., 123.
[95] See Phil C.W. Chan, 'Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage', *Singapore Journal of Legal Studies* [2006], 285.
[96] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1999).
[97] Ibid., 79-80, fns.34 and 36.

are Han Chinese,[98] Hong Kong was ceded to the United Kingdom 'on the basis of a Treaty that provided for a lease and not a cession proper',[99] and the Hong Kong people were meaningfully consulted by the United Kingdom and the colonial local government, a finding he supports by reference to a statement of the United Kingdom.[100] Cassese lauds 'the solution agreed upon in 1984 concerning Hong Kong' as 'a useful model for dealing with disputed territories'.[101] As Chapter V shows, Cassese's findings are wrong in law and in fact. More fundamentally, the fact that Hong Kong's right to self-determination is disregarded in Western research literature and government rhetoric and policies in order to preserve the integrity of the principle of self-determination (and that of international legal scholarship), particularly in light of the ways and frequency in which Western international legal scholars and governments make use of the principle, is of such import that it cannot be salvaged by characterising Hong Kong as yet another exception.

In addition, scholars who claim that there is an emerging, crystallised or fundamental right in customary international law to democratic governance, or that the development of international law should be guided under the framework of liberal internationalism, tend to reduce the concept of democracy to electoral processes, representative institutions and elected representatives. Criticism of such processes, institutions and representatives as undemocratic at a substantive level has largely been kept at bay. Whenever liberal States are under threat *from* a democratic exercise, they deny the democratic exercise legitimacy, as were seen in the diplomatic isolation of Austria's democratically elected coalition government in 2000 and in the imposition of diplomatic and economic sanctions on the Palestinian Territory in 2006 after Hamas were democratically elected by the Palestinian people as their representative government. If democracy should be a human right or a core value of

[98] Ibid., 80, fn.36.
[99] Ibid.
[100] Ibid., 79-80, fn.34.
[101] Ibid., 357.

the post-Cold War international order, the fact that a democratically elected government holds far-right views or is (declared by other States) a terrorist organisation is irrelevant to its status as a democratically elected government. Fox and Nolte justify different treatment of unfavourable governments elected through democratic processes on the basis that 'it is not clear if the obligation to respect the democratic entitlement is enforceable as a "suicide pact", forcing governments to hand over power to anti-democratic parties who win electoral majorities or pluralities.'[102] Fox and Roth argue that 'no empirical account of popular satisfaction with an authoritarian system would satisfy the democratic entitlement. It would not be sufficient even for a dictatorship to hold a verifiably honest plebiscite on the continuation of dictatorial rule, since the "proper conditions" for the exercise of popular will require a remaking of authoritarian institutions to allow for knowing, willing, and *intelligent* collective choice.'[103]

Through this lens, views, traditions and preferences shared by other peoples that do not comport with dominant Western conceptions of proper and desirable governance are dismissed or assumed to be negative towards, or otherwise indoctrinated or imposed by, their governments. As the next chapter discusses, sentiments about China having been traumatised by Western powers and Japan during the past two centuries are real, enduring and widely shared among the Chinese people. Foreign criticism of Chinese policies, practices, preferences and traditions helps bolster the internal legitimacy of the Chinese leadership and undermines the development of a more open society in China with a participatory foreign policy. An international norm depends on the legitimacy it is accorded in a domestic setting in order for it to be effective domestically; its international standing does not necessarily correlate with its domestic salience.[104] Democratic institutions imposed from outside

[102] Fox and Nolte, *supra* n.11, 8.
[103] Fox and Roth, *supra* n.11, 347 (emphasis added).
[104] Gary Goertz and Paul F. Diehl, 'Toward a Theory of International Norms: Some Conceptual and Measurement Issues', 36 *Journal of Conflict Resolution* (1992), 634, 646.

tend to 'disintegrate without the initiatives of a population *accustomed* to freedom'.[105] United Nations General Assembly Resolution 45/150 (1990) in support of enhancing the effectiveness of the principle of periodic and genuine elections, which received overwhelming support (129 in favour, 8 against, and 9 abstentions), acknowledged that 'the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States'.[106] The resolution was accompanied by General Assembly Resolution 45/151 (1990), which was passed amidst opposition of Western States (111-29-11) as it called for respect for the principles of State sovereignty and non-interference in the internal affairs of a State in its electoral processes.[107] In proclaiming that there is now a right to democratic governance in customary international law or that liberal internationalism is empirically and normatively applicable to all States, Western scholars have failed to confront the reality of State practice that decidedly contradicts their claims. Their failure to do so perhaps is why they characterise a right to democratic governance as 'emerging', to allow it to 'remain poised between occurrence and prediction',[108] or to equivocate between *lex lata* and *lex ferenda*.

When the United Nations Human Rights Committee debated a draft General Comment on the nature, scope and applicability of Article 25 of the International Covenant on Civil and Political Rights, which provides for the right and the opportunity to take part in public affairs and to vote and to stand in genuine periodic elections by universal suffrage, it noted that the provision 'made no mention of democracy or accountability and was quite neutral regarding the power structure

[105] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996), 130 (emphasis in original).
[106] U.N. G.A. Res. 45/150 (1990), para.4.
[107] U.N. G.A. Res. 45/151 (1990).
[108] Susan Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *European Journal of International Law* (1997), 449, 473.

within which the rights it proclaimed were exercised'.[109] However, relying on the European Union and the Organization of American States as evidence of democratic governance having crystallised as a right in customary international law, Fox and Roth argue that *all* international organisations should impose democratic governance as a precondition of a State's membership and participation, and that a State that is not truly democratic should be deprived of its right to participate in international affairs if not altogether de-recognised as a State.[110] Roth asserts that the absence in Article 25 of a requirement of democracy or elections as 'the basis of the authority of government' was 'calculated to avoid controversy over institutional requisites, while still asserting a universal human *interest* in political participation'.[111] As Chapter IV discusses, in communist or socialist States such as China, democracy may entail suppression of dissent in order for citizens meaningfully 'to take part in the conduct of public affairs'.[112] Roth concedes[113] that any interpretation of human rights treaties that purportedly prescribe a right to political participation must take into account 'any relevant rules of international law applicable in the relations between the parties'[114] and the primacy of the United Nations Charter over any other international agreement.[115]

Mortimer Sellers maintains, nonetheless, that international legal norms 'imposed' by non-republican/non-democratic States, of which State sovereignty is exemplar, should be disregarded as they are inherently morally invalid.[116] In his view, *proper* international law is one that possesses and demands the purity that only democratic/republican States share and provide. As democratic States in the past two decades have repeatedly taken the initiative to intervene to protect against human

[109] CCPR/C/SR.1422, 20 July 1995, para.87.
[110] Fox and Roth, *supra* n.11, 343.
[111] Roth, *supra* n.81, 330-32; the quoted passage appears at 332 (emphasis added).
[112] Ibid., 331.
[113] Ibid., 338.
[114] Vienna Convention on the Law of Treaties, Art.31(3)(c).
[115] United Nations Charter, Art.103.
[116] Mortimer N.S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (New York: Palgrave Macmillan, 2006), 2, 8 and 25.

rights violations in despotic or non-democratic States, Sellers admonishes those who exhaust time and resources to question the legality of humanitarian intervention, as the question should be 'rather *when* intervention is legitimate and when it is not'.[117] Sellers also finds that the legitimacy and authority of the ICJ are weakened by inclusion of judges from despotic/non-democratic States.[118] Taking a step further, Allen Buchanan argues that a territorial entity, even if it be an existing State, in order to (continue to) be recognised as a State with attendant sovereignty, must possess legitimacy, confusing the meanings and implications of statehood, State sovereignty, territorial integrity, and recognition of States and governments all at once.[119]

Misstatements of international law and its displacement by subjective notions of morality aside, it is regrettable that these scholars, who believe that the decline or demise of State sovereignty translates or is essential to protection of human rights and implementation of democratic practices, fail to see that their reasoning is self-defeating. To deprive a State of its right to participate in international affairs or to de-recognise its statehood, even if at all legally possible, only undermines the right of the *people* of the State to be represented in international affairs, while the state leadership's effective control over its people remains unabated and its violations of human rights incapable of being scrutinised. Karima Bennoune notes in relation to economic sanctions imposed by the United Nations on Iraq during the 1990s that Iraq 'was largely hindered from exercising its positive sovereign power in terms of

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[117] Ibid., 130 (emphasis in original).
[118] Ibid., 140.
[119] Allen Buchanan asserts that '[t]he choice to recognize or not recognize has moral implications and can be made rightly or wrongly. To recognize an entity as a state is to acknowledge that it has an internal legal right of territorial integrity and this in turn lends strong presumptive support to its territorial claims and thereby presumes the illegitimacy of claims on its territory that others may make. For the same reason, simply continuing the current practice of recognizing the legitimacy of existing states is not a morally neutral activity. Recognizing an entity as a legitimate state empowers certain persons, those who constitute its government, to wield coercive powers over others, for better or worse ... To participate without protest in a practice of recognition that empowers governments that engage in systematic violations of human rights is to be an accomplice to injustice': *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (New York: Oxford University Press, 2004), 3.

ensuring that their human needs were met.'[120] Richard Garfield estimated that such economic sanctions on Iraq directly led to the deaths of 100,000 to 227,000 children.[121] John Mueller and Karl Mueller argue that 'economic sanctions may well have been a necessary cause of the deaths of more people in Iraq than have been slain by all so-called weapons of mass destruction throughout history.'[122] Madeleine Albright, United States Ambassador to the United Nations at the time, callously stated in May 1996 that, such huge casualties notwithstanding, 'the price is worth it'.[123] As the United Nations Committee on Economic, Social and Cultural Rights in its *General Comment No.8* on the relationship between economic sanctions and respect for economic, social and cultural rights emphasised:

> the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security. The aim is not to give support or encouragement to such leaders, nor is it to undermine the legitimate interests of the international community in enforcing respect for the provisions of the Charter of the United Nations and the general principles of international law. Rather, it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any

[120] Karima Bennoune, 'Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq', 13 *European Journal of International Law* (2002), 243, 254.
[121] Richard Garfield, 'Morbidity and Mortality among Iraqi Children from 1990 through 1998: Assessing the Impact of the Gulf War and Economic Sanctions', July 1999, http://www.cam.ac.uk/societies/casi/info/garfield/dr-garfield.html.
[122] John Mueller and Karl Mueller, 'Sanctions of Mass Destruction'. 78:3 *Foreign Affairs* (1999), 43, 51.
[123] As quoted in Daniel W. Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice', 13 *International Studies Review* (2011), 96, 98.

such collective action.[124]

Disenfranchising non-democratic States entails grave consequences.[125] Sergio Dellavalle has noted that Sellers' approach would leave the majority of States excluded from the current international legal order, which since its inception has set out to be inclusive of all States in order to augment its efficacy, legitimacy and normative values.[126] As Chapter VI discusses, international law, with its capacity for communicative action within a legal–normative framework, provides States with opportunities to understand and reflect on positions to which they may otherwise not be amenable. For international law to be truly universally applicable, one must conceive it as open to – and requiring – the participation of States with differing national characteristics. It is neither helpful nor correct to ascribe overwhelming influence to practices of the European Union and the Organization of American States that alone cannot generate any norm of customary international law that modifies established principles of international law, especially when other transnational political communities such as the Association of Southeast Asian Nations and the African Union have sidelined democratic governance as a condition of membership or participation.[127] A customary norm materialises only upon general,

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[124] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, E/C.12/1997/8, para.16.

[125] See Ian Brownlie, 'Recognition in Theory and Practice', 53 *British Year Book of International Law* (1982), 197; Michael Byers and Simon Chesterman, '"You the People": Pro-Democratic Intervention in International Law', in Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), 259.

[126] Sergio Dellavalle, 'Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order', 21 *European Journal of International Law* (2010), 765, 780. As Franck (1992), *supra* n.11, 78, has argued, citing Article 4(1) of the United Nations Charter, United Nations membership extends only to peace-loving States. As has been explained, democratic States are not necessarily peace-loving.

[127] See, *e.g.*, Simon Chesterman, 'Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person', 12 *Singapore Year Book of International Law* (2008), 199; Rachel H. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004); Rachel Murray, 'Recent Developments in the African Human Rights System 2007', 8 *Human Rights Law Review* (2008), 356; Vincent O. Nmehielle, 'The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?', 7 *Singapore Journal of International and Comparative Law* (2003),

consistent and widespread State practice representative of the international community and accompanied by the requisite *opinio juris*.

In proclaiming that liberal democracy manifested by elections signals the 'end of history' and constitutes a foundational norm of the current international order (or a new one), shortcomings and problems of liberal democracy escape scrutiny. As Belden Fields and Wolf-Dieter Narr have noted, Western understanding of liberal democracy, as drawn from Joseph Schumpeter's work,[128] only allows for those deemed sufficiently not self-interested to be entrusted with political power and to save the masses from themselves. Liberal democracy and human rights are by no means always compatible.[129] The roles civil society plays are often disregarded, as could be seen in the discrepancies and changes of views over the 2003 invasion of Iraq on the parts of the Australian, British, Spanish and, in time, United States publics and their elected representatives. Democracy under the banner of elections and elected representatives ignores the structural and substantive flaws of a political system in which disagreements are often dismissed as irrelevant, illegitimate, subversive or unpatriotic. Possibilities that democracy may manifest in informal elections or at a local level, such as village elections in China,[130] that a democratic

412; Eugene K.B. Tan, 'The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia', 12 *Singapore Year Book of International Law* (2008), 171; Simon S.C. Tay, 'The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment', 12 *Singapore Year Book of International Law* (2008), 151. See also Daniela Donno, 'Who is Punished? Regional Intergovernmental Organizations and the Enforcement of Democratic Norms', 64 *International Organization* (2010), 593, where the author argues that even in transnational political communities that stipulate democratic governance as a condition of membership or participation, enforcement is dependent on geopolitical interests and international monitoring.

[128] Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper, 1947).

[129] A. Belden Fields and Wolf-Dieter Narr, 'Human Rights as a Holistic Concept', 14 *Human Rights Quarterly* (1992), 1, 8. As the authors, ibid., 12, elaborate, 'democratic forms are important, but … democracy must not be conceived of as narrowly political. If "democracy" is not expanded to include the economic and social domains, it merely serves to legitimize and perpetuate "private" inequalities. A narrowly political "democracy" undermines human rights because it ignores the conception of equality. The two ideas, democracy and human rights, are necessarily connected; democracy cannot exist without human rights, and there can be no human rights without democracy. Democracy is the form; human rights are the norm or content. Furthermore, human rights and their necessary procedural rules cannot be put into practice by a segmental approach – the society as a whole has to be structured according to the requirements of this norm and form relationship.'

[130] See discussion in Chapter IV.

framework may not necessarily embody democratic structures or reflect democratic norms, as the electoral and legislative systems in Hong Kong (both before and after the transfer of sovereignty in July 1997) illuminate,[131] and their implications for the character and development of democratic governance as a right in international law, have not been sufficiently explored. One also must bear in mind that discrimination on grounds of gender, ethnic or national origin, class, sexual orientation, etc., continues to be justified and perpetuated in liberal States through democratic processes. In order for civil and political rights to materialise, elections, while necessary, are not sufficient. Other rights must be furthered and aligned with electoral processes and representation: 'A human rights-driven democracy is one in which all social processes are evaluated by their effect on human rights.'[132]

V. State sovereignty in the international legal order: Impediment or essentiality?

The State as personified by its territory permeates all discourses and practices of international law and international relations. The United Nations is composed of sovereign States.[133] One speaks of China or the United States as if it were a natural person with a particular collective mentality to be differentiated in terms, among others, of liberality/non-liberality. The interests, identities and particular collective mentalities of States are socially constructed and 'embedded in the web of normative expectations that prevails in international society at a given time'.[134] The social structure, in which States with differing collective mentalities and asymmetric power capabilities inhabit, in turn guides, shapes and constrains States' self-conceptions of

[131] See discussion in Chapter V.
[132] Fields and Narr, *supra* n.129, 10.
[133] United Nations Charter, Art.4(1).
[134] Krisch, *supra* n.29, 374.

their roles and subjective interests.[135]

Amidst current proliferation of international human rights treaties and organisations, many Western States and scholars argue that human rights now take precedence over the principle of State sovereignty and should be enforced by humanitarian intervention in cases of gross and egregious violations, particularly – although not necessarily – if the State in question has already agreed to 'transfer' or 'surrender' its sovereignty by its ratifications of human rights treaties or its participation in international organisations for which human rights protection is a central concern. As the United Nations Secretary-General's *High-Level Panel report on Threats, Challenges and Change*[136] in 2004 stated:

> In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligations of a State to protect the welfare of its own peoples and meet the obligations to the wider international community. But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbours. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the

[135] Barnett and Duvall, *supra* n.32, 53.
[136] *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (New York: United Nations, 2004).

necessary protection, as the case may be.[137]

Such propositions have been put forward due to a myriad of confusions about the meaning and implications of State sovereignty. First and foremost, State sovereignty does not derive from United Nations membership. Without State sovereignty, there can be no United Nations membership; without sovereign States, there can be no United Nations. Any demise or diminution of the principle of State sovereignty only brings about the immediate disintegration of the United Nations and the current international legal order. State sovereignty is not a moral, or even political, principle that can be swayed at the will of powerful States and the opinions of scholars. State sovereignty is a foundational legal principle of the current international order that is enshrined in the United Nations Charter and customary international law. It remains so until the Charter is amended, or a rule of customary international law has crystallised, to the effect that State sovereignty is displaced or reduced as a lesser principle. As Xue Hanqin has warned, 'should the responsibility to protect derive from the notion of sovereignty, it would be tantamount to claiming that any state or states could individually or collectively take measures to prevent or redress human rights violations wherever it occurs. In other words, any state could step in and take action against another state when the situation, in its opinion, constitutes a violation of human rights in the territory of the latter state.'[138] Furthermore, Roth notes, '[t]o frame the issue as sovereignty *versus* human rights is to ignore that sovereignty can itself be characterized as a human right, and indeed – given common Article 1 of the two main human rights covenants – as the *first* human right'.[139]

China's exercise of State sovereignty, through its positions on the internal

[137] Ibid., para.29.
[138] Xue Hanqin, 'Chinese Observations on International Law', 6 *Chinese Journal of International Law* (2007), 83, 90.
[139] Roth, *supra* n.81, 429 (emphasis in original).

conflicts in Libya and in Syria as reflected by its votes in the Security Council, has recently been a subject of sustained criticism. Western States take it a matter of course that China ought to support their positions or else must be taken as disregarding the security and welfare of the Libyan and Syrian civilians behind the veil of (Libya's and Syria's) State sovereignty. What has been left unsaid is that China did support six of the seven draft Security Council resolutions concerning the Libyan government's use of violence against its civilians, and abstain, along with Russia, Brazil, Germany and India, on only one draft Security Council resolution that sought to impose sanctions.[140] Along with Russia, China vetoed two draft Security Council resolutions concerning the Syrian government's use of violence against its civilians on grounds that Security Council action would go beyond the perimeters of the principle of non-interference in Member States' internal affairs.[141] China did vote with other Security Council Members in unanimity on 14 April 2012 in favour of authorising up to thirty unarmed military observers to be dispatched to Syria to monitor compliance with the ceasefire agreement between forces loyal and hostile to the Syrian government;[142] on 21 April 2012 of establishing a United Nations Supervision Mission in Syria (with an authorised capacity of up to three hundred unarmed military observers and necessary civilian personnel);[143] and on 20 July 2012 of extending the mandate of the Mission for a final period of thirty days.[144] The Security Council in its Resolution 2059 (2012) was adamant that it would be willing to further extend the mandate of the Mission 'only in the event that the Secretary-

[140] U.N. S.C. Res. 1970 (2011; passed unanimously) imposing sanctions on the Libyan government; U.N. S.C. Res. 1973 (2011; China, Russia, Brazil, Germany, and India abstained) authorising a no-fly-zone over Libya for the protection of civilians; U.N. S.C. Res. 2009 (2011; passed unanimously) establishing a United Nations Support Mission in Libya; U.N. S.C. Res. 2016 (2011; passed unanimously) terminating military intervention in Libya on 27 October 2011; U.N. S.C. Res. 2017 (2011; passed unanimously) regarding portable surface-to-air missiles in Libya; U.N. S.C. Res. 2022 (2011; passed unanimously) extending the mandate of the United Nations Support Mission in Libya; and U.N. S.C. Res. 2040 (2012; passed unanimously) further extending the mandate of the Mission.
[141] S/PV.6627, 4 October 2011; S/PV.6711, 4 February 2012.
[142] U.N. S.C. Res. 2042 (2012).
[143] U.N. S.C. Res. 2043 (2012).
[144] U.N. S.C. Res. 2059 (2012).

General reports and the Security Council [confirm] the cessation of the use of heavy weapons and a reduction in the level of violence by all sides sufficient to allow [the Mission] to implement its mandate'.[145] The mandate of the Mission ceased as of 19 August 2012 amidst escalating violence in Syria. In casting its vetoes in respect of Syria, China has preserved the integrity of international law and the maintenance of international peace and security which would be undermined if a State, or a group of States, were able to decide on its own at any time to impose sanctions or use force against another State in contravention of the Charter and customary international law.

At the same time as they proclaim that State sovereignty as a principle of international law has become obsolete, Western States and scholars assert that their States' sovereignty must be protected at all costs. Even the European Union, which many have treated as the prototype of 'diminished sovereignty', is regarded by its constituent States as either 'a puppet of the member states or a superstate in its own right',[146] and it is its constituent States that determine its activities and competences within and among the constituent States and *en bloc*. Each and every European Union treaty requires the ratifications of all Member States for it to come into force. The participation or non-participation in, or the subsequent withdrawal of support of, the 2003 invasion of Iraq on the parts of individual European Union Member States demonstrated that their State sovereignty remained firmly intact. The incessant squabbles among European leaders throughout the euro-zone sovereign debt crisis have shown that Member States guard their sovereignty jealously.

Many Western scholars have taken the view that the absolute nature of State sovereignty, as opposed to popular sovereignty, enables a State to violate the human rights of its citizens and to disregard international law. Such a view ignores the fact that, as much as a source of violations of human rights, the State remains the ultimate

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[145] Ibid., para.3.

[146] Alexander B. Murphy, 'The Sovereign State System as Political–Territorial Ideal: Historical and Contemporary Considerations', in Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996), 81, 106.

irreplaceable arbiter and protector of rights and freedoms of its people. Protection of citizens abroad through diplomatic protection, consular assistance, and mutual police assistance, to name but three examples, will not be available but for sustained interstate co-operation. International co-operation can be achieved only with the consent and active participation of States. As the Permanent Court of International Justice in its judgment in *Wimbledon* in 1923 stated, to agree to be bound by international law and the capacity to do so are attributes of State sovereignty.[147] In participating in international organisations, a State 'acquires rights of international decision-making through membership of the organs of the UN, which valuable rights it exercises because, and only because, it is a sovereign State, a member of the UN. This activity, which it is now entitled to pursue, not only is predicated upon its status as sovereign but also itself a method of exercising its proper sovereignty in broadly influential and even decisive ways which were formerly wholly closed to it.'[148] State sovereignty 'is far and away the most important factor' in the implementation and enforcement of municipal and international law, including human rights law.[149] Even in Europe where the European Convention on Human Rights has acquired omnipotent influence over the municipal laws and practices of States parties, implementation and enforcement of the Convention remain dependent on States parties' incorporation of the Convention into their municipal legal systems and laws. As Philip Cunliffe has argued:

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[147] *Case of the S.S. Wimbledon*, *Judgment*, P.C.I.J. Ser. A (1923), No.1, 15. See also *Nationality Decrees Issued in Tunis and Morocco (French Zone) on 8 November 1921*, *Advisory Opinion*, P.C.I.J. Ser. B (1923), No.4, 3. As Lassa Oppenheim, *The Future of International Law* (Ithaca, NY: Cornell University Press, 1921), 11, stated: 'Sovereignty as the highest earthly authority, which owes allegiance to no other power, does not exclude the possibility that the sovereign should subject himself to a self-imposed order, so long as this order does not place him under any higher earthly power. All members of the international society thus subject themselves in point of fact to the law of nations without suffering the least diminution of their sovereignty.'

[148] Robert Jennings, 'Sovereignty and International Law', in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth de Vos, and John Dugard, eds., *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002), 27, 36.

[149] Ibid., 41.

> even with popular sovereignty the state has to take the form of an institution that is over and above society. Collective political interests can only be pursued among modern individuals if these individuals abstract themselves from their differing circumstances to become citizens in a common political process. … The separation of the state from society provides the sovereign people with a barometer by which to observe whether their collective, general will is being carried out. Though the state is necessary to make possible the exercise of the general will, it is still the people, not the state, that is sovereign, *regardless of how despotic any individual state might be*. Popular sovereignty, therefore, is a mediated relationship between people and state; it *cannot* belong to the body of the people separate from the state. Without a state, modern society cannot conceive of itself as a polity.[150]

Robert Jennings laments the failure of many international legal scholars to see that 'what is needed is not so much a theory explaining the decline of national sovereignty but a theory explaining and justifying the present vital transformation of State sovereignty into the field of governmental activity on the international plane',[151] and 'to explain to the general public the importance of, and the necessity for, this

[150] Philip Cunliffe, 'Sovereignty and the Politics of Responsibility', in Christopher J. Bickerton, Philip Cunliffe, and Alexander Gourevitch, eds., *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: Routledge, 2007), 39, 49-50 (emphasis in original). As Alexander Wendt in *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), 219, also notes, '[e]lements of this belief [of the "Idea" of a state with "corporate agency and a decision structure that both institutionalizes and authorizes collective action" (218)] will include a representation of the state's members as a "we" or "plural subject", a discourse about the principles of political legitimacy upon which their collective identity is based … and collective memories that connect them to the state's members in the past. … What matters is that individuals accept the obligation to act jointly on behalf of collective beliefs, whether or not they subscribe to them personally. Acting on this commitment is how states acquire their causal powers and get reproduced over time. The concept of state agency is not simply a useful fiction for scholars, in other words, but how the members of states themselves constitute its *reality*' (emphasis in original).

[151] Jennings, *supra* n.148, 38.

transformation of state sovereign power, and not only of course for human rights but also for international law and order generally'.[152]

While State sovereignty as a legal concept may be an abstract, elusive or remote notion to many individuals, individuals have no difficulty in understanding that their capacity to exercise, protect and enforce their contractual, property and human rights and interests and their personal safety, not only against the state but also *vis-à-vis* each other, is entirely dependent on the proper functioning of the legislative, executive and judicial organs of the State. Many individuals are also keen to enhance and defend their State in one way or another to the best of their abilities, even if doing so might entail the ultimate sacrifice. To many people in Asia and Africa, oppression by Western States, be it colonialism in the past or economic, political or military subjugation in the present, constitutes and causes violations of human rights, including their right to self-determination and freedom of political participation. As Michael Ignatieff has noted, 'State sovereignty safeguards self-determination and if we move into a world in which coalitions of the willing believe that human rights considerations automatically override the claim of State sovereignty we may actually arrive at the paradoxical and unwelcome result of using human rights arguments to sacrifice human rights.'[153] It should not escape notice that the ultimate aim of many a liberation/independence movement in the name of self-determination or human rights is statehood with corresponding State sovereignty being non-negotiable. **'**The existence of the right of self-determination', as Marc Weller has pointed out, 'served as a convenient legitimizing myth for the existing state system.'[154] The notion that the right to self-determination and its status as a norm of *jus cogens* manifests the diminution or demise of the principle of State sovereignty is, thus, fallacious.

If State sovereignty as a legal concept is difficult for some to grasp, it surely

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[152] Ibid.
[153] Michael Ignatieff, *Whose Universal Values: The Crisis in Human Rights* (Amsterdam: Praemium Erasmianium, 1999), 21.
[154] Marc Weller, 'The Self-determination Trap', 4 *Ethnopolitics* (2005), 3, 26.

is unhelpful for international legal scholars to confuse or distort it. Equally, it is unhelpful, if not dangerous, for one to inflate the capabilities of States and international organisations in the name of the international community, when the unity of such a community and the effectiveness of international organisations are undermined by such inflation. As David Ellis argues, '[i]f normative scholars desire the evolution of a comprehensive international community, then they should orient their research and prescriptions on how to achieve such an international system with guides as to how it can be achieved.'[155] Much of the criticism about the effectiveness and legitimacy of the Security Council neglects that the Security Council itself is bound by the United Nations Charter.[156] As Franck has stated, the international community 'is constituted not only by its substantive rules, but also by those institutional processes that implement the rules'.[157] The Security Council – and the United Nations – loses *all* of its legitimacy if it undermines or ignores the legal constraints placed upon it.

Moreover, any abstraction, elusiveness or remoteness of State sovereignty as a legal concept pales in comparison with the abstraction, elusiveness and remoteness of the notions and workings of international law, international organisations and the international community. Ramesh Thakur has noted that '[t]oday we use the phrase "international community" by habit and without thinking',[158] and the notion that there is at present an 'international community' that speaks with one voice does not comport with reality. The innumerable distortions of international law by powerful States instil little confidence on the part of weaker States and their peoples that the international community would come to their assistance when tragedy – be it natural, political or military – strikes: '"International community" is a dangerous reference

[155] David C. Ellis, 'On the Possibility of "International Community"', 11 *International Studies Review* (2009), 1, 24.
[156] See discussion in Chapter VI.
[157] Franck, *supra* n.44, 102.
[158] Ramesh Thakur, 'Introduction', in Ramesh Thakur, ed., *Past Imperfect, Future Uncertain: The United Nations at Fifty* (New York: St Martin's Press, 1998), 1, 12. See also examples given by Ellis, *supra* n.155, 3-4, of how politicians often make it a point to refer to the international community in their speeches.

point for the naïve. Its connotation of sociability and commitment invites unwise reliance by those who must ultimately fend for themselves.'[159] Carr has observed a 'universal reluctance' on the part of individuals to accord the interests of the international community priority over those of their States;[160] *a fortiori*, the willingness of individuals to defend the 'international community' from a substantive threat is clearly absent. Humanitarian intervention in the name of the interests of the 'international community' additionally suffers a lack of internal legitimacy *vis-à-vis* the intervening State insofar as its government allocates military and fiscal resources to an armed conflict to (forcibly) protect the rights of non-citizens outside its territory.[161] The international community – and the current international legal order – is in dire need of defence from within and from those who claim to defend and augment, but in reality distort and undermine, it. The Security Council's increasing use of powers under Chapter VII of the Charter to identify and confront threats to international peace and security even when the matters at hand were internal in character, in which the Security Council had no jurisdiction to intervene,[162] has undermined the principle of State sovereignty and the normative framework for the maintenance of international peace and security.

Finally, what if the people of a State demand that their government oppose the international community, say, by (re-)occupying a territory – perhaps Kosovo, or Malvinas (Falkland Islands) – that the international community considers to be entitled to self-determination but which the people, in their exercise of self-determination, consider to be part and parcel of their State? If the State (Serbia, or Argentina) conforms to the wishes and demands of the international community

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[159] Ruth Wedgwood, 'Gallant Delusions', 101 *Foreign Policy* (September/October 2002), 44, 44.
[160] Carr, *supra* n.33, 166-67. As Ellis, *supra* n.155, 23, points out, '[i]t would be impossible to derive a stronger institutional framework to empower the United Nations to work on humanity's behalf when the constituent units of the organization cannot themselves agree on the priority of interests.'
[161] See Allen Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', 7 *Journal of Political Philosophy* (1999), 71.
[162] United Nations Charter, Art.2(7).

despite the democratic will of the people demanding otherwise, is the people's popular sovereignty not thereby forsaken? It cannot have escaped the memory of any scholar of international law or international relations that the notion of the 'family of nations' was relied on to colonise territories and oppress peoples deemed not to possess what was required for membership. Similarly, does making the democratic will of the people subsidiary to foreign officials and bureaucrats not undermine the very meaning of liberal democracy that the State is accountable to its people in whom popular sovereignty resides? Democratic governance being an emerging, crystallised or fundamental right in customary international law as conceived and delineated by Franck, Slaughter and others pertains to democratic governance within the domestic sphere; even advocates of democratic governance do not suggest that there is at present a right to democratic governance at the international level under which international affairs should be conducted by majority rule. Does opposing the international community on account of the democratic will of the people constitute a threat to international peace and security, warranting military intervention? Conversely, if State sovereignty is displaced in favour of liberal internationalism, state machineries will coalesce around the international community, as the moral cloak of international legitimacy gives them a free hand to dilute, if not altogether ignore, the demands of the people, as domestic oppositions in States that partook in the 2003 invasion of Iraq showed. In the process, *both* popular sovereignty and State sovereignty suffer.

VI. Conclusion

In order to understand how China's approaches to international legal norms and principles, in its exercise of State sovereignty and generally, may help consolidate and buttress those norms and principles and the current international legal order, scholars ought to move from the myopic lens of compliance and reflect on, synthesise

and augment the understanding and development of international law and proper conduct of international affairs. To distort or ignore international law whenever it presents inconveniences is a fundamental disservice to its legitimacy, authority and normative values and to the validity, authenticity and normative application of international relations theories, reducing both disciplines – and the notion of an international order underpinned by law – to irrelevance. Susan Marks observes that the unease felt by many scholars of international law regarding the place of State sovereignty in the current international legal order stems from their 'anxiety of influence': in their attempts to cleanse international law of the stains and ills of State sovereignty through discourses of human rights, democracy and self-determination, these scholars struggle with the reality that state power is always a product of international law.[163] Western discourses about State sovereignty's demise or diminution serve only 'to reaffirm and hence strengthen the state as the central problematic with respect to which analysis and policy must be formulated'.[164]

Compliance with international law, by definition, keeps the current state of international law and the international legal order from progressive development, and is not always voluntary even where effective enforcement mechanisms may not be in place, given the increasing tendency of powerful States to construct fictional norms or bypass international law in order to justify unilateral action. Contrary to John Tasioulas' belief that 'one can only be subject to an authority if one can reasonably come to know of its legitimacy without undue expenditure of time and effort',[165] I argue that it is through sufferings, trials and errors that the legitimacy of an authority and its demand for subjection may endure. The successes of liberal democracy, and recognition and implementation of human rights and international law, in Western States came from centuries of errors, during which tens of millions of lives were lost,

[163] Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence', 19 *Leiden Journal of International Law* (2006), 339, 346.
[164] Ibid., 340.
[165] John Tasioulas, 'Human Rights, Legitimacy, and International Law', 58 *American Journal of Jurisprudence* (2013), 1, 24.

and through which these States came to recognise for themselves that a principled normative international legal framework would provide the best avenue and refuge for the protection of individuals, the maintenance of international peace and security, and the very survival of their statehood. It is imperative for the legitimacy of international law to understand China's relationship with the current international legal order in a normative framework that takes into account China's national characteristics and its agency.[166]

From its defeat in the Opium War in 1842 until the midst of the Second World War, China, despite being a State in the European sense and a civilisation for millennia, was adjudged by Western powers and legal theorists to be insufficiently civilised to be admitted to the 'family of nations'. Yet, China was expected in its relations with Western powers to comply with international law that the latter created, interpreted and manipulated, and was forced to surrender parts of its territory and sovereign rights through a series of treaties. Perceptions of international law as a tool to subjugate China to the demands of Western powers have influenced and shaped imperial, republican, communist and contemporary China's approaches to international law, international organisations and the current international legal order. As subsequent chapters demonstrate, through increasing socialisation with international organisations, China has learned to adapt its role as a power that expects itself and is expected by other States to contribute meaningfully and responsibly to the stability of the current international legal order, while maintaining its independence, including its traditions, norms and values, and protecting its national interests. In the process, China has helped shape the development of international law and an international order underlain and governed by the international rule of law.

[166] Despite his acceptance that Western States have played disproportionate roles in the shaping of international law, Tasioulas, ibid., 25, argues that non-liberal-democratic States are bound by human rights morality 'although their historically-induced misconceptions may generate some excuse (not a justification) for non-compliance'. The presumption that any variation from Western understandings of human rights constitutes non-compliance precisely undermines the agency of non-Western States in their relationships with the current international legal order, and the legitimacy of international law.

Chapter III: China's Approaches to International Law since the Opium War*

I. 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 rationalised, 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, crystallisation 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 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

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[1] Avery Goldstein, 'Parsing China's Rise: International Circumstances and National Attributes', in Robert S. Ross and Zhu Feng, eds., *China's Ascent: Power, Security, and the Future of International Politics* (Ithaca, NY: Cornell University Press, 2008), 55, 74-75.

civilisation', 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, as discussed in the previous chapter, 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

[2] The most notable example is embodied in Article 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] Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence', 19 *Leiden Journal of International Law* (2006), 339, 347.

[4] Mikhaïl Xifaras, 'Commentaire sur "Les ambivalences imperials" de Nathaniel Berman', in Emmanuelle Jouannet and Hélène Ruiz-Fabri, eds., *Impérialisme et droit international en Europe et aux Etats-Unis: mondialisation et fragmentation du droit: recherches sur un humanisme juridique critique* (Paris: Société de législation comparée, 2007), 183, as quoted in Emmanuelle Jouannet, 'Universalism and Imperialism: The True–False Paradox of International Law?', 18 *European Journal of International Law* (2007), 379, 406.

legitimating Western powers' oppression of non-Western States, peoples and cultures, including a State and civilisation 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 chapter explores how the Opium War (1839–1842) transformed China's approaches during the last century of the Qing dynasty (1644–1912) to international law and the 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

[5] Rune Svarverud, 'Re-Constructing East Asia: International Law as Inter-Cultural Process in Late Qing China', 12 *Inter-Asia Cultural Studies* (2011), 306, 310.
[6] Hsin-Pao Chang, *Commissioner Lin and the Opium War* (Cambridge, MA: Harvard University Press, 1970), ix.

contemporary use of international law to defend its State sovereignty and define and attain its political objectives.

This chapter then examines the evolution of China's approaches to international law during the republican period (1912–1949); the period from 1949 to 24 October 1971 during which the People's Republic of China ('PRC') government was not recognised 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 the current 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 organisations.

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

[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 (B.C. 722-476) and Warring States periods (B.C. 476-221) before China became a unified State under the Qin dynasty in B.C. 221: 'International Law in China: Historical and Contemporary Perspectives', 221 *Recueil des cours* (1990–II), 195, 205-13; see also Yongjin Zhang, 'System, Empire and State in Chinese International Relations', 27 *Review of International Studies* (2001), 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 Xiaoming Zhang, 'China in the Conception of International Society: The English School's Engagements with China', 37 *Review of International Studies* (2011), 763, 765-68.

China for millennia was the ruling centre of an international system that John King Fairbank and his colleagues, in *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press, 1973), call 'the Chinese world order', which Adda 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* (Princeton: Princeton University Press, 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 civilisation 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 civilisations as Samuel P. Huntington has argued ('The Clash of Civilizations?', 72 *Foreign Affairs* (Summer 1993), 22; *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996)), between China and Western powers that rendered military conflicts inevitable: see Andrew J. Bacevich, *American Empire: The Realities and Consequences of U.S. Diplomacy* (Cambridge, MA: Harvard University Press, 2002); Ulrich Beck and Edgar Grande, *Cosmopolitan Europe* (Cambridge: Polity, 2007); Li Chen, 'Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter', 13 *Journal of the History of International Law* (2011), 75; Helene Carrere d'Encausse and Maxime Rodinson, *Islam and the Russian Empire: Reform and Revolution in Central Asia* (London: I.B. Tauris, 2009); Niall Ferguson, *Colossus: The Price of America's Empire* (New York: Allen Lane, 2004); Christopher A. Ford, *The Mind of Empire: China's History and Modern Foreign Relations* (Lexington, KY: University of Kentucky Press, 2010); Harold James, *The Roman Predicament: How the Rules of International Order Create the Politics of Empire* (Princeton: Princeton University Press, 2006); Dominic Lieven, *Empire: The Russian Empire and its Rivals* (New Haven: Yale University Press, 2002); Lydia H. Liu, 'The Desire for the Sovereign and the Logic of Reciprocity in the Family of Nations', 29:4 *Diacritics* (1999), 150; Lydia H. Liu, *The Clash of Empires: The Invention of China in Modern World Making* (Cambridge, MA: Harvard University Press, 2004); Charles S. Maier, *Among Empires: American Ascendancy and its Predecessors* (Cambridge, MA: Harvard University Press, 2006); Alain Peyrefitte, *The Immobile Empire* (New York: Knopf, 1992); Earl H. Pritchard, *The Crucial Years of Early Anglo-Chinese Relations, 1750–1800* (New York: Routledge, 2000); Teemu Ruskola, 'Raping Like a State', 57 *UCLA Law Review* (2010), 1477; Ross Terrill, *The New Chinese Empire* (Sydney: University of New South Wales Press, 2003); Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford: Oxford University Press, 2006). As Jan 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', 17 *Geopolitics* (2012), 502, 506. *Contra*, see James Rosenau, 'The Illusion of Power and Empire', 44 *History and Theory* (2005), 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 Eric 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* (New York: Oxford University Press, 2009), 10 (emphasis in original). Similarly, J.A. Hobson opined that Asia was the 'great test of Western imperialism' because Asian civilisations, as opposed to Africa that was more easily colonised as 'savages or children', were 'as complex as our own, more ancient and more firmly rooted by enduring custom': *Imperialism: A Study* (New York: Allen & Unwin, 1902), 182.

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 recognised 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

[8] John K. Fairbank, 'The Early Treaty System in the Chinese World Order', in Fairbank, ibid., 257, 273.
[9] Zhang (2001), *supra* n.7, 56.
[10] Mark Mancall, 'The Persistence of Tradition in Chinese Foreign Policy', 349 *Annals of the American Academy of Political and Social Science* (1963), 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 favor to those Chinese who sided with the alien regime': *Traditional Government in Imperial China: A Critical Analysis*, trans. Chün-tu Hsüeh and George O. Totten (Hong Kong: Chinese University Press, 1982), 126-35.
[11] Li Zhaojie, 'Traditional Chinese World Order', 1 *Chinese Journal of International Law* (2002), 20, 39 (emphasis in original).

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.

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

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[12] See, generally, Valerie Hansen, *The Open Empire: A History of China to 1600* (New York: W.W. Norton, 2000); Joanna Waley-Cohen, *The Sextants of Beijing: Global Currents in Chinese History* (New York: W.W. Norton, 1999).

[13] See, *e.g.*, John E. Wills, Jr., *Embassies and Illusions: Dutch and Portuguese Envoys to K'ang-Hsi* (Cambridge, MA: Harvard University Press, 1984).

[14] Andre Gunder Frank, *ReORIENT: Global Economy in the Asian Age* (Berkeley: University of California Press, 1998), 126.

[15] Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton: Princeton University Press, 2000), 70.

[16] Zhang (2011), *supra* n.7, 768. Ruskola, *supra* n.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

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 civilisation', 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

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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] Adam Watson, *The Evolution of International Society: A Comparative Historical Analysis* (London: Routledge, 1992), 3.

[18] Prasenjit Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (Lanham, MD: Rowman & Littlefield, 2003), 9 and 19; John Kelly and Martha Kaplan, *Represented Communities: Fiji and World Decolonization* (Chicago: University of Chicago Press, 2001), 1-4.

[19] Liu (2004), *supra* n.7.

[20] Randle Edwards, 'The Old Canton System of Foreign Trade', in Victor H. Li, ed., *Law and Politics in China's Foreign Trade* (Seattle: University of Washington Press, 1977), 360; R. Randle Edwards, 'Imperial China's Border Control Law', 1 *Journal of Chinese Law* (1987), 33; R. Randle Edwards, 'China's Practice of International Law – Patterns from the Past', in

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] 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 civilisation 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

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Ronald St John Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers, 1994), 243.

[21] Mancall, *supra* n.10, 19.

[22] Kevin Herrick, 'The Merger of Two Systems: Chinese Adoption and Western Adaptation in the Formation of Modern International Law', 33 *Georgia Journal of International and Comparative Law* (2005), 685, 693. David C. Kang 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* (New York: Columbia University Press, 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 civilisation *vis-à-vis* its neighbours: see Shogo Suzuki, *Civilization and Empire: China and Japan's Encounter with European International Society* (London: Routledge, 2009).

[23] Benjamin I. Schwartz, 'The Chinese Perception of World Order: Past and Present', in Fairbank, *supra* n.7, 276, 277.

[24] Kang, *supra* n.22, 25. Moreover, Zhang Yongjin and Barry 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', 5 *Chinese Journal of International Politics* (2012), 3, 16-17.

[25] Zhang and Buzan, ibid., 19.

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 has 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 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

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[26] Zhang (2001), *supra* n.7, 53. See also Rodney Bruce Hall, 'Moral Authority as a Power Source', 51 *International Organization* (1997), 591.
[27] Larisa 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', 6 *Journal of Historical Sociology* (1993), 351, 352-53.
[28] Mancall, *supra* n.10, 20-21.
[29] John K. Fairbank, *Trade and Diplomacy on the China Coast* (Cambridge, MA: Harvard University Press, 1953), 14. For a discussion of the historical event and the significance of kowtow in imperial China, see James L. Hevia, *Cherishing Men from Afar: Qing Guest Ritual and the Macartney Embassy of 1793* (Durham, NC: Duke University Press, 1995).
[30] See Immanuel C.Y. Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858–1880* (Cambridge, MA: Harvard University Press, 1960), 123-25.

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 the British as they conceived 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 which was agreed to only after the

[31] Ibid., 125.
[32] Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 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* n.7, 90-92.
[34] Gong, *supra* n.32, 145.
[35] Ruskola, *supra* n.7, 1531-32.
[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

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 formalised 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

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

[37] Mary Clabaugh Wright, *The Last Stand of Chinese Conservatism: The T'ung-Chih Restoration, 1862–1874* (Stanford: Stanford University Press, 1962), 243.

[38] Fairbank, *supra* n.8, 262.

[39] Li Hongzhang, 'Tuochou qiuan zhe', *Li Hongzhang Quanji: Zougao*, Vol.3 (Changchun: Shidai wenyi chubanshe, 1998), 1541, as quoted in Shogo Suzuki, 'China's Perceptions of International Society in the Nineteenth Century: Learning More about Power Politics?', 28 *Asian Perspectives* (2004), 115, 132.

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 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]

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[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 (Oxford: Clarendon Press, 1963), 57.

[41] As quoted in Suzuki, *supra* n.39, 135-36.

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 to 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 worldview, the Qing court used it

[42] Gong, *supra* n.32, 154.
[43] Hsü, *supra* n.30, 145.
[44] Ibid., 136-37.
[45] Ibid., 138.
[46] Ibid., 132-34.
[47] Wright, *supra* n.37, 231.
[48] Gong, *supra* n.32, 146.

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 the superiority of 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 civilisation. The extension of international law (including the principle of State sovereignty), and of an international legal order of which States are 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 civilisation '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 civilisation, they questioned whether the Chinese state, with its level of civilisation, 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 recognised State may be denied membership in the 'family of nations', should its level of civilisation 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

[49] Jouannet, *supra* n.4, 382.
[50] Gong, *supra* n.32, 93.
[51] Lassa Oppenheim, *International Law: A Treatise* (London: Longmans, Green, 1905), 109.

to act in conformity with the principles of International Law.'[52] Martti Koskenniemi argues that the ambiguity of 'civilisation' 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 civilisation', 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] Despite some dissension that an ancient non-European civilisation, 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 recognized as being civilised, though with other civilisation than ours',[56] 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

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[52] Ibid., 108.
[53] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), 103 (emphasis in original), quoting Hayden White, *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore: Johns Hopkins University Press, 1978), 151-52.
[54] Gong, *supra* n.32, 50.
[55] Ibid., 98.
[56] John Westlake, *Collected Papers of John Westlake*, ed. Lassa Oppenheim (Cambridge: Cambridge University Press, 1914), 103, as quoted in Gong, ibid., 59.

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 modernisation 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 civilizaton, then everything depended on what Europeans approved. But the more eagerly the

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[57] Ruskola, *supra* n.7, 1525.
[58] Gong, *supra* n.40, 164. Indeed, Japan proceeded to colonise Korea by asserting that Korea was uncivilised: see Alexis Dudden, *Japan's Colonization of Korea: Discourse and Power* (Honolulu: University of Hawaii Press, 2005).
[59] Oppenheim, *supra* n.51, 33-34.
[60] See, *e.g.*, Paul Gordon Lauren, 'Human Rights in History: Diplomacy and Racial Equality at the Paris Peace Conference', 2 *Diplomatic History* (1978), 257; Shimazu Naoko, *Japan, Race, and Equality: The Racial Equality Proposal of 1919* (London and New York: Routledge, 1998).
[61] Koskenniemi, *supra* n.53, 135.
[62] Ibid.

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 [did] not amount to full rights of property or sovereignty, but which [were] 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] Hall further noted that uncivilised or semi-civilised States were 'subject to a law of which they [had] never heard, their relations to the protecting state [were] 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 civilised States.

III. 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

[63] Ibid., 135-36.
[64] William Edward Hall, *A Treatise on International Law*, 8th ed. A. Pearce Higgins (Oxford: Clarendon Press, 1924), 130.
[65] Ibid., 131.
[66] William C. Kirby, 'The Internationalization of China: Foreign Relations at Home and Abroad in the Republican Era', 150 *China Quarterly* (1997), 433, 433.

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 recognise that Tibet was capable of entering into an international treaty on an equal basis as a State), by emphasising 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

[67] Julie Lee Wei, Ramon H. Myers, and Donald G. Gillin, eds., *Prescriptions for Saving China: Selected Writing of Sun Yat-sen* (Stanford: Hoover Institution, 1994), 225.
[68] Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', 15 *Journal of World History* (2005), 445, 482.
[69] Kirby, *supra* n.66, 437 (emphasis in original).
[70] Andrew D.W. Forbes, *Warlords and Muslims in Chinese Central Asia: A Political History of Republican Sinkiang* (Cambridge: Cambridge University Press, 1986), 157.
[71] Mark Mancall, *China at the Center: 300 Years of Foreign Policy* (New York: Free Press, 1984), 250.
[72] John W. Garver, *Chinese–Soviet Relations, 1935–1945* (New York: Oxford University Press, 1988), 178.

struggling 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 utilise 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.

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[73] Kirby, *supra* n.66, 437-38.
[74] Ibid., 438.
[75] Brook Gotberg, 'The End of Conquest: Consolidating Sovereign Equality', in Wayne Sandholtz and Kendall Stiles, eds., *International Norms and Cycles of Change* (New York: Oxford University Press, 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* n.75, 65-66.
[78] Ibid., 69.

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 (1894–1895), 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 1919 confirmed that Germany's rights over Shandong be 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

[79] Zhidong Hao, 'May 4th and June 4th Compared: A Sociological Study of Chinese Social Movements', 6:14 *Journal of Contemporary China* (1997), 79.
[80] As quoted in Kirby, *supra* n.66, 440.
[81] Harold Scott Quigley, 'Extraterritoriality in China', 20 *American Journal of International Law* (1926), 46, 51.

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 civilisation. 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;

[82] As quoted ibid., 46.
[83] As quoted ibid.
[84] As quoted in Westel W. Willoughby, *China at the Conference* (Baltimore: Johns Hopkins University Press, 1922), 118-19.

(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]

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

[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.
[86] Quigley, *supra* n.81, 64.
[87] The International Court of Justice in *Fisheries Jurisdiction Case* (*Federal Republic of Germany* v. *Iceland*), *Judgment*, *ICJ Reports* 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.'

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.
>
> (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]

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[88] As quoted in Wang, *supra* n.7, 346-47.
[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*), P.C.I.J. Ser. A (1927), No.8, 6.
[92] As quoted ibid., 261.

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]

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[93] As quoted ibid.
[94] Skinner Turner, 'Extraterritoriality in China', 10 *British Year Book of International Law* (1929), 56, 61.
[95] See Charlotte Ku, 'Change and Stability in the International System: China Secures Revision of the Unequal Treaties', in Macdonald, *supra* n.20, 447.
[96] William A. Callahan, 'Nationalizing International Theory: Race, Class and the English School', 18:4 *Global Society* (2004), 305, 321.

IV. International law in communist China, 1949–1971

The communist forces prevailed in the Chinese civil war (1947–1949) 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 recognised by the United Nations as the representative government of China until 25 October 1971. Indeed, as the Cultural Revolution (1966–1976) was raging in China, Coral Bell regarded China as 'the most determined and implacable revolutionary enemy of the existing international order'.[98]

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 organisations, but also, as Chapter V discusses, the continual impasse over the legal status of Taiwan.

The 1933 Montevideo Convention on the Rights and Duties of States[99] 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.'[100] 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

[97] Zhang (2011), *supra* n.7, 773.
[98] Coral Bell, 'China and the International Order', in Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Oxford: Clarendon Press, 1984), 255, 255.
[99] Signed at Montevideo on 26 December 1933.
[100] Ibid., Art.1 (emphasis added).

presupposes the entity being a State already existent.

The PRC government began to be recognised 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.'[101] 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.'[102]

Quincy Wright has stated that 'international law forbids premature recognition of an insurgent or revolutionary government and, apart from the Stimson doctrine, forbids continued non-recognition of a firmly established government.'[103] 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

[101] John Bassett Moore, *Digest of International Law*, Vol.1 (Washington, D.C.: United States Government Printing Office, 1906), 249.
[102] Montevideo Convention on the Rights and Duties of States, Art.3.
[103] Wright, *supra* n.37, 324.

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.'[104] 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*'.[105]

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.'[106] Arthur Steiner has identified six major

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[104] Ibid., 327-28; the quoted passage appears at 328.

[105] Nicholas Tsagourias, 'International Community, Recognition of States and Political Cloning', in Stephen Tierney and Colin Warbrick, eds., *Towards an International Legal Community?: The Sovereignty of States and the Sovereignty of International Law* (London: British Institute of International and Comparative Law, 2006), 211, 227, citing, *inter alia*, Robert Y. Jennings, 'Nullity and Effectiveness in International Law', in D.W. Bowett, ed., *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (London: Stevens and Sons, 1965), 64, 74: '*Ex factis jus oritur* is an expression of truth that no law can ignore save at its peril'.

[106] Liu Shaoqi, 'On Internationalism and Nationalism', broadcast by North Shensi Radio, 9 November 1948, reprinted in 5:4 *China Digest*, 14 December 1948, 6, as quoted in H. Arthur Steiner, 'Mainsprings of Chinese Communist Foreign Policy', 44 *American Journal of International Law* (1950), 69, 74-75.

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;
>
> (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.[107]

That China was reduced by imperialism during the 'century of humiliation' since the Opium War to a semi-colonial entity was – and remains – 'a cardinal

[107] Steiner, ibid., 77.

principle of the Chinese Communist faith'[108] 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'.[109] 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.[110]

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,

[108] Ibid., 80.
[109] As quoted ibid., 93.
[110] As quoted ibid.

depending on their contents, recognize, annul, revise or re-conclude them.'[111] 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.[112] Significantly, at a Security Council 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.'[113] The PRC government's position should demonstrate the fallacy of the notion that non-democratic States should be not recognised or de-recognised, or be excluded from membership or participation in international organisations, as discussed in the preceding chapter.

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.'[114] 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

[111] As quoted in Wang, *supra* n.7, 348.
[112] Chen Tiqiang, 'The People's Republic of China and Public International Law', 8 *Dalhousie Law Journal* (1984), 3, 22.
[113] S/PV.527, 28 November 1950, 4.
[114] *Yearbook of the International Law Commission* (1963), Vol.II, 52.

void and terminates.[115] 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,[116] although the fact, as discussed in Chapter V, 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 a country is socialist or capitalist, it will to a certain degree utilize international law in implementing its foreign policy',[117] international law for communist China was a means to attain socialist revolution as well as modernisation 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.

[115] Vienna Convention on the Law of Treaties, Art.64.
[116] Ibid., Art.62(2)(a).
[117] Chou Fu-lun, *Chiao hsiieh yii yen chin* [*Teaching and Research*], No.3 (1958), 52, as quoted in Hungdah Chiu, 'Communist China's Attitude toward International Law', 60 *American Journal of International Law* (1966), 245, 248.

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.'[118]

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[118] Chu Li-lu, 'Refute the Absurd Theory Concerning International Law by [Chen T'iqiang]', *People's Daily*, 18 September 1957, as quoted in Chiu, ibid., 248-49. (Chiu notes, ibid., fn.15, that Chen had received 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*] (Beijing: Mass Press, 1982), 5, as quoted in Hungdah Chiu, 'Chinese Attitudes toward International Law in the Post-Mao Era, 1978–1987', 21 *International Lawyer* (1987), 1127, 1129. Such a policy-oriented approach to international law, espoused also by many Western scholars (see Chapter II), was strongly criticised 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', 5 *Studies in Law* (1985), 84, as quoted in Chiu, ibid., 1130, fn.9. Wei Min likewise criticised 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': Wei Min, ed., *Guoji Fa Gailun* [*Introduction to International Law*] (Beijing: Guangmin Daily Press, 1986), 38, as quoted in Chiu, ibid. Wei believes 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

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 of Peaceful Co-existence to call on the Soviet Union to cease suppression

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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., 1131, fn.12.

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.[119]

Albeit a creation in a bilateral treaty between China and India in 1954, the Five Principles of Peaceful Co-existence did not reflect a novel or peculiarly Chinese (or Indian) perspective of international law or of the international legal order. James Chieh Hsuing has characterised 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'.[120] Russell Fifield argued in 1958 that the inclusion of these Principles in a General Assembly declaration in October 1957 without objection constituted 'a significant step in the evolution of the Five Principles since their formal inception in 1954'.[121] 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',[122] and adds that the PRC government and Chinese scholars do not regard these Principles as the *only* fundamental principles of the international legal order, but 'the core, or at least the main part, of the fundamental principles of international law'.[123]

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[119] 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 Joseph Y.S. Cheng and Zhang Wankun, 'Patterns and Dynamics of China's International Strategic Behaviour', 11:31 *Journal of Contemporary China* (2002), 235, 243.

[120] James Chieh Hsuing, *Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice* (New York: Columbia University Press, 1972), 29.

[121] Russell H. Fifield, 'The Five Principles of Peaceful Co-existence', 52 *American Journal of International Law* (1958), 504, 504.

[122] Wang, *supra* n.7, 274.

[123] Ibid., 276.

V. International law in communist China, 1971–1984

25 October 1971 marked the turning point in the relationship between China and the current 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 organisations, 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.[124] 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"',[125] until it warmed during the 1980s to the roles it may play through the United Nations to shape 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

[124] See Natalie G. Lichtenstein, 'The People's Republic of China and Revision of the United Nations Charter', 18 *Harvard International Law Journal* (1977), 629.
[125] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), 286.

> 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.[126]

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, 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 organisations and international adjudication, as well as the relationship between international law and municipal law in the Chinese legal system.[127]

In line with Soviet thinking, China emphasised 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

[126] 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.

[127] A comparison of China's positions, approaches and practices with those of other States, including those with civil-law legal systems or in East Asia, only distracts and digresses from a discussion of China's positions, and this thesis does not purport to be a comparative study of legal systems or their treatment of international law. Furthermore, a civil-law legal system such as Germany, which deploys a monist approach to international law in its municipal legal order, places the relationship between international law and municipal law in different manners from those that pertain to China, which deploys a dualist approach. Not all legal systems in East Asia are based on European civil law; notably, Hong Kong adopts a dualist approach. Similarly, not all common-law legal systems adopt a dualist approach, as the United States exemplifies. Indeed, the hierarchy in a national legal order between international law and municipal law varies among continental European legal systems.

that contained the same norm.[128] 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,[129] 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.'[130] 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.'[131] 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.[132]

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[128] Edward McWhinney, '"Peaceful Coexistence" and Soviet–Western International Law', 56 *American Journal of International Law* (1962), 951, 955.
[129] Grigory Ivanovich Tunkin, 'Co-existence and International Law', 95 *Recueil des cours* (1958–III), 1, 23.
[130] Ibid., 20.
[131] McWhinney, *supra* n.128, 956-57.
[132] Wang Tieya and Wei Min, eds., *Guoji fa* [*International Law*] (Beijing: Law Press, 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

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 recognised in treaties or as customs.[133] 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.'[134] 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

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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 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* n.118, 1142-43. 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 Hungdah Chiu, 'Chinese Views on the Sources of International Law', 28 *Harvard International Law Journal* (1987), 289, 304.

[133] Chiu, *supra* n.118, 1140-41.

[134] Zhu Lisun, *Guoji gong fa* [*Public International Law*] (Beijing: Central Broadcasting and Televising University Press, 1985), 10, as quoted in Chiu, ibid., 1141, fn.47.

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.'[135] Article 38 of the Statute of the ICJ itself is not a source of international law; it is a provision that enumerates sources to which the ICJ may refer in its decisions and advisory opinions. Constituting one facet of the ICJ'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.[136] In respect of teachings of jurists which Article 38(3)(d) of the Statute recognises 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

[135] Wang and Wei, *supra* n.132, 32, as quoted in Chiu, ibid., 1141-42.

[136] 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 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', 4 *International Studies* (1985), 29, as quoted in Chiu, ibid., 1144-45.

law can correctly apply or interpret rules of international law'.[137]

Samuel Kim suggested in 1978 that China's frequent non-participation and abstentions as a Permanent Member within the Security Council in the 1970s, which Chapter VI explores in detail, were indicative of its lack of a 'principled stand' on many legal issues.[138] 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.'[139] 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.[140] Even after China started to participate more actively in international organisations 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

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[137] Chiu, *supra* n.117, 261.

[138] Samuel S. Kim, 'The People's Republic of China and the Charter-Based International Legal Order', 72 *American Journal of International Law* (1978), 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 Byron S.J. Weng, *Peking's U.N. Policy: Continuity and Change* (New York: Praeger, 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.

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

[140] Ann Kent, 'China's International Socialization: The Role of International Organizations', 8 *Global Governance* (2002), 343, 349. See also Trong R. Chai, 'Chinese Policy toward the Third World and the Superpowers in the UN General Assembly 1971–1977: A Voting Analysis', 33 *International Organization* (1979), 391.

as-it-should-be presumably continue to embody the vague Marxist notion of the eventual withering-away of the state, a development which (if it ever occurs) will obviously make the notion of a society of states obsolete.'[141] Other scholars were concerned about the apparent incompatibility between China and the current international legal order in which human rights began to assume a primary place, as the Chinese conception of rights emphasises collective rather than individual rights.[142] 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. Kim 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.'[143]

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 ('ICJ') 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.'[144] 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

[141] Bell, *supra* n.98, 265.
[142] R.J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), 41-42. See discussion in Chapter IV.
[143] Samuel S. Kim, 'Sovereignty in the Chinese Image of World Order', in Macdonald, *supra* n.20, 425, 432.
[144] *Report of the International Court of Justice* (August 1972–July 1973), 28 G.A.O.R. Supp. No.5, 1.

as contrary to the principle of State sovereignty.[145] 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 ICJ 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 of the ICJ.

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[146] in which the ICJ 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 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.'[147]

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 ICJ and the International Criminal Court, precisely in the name of State sovereignty and in its confidence of the superior quality of its municipal laws and legal system and

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[145] *Third United Nations Conference on the Law of the Sea Official Records*, Vol.V (1976), 24.
[146] *Military and Paramilitary Activities in and against Nicaragua* (*Merits*) (*Nicaragua* v. *United States of America*), *Judgment*, *ICJ Reports* 1986, 14.
[147] China's Ambassador Huang Jiahua's speech at New York University School of Law, 11 March 1987.

their conformity with international law. In fact, among the five Permanent Members of the Security Council, only the United Kingdom has accepted the compulsory jurisdiction of the ICJ. 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 organisations should be 'better seen as adaptive/instrumental learning rather than cognitive/normative learning at the basic level of worldview and national identity'.[148] However, Kim believed that in continuing to deepen its participation in international organisations, China's choices would be constrained and many of its foreign policy policies, practices and principles would require readjustment.[149]

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.'[150] 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.[151] 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

[148] Samuel S. Kim, 'China and the United Nations', in Elizabeth Economy and Michel Oksenberg, eds., *China Joins the World: Progress and Prospects* (New York: Council on Foreign Relations, 1999), 42, 80.
[149] Ibid., 81.
[150] Shao-Chuan Leng, 'The Role of Law in the People's Republic of China as Reflecting Mao Tse-tung's Influence', 68 *Journal of Criminal Law and Criminology* (1977), 356, 366.
[151] Kim, *supra* n.138, 318.

on different aspects of public and private international law.[152] Since then, universities offering degrees and courses, and students trained, in international law have proliferated. 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 now been complemented with the publication of the *Chinese Journal of International Law* by Oxford University Press.

VI. 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.'[153] Zhou Gengsheng stated that

[152] Chiu, *supra* n.118, 1159-60.
[153] Feodor I. Kozhevnikov, ed., *International Law: A Textbook for Use in Law School* (Moscow: Institute of State and Law of the Academy of Sciences of the U.S.S.R., 1957; trans. 1961), 15, as quoted in Chiu, *supra* n.117, 259-60.

> 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 fulfill 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.[154]

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'.[155] Wang and Wei explained that

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[154] Zhou Gengsheng, *Guoji fa* [*International Law*] (Beijing: Commercial Press, 1981), 20, as quoted in Chiu, *supra* n.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 U.S. 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.

[155] Wang and Wei, *supra* n.132, 43-44, as quoted in Chiu, ibid.

> 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.[156]

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.'[157]

Notwithstanding these views espoused by Chinese scholars, and although the 1982 Constitution is silent on the status of international law *vis-à-vis* municipal law,

[156] Wang and Wei, ibid., 44, as quoted in Chiu, ibid., 1146-47.
[157] Liu, *supra* n.118, 9, as quoted in Chiu, ibid., 1147.

Articles 18, 32 and 50 guarantee that in certain areas international law takes precedence over municipal law.[158] In addition, Article 238 of the Law of Civil Procedure,[159] Article 142 of the General Principles of the Civil Law,[160] Article 16 of the Income Tax Law concerning Joint Ventures Using Chinese and Foreign Investment,[161] Article 28 of the Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises,[162] Article 6 of the Law on Foreign-related

[158] Article 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.' Article 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.' Article 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.'

[159] 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, and effective on the date of promulgation. Article 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.'

[160] 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. Article 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.'

[161] Adopted at the Third Session of the Fifth National People's Congress and promulgated on 10 September 1980. Article 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.'

[162] 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, and effective as of 1 July 1991. Article 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.'

Economic Contracts,[163] and Article 36 of the Law of Succession[164] 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.'[165]

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 law.[166] 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

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[163] 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, and effective as of 1 July 1985. Article 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.'

[164] 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, and effective as of 1 October 1985. Article 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.'

[165] Li Zhaojie, 'The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problems in China', in Benedetto Conforti and Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (Dordrecht: Martinus Nijhoff Publishers, 1997), 329, 341, referring to *Legal Status of Eastern Greenland* (*Denmark* v. *Norway*), *Judgment*, P.C.I.J. Ser. A/B, No.53 (1933), 22**.**

[166] Xue Hanqin and Jin Qian, 'International Treaties in the Chinese Domestic Legal System', 8 *Chinese Journal of International Law* (2009), 299, 300.

national legislation or Article 142 of the General Principles of the Civil Law and Article 238 of the Law of Civil Procedure.[167] 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.[168] As it was about to join the World Trade Organisation ('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.[169]

Xue and Jin note that 'China has repealed, abrogated, revised, enacted and promulgated more than 3000 domestic laws, administrative regulations and

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[167] Ibid., 306-13.
[168] Ibid., 303.
[169] *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001.

administrative orders to ensure compliance with WTO rules.'[170]

VII. 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 modernised 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, realising that it would never be accepted as a member within the 'family of nations', decided to react against the international system and align itself with Germany in the First World War, with the result that the entire empire disintegrated.[171]

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 utilise international law to defend its State sovereignty and sovereign rights and to 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

[170] Xue and Jin, *supra* n.166, 308.
[171] 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* n.68. See also Mustafa Aksakal, 'Not "by those Old Books of International Law, but Only by War": Ottoman Intellectuals on the Eve of the Great War', 15 *Diplomacy and Statecraft* (2004), 507.

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 realised after 1971, through increasing socialisation with international organisations, the roles China may play in the conduct of international relations through international law and international organisations. With China's rise as arguably one of the two most important actors in the current international legal order, it is imperative to understand 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 the current international legal order may proceed.

Chapter IV: Human Rights and Democracy with Chinese Characteristics?*

I. Introduction

China's rise to superpower capability and status and its increasing influence in shaping the normative and substantive structure and content of the current international legal order has aroused significant concern that human rights development and liberal democracy will be placed in a precarious position, as other non-liberal States may look to emulate China's development model and justify their violations of human rights and authoritarian, or even totalitarian, governance. Harry Harding describes China's political system as a 'consultative authoritarian regime' marked by 'significant departure from the totalitarianism of the past but not yet a fully democratic, or even a quasi-pluralistic, political system. … It is increasingly consultative in its recognition of the need to obtain information, advice, and support from key sectors of the population, but still authoritarian in its desire to suppress dissent and maintain ultimate political power in the hands of the party.'[1] Robert Jackson has strongly doubted Western countries' capacity or willingness to force China to accept their demand for democratisation or improvement of its human rights record, partly because to do so 'would go against the fundamental commercial interests of such countries. It would be an irresponsible and unrealistic foreign policy.'[2] In contrast to Bruce Gilley's contention that 'there is simply no compelling argument that China will be a great exception to the nearly-worldwide movement of social emancipation from "sclerotic authoritarianism" that we now call

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[1] Harry Harding, 'Political Development in Post-Mao China', in A. Doak Barnett and Ralph N. Clough, eds., *Modernizing China: Post-Mao Reform and Development* (Boulder, CO: Westview Press, 1986), 13, 33.

[2] Robert H. Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), 364.

democratization',[3] Andrew Nathan speaks of the 'disturbing possibility' that China's experience may suggest that 'authoritarianism is a viable regime from even under conditions of advanced modernization and integration with the global economy'.[4]

However, is authoritarianism[5] perforce incompatible with human rights and democracy? Do Western conceptions of human rights and democracy constitute the only viable and proper interpretations to which there are no alternatives? What are Chinese conceptions of human rights and democracy, and how might these conceptions enhance or undermine the human rights project? With its increasingly adept socialisation with international organisations as discussed in Chapters III and VI, how has China's approach to international human rights law evolved since its realisation of the roles it may play in shaping international law, how international human rights norms might already have contributed to human rights protection under China's Constitution and laws, and might China reconcile its governance with the rule of law? Are democratic practices entirely absent in China; if not, in what forms do they manifest? At a fundamental level, is it possible that China's experience may help augment our understanding and the development of international human rights law and democracy through a mixture of convergence and divergence? These questions raise interesting and important issues from scholarly, political and legal standpoints that this chapter examines.

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[3] Bruce Gilley, *China's Democratic Future: How it will Happen and Where it will Lead* (New York: Columbia University Press, 2004), 251.

[4] Andrew J. Nathan, *Chinese Democracy* (Berkeley: University of California Press, 1985), 16.

[5] Many Western scholars confuse authoritarianism with totalitarianism and define it as absence of democracy and meaningfully protected human rights. Anne-Marie Slaughter, in 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995), 503, 514 and 509, argues that liberal States constitute 'a world of peace, democracy, and human rights' and '[l]iberal international relations theory applies to *all* states. Totalitarian governments, authoritarian dictatorships, and theocracies can all be depicted as representatives of some subset of actors in domestic and transnational society, even if it is a very small or particularistic slice' (emphasis in original). As noted in Chapter II, an authoritarian dictatorship is a misnomer. An authoritarian government relies on inculcation in its people of certain beliefs, norms and values in order to maintain and exercise control, and not on overt coercion as a dictatorship does. In addition, an authoritarian government may be a democratically elected one, as many Western governments evidence.

This chapter first discusses China's conceptions of human rights and democracy, cognisance of which is essential not only to our understanding the human rights situation in China but also to the legitimacy of international human rights law and the merits and flaws of liberal democracy. As noted in Chapters I and II, many Western States and scholars assume that China does not subscribe to international human rights law and is a non-liberal State least likely to be compliant with international human rights norms and principles. This chapter thus proceeds to explore the evolution of China's approach to international human rights law since October 1971 when the People's Republic of China ('PRC') government replaced the authorities on Taiwan in the United Nations as the representative government of China. It also examines China's approaches to the newly created Human Rights Council and its universal periodic review mechanism under which all United Nations Member States' human rights performances are regularly assessed. As all international human rights norms require domestic implementation and enforcement, this chapter then discusses the extent to which human rights protection may already be available under China's Constitution and laws, with workers' rights, women's rights, and privacy rights as case studies (which should not be taken as exhaustive), and the contributions international human rights norms may have made in their domestic development and formulation. Subsequently, this chapter addresses the applicability of a rule-of-law model in China, and the roles and problems civil society in China and abroad play and present in the promotion, development and understanding of human rights norms in China. Finally, this chapter considers how democratic practices, as exemplified by experiences in China, need not necessarily be in the form of periodic elections, and how democracy, contrary to Western perceptions that it is absent in China, may already have been implemented and exercised.

II. Human rights with Chinese characteristics?

A fundamental difference between Western States and China over human rights is that in Western States human rights serve as the ultimate bulwark against the state, are relied on also between private persons or companies, and are of an individualistic nature; in China, communitarian rights and obligations take precedence over individual rights. While not a religion and indeed 'thoroughly secular',[6] Confucianism (except during the Cultural Revolution when adherents were purged, publicly humiliated, or killed) as a philosophy of life pervades the moral, social, political and juristic fabrics of society and governance throughout East Asia. William Gabrenya and Kwang-Kuo Hwang note that 'Confucian concepts are employed both in an analytical, abstract, philosophical sense and as a useful heuristic for describing the professed values of Chinese people.'[7]

The institution of family, in particular, is central to Confucianism, with the principle of filial piety controlling all social thoughts and interactions as well as providing moral guidance. Although obedience and deference to authority is expected of in other cultures, filial piety 'surpasses all other ethics in its historical continuity, the proportion of humanity under its governance, and the encompassing and imperative nature of its precepts. The attributes of intergenerational relationships governed by filial piety are structural, enduring, and invariable across situations within Chinese culture.'[8] Filial piety constitutes 'a guiding principle governing

[6] William K. Gabrenya, Jr., and Kwang-Kuo Hwang, 'Chinese Social Interaction: Harmony and Hierarchy on the Good Earth', in Michael Harris Bond, ed., *The Handbook of Chinese Psychology* (Hong Kong: Oxford University Press, 1996), 309, 310.
[7] Ibid., 309. See also Kwang-Kuo Hwang, 'Two Moralities: Reinterpreting the Findings of Empirical Research on Moral Reasoning in Taiwan', 1 *Asian Journal of Social Psychology* (1998), 221; Kwang-Kuo Hwang, 'Filial Piety and Loyalty: Two Types of Social Identification in Confucianism', 2 *Asian Journal of Social Psychology* (1999), 163; Kwang-Kuo Hwang, 'Chinese Relationalism: Theoretical Construction and Methodological Considerations', 30 *Journal for the Theory of Social Behaviour* (2000), 155.
[8] David Y.F. Ho, 'Filial Piety and its Psychological Consequences', in Bond, *supra* n.6, 155, 155.

generational Chinese patterns of socialization, as well as specific rules of intergenerational conduct, applicable throughout the length of one's life span'.[9]

Not only do filial obligations guide familial interactions, but they also provide and constitute the framework against which authority in all generalities and circumstances is to be understood and observed. Individuals are culturally engrained to regard as their ultimate purpose not serving their own goals and ideals but those of their parents and, above all, the State. As Henry Rosemont observes, '[f]or the early Confucians there can be no *me* in isolation, to be considered abstractly; I am the totality of roles I live in relation to specific others. I do not play or perform these roles; I am these roles. When they have all been specified I have been defined uniquely, fully, and altogether, with no remainder with which to piece together a free, autonomous self.'[10] It is this difference in the relationship between the individual and the state that has led to mutual miscomprehension and unease between Western States and China and between their peoples.

Of course, a culture does not possess any rights *in se*. As Peter Jones puts it, '[b]eliefs and forms of life are not entities possessed of moral standing to which we might, as a consequence, owe duties.'[11] Some might even question how traditional Confucian norms and values could survive in China after 1949 with a communist ideology operating in tandem. Yet, as Mark Mancall explains:

> The survival of elements of the tradition into the contemporary scene has not necessarily brought the Chinese Marxism into a sharp schizophrenic conflict with his own tradition as a Chinese. Quite the contrary, it would appear that, in large areas, the tradition may well

[9] Ibid.
[10] Henry Rosemont, Jr., 'Why Take Rights Seriously? A Confucian Critique', in Leroy Rouner, ed., *Human Rights and the World's Religions* (Notre Dame, IN: University of Notre Dame Press, 1988), 167, 177.
[11] Peter Jones, 'Individuals, Communities and Human Rights', 26 *Review of International Studies* (2000), 199, 202.

> reinforce certain Marxist-Leninist assumptions, at least as these assumptions have developed out of an amalgam of Chinese Communist revolutionary experience and Marxist-Leninist revolutionary theory. To take but one brief and general example, the unitary nature of the traditional Chinese state together with the traditional existence of an official ideology – Confucianism – which served as the intellectual basis for the state certainly do not conflict with, and in fact reinforce, the Chinese Communist tendency to see no real or apparent dichotomy between the state and the party, a tendency which evolved directly out of Chinese revolutionary experience. Or another: the traditional hierarchical view of the world order together with the traditional respect due elders may well have contributed to the creation of an intellectual disposition to acquiesce to Stalin's approach to bloc organization, enabling Mao, as a Communist, to accept Stalin's leadership despite his own dissatisfactions with Stalin's leadership in China during the revolutionary struggle.[12]

It must also be noted that in China communism originated from within, unlike in Eastern Europe where it was imposed by the Soviet Union. Many predicted that the demise of communism in the Soviet Union would be followed by the collapse of the communist Party-state in China. China's astonishing economic development in the past two decades suggests that its communist Party-state is likely to endure for some time to come. Furthermore, as Benjamin Schwartz has argued, one of the reasons Marxism-Leninism had its appeal to young Chinese was its theory of nationalism,

[12] Mark Mancall, 'The Persistence of Tradition in Chinese Foreign Policy', 349 *Annals of the American Academy of Political and Social Science* (1963), 14, 24-25.

which 'provided a plausible explanation for China's failure to achieve its rightful place in the world of nations'.[13]

As noted in Chapter II, in a survey of seven hundred Beijing residents in December 1995, more than 95 per cent of the respondents either agreed or strongly agreed with the statement that they 'would rather live in an orderly society than in a freer society which is prone to disruptions'.[14] Nathan and Tianjian Shi found the Chinese to be generally disengaged from their government. In their survey conducted in 1990, 71.6 per cent of the 2,896 respondents considered their local government to have no effect on their daily life, while 71.8 per cent held the same view in respect of the national government.[15] The authors suggested that the respondents had such apathy towards their local and national governments not so much because they thought that government policy would have little impact on their lives but out of a belief that government officials would not treat them equally given the hierarchical nature of Chinese society.[16] Together with Confucian enculturation through which rights are regarded and engrained as not inherent in being a human but '[flowing] from the state in the form of a gratuitous grant that can be subjected to conditions or abrogation by the unilateral decision of the state',[17] the economic progress and benefits brought to the Chinese people as a whole (albeit not all of them individually) by China's modernisation and increasing economic relations with other States have augmented the general contentment of the Chinese people with the Chinese leadership. External pressures may be stymied by 'countervailing national norms and value structures that emphasized sovereignty and domestic cohesion more than

[13] Benjamin I. Schwartz, 'The Chinese Perception of World Order: Past and Present', in John King Fairbank, ed., *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press, 1973), 276, 286.
[14] Yang Zhong, Jie Chen, and John M Scheb, II, 'Political Views from Below: A Survey of Beijing Residents', 30 *PS: Political Science and Politics* (1997), 474, 476. The response rate was 97 per cent.
[15] Andrew J. Nathan and Tianjian Shi, 'Cultural Requisites for Democracy in China: Findings from a Survey', 122:2 *Daedalus* (1993), 95, 99-100.
[16] Ibid., 115.
[17] R. Randle Edwards, 'Civil and Social Rights: Theory and Practice in Chinese Law Today', in R. Randle Edwards, Louis Henkin, and Andrew J. Nathan, eds., *Human Rights in Contemporary China* (New York: Columbia University Press, 1986), 41, 44-45.

human rights principles.'[18] Thus, when seeking to foster the development and protection of human rights in China, one should heed Ann Kent's caution that '[i]n pitting the sovereignty and national prestige of one state against another they may have the counter-productive effect of mobilizing the very citizenry whose human rights are being abused in support of the abusing state.'[19]

In automatically dismissing communitarian notions of rights (and duties) as incompatible with individualism and attendant notions of rights and freedoms, Western States and scholars deny the right of other States and their peoples to decide the forms of society in and governance under which they wish to live.[20] Democracy is not necessarily identical to popular sovereignty, and if a people decide that they desire a non-democratic form of governance for their State and society, it is not merely that non-democratic governance is part of their culture but also that it is *accepted by the people* as part of their culture, and an 'appeal to a traditional culture against democracy is still an appeal to a form of populism'.[21] Individualism demands that '*We* should respect their form of government because it is the form that they endorse, even though *they* do not themselves believe that the legitimacy of their form of government depends upon their own endorsement.'[22] As Brad Roth explains, in States where communism is subscribed to (by both the state and its people), Western notions of democracy *qua* elections undermine true and meaningful participation in the political process:

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[18] Thomas Risse, 'International Institutions, Non-State Actors, and Domestic Change: The Case of Human Rights', *Recueil des cours de l'académie de droit européen*, Vol.VIII, Book 2 (2000), 1, 39.
[19] Ann Kent, 'China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989–1994', 17 *Human Rights Quarterly* (1995), 1, 1.
[20] The notion that communitarianism perforce undermines individual rights and freedoms and is subscribed to only in non-liberal States (or perpetuated by their governments in order to legitimate their governance) is also not true, as the example of Ireland shows: see Aisling O'Sullivan and Phil C.W. Chan, 'Judicial Review in Ireland and the Relationship between the Irish Constitution and Natural Law', 15:2 *Nottingham Law Journal* (2006), 18.
[21] Jones, *supra* n.11, 210.
[22] Ibid., 211 (emphasis in original).

> In the Marxist-Leninist view, multi-party competition masks the inalterable structure of power rooted in the concentrated ownership and control of the major means of production, distribution and exchange. In conditions of social stratification, dissent and opposition party activity aimed at challenging the structure of social decisionmaking are effectively marginalized, as a particular social stratum holds *de facto* control over the major parties, the mass media, the sources of campaign financing, and other channels of influence. Even where politicians espousing change are elected to office, the private sector's stranglehold over the economy forces efforts at social transformation to yield in the name of preserving the 'investment climate'. Voters are thus left merely to choose which representatives of private sector interests will administer a public sector of limited scope and autonomy.[23]

Furthermore, popular will may dissipate in the face of a democratically elected government failing its promises and duties to its citizens, while an authoritarian or totalitarian government may be held by its people in esteem. Thus, 'it cannot be said *a priori* that *coups d'état*, emergency rule, or even substantial periods of one-party or coalitional dictatorship violate popular sovereignty.'[24]

III. China's approach to international human rights law

The five-phase spiral model developed by constructivist international relations theorists posits a network of domestic and international non-governmental organisations ('NGOs'), together with United Nations monitoring mechanisms, with

[23] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), 331.
[24] Ibid., 344.

the capacity to influence a State's approach to its identities and short- and long-term state interests and behaviours through socialisation with international human rights norms.[25] The five phases are, namely, a State's marked deterioration in its human rights record (phase one), NGOs being able to receive information about the State's human rights violations (phase two), opportunistic concessions from the State (phase three), the State's deployment of international human rights norms, the validity of which it no longer contests (phase four), and the State's alignment of its behaviours with international human rights norms (phase five).[26]

While one should be sceptical about such a linear and teleological approach to human rights development that again posits compliance with international human rights norms, as interpreted by Western States and scholars, as its pinnacle,[27] most observers of China's human rights record likely would argue that China is in the midst of phase three in its socialisation with international human rights norms, with its occasional release of noted political prisoners being the most illuminating (and intentionally so, for Western States and media). However, as Nathan has observed, 'China has behaved as a realist power, making concessions it perceived as necessary to influence states with which it was interacting and not making them when they were not seen as necessary'.[28] Furthermore, it is important to note that '[t]he arbitrariness with which a regime can, in response to political pressure, release an individual who had been sentenced to prison may be just as much a signal of systemic deficiencies as the arbitrariness with which a regime can arrest and imprison an individual.'[29] The release of a few noted political prisoners necessarily entails that China is under less

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[25] See Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).
[26] Caroline Fleay, 'Human Rights, Transnational Actors and the Chinese Government: Another Look at the Spiral Model', 2 *Journal of Global Ethics* (2006), 43, 45-47.
[27] See discussion in Chapter I.
[28] Andrew J. Nathan, 'China and the International Human Rights Regime', in Elizabeth Economy and Michel Oksenberg, eds., *China Joins the World: Progress and Prospects* (New York: Council on Foreign Relations, 1999), 136, 159.
[29] Alan M. Wachman, 'Does the Diplomacy of Shame Promote Human Rights in China?', 22 *Third World Quarterly* (2001), 257, 273.

pressure, at least at the time of such release and surrounding publicity, to abate its human rights violations and that most political prisoners continue to be under house arrest, imprisoned or tortured.

China does not deny the validity of international human rights law; it maintains that it does not commit human rights violations on a widespread or systemic basis. As Caroline Fleay argues, 'denial is still considered to be part of socialisation as it reflects the fact that at least the state acknowledges that its international reputation has been tarnished, and the human rights concept is not usually rejected outright'.[30] China has ratified six of the nine core human rights treaties, with the notable exception of the International Covenant on Civil and Political Rights ('ICCPR') that it has signed but has not yet ratified:

Treaty	**China's status**	**Key reservations and declarations**
International Convention on the Elimination of All Forms of Racial Discrimination, 1965	State Party Acceded on 29 December 1982	The International Court of Justice does not have competence to settle disputes between China and other States Parties regarding the interpretation or application of the Convention
ICCPR, 1966	Non-State Party* Signed on 5 October 1998 Not yet ratified * The ICCPR applies in Hong Kong since 1979 and continues to apply since July 1997	
International Covenant on Economic, Social and Cultural Rights ('ICESCR'), 1966	State Party Signed on 27 October 1997 Ratified on 27 March 2001	The right to form or to join a trade union of one's choosing must be in accordance with Chinese law The right to work does not override employment restrictions applicable to non-local workers in Hong Kong
Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), 1979	State Party Signed on 17 July 1980 Ratified on 4 November 1980	The Convention does not apply in International Court of Justice or inter-State arbitration proceedings against China The Convention does not apply in Hong Kong in relation to religious denominations, preservation of property rights for the male line in the New Territories, and immigration and pension schemes

[30] Fleay, *supra* n.26, 46.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	State Party Signed on 12 December 1986 Ratified on 4 October 1988	The Committee against Torture does not have competence to investigate 'well-founded indications' of systematic torture in China China has opted out of a dispute settlement mechanism regarding interpretation or application of the Convention
Convention on the Rights of the Child, 1989	State Party Signed on 29 August 1990 Ratified on 2 March 1992	A child's right to life is subject to Chinese laws regarding family planning The right to life in Hong Kong commences after live birth Restrictions may apply on the right to enter or to remain in Hong Kong Hong Kong may detain juveniles and adults in same facilities under certain circumstances
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990	Non-State Party	
Convention on the Rights of Persons with Disabilities, 2006	State Party Signed on 30 March 2007 Ratified on 1 August 2008	Hong Kong immigration and nationality laws unaffected by Convention provisions on liberty of movement and on nationality
International Convention for the Protection of All Persons from Enforced Disappearance, 2006	Non-State Party	

Source: Sonya Sceats with Shaun Breslin, 'China and the International Human Rights System', Chatham House, October 2012, 33-34.

China has maintained that, as a developing State, economic, social and cultural rights must take precedence over civil and political rights. In its 2012 *White Paper on National Human Rights Action Plan of China (2012–2015)*,[31] China stated that notwithstanding its economic development, it remained a developing State 'fraught with problems from unbalanced, uncoordinated and unsustainable development',[32] which given its vast territory and the huge disparity in terms of wealth within its populace, particularly between people in cities and those in rural areas, was not an untrue statement. China reiterated its position that it 'will continue to give priority to the protection of the people's rights to subsistence and

[31] Information Office of the State Council of the People's Republic of China, June 2012.
[32] Ibid., Introduction.

development. It will take proactive measures to ensure and improve the people's livelihood, spare no efforts to solve the problems of immediate concern to the people, and improve the level of protection of economic, social and cultural rights, so as to ensure that the benefits of development are shared by all members of society.'[33] China also stated that it 'endeavours to develop socialist democracy, improve the socialist rule of law, expand the orderly political participation of citizens and [guarantee] people's civil and political rights in an all-round way.'[34]

While Western States and scholars criticise China's emphasis on economic, social and cultural rights at the expense of civil and political rights, human rights discourses have invariably focused on the latter and relegated the former to lesser significance. In its statement to the World Conference on Human Rights in Vienna in 1993, the United Nations Committee on Economic, Social and Cultural Rights stated:

> The shocking reality against the background of which this challenge must be seen, is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.[35]

[33] Ibid., I. Economic, Social and Cultural Rights.
[34] Ibid., II. Civil and Political Rights.
[35] United Nations Committee on Economic, Social and Cultural Rights, *Report on its Seventh Session*, E/1993/22, 23 November–11 December 1992, Annex III: Statement to the World Conference on Human Rights on Behalf of the United Nations Committee on Economic, Social and Cultural Rights, para.5.

Although the 1993 Vienna Declaration and Programme of Action reaffirmed that '[a]ll human rights are universal, indivisible and interdependent and interrelated',[36] issues relating to realisation of economic, social and cultural rights are left unaddressed in almost the entire Declaration and Programme.[37] China in 2000 urged that the Human Rights Commission, since replaced by the Human Rights Council, should 'play its part in the realization of economic, social and cultural rights. It must urgently address the tendency to emphasize civil and political rights at the expense of economic, social and cultural ones'.[38] In 2005, China insisted in a statement to the Commission that the international community must 'take measures to correct the prevailing imbalance between two categories of human rights' and 'called on it to respond positively to the legitimate demand of developing countries by giving greater prominence to economic, social and cultural rights'.[39]

That having been said, there is no evidence that economic, social and cultural rights and civil and political rights are mutually exclusive or that economic, social and cultural rights will be realised if civil and political rights are to be sidelined.[40] The European Court of Human Rights, in the context of the European Convention on

[36] Vienna Declaration and Programme of Action, adopted by acclamation on 25 June 1993, A/CONF.157/24 (Part I), 32 ILM 1661 (1993), para.5.
[37] Audrey R. Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights', 18 *Human Rights Quarterly* (1996), 23, 24-25, fn.3.
[38] E/CN.4/2000/SR.23 (2000), para.60.
[39] E/CN.4/2004/SR.26 (2005), para.84.
[40] Illustrating the commensurability between civil and political rights and economic development in East Asia where Confucianism is prevalent, Inoue Tatsuo refers to Japan's post-World War II democracy (albeit imposed by the United States) and economic development and maintains that China's argument that on account of its need for economic development it should not be held to developed States' human rights standards is self-defeating in its quest for equal respect on the global stage as it 'suppresses or rationalizes abominable Western practices past and present, such as colonialism, slavery, racism, fascism, anticommunist crusades (McCarthyism, Vietnam War), and so on': 'Liberal Democracy and Asian Orientalism', in Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), 27, 41. With human rights starting to develop in Western States only after the Second World War, the Orientalist argument that China continues to rely on to justify its human rights record 'traps the West as well as Asia in a distorted perception of self-identity' (42), which stereotypes China as inferior to Western States that only serves as 'an epistemological device for guaranteeing Western hegemony over Asia' (39).

Human Rights, stated in *Airey* v. *Ireland*[41] that even '[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. … the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.'[42] The 2000 *Human Development Report* explained the close correlations between human development and human rights and between economic, social and cultural rights and civil and political rights.[43] China's handling of the severe acute respiratory syndrome epidemic during 2002–2003 demonstrated the importance of civil and political rights, including freedom of the press, in the protection of all human rights, including the right to health.

China stresses that human rights are matters within the internal affairs and jurisdiction of a State and that a State is bound by the United Nations Charter and customary international law not to interfere in other States' internal affairs, a position China has expressed in its voting behaviour and argumentation within the Security Council, as Chapter VI discusses. In its 1991 *White Paper on Human Rights in China*,[44] China maintained that

> China is in favour of strengthening international cooperation in the realm of human rights on the basis of mutual understanding and seeking a common ground while reserving differences. However, no country in its effort to realise and protect human rights can take a route that is divorced from its history and its economic, political and cultural realities. … It is neither proper nor feasible for any country to judge other countries by the yardstick of its own mode or to

[41] (1979) 2 EHRR 305.
[42] Ibid., para.26.
[43] United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000), ch.I.
[44] Information Office of the State Council of the People's Republic of China, November 1991.

> impose its own mode on others. Therefore, the purpose of international protection of human rights and related activities should be to promote normal cooperation in the international field of human rights and international harmony, mutual understanding and mutual respect. Consideration should be given to the differing views on human rights held by countries with different political, economic and social systems, as well as different historical, religious and cultural backgrounds. International human rights activities should be carried on in the spirit of seeking common ground while reserving differences, mutual respect, and the promotion of understanding and cooperation.[45]

China's position was restated in the 1993 Bangkok Declaration on Human Rights.[46] The Bangkok Declaration states, *inter alia*, that Asian States 'recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds',[47] and that 'States have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms, and also recognise that remedies must be sought and provided primarily through such mechanisms and procedures'.[48] In its 2004 *White Paper on Progress in China's Human Rights Cause in 2003*,[49] China stated thus:

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[45] Ibid., X. Active Participation in International Human Rights Activities.
[46] Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, adopted by Ministers and representatives of Asian States in Bangkok during 29 March–2 April 1993 pursuant to U.N. G.A. Res. 46/116 (1991) in the context of preparations for the World Conference on Human Rights to be held in Vienna during 14–25 June 1993.
[47] Ibid., para.8.
[48] Ibid., para.9. Reference should be had also to paragraph 3, which '[stresses] the urgent need to democratise the United Nations system, eliminate selectivity and improve procedures and mechanisms in order to strengthen international cooperation, based on principles of equality and mutual respect, and ensure a positive, balanced and non-confrontational approach in addressing and realising all aspects of human rights'; paragraph 4, which '[discourages] any

China holds that the development of human rights is an important mark of the continuous progress of the civilisation of human society, and an important part of the progressive current of world peace and development. Full realisation of human rights is the common goal of countries throughout the world as well as an important target for China in her efforts to build a moderately prosperous society in an all-round way, as well as her 'peaceful rise' in the world. China will, as always, devote herself to promoting the human rights cause, actively carry out exchanges and cooperation with the international

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attempt to use human rights as a conditionality for extending development assistance'; paragraph 5, which '[emphasises] the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure'; paragraph 6, which '[reiterates] that all countries, large and small, have the right to determine their political systems, control and freely utilise their resources, and freely pursue their economic, social and cultural development'; paragraph 7, which '[stresses] the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicisation, and that no violation of human rights can be justified'; paragraph 10, which '[reaffirms] the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights'; paragraph 17, which '[reaffirms] the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights, which must be realised through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realisation of such right'; paragraph 19, which '[affirms] that poverty is one of the major obstacles hindering the full enjoyment of human rights'; paragraph 20, which '[affirms] also the need to develop the right of humankind regarding a clean, safe and healthy environment'; paragraph 22, which '[reaffirms Asian States'] strong commitment to the promotion and protection of the rights of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women'; paragraph 23, which '[recognises] the rights of the child to enjoy special protection and to be afforded the opportunities and facilities to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity'; paragraph 24, which indicates Asian States' embrace of 'the important role played by national institutions in the genuine and constructive promotion of human rights', and their belief 'that the conceptualisation and eventual establishment of such institutions are best left for the States to decide'; paragraph 25, which '[acknowledges] the importance of cooperation and dialogue between governments and non-governmental organisations on the basis of shared values as well as mutual respect and understanding in the promotion of human rights, and encourage the non-governmental organisations in consultative status with the Economic and Social Council to contribute positively to this process in accordance with Council resolution 1296(XLIV)'; paragraph 26, which '[reiterates] the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia'; and paragraph 27, which '[reiterates] further the need to explore ways to generate international cooperation and financial support for education and training in the field of human rights at the national level and for the establishment of national infrastructures to promote and protect human rights if requested by States'.

[49] Information Office of the State Council of the People's Republic of China, March 2004.

> community according to the provisions of the Constitution of China and the need for modernisation of the country, and make her contributions to promoting the healthy development of the international human rights cause.[50]

China has stressed that any interference by foreign States or the international community in the internal affairs of a State, even amidst widespread human rights violations or a humanitarian catastrophe, will simply 'endanger world peace and security'. [51] Nevertheless, as Chapter VI demonstrates, China's approach to international peacekeeping has been evolving and on particular occasions it has supported peacekeeping operations sanctioned by the Security Council. As noted in Chapter II, foreign criticism of Chinese policies, practices, preferences and traditions, particularly without proper understanding of or regard for how the Chinese people view them, merely helps bolster the internal legitimacy of the authoritarian government. International acceptance of a human rights norm does not mean that such acceptance necessarily translates into acceptance in a domestic setting.[52] As Jürgen Habermas has observed, democratic institutions imposed without domestic

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[50] Ibid., VIII. International Exchanges and Cooperation in Human Rights.

[51] 1991 *White Paper on Human Rights in China*, *supra* n.44, X. Active Participation in International Human Rights Activities. In particular, China stated, ibid., that it 'has firmly opposed … any country making use of the issue of human rights to sell its own values, ideology, political standards and mode of development, and … any country interfering in the internal affairs of other countries on the pretext of human rights, the internal affairs of developing countries in particular, and so hurting the sovereignty and dignity of many developing countries. Together with other developing countries, China has waged a resolute struggle against all such acts of interference, and upheld justice by speaking out from a sense of fairness. China has always maintained that human rights are essentially matters within the domestic jurisdiction of a country. Respect for each country's sovereignty and non-interference in internal affairs are universally recognised principles of international law, which are applicable to all fields of international relations, and of course applicable to the field of human rights as well. … Using the human rights issue for the political purpose of imposing the ideology of one country on another is no longer a question of human rights, but a manifestation of power politics in the form of interference in the internal affairs of other countries. Such abnormal practice in international human rights activities must be eliminated … Hegemonism and power politics continue to exist and endanger world peace and development. Interference in other countries' internal affairs and the pushing of power politics on the pretext of human rights are obstructing the realisation of human rights and fundamental freedoms.'

[52] Gary Goertz and Paul F. Diehl, 'Toward a Theory of International Norms: Some Conceptual and Measurement Issues', 36 *Journal of Conflict Resolution* (1992), 634, 646.

support tend to 'disintegrate without the initiatives of a population *accustomed* to freedom'.[53]

Finally, China's substantial investment in States ruled by repressive regimes, with no conditions attached, has been much criticised on human rights grounds.[54] Critics typically do not acknowledge that China has also invested heavily in Western democratic States such as Australia and Canada whose economies have been tremendously bolstered in recent years, and that democratic States provide aid to repressive regimes often for non-altruistic reasons or resulting in continued repressive rule and expanded military expenditures.[55] As will be discussed below, economic development is positively correlated with human rights protection and government efficacy, among others. It is not implausible that the increasing affluence of the Chinese people and their growing awareness of their rights may in time influence populations currently enduring repressive regimes to become more assertive about

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[53] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996), 130 (emphasis in original).

[54] See, *e.g.*, Chris Alden, 'China in Africa', 47:3 *Survival* (2005), 147; Matthew E. Chen, 'Chinese National Oil Companies and Human Rights', 51:1 *Orbis* (2007), 41; Lindsey Hilsum, 'Re-Enter the Dragon: China's New Mission in Africa', 32 *Review of African Political Economy* (2005), 419; Raphael Kaplinsky and Mike Morris, 'Chinese FDI in Sub-Saharan Africa: Engaging with Large Dragons', 21 *European Journal of Development Research* (2009), 551; Robert I. Rotberg, ed., *China into Africa: Trade, Aid, and Influence* (Baltimore: Brookings Institution Press, 2008); Ian Taylor, 'China's Oil Diplomacy in Africa', 82 *International Affairs* (2006), 937; Ian Taylor, 'Governance in Africa and Sino-African Relations: Contradictions or Confluence?', 27 *Politics* (2007), 139; Ian Taylor, 'Sino-African Relations and the Problem of Human Rights', 107 *African Affairs* (2008), 63; Denis M. Tull, 'China's Engagement in Africa: Scope, Significance and Consequences', 44 *Journal of Modern African Studies* (2006), 459. Barry Sautman and Yan Hairong argue, however, that Chinese investment in Africa is better than Western investment on the continent in terms of support for Africa's development and respect for Africans and their States and governments: 'Friends and Interests: China's Distinctive Links with Africa', 50:3 *African Studies Review* (2007), 75. For an understanding of Sino-African relations generally, see Firoze Manji and Stephen Marks, eds., *African Perspectives on China in Africa* (Oxford: Fahamu, 2007); Ian Taylor, *China and Africa: Engagement and Compromise* (London: Routledge, 2006).

[55] See, *e.g.*, Alberto Alesina and David Dollar, 'Who Gives Foreign Aid to Whom and Why?', 5 *Journal of Economic Growth* (2000), 33; Tarhan Feyzioglu, Vinaya Swaroop, and Min Zhu, 'A Panel Data Analysis of the Fungibility of Foreign Aid', 12 *World Bank Economic Review* (1998), 29; Stephen Knack, 'Does Foreign Aid Promote Democracy?', 48 *International Studies Quarterly* (2004), 251; Ilyana Kuziemko and Eric Werker, 'How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations', 114 *Journal of Political Economy* (2006), 905; Hans Morgenthau, 'A Political Theory of Foreign Aid', 56 *American Political Science Review* (1962), 301; Howard Pack and Janet Rothenberg Pack, 'Foreign Aid and the Question of Fungibility', 75 *Review of Economics and Statistics* (1993), 258; Peter J. Schraeder, Steven W. Hook, and Bruce Taylor, 'Clarifying the Foreign Aid Puzzle: A Comparison of American, Japanese, French, and Swedish Aid Flows', 50 *World Politics* (1998), 294.

their own rights and governments. In fact, as Gregory Chin and Ramesh Thakur have noted, the United Nations worked with the Chinese and African governments in establishing a China–Africa Business Partnership and a China–Africa Business Council, both of which commenced operations in 2005, while the United Nations Development Programme ('UNDP') spearheaded a multi-donor effort in order to establish an International Poverty Reduction Centre in Beijing in 2006 with a view to helping developing States learn from the practices and lessons of China's development and emulating them at home.[56] China has also been a major donor to the UNDP's Voluntary Trust Fund for the Promotion of South–South Cooperation and encouraged 'ongoing development dialogue between countries in the Global South'.[57]

IV. China's approach to the Human Rights Council and universal periodic review

While communist China formally entered the foray of international organisations on 25 October 1971, it began to participate in the activities of the Human Rights Commission only in 1979 as an observer and in 1982 as a full member. China argued that human rights debates within the United Nations should focus on thematic issues and not monitoring of national human rights situations. The Human Rights Commission and its Sub-Commission on the Promotion and Protection of Human Rights, China contended, 'should carry out studies and refrain from deliberating on human rights situations in specific countries',[58] and the Commission should be 'a forum for mutual learning from experience'.[59]

Due to disillusionment and dismay with the Commission about the lack of human rights qualifications for election to membership and how it stymied human

[56] Gregory Chin and Ramesh Thakur, 'Will China Change the Rules of Global Order?', 33:4 *Washington Quarterly* (2010), 119, 128.
[57] United Nations Development Programme, 'Forging a Global South', 19 December 2004.
[58] E/CN.4/2000/SR.50 (2000), para.74.
[59] E/CN.4/2004/SR.21 (2004), para.56.

rights development,[60] in April 2006 the General Assembly through Resolution 60/251[61] replaced it with the Human Rights Council as a subsidiary organ of the General Assembly[62] (instead of the Economic and Social Council as was the case with the Commission) with 47 Member States (compared to 53 in the Commission) based on 'equitable geographical distribution'[63] and 'elected directly and individually by secret ballot by the majority of the members of the General Assembly'.[64] Members

[60] In his Secretary-General report *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, 21 March 2005, para.182, Kofi Annan stated that 'the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.' For discussions of criticism about the Commission, the rationales and negotiations leading to its replacement by the Human Rights Council as well as the concerns that the Council might face, see Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council', 7 *Melbourne Journal of International Law* (2006), 185; Felice D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System', 7 *Human Rights Law Review* (2007), 109; Paul Gordon Lauren, '"To Preserve and Build on its Achievements and to Redress its Shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council', 29 *Human Rights Quarterly* (2007), 307; Elvira Domínguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', 7 *Chinese Journal of International Law* (2008), 721; Patrizia Scannella and Peter Splinter, 'The United Nations Human Rights Council: A Promise to be Fulfilled', 7 *Human Rights Law Review* (2007), 41; Nico Schrijver, 'The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles?', 20 *Leiden Journal of International Law* (2007), 809; Rhona K.M. Smith, 'More of the Same or Something Different? Preliminary Observations on the Contribution of Universal Periodic Review with Reference to the Chinese Experience', 10 *Chinese Journal of International Law* (2011), 565; Yvonne Terlingen, 'The New Human Rights Council: A New Era in UN Human Rights Work?', 21 *Ethics & International Affairs* (2007), 167; Helen Upton, 'The Human Rights Council: First Impressions and Future Challenges', 7 *Human Rights Law Review* (2007), 29.

[61] U.N. G.A. Res. 60/251 (2006). 170 States voted in favour of the resolution, while four States (Israel, Marshall Islands, Palau, and the United States) opposed and three States (Belarus, Iran, and Venezuela) abstained.

[62] Ibid., para.1.

[63] Ibid., para.7. The resolution stipulates that 13 seats be allocated to African States, 13 seats to Asian States, six seats to Eastern European States, eight seats to Latin American and Caribbean States, and seven seats to Western European and other States. Sonya Sceats with Shaun Breslin, 'China and the International Human Rights System', Chatham House, October 2012, 11, argue that such geographical distribution, with more than half of seats allocated to African and Asian States, works in China's favour and has resulted in China's human rights record receiving scant attention in the Council. China was on the winning side in 102 of 120 resolutions adopted after a vote, while abstaining on six resolutions regarding religious discrimination (sixth session), good governance and corruption (seventh session), complicity by medical personnel in torture (tenth session), religious discrimination and its impact on economic, social and cultural rights (tenth session), sexual orientation and gender identity equality and non-discrimination (17th session), and democracy and the rule of law that stressed genuine periodic elections and a right to dispose of a sitting government 'without fear of being injured, beaten, arbitrarily arrested and detained, tortured, killed or subjected to enforced disappearance' (19th session): ibid., 24-27.

[64] Ibid.

are to serve for three years and are not eligible for immediate re-election after two consecutive terms.[65] In addition to its universal periodic review mechanism through which each and every United Nations Member State must participate in evaluation of its human rights performance,[66] the Council shall 'assume, review and, where necessary, improve and rationalise all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure'.[67]

In terms of qualifications for election, the resolution requires only that States 'take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'.[68] Nevertheless, the resolution states that 'members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during the term of their membership'.[69] The General Assembly may by a two-thirds majority of votes suspend membership in the Council if a Member 'commits gross and systematic violations of human rights'.[70] As the Libyan regime's suppression of internal unrest escalated in 2011, Libya's Ambassador to the Council 'emphasized that the Libyan mission had decided to represent and serve the Libyan people and not the regime'.[71] The Council on 25 February 2011 recommended that Libya's membership in the Council be suspended, and the General Assembly complied on 1 March 2011 through a resolution adopted by consensus.[72]

While Resolution 60/251 does not stipulate how the universal periodic review mechanism should complement existing reporting and monitoring procedures under

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[65] Ibid.
[66] Ibid., para.5(e).
[67] Ibid., para.6.
[68] Ibid., para.8.
[69] Ibid., para.9.
[70] Ibid., para.8.
[71] See Catherine Powell, 'Libya: A Multilateral Constitutional Moment?', 106 *American Journal of International Law* (2012), 298, 311.
[72] See U.N. G.A. Press Release, GA/11050, 1 March 2011.

human rights treaties, it indicates that the mechanism should entail regular and systematic reviews, 'based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner that ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on interactive dialogue, with the full involvement of the State concerned and with consideration given to its capacity-building needs.'[73] The Council is to meet at least thrice a year for at least ten weeks in aggregate.[74] Currently 14 States are evaluated under the universal periodic review mechanism in each Council session.

China has stated that the universal periodic review mechanism should focus on human rights development in accordance with a State's particular political, economic and socio-cultural conditions[75] and its particular situations that pertain at a given time.[76] China has argued that imposition of any international standards could only be counterproductive: 'To arbitrarily impose a fixed set of human rights rules, regardless of the differences in the specific environment and reality, will not serve the interests of the people of any country.'[77] China has urged that the Human Rights Council should 'promote the inclusive coexistence of different conceptions of human rights'.[78] China's position on universal periodic review is not dissimilar to that which it expressed *vis-à-vis* the Human Rights Commission as it opposes monitoring and reporting of country human rights situations, describing it as 'the most politicized aspect' of the Council.[79] In a debate about Cuba in 2007, China stated that country mandates were 'against the principle[s] of the Human Rights Council and should be disregarded'.[80] After the Arab Spring began to take hold, China urged the Council to 'appropriately settle differences through dialogue and cooperation, respect different

[73] U.N. G.A. Res. 60/251 (2006), para.5(e).
[74] Ibid., para.10.
[75] A/HRC/16/5 (2011), para.84(31).
[76] A/HRC/15/16 (2010), para.97(10).
[77] A/55/PV.12 (2000), 7.
[78] A/C.3/63/SR.32 (2008), para.34.
[79] Second Human Rights Council session, 5 December 2006.
[80] Fifth Human Rights Council session, 12 June 2007.

practices emanating from specific cultural traditions and do away with the practice of using human rights to pursue other political based agendas'.[81]

Before the universal periodic review mechanism was set in stone, China called for a procedural provision that support of one-third of Council membership be required before a draft resolution on a State could be tabled and two-thirds of Council membership be requisite for adoption of any such draft resolution. While China's proposal was rejected, it was agreed that a Member proposing a resolution on a specific State should ensure 'the broadest possible support for [its] initiatives (preferably 15 Members)'.[82] It was agreed that universal periodic review should be conducted in an 'objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner' and 'take into account the level of development and specificities of countries'.[83]

However, similar to its evolving position on international peacekeeping, as will be discussed in Chapter VI, China does not oppose specific country mandates where the consent of the State in question has been obtained. China lauded Cambodia for facilitating the special rapporteur in assessing the human rights situation in Cambodia and 'expressed support for the Council to extend the mandate of the Special Rapporteur, in strict conformity to the provisions included in the Institution Building resolution of the Council'.[84] China supported a special session on how Haiti following the earthquake in 2010 could be assisted, the mandate of the independent expert on the human rights situation in Côte d'Ivoire, and capacity-building initiatives for Somalia and Yemen. China has also co-sponsored a resolution put forward by Sri Lanka on the latter's endeavour to combat terrorism.[85]

Finally, perhaps still considering itself to be a newcomer to international human rights mechanisms, much as it did with the International Court of Justice

[81] 17th Human Rights Council session, 15 June 2011.
[82] Sceats with Breslin, *supra* n.63, 10-11.
[83] A/HRC/5/1, 18 June 2007, para.3(g).
[84] 18th Human Rights Council session, 28 September 2011.
[85] Sceats with Breslin, *supra* n.63, 19.

during the 1970s and early 1980s (as discussed in Chapter III), China has rarely assumed leadership in the Council even on issues central to its position that socio-economic rights and the right to development should be prioritised. Sceats with Breslin note that China thus far has introduced only two resolutions in the Council, on the impact of globalisation on human rights and on the personnel composition of the Office of the High Commissioner for Human Rights.[86] However, as China became more immersed and assertive about the roles it may play within the Council, at the 18th session on peaceful protests, it delivered a joint statement on behalf of 32 'Like-Minded States' that emphasised a government's obligations 'to take necessary measures to maintain public security, public order and social stability' in accordance with international and municipal laws. The joint statement also called for international co-operation when it came to human rights development and protection 'with full respect for sovereignty, territorial integrity, political independence, the non-use of force or the threat of force in international relations and non-intervention in matters that are essentially within the domestic jurisdiction of any State'.[87]

V. Domestic human rights protection in China

Against this backdrop of China's participation in international human rights mechanisms, one should wonder if international human rights norms might contribute to domestic human rights protection and development in China. After all, international human rights norms require implementation and enforcement in a State and its municipal legal system in order to be truly effective. This section thus explores how certain human rights might already be available in China under its

[86] Ibid., 15.
[87] The signatories States included Algeria, Angola, Bahrain, Bangladesh, Belarus, Bolivia, Burma/Myanmar, China, Congo, Cuba, Djibouti, Ecuador, Iran, Kuwait, Laos, Malaysia, Mauritania, Namibia, Nicaragua, North Korea, Pakistan, the Philippines, Qatar, Russia, Saudi Arabia, Sri Lanka, Sudan, Tajikistan, Uganda, Uzbekistan, Venezuela, Vietnam, Yemen, and Zimbabwe. The joint statement is available at http://www.china-un.ch/eng/hom/t859047.htm.

Constitution and laws, and the extent to which international human rights norms might have facilitated the development and protection of human rights in China.

In Chinese lexicon, citizen as a concept is generally understood to mean 'the masses'.[88] Historically the Chinese tended to view the notion of human rights as one stemming from selfishness, as 'Confucianism emphasizes that a genuine community is not composed of mutually disinterested egoistic individuals, but is composed of virtuous members thinking of shared goals and values over one's own'.[89] The increasing affluence of many Chinese people, especially in urban areas, and their growing awareness of international human rights norms and Western discourses about liberal democracy have already generated local demand for political reform, including improved protection of their public and private rights, and a say in the elections or selections of their representatives, at least at sub-national and local levels.[90]

I do not suggest that China is a model international citizen when it comes to human rights. However, human rights are taken seriously in China in ways that may converge with or diverge from dominant Western interpretations. China's state behaviours *vis-à-vis* human rights, including its recognition of human rights and freedoms in its territory, as a microcosm of the symbiosis between China's exercise of State sovereignty and the current international legal order, should thus be taken

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[88] Robert Heuser, '"Legal System" and "Rule of Law" in Chinese Legal Science (1978–1992)', in Ronald St John Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers, 1994), 359, 363.

[89] Lee Seung-hwan, 'Was There a Concept of Rights in Confucian Virtue-Based Morality?', 19 *Journal of Chinese Philosophy* (1992), 241, 252.

[90] As Randall Peerenboom has pointed out, 'the public has higher expectations of the government. Businesses and a rising middle class expect a government that facilitates economic transactions and a legal system that protects their property rights. Citizens have a greater sense of their rights and are more likely to appeal to law and constitutional principles in making their claims, even if they also rely on appeals to broader normative principles such as [just] government and on social networks and other mechanisms to achieve their ends. In response to public pressure and its own internal development logic, the government has taken steps to enhance the professionalism of civil servants, police, judges, and procuratorates': 'Law and Development of Constitutional Democracy in China: Problem or Paradigm?', 19 *Columbia Journal of Asian Law* (2005–2006), 185, 226.

* This sub-section draws on my article 'Strikes' in David Pong, ed., *Encyclopedia of Modern China*, Vol.3 (New York: Charles Scribners & Sons, 2009), 501-4, completed during my doctoral candidature at the Faculty of Law, National University of Singapore.

seriously. In order to understand and underscore how China's culture, Party-state politics and attitudes to law may affect the depth and extent of human rights protection and development in China, I now turn to discuss how workers' rights (which have developed partly as a result of the government's suppression of dissent on Tiananmen Square in June 1989), women's rights (despite the patriarchal nature of Chinese society), and privacy rights (despite China's communitarian culture) have come to be recognised, protected and understood in China. These specific rights highlight and exemplify the tensions between traditional Chinese culture and the notion of rights and how such tensions may be capable of being reconciled, and their selection in this study by no means implies that other rights are not available in the Chinese legal system.

a. Workers' rights*

Workers' rights, Virginia Leary maintains, are a good indicator of the extent to which a State recognises and protects the rights of its citizens, for workers constitute the bedrock of a society.[91] After its large-scale suppression of dissent on Tiananmen Square in June 1989, the PRC government was disinclined from suppressing labour protests so long as they remained localised and did not escalate into general strikes.[92] Ching Kwan Lee has observed that labour protests in China have since discarded the

[91] Virginia A. Leary, 'The Paradox of Workers' Rights as Human Rights', in Lance A. Compa and Stephen F. Diamond, eds., *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press, 1996), 22, 22.

[92] Feng Chen discerns that 'the government is afraid that such incidents thwart one of its paramount goals – social and political stability. But on the other hand, crackdowns against people who make no political claims and only demand a minimum livelihood would place the government in a morally and politically indefensible position. Suppressing these protests would make the government look indifferent to the condition of the working class, and cause even greater resentment among workers. Thus, the government has adopted a policy of conciliation and has emphasized the use of "persuasion" and "education" to resolve the conflicts … defused through the state's effective implementation of modest compensatory measures aimed at temporarily alleviating the economic plight of laid-off workers': 'Subsistence Crises, Managerial Corruption and Labour Protests in China', 44 *China Journal* (2000), 41, 61-62.

banner of class struggle and begun to revolve around the rule of law and rights.[93] In China, workers do not enjoy a right to strike, which was removed when the 1982 Constitution was promulgated and was not revived by the 1992 Trade Union Law.[94] Any demonstration or assembly requires prior approval of the local public security bureau, which is rarely granted.[95]

However, the passage of a Labour Law in 1994[96] marked a crucial change in labour relations in China, in particular through the All-China Federation of Trade Unions. The Law enables arrangements for collective bargaining on the basis of tripartite representation of trade unions, investors, and the state bureaucracy. The Law, which governs all employment relationships in China,[97] is organised into thirteen chapters with 107 provisions. Article 3 in Chapter 1 guarantees, *inter alia*, workers' rights to equality in employment, freedom of employment, labour safety and sanitation protection, and remuneration for work, rest, holidays and leaves of absence. Article 7 guarantees 'the right to participate in and organise trade unions in accordance with law',[98] and states that trade unions 'shall represent and safeguard the legitimate rights and interests of labourers, and stage activities independently in accordance with law.'[99] Article 8 states that workers 'shall take part in democratic management through workers' congress, workers' representative assembly, or any other forms in accordance with law, or consult with the employer on an equal footing

[93] Ching Kwan Lee, 'The "Revenge of History": Collective Memories and Labor Protests in Northeastern China', 1 *Ethnography* (2000), 217.
[94] Trade Union Law of the People's Republic of China, adopted at the Fifth Session of the Seventh National People's Congress on 3 April 1992 and promulgated by Order No.57 of the President of the People's Republic of China on 3 April 1992, as amended in accordance with Decision on Amending the Trade Union Law of the People's Republic of China adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on 27 October 2001.
[95] Chen, *supra* n.92, 60-61.
[96] Labour Law of the People's Republic of China, adopted at the Eighth Meeting of the Standing Committee of the Eighth National People's Congress on 5 July 1994 and promulgated by Order No.28 of the President of the People's Republic of China on 5 July 1994, effective as of 1 January 1995.
[97] Ibid., Art.2.
[98] Ibid., Art.7.
[99] Ibid.

about protection of the legitimate rights and interests of labourers.'[100] Articles 12 and 13 in Chapter 2 prescribe that the state create and expand employment opportunities and encourage enterprises to do the same, and that gender discrimination in employment be outlawed, with special protection for female and young workers laid down in Chapter 7. The Law pays prominent attention to the roles of employment contracts, with Chapter 3 devoted to the nature and requirements of contractual stipulations, including collective agreements. Chapter 4 places emphasis on work conditions, with Article 36 stipulating a maximum of eight work hours a day and 44 work hours a week, Article 38 guaranteeing one day of rest per week, and Article 44 mandating overtime pay. Articles 48 and 49 in Chapter 5 stipulate minimum wage standards, while Chapter 6 stipulates standards and requirements for labour sanitation and safety. Chapter 8 provides for professional training, whereas Chapter 9 governs requirements for social insurance and welfare treatment. Importantly, Chapter 10 stipulates standards and processes for settlement of labour disputes. Chapter 11 specifies requirements for supervision and inspection of compliance with the Law, and Chapter 12 details the legal consequences for non-compliance. Hilary Josephs argues that 'the Law appears to acknowledge that the same inequality of bargaining power between employer and employee which prevails in market economies can also exist in a transition economy, and therefore the worker requires added legal protection, including the ability to enforce his rights as a private litigant'.[101]

Despite China's accession to the World Trade Organisation ('WTO') in December 2001 and enthusiasm about how the WTO might be used to promote and protect human rights, including worker's rights, in China and generally,[102] I have

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[100] Ibid., Art.8.

[101] Hilary K. Josephs, 'Labor Law in a "Socialist Market Economy": The Case of China', 33 *Columbia Journal of Transnational Law* (1995), 559, 570.

[102] In the first preambular paragraph of the Agreement Establishing the World Trade Organisation, done at Marrakesh on 15 April 1994, 33 ILM 1125 (1994), the Contracting Parties state that 'their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources

explained elsewhere[103] that the WTO is not a suitable forum to help promote or protect human rights, including workers' rights in China, for it is constrained by its constituting legal framework that is the 1994 Marrakesh Agreement Establishing the WTO which does not confer the WTO jurisdiction to deal with matters that fall outside the ambit of the Agreement and its Annexes.[104]

However, the WTO's lack of jurisdiction to take into account and enforce human rights norms in its dispute settlement and enforcement mechanisms does not absolve its Members from their general and continuing obligation to guarantee and protect international human rights norms including those embodied in other treaties they have ratified. In light of the jurisdictional limitations of the WTO, it has been suggested that the International Labour Organisation ('ILO'), a specialised agency of the United Nations and a tripartite organisation of governments, employers, and union representatives, may be suitable for the development and protection of workers' rights in China.[105] Acknowledging that the ILO lacks effective enforcement mechanisms,[106] Daniel Ehrenberg proposes that the ILO and the WTO, with the latter's compulsory dispute settlement and enforcement mechanisms, should be merged such that adherence to international human rights and labour rights and standards could be sought in respect of production of such goods that another WTO Member might import. Believing that such collaboration 'could be used as a model to

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in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'. In his report to the fifty-fifth session of the United Nations General Assembly, Kofi Annan stated that '[t]he goals and principles of the WTO Agreements and those of human rights do therefore share much in common. Goals of economic growth, increasing living standards, full employment and the optimal use of the world's resources are conducive to the promotion of human rights, in particular the right to development. Parallels can also be drawn between the principles of fair competition and non-discrimination under trade law and equality and non-discrimination under human rights law. Further, the special and differential treatment offered to developing countries under the WTO rules reflects notions of affirmative action under human rights law': *Globalization and its Impact on the Full Enjoyment of All Human Rights: Preliminary Report of the Secretary-General*, 55th Session, 31 August 2000, A/55/342, 4.

[103] Phil C.W. Chan, 'Using the WTO for the Protection of Human Rights in China?', 19 *European Business Law Review* (2008), 605.

[104] Ibid., 617-20.

[105] Daniel S. Ehrenberg, 'From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights', in Compa and Diamond, *supra* n.91, 163, 163-64.

[106] Ibid., 164.

demonstrate how cooperation between multilateral organizations can be effectively utilized to effectuate international human rights and labor rights policies, and optimize world public order',[107] Ehrenberg provides detailed guidelines as to how such collaboration might proceed.[108] In its Singapore Ministerial Declaration,[109] the WTO acknowledged the ILO's competence in the field of labour rights and standards and noted its complementariness with the roles and functions of the ILO.[110]

However, only 21 of the 189 ILO conventions are legally binding on China.[111] China's general rejection of international tribunals as a means to settle disputes between States, let alone between a State and its citizens, the effective absence in China of a right of association, and the fact that such proposed joint

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[107] Ibid., 165.
[108] Ibid., 165-75.
[109] WTO Singapore Ministerial Declaration, adopted at the WTO Ministerial Conference held in Singapore on 13 December 1996, 36 ILM 218 (1997).
[110] The Declaration, ibid., para.4, states that the WTO '[renews] our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and the ILO Secretariats will continue their existing collaboration.'
[111] ILO Convention No.11 on Right of Association (Agriculture), 1921, ratified by China on 27 April 1934; Convention No.14 on Weekly Rest (Industry), 1921, ratified by China on 17 May 1934; Convention No.16 on Medical Examination of Young Persons (Sea), 1921, ratified by China on 2 December 1936; Convention No.19 on Equality of Treatment (Accident Compensation), 1925, ratified by China on 27 April 1934; Convention No.22 on Seamen's Articles of Agreement, 1926, ratified by China on 2 December 1936; Convention No.23 on Repatriation of Seamen, 1926, ratified by China on 2 December 1936; Convention No.26 on Minimum Wage-Fixing Machinery, 1928, ratified by China on 5 May 1930; Convention No.27 on Marking of Weight (Packages Transported by Vessels), 1929, ratified by China on 24 June 1931; Convention No.32 (Revised) on Protection against Accidents (Dockers), 1932, ratified by China on 30 November 1935; Convention No.45 on Underground Work (Women), 1935, ratified by China on 2 December 1936; Convention No.80 on Final Articles Revision, 1946, ratified by China on 4 August 1947; Convention No.100 on Equal Remuneration, 1951, ratified by China on 2 November 1990; Convention No.111 on Discrimination (Employment and Occupation), 1958, ratified by China on 12 January 2006; Convention No.122 on Employment Policy, 1964, ratified by China on 17 December 1997; Convention No.138 on Minimum Age, 1973, ratified by China on 28 April 1999 (with obligatory declaration of minimum age set at 16 years); Convention No.144 on Tripartite Consultation (International Labour Standards), 1976, ratified by China on 2 November 1990; Convention No.150 on Labour Administration, 1978, ratified by China on 7 March 2002; Convention No.159 on Vocational Rehabilitation and Employment (Disabled Persons), 1983, ratified by China on 2 February 1988; Convention No.167 on Safety and Health in Construction, 1988, ratified by China on 7 March 2002; Convention No.170 on Chemicals, 1990, ratified by China on 11 January 1995; Convention No.182 on Worst Forms of Child Labour, 1999, ratified by China on 8 August 2002.

enforcement mechanism will require the consent of all contracting parties to both the Marrakesh Agreement and the numerous ILO conventions, render Ehrenberg's project a definite impossibility. Michael Trebilcock and Robert Howse in fact warn that 'attachment of economic sanctions to the powers of the ILO may destabilize the organization, causing states to withdraw from membership or to withhold ratification of its Conventions to an even greater extent than is the case at present.'[112]

The ILO Declaration on Fundamental Principles and Rights at Work[113] states that all Members of the ILO, 'even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions'.[114] On the basis of the Declaration, Ernst-Ulrich Petersmann argues that 'UN membership entails legal obligations to respect core human rights',[115] and that the rules and principles that ILO conventions and 'other modern human rights instruments'[116] have set out illustrate that certain human rights have reached the status of *erga omnes* obligations of States and international organisations.[117] Petersmann fails to address the cardinal principle of international law that the consent of a State must have been obtained before a treaty obligation may be imposed, and membership in an international organisation does not by itself constitute consent to be bound by any treaty or declaration as might be adopted under the framework of the organisation. The Annex to the ILO Declaration specifically states that the Declaration 'is of a strictly promotional nature'.[118] Lastly, legal liability

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[112] Michael J. Trebilcock and Robert Howse, 'Trade Policy & Labor Standards', 14 *Minnesota Journal of Global Trade* (2005), 261, 284.
[113] ILO Declaration on Fundamental Principles and Rights at Work and Annex, adopted by the ILO General Conference at Geneva on 18 June 1998, 37 ILM 1233 (1998).
[114] Ibid., para.2.
[115] Ernst-Ulrich Petersmann, 'The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?', 7 *Journal of International Economic Law* (2004), 605, 634.
[116] Ibid., 617.
[117] Ibid.
[118] ILO Declaration, *supra* n.113, Annex: Follow-up to the Declaration, para.2.

cannot be ascribed Member States of an international organisation whose collective decision violates international law[119] (although it is noteworthy that China has indicated its support for legal liability to be ascribed Member States individually).[120]

b. Women's rights

A special area of Chinese domestic human rights law has emerged in the past two decades, known as social protection law or social law, designed to protect specific groups of citizens deemed by the state to be socially vulnerable.[121] Reflective of the patriarchal and paternalistic nature of Chinese society, youth, the elderly, and women are considered especially socially vulnerable and in need of legal protection. Michael Palmer observes that 'for the protection of the young we see a strongly controlling framework of rules and policies, seemingly directed at creating the model Chinese socialist citizen. In contrast, in the legal support offered to the elderly, there is a robust and seemingly more genuine attempt to protect and assist the elderly to deal with difficulties of age discrimination.'[122] Palmer argues that the purpose of legal protection afforded on the basis of age is to preserve 'a system of gerontocracy'.[123]

Given the inferior positions of women and girls in Chinese society,[124] I now focus on how women's rights protection has been implemented or stonewalled in

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[119] See Rosalyn Higgins, *Report to Institut de droit international*, 66-I *Yearbook of Institut de droit international* (1995), 375; Resolution of *Institut de droit international* on the Legal Consequences for Member States of the Non-Fulfillment by International Organisations of their Obligations towards Third States, Session of Lisbon, 1 September 1995.

[120] Statement of China in the Sixth Committee of the Sixtieth Session of the United Nations General Assembly, A/C/6/60/SR.11, 23 November 2005, para.53.

[121] Michael Palmer, 'On China's Slow Boat to Women's Rights: Revisions to the Women's Protection Law, 2005', 11 *International Journal of Human Rights* (2007), 151, 151.

[122] Ibid., 152. See also Michael Palmer, 'Minors to the Fore: Juvenile Protection Legislation in the PRC', in Michael Freeman, ed., *Annual Survey of Family Law: 1991*, Vol.15 (London: International Society on Family Law, 1993), 299; Michael Palmer, 'Caring for Young and Old: Developments in the Family Law of the People's Republic of China, 1996–8', in Andrew Bainham, ed., *International Survey of Family Law, 2000* (Dordrecht: Kluwer, 2000), 95.

[123] Ibid., 173, n.3.

[124] Ibid., 154-55, for a summary of the positions of women and girls and their treatment in Chinese society.

China since 1980, when China ratified the CEDAW in 1979,[125] by exploring the 1992 Law on the Protection of Rights and Interests of Women (Women's Protection Law) as amended in 2005.[126]

Article 2 of the amended Women's Protection Law states that '[e]quality between men and women is a basic state policy'[127] and prohibits discrimination, maltreatment, abandonment, and physical abuse of women. Article 3 mandates that the State Council and municipal authorities at or above the county level formulate programmes for women's development. Articles 6 and 7 state that municipal authorities at or above the county level, trade unions, and local women's federations at various levels (with emphasis particularly laid on the All-China Women's Federation[128]) shall ensure, represent, uphold and strive to safeguard the rights and interests of women. Article 14 requires that authorities ensure a complaint about a violation of the Law to be addressed properly. Article 52 enables a woman to request a relevant government department to remedy a violation of the Law or to commence

[125] China, however, has not acceded to the Optional Protocol to the CEDAW that would enable an individual to submit a complaint to the Committee on the Elimination of Discrimination against Women, which since January 2008 is serviced by the Office of the High Commissioner for Human Rights.

[126] Adopted at the Fifth Session of the Seventh National People's Congress on 3 April 1992, as amended in accordance with Decision on Amending the Law of the People's Republic of China on the Protection of Rights and Interests of Women adopted at the 17th Meeting of the Standing Committee of the Tenth National People's Congress on 28 August 2005.

[127] Ibid., Art.2.

[128] Palmer is sceptical of the extent to which the All-China Women's Federation may be able or willing to enhance the promotion and protection of women's rights in China. He notes, *supra* n.121, 171, that the Federation is 'a quasi-governmental body' intended as an intermediary between the Party-state and society, and it is predominantly the Party-state that receives information. Furthermore, the Federation seeks to act for women collectively in a way that undermines an a woman's individual rights and interests and potentially her complaint about a particular violation of the Law. It does not challenge the Party-state's understanding and views of the nature and implications of womanhood, a woman's human agency and her rights and interests. In addition, the Federation defines its role in terms of promoting 'equality between men and women' and not gender equality, thereby maintaining the status quo that men, their positions in society and what and how they do things in public or in private are the standards to which women should adhere. Lastly, 'as a large, nation-wide representative body, with close links to the party-state leadership, the Federation tends to operate in a top-down manner. Its endeavours at the grass-roots level and its responsiveness to the local community are limited and its activities and campaigns tend to prioritise the party-state's axiomatic goals of economic development rather than women's welfare': ibid. The Federation also 'continues to call upon women to contribute more in social, moral and family affairs. From the point of view of the party-state leadership, an important role of the Federation is to safeguard moral purity and stability': Du Jie, 'Gender and Governance: The Rise of New Women's Organisations', in Jude Howell, ed., *Governance in China* (Lanham, MD: Rowman & Littlefield, 2004), 172, 183.

arbitration or legal proceedings, with legal aid or judicial relief where necessary. However, as adversarial litigation is generally not preferred in China, women are urged to seek recourse to administrative processes or mediations (even though mediations in China are quite evaluative and coercive).[129] Palmer criticises the Law as vague and in want of a clear definition of 'discrimination against women'.[130] Gender equality in China is valued not for its own sake but for women to fully contribute to China's 'socialist modernisation'.[131]

Article 16 seeks to ensure equality of access to educational institutions by stipulating that, except for special subjects (which are not specified or defined), a school may not refuse to enrol women or raise enrolment standards *vis-à-vis* women on grounds of their gender. Palmer maintains that enhancement of gender equality on matters of education is of great importance as social status in China is heavily dependent on education.[132] Articles 22 to 25 guarantee gender equality on matters of employment, pay, promotion, and social security, although the position of women, even in cities, has not improved since the early 1990s.[133] Article 26 provides women with special protection 'during menstrual period, pregnancy, obstetrical period and nursing period';[134] under the same provision, women may not be assigned any work or physical labour unsuitable to women. Article 27 prohibits lowering a female employee's salary or unilaterally terminating her employment on grounds of her marriage, pregnancy, maternity leave or breast-feeding. Article 28 extends to women

[129] Palmer, ibid., 167.
[130] Ibid., 156.
[131] Women's Protection Law, Art.1.
[132] Palmer, *supra* n.121, 157-58.
[133] Ibid., 159. See also Shu Xiaoling and Bian Yanjie, 'Market Transition and Gender Gap in Earnings in Urban China', 81:4 *Social Forces* (2003), 1107. Shu and Bian, ibid., 1136-37, argue that gender inequality that persists in China reflects 'a consistent gender difference in human capital, political capital, and labor-force placement that remains largely unchanged over the years. Women had less education, had fewer years of seniority, were less likely to be Communist Party members, less likely to be in the state sector … less likely to be cadres and managers in state agencies and enterprises … Moreover, women were more likely to be workers and to work in service and education … Market forces [have not necessarily eliminated] the practice of discrimination, and its numerous mechanisms of self-maintenance, including gender-based occupational segregation, sex-typed career orientations, and institutional and attitudinal biases': as quoted in Palmer, ibid., 175, n.34.
[134] Women's Protection Law, Art.26.

'social insurance, social relief, social welfare and health care services'.[135] Sexual harassment is now proscribed in China under Article 40, while Article 42 protects a woman's rights of reputation, honour, privacy, and portrait. Given the increasing affluence of the Chinese people and the seemingly endless construction of properties, a woman's legal equality on matters of property ownership is a prime concern and is affirmed by Article 30, while Article 32 provides for women equal rights of compensation for land expropriated or requisitioned by the state.

Domestic violence, previously treated as a non-issue, is now prohibited by national legislation. The 1980 Marriage Law as amended in 2001[136] declares that '[d]omestic violence shall be prohibited. Maltreatment and desertion of one family member by another shall be prohibited.'[137] Articles 43 to 46 of the amended Marriage Law deal with succour measures and legal liability where domestic violence is a reason. Article 46 of the amended Women's Protection Law stipulates that '[d]omestic violence against women is prohibited. The state takes measures to prevent and stop domestic violence. The departments of public security, civil affairs, judicial administration, etc., as well as urban and rural mass organisations of self-government at the grass-roots level and public organisations shall, within the scope of their respective duties, prevent and stop domestic violence, and provide succour to female victims.'[138] Palmer argues that the enactment of these provisions was not only due to pressure from civil society in China, but also China's concern that the Committee on the Elimination of Discrimination against Women might otherwise

[135] Ibid., Art.28.
[136] Adopted at the Third Session of the Fifth National People's Congress on 10 September 1980, as amended in accordance with Decision regarding the Amendment of Marriage Law of the People's Republic of China adopted at the 21st Session of the Standing Committee of the Ninth National People's Congress on 28 April 2001.
[137] Ibid., Art.3. See also Michael Palmer, 'Patriarchy, Privacy and Protection: Slowly Conceptualising Domestic Violence in Chinese Law', in Natalia Iu. Erpyleva, Jane Henderson, and M. Butler, eds., *Forging a Common Legal Destiny: Liber Amicorum in Honour of Professor W.E. Butler* (London and New York: Wildy, Simmonds and Hill, 2005), 786.
[138] Women's Protection Law, Art.46.

criticise its failure to implement the CEDAW.[139]

Related to domestic violence is China's one-child policy, introduced in 1978 to contain population growth. The policy is inconsistent with Article 16(1)(e) of the CEDAW, which states that 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women[, t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.'[140] The policy also contravenes Article 12(1) of the CEDAW, which states that 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.'[141] China might argue that its one-child policy is not inconsistent with the provisions as the policy applies equally to men. However, responsibilities for family planning (especially the bearing of a son) are always regarded in Chinese society as those of a woman, with family planning, in particular a woman's failure to bear a son, often a major cause of domestic violence.[142] While Article 51 of the amended Women's Protection Law provides that a woman has 'the freedom not to bear any child',[143] the provision 'rests uneasily with provisions in Article 17 of the Population and Birth Planning Law 2001 which declare that: "citizens have the right to reproduction".'[144] Palmer argues that a husband may rely on Article 17 to commit marital rape.[145]

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[139] Palmer, *supra* n.121, 163.
[140] CEDAW, Art.16(1)(e).
[141] Ibid., Art.12(1).
[142] Palmer, *supra* n.121, 167-68. See also Anthony Clayre, 'Mediating: Caring and Control', in Anthony Clayre, ed., *The Heart of the Dragon* (Boston: Houghton Mifflin, 1988), 91.
[143] Women's Protection Law, Art.51.
[144] Palmer, *supra* n.121, 168.
[145] Ibid. Palmer, ibid., 176, n.50, notes that '[t]he issue of marital rape is one of considerable controversy within Chinese legal circles, with the possibility that a husband could be considered to have raped his spouse having been accepted in principle as an offence, but dealt

Last but not least, given the traditional preference for sons, forced abortions and female infanticides are prevalent in China. Such practices are now specifically outlawed, with Article 38 of the amended Women's Protection Law stating that '[w]omen's right of life and health is inviolable. Drowning, abandoning or cruel infanticide in any manner of female babies is prohibited; discriminating against or maltreating of women who give birth to female babies or women who are sterile is prohibited; cruel treatment causing bodily injury to or death of women by means of superstition or violence is prohibited; maltreating or abandoning women who are ill, disabled and aged is prohibited.'[146] Of course, as with all laws, whether such practices will in time diminish or cease depends ultimately on cultural and behavioural changes through education, public appeals and advertising, and other suitable means.

While the amended Women's Protection Law serves important purposes, objectives and results, and is a laudable step to enhancing the positions of women and girls in society, in public affairs, in private dealings and at home, one purpose and objective remains amiss: the Law tells people and authorities what to do and what not to do, instead of setting, instigating, and encouraging a foundation upon which individuals', authorities', and society's behaviours and attitudes to women and girls may evolve for the better. Furthermore, the Law in its entire text refers to women almost invariably in the plural sense,[147] with the result that a woman or a girl, as an individual human being with her own human agency, dignity, and need for protection from harm, is entirely overlooked.

c. Privacy rights*

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with very conservatively as a matter of judicial practice so that very few prosecutions have actually convicted a husband of the rape of his wife.'

[146] Women's Protection Law, Art.38.

[147] Of the 59 substantive provisions in the amended Women's Protection Law, a woman is referred to in the singular sense only in ten. Girls and female babies are always referred to in the plural sense in all relevant provisions.

* This sub-section draws on my article 'Privacy' in David Pong, ed., *Encyclopedia of Modern China*, Vol.3 (New York: Charles Scribners & Sons, 2009), 176-77, completed during my doctoral candidature at the Faculty of Law, National University of Singapore.

This section concludes its discussion of domestic human rights protection in China with the issue of privacy rights, given the communitarian nature of Chinese society and the interplay between privacy rights and workers' and women's rights. Privacy is strongly correlated with how a society is governed. As Raymond Wacks discerns, 'at the heart of the concern to protect "privacy" lies a conception of the individual and his or her relationship with society'.[148]

In discussing privacy in China, it is pertinent to note that privacy as a legal concept is of relatively recent origin in Western States. Although Samuel Warren and Louis Brandeis first formulated the concept in an 1890 *Harvard Law Review* article,[149] privacy has still not been recognised as a constitutional right *per se* in most Western States, including the United States. In its 2007 ranking of then 27 European Union and 19 other States including China, as well as Taiwan, Privacy International, an NGO, ranked China second last on the list, with a score of 1.3 out of 5.0 (tied with Malaysia and Russia) denoting an 'endemic surveillance society'. Both the United Kingdom (1.4) and the United States (1.5) fell under the same category.[150] In Chinese language, the word *si* (private/privacy) has generally negative connotations (except in the context of family) such as secrecy and selfishness, whereas *gong* (public) and *guan* (official) are used in relation to fairness and justice.[151] Bonnie McDougall argues that '[t]he emphasis on public service as a personal goal and on the public good as a national objective by Chinese political figures throughout the greater part of the twentieth century is partly responsible for the perception that privacy as a value is foreign to China'.[152] As will be discussed below, as democratic practices have begun to take hold in China, albeit at sub-national and local levels only, dissatisfaction – and expressions of it – with public officials, some of whom have

[148] Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989), 7.
[149] Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy', 4 *Harvard Law Review* (1890), 193.
[150] Privacy International, 'National Privacy Ranking 2007 – Leading Surveillance Societies around the World'.
[151] Bonnie S. McDougall, 'Privacy in Modern China', 2 *History Compass* (2004), 1.
[152] Ibid., 2.

visibly engaged in corruption and profiteering, has increased and reinforced discontent within the Chinese populace about the pervasiveness that public officials intrude the lives and livelihood of ordinary people. It is, nevertheless, precisely such expressions of dissatisfaction with public officials and their policies and practices that illustrate, reinforce and demarcate the boundary that divides affairs that the state may control and private realms of which the state is expected to steer clear. In Confucian culture, family is considered a realm separate from the state, within which individuals may enjoy freedom from public scrutiny – albeit as a family unit and not as individuals.

Nevertheless, the excesses of the Red Guards during the Cultural Revolution and China's subsequent economic and political reforms have resulted in increasing acceptance in society, by the state and among individuals, of the notion that certain activities should be regarded as entirely personal and free from scrutiny outside the confines of one's home. Privacy is now recognised and protected in China as a constitutional and legal right to reputation. Under Article 38 of the 1982 Constitution, '[t]he personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.'[153] Article 39 guarantees the inviolability of the home and prohibits unlawful search or intrusion. Article 40 provides that '[n]o organisation or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.'[154] Article 252 of the Criminal Law of the People's Republic of China prohibits infringement of a person's 'right of communication freedom by hiding, destroying, or illegally opening' of letters belonging to another, and illegal search or intrusion of

[153] 1982 Constitution, Art.38.
[154] Ibid., Art.40.

another person or his or her home.[155] Article 101 of the General Principles of the Civil Law protects a 'right of reputation' and states that '[t]he personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.'[156] However, information relating to public affairs or immoral conduct is not protected.[157] As the Party-state controls the media and alternative sources of information, the Internet, which in 2006 was used by 123 million Chinese people,[158] has raised significant issues relating to privacy protection. According to a Chinese government survey, 23.2 per cent of Internet users and 18.6 per cent of non-users regarded Internet use as very likely to lead to unauthorised disclosure of personal information.[159] Meanwhile, perpetrators of domestic violence assert privacy as a pretext to circumvent sanction. Thus, privacy rights in China paradoxically help construct a realm to which women's lives and voices are relegated as unimportant or irrelevant to (male) society.[160]

VI. The rule of law in China: A hopeless case?

The United Nations and Western States have long sought to foster acceptance by developing States of a rule-of-law model, and the World Bank requires it as a condition of foreign aid, emphasising that '[t]he rule of law is a key element of predictability and stability where business risks may be rationally assessed,

[155] Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, as amended at the Fifth Session of the Eighth National People's Congress on 14 March 1997 and promulgated by Order No.83 of the President of the People's Republic of China on 14 March 1997, Art.252.
[156] 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.101.
[157] Jingchun Cao, 'Protecting the Right to Privacy in China', 36 *Victoria University of Wellington Law Review* (2005), 645.
[158] Lingjie Kong, 'Online Privacy in China: A Survey on Information Practices of Chinese Websites', 6 *Chinese Journal of International Law* (2007), 157, 158.
[159] Ibid., 159.
[160] McDougall, *supra* n.151; Cecilia Milwertz and Wei Bu, 'Non-Governmental Organising for Gender Equality in China – Joining a Global Emancipatory Epistemic Community', 11 *International Journal of Human Rights* (2007), 131.

transaction costs lowered, and governmental arbitrariness reduced'.[161] An array of problems inheres, however, in transplanting a theory of governance that may not be compatible with a society unwilling to accept it. A rule-of-law model does not by itself guarantee democratic governance or respect for human rights (by the state and among its people). In fact, law has long been used at the hands of despotic or authoritarian governments as a tool to suppress political dissent. As Joseph Raz has noted, '[i]f rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to believe that good should triumph … A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.'[162]

With a culture predicated on communitarian norms and values and on resolving differences under the umbrella of social harmony rather than through adversarial litigation, China has been lukewarm in embracing a rule-of-law model in its governance and legal structure. Recent years have nevertheless seen an increasing ambivalence among Chinese state apparatuses and scholars as to the place of law in China. For example, law is seen to be necessary to constrain the executive government and the Party[163] that in a State remains supreme (and subsumes all branches of government),[164] and to facilitate economic development.[165] The 1982

[161] World Bank, *Managing Development: The Governance Decision* (Washington, D.C.: World Bank, 1991), iii.
[162] Joseph Raz, 'The Rule of Law and its Virtue', in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 210, 211.
[163] Albert H.Y. Chen, 'Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law', 17 *UCLA Pacific Basin Law Journal* (1999), 125; Wang Jiafu, 'Guanyu yifa zhiguo jianshe shehui zhuyi fazhi guojia de lilun he shijian wenti' ['On Governing the Country in Accordance with Law: Theoretical and Practical Issues in Establishing a Socialist Rule-of-Law State'], in Ministry of Justice, ed., *Zhonggong zhongyang fazhi jiangzuo huibian* (Beijing: Falü chubanshe, 1998).
[164] Geor Hintzen, 'The Place of Law in the PRC's Culture', 11 *Cultural Dynamics* (1999), 167; Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St Martin's Press, 1994); Wang, ibid.

Constitution prescribes that government be one of law and not of men and that law be supreme.[166] Article 41 states that 'citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with law'.[167] Article 51 states that '[t]he exercise by PRC citizens of their freedoms and rights may not infringe on the interests of the state, of society, and of the collective, or on the lawful freedoms and rights of other citizens.'[168] It ought to be noted that restrictions on the exercise of one's rights or freedoms are not unique in China, as they similarly are contained in human rights treaties such as the ICCPR[169] and the European Convention on Human Rights,[170] and

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[165] Wang, ibid.
[166] 1982 Constitution, Arts.5 and 33.
[167] Ibid., Art.41.
[168] Ibid., Art.51.
[169] Article 4(1) of the ICCPR states that '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' Article 12(3), ibid., states that a person's right to liberty of movement and freedom to choose his residence within the territory of a State in which he or she is lawfully situate, and his or her freedom to leave any country, 'shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.' Article 18(3), ibid., states that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.' Article 19(3), ibid., states that the exercise of the right to freedom of expression 'carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.' Article 21, ibid., states that '[t]he right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.' Article 22, ibid., states that '[n]o restrictions may be placed on the exercise of [the right to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'
[170] Article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms states that '[t]here shall be no interference by a public authority with the exercise of [the right to respect for one's private and family life, home and correspondence] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights

within a democratic State such as Canada in the Canadian Charter of Rights and Freedoms.[171] In October 2000, China stated before the Human Rights Commission that '[t]he concept of a state subject to the rule of law had been formally incorporated into the Constitution in 1999. Chinese society was in a phase of transition between two systems; supremacy of power was about to give way to supremacy of law.'[172] While China has not ratified the ICCPR, the National People's Congress in 2004 amended the Constitution by adding a special clause on protection of human rights.[173]

Article 5 of the Constitution states that '[t]he state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the Constitution. All state organs, the armed forces, all political parties and public organisations and all enterprises and undertakings must

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and freedoms of others.' Article 9(2), ibid., states that '[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' Article 10(2), ibid., states that the exercise of the right to freedom of expression, 'since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.' Article 11(2), ibid., states that '[n]o restrictions shall be placed on the exercise of [the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of one's interests] other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.' Article 15(1), ibid., states that '[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' Article 16, ibid., states that '[n]othing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.' Article 17, ibid., states that '[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

[171] Article 33 of the Canadian Charter of Rights and Freedoms (Part I, Constitution Act 1982, S.C.1982, c.79; Canada Act 1982 (United Kingdom), c.11), commonly referred to as the 'notwithstanding clause', provides that Parliament or the legislature of a province may derogate from certain express rights provided for in the Charter, and such derogation may continue to subsist upon a new Act of Parliament or a new piece of legislation enacted by a provincial legislature.

[172] E/CN.4/2000/SR.31 (2000), para.14.

[173] 1982 Constitution, Art.33, para.3.

abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organisation or individual may enjoy the privilege of being above the Constitution and the law.'[174] I argue that the focus of the provision in fact illuminates a rule-of-law model, which requires that the Constitution and laws be the ultimate point of reference in governance, legislative enactments, and individual behaviours. Randall Peerenboom notes that Li Peng's observance of the constitutionally prescribed two-term limit for premiership and his acceptance of a lower-level position as head of the National People's Congress, as well as the Party's withdrawal in 1993 of an amendment to the Constitution that had violated prescribed procedures, illustrated respect for law that would have been highly unlikely during the Mao era.[175] It is also worth noting that China has resorted to law when intervening in constitutional disputes arising from Hong Kong (even if in doing so it may distort legal language).[176] As Michael Dowdle has pointed out, even if bad faith belies the Party's claims that it adheres to the rule of law, the fact that such claims have been made evidences the normative appeal of a rule-of-law model to the Chinese leadership.[177] Dowdle also notes that constitutionalism and the rule of law have increasingly been used in the power wrangling between the National People's Congress and the Party.[178]

Dowdle furthermore cautions against conflating particular *cultural* rational value orderings with particular rational value orderings at the *individual* level, as the collective decision-making process is highly dependent on variable options, information flows, and expectations of repercussions.[179] Scholars of Chinese culture

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[174] Ibid., Art.5.
[175] Randall Peerenboom, 'Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China', 11 *Cultural Dynamics* (1999), 315, 322.
[176] See Phil C.W. Chan, 'Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage', *Singapore Journal of Legal Studies* [2006], 285.
[177] Michael W. Dowdle, 'Heretical Laments: China and the Fallacies of "Rule of Law"', 11 *Cultural Dynamics* (1999), 287, 293.
[178] Michael W. Dowdle, 'The Constitutional Development and Operations of the National People's Congress', 11 *Columbia Journal of Asian Law* (1997), 1, 22-23.
[179] Dowdle, *supra* n.177, 289. See also Kenneth J. Arrow, *Social Choice and Individual Values*, 2nd ed. (New Haven: Yale University Press, 1963); Michael MacKuan, 'Speaking of

are able to find communitarian and individualistic priorities to co-exist in Chinese society.[180] Moreover, in many settings, formal law, as opposed to informal rules, may not be the best means by which to attain social justice. Although the concept of *guanxi*, or informal network, suffers a deficit of legitimacy from the standpoint of a rule-of-law model, given its all-encompassing omnipotence in Chinese behaviours, it may serve disciplinary and co-ordinating functions that supplant the transparency, accountability and predictability the rule of law is presumed to provide. As Xue Hanqin noted in her 2011 Hague Academy Lectures on contemporary Chinese perspectives of international law, the importance and values of informal network are not confined to China but can be found in all societies.[181] The rule of law is as much about the supremacy of law as an expression and exercise of a distinct, but by no means unique or perforce desirable or essential, political value. Enforced legality under a rule-of-law model, much like Anne-Marie Slaughter's enforced liberal internationalism as discussed in Chapter II, ignores the structural problems China must address in order for a sound legal system to firmly take hold, and conflates itself with an ultimate good. The shortcomings and problems a rule-of-law model presents, particularly in the context of China, meanwhile escape scrutiny and useful lessons

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Politics: Individual Conversational Choice, Public Opinion, and the Prospects for Deliberative Democracy', in John A. Ferejohn and James H. Kuklinski, eds., *Information and Democratic Processes* (Urbana, IL: University of Illinois Press, 1990), 59; Arthur L. Stinchcombe, *Information and Organizations* (Berkeley: University of California Press, 1990).

[180] William Theodore de Bary, *Learning for One's Self: Essays on the Individual in Neo-Confucian Thought* (New York: Columbia University Press, 1991); Amartya Sen, *Human Rights and Asian Values* (New York: Carnegie Center on Ethics and International Affairs, 1997); Marina Svensson, *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898–1949* (Lund: Lund University, 1996).

[181] Nathan and Shi, *supra* n.15, 117, similarly observe that 'findings of cultural distinctiveness are equally an [artefact] of the interpretive approach. In this approach, cultural attributes are conceptualized with such specificity or complexity that what is portrayed is by definition unique. … If we were to ask Americans whether they function through *kuan-hsi*, they would say no, because they would not know what we were talking about. If we were to ask them whether they sometimes get things done through networks or connections, or whether they consider it proper to help a relative or friend under certain circumstances, or whether it is important to cultivate personal relations with people from whom one wishes to get favors, many of them would say yes, perhaps as many in the United States as in China.' Mick Moore notes that 'it is widely agreed that, even in societies where the rule of law is respected, law plays only a limited role in regulating commercial transactions': 'How Difficult is it to Construct Market Relations? A Commentary on Platteau', 30 *Journal of Development Studies* (1994), 818, 819.

from China's experience that might enhance a rule-of-law model are overlooked or dismissed. Human agency and human differences in better understanding, co-ordination and co-operation both among States and among individuals are devalued.[182]

VII. Implementation of democratic practices in China

When discussing democracy in China, the suppression of dissent on Tiananmen Square in June 1989 immediately springs to mind. To foreign eyes, the student protesters were demanding democracy only to be brutally suppressed. Andrew Walder and Gong Xiaoxia characterise the protests as representing 'the emergence of a new species of political protest in the People's Republic' that diverged from the kind of worker activism previously seen in the Cultural Revolution 'where factions of political leaders mobilized their local followers for political combat'.[183] Jack Goldstone argues that 'unlike other confrontations that involved mainly intellectuals, such as the Hundred Flowers Movement, or other events that were in some sense orchestrated by the regime, such as the Cultural Revolution, Tiananmen marked the first time that intellectuals and popular elements acted independently to challenge the regime'.[184]

A deeper understanding, however, shows that the student protesters on Tiananmen Square, in terms of how they perceived democracy, were in unison with Chinese traditions. Democracy as that which embodies and enshrines a plurality of diverse opinions and participation by all segments of society was not one that the student protesters on Tiananmen Square in 1989 conceived. Joseph Esherick and

[182] William P. Alford, 'A Second Great Wall: China's Post-Cultural Revolution Project of Legal Construction', 11 *Cultural Dynamics* (1999), 193, 208.
[183] Andrew G. Walder and Gong Xiaoxia, 'Workers in the Tiananmen Protests: The Politics of the Beijing Workers' Autonomous Federation', 29 *Australian Journal of Chinese Affairs* (1993), 1, 3-4.
[184] As quoted in Elizabeth J. Perry, 'Shanghai's Strike Wave of 1957', 137 *China Quarterly* (1994), 1, 3.

Jeffrey Wasserstrom observed that the student protesters seemed to consider the *min* (people) in *minzhu* (democracy) to mean them primarily if not exclusively.[185] Mary Erbaugh and Richard Kraus similarly observed that students protesting in Fujian province at the same time were 'horrified at the suggestion that truly popular elections would have to include peasants, who would certainly outvote educated people like themselves'.[186] On Tiananmen Square, as students spoke of the importance of (their) views, principles and ideals and sought to assert exclusive control over the course and aims of the protests, workers focused from the beginning on economic issues[187] and 'displayed an acute sense of alienation not only from the political system but to a considerable extent also from the student leaders and intellectuals'.[188] Workers' demands revolved around price stabilisation, employment security, freedom of employment, cessation of gender discrimination in employment, improvements in work conditions, and a right to strike.[189] Throughout the protests, workers regarded students as the epitome of the elitist class that oppressed them. Walder and Gong noted that students went as far as to exclude workers from Tiananmen Square until military action appeared imminent when workers were finally allowed onto the Square to protect students. It was only on the day before the crackdown that students sought workers' collaboration in staging a general strike.

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[185] Joseph W. Esherick and Jeffrey N. Wasserstrom, 'Acting Out Democracy: Political Theater in Modern China', 49 *Journal of Asian Studies* (1990), 835, 837.

[186] Mary S. Erbaugh and Richard C. Kraus, 'The 1989 Democracy Movement in Fujian and its Consequences', 23 *Australian Journal of Chinese Affairs* (1990), 145, 153; see also Anita Chan and Jonathan Unger, 'China after Tiananmen: It's a Whole New Class Struggle', *The Nation*, 22 January 1990, 79.

[187] Walder and Gong, *supra* n.183, 23, observed that '[t]hese differences, and the students' growing attraction to the elite's factional struggle, underlined a sharp class distinction in the politics of dissent: the students understood elite political discourse, were themselves a tiny elite, and many would probably become officials in the future. … From the outset of their movement, and continuing well into martial law, the students made a self-conscious effort to maintain their "purity" (*chunjiexing*). This meant, in practice, that they limited their politics to moral questioning of the authorities, seeking to speak as the conscience of the nation, striving to maintain public order and production, while keeping off to one side any "narrow" economic and group interests that might potentially disrupt their quest.'

[188] Ibid., 15.

[189] Jude Howell, 'The Chinese Economic Miracle and Urban Workers', 9 *European Journal of Development Research* (1997), 148; Andrew G. Walder, 'Workers, Managers and the State: The Reform Era and the Political Crisis of 1989', 127 *China Quarterly* (1991), 467; Walder and Gong, ibid.

Afterwards, workers received much harsher penalties than did students, including the death penalty, for taking part in the protests.[190]

As noted in Chapter II, dominant Western discourses of international law and State sovereignty, including the question of whether liberal democracy now constitutes a rule or requirement for a State to possess internal and external legitimacy for its exercise of sovereignty, are pregnant with problems and concerns that not only undermine the universality of international law and the stability of the current international legal order, but also neglect the flaws that inhere in Western conceptions of liberal democracy. Chenyang Li has argued in the context of China that '[i]t is a simple-minded fallacious inference that, since democracy is good, anything that is undemocratic must be bad. An argument can be made that in the United States and throughout the democratic West, healthy society has been threatened precisely by the diminishing of traditional values similar to these undemocratic Confucian values.'[191]

It is, in fact, a misconception that no democratic practices take place in China. While universal suffrage continues to be wanting in China at the national level and contests for higher offices remain a matter not for the masses but a select few Party officials, an Election Law of the Representatives of the National People's Congress and the Local People's Congresses at All Levels was adopted in July 1979,[192] which requires that all representatives at or below the county level be directly elected.[193] An Organic Law of the Village Administration Committees was

[190] Walder and Gong, ibid., 24-25.
[191] Chenyang Li, 'Confucian Value and Democratic Value', 31 *Journal of Value Inquiry* (1997), 183, 189.
[192] Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, as amended for the fifth time in accordance with Decision on Revising the Election Law of the National People's Congress and Local People's Congresses of the People's Republic of China adopted at the Third Session of the 11th National People's Congress on 14 March 2010.
[193] Ibid., Art.2.

adopted in November 1998, which provides that self-government in villages should be implemented across the country.[194]

Voting has been implemented in every province, with generally high turnout rates[195] and improvements over time in the conduct of elections.[196] The Party has set out policies for village representative assemblies to implement, and implementation is monitored by Party members within the assemblies.[197] Article 97 of the Constitution provides that '[d]eputies to the people's congresses of provinces, municipalities directly under the Central Government, and cities divided into districts are elected by the people's congresses at the next lower level; deputies to the people's congresses of counties, cities not divided into districts, municipal districts, townships, nationality townships and towns are elected directly by their constituencies. The number of deputies to local people's congresses at different levels and the manner of their election are prescribed by law.'[198] According to Article 99 of the Constitution:

> Local people's congresses at different levels ensure the observance and implementation of the Constitution, the statutes and the administrative rules and regulations in their respective administrative areas. Within the limits of their authority as prescribed by law, they adopt and issue resolutions and examine and decide on plans for local economic and cultural development and for development of public services. Local people's congresses at and above the county level examine and approve the plans for economic and social

[194] Adopted at the Fifth Meeting of the Standing Committee of the Ninth National People's Congress on 4 November 1998 and promulgated by Order No.9 of the President of the People's Republic of China on 4 November 1998.
[195] Kevin J. O'Brien and Rongbin Han, 'Path to Democracy? Assessing Village Elections in China', 18 *Journal of Contemporary China* (2009), 359, 359-60.
[196] Baogang He, *Rural Democracy in China: The Role of Village Elections* (New York: Palgrave Macmillan, 2007); Melanie Manion, 'How to Assess Village Elections in China', 18 *Journal of Contemporary China* (2009), 379; Qingshan Tan, 'Building Institutional Rules and Procedures: Village Election in China', 37 *Policy Sciences* (2004), 1.
[197] Susan V. Lawrence, 'Democracy, Chinese Style', 32 *Australian Journal of Chinese Affairs* (1994), 61, 63.
[198] 1982 Constitution, Art.97.

development and the budgets of their respective administrative areas, and examine and approve reports on their implementation. They have the power to alter or annul inappropriate decisions of their own standing committees. The people's congresses of nationality townships may, within the limits of their authority as prescribed by law, take specific measures suited to the peculiarities of the nationalities concerned.[199]

Importantly, from the standpoints of accountability of officials, electorates' participatory capacity and inclination, and human agency, Article 101 of the Constitution provides that '[a]t their respective levels, local people's congresses elect, and have the power to recall, governors and deputy governors, or mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns. Local people's congresses at and above the county level elect, and have the power to recall, presidents of people's courts and chief procurators of people's procuratorates at the corresponding level.'[200]

It has been found that elections in China tend to generate a synergetic relationship between the electorates and their elected representatives. Such synergy may be created and reinforced by the direct and intimate relationships that the

[199] Ibid., Art.99.

[200] Ibid., Art.101. Similarly, Article 103, ibid., states that '[t]he standing committee of a local people's congress at and above the county level is composed of a chairman, vice-chairmen and members, and is responsible, and reports on its work, to the people's congress at the corresponding level. The local people's congress at and above the county level elects, and has the power to recall, anyone on the standing committee of the people's congress at the corresponding level. No one on the standing committee of a local people's congress at and above the county level shall hold any post in state administrative, judicial and procuratorial organs.' Article 104, ibid., states that '[t]he standing committee of a local people's congress at and above the county level discusses and decides on major issues in all fields of work in its administrative area; supervises the work of the people's government, people's court and people's procuratorate at the corresponding level; annuls inappropriate decisions and orders of the people's government at the corresponding level; annuls inappropriate resolutions of the people's congress at the next lower level; decides on the appointment and removal of functionaries of state organs within its jurisdiction as prescribed by law; and, when the people's congress at the corresponding level is not in session, recalls individual deputies to the people's congress at the next higher level and elects individual deputies to fill vacancies in that people's congress.'

electorates and their elected (or nominated) representatives share. Under Article 111 of the Constitution:

> The residents' committees and villagers' committees established among urban and rural residents on the basis of their place of residence are mass organisations of self-management at the grass-roots level. The chairman, vice-chairmen and members of each residents' or villagers' committee are elected by the residents. The relationship between the residents' and villagers' committees and the grass-roots organs of state power is prescribed by law. The residents' and villagers' committees establish committees for people's mediation, public security, public health and other matters in order to manage public affairs and social services in their areas, mediate civil disputes, help maintain public order and convey residents' opinions and demands and make suggestions to the people's government.[201]

Lianjiang Li, Anne Thurston, and Xu Wang have shown that elections have an empowering effect on villagers in China.[202] Eighty-six per cent of the 218 villagers Lin Changsheng surveyed in Liaoning and Jilin provinces believed that elected officials were likely to be more effective in defending the interests of villagers.[203] Elected representatives in turn tend to believe that they are accountable to their

[201] Ibid., Art.111.
[202] Lianjiang Li, 'The Empowering Effect of Village Elections in China', 43 *Asian Survey* (2003), 648; Anne F. Thurston, *Muddling toward Democracy: Political Change in Grassroots China* (Washington, D.C.: United States Institute of Peace, 1999); Xu Wang, 'Mutual Empowerment of State and Peasantry: Grassroots Democracy in Rural China', 25 *World Development* (1997), 1431.
[203] Lin Changsheng, *Dalu nongcun cunmin zizhi zhidu yanjiu* [*A Study of the Villagers' Self-Government System on the Mainland*] (Taipei: Xingzhengyuan dalu weiyuanhui, 1995), 164, as cited in Lianjiang Li, 'Elections and Popular Resistance in China', 15:2 *China Information* (2001), 1, 2-3.

electorates.[204] According to Gao Xinjun, more than one-third of elected officials from 14 villages in a Henan township indicated that they would side with villagers as opposed to conflicting higher-level directives.[205] He Baogang and Lang Youxing found that 43 per cent of the 111 surveyed elected village committee directors in Zhejiang province believed that they must be accountable to their electorates, with only ten per cent indicating that they must be accountable to higher levels of the state bureaucracy.[206] The Organic Law of Village Administration Committees affirms that villagers' committees shall 'convey the villagers' opinions and demands and make suggestions' to the government.[207] At a broader level, Melanie Manion has noted the capacity of genuine elections to create and sustain congruence between the electorates and elected officials regarding the roles of the state in the economy.[208] Additionally, village elections help enable citizenship practices to emerge and mature,[209] and legitimise governance.[210]

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[204] Loren Brandt and Matthew A. Turner, 'The Usefulness of Corruptible Elections', 19 *Economics and Survey* (2007), 453; Guo Zhenglin and Thomas Bernstein, 'The Impact of Elections on the Village Structure of Power: The Relations between Village Committees and Village Party Branches', 13 *Journal of Contemporary China* (2004), 257; John James Kennedy, Scott Rozelle, and Yaojiang Shi, 'Elected Leaders and Collective Land: Farmers' Evaluation of Village Leaders' Performance in Rural China', 9 *Journal of Chinese Political Science* (2004), 1; Lianjiang Li and Kevin J. O'Brien, 'The Struggle over Village Elections', in Merle Goldman and Roderick MacFarquhar, eds., *The Paradox of China's Post-Mao Reforms* (Cambridge, MA: Harvard University Press, 1999), 142; Melanie Manion, 'Democracy, Community, Trust: The Impact of Elections in Rural China', 39 *Comparative Political Studies* (2006), 301.

[205] Gao Xinjun, 'Woguo xian xiang liangi zhengzhi tizhi gaige de shuguang – Henan sheng Xinmi shi cunji minzhu zhengzhi zhidu jianshe diaocha' ['The twilight of the reform of political institutions at county and township levels – An investigating report on the construction of village democracy in Xinmi county, Henan province'], 6 *Jingji shehui tizhi bijiao* [*Comparative Economic and Social Systems*], December 1998, 5, as cited in Li, *supra* n.203, 1-2.

[206] He Baogang and Lang Youxing, 'The Impact of Village Elections on Village Power Structure and its Operation', 16 *Hong Kong Journal of Social Sciences* (2000), 115.

[207] Organic Law of Village Administration Committees, Art.2.

[208] Melanie F. Manion, 'The Electoral Connection in the Chinese Countryside', 90 *American Political Science Review* (1996), 736.

[209] Susanne Brandstädter and Gunther Schubert, 'Democratic Thought and Practice in Rural China', 12 *Democratization* (2005), 810; Kevin J. O'Brien, 'Villagers, Elections, and Citizenship in Contemporary China', 27 *Modern China* (2001), 407.

[210] Gunther Schubert and Chen Xuelian, 'Village Elections in Contemporary China: New Spaces for Generating Regime Legitimacy? Experiences from Lishu County', 3 *China Perspectives* (2007), 12; Gunther Schubert, 'One-Party Rule and the Question of Legitimacy in Contemporary China: Preliminary Thoughts on Setting up a New Research Agenda', 17 *Journal of Contemporary China* (2008), 191.

An inevitable consequence of elections is expressions of dissatisfaction on the part of voters with their elected representatives and, ultimately, with the state, which can point to greater levels of accountability and openness of criticism, increased electioneering, or incompetence and corruption. In surveys conducted by Li and Tony Saich, respondents in rural areas ranked their level of satisfaction with their village leadership to be at the lowest as opposed to national, provincial, county, and township leaderships. Nevertheless, such dissatisfaction in fact may augment the legitimacy of elected representatives and the national government, as more people confront corrupt officials, participate in elections, and assert their rights on the basis of law.[211]

Expressions of dissatisfaction with elected representatives and the state, and the participatory nature of electioneering and elections, have increased discontent about the continuing dominance of Party officials in national politics. In a study by Min Qi in 1989 that Yongnian Zheng adopted in his 1994 analysis of whether development and democracy were compatible in China, 54 per cent of 1,721 respondents were proud of the socialist state, and 56 per cent of 1,510 respondents agreed that in China development should take precedence over basic principles of democratic governance. Significantly, 30 per cent of 1,419 respondents indicated that they had not had their expectations satisfied by the Party's performance. While 56 per cent of 472 respondents were proud to be Party members, only 43 per cent of 1,230 respondents wanted to become one (even though Party membership is a prerequisite to high state and private positions). Whereas 57 per cent of 1,405 respondents were satisfied with the Party's policies and 52 per cent with the Party's social development goals, a paltry 18 per cent of 1,404 respondents found the Party to play a frontline role for their lives and society. Only 16 per cent of 1,709 respondents found the National People's Congress to function well while 23 per cent found its functioning

[211] John James Kennedy, 'Legitimacy with Chinese Characteristics: "Two Increases, One Reduction"', 18 *Journal of Contemporary China* (2009), 391; O'Brien, *supra* n.209.

to be poor. A mere 39 per cent of 1,600 respondents shared high expectations of contributions the National People's Congress could make to Chinese democracy, while 14 per cent had no expectations at all. Seventy-two per cent of 1,369 respondents believed that a main reason democratic development had taken a slow pace in China was its political institutions' intransigence or resistance, and 67 per cent of 1,337 respondents believed that it was necessary to reform the political system. Seventy-five per cent of 1,391 respondents agreed that democracy needed to be set in place in China.[212]

Despite, or perhaps due to, the roles and values elections may play and embody in the implementation and augmentation of democratic governance in China, the Party has not wholeheartedly embraced the contestation that elections necessarily entail, and the low level of support for the Party among the Chinese people certainly would be unlikely to induce the Party to introduce democratic governance in China at a broader, let alone national, level any time soon. It is indisputable that the Party continues to have a dominant role in all state apparatuses.[213] According to William Alford, Cai Dingjian, and Liu Nanping, the notion that the Constitution may be utilised to constrain the executive government or the Party has not been successfully put into practice, the Supreme People's Court has instructed lower courts to not rely on the Constitution, and the task of interpreting the Constitution remains vested in the National People's Congress through its Standing Committee.[214] Rather alarmingly, under Article 110 of the Constitution:

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[212] Min Qi, *Zhongguo zhengzhi wenhua* [*Chinese Political Culture*] (Kunming: Yunnan People's Publishing House, 1989), 33, 35, 98, 99, 101, 64, 66, 83 and 179, as adopted in Yongnian Zheng, 'Development and Democracy: Are They Compatible in China?', 109 *Political Science Quarterly* (1994), 235, 244.

[213] Kenneth Lieberthal, *Governing China* (New York: W.W. Norton, 1995); Murray Scot Tanner, 'The Erosion of Communist Party Control over Lawmaking in China', 138 *China Quarterly* (1994), 382.

[214] William P. Alford, 'A Second Great Wall: China's Post-Cultural Revolution Project of Legal Construction', 11 *Cultural Dynamics* (1999), 193, 196; Cai Dingjian, 'Constitutional Supervision and Interpretation in the People's Republic of China', 9 *Columbia Journal of Asian Law* (1995), 219, 227-29; Liu Nanping, *Opinions of the Supreme People's Court: Judicial Interpretation in China* (Hong Kong: Sweet and Maxwell, 1997), 95.

> Local people's governments at different levels are responsible, and report on their work, to people's congresses at the corresponding level. Local people's governments at and above the county level are responsible, and report on their work, to the standing committee of the people's congress at the corresponding level when the congress is not in session. Local people's governments at different levels are responsible, and report on their work, to the state administrative organs at the next higher level. Local people's governments at different levels throughout the country are state administrative organs under the unified leadership of the State Council and are subordinate to it.[215]

At the local level, while the Organic Law on Local People's Congresses and Local People's Governments as amended in 2004[216] mandates contested elections,[217]

[215] 1982 Constitution, Art.110. Provisions that vest ultimate control in state apparatuses over elected representatives may be found also in Articles 107 and 108 of the Constitution. Article 107 states that '[l]ocal people's governments at and above the county level, within the limits of their authority as prescribed by law, conduct the administrative work concerning the economy, education, science, culture, public health, physical culture, urban and rural development, finance, civil affairs, public security, nationalities affairs, judicial administration, supervision and family planning in their respective administrative areas; issue decisions and orders; appoint, remove and train administrative functionaries, appraise their work and reward or punish them. People's governments of townships, nationality townships and towns carry out the resolutions of the people's congress at the corresponding level as well as the decisions and orders of the state administrative organs at the next higher level and conduct administrative work in their respective administrative areas. People's governments of provinces and municipalities directly under the Central Government decide on the establishment and geographic division of townships, nationality townships and towns.' Article 108 states that '[l]ocal people's governments at and above the county level direct the work of their subordinate departments and of people's governments at lower levels, and have the power to alter or annul inappropriate decisions of their subordinate departments and people's governments at lower levels.'

[216] Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979 and promulgated by Order No.1 of the Chairman of the Standing Committee of the National People's Congress on 4 July 1979, effective as of 1 January 1980, as amended for the fourth time in accordance with Decision on Amending the Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China adopted at the 12th Meeting of the Standing Committee of the Tenth National People's Congress on 27 October 2004.

[217] Ibid., Arts.5 and 22.

it allows for an uncontested election where only one candidate is nominated,[218] with the result that contestation may be controlled by the Party through informal but strong pressure on candidates and their supporters. In 1997, the head of the Party's Central Organisation Department promoted uncontested elections as Party policy, as the Party concluded that contestation was 'not conducive to stability or development, with ill effects impossible to eradicate for years after'.[219] Shen Yaping and Chen Kelin found that more than three-fourths of candidates for nine local people's congresses in Jiangxi province were 'partner candidates', who ran with the objective of not winning any votes, including their own.[220] The Organic Law insists that Party branches constitute a village's 'leadership core', and Party secretaries have been found to enjoy much more power than elected committee directors.[221] In July 2002, the Central Committee and the State Council issued a joint circular endorsing 'concurrent office-holding by village chiefs and Party secretaries' and 'merging the Party branch and the village committee'.[222] Wang argues that self-government by villagers' committees has been promoted by the state in order to foster its legitimacy and capacity to govern in rural areas, and that democratic movement, including generation of democratic consciousness, need not proceed on a large scale but may flourish first in rural areas and at a local level.[223] However, instead of relinquishing control over village affairs,

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[218] Ibid., Art.22.

[219] Zhang Quanjing, 19 August 1997, as cited in Shi Weimin, *Gongxuan yu zhixuan: xiangzhen renda xuanju zhidu yanjiu* [*Open Selection and Direct Election: Research on the Electoral System for Township and Town People's Congresses*] (Beijing: Zhongguo shehui kexue chubanshe, 2000), 312, as quoted in Melanie Manion, 'When Communist Party Candidates Can Lose, Who Wins? Assessing the Role of Local People's Congresses in the Selection of Leaders in China', 195 *China Quarterly* (2008), 607, 619.

[220] Shen Yaping and Chen Kelin, 'Xuanju difang guojia jiguan lingdao ren zhi xiankuang: Jiangxi sheng ji bufen shi xian xiang zhen jianjie xuanju qingkuang de diaocha' ('Electing Local State Leaders: Survey on Indirect Elections at the Jiangxi Provincial Level and in a Sample of Cities, Counties, Townships, and Towns'), in Cai Dingjian, ed., *Zhongguo xuanju zhuangkuang de baogao* [*Report on the Status of China's Elections*] (Beijing: Falü chubanshe, 2002), 100, as cited in Manion, ibid., 621.

[221] He, *supra* n.196; Baogang He, 'The Theory and Practice of Chinese Grassroots Governance: Five Models', 4 *Japanese Journal of Political Science* (2003), 293.

[222] 'Zhonggong zhongyang bangongting guowuyuan bangongting guanyu jinyibu zuobao cunmin weiyuanhui huanjie xuanju gongzuo de tongzhi' ['Circular by General Offices of Party Central Committee and State Council on further improving the work of next round village committee elections'], 14 July 2002, as cited in O'Brien and Han, *supra* n.195, 373.

[223] Wang, *supra* n.202.

the Party-state may use elections and self-government through villagers' committees to masquerade its continued control over rural politics.[224]

VIII. Civil society and its implications for human rights and democratic development in China

Seymour Martin Lipset has argued that a strong participatory civil society is more important than elections in fostering a political system or a political culture in which individuals may mediate powers vested in state authorities.[225] Civil society in China has been a major subject of discussions.[226] As David Strand has found, however, civil society in China still retains the essentials of *guanxi* and seeks supporters from within

[224] Björn Alpermann, 'The Post-Election Administration of Chinese Villages', 46 *China Journal* (July 2001), 45, 47.

[225] Seymour Martin Lipset, 'The Social Requisites of Democracy Revisited', 59 *American Sociological Review* (1994), 1, 12-13.

[226] See, *e.g.*, Heath B. Chamberlain, 'On the Search for Civil Society in China', 19 *Modern China* (1993), 199; Thomas Gold, 'Party-State versus Society in China', in Joyce K. Kallgren, ed., *Building a Nation-State: China after Forty Years* (Berkeley: Center for Chinese Studies, University of California, Berkeley, 1990), 125; Thomas Gold, 'The Resurgence of Civil Society in China', 1 *Journal of Democracy* (1990), 18; David Kelly and He Baogang, 'Emergent Civil Society and the Intellectuals in China', in Robert Miller, ed., *The Developments of Civil Society in Communist Systems* (Sydney: Allen & Unwin, 1992), 24; Philip Huang, '"Public Sphere"/"Civil Society" in China?', 19 *Modern China* (1993), 216; Richard Madsen, 'The Public Sphere, Civil Society, and Moral Community', 19 *Modern China* (1993), 183; Barrett L. McCormick, *Political Reform in Post-Mao China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990); Barrett L. McCormick, 'The Impact of Democracy in China Studies', 40 *Problems of Communism* (1991), 126; Clements Stubbs Ostergaard, 'Citizens, Groups and Nascent Civil Society in China: Towards an Understanding of the 1989 Student Demonstrations', 4:2 *China Information* (1989), 28; Elizabeth J. Perry, 'State and Society in Contemporary China', 41 *World Politics* (1989), 579; Lucian Pye, 'China: Erratic State, Frustrated Society', 69:4 *Foreign Affairs* (1990), 56; Lucian Pye, 'The State and the Individual: An Overview', 127 *China Quarterly* (1991), 443; Mary Rankin, 'Some Observations on a Chinese Public Sphere', 19 *Modern China* (1993), 158; William T. Rowe, 'The Public Sphere in Modern China', 16 *Modern China* (1990), 309; Vivienne Shue, *The Reach of the State: Sketches of the Chinese Body Politic* (Stanford: Stanford University Press, 1998); Dorothy J. Solinger, 'Urban Entrepreneurs and the State: The Merger of State and Society', in Arthur Lewis Rosenbaum, ed., *State and Society in China* (Boulder, CO: Westview Press, 1992), 121; Dorothy J. Solinger, 'China's Transients and the State: A Form of Civil Society?', 21 *Politics and Society* (1993), 91; David Strand, 'Protests in Beijing: Civil Society and Public Sphere in China', 39:3 *Problems of Communism* (1990), 1; Lawrence R. Sullivan, 'The Emergence of Civil Society in China, Spring 1989', in Tony Saich, ed., *The Chinese People's Movement: Perspectives on Spring 1989* (Armonk, NY: M.E. Sharpe, 1990), 126; Frederic Wakeman, Jr., 'The Civil Society and Public Sphere in China', 19 *Modern China* (1993), 108; Gordon White, 'Prospects for Civil Society in China: A Case Study of Xiaoshan City', 29 *Australian Journal of Chinese Affairs* (1993), 63.

the state bureaucracy.[227] In addition, NGOs suffer their own democratic deficits in their formation, networking, agenda setting, and activism, as they are managed, staffed and funded by those who share identical interests and beliefs to the exclusion of dissent. Ngaire Woods notes that NGOs tend to be assumed to act in an optimal and objective manner:

> Yet NGOs are a vast and largely unregulated spectrum of organizations – some legitimate, some self-serving and corrupt. … NGOs themselves need to be subjected to standards of accountability and good governance. Accountability, for example, has often meant NGOs working in developing countries being answerable to donors in the industrialized countries. Yet good governance surely requires that these NGOs become accountable to those most affected by their work and on whose behalf they are advancing claims.[228]

While rights assessment, evidence documentation and advocacy by NGOs serve important and laudable purposes, objectives and results, their reasoning and judgments are often coloured by a lack of objectivity and an unwillingness to appreciate that a person's, a group's or a society's practices, policies, preferences, priorities and decision-making processes may be informed by traditions and resources other than liberal discourses of human rights or democracy. Peerenboom observes that reports issued by human rights NGOs

> generally suffer from a cursory or one-sided presentation of facts, the lack of citation to sources for factual claims, reliance on hearsay evidence and unconfirmed information, and no or little legal analysis,

[227] David Strand, *Rickshaw Beijing* (Berkeley: University of California Press, 1989), 98-120.
[228] Ngaire Woods, 'Good Governance in International Organizations', 5 *Global Governance* (1999), 39, 45.

> with citations to relevant PRC or international law as rare as a snowman in the tropics. Most reports dismiss summarily the arguments of the government and prosecutors about violations of PRC law, underestimate the complexity of the legal issues involved, and assume an expansive and liberal interpretation of civil and political rights that is often contested as a matter of international law. They rarely attempt to place the individual cases selected within a broader comparative, historical, economic, or political context or include any statistical analysis that would give any indication of the representativeness of the cases.[229]

Methodological flaws in empirical and theoretical studies have led critics of the human rights situation in China to assess China by a double standard, not only *vis-à-vis* developed States but also developing States and other emerging powers such as India. Peerenboom finds that China in fact has managed to do quite well against all indicia of good governance, especially when compared with States with a similar level of economic development and wealth,[230] and that economic development is positively correlated with protection of civil, political, economic, social and cultural rights, government efficacy, observance of the rule of law, and measures against corruption.[231] Even though China's Constitution does not contain directly justiciable

[229] Randall Peerenboom, 'Assessing Human Rights in China: Why the Double Standard?', 38 *Cornell International Law Journal* (2005), 71, 98.
[230] Ibid., 125.
[231] Randall Peerenboom, 'Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia', 15 *Duke Journal of Comparative and International Law* (2004–2005), 75; Peerenboom, *supra* n.175, 191-94, 197-99 and 201. See also Clair Apodaca, 'Measuring Women's Economic and Social Rights Achievement', 20 *Human Rights Quarterly* (1998), 139; Alberto Chong and Cesar Calderón, 'Causality and Feedback between Institutional Measures and Economic Growth', 12 *Economics & Politics* (2000), 69; Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations across Nations*, 2nd ed. (Thousand Oaks, CA: Sage Publications, 2001), 248 and 251; William H. Meyer, 'Human Rights and MNCs: Theory versus Quantitative Analysis', 18 *Human Rights Quarterly* (1996), 368; Wesley T. Milner, David Leblang, Steven C. Poe, and Kara Smith, 'Providing Subsistence Rights at the End of the Twentieth Century: Do States Make a Difference?', in Sabine C. Carey and Steven C. Poe, eds., *Understanding*

rights[232] and Chinese citizens do not enjoy *habeas corpus* protection, they may be able to challenge decisions through administrative channels.[233]

On occasions where NGOs refer to international law, they tend to premise their findings on the assumption that China's practices, policies and decisions violate international law, even if China may not even have ratified the particular human rights treaty that they seek to rely on (such as the ICCPR). China's refusal or disinclination to ratify a human rights treaty is taken as non-compliance with international human rights norms or indicator of its non-readiness or unwillingness to accept its roles and responsibilities as a responsible international actor.

However, there is no obligation under international law on the part of a State to accede to a treaty; a decision to ratify and a decision to not ratify a treaty are prerogatives of a State. Even within the European Union that is often regarded as exemplifying the diminution of State sovereignty, a Union treaty requires the ratifications of all 28 Member States for it to come into force. Furthermore, until they mature as norms of customary international law, provisions that inhere in a bilateral or multilateral treaty entail international legal *obligations* between the contracting parties only and do not form part of the general corpus of international *law*.[234] The distinction is important as different States and their legal systems treat their treaty obligations and customary/general international law differently; a State may withdraw from a treaty but not a customary norm or a general principle of international law (save deviation leading to the creation of a new customary norm).[235] The distinction also helps correct the misconception that numerous ratifications of a

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Human Rights Violations: New Systematic Studies (Aldershot: Ashgate, 2004), 110, 119; Neil J. Mitchell and James M. McCormick, 'Economic and Political Explanations of Human Rights Violations', 40 *World Politics* (1988), 476, 497.

[232] Shen Kui, 'Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case"', 12 *Pacific Rim Law and Policy Journal* (2003), 199, 208.

[233] Peerenboom, *supra* n.229, 88.

[234] Being a multilateral treaty, the United Nations Charter itself entails international legal obligations only, one of which is to respect the principles and norms of international law.

[235] For an interesting discussion as to whether a State may withdraw from a norm of customary international law, see Curtis A. Bradley and Mitu Gulati, 'Withdrawing from International Custom', 120 *Yale Law Journal* (2010), 202.

treaty equate or constitute maturation of obligations it contains as customary norms or the treaty as a universal treaty. Indeed, under the principle of the persistent objector, a State may object to being bound by a norm of customary international law.[236] As Chapter II discussed, for many developing States, State sovereignty represents the ultimate bulwark against human rights violations. To impose a quasi-obligation on a State to accept a human rights norm or ratify a human rights treaty because other States have done so betrays both the principle of State sovereignty and that of popular sovereignty.

Critics of China's human rights record also point to its assumed non-compliance with the spirit and letter of the Universal Declaration of Human Rights ('UDHR'). As noted in Chapter II, James Crawford argued in 1994 that a customary right to democratic governance could be discerned from the UDHR and the ICCPR,[237] while failing to produce evidence of the general, consistent and widespread State practice accompanied by the requisite *opinio juris*, particularly in Asia that is the largest continent with the largest population, and forgetting that ratification of a treaty alone does not evince State practice.[238] Superficial reliance on the UDHR and human rights treaties betrays a lack of understanding of their nature

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[236] See *Asylum Case* (*Colombia* v. *Peru*), *ICJ Reports* 1950, 266; *Fisheries Case* (*United Kingdom* v. *Norway*), *ICJ Reports* 1951, 116; cf. *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands*), *ICJ Reports* 1969, 3, 38-39. Prosper Weil argues that the principle of the persistent objector is integral to the stability of the current international legal order underlain by State consent: 'The classic theory of custom depends on a delicate, indeed precarious, equilibrium between two opposite concerns: on the one hand, to permit customary rules to emerge without demanding the individual consent of every state; on the other hand, to permit individual states to escape being bound by any rule they do not recognize as such … It is this opportunity for each individual state to opt out of a customary rule that constitutes the acid test of custom's voluntarist nature. … It is this equilibrium that is threatened today. For the past several years, the degree of generality required of a practice, to enable it to serve as the basis of a customary rule, has been steadily diminished, while, on the contrary, the binding character of such a rule once formed is being conceived of as increasingly general in scope. The result is a danger of imposing more and more customary rules on more and more states, even against their clearly expressed will': 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* (1983), 413, 433-34. For a discussion of the principle, see Ted L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard International Law Journal* (1985), 457.

[237] James Crawford, 'Democracy and International Law', 64 *British Year Book of International Law* (1994), 113.

[238] Ibid., 121-22.

and impact. Hersch Lauterpacht was particularly sceptical of the UDHR as a document entailing any legal value or significance.[239] In fact, Lauterpacht believed that the UDHR was equally devoid of moral force, given the vagueness and flaws of its provisions and the *intended* lack of real action on the part of almost all States in implementing the stated rights.[240] Lastly, the UDHR, it must be remembered, was formulated and proclaimed only by States that existed at the time, about a quarter of the number of States today, many of which continued thereafter to exercise colonial domination and subjugation over territories and peoples in Asia and Africa, some with recourse to force.

In addition, as Jochen von Bernstorff has pointed out, '[p]ure textualization of human rights in political or legal documents without normative concretization and practical realization leads to a "hypertrophy" of the symbolic dimension of rights. After 1948 practically every new national constitution included a human rights catalogue, many inspired by the Declaration. This textual "façade" can crate the illusion of enshrined rights, while obstructing consistent debate about structural impediments for their implementation. … It serves as a cloak of legitimacy for those who are in a position of power.'[241] Excessive and superficial reliance on a State voting on the UDHR (as it was adopted by the General Assembly by consensus) and ratifying certain human rights treaties neglects a real possibility that a primary rationale for a State doing so is that it may then be able, through its appearance as a law-supporting international citizen, to forestall criticism of its *actual* malpractices of governance and violations of human rights and freedoms within its territory. As Oona Hathaway has demonstrated, many States ratify a human rights treaty with no

[239] Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons, 1950), 416-17.
[240] Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law', 19 *European Journal of International Law* (2008), 903, 908-9.
[241] Ibid., 909, citing Martti Koskenniemi, 'The Effect of Rights on Political Culture', in Philip Alston, ed., *The European Union and Human Rights* (Oxford: Oxford University Press, 1993), 99; Marcelo Neves, 'The Symbolic Force of Human Rights', 33 *Philosophy & Social Criticism* (2007), 411, 432.

intention of abiding by it, and human rights violations may worsen post-ratification.[242] The lack of meaningful enforcement of international human rights treaties is precisely one principal reason why, in appraising the relationship between a State's exercise of sovereignty and international human rights law, one must explore and understand the process by which municipal human rights laws come into existence and become entrenched in the State's legal and political systems and its society. I have argued elsewhere that reference to international law and foreign laws without a principled basis undermines the (international) rule of law. It demonstrates not reverence, but cavalier disregard, for the meaning, content, implications and development of international law.[243] The underlying values of the rule of law, Paul Stephan has stated, may actually be enhanced if a judiciary specifically and consistently disavows any application of international law[244] (which, one should remember, is not given democratic assent by the citizens of a State, and exemplifies the flaws of resting popular sovereignty on international law – and vice versa).

Another reason compliance is not an optimal approach to understanding the relationship between China and international law can be stated thus.[245] There is an undeniable interest for a State to protect or further its reputation as a responsible international actor by abiding by international law and the international agreements into which it has entered. However, the size and power of a State are material variables when it comes to assessing the impact of reputation on a State's compliance or non-compliance with international law. One only need recall the periodic threats on the part of the United States and the European Union during the 1990s of opposing China's application for WTO membership and of trade embargoes or punitive trade

[242] Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale Law Journal* (2002), 1935; Oona A. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law', 72 *University of Chicago Law Review* (2005), 469.
[243] Phil C.W. Chan, 'Keeping up with (which) Joneses: A Critique of Constitutional Comparativism in Hong Kong and its Implications for Rights Development', 13 *International Journal of Human Rights* (2009), 307.
[244] Paul B. Stephan, 'Rethinking the International Rule of Law: The Homogeneity Fallacy and International Law's Threat to Itself', 4 *Jerusalem Review of Legal Studies* (2012), 19, 30-34.
[245] See Chapter I for a detailed discussion about the shortcomings of a compliance-model in understanding China and international law.

tariffs on grounds of China's poor human rights record or its treatment of Tibet; ultimately, the threats did not materialise. The importance that a State assigns to a particular agreement, or a particular legal norm, also varies, even though 'formal models of reputation rarely reflect this fact because it complicates the mathematics considerably and often distracts the readers from the point that they are trying to make'.[246] A compliance rate *averaged* by variant levels of compliance is not the same as a *unitary* compliance rate, and it affords little in understanding a State's general approach to international law. Lastly, the impact a State's non-compliance may have on its future capacity to enter into an agreement within the same regime should not be overstated. As can be seen from the amount of international pressure brought to bear on China to ratify the ICCPR, the United Nations, other States, NGOs and the media would consider it a milestone in the international human rights movement if China were to ratify the treaty, even though China is more unlikely than not to improve its human rights record on account of such ratification and is likely to violate its obligations and commitments the treaty commands.

Despite the ideology of human rights scholarship and activism and the proliferation of human rights treaties and declarations, human rights are not inherent in a person because of his or her being a human; they are recognised under particular national, historical, political, economic and socio-cultural circumstances at any given time and then, and only then, defined and protected by law, including national constitutions and laws and international law, all of which evolve over time. Whether or not we like it, recognition and protection of human rights, for them to have legal substance and binding force, demand and require that the framework of international law be respected and preserved. As Belden Fields and Wolf-Dieter Narr have pointed out, '[p]eople may be born with the potential for rights; they may long for them consciously or unconsciously; and they may struggle for them. But human rights are

[246] George W. Downs and Michael A. Jones, 'Reputation, Compliance, and International Law', 31 *Journal of Legal Studies* (2002), S95, S108.

norms and practices which can be achieved only if proper historical circumstances are created.'[247] The religious, gender, racial, and sexual orientation persecutions and equality movements highlight the importance that '[i]f people are not aware of the historical and contextual nature of human rights and not aware that human rights become realized only by the struggles of real people experiencing real instances of domination, then human rights are all too easily used as symbolic legitimizers for instruments of that very domination.'[248] Many human rights scholars and activists presuppose that by shaming a State or a government, its people or the international community would then pressure the State or the government for political reform, or that the government would do so under pressure.[249] As Alan Wachman has noted, shaming China for its human rights record has not led to improved human rights practices.[250] In fact, Cooper Drury and Yitan Li have observed, China tends to respond to foreign pressure not with improved human rights practices but with less accommodation, and to positive rhetoric with more favourable concessions.[251] It is a disservice on the part of human rights scholars and activists to the development of national and international human rights law to simplify or distort human rights as something that ought to be taken for granted, with the result that implementation on the ground and negotiations within a State and among States become more difficult to attain satisfactory outcomes and lasting positive impact.

Instead, through persuasion and internalisation of international norms, behavioural changes on the parts of a State and of its people are more likely to occur and be more durable, and international NGOs have important roles to play in the protection of human rights and the promotion and implementation of democratic practices in a State. Jing-bao Nie argues that criticism about international NGOs

[247] A. Belden Fields and Wolf-Dieter Narr, 'Human Rights as a Holistic Concept', 14 *Human Rights Quarterly* (1992), 1, 4-5.
[248] Ibid., 5.
[249] Wachman, *supra* n.29, 260.
[250] Ibid., 262.
[251] A. Cooper Drury and Yitan Li, 'U.S. Economic Sanction Threats against China: Failing to Leverage Better Human Rights', 2 *Foreign Policy Analysis* (2006), 307.

seeking to transplant or impose liberal norms on a populace despite its preferences or wishes should be taken seriously, but 'it is an entirely different matter if people in non-Western societies want to use Western values in their own struggles against injustice and inequality'.[252] Cecilia Milwertz and Wei Bu have demonstrated the gains national and sub-national women's rights NGOs in China have made through engagement with international NGOs, with its generation and diffusion of knowledge, insights and perspectives on traditional practices and human rights norms, such that in less than a decade women's rights in China have metamorphosed as human rights and domestic violence transformed from a non-issue to a health concern.[253] The process has been particularly encouraging as 'the construction of new knowledge has not been imposed from without as a top-down education process but has instead been shaped by the activists themselves in the context of international interactions'[254] that have enabled the activists to join 'a global emancipatory epistemic community'.[255]

IX. Conclusion

Suppression of human rights and fundamental freedoms as well as subversion of democratic practices, in overt and covert ways, can be found in all States, including liberal States with established constitutional and legal frameworks for human rights and democracy. Yet criticism about China's human rights practices and lack of democracy has been most vocal and sustained. While I do not suggest that China has a good human rights record or its government does not suppress dissent, I argue that such criticism stems partly from Western States and scholars' apprehension about China's rise and how China's economic development, coupled with its political

[252] Jing-bao Nie, 'Feminist Bioethics and the Language of Human Rights in the Chinese Context', in Rosemarie Tong, Anne Donchin, and Susan Dodds, eds., *Linking Visions: Feminist Bioethics, Human Rights, and the Developing World* (Lanham, MD: Rowman & Littlefield, 2004), 73, 78.
[253] Milwertz and Bu, *supra* n.160.
[254] Ibid., 134.
[255] Ibid.

importance and military capabilities, may alter the course of development of human rights norms and liberal democracy they have been aggressively putting forward. As the next chapter shows in respect of Tibet, China's economic development itself constitutes a focal point of criticism as to how it undermines traditional Tibetan culture and practices, while China's traditional culture, practices, norms and values are criticised for impeding the development and protection of human rights and democratisation.

A human rights norm has many facets, most important of which are its requirements that the people actually recognise its existence and validity in the light of their culture and that their human agency be respected. While a culture *in se* does not have any rights, a people, be they the majority or a minority of a State, who adhere to their particular cultural norms and values have a right to enjoy their own culture. The Preambles to the ICCPR and the ICESCR recognise that 'the ideal of free human beings … can only be achieved if conditions are created whereby everyone may enjoy his … cultural rights'.[256] Common Article 1 of the two Covenants state that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[257] Article 15(1)(a) of the ICESCR, which China ratified in 2001, states that '[t]he States Parties to the present Covenant recognise the right of everyone to take part in cultural life',[258] while Article 15(2) states that '[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.'[259] The most important component of a human rights norm is that it may be exercised *freely*. Transplantation of Western ideals and interpretations of human rights and freedoms, including the

[256] ICCPR, Preamble; ICESCR, Preamble.
[257] ICCPR, Art.1; ICESCR, Art.1.
[258] ICESCR, Art.15(1)(a).
[259] Ibid., Art.15(2).

rule-of-law model, without due understanding of and regard for other States' and their peoples' cultures are likely to face opposition not only from States to such ideals and interpretations, but also, and more fundamentally, from peoples forced to disregard their own cultural norms and values.

Human rights protection within a constitutional and legal framework is not a monopoly of liberal States. While China emphasises that developing States and their peoples need – or choose – to develop and pursue economic, social and cultural rights even if their civil and political rights may need to take a back seat, and that the understanding, development and implementation of human rights must take into account the particular historical, political, economic, social and cultural characteristics of a State and its people, it has recognised and guaranteed various human rights and freedoms in its territory through its Constitution and laws, including workers' rights (which have developed partly as a result of the government's suppression of dissent on Tiananmen Square in June 1989), women's rights (despite the patriarchal nature of Chinese society), and privacy rights (despite China's communitarian culture).

Meanwhile, China's economic development, frequently discussed among international policymakers and in the media, has overshadowed its implementation of political reform, with most Western States, scholars (with the exception of a few Western scholars engaged in Chinese studies) and media assuming that China is devoid of any form of democratic practice. In fact, China has adopted laws since 1979 encouraging self-government in villages across the country through villagers' committees and, at and above county level, through local people's congresses and local people's governments. Members of villagers' committees, local people's congresses and local people's governments are elected directly by their constituents who have the power to recall them. Elected representatives are required to convey their constituents' opinions and demands and make suggestions to the government. The periodic elections and the power to recall have enabled the Chinese people a

greater say in affairs central to their lives and local areas, and helped instil in them a sense of belonging, ownership and agency *vis-à-vis* their village, local, provincial and, ultimately, national governments.

Instead of a top-down approach to promoting the development of human rights and democratic practices in China and elsewhere, a bottom-up approach is more preferable and effective – other States, international organisations, and international NGOs should engage with domestic NGOs as well as the government. Through such engagement, all parties may learn from and acquire diverse experiences; awareness of human rights norms may be able to be generated and internalised both by the government and among the people; their attitudes to traditional norms, values and practices may evolve for the better; and international human rights law may be improved and acquire greater legitimacy. As the Chinese people become increasingly affluent and aware of their rights on the basis of law, human rights and democratic practices, one may hope, will continue to develop more substantively.

Chapter V: Self-Determination in Schizophrenia: Revisiting China's Positions on Hong Kong, Taiwan, and Tibet (and Kosovo / East Timor)

I. Introduction

The fact that China, with the aid of international law, was reduced to a semi-colonial entity forced to cede parts of its territory and surrender certain sovereign rights to other States as a result of military losses during the nineteenth century, as Chapter III detailed, has resulted in a constant state of anxiety on the part of the Chinese leadership whenever China's territorial integrity is threatened or even questioned. As self-determination has evolved as 'one of the essential principles of contemporary international law' with 'an *erga omnes* character',[1] is mentioned whenever one argues for the demise or diminution of State sovereignty, and is construed as a right of a people and not of a territory, China's unease with self-determination and how self-determination might potentially lead to its dismemberment, as happened in the Soviet Union and Yugoslavia, is further heightened. China also regards discourses of self-determination as renewed Western attempts to subvert its State sovereignty and territorial integrity, and has taken a strong position on how self-determination should be recognised and implemented in China and generally.

However, China's strong position should not automatically be construed as its denial or rejection of self-determination as a normative principle or as a legal right. In fact, China has developed certain systems of autonomous governance within its territory in ways that complement and perhaps even augment self-determination in its current international form. While Judge Dillard in his separate opinion in the

[1] *East Timor* (*Portugal* v. *Australia*), *Judgment*, *ICJ Reports* 1995, 90, 102.

International Court of Justice ('ICJ') advisory opinion in *Western Sahara*[2] stated that '[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people',[3] self-determination requires a delineated territory for it to be exercised and for the self to be determined, and there are criteria which a territory must fulfil in order to have a valid claim to self-determination. Self-determination in international law is still fundamentally statist.[4] China's approaches to self-determination in its exercise of State sovereignty illustrate how it may be capable of influencing the development of international law in an area that has received one of the most sustained concerns. As China defends its approaches to human rights and democratic norms and implements them domestically within the confines of Chinese culture, Party-state politics, and increasing local demand for political reform, as the preceding chapter explored, the ways in which China has addressed some of its peoples' claims to self-determination further highlight that a universalist conception of international law may not reflect legal or factual reality.

This chapter first examines how self-determination has evolved as a principle and a right under international law and in Chinese laws and practices, including the manners in which it may be exercised as well as its ambiguity and fragility. In particular, it explores issues of self-determination that Hong Kong, Taiwan, and Tibet present and illuminate. It also discusses how China, other States and the international community have facilitated or undermined self-determination in the three territories, and the roles international law has played in creating the situations in which these territories and their peoples now find themselves. In connexion with China's approaches to self-determination within its territory, this chapter also explores its

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[2] *Advisory Opinion*, *ICJ Reports* 1975, 12.

[3] Ibid., per Judge Dillard (sep. op.), 122. Marc Weller argues that 'there has rarely been a pronouncement more dangerously mistaken than this one': 'The Self-determination Trap', 4 *Ethnopolitics* (2005), 3, 3.

[4] Richard Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)', in James Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988), 18, 24-27; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), 328.

attitudes to self-determination in territories beyond its mountains and shores – notably, Kosovo and East Timor – that shed light on our understanding of self-determination, State sovereignty, and international law.

II. Self-determination in international law: Origins, definitions, and implications

A territory's claim to self-determination must be established in law with reference to its historical context, and not through what one believes to be morally just or politically expedient. As John Dugard has noted, '[m]uch of the support for the principle of self-determination as a legal right and as a peremptory norm is couched in generalisations and little attempt is made to define the content of the right with any precision.'[5] Alfred Rubin argues that, on matters of self-determination, 'resolutions of the United Nations General Assembly and other statements by statespeople unconcerned with rules that do not apply to themselves immediately – or, under various rationales, to their own countries' minorities or local majorities – are regarded as statements of at least inchoate natural law.'[6] While self-determination is now regarded as an inherent right of all peoples, the processes and manners in which a people's right to determine their ways of life and political destinies was suppressed

[5] John Dugard, *Recognition and the United Nations* (Cambridge: Cambridge University Press, 1987), 160. Catriona Drew describes self-determination as 'plagued by an excess of indeterminacy both in terms of scope and content': 'The East Timor Story: International Law on Trial', 12 *European Journal of International Law* (2001), 651, 658. For example, Hurst Hannum states that '[w]ithout entering into the debate of whether the right of self-determination is *jus cogens*, it would seem difficult to question its status as a "right" in international law. While General Assembly resolutions do not of themselves make law, the unanimous adoption of Resolutions 1514, 2625, and numerous others reiterating the "right" to self-determination is significant': *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 45. Alexander Orakhelashvili asserts, in circularity, that '[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance': *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 51.

[6] Alfred P. Rubin, 'Secession and Self-Determination: A Legal, Moral, and Political Analysis', 36 *Stanford Journal of International Law* (2000), 253, 254.

by Western powers through colonialism are well documented.[7] The notion of a right to self-determination was one treated with derision by international lawyers of the past.[8] It is untenable to suggest that past events are immaterial. The circumstances and processes in which the right has evolved constitute an important legal framework in determining its applicability to and implications for a territory. A claim to self-determination that does not have a proper legal basis undermines the claim, and self-determination as a legal right.

Due to the roles nationalism played in bringing about the First World War, the Covenant of the League of Nations proclaimed that '[t]o those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.'[9] Foreign rule of peoples continued to be forborne, and the provision applied only to colonies of enemy States. As Gerrit Gong has pointed out, '[b]ecause protectorates over "uncivilized" countries remained an affair between the occupying European state and the rest of the civilized states of the world, the "sacred trust of civilization" provided a mechanism for the occupying state to be granted legal privileges and duties (*vis-à-vis* the Family

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[7] See, *e.g.*, Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999), 1; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Michael Byers and Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003); Koskenniemi, *supra* n.4; Martti Koskenniemi, 'International Law and Imperialism', in David Freestone, Surya Subedi, and Scott Davidson, eds., *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures* (The Hague: Kluwer Law International, 2002), 197; Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Review of International Affairs* (2004), 197.

[8] In 1920 when called upon by the League of Nations to advise on the legal status of the Aaland Islands, the International Commission of Jurists rejected outright the notion of a positive right to self-determination: 'The Aaland Islands Question: Report of the Committee of Jurists', *League of Nations Official Journal: Special Supplement* (1920), 3.

[9] Treaty of Versailles, signed at Versailles on 28 June 1919, Section I, Art.22(1).

of Nations) without necessarily extending legal personality to the occupied territory.'[10] The history of the First World War, which led to the Second World War, the intractable problems associated with decolonisation, and the dissolution of the Soviet Union and of States such as Yugoslavia that precipitated the Kosovo crisis, should teach us that 'separations or dissolutions of States do not usually diminish the number of minorities. On the contrary, new minority problems and inter-ethnic conflicts often arise.'[11]

Self-determination began to develop as a legal right after the Second World War, as colonial powers during the war had had to rely on the manpower and resources of their colonies, whose peoples began to question the legitimacy of colonial rule when the colonial powers had failed to defend them from invasion. The United Nations Charter proclaims self-determination as a principle of international law.[12] Chapter XI of the Charter provides for the utmost promotion 'within the system of international peace and security established by the present Charter'[13] – notably the principles of State sovereignty, territorial integrity, and non-intervention – of the interests and well-being of non-self-governing territories with a view to 'the progressive development of their free political institutions'.[14] Independence is not a mandatory objective of Chapter XI, and many colonial powers sought to cling to *status quo ante bellum*.[15] Through numerous rebellions and wars of independence, decolonisation ensued globally, culminating in the 1960 Declaration on the Granting

[10] Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984), 76. The notion that certain territories were the 'sacred trust' of the international community similarly found expression in Article 73 of the United Nations Charter.
[11] Rein Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia', 8 *Chinese Journal of International Law* (2009), 2, 20.
[12] United Nations Charter, Arts.1(2) and 55.
[13] Ibid., Art.73.
[14] Ibid., Art.73(b).
[15] Notably France in Algeria, Indochina (present-day Cambodia, Laos, and Vietnam), Madagascar, Morocco, and Tunisia; the Netherlands in Indonesia; Portugal in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe; the United Kingdom in India (present-day Bangladesh, Burma, Pakistan, and Sri Lanka), Kenya, Malaya (present-day Malaysia and Singapore), Rhodesia, and Yemen.

of Independence to Colonial Countries and Peoples,[16] which declared that '[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[17] The Declaration reaffirmed 'the sovereign rights of all peoples and their territorial integrity'[18] and stated that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'[19] In 1965, the General Assembly adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,[20] which declares that '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State',[21] and that '[a]ll States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.'[22]

Self-determination then found its place in the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). Common Article 1 of the Covenants states that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[23] Self-determination as referred to in common Article 1 relates to

[16] U.N. G.A. Res. 1514(XV) (1960).
[17] Ibid., para.2.
[18] Ibid., para.7.
[19] Ibid., para.6.
[20] U.N. G.A. Res. 2131(XX) (1965).
[21] Ibid., para.5.
[22] Ibid., para.6.
[23] ICCPR, Art.1; ICESCR, Art.1.

efforts at the time for decolonisation and not to dismemberment of existing States. Matthew Saul finds the fact that numerous States have ratified the ICCPR to '[reduce] the need for enquiry' as to whether self-determination is a treaty right or a norm of customary international law.[24] I argue, however, that the provision in the Covenants does not mature as a norm of customary international law simply because the Covenants have been widely ratified, particularly when certain major States continue not to ratify either or both of the Covenants (China *vis-à-vis* the ICCPR and the United States *vis-à-vis* the ICESCR, with the latter's ratification of the ICCPR in 1992 entailing significant reservations). As the ICJ noted in its judgment in *Continental Shelf*[25] between Libya and Malta in 1985, '[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them'.[26]

Common Article 1 was followed by the 1970 Friendly Relations Declaration,[27] which contains an explicit section on the principle of equal rights and

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[24] Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?', 11 *Human Rights Law Review* (2011), 609, 625.

[25] *Continental Shelf* (*Libyan Arab Jamahiriya* v. *Malta*), *Judgment*, *ICJ Reports* 1985, 13.

[26] Ibid., 29-30. As Rosalyn Higgins has pointed out, 'an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*': *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), 22.

[27] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, proclaimed by U.N. G.A. Res. 2625(XXV) (1970). While not without critics (*e.g.*, Gaetano Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 137 *Recueil des cours* (1972–III), 419; Robert Rosenstock, 'The Declaration of Principles of International Law concerning Friendly Relations: A Survey', 65 *American Journal of International Law* (1971), 713), the Declaration has been hailed as 'an outstanding contribution to the strengthening of international legality' (Milan Šahovic, *Principles of International Law Concerning Friendly Relations and Cooperation* (New York: Oceana, 1972), 50) and 'the most authoritative expression of the scope and meaning of the basic principles of today's international legal order' (Christian Tomuschat, 'Yugoslavia's Damaged Sovereignty over the Province of Kosovo', in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth de Vos, and John Dugard, eds., *State, Sovereignty, and International Governance* (New York: Oxford University Press, 2002), 323, 341). In his 1978 Hague Academy Lectures, E. Jimènez de Aréchaga, then President of the ICJ, stated that '[t]his Resolution does not purport to amend the Charter, but to clarify the basic legal principles

self-determination of peoples. The principle was qualified in the same section by the affirmation that '[n]othing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or territory'.[28] In a strong critique of the right to self-determination as empowering peoples, Marc Weller argues that self-determination in fact

> disenfranchises populations. This process of disenfranchisement has traditionally proceeded in five steps. First, self-determination is intrinsically linked with, and deployed to justify, the disenfranchising doctrine of territorial unity. Second, there is the issue of the definition of the object of protection of the right to self-determination

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contained in Article 2. Adopted in these terms and without a dissenting vote, it constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognizing what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members': 'International Law in the Past Third of a Century', 159 *Recueil des cours* (1978–I), 1, 32.

[28] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, The Principle of Equal Rights and Self-Determination of Peoples. The affirmation was reiterated by the World Conference on Human Rights in 1993 in its Vienna Declaration and Programme of Action, adopted by acclamation on 25 June 1993, A/CONF.157/24 (Part I), 32 ILM 1661 (1993). In slightly different language, the Vienna Declaration and Programme of Action, ibid., para.2, states that '[i]n accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, [the right to self-determination] shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind'.

> – that is to say, the definition of the types of 'people' entitled to exercise this right. Third, there is the scope of application of the right to self-determination. … even if a 'people' is designated as a right holder, does this right trump previously existing territorial definitions, or is it exercised within these confines? Then there is the issue of the singularity of implementation of the right – is it a continuous process, or is it a one-time-only event? Finally, there is the problem of the modalities of achieving the point of self-determination.[29]

As Chapter III discussed, in order to reinforce its socialist foundation and anti-imperialistic self-conception, communist China in its early foreign policy-making focused on endorsing national independence movements. It supported decolonisation on the basis of a right to self-determination, even though it was largely precluded from having a formal role in the development of international law on the matter as it was the authorities on Taiwan that represented China within the United Nations at the time. Self-determination has developed in Chinese laws and practices in tandem with its evolution on the international plane. Issues presented by Hong Kong, Taiwan and Tibet, as well as China's approaches to Kosovo and East Timor, illustrate how recognition and implementation of self-determination do not follow a rigid formula, and how China's approaches to self-determination in these territories contribute to the content of the right as well as our understanding of its potential, limits and implications.

III. Self-determination in Chinese laws and practices

[29] Weller, *supra* n.3, 5-6.

a. Hong Kong: A case of (non-)self-determination or *sui generis*?*

As noted in Chapter II, most Western scholars, other than those with an interest in Hong Kong, when discussing self-determination largely dismiss or ignore issues that Hong Kong presents.[30] A notable example could be found in Antonio Cassese's *Self-Determination of Peoples*,[31] where he takes the view that 'the whole cluster of legal standards (the general principle and the customary rules) on self-determination should be regarded as belonging to the body of peremptory norms.'[32] Cassese argues that Hong Kong is not a case where self-determination is relevant,[33] as the people of Hong Kong are Han Chinese,[34] the United Kingdom obtained control and jurisdiction over Hong Kong 'on the basis of a Treaty that provided for a lease and not a cession proper',[35] and the people were meaningfully consulted by the United Kingdom and the colonial local government, a finding he supports by reference to a statement of the United Kingdom.[36] Cassese lauds the outcome China and the United Kingdom reached for Hong Kong in 1984 as 'a useful model for dealing with disputed territories'.[37] One might argue that Hong Kong also is a bygone case and, when compared with Tibet (or Kosovo or East Timor), has fared well as it continues to be a major international financial centre further enhanced by its access to the Chinese market and receipt of Chinese investment in its economy, while maintaining autonomous governance.

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[30] Weller, ibid., 7, acknowledges that '[t]his doctrine is, however, displaced in certain circumstances, for instance in cases of territorial change that are anticipated in historical arrangements such as the hand-over of Hong Kong', albeit without further elaboration.

* This sub-section draws on my article 'Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage', *Singapore Journal of Legal Studies* [2006], 285-311. I declare and affirm that the article was written solely by me and no part of the article embodies any work in fulfilment of a university degree, diploma or certificate.

[31] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1999).

[32] Ibid., 140.

[33] Ibid., 79-80, fns.34 and 36.

[34] Ibid., 80, fn.36.

[35] Ibid.

[36] Ibid., 79-80, fn.34.

[37] Ibid., 357.

I argue that a primary reason Hong Kong is neglected in legal literature on self-determination is that it uncomfortably exemplifies the reality that self-determination, despite its supposed purity as a norm of *jus cogens* requiring uniform application, is not immune to selective reasoning and application of international law by Western States, policymakers and scholars. Neglect or disregard of historical circumstances underlying a territory's claim to self-determination jeopardises the integrity of the norm and of international law generally. As Judge Elaraby in his separate opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[38] stated in respect of the Palestinian Territory, '[a]n historical survey is relevant to the question posed by the General Assembly, for it serves as the background to understanding the legal status of the Palestinian Territory on the one hand and underlines the special and continuing responsibility of the General Assembly on the other. This may appear as academic, without relevance to the present events. The present is however determined by the accumulation of past events and no reasonable and fair concern for the future can possibly disregard a firm grasp of past events.'[39]

In 1842 after its defeat in the Opium War, China ceded Hong Kong Island to Great Britain in perpetuity under the Treaty of Nanjing, and in 1860 after its defeat by Great Britain and France ceded Kowloon Peninsula and Stonecutters Island to Great Britain in perpetuity under the 1860 Treaty of Beijing. It was the 1898 Treaty of Beijing, under which Great Britain leased from China for 99 years the segment of present-day New Territories and all outlying islands, that gave rise to the misconception that the United Kingdom was legally bound to return the entirety of Hong Kong to China on the eve of July 1997. Although China under the imperial, republican, and communist governments considered the three treaties to be unequal treaties, as the use of force in acquiring territory was lawful during the nineteenth

[38] *Advisory Opinion*, *ICJ Reports* 2004, 136.
[39] Ibid., 249 (sep. op. Elaraby).

century, under the principle of the intertemporal law, the three treaties were validly entered into and remained binding notwithstanding subsequent changes in international law. While international law admits of the doctrine of *rebus sic standibus*, China was not in a position to argue that a fundamental change of circumstances (regarding its regime, governance or society) enabled it to amend, repudiate, terminate or withdraw from any treaty that established a boundary.[40]

When the Charter came into force in 1945, Hong Kong was a colony of the United Kingdom and listed by the United Nations as a non-self-governing territory possessing the right to self-determination. Shortly after the People's Republic of China ('PRC') government replaced the authorities on Taiwan as the representative government of China in the United Nations in October 1971,[41] China demanded removal of Hong Kong (and Macau, then a Portuguese colony since reverted to China's sovereignty in 1999) from the list, with China's Ambassador to the United Nations stating that 'the settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories.'[42] China's demand was met and encountered no protest from the United Kingdom other than a statement that it considered such removal 'in no way affects the legal status of Hong Kong'.[43] China and the United Kingdom eventually entered into negotiations that culminated in the 1984 Sino-British Joint Declaration.[44] The Joint Declaration stated that sovereignty over Hong Kong was to be restored to China as of 1 July 1997[45] and that Hong Kong 'will enjoy

[40] Vienna Convention on the Law of Treaties, Art.62(2)(a).
[41] U.N. G.A. Res. 2758(XXVI) (1971).
[42] Letter of China's Ambassador Huang Hua to Chairman of the Special Committee, 10 March 1972, reprinted in David A. Jones, Jr., 'A Leg to Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgement of Individual Rights and Local Autonomy', 12 *Yale Journal of International Law* (1987), 250, 255.
[43] Letter of the United Kingdom's Permanent Representative to the United Nations to the United Nations Secretary-General, 19 December 1972, as quoted in Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in regard to the Right of Self-Determination', 66 *British Year Book of International Law* (1995), 283, 291.
[44] Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong, 23 ILM 1366 (1984).
[45] Ibid., Art.2.

a high degree of autonomy, except in foreign and defence affairs which are the responsibility of the Central People's Government.'[46] The Joint Declaration requires that post-colonial Hong Kong's legislature be constituted by elections,[47] which necessitated that Hong Kong's political structure in 1984 be substantially reformed, as direct elections were not introduced during British colonial rule until its dying years.[48]

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[46] Ibid., Art.3(2).

[47] Ibid., Annex I: Elaboration by the Government of the People's Republic of China of its Basic Policies regarding Hong Kong, Art.1.

[48] The process by which the United Kingdom consulted the people of Hong Kong about their political future was one Yash Ghai describes as shameful and manipulative: 'Putting the Cat among the Pigeons: The Politics of the Referendum', 34 *Hong Kong Law Journal* (2004), 433, 444. After the Joint Declaration had already been concluded with China, the United Kingdom set up a special assessment office to collect public views on the Joint Declaration for *the United Kingdom's* consideration, while rejecting a referendum. Ian Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong: Oxford University Press, 1989), 2, notes that '[p]otential respondents were warned, however, that the agreement had to be considered as a whole, that it could not be amended in part, and that the alternative to its acceptance was a unilateral plan for the future of the territory drawn up by the Chinese government.' In July 1984, the colonial local government issued a *Green Paper* indicating an intention 'to develop progressively a system of government the authority for which is firmly rooted in Hong Kong, which is able to represent authoritatively the views of the people of Hong Kong, and which is more directly accountable to the people of Hong Kong': Hong Kong Government, *Green Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Government Printer, 1984), para.7(a). It proposed that in 1985 and in 1988 a number of seats in the Legislative Council would be open to election by an electoral college as well as to indirect election through a limited franchise referred to as functional constituencies (ibid., para.25) based on 'people's common interests, such as commerce, industry, law, medicine, finance, education, trade union, etc.': ibid., para.22. In November 1984, the colonial local government issued a *White Paper* concluding that '[p]ublic reaction was generally in favour of the aims of the *Green Paper* and the gradual and progressive nature of the proposals made in it. The need to ensure that the prosperity and stability of Hong Kong are not put at risk by introducing too many constitutional changes too rapidly was widely recognised': Hong Kong Government, *White Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Government Printer, 1984), 4. The consultation remains of pivotal relevance to Hong Kong's continuing struggle for universal suffrage. As Albert H.Y. Chen has stated, '[t]he force of originalism as one of the legitimate and most important modes of constitutional interpretation need not and cannot be denied. The real question is how originalism is to be applied. … originalism does not necessarily mean giving effect to the subjective intent of the framers and adopters of the constitution. How the constitutional text was understood by members of the community at the time of the enactment of the constitution can be an even more important consideration. In the case of the Basic Law, the relevant members of the community would include the people of Hong Kong. Hence how they understood the wording and promise of the Basic Law in the late 1980s and 1990 … does matter. And since much of the content of the Basic Law simply reproduces the text of [the] Sino-British Joint Declaration, how the people of Hong Kong understood the wording and promise of the Joint Declaration in 1984 also matters': 'The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives', 30 *Hong Kong Law Journal* (2000), 380, 421.

China considered that the United Kingdom was seeking to establish a democratically elected government in Hong Kong in order to undermine its authority in Hong Kong (Michael B. Yahuda, *Hong Kong: China's Challenge* (London and New York: Routledge, 1996), 74),

Being a norm of *jus cogens*, self-determination cannot be denied at the will of a colonial power or of a State wishing to regain control over a territory it has ceded. The United Nations General Assembly has stated that 'in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the UN Charter, the administering Power concerned should continue to transmit information under Article 73(e) of the UN Charter with respect to that Territory.'[49] The General Assembly made no such decision in respect of Hong Kong, and Hong Kong thus continued after 1971 to remain a non-self-governing territory.[50] The fact that China proffered a competing claim of sovereignty over Hong Kong does not alter the right of Hong Kong to self-determination that must, at the very least, be ascertained through genuine consultation

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and opposed the consultations and insisted that Hong Kong's political structure be altered only in ways that 'converged' with the Joint Declaration (Robert Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial Retreat* (London: John Murray, 1993), 182-83. Cottrell, ibid., 183, opines that '[t]he accommodation of "convergence" produced perhaps the most regrettable action of the British and Hong Kong governments during this difficult period: the publication of a further *Green Paper* on representative government in 1987 [Hong Kong Government, *Green Paper: The 1987 Review of Developments in Representative Government* (Hong Kong: Government Printer, 1987)], which was designed to dampen earlier hopes for a brisk pace of democratization, not by an admission of China's successful intransigence, but by a farrago of leading questions designed to insinuate that the change of heart had come from Hong Kong itself.'). The United Kingdom in turn stated that it was in charge of Hong Kong only until 30 June 1997. In other words, its position was that it would be neither capable of nor responsible for dealing with what might happen to Hong Kong thereafter. Such a position was contrary to international law, which prescribes that '[a]ny change of sovereignty over a territory without any exercise of the right of self-determination by the people of that territory does not absolve the old or the new sovereign of the responsibility to protect the right of self-determination of the people of that territory': McCorquodale, *supra* n.43, 331. McCorquodale, ibid., 329, explains that 'under both treaty and customary international law, the right of self-determination of the people of Hong Kong is not limited by any treaty. Indeed, the action of the United Kingdom in entering into a treaty with China without allowing the people of Hong Kong to exercise their right of self-determination is a breach of the United Kingdom's treaty obligations (under the International Human Rights Covenants) to protect the right of self-determination. Because common Article 1 requires all States at all times to "facilitate realization of and respect for the right of peoples to self-determination", irrespective of the dependency of those peoples on that State, the United Kingdom retains a legal obligation to the people of Hong Kong in regard to their right of self-determination after 1997.'

[49] U.N. G.A. Res. 41/13 (1986). As Judge Skubiszewski in his separate opinion in *East Timor*, *supra* n.1, 259, stated, '[s]ince 1960 East Timor has continually appeared and still appears on the United Nations list of non-self-governing territories. The United Nations maintains that status of East Timor. Only the Organization can bring about a change. Rejection of the status by the original sovereign Power; or the use of force by another country to gain control over the territory; or recognition by individual States of the factual consequences of the recourse to force – none of these unilateral acts can abolish or modify the status of non-self-government. That status has its basis in the law of the Organization and no unilateral act can prevail over that law.'

[50] McCorquodale, *supra* n.43, 292.

and exercised by the Hong Kong people. In its advisory opinion in *Western Sahara*, the ICJ stated that 'the consultation of the people of a territory awaiting decolonisation is an inescapable imperative. … Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people – the very *sine qua non* of all decolonization.'[51] The International Commission of Jurists in its 1992 report on Hong Kong[52] regarded it 'intolerable for the British Government to transfer British citizens in Hong Kong to the jurisdiction of the People's Republic of China without their own consent and without any opportunity having been given to them to participate in deciding on their own future.'[53] It was all the more deplorable that the United Kingdom enacted successive pieces of legislation depriving the Hong Kong people of British citizenship and the right of abode in the United Kingdom, while simultaneously engaging in a military and diplomatic conflict with Argentina in the name of defending the Falkland Islands' right to self-determination and its own State sovereignty.[54]

Against this political backdrop and the PRC government's suppression in June 1989 of calls for democratic development in China, more than one million people held demonstrations in Hong Kong demanding immediate implementation of universal suffrage. In January 1990, Beijing agreed to an increase in the number of directly elected seats in the Legislative Council in 1991.[55] In the Basic Law of Hong Kong promulgated by the National People's Congress in 1990 under Article 31 of the 1982 Constitution,[56] which took effect upon China's assumption of sovereignty over

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[51] *Western Sahara*, *supra* n.2, 81.
[52] International Commission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong* (Geneva: International Commission of Jurists, 1992).
[53] Ibid., 56.
[54] See Phil C.W. Chan, 'Hong Kong: Nationality Issues since 1983', in David Pong, ed., *Encyclopedia of Modern China*, Vol.2 (New York: Charles Scribners & Sons, 2009), 241.
[55] Leo F. Goodstadt, *Uneasy Partners: The Conflict between Public Interest and Private Profit in Hong Kong* (Hong Kong: Hong Kong University Press, 2005), 85.
[56] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China as adopted by the Seventh National People's Congress at its Third Session on 4 April 1990 in pursuance of the Sino-British Joint Declaration, 29 ILM 1519 (1990). The Preamble

Hong Kong on 1 July 1997, the ICCPR (which China has not ratified), the ICESCR (which China ratified in 2001), and various International Labour Organisation conventions previously extended to Hong Kong are accorded constitutional force in the territory.[57] The colonial local government also enacted the Hong Kong Bill of Rights Ordinance in June 1991, implementing the ICCPR in Hong Kong, with its substantive rights provisions premised on those of the ICCPR. Section 2(3) of the Ordinance stated that in 'interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights'.[58] Ghai maintains that the provision was 'undoubtedly an invitation to the judiciary to consider the interpretations of the ICCPR by the Human Rights Committee as well as of other international bodies dealing with analogous provisions. This internationalises the rights issue in a manner which upsets China, which prefers to see rights as determined by the specific historical and economic circumstances of a

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to the Basic Law of Hong Kong states that '[u]pholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems", the socialist system and policies will not be practised in Hong Kong.' Article 31 of the Constitution states that '[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.' The Basic Law of Hong Kong provides, *inter alia*, that Hong Kong is authorised 'to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication' (Art.2); that the socialist system and policies practised in China will not extend to Hong Kong, whose 'previous capitalist system and way of life shall remain unchanged for 50 years' (Art.5); that '[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region' (Art.8); and that, in addition to Chinese (Cantonese), English may be used as an official language by the three branches of government in Hong Kong (Art.9). In addition, the Basic Law of Hong Kong in 18 substantive provisions guarantees such fundamental rights and freedoms as may continue to be enjoyed in Hong Kong as of 1 July 1997 (Arts.24-41).

[57] Basic Law of Hong Kong, Art.39.

[58] Hong Kong Bill of Rights Ordinance (Cap.383), s.2(3) (not adopted as part of the law of Hong Kong as of 1 July 1997).

particular state'.[59] It was thus not surprising that section 2(3), together with three other provisions of the Ordinance, was specifically not adopted by the Standing Committee of the National People's Congress on 23 February 1997 as part of the law of Hong Kong as of 1 July 1997 in accordance with Article 160 of the Basic Law of Hong Kong.[60] The reason for the Standing Committee's decision not to adopt the provisions lay in China's unease with international human rights law, in the form of a treaty it has not ratified, having explicit direct effect on the interpretation and application of a domestic law, that is, the Hong Kong Bill of Rights Ordinance, that affects the validity of all domestic laws and policies in Hong Kong.[61]

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[59] Yash Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights', 60 *Modern Law Review* (1997), 459, 461.

[60] Article 160 of the Basic Law of Hong Kong states that '[u]pon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law. Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.' By Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Cap.2206), adopted at the 24th Session of the Standing Committee of the Eighth National People's Congress on 23 February 1997, the following provisions of the Hong Kong Bill of Rights Ordinance were not adopted as part of the law of the Hong Kong Special Administrative Region as of 1 July 1997:

> Section 2(3): 'In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters.'
>
> Section 3(1): 'All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.'
>
> Section 3(2): 'All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.'
>
> Section 4: 'All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be constructed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.'

[61] Yash Ghai, Peter Wesley-Smith, and Johannes Chan have argued that the Standing Committee's decision has no legal effect on the continuing direct applicability of the ICCPR in Hong Kong, as judges may rely on the preamble, long title and substantive provisions of the Hong Kong Bill of Rights Ordinance, all of which make reference to the ICCPR and its incorporation into the law of Hong Kong: Yash Ghai, 'The Continuity of Laws and Legal Rights and Obligations in the SAR', 27 *Hong Kong Law Journal* (1997), 136; Peter Wesley-Smith, 'Maintenance of the Bill of Rights', 27 *Hong Kong Law Journal* (1997), 15; Johannes Chan, 'The Status of the Bill of Rights in the Hong Kong Special Administrative Region', 28 *Hong Kong Law Journal* (1998), 152. Chan further asserts, ibid., 152-54, that the repeal of any statutory provision found to be inconsistent with the Ordinance took effect on the

Neither the United Kingdom nor the colonial local government desired a Bill of Rights for Hong Kong but for China's suppression of calls for political reform in June 1989[62] that caused public and investors' confidence in Hong Kong to sink 'to an all-time low'[63] and an influx of emigration and outflow of capital from Hong Kong. China opposed a Bill of Rights for Hong Kong as it considered the Basic Law of Hong Kong to suffice for the protection of fundamental rights and freedoms that the ICCPR guarantees. According to Ghai, 'China interprets the expression as "applied to Hong Kong" [in Article 39 of the Basic Law of Hong Kong] to mean as already provided for under domestic law, a stance which the Chinese claim Britain earlier promoted as a way to persuade it to include the ICCPR in the Joint Declaration.'[64] While the PRC government refrained from refusing to adopt the Bill *in toto* as part of the law of Hong Kong as of 1 July 1997, it did refuse to adopt four provisions of the Ordinance which expressly incorporated the Covenant into the law of Hong Kong, as has been noted.

Notwithstanding its objection to the direct applicability of the ICCPR in Hong Kong and the fact that it has not ratified the ICCPR, Article 40 of which requires submission of periodic reports to the Human Rights Committee on States Parties' implementation (similar reporting requirements exist under Article 17 of the ICESCR, to the Committee on Economic, Social and Cultural Rights), China has committed itself to submitting periodic reports on Hong Kong to the two Committees.[65] Dinusha Panditaratne asserts that China has complied with the

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commencement of the Ordinance, that is, 8 June 1991, and it matters neither when the impugned statutory provision was enacted nor when the inconsistency was discovered; any such impugned statutory provision could not be 'laws previously in force in Hong Kong' under Article 8 of the Basic Law of Hong Kong and thus could not have been adopted as part of the law of Hong Kong as of 1 July 1997.

[62] Ghai, *supra* n.59, 460.

[63] Norman J. Miners, *The Government and Politics of Hong Kong*, 5th ed. (Hong Kong: Oxford University Press, 1991), 27.

[64] Ghai, *supra* n.59, 461.

[65] *Consideration of Reports submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights: Hong Kong Special Administrative Region of the People's Republic of China*, CPR/C/HKSAR/99/1, 16 June 1999, Introduction, para.3; *Implementation of the International Covenant on Economic, Social and Cultural Rights,*

reporting procedures in respect of Hong Kong generally in a timely manner,[66] with the Chairperson of the Human Rights Committee thanking 'the delegation [of Hong Kong] for its prompt and full compliance with its reporting obligations under the Covenant'.[67] The two reports on Hong Kong submitted to the Committee on Economic, Social and Cultural Rights since 1997 also encountered no delay.[68] However, the subsequent report on Hong Kong in respect of its implementation of the ICCPR was submitted more than a year behind schedule.[69] At the substantive level, Panditaratne argues that the four reports that Hong Kong submitted to the two Committees since 1997 'reflect a comprehensive and practical – rather than purely normative or quantitative – approach to reporting information',[70] with the first report on Hong Kong to the Human Rights Committee commended as 'impressively thorough'[71] and 'highly informative',[72] and the second report 'particularly thorough and thoughtful'.[73] Significantly, China has allowed Hong Kong to conduct its own consultations with interested parties, including local civil society, in order to prepare its reports to the two Committees.[74]

When the United Kingdom extended its ratification of the ICCPR to Hong Kong in 1976, it declared its 'understanding that, by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations

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China: Report of the Hong Kong Special Administrative Region of the People's Republic of China, E/1990/5/Add.43, 20 September 1999, Introduction, para.3. See also Andrew Byrnes, 'Uses and Abuses of the Treaty Reporting Procedure: Hong Kong between Two Systems', in Philip Alston and James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), 287, 313.

[66] Dinusha Panditaratne, 'Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse since 1997?', 8 *Human Rights Law Review* (2008), 295.

[67] United Nations Human Rights Committee, *Summary Record of its 1805th Meeting*, CCPR/C/SR.1805, 8 November 1999, para.53.

[68] Panditaratne, *supra* n.66, 304.

[69] *Hong Kong Special Administrative Region of the People's Republic of China: Second Periodic Report*, CCPR/C/HKG/2005/2, 3 March 2005, para.1.

[70] Panditaratne, *supra* n.66, 306.

[71] United Nations Human Rights Committee, *Summary Record of its 1803rd Meeting*, CCPR/C/SR.1803, 5 November 1999, para.76.

[72] Ibid., para.55.

[73] United Nations Human Rights Committee, *Summary Record of its 2351st Meeting*, CCPR/C/SR.2351, 31 March 2006, para.69.

[74] Byrnes, *supra* n.65, 313.

under Article 1 of the Covenant and their obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail'.[75] The United Kingdom stated in respect of the ICCPR that it reserved 'the right not to apply sub-paragraph (b) of article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong'.[76] The failure of the United Kingdom to recognise and implement the right of the Hong Kong people to vote for their representatives to the executive and legislative branches of government throughout its colonial rule has the lasting impact that universal suffrage continues to be stalled after China assumed sovereignty over Hong Kong in July 1997. While the Basic Law of Hong Kong provides for universal suffrage as the ultimate aim of governance in Hong Kong,[77] China opposed Governor Chris Patten's proposal that the franchise for functional constituencies be widened from approximately 70,000 for the 1991 election to over three million for the 1995 election, and warned that it would not abide by the Joint Declaration that the Hong Kong legislature elected in 1995 was to continue to subsist into 1999 if the proposed reform were implemented. Reform

[75] Declarations and reservations by the United Kingdom made upon ratification, accession or succession of the International Covenant on Civil and Political Rights, 20 May 1976.
[76] Ibid.
[77] Article 45 of the Basic Law of Hong Kong states that '[t]he Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The specific method for selecting the Chief Executive is prescribed in Annex I: "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region".' Article 68, ibid., states that '[t]he Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election. The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage. The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: "Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures".' Article 7 of Annex I and Article III of Annex II, ibid., stipulate the procedures for any change to the selection and formation methods. Both Annexes state that if there is a need to make any change for terms subsequent to 2007, such change must be endorsed by a two-third majority of the Legislative Council, obtain the consent of the Chief Executive of Hong Kong, and be submitted to the Standing Committee of the National People's Congress for approval (in the case of selection of the Chief Executive) or for the record (in the case of formation of the Legislative Council).

proceeded nonetheless and China arranged for an entirely appointed Provisional Legislative Council to be put in place on 1 July 1997 so that new laws could immediately be passed to narrow the electoral franchise for Hong Kong's first post-colonial election in May 1998, in which only twenty legislators were returned by universal suffrage, while thirty were returned by functional constituencies and ten by an Election Committee whose 800 members were appointed by the Central Government. In the 2000 election, the number of legislators returned by the Election Committee was reduced to six while the number of directly elected legislators was increased to 24; in the 2004 election, the six Election Committee seats were replaced with seats returned by universal suffrage. In the 2012 election, the composition of the Legislative Council was enlarged to seventy seats, half of which were allocated for geographical constituencies returned by universal suffrage and the other half for functional constituencies. Hong Kong's exercise of internal self-determination,[78] in the form of universal suffrage by all Hong Kong permanent residents for all seats in the Legislative Council and for the Chief Executive of Hong Kong, remains a goal that the Chinese and Hong Kong governments continue to stonewall.

The experience Hong Kong has endured illustrates that recognition and implementation of self-determination remain dependent on the foreign policy preferences and priorities of administering and foreign States that stymie and undermine, if not altogether deny, the right of a non-self-governing territory and its

[78] The right to self-determination as embodied in common Article 1 of the ICCPR and the ICESCR does not indicate that it entails a right to secession or independence. Ralph Wilde asserts that articulation of the right to self-determination as within the ambit of international human rights law serves as an alternative to external self-determination that is generally inapplicable beyond the colonial context: *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (Oxford: Oxford University Press, 2008), 161. Drew, *supra* n.5, 663, has commented that '[d]espite its textbook characterisation as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be "human rights".' Lauri Hannikainen notes that although '[m]any international instruments speak of "the right of self-determination of all peoples" … the international community of States has not really required the realisation of *internal* self-determination within *existing* States': *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing, 1988), 357 (emphasis in original).

people to decide for themselves how they wish to be governed. Conversely, the same foreign policy-dominated approach has enabled many a territorial entity to claim a right to self-determination to which it may not be entitled under international law, as the following discussion of Taiwan shows.

b. Taiwan: Self-determination in Realpolitik*

Although commonly associated with Hong Kong and Macau, the system of 'one country, two systems' special administrative regions was in fact intended for Taiwan's reunification with China. Apart from its firm position that Taiwan is an integral part of China, the PRC government believes that independence of Taiwan would bring about separatism and chaos in China and irretrievably undermine its legitimacy.[79] Wang Jisi observes that '[m]any Chinese feel that China's revival would be meaningless and unreal if the mainland failed to reunify with Taiwan.'[80] The legal status of Taiwan, '[t]he most concrete marker of sovereignty for China today',[81] remains one of the most contentious issues *vis-à-vis* China and international law that has repercussions not only for Taiwan and China, for the definitional scopes of statehood and sovereignty, but also for the maintenance of international peace and security.

While the question of whether a territorial entity is a State ultimately is a legal one,[82] the legal status of Taiwan has invariably been constructed as a political

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* This sub-section draws on my article 'The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict', 8 *Chinese Journal of International Law* (2009), 455-92, completed during my doctoral candidature at the Faculty of Law, National University of Singapore.

[79] Wang Yizhou, *Tanxun quanqiu zhuyi guoji guanxi* [*Exploring Globalist International Relations*] (Beijing: Beijing University Press, 2005), 344-45.

[80] Wang Jisi, 'China's Changing Role in Asia', in Kokubun Ryosei and Wang Jisi, eds., *The Rise of China and a Changing East Asian Order* (Tokyo: Japan Center for International Exchange, 2004), 3, 14.

[81] Jeffrey W. Legro, 'Purpose Transitions: China's Rise and the American Response', in Robert S. Ross and Zhu Feng, eds, *China's Ascent: Power, Security, and the Future of International Politics* (Ithaca, NY: Cornell University Press, 2008), 163, 181.

[82] As James Crawford has put it, '[a] State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules': *The Creation of States in International Law*,

matter. In the process, the substance and authority of international law are destabilised. Collapsing law into politics jeopardises international legal rules and principles that are applicable to all States. Consideration of political facts and developments must serve to inform and not prejudice our endeavour to find objective legal answers. As the ICJ has pointed out, the fact that a legal question entails political aspects does not deprive the question of its legal character.[83]

China ceded Taiwan (then known as Formosa) and appertaining islands to Japan in perpetuity under the 1895 Treaty of Shimonoseki after China's defeat in the First Sino-Japanese war (1894–1895). In the course of the Second World War, the Allies stated in the 1943 Cairo Declaration their 'purpose … that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China.'[84] The Allies' Potsdam Proclamation in 1945 reaffirmed that '[t]he terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine',[85] which Japan in its Instrument of Surrender undertook to implement.[86] However, Taiwan continued to be Japanese territory *de jure* until Japan relinquished its title in 1951 under the San Francisco Peace Treaty.[87] As an arbitral tribunal stated in the *Iloilo Claims Case*[88] in 1925, 'in

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1st ed. (Oxford: Oxford University Press, 1979), 4. Krystyna Marek has stated that '[a] legal system which does not itself determine the character and existence of its subjects is unthinkable. International law does not "create" States, just as State law does not "create" individuals. But it is international law and international law alone which provides the legal evaluation of the process, determines whether an entity is in fact a State, delimits its competences and decides when it ceases to exist': *Identity and Continuity of States in Public International Law*, 2nd ed. (Geneva: Librairie E. Droz, 1968), 2.

[83] *Application for Review of Judgement No.158 of the United Nations Administrative Tribunal*, *Advisory Opinion*, *ICJ Reports* 1973, 172, para.14; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, *ICJ Reports* 2010, 403, para.27.

[84] Cairo Declaration, 27 November 1943.

[85] Potsdam Proclamation, 26 July 1945.

[86] Japan's Instrument of Surrender, 2 September 1945.

[87] Signed at San Francisco on 8 September 1951 and entered into force on 28 April 1952. It has been argued that the Cairo Declaration, the Potsdam Proclamation, and Japan's Instrument of Surrender sufficiently transferred title to Taiwan from Japan to China *de jure*. I do not agree with such a position.

One might argue that Japan's relinquishment of its title to Taiwan without specifying a transferee rendered Taiwan *terra nullius* and the occupation of Taiwan by the Chinese Nationalist forces might have been capable of creating statehood in Taiwan as such. It has been suggested that the co-existence of the Federal Republic of Germany and the German Democratic Republic during the Cold War might serve as an example whereby China and Taiwan may co-exist as two sovereign States: see, *e.g.*, Markus G. Puder, 'The Grass Will Not Be Trampled Because the Tigers Need Not Fight – New Thoughts and Old Paradigms for Détente across the Taiwan Strait', 34 *Vanderbilt Journal of Transnational Law* (2001), 481. Such a solution cannot be applicable to Taiwan on account of a juridical fact peculiar to Germany: 'It is this fact of the complete disintegration of the government in Germany, followed by unconditional surrender and by occupation of the territory, which explains and justifies the assumption and exercise of supreme governmental power by the Allies. The same fact distinguishes the present occupation of Germany from the type of occupation which occurs when, in the course of actual warfare, an invading army enters and occupies the territory of another State, whose government is still in existence and is in receipt of international recognition, and whose armies, with those of its allies, are still in the field': *In re Altstötter and Others (The Justice Trial)* (United States Military Tribunal at Nuremberg), 14 *International Law Reports* (1947), Case No.126, 278, 280. The United States Military Tribunal at Nuremberg in *In re Greifelt and Others*, 15 *International Law Reports* (1948), Case No.216, 653, 655, similarly concluded that '[a]ny purported annexation of territories of a foreign nation, occurring during the time of war and while opposing armies were still in the field, we held to be invalid and ineffective.' James Crawford argues that 'Japanese relinquishment, which took place against a background of a commitment to return Taiwan to "China", and the continued occupation of Taiwan by a recognized government of "China", operated to re-vest sovereignty in China as a State without taking any position as to the government entitled to exercise that sovereignty': *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press, 2006), 209.

A *terra nullius* is a territory in want of inhabitants sufficiently organised. In *Legal Status of Eastern Greenland* (*Denmark* v. *Norway*), *Judgment*, P.C.I.J. Ser. A/B, No.53 (1933), 22, the Permanent Court of International Justice stated that occupation had significance under international law only if the territory at the material times was *terra nullius* or belonged to the occupying State. The Nationalist forces made no claim of statehood in Taiwan as such. Their occupation of Taiwan, both antecedent and subsequent to the signing of the San Francisco Peace Treaty, in which neither the PRC government nor the authorities on Taiwan took part and Article 25 of which explicitly states that the Treaty shall have effects upon signatories States only, entailed the *animus occupandi* of holding Taiwan in the name of China of which they considered themselves the sole legitimate government until 1994, when they began to make claims of Taiwan being, and always having been, a separate State. As Ian Brownlie pointed out in 1982, '[o]ften the confusion attending the "factual ambitions" of the entity is compounded by the endemic ignorance of the Anglophonic press in matters of international relations and also the success of techniques of news management in muddying the waters. … Journalists would commonly fail to see that the authorities on Taiwan did not claim statehood for themselves (or at all) but claimed to be the *government* of an existing State (called China). … After the Peking Government had been installed as representative of China in the United Nations, the position of Taiwan was the subject of especially obtuse comment. Thus it was said that "Taiwan had been expelled from the United Nations": but of course it had not been a member and did not consider itself to be a State in any case': 'Recognition in Theory and Practice', 53 *British Year Book of International Law* (1982), 197, 202 (emphasis in original). In 1949 when the Nationalist forces lost in the Chinese civil war and fled *en masse* to Taiwan, they did so considering themselves the government of China and contemplating an eventual resumption of authority and control over Mainland China. Thomas B. Gold observes that the authorities on Taiwan 'assiduously promoted the idea that the island was the repository and guarantor of Chinese tradition as well as the mainland's rich diversity': 'Taiwan's Quest for Identity in the Shadow of China', in Steve Tsang, ed., *In the Shadow of China: Political Developments in Taiwan since 1949* (Honolulu: University of Hawaii Press, 1993), 169, 171.

It must be noted that China's non-participation in the San Francisco Peace Treaty was not due to any doubt about its statehood or State sovereignty but to a compromise between the United Kingdom, which recognised the PRC government in 1950 and insisted on China's participation, and the United States, which changed its declaration of non-intervention in the

case of cession the sovereignty *de jure*, and the obligations resulting therefrom, did not begin before the treaty of cession had been ratified'.[89] The Chinese Nationalist forces occupied Taiwan in 1945 with the sufferance of the Allies (and Japan), which did not confer or embody sovereignty over Taiwan as a State.

The Chinese Nationalist forces' occupation of Taiwan prior to Japan's surrender in September 1945 and their *en masse* retreat to Taiwan reflected their view that Mainland China and Taiwan were one territorial entity *de jure*, for otherwise their occupation would have contravened the sovereignty and territorial integrity of another State (which it actually did: of Japan until 1951). The authorities on Taiwan, considering themselves in an unfinished civil war with the PRC government, imposed martial law on Taiwan's civilian population between 1949 and 1987 outlawing 'any political movements for Taiwan's independence and insisted on [their] claim of sovereignty of all of China'.[90] Such belligerency was perpetuated by the United States, with President Truman in 1950 ordering the Seventh Fleet to patrol the

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Chinese civil war after the outbreak of the Korean War in 1950 and proposed that neither the PRC government nor the authorities on Taiwan should be invited to the San Francisco Peace Conference: Kenzo Uchida, 'A Brief History of Postwar Japan–China Relations', 9 *Developing Economies* (1971), 538, 539. On 16 August 1951, Zhou Enlai, China's Premier and Foreign Minister, condemned the proposed Peace Conference and Treaty as a violation of the United Nations Declaration of 1 January 1942, the Cairo Declaration, the Yalta Agreements, the Potsdam Proclamation, and the Basic Post-Surrender Policy of the Far Eastern Commission: 'The United Nations Declaration provides that no separate Peace should be made. The Potsdam Agreement states that the "preparatory work of the Peace Settlements" should be undertaken by those States which were signatories to the terms of surrender imposed upon the Enemy State concerned.' The PRC government took particular exception to Article 15 of the Treaty, which imposed on Japan liability for reparations only for acts that took place after 7 December 1941, while the Pacific theatre of the Second World War dated back to as early as 1937, if not 1931 when Japan invaded Manchuria, and to the omission of the question of the legal status of Taiwan and appertaining islands. The PRC government declared that it would reserve its right to demand reparations from Japan and refuse to recognise the legality and validity of the Treaty: John Price, 'A Just Peace? The 1951 San Francisco Peace Treaty in Historical Perspective', Japan Policy Research Institute Working Paper No.78, June 2001. It was only by the Joint Communiqué of 29 September 1972 between Japan and China that China renounced its claim to war reparations from Japan. In Article 3 of the Joint Communiqué, it is stated that '[t]he Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan fully understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation.'

[88] *Annual Digest of Public International Law Cases* (1925–1926), Case No.254, 336.

[89] Ibid.

[90] Che-Fu Lee, 'China's Perception of the Taiwan Issue', 32 *New England Law Review* (1998), 695, 697.

Taiwan Strait and President Eisenhower in 1953 sanctioning an attack by the authorities on Taiwan upon Mainland China.[91] On 1 October 1949, the PRC government became the lawful and effective government of China. As Matthew Craven has pointed out, 'mere loss of territory (even if quite extensive) will not affect the legal personality of the State, nor will a political transformation in the State. Indeed, it has been accepted that in the context of belligerent occupation, complete lack of government does not extinguish the sovereignty of the State.'[92]

As Japan desired to end its state of war with China, under pressure from the United States to enter into a peace treaty only with the authorities on Taiwan, in 1952

[91] Crawford, *supra* n.82, 199. On 5 January 1950, President Truman stated that in accordance with the Cairo Declaration and the Potsdam Proclamation, 'Formosa was surrendered to Generalissimo Chiang Kai-shek and for the past four years, the United Nations and the other Allied Powers have accepted the exercise of Chinese authority over the Island': *Department of State Bulletin*, Vol.22 (1950), 79, as quoted in Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', 221 *Recueil des cours* (1990–II), 195, 324. On the same day the United States Secretary of State stated that the Cairo Declaration 'was incorporated in the Declaration at Potsdam and that the Declaration at Potsdam was conveyed to the Japanese as one of the terms of their surrender and was accepted by them, and the surrender was made on that basis. Shortly after that, the Island of Formosa was turned over to the Chinese in accordance with the declaration made. The Chinese have administered Formosa for four years. Neither the United States nor any other ally ever questioned that authority and that occupation. When Formosa was made a province of China nobody raised any lawyers' doubts about that. That was regarded as in accordance with the commitments': *Department of State Bulletin*, 80-81, as quoted in Wang, ibid. However, after the outbreak of the Korean War, President Truman on 17 June 1950 declared that the 'determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations': *Department of State Bulletin*, Vol.23 (1950), 5; as quoted in Wang, ibid., 325. The Cairo Declaration and the Potsdam Proclamation were not mentioned in President Truman's statement, and no legal basis was given for the United States' change of position: Wang, ibid. At a House of Commons debate on 4 February 1955 on the legal status of Taiwan, British Foreign Secretary Anthony Eden (as he then was) stated the position of the United Kingdom thus: 'The Cairo Declaration … was a statement of intent that Formosa should be retroceded to China after the war. This retrocession has, in fact, never taken place because of the difficulties arising from the existence of the two entities to represent China and the differences among the powers as to the status of these entities. The Potsdam Declaration … laid down as one of the conditions for the Japanese peace that the terms of the Cairo Declaration should be carried out. In September 1945, the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied Powers, but this was not a cession, not did it in itself involve any change of sovereignty. The arrangement made with Chiang Kai-shek put him there on a basis of military occupation pending further arrangements and did not of themselves constitute the territory as Chinese': House of Commons Debates (*Hansard*), Vol.536, col.159, 4 February 1955. At Vanderbilt University on 27 February 2008 where I presented a seminar on the legal status of Taiwan, Brett Benson queried if my conclusion would be different if the authorities on Taiwan launched a successful attack on Mainland China and resumed its claim that it was the sole legitimate government of China. Such an event, if it were to occur, would clearly demonstrate and reinforce the fact that Taiwan as such is not a State.

[92] Matthew C.R. Craven, 'The European Community Arbitration Commission on Yugoslavia', 66 *British Year Book of International Law* (1995), 333, 361.

it concluded with the authorities on Taiwan the Treaty of Taipei,[93] which reiterated its relinquishment in the San Francisco Peace Treaty of its title to Taiwan.[94] As with the San Francisco Peace Treaty, the PRC government objected to the Treaty of Taipei and the preceding negotiations as 'the gravest and most naked act of war provocation'.[95] The authorities on Taiwan entered into the Treaty in the name of China; Article 4 states that '[i]t is recognised that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.'[96] The authorities on Taiwan's purported representation of China after their *en masse* retreat to Taiwan in September 1949 again reflected their view that China and Taiwan constituted one single State *de jure*.[97] There is a presumption in international law that 'the territory ought in principle

[93] Signed at Taipei on 28 April 1952.
[94] Ibid., Art.2.
[95] Uchida, *supra* n.87, 539-40. It was only by the Treaty of Peace and Friendship between China and Japan of 12 August 1978 that the state of war between the two States ceased.
[96] Treaty of Taipei, Art.4.
[97] Furthermore, the Treaty of Taipei did not, and did not seek to, resolve the question of the legal status of Taiwan, which Japan in any case could not have done as it had in the San Francisco Peace Treaty relinquished its title to Taiwan. Indeed, assuming *arguendo* that Japan did specify or imply, either in the Treaty of Taipei or in the San Francisco Peace Treaty, Taiwan as the transferee of the title to the territory, the pivotal question of the legal status of Taiwan would remain unresolved as Taiwan was not, and did not claim to be, a State and to confer on Taiwan title to the territory would merely have meant that the State of China, which the authorities on Taiwan purported to represent, was returned such title. It is important to keep in mind that 'a government is only recognized for what it claims to be' (D.P. O'Connell, 'The Status of Formosa and the Chinese Recognition Problem', 50 *American Journal of International Law* (1956), 405, 415) – although it 'may be recognized for *less* than it claims': Crawford, *supra* n.82, 211, fn.64 (emphasis in original). As early as 1955, Quincy Wright stated that '[i]f it were assumed that the Japanese surrender constituted a definitive renunciation of Formosa and the Pescadores and that the Chinese occupation constituted definitive re-annexation of these territories by China, then the Communist government, if recognized as the government of China, would have a legal claim to these islands': 'The Chinese Recognition Problem', 49 *American Journal of International Law* (1955), 320, 332. To divest China of its State sovereignty over Taiwan, Crawford argues, would 'have been a violation of the agreed terms of the peace as well as intervention in the civil war in China': ibid., 211. The sufferance and protection the authorities on Taiwan have received from the Allies, Japan and the majority of other States during and subsequent to the Second World War in their occupation of the territory do not create statehood in Taiwan. In fact, such foreign intervention has constituted unlawful disruption of China's State sovereignty and territorial integrity.

to revert to the parent state when the administering state transfers power in the region, provided there is no conclusive evidence that the entity aspires for independence.'[98]

On 25 October 1971, the United Nations General Assembly voted to replace the authorities on Taiwan with the PRC government as the representative government of China in the United Nations. The General Assembly concluded that the authorities on Taiwan's purported representation of China since October 1949 was unlawful.[99] Insisting that only they legitimately represented China, the authorities on Taiwan withdrew their delegation from the United Nations. It was only in 2007 that they ceased to maintain such a stance and applied for United Nations membership as a new State as Taiwan.[100]

One must keep in mind that only States and not governments may be admitted to United Nations membership,[101] and the General Assembly restored the lawful rights of China to be represented in the United Nations by its lawful and effective government.[102] As Christopher Hill has pointed out, 'it is vital to recognize

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[98] Kaiyan Homi Kaikobad, 'Self Determination, Territorial Disputes and International Law: An Analysis of UN and State Practice', 1 *Geopolitics and International Boundaries* (1996), 15, 47. Michael Yahuda argues that '[s]ince it will be more productive to examine the political rather than the strictly legal dimensions of Taiwan's international identity it will be better to do so by employing the more avowedly political concept of international standing': 'The International Standing of the Republic of China over Taiwan', 148 *China Quarterly* (1996), 1319, 1325. Such a suggestion, if taken seriously, endangers the stability of international boundaries and of multi-level international co-operation, and makes a mockery of the integrity of international law.

[99] U.N. G.A. Res. 2758(XXVI) (1971).

[100] Chia-Lung Lin, 'The Importance of China and Identity Politics in Taiwan's Diplomacy', in Steve Tsang, ed., *Taiwan and the International Community* (Oxford: Peter Lang, 2008), 51, 63-64.

[101] United Nations Charter, Art.4(1).

[102] In his 1970 Hague Academy Lectures, Hans Martin Blix was adamant that the exclusion of the PRC government from representing China in the United Nations was unlawful as it was a treaty right of China as a State Party to the United Nations Charter to be represented by a government that under international law must properly be regarded as that of the State. He explained that such exclusion 'stems from a mistaken belief that the option which may be exercised by States under customary international law to accept or reject relations with a new government, signalled by recognition or absence of recognition – is open to them also as members of international organizations. However, by accepting treaties constituting international organizations, they must be deemed to have obliged themselves to accept the measure of relations which is necessary under these constitutions – but not more – with authorities which fulfil the international law criteria of governments of States members, although, in a pursuit of a policy of non-recognition, they may refuse relations outside the framework of such organizations': 'Contemporary Aspects of Recognition', 130 *Recueil des cours* (1970–II), 589, 692-93. A memorandum prepared for the United Nations Secretary-

that a government is a temporary holder of power and a state is the set of institutions, dispositions and territory which makes it possible for governments to exist – and to change.'[103] It is the blurring of the notions of State and government that perpetuates the impasse over the legal status of Taiwan. A change of government of a State, of the official name of a State, or of the government representing a State does not alter the State's international legal personality or statehood.[104]

Since the United Nations Charter came into force in 1945, Taiwan has never been considered a non-self-governing territory, and 'possession without title [does not] give the entity the right to proceed to self-determination.'[105] The legal situation that pertains to Taiwan is thus dissimilar to that regarding East Timor (now Timor Leste) or the Palestinian Territory, as East Timor was and the Palestinian Territory continues to be recognised by the United Nations as a non-self-governing territory under Chapter XI. Just as there are criteria a territory must fulfil in order to constitute a State, there are certain rules a people of a territory must meet in order to validly lay claim to the right to self-determination. A territory may not unilaterally declare itself a non-self-governing territory without a valid basis in international law.[106]

General in February 1950 on 'Legal Aspects of Problems of Representation in the United Nations', S/1466, 5 S.C.O.R. Supplement, January–May 1950, 18-23, had attempted to clarify the matter, stating that '[f]rom the standpoint of legal theory, the linkage of representation in an international organization and recognition of a government is a confusion of two institutions which have superficial similarities but are essentially different. The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. … On the other hand, membership of a State in the United Nations and representation of a State in organs is clearly determined by a collective act of the appropriate organ.'

[103] Christopher Hill, *The Changing Politics of Foreign Policy* (London: Palgrave Macmillan, 2003), 32.

[104] Article 23(1) of the United Nations Charter continues to refer to 'the Republic of China' as one of the five Permanent Members of the United Nations Security Council. Neither the United Nations nor the PRC government has considered it necessary for the Charter to be amended in order for the PRC government to represent China in the Security Council.

[105] Kaikobad, *supra* n.98, 49.

[106] As Malcolm N. Shaw has noted, '[p]ractice demonstrates that self-determination has not been interpreted to mean that any group defining itself as such can decide for itself its own political status up to and including secession from an already independent State. After all, the very United Nations instruments constituting the foundation of the development of self-determination also clearly opposed the partial or total disruption of the national unity and territorial integrity of States': 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 *British Year Book of International Law* (1996), 75, 121.

One might argue that Taiwan's right to self-determination is not dependent on the United Nations' list of non-self-governing territories, and with its geographical separation from China and different legal, political, social and economic systems, Taiwan should be regarded as entitled to self-determination.[107] However, citing thirty examples of attempted unilateral secession in Africa, Asia, Europe and the Middle East,[108] James Crawford has noted that 'outside the colonial context, the principle of self-determination is not recognized in practice as giving rise to unilateral rights of secession by parts of independent States';[109] and that '[w]here the government of the State in question has maintained its opposition to the unilateral secession, such attempts have gained virtually no international support or recognition, and this has been true even when other humanitarian aspects of the situation have triggered widespread concern and action.'[110] It is apposite at this juncture to revert to Weller's critique of self-determination as disenfranchisement of peoples:

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[107] Citing the lone example of Bangladesh, Jorris Duursma argues that '[p]eoples who find themselves in similar circumstances as colonies will enjoy a complete right of self-determination, even if they are not specifically mentioned on the list of Non-Self-Governing or Trust Territories': 'Preventing and Solving Wars of Secession: Recent Unorthodox Views on the Use of Force', in Kreijen *et al.*, *supra* n.27, 349, 350. Duursma, ibid., 350-51, finds that '[b]ecause of Bangladesh's special circumstances, international recognition followed promptly. … Recognition could also have been prompted, because Bangladesh was able to maintain effective control over its territory with Indian armed reinforcement.' With respect, Duursma has distorted facts in order to advance a legal proposition unsupported by authorities. Bangladesh was not admitted to United Nations membership until two years after it declared independence from Pakistan in 1972, and only after Pakistan recognised its independence. James Crawford in 'State Practice and International Law in relation to Secession', 69 *British Year Book of International Law* (1998), 85, 115, argues that Bangladesh's secession from Pakistan should be viewed 'as a *fait accompli* achieved as a result of foreign military assistance in special circumstances' and not as evidence of a right to secession. India's military intervention was considered by the international community to have contravened international law: see Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2002). As Chapter VI notes, China as represented by the PRC government exercised its first veto in 1972 of Bangladesh's initial application for admission to United Nations membership due to its concern over the legal status of Taiwan and its position that the parent State's consent was essential to a territory attaining independence and statehood. It was only after Pakistan acknowledged Bangladesh's independence in 1974 that China no longer blocked Bangladesh's admission to United Nations membership and Bangladesh was then admitted without vote.

[108] Crawford, ibid., 107-8.

[109] Ibid., 113.

[110] Ibid., 115-16.

> The first element of disenfranchisement lies in the very existence of a right to self-determination. While this right purports to enfranchise populations wishing to exercise their will, it does the opposite. In generating what is an exceptional entitlement to secession, self-determination appears to confirm that secession is not otherwise available in circumstances where the central government refuses to consent to a separation. This strengthens the view that a secession that is not covered by the exceptional right to (colonial) self-determination amounts to an internationally unlawful act. This, for example, was the view (wrongly) taken by the rump Yugoslavia in relation to Croatia, Slovenia, Bosnia and Herzegovina, and Macedonia. The consequence of this – mistaken – view would be that an entity that succeeds in secession would be an unlawful entity.[111]

Some guidance may be drawn from Chechnya, Québec, and Yugoslavia. Crawford observes that, despite criticising Russia for disregarding international humanitarian law in its conflict in Chechnya, other States accept that Chechnya is an integral part of Russia and the conflict is of an internal character.[112] In its *Reference re Secession of Québec*[113] on whether international law endowed Québec the right to self-determination that would empower it to secede from Canada unilaterally, the Supreme Court of Canada resolved the question in the negative.[114] Attention must be

[111] Weller, *supra* n.3, 9.
[112] Crawford, *supra* n.107, 110-11.
[113] [1998] 2 SCR 217.
[114] The Court, ibid., 295-96, nevertheless took liberty to interpret a right to secession as might arise from the right to self-determination: 'We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question I, i.e., a clear democratic expression of support on a clear question for Québec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Québec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Québec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as

drawn to the European Community Arbitration Commission's conclusion on the status and consequences of the break-up of Yugoslavia that self-determination was not at all in issue or indeed mentioned.[115] At a Security Council meeting on 10 June 1999 regarding the Kosovo crisis, China stated that '[w]e are not in favour of discrimination against or the oppression of any ethnic group. At the same time, we are also opposed to any act that would create division between different ethnic groups and undermine national unity. Fundamentally speaking, ethnic problems within a State should be settled in a proper manner by its own Government and people, through the adoption of sound policies. They must not be used as an excuse for external intervention, much less used by foreign States as an excuse for the use of force. Otherwise, there will be no genuine security for States and no normal order for the world.'[116] The break-up of Yugoslavia and the independence of four of the six constituent republics were brought about not by secession but by the dismemberment and dissolution of Yugoslavia to which all six constituent republics now constituted full and equal successors in title.[117] The greater aggregate size of the territories and

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part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.'

[115] Crawford, *supra* n.107, 105.

[116] S/PV.4011, 10 June 1999, 8-9.

[117] The European Community Arbitration Commission in its Opinion No.8 on Questions arising from the Dissolution of Yugoslavia, 31 ILM 1521 (1992), 1523, observed that the exercise of sovereignty of three of the four constituent republics seeking to secede from Yugoslavia over their respective territories had by then been effective and recognised among themselves and by the European Community, its Member States as well as numerous other States, culminating in their admission to United Nations membership on 22 May 1992. (Recognition of the constituent Yugoslav republic of Macedonia as a sovereign State by the other three constituent Yugoslav republics seeking independence and by the international community was delayed due to opposition from Greece to the official name that Macedonia adopted – Republic of Macedonia – which Greece claims conflicts with the same name of the largest region of Greece upon which Greece claims Macedonia has irredentist territorial designs. Macedonia was admitted to United Nations membership on 8 April 1993 under the provisional name 'The Former Yugoslav Republic of Macedonia'.) The Commission, ibid., stated that 'the existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign states with the result that federal

populations of the four constituent republics seeking independence 'is arguably crucial in the context of Yugoslavia in so far as it provides a partial basis for distinguishing between it and the case of the USSR, the personality of which was deemed to continue in the form of Russia.'[118] Although Taiwan encompasses a significant geographical area and population, the impasse over the legal status of Taiwan has not jeopardised the proper functioning of China's central government, its exercise of State sovereignty or its attribute as a State. China's uninterrupted membership of the United Nations is testament of its continuity as a State. Indeed, it is precisely due to fear of dismemberment that State sovereignty and territorial integrity constitute the most sacrosanct principles of international law.[119]

China adopted a similar, albeit more flexible, approach to the humanitarian crisis in East Timor in 1999. When Indonesia invaded and annexed East Timor in 1975 notwithstanding East Timor's status as a non-self-governing territory under Chapter XI of the United Nations Charter with Portugal as its administering power, ASEAN Member States sided with Indonesia (except for Singapore, which abstained) on the relevant General Assembly resolutions in 1975[120] and 1976[121] (although they

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authority may no longer be effectively exercised.' The Commission, ibid., referred to Security Council Resolution 757 (1992) which noted that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the SFRY [Socialist Federal Republic of Yugoslavia] in the United Nations has not been generally accepted', and concluded that 'the process of dissolution of the SFRY is now complete and that the SFRY no longer exists.' Stephen Tierney argues that the Commission 'was established to avoid the arbitrary application of the recognition criteria by states and thereby to limit the influence of political expediency in defining recognition policy': 'In a State of Flux: Self-Determination and the Collapse of Yugoslavia', 6 *International Journal on Minority and Group Rights* (1999), 197, 212.

[118] Craven, *supra* n.92, 370.

[119] The European Community Arbitration Commission, *supra* n.117, 1522, stated that '[t]he dissolution of a state means that it no longer has legal personality, something which has major repercussions in international law. It therefore calls for the greatest caution.' It is pertinent to note that in the case of the dissolution of Czechoslovakia, the Czech and Slovak constituent republics agreed to dissolve by parliamentary action Czechoslovakia into two sovereign States as the Czech Republic and Slovakia as of 31 December 1992, both of which were duly admitted to United Nations membership on 19 January 1993 unopposed. In the entire process, no right to secession on the basis of the right to self-determination was claimed.

[120] U.N. G.A. Res. 3485(XXX) (1975). The resolution, *inter alia*, '[c]alls upon all States to respect the inalienable right of the people of Portuguese Timor to self-determination, freedom and independence and to determine their future political status in accordance with the principles of the Charter of the United Nations and the Declaration of the Granting of Independence to Colonial Countries and Peoples', '[s]trongly deplores the military

refrained from recognising Indonesia's sovereignty over East Timor), while China, along with Vietnam (not yet an ASEAN Member), strongly criticised Indonesia's violations of East Timor's right to self-determination and of international law.[122] East Timor continued to remain a non-self-governing territory under Chapter XI with Portugal as its administering power notwithstanding Indonesia's claim of sovereignty (recognised only by Australia) and exercise of effective control. Portugal and Indonesia eventually reached an agreement in May 1999 regarding how the status of East Timor could be settled. However, following a United Nations-sponsored referendum on 30 August 1999 in which East Timorese overwhelmingly (78.5 per cent) rejected proposed special autonomy for East Timor with Indonesia as sovereign State, rejection that would lead to separation of East Timor from Indonesia, anti-independence militias organised by Indonesian military forces immediately mounted a campaign of massacres and destructions of infrastructure in the territory. At a Security Council meeting on 11 September 1999, while gravely concerned about 'the

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intervention of the armed forces of Indonesia in Portuguese Timor', '[c]alls upon the Government of Indonesia to desist from further violation of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forces from the territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence', and '[c]alls upon all States to respect the unity and territorial integrity of Portuguese Timor'.

[121] U.N. G.A. Res. 31/53 (1976). The resolution '[r]eaffirms the inalienable right of the People of East Timor to self-determination and independence and the legitimacy of their struggle to achieve that right', '[r]eaffirms its resolution 3485(XXX) and Security Council resolutions 384 (1975) and 389 (1976)', '[s]trongly deplores the persistent refusal of the Government of Indonesia to comply with the provisions of General Assembly resolution 3485(XXX) and Security Council resolutions 384 (1975) and 389 (1976)', '[r]ejects the claim that East Timor has been integrated into Indonesia, in as much as the people of the Territory have not been able to exercise freely their right to self-determination and independence', '[c]alls upon the Government of Indonesia to withdraw all its forces from the Territory', '[d]raws the attention of the Security Council, in conformity with Article 11, paragraph 3, of the Charter of the United Nations, to the critical situation in the Territory of East Timor and recommends that it should take all effective steps for the immediate implementation of its resolutions 384 (1975) and 389 (1976) with a view to securing the full exercise by the people of East Timor of their right to self-determination and independence', and '[r]equests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to keep the situation in the Territory under active consideration, to follow the implementation of the present resolution, to dispatch to the Territory as soon as possible a visiting mission with a view to the full and speedy implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and to report to the General Assembly at its thirty-second session'.

[122] James Cotton, 'Against the Grain: The East Timor Intervention', 43:1 *Survival* (2001), 127, 134.

continuing violence and resulting humanitarian crisis in East Timor',[123] China insisted that '[t]he deployment of any peacekeeping force should be at the request of the Indonesian Government and endorsed by the Security Council.'[124] Australia, Russia, the United States, Malaysia (a non-Permanent Member of the Security Council at the time) and other non-aligned States were in agreement with China that the consent, or at least acquiescence, of Indonesia was critical to the success of the peacekeeping mission in East Timor and the maintenance of long-term regional order and stability,[125] with China and Russia additionally concerned that international intervention in East Timor might set a precedent.[126] On 12 September 2011, Indonesia consented to a United Nations peacekeeping mission in East Timor. Noting the 'worsening humanitarian situation in East Timor'[127] and expressing concern about 'reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor',[128] Security Council Resolution 1264 (1999), adopted unanimously, authorised under Chapter VII of the Charter a multinational peacekeeping mission to restore peace and security in East Timor '*pursuant to the request of the Government of Indonesia* conveyed to the Secretary-General on 12 September 1999, with the following tasks: to restore peace and security in East Timor, to protect and support [the United Nations Mission for

[123] S/PV.4043, 11 September 1999, 13.
[124] Ibid.
[125] See Ian Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations', 18:2 *International Peacekeeping* (2011), 170; Nicholas Wheeler and Tim Dunne, 'East Timor and the New Humanitarian Intervention', 77 *International Affairs* (2001), 805.
[126] Ian Martin and Alexander Mayer-Rieckh, 'The United Nations and East Timor: From Self-Determination to State-Building', 12:1 *International Peacekeeping* (2005), 125, 131; Astri Suhrke, 'Peacekeepers as Nation-builders: Dilemmas of the UN in East Timor', 8:4 *International Peacekeeping* (2001), 1, 5. Given that only Australia recognised East Timor as part of Indonesia and Portugal remained the administering power of East Timor as a non-self-governing territory under Chapter XI, Aidan Hehir argues that Indonesia's consent was unnecessary under international law and, given the significant pressure by which its consent was attained, in want of legality *in se*: 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect', 38:1 *International Security* (2013), 137, 146, citing Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), 371; Simon Chesterman, *You the People: The United Nations, Transnational Administration, and State-Building* (Oxford: Oxford University Press, 2005), 62.
[127] U.N. S.C. Res. 1264 (1999), Preamble.
[128] Ibid.

East Timor] in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations'.[129] The resolution authorised States that participated in the mission 'to take all necessary measures to fulfil this mandate'.[130] On 25 October 1999, the Security Council adopted Resolution 1272 authorising under Chapter VII the establishment of the United Nations Transitional Administration in East Timor 'endowed with overall responsibility for the administration of East Timor'[131] and 'empowered to exercise all legislative and executive authority, including the administration of justice'.[132] Jonathan Davis has noted that China contributed about two hundred civilian police personnel to the United Nations Transitional Administration in East Timor.[133]

In the context of Taiwan, as was noted in relation to Hong Kong, self-determination is a two-dimensional right.[134] On account of its particular history, culture, language, political or economic system, or ethnic makeup, a territory may possess a right to internal self-determination that would not conflict with the sovereignty and territorial integrity of the State. Taiwan already enjoys a high degree of internal self-determination as it maintains political, legal and economic systems independent of those in China. In fact, the people on Taiwan share significant ambivalence over the desirability of independence. In their 1994 *White Paper on Relations across the Taiwan Straits*, the authorities on Taiwan stated that 'advocates of Taiwan independence represent only a minority of the population.'[135] While the

[129] Ibid., para.3 (emphasis added).
[130] Ibid.
[131] U.N. S.C. Res. 1272 (1999), para.1.
[132] Ibid.
[133] Jonathan E. Davis, 'From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era', 44 *Vanderbilt Journal of Transnational Law* (2011), 217, 253.
[134] See text in note 78 *supra*.
[135] Mainland Affairs Council, Executive Yuan, Taiwan, *White Paper on Relations across the Taiwan Straits*, July 1994, reproduced in Jean-Marie Henckaerts, ed., *The International Status of Taiwan in the New World Order: Legal and Political Considerations* (London: Kluwer Law International, 1996), Appendix 4. The quoted passage appears in Henckaerts, ibid., 286.

people on Taiwan consider themselves Taiwanese rather than Chinese,[136] attempts by the authorities on Taiwan since the 1990s to instil a distinct ethnic or cultural identity have not been successful.[137] In particular, younger generations who grew up after Taiwan underwent democratisation during the 1990s tend to hold 'inclusive identities' as both Taiwanese and Chinese.[138]

Despite reversing in 1994 their previous position and now contending that Taiwan is a separate State since at least 1949 (although oscillating as recently as September 2012 when in a speech to the European Parliament Mainland Affairs Council Minister Lai Shin-yuan stated that 'Taiwan's position is that "one China stands for the Republic of China"'[139]), the authorities on Taiwan have been pursuing negotiations with the PRC government with a view to Taiwan's reunification with China. The authorities on Taiwan made clear their position in their 1994 *White Paper*, reiterating certain 'Guidelines for National Unification' drawn up by their

[136] Shelley Rigger, 'Taiwan's Rising Rationalism: Generations, Politics, and "Taiwanese Nationalism"', *Policy Studies* 26 (Washington, D.C.: East–West Center Washington, 2006), 4.

[137] Wu Yu-shan has observed that 'the rapid nativization of ethnic consciousness is only partially reflected in positions on national identity and the independence/unification question, and its influence on concrete policy positions [related to cross-Strait economic relations] is even more limited. … Put simply, the trend toward Taiwanization in basic ethnic consciousness has not evolved into a political demand for Taiwan independence': 'Liangan guanxi zhong de Zhongguo yishi yu Taiwan yishi', 4 *Zhongguo Shiwu* (April 2001), 71, 84, as quoted in Rigger, ibid., 7-8. Chu Yun-han has found that the ratio of those born after 1968 believing in Taiwanese independence as a matter of principle is not very high 'despite the fact that they have been exposed more extensively to the democratization process and the state-sponsored cultural [Taiwanization] program': 'Taiwan's National Identity Politics and the Prospects of Cross-Strait Relations', 44 *Asian Survey* (2004), 484, 504. Chu's findings were consistent with research in preceding years that indicated that support for Kuomintang, which dominated Taiwanese politics for half a century and had a longstanding policy of advocating Taiwanese independence (after previously maintaining that the authorities on Taiwan were the sole legitimate government of China), was at its weakest among younger generations: Liu I-chou, 'Taiwan de zhengzhi shidai', 21 *Zhengzhi Xuebao* (December 1993), 99; Liu I-chou, 'Taiwan xuanmin zhengdang xingxiang de shidai chayi', 5 *Xuanju yanjiu* (May 1994), 53; Chen Yi-yan and Tsai Meng-his, 'Xinshidai xuan min de zhengdang zuxiang yu toupiao juece: Shouju minxuan zongtong de fenxi', 29 *Zhengzhi Xuebao* (1997), 63; Chen Lu-hui, 'Taiwan xuanmin zhengdang renting de xingcheng', paper presented at National Chengchi University Election Studies Center Research Symposium (2000), all as cited in Rigger, ibid., 26.

[138] Rigger, ibid., 12 and 24. See also Andy G. Chang and T.Y. Wang, 'Taiwanese or Chinese? Independence or Unification? An Analysis of Generational Differences in Taiwan', 40 *Journal of Asian and African Studies* (2005), 29; Chen Yi-yan, 'Butong zuqun zhengzhi wenhua de shidai fenxi', 27 *Zhengzhi Xuebao* (1996), 83; Chu, ibid.

[139] Mainland Affairs Council, Executive Yuan, Taiwan, 'The ROC Government's Steady Promotion of Developments in Cross-Strait Relations and the Breadth of Vision and Mind of President Ma's Mainland Policy are the Keys to Peace in the Taiwan Strait', 5 September 2012.

National Unification Council.[140] Meanwhile, the PRC government has acknowledged China's differences from Taiwan in governance and ways of life and indicated that it would let the people on Taiwan govern autonomously under the 'one country, two systems' model.[141] Thus, assuming *arguendo* that the people on Taiwan did constitute

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[140] The authorities on Taiwan in their *White Paper on Relations across the Taiwan Straits*, *supra* n.135, reproduced in Henckaerts, *supra* n.135, 284, stated that

> 1. The existence of the Republic of China is a simple reality that cannot be denied.
> 2. 'One China' refers to China as a historical, geographical, cultural, and racial entity.
> 3. The division of China under two separate *governments* on either side of the Taiwan Strait is a temporary, transitional phenomenon in Chinese history, and the joint efforts of the two sides will inevitably put China once again on the road to unification. Therefore, in the process of seeking unification, the two sides may first eradicate mutual hostility through routine people-to-people exchanges and then proceed to create the conditions for unification. The two sides should also respect, rather than exclude, each other in the international arena, and should renounce armed force as a means for achieving unification.
> 4. Room should be left for future political negotiations. It is precisely because China is divided into two *political* entities that we must bring about its unification through exchanges and negotiations. The 'Guidelines for National Unification' clearly stipulate that in the long-term phase of consultation for unification, the two sides will establish a consultative body and complete the plans for unification through negotiation.

(emphasis added) Reference is had also to a statement by the Mainland Affairs Council of Taiwan's Executive Yuan on 1 August 1999: 'we have always maintained that the "one China" concept refer[s] to the future rather than the present. The two sides are not yet unified, but are equals, separately ruled. We both exist concurrently. Therefore, the two sides can be defined as sharing a "special state-to-state relationship", prior to unification. Cross-strait relations are "special", because we share the same culture, historical origins, and ethnic bonds. The people on the two sides engage in exchanges in social, economic, trade … activities … which other divided countries cannot match. What is most important is that the two sides are willing to work in concert and engage in consultations on an equal basis to ensure the future unification of China': as quoted in Crawford, *supra* n.82, 217.

[141] China has affirmed that '[a]fter reunification, Taiwan will become a special administrative region. It will be distinguished from the other provinces or regions of China by its high degree of autonomy. It will have its own administrative and legislative powers, an independent judiciary and the right of adjudication on the island. It will run its own party, political, military, economic and financial affairs. It may conclude commercial and cultural agreements with foreign countries and enjoy certain rights in foreign affairs. It may keep its military forces and the mainland will not dispatch troops or administrative personnel to the island. On the other hand, representatives of the government of the special administrative region and those from different circles of Taiwan may be appointed to senior posts in the central government and participate in the running of national affairs': Taiwan Affairs Office and Information Office of the State Council of the People's Republic of China, *White Paper: The Taiwan Question and Reunification of China*, August 1993, reproduced in Henckaerts, ibid., Appendix 3, 273.

Issues of cross-Strait relations have been prominent in Taiwanese parliamentary elections since they were introduced in 1992 and Taiwanese presidential elections since 1996: Kenneth Lieberthal, 'Preventing a War over Taiwan', *Foreign Affairs* (March/April 2005), 53. Since Ma Ying-jeou, who is in favour of maintaining dialogues with the PRC government, was elected President of the Republic of China (Taiwan) in May 2008, cross-Strait relations have improved. Ma pledged that during his office there would be 'no independence, no reunification, and no use of force': Bonnie Glaser and Brad Glosserman, 'Promoting Confidence Building across the Taiwan Strait: A Report of the CSIS International Security Program and Pacific Forum CSIS', Center for Strategic and International Studies, Washington, D.C., September 2008, 9. Dialogues between the PRC government and the

a people possessing the right to self-determination, their right will be deemed under international law to have been exercised by Taiwan reuniting with China as its parent State, so long as the people on Taiwan are treated on a basis of equality with the majority people of China. Conversely, to deprive China of a significant territory violates China and its people's right to self-determination. It ought to be kept in mind that common Article 1 of the ICCPR and the ICESCR stipulates that all peoples, not only a minority people, have the right to self-determination.

Nevertheless, one might argue that Taiwan through decades of autonomous rule has effectively seceded from China. In claiming a right to secede, one implicitly accepts that Taiwan, until it secedes from China, is part of China, as a territory is not

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authorities on Taiwan, through the Association for Relations across the Taiwan Straits (representing the PRC government) and the Straits Exchange Foundation (representing the authorities on Taiwan), resumed in June 2008. A public opinion survey by the Mainland Affairs Council of Taiwan's Executive Yuan conducted during April 2009 indicated 73.8 per cent in public support for Taiwan continuing negotiations and resolutions of cross-Strait issues (Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of the Public Opinion Survey on the Third "Chiang–Chen Talks" (April 28–30, 2009)'), with similar levels of support reported in subsequent surveys conducted during December 2009 (Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of the Public Opinion Survey on the Fourth Chiang–Chen Talks (December 25–27, 2009)') and April–May 2010 (Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of Public Opinion Survey on the "Public's View on Current Cross-Strait Relations" (April 29–May 2, 2010)'). A Cross-Strait Economic Cooperation Framework Agreement and a Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation were signed in June 2010, with 79.3 per cent of respondents in a July 2010 survey indicating support for handling of cross-Strait issues through negotiations, 61.1 per cent satisfied with the Cross-Strait Economic Cooperation Framework Agreement and 73.1 per cent with the Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation: Mainland Affairs Council, Executive Yuan, Taiwan, 'Survey on Public Views on the Fifth Chiang–Chen Talks (July 2–4, 2010)'. See Miles Kahler and Scott L. Kastner, 'Strategic Uses of Economic Interdependence: Engagement Policies on the Korean Peninsula and across the Taiwan Strait', 43 *Journal of Peace Research* (2006), 523, for an analysis of the rationales and impact of economic interdependence on cross-Strait relations. In a September 2010 survey, 86.2 per cent of respondents indicated support for maintaining the status quo in cross-Strait relations (Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of Public Opinion Survey on the "Public's Views on Current Cross-Strait Relations" (September 1–5, 2010)'. A subsequent survey conducted in May 2011 pointed to 88.4 per cent in public support for maintaining the status quo in cross-Strait relations: Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of the Public Opinion Survey on the "Public's Views on Current Cross-Strait Relations" (May 27–30, 2011)'). Subsequent cross-Strait co-operation has comprised the signing of a Cross-Strait Agreement on Medical and Health Cooperation in December 2010, a Cross-Strait Nuclear Power Safety Cooperation Agreement in October 2011, and a Cross-Strait Customs Cooperation Agreement in June 2012, with the level of public support for continuing negotiations over cross-Strait issues and maintaining the status quo in cross-Strait relations remaining constant (Mainland Affairs Council, Executive Yuan, Taiwan, 'Public Opinion Survey Shows High Support for the Results of the Negotiations at the Seventh Chiang–Chen Talks', 28 November 2011; 'The Public Affirms the Achievements of the Eighth Chiang-Chen Talks', 31 August 2012). Ma was re-elected in January 2012.

capable of seceding from a State of which it does not form part. It is worth noting that States that have diplomatic relations with the authorities on Taiwan do so on the basis that they are the lawful government of China as a whole.[142] In addition, as Weller has pointed out, '[a]fter all, the central government (or former central government) can argue that the entity is not effective, and will never be effective, as it only exists so long as it is not forcibly reincorporated. And such an act can occur at any moment chosen by the central government.'[143]

The question of whether international law provides for a right to secede is yet to be resolved. Serbia on 8 October 2008 requested that the General Assembly vote on referring to the ICJ for an advisory opinion on the question: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'[144] China along with 76 other States voted in favour, while 74 States abstained, including 22 of then 27 European Union Member States (with the exceptions of Cyprus, Greece, Romania, Slovakia, and Spain, who voted in favour), and six States, including the United States, voted against referral.[145]

Saul has noted that a number of States argued before the ICJ that independence of Kosovo could be justified as 'remedial secession'[146] while providing scant legal authorities.[147] In an extraordinary move as it always objects to the ICJ as a forum through which inter-State disputes or questions of international law should be resolved and had never participated in any contentious or advisory proceedings before the ICJ (even though it nominates a Chinese judge to the bench as of right as a Permanent Member of the Security Council), China presented an oral statement to the

[142] Yahuda, *supra* n.98, 1326.
[143] Weller, *supra* n.3, 9.
[144] U.N. G.A. Res. 63/3 (2008).
[145] A/63/PV.22 (2008).
[146] Saul, *supra* n.24, 616, citing written statements to the ICJ from Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia, and Switzerland, 19 April 2009.
[147] Ibid., citing written comments to the ICJ from Serbia, 17 July 2009, para.312.

ICJ to state its position that a right to secession, remedial or otherwise, did not exist under international law.[148] Eventually, in its advisory opinion in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*[149] on 22 July 2010, the ICJ by majority refrained from this pivotal issue and confined its opinion to the question of whether Kosovo's unilateral declaration of independence from Serbia was in accordance with international law. The majority considered it unnecessary to resolve whether a right to secede exists under international law and merely noted that international law does not authorise or prohibit secession. It is important to keep in mind that the majority of the ICJ held only that Kosovo's unilateral declaration of independence from Serbia did not violate international law; they did not conclude that Kosovo was entitled under international law to secession, independence or statehood. Hannum has noted that, at a Security Council meeting on 3 August 2010, '[s]tatements by France, the United Kingdom, the United States, and others that Kosovo *is* independent are little more than feeble attempts to substitute a constitutive approach to recognition for the widely accepted declaratory theory.'[150] Furthermore, Rein Müllerson argues, even if the NATO intervention in Kosovo, on humanitarian grounds, through the use of force had been lawful (or unlawful but legitimate), recognition of Kosovo as an independent State was not.[151]

While an advisory opinion of the ICJ in itself does not constitute international law,[152] one ought to be alarmed by the deviation in the advisory opinion from United Nations instruments and State practice, for many States and non-State entities may

[148] Official transcript of oral argument before the ICJ from China, 7 December 2009, 28.
[149] *Advisory Opinion*, *ICJ Reports* 2010, 403.
[150] Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?', 24 *Leiden Journal of International Law* (2011), 155, 156 (emphasis in original), citing S/PV.6367, 3 August 2010, 12 (France), 14 (Turkey), 15-16 (United Kingdom), 19 (Japan), and 19 (United States).
[151] Müllerson, *supra* n.11, 7.
[152] Article 68 of the Statute of the ICJ states that '[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.' Article 59, ibid., states that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.'

rely on it for precedential value. As Judge Koroma warned in dissent, to allow secession outside the context of decolonisation on the basis of a unilateral declaration of independence 'creates a very dangerous precedent' and 'amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms. The Court's Opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.'[153] Judge Koroma stated that it was not true that international law did not authorise or prohibit a unilateral declaration of independence in a case that was specific and well defined.[154] Even if international law were neutral or silent over secession or unilateral declarations of independence,[155] it does not mean that there exists outside the context of decolonisation a *right* on the part of a territory or its people to secede.

Amidst current political climate in which secession is increasingly regarded as permissible or even as of right that could, should or must be supported by the international community in the form of humanitarian intervention,[156] China in 2005 enacted an anti-secession law that declares that it will use force to reunite with

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[153] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra* n.149, per Judge Koroma (diss. op.), para.4. Similarly, Judge Yusuf in his separate opinion noted that 'claims to separate statehood by ethnic groups or other entities within a State can create situations of armed conflict and may pose a threat not only to regional stability but also to international peace and security. The fact that the Court decided to restrict its opinion to whether the declaration of independence, as such, is prohibited by international law, without assessing the underlying claim to external self-determination, may be misinterpreted as legitimising such declarations under international law, by all kinds of separatist groups or entities that have either made or are planning to make declarations of independence': para.6.

[154] Ibid., per Judge Koroma, para.20.

[155] For a discussion of whether international law does not prohibit secession or unilateral declarations of independence, see Theodore Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?', 24 *Leiden Journal of International Law* (2011), 73.

[156] See discussion in Chapter II. In fact, an attempt to secede that is supported by or based on the intervention of a foreign State brings into play the general principles of international law that an illegal act cannot produce legal rights (*ex injuria jus non oritur*) and that 'an entity is not a State if created through a violation of the rules relating to the use of force': Crawford, *supra* n.87, 211.

Taiwan if necessary.[157] The international community responded with calls for restraint,[158] while the population and authorities on Taiwan denounced the measure.[159]

[157] Anti-Secession Law, adopted at the Third Session of the Tenth National People's Congress on 14 March 2005. For discussions of the anti-secession law, see, *e.g.*, You Ji, 'China's Anti-Secession Law and the Risk of War in the Taiwan Strait', 27 *Contemporary Security Policy* (2006), 237; Keyuan Zou, 'Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law', 4 *Chinese Journal of International Law* (2005), 455.

[158] It is worth noting that the United States has never argued that China's use of force to regain control over Taiwan will contravene international law; it only urges the authorities on both sides of the Taiwan Strait to seek peaceful resolution of the legal status of Taiwan. The position of the United States on Chechnya is illuminating: 'We support the sovereignty and territorial integrity of the Russian Federation. … We oppose attempts to alter international boundaries by force, whether in the form of aggression by one State against another or in the form of armed secessionist movements … although Chechnya is an integral part of the Russian Federation, Moscow *should limit any use of force to a minimum*, and respect human rights': 'Supporting Democracy and Economic Reform in the New Independent States', 6 *US Department of State Dispatch* (1995), 119, 120, as quoted in Crawford, *supra* n.107, 111 (emphasis added).

Much has been written on the Taiwan Relations Act of 1979 enacted by the United States Congress. Steven M. Goldstein and Randall Schriver find that the Taiwan Relations Act 'has emerged as a powerful legislative instrument for the setting of foreign policy boundaries by Congress. … Unlike the usual diet of Congressional action on foreign affairs, it is "the law of the land". Such a status has permitted members of Congress to declare it as the "legal standard" against which to judge Taiwan policy; has led at least one Congressional committee to suggest that a president might be held constitutionally accountable for not upholding it; and can provide the legitimacy for the efforts of sympathetic individuals in the defence bureaucracy to justify support for Congress's efforts': 'An Uncertain Relationship: The United States, Taiwan and the Taiwan Relations Act', 165 *China Quarterly* (2001), 147, 171. While the Taiwan Relations Act may well be a legal standard by which the United States is constrained in its domestic policymaking and actions *vis-à-vis* Taiwan, the municipal legislation does not constitute a legal basis under international law for the United States to intervene in the event that China and Taiwan were to enter into an armed conflict, and is in fact a piece of legislation that in and of itself contravenes international law. In *Military and Paramilitary Activities in and against Nicaragua* (*Merits*) (*Nicaragua* v. *United States of America*), *Judgment*, *ICJ Reports* 1986, 14, the ICJ stressed that '[t]he element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State' (ibid., 108); and that 'acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations' (ibid., 109-10). In *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *ICJ Reports* 1996, Vol.I, 226, 246, the ICJ stated that '[w]hether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State – whether or not it defended the policy of deterrence – suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.' The ICJ explained, ibid., 246-47, that '[w]hether [there] is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State or against the Purposes of the United Nations or whether, in the event

Article 3 of Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) states that '[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State' or 'as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.'[160] Jonathan Charney and John Prescott argue that so long as Taiwan does not threaten or deploy military force when it declares independence, China may not justify the use of force against Taiwan.[161] Such an argument undermines the primacy and sanctity of the principles of State sovereignty and territorial integrity. In fact, should China refrain from action, the doctrine of estoppel will operate against

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that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.' Additionally, the Friendly Relations Declaration states that '[e]very State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.' By providing arms to Taiwan (Taiwan Relations Act, s.2(b)(5)) and proclaiming its willingness to defend the territory against any use of force (ibid., s.2(b)(6)), the United States may be taken as assisting and encouraging Taiwan to secede from or resist reunification with China, which violates China's State sovereignty and territorial integrity, the principle of non-intervention, and the prohibition of the threat or use of force as enshrined in the Charter and customary international law. The fact that the United States is empowered and compelled by the Taiwan Relations Act to provide arms to Taiwan and to defend the territory against any use of force is immaterial to and does not prejudice the aforementioned obligations of the United States under the Charter and customary international law to refrain from intervening in China's internal affairs. It is a well-established principle of international law that a State may in no circumstance disregard its international obligations on account of its municipal laws that may allow or dictate otherwise. As the Permanent Court of International Justice in *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, *Advisory Opinion*, P.C.I.J. Ser. A/B, No.44 (1932), 4, 24, stated, 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.' This rule of customary international law has since been codified in Article 27 of the Vienna Convention on the Law of Treaties.

[159] The authorities on Taiwan stated that 'based on the Montevideo Convention of 1933 … it is undeniable that the Republic of China is a sovereign and independent state' and the anti-secession law 'infringes upon the sovereignty of the Republic of China': Mainland Affairs Council, Executive Yuan, Taiwan, 'Official Position of the Republic of China (Taiwan) on China's Passing of the Anti-secession (Anti-Separation) Law', 29 March 2005.

[160] Signed at Geneva on 8 June 1977, Art.3.

[161] Jonathan I. Charney and J.R.V. Prescott, 'Resolving Cross-Strait Relations between China and Taiwan', 94 *American Journal of International Law* (2000), 453, 477.

China's claim and exercise of State sovereignty over Taiwan.[162] As Taiwan does not possess the right to external self-determination, China's entitlement to observance of its State sovereignty and territorial integrity is conjoined with a right to prevent the break-up of its territory by all means including the use of force.[163] Such a right is so sacrosanct that '[t]he consequence of violations even of fundamental human rights will be responsibility, scrutiny and the loss of legitimacy; they do not entail the loss of title or status of the State concerned.'[164]

Hong Kong and Taiwan's economic significance and international profiles entail major repercussions for China if it threatens to further undermine their political autonomy. On the other hand, Tibet, with its ethnic and cultural differences from China, its dependence on economic aid from the national government, China's

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[162] See Phil C.W. Chan, 'Acquiescence/Estoppel in International Boundaries: *Temple of Preah Vihear* Revisited', 3 *Chinese Journal of International Law* (2004), 421.

[163] Crawford, *supra* n.87, 220, asserts that regardless of whether there were a 'Taiwanese people' in the midst of the Chinese civil war, 'the experience of a half century of separate self-government has tended to create one. In any case, attempts to solve the problem of Taiwan otherwise than by peaceful means must now constitute a situation "likely to endanger the maintenance of international peace and security" under Article 33 of the Charter.' He concludes, ibid., 221, that 'the suppression by force of 23 million people cannot be consistent with the Charter. To that extent there must be a cross-Strait boundary for the purposes of the use of force.' With respect, as Taiwan is an integral part of China, for China to use force to resist secessionist attempt by Taiwan cannot be inconsistent with the Charter, which governs the conduct of international relations. An artificial cross-Strait boundary for the purpose of the use of force is an encumbrance upon, and constitutes unlawful interference in, China's exercise of State sovereignty over its territory.

[164] Crawford, ibid., 149. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor* v. *Dusko Tadic*, Appeal on Jurisdiction, IT-94-1-AR72, 35 ILM 32 (1996), para.30, stated that 'the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.' However, the Security Council generally takes the view that Article 39 applies only to armed conflict that constitutes a threat to international peace and security. In cases where the Security Council discerned a threat to international peace and security from an internal armed conflict, it was the *consequences* arising from the conflict that the Security Council found to constitute a threat. For instance, the Security Council in its Resolution 688 (1991) expressed grave concern about 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions *which* threaten international peace and security in the region' (emphasis added). The emphasis on the consequences of the internal armed conflict rather than the conflict itself was repeated in the first operative paragraph in which the Security Council condemned 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, *the consequences of which* threaten international peace and security in the region' (emphasis added).

physical control of its territory, and its lack of recognition and representation on the international plane, faces significant obstacles in its exercise of the right to self-determination that in turn have influenced the extent to which China has recognised and implemented self-determination in the territory. Much has been written on the historical status of Tibet; the following sub-section explores the legal aspects of Tibet's historical–political background on account of which Tibet now finds its right to self-determination submerged in ambiguity.

c. Tibet: A Shangri-La in minority nationality autonomy?

The dispute over whether Tibet forms an integral part of China stems from ambiguity in international law, in the complicity of the international community and in Tibet's historical relations with China. While the PRC government and Chinese scholars regard any discussion of Tibet's historical status to be unnecessary, Western scholars in Tibetan studies have tended to emphasise the personal – especially the religious – union between the Chinese emperor and the Dalai Lama that dated as earlier as the Yuan dynasty and became entrenched during the Qing dynasty. While not disputing that the personal-religious relationship constituted the foundation of Sino-Tibetan relations,[165] Michael van Walt van Praag argues that the relationship cannot be defined under contemporary international law and was *sui generis*.[166] He concedes that the relationship entailed features characteristic of a protectorate; nonetheless, 'as the nature of Manchu interference in Tibetan affairs, specifically in foreign affairs, did not differ from that characteristic of protectorate relationships and the extent of actual interference was limited and by no means continuous, Tibet as a State never ceased to exist. The exercise of sovereignty by Tibet was restricted by the Manchu involvement in the affairs of Tibet, but that did not result in the extinction of the

[165] Michael C. van Walt van Praag, *The Status of Tibet: History, Rights and Prospects in International Law* (Boulder, CO: Westview Press, 1987), 47.
[166] Ibid., 12.

independent State, which continued to possess the essential attributes of statehood.'[167] Tashi Tsering acknowledges that Tibet was occupied by the Mongols, but insists that the situation was strictly one of occupation and not annexation.[168] Elliot Sperling observes that Chinese historiography between the Yuan dynasty and the founding of the communist state never included Tibet as part of China proper.[169] In addition, Sperling argues, being part of the Mongol empire was not the same as being a part of China, as the Mongol empire was one 'with constituent elements that were not integral parts of China'.[170] The requirement that reincarnations of the Dalai and Panchen Lamas be approved by the Qing court was not so much 'to establish Chinese sovereignty over Tibet, but was rather a means that the Qing employed in both Mongolia and Tibet to limit the power of the aristocracy by limiting the discovering of reincarnations among them'.[171] Due to its conflicts with Western powers from the 1830s onwards, China was not able to sustain its control and authority over Tibet and the Chinese amban in Lhasa ceded powers to the Tibetan government in 1847.[172] Sperling observes that the Qing court segregated its control of China from that of Tibet and Mongolia, with the latter falling under the jurisdiction of the *Lifanyuan* (which handled China's affairs with 'barbarians', including with Russia).[173]

The concept of suzerainty, or vassalage, in international law has always been uncertain. Scelle explained in 1911 that '[e]xactly what vassalage is, and how it affects sovereignty or independence, is difficult to state *a priori*. … The ability to decide definitely in this matter is chiefly the result of an anachronism. The attempt was made to transfer to modern international relations a notion of feudal law which does not harmonise with the present idea of a State; it could only survive as a

[167] Ibid., 127.
[168] Tashi Tsering, *A Brief Survey of Fourteen Centuries of Sino-Tibetan Relations* (Dharamsala: Central Tibetan Secretariat Office of Information and International Relations, 1988), 5-7.
[169] Elliot Sperling, 'The Tibet–China Conflict: History and Polemics', *Policy Studies* 7 (Washington, D.C.: East–West Center Washington, 2004), 24.
[170] Ibid., 25.
[171] Ibid., 8.
[172] Ibid.
[173] Ibid., 29.

skeleton stripped of substance.'[174] Hackworth maintained in 1940 that 'the extent of the sovereignty retained by a vassal or a semi-sovereign State is not determined by general rules of international law. It is ascertained in each case by the facts of the particular case.'[175] Scelle argued that vassalage implied personal union but 'the armies are separate, and there may even be occasions for a regular war between the vassal State and the suzerain State'.[176] Such a union was based on '*reciprocal duties* based upon treaty, and not *pre-existing rights*'.[177] Alexandrowicz-Alexander stated that 'suzerainty, though still continuing on the basis of an historical relationship, became a *nominal* title ripe for elimination or conversion into a title more favorable to the subordinate state', a principle he found to be of great import in the case of Tibet.[178] The Permanent Court of International Justice in its advisory opinion in *Nationality Decrees in Tunis and Morocco*[179] stressed that the legal status of a dependency needed to be assessed in light of its characteristics.

A lawyer knows well that ambiguity is a source as much of conflict as of compromise. By maintaining the notion that China was Tibet's suzerain State and Tibet China's vassal, imperial China and Tibet managed to co-exist for centuries. Joseph Fletcher has noted that '[w]ithin the empire, the myth of world suzerainty was a useful ideological instrument for ruling China, and … it was not to be compromised. But in foreign affairs the myth often proved a hindrance. Then quietly, the emperor practised what he pleased, not what he preached. Relations on an equal basis with Heart, Lhasa, Kokand, or Moscow were not exceptions to Chinese practices at all. They were customary dealings on the unseen side of a long-

[174] G. Scelle, 'Studies on the Eastern Question', 5 *American Journal of International Law* (1911), 144, 161.
[175] Green Haywood Hackworth, *A Digest of International Law*, Vol.I (Washington, D.C.: United States Government Printing Office, 1940), 75.
[176] Scelle, *supra* n.174, 162.
[177] Ibid. (emphasis in original).
[178] Charles Henry Alexandrowicz-Alexander, 'The Legal Position of Tibet', 48 *American Journal of International Law* (1954), 265, 266 (emphasis in original).
[179] *Nationality Decrees Issued in Tunis and Morocco (French Zone) on 8 November 1921*, *Advisory Opinion*, P.C.I.J. Series B, No.4, 3.

established tradition.'[180] Dawa Norbu argues that '[e]mpire-tolerated heterogeneity allowed considerable social space for different identities, cultures, languages, etc., to exist, whereas the nation-state, in the name of political centralization and cultural unification, does not tolerate the politics of differences; instead it melts minorities within the crucible of national integration.'[181]

Alexandrowicz-Alexander believed that a personal union did exist between the Qing emperor and the Dalai Lama but ceased automatically upon the demise of the Qing dynasty in 1912,[182] a view the International Commission of Jurists concurred with.[183] Shushi Hsü noted in 1926 that 'it has been the practice of China as suzerain not to interfere with her vassals in their relationship with other nations … so long as she was not called upon.'[184] In a treaty of friendship and commerce concluded in 1883 between Great Britain and Korea, there was no mention of Korea's (undisputed) status as a vassal of China and China was not a signatory to the treaty.[185] The Convention between Great Britain and Tibet in 1904, concluded to 'resolve and determine the doubts and difficulties' arising from 'the meaning and validity of the Anglo-Chinese Convention of 1890',[186] which delineated the boundary between Sikkim and Tibet but could not be implemented by China as Tibet refused its validity, referred to the 'Government of Tibet'[187] and was not endorsed by the Chinese seal.[188] Krishna Rao argues that the provision in the 1904 treaty, that '[t]he Government of Tibet engages to respect the Anglo-Chinese Convention of 1890 and to recognise the

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[180] Joseph F. Fletcher, 'China and Central Asia', in John King Fairbank, ed., *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press, 1973), 206, 224.
[181] Dawa Norbu, *China's Tibet Policy* (Richmond: Curzon Press, 2001), 15.
[182] Alexandrowicz-Alexander, *supra* n.178, 270.
[183] International Commission of Jurists, *The Question of Tibet and the Rule of Law* (Geneva: International Commission of Jurists, 1959), 84-85.
[184] Shuhsi Hsü, *China and Her Political Entity: A Study of China's Foreign Relations with Reference to Korea, Manchuria and Mongolia* (New York: Oxford University Press, 1926), 92.
[185] K. Krishna Rao, 'The Sino-Indian Boundary Question and International Law', 11 *International and Comparative Law Quarterly* (1962), 375, 395.
[186] Convention between Great Britain and Tibet, signed at Lhasa on 7 September 1904, Preamble.
[187] Ibid.
[188] Rao, *supra* n.185, 397.

frontier between Sikkim and Tibet, as defined in Article I of the said Convention',[189] clearly implied that treaties concluded by China ostensibly for or on behalf of Tibet were not binding on and would not be implemented by Tibet without a separate agreement to which Tibet was privy.[190]

As Tibet refused to enter into relations with British India, Great Britain invaded Tibet in 1904 in what is known as the Younghusband mission. British India noted that 'recent military incidents of advance are regarded by the Chinese Government, if not with satisfaction, as conducing to the recovery of the authority they have lost, at any rate with indifference'.[191] The Younghusband mission compelled the Qing court to regard loose political control over Tibet no longer acceptable, and complete control of Tibet a strategic bulwark for China from foreign powers.[192] Dibyesh Anand observes that the mission, which brought to the fore 'the question of what exactly was Tibet, who had the final say in its affairs and what were its precise geographical limits',[193] tends to be completely ignored in contemporary journalistic reports on Tibet, even though its predatory nature has been detailed in historical studies.[194] In 1906, Great Britain and China concluded a treaty confirming the 1904 treaty.[195] Rao argues that if China had the capacity then to conclude treaties on behalf of Tibet, its treaty with Great Britain in 1906 should have confirmed the

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[189] Convention between Great Britain and Tibet (1904), Art.I.
[190] Rao, *supra* n.185, 398.
[191] India Office Records, 'Further Correspondence Respecting the Affairs of Tibet, Part III', as quoted in Dibyesh Anand, 'Strategic Hypocrisy: The British Imperial Scripting of Tibet's Geopolitical Identity', 68 *Journal of Asian Studies* (2009), 227, 236.
[192] Alastair Lamb, *Britain and Chinese Central Asia: The Road to Lhasa, 1767 to 1905* (London: Routledge and Kegan Paul, 1960); Alastair Lamb, *British India and Tibet, 1766–1910*, rev. ed. (London: Routledge and Kegan Paul, 1986); S. Liming, 'The Younghusband Expedition and China's Policy towards Tibet, 1903–1904', in Per Kvaerne, ed., *Tibetan Studies: Proceedings of the 6th Seminar of the International Association for Tibetan Studies* (Oslo: Institute for Comparative Research in Human Culture, 1994), 59; Gray Tuttle, *Tibetan Buddhists in the Making of Modern China* (New York: Columbia University Press, 2005).
[193] Lamb (1986), ibid., 257.
[194] Anand, *supra* n.191, 237, citing Michael Carrington, 'Officers, Gentlemen and Thieves: The Looting of Monasteries during the 1903/4 Younghusband Mission to Tibet', 37 *Modern Asian Studies* (2003), 81; Patrick French, *Younghusband: The Last Great Imperial Adventurer* (London: Flamingo, 2000).
[195] Convention between Great Britain and China Respecting Tibet, signed at Beijing on 27 April 1906 and ratified at London on 23 July 1906, Art.1.

1890 treaty and cancelled, instead of confirming, the 1904 treaty between Great Britain and Tibet.[196]

When the Qing dynasty fell and Chinese troops were expelled from Tibet in 1912, the new Republic of China government declared that Tibet would thenceforth be a province of China. While stating that China had suzerainty over Tibet, Great Britain in its note of protest stated that it 'could not consent to the assertion of Chinese sovereignty over a State enjoying independent treaty relations with her'.[197] In reply, China stated that it had 'no intention of converting Tibet into another province of China and that the preservation of the traditional system of Tibetan Government was as much the desire of China as of Great Britain.'[198] In a letter to his counterpart Zhou En-lai in September 1959, the Prime Minister of India stated that '[t]he arrangements for the Simla Conference were made with the full knowledge and consent of the Government of China. The Foreign Minister of China wrote to the British representative on the 7th August, 1913, that the Chinese plenipotentiary would proceed to India "to open negotiations for a treaty jointly" with the Tibetan and British plenipotentiaries. It is clear from the proceedings of the conference that not only did the Chinese representative fully participate in the Conference but that the Tibetan representative took part in the discussions on an equal footing with the Chinese and the then British Indian representatives.'[199] India rejected 'the so-called suzerainty of China over Tibet as a constitutional fiction – a political affectation which has only been maintained because of its convenience to both parties'.[200]

China's conduct in relation to the Simla Convention could result in three different consequences under international law. The first consequence, applying the

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[196] Rao, *supra* n.185, 398-99.
[197] International Commission of Jurists, *supra* n.183, 81.
[198] Ibid.
[199] As quoted in Rao, *supra* n.185, 400.
[200] India Office Records, 'Papers Relating to Tibet' (1904), as quoted in Anand, *supra* n.191, 236.

reasoning of the ICJ in *Temple of Preah Vihear*,[201] was that China should be estopped from claiming that Tibet was part of China, when its representative in Lhasa participated in the negotiations for the Convention even though Tibet did not ratify it subsequently, and when the President of China upon British protest indicated that Tibet was not a province of China. Alternatively, given that China did not ratify the Convention, Tibet was free to ignore the inclusion in the Convention of Great Britain's acknowledgment of China's suzerainty over Tibet, and China 'could not … claim rights of suzerainty' on the basis of the Convention.[202] Finally, on the basis of the cardinal principle that a treaty, or a provision therein, is binding on a State only after it agrees to the treaty, one may rely on China's non-ratification of the Simla Convention to argue that China should not be considered bound by the Convention or estopped from claiming that through non-ratification it merely reserved its right to settle with Tibet directly.

Despite its declaration of independence in 1913, Tibet was not recognised between 1913 and 1951 as an independent State by any State other than Mongolia. The United Kingdom, and British India, which had the most intimate relations with Tibet, dealt with Tibet as if an independent State subordinate to China in a relationship of suzerainty, so as to forestall Chinese objections.[203] The United Kingdom was indifferent to the status of Tibet so long as Tibet was able to adhere to the Simla Convention.[204] Although Tibet was neutral during the Second World War, its attempts at admission to United Nations membership were systematically ignored or undermined by the United Kingdom and British India. Anand notes that 'not only did the British ignore Tibetan efforts to acquire international personality in 1948–49,

[201] *Case concerning the Temple of Preah Vihear* (*Cambodia* v. *Thailand*), *Merits*, *Judgment*, *ICJ Reports* 1962, 6. For a discussion of estoppel in international law and a critique of the judgment, see Chan, *supra* n.162.
[202] Alexandrowicz-Alexander, *supra* n.178, 271.
[203] Anand, *supra* n.191, 240.
[204] Ibid., 241.

they actively discouraged any other state from encouraging them'.[205] The United Kingdom altered its previous position that Tibet was under the suzerainty of China and confusedly stated that before the Qing court fell in 1912, 'Tibet was under Chinese sovereignty. In that year she broke away and although she has maintained her independence ever since (subject to her recognition of Chinese suzerainty) the Chinese have in recent years shown an increasing tendency to claim sovereignty over the country.'[206] A secret note from British Indian officials cautioned that 'glamorising' Tibet might, in addition to stirring Chinese reactions, compel the United States to 'scent British propaganda, and to conclude that Tibet needed protection rather against British imperialism, or that it needed to be roused from its pathetic contentment and given the blessings of civilisation and reform, if not by China then by American businessmen (who would be ready on their own account to take any opportunities they saw) or missionaries.'[207] A note from British India warned that raising the international profile of Tibet would lead the United States to devise 'ill-advised schemes' such as a 'presence of Tibetan representation at the peace conference' and would likely give 'the Tibetans swelled head' and at any rate cause inconveniences to British India.[208] Tibet's endeavour to attain international recognition was further stymied after India attained independence, as the United Kingdom's strategic interests in the region decreased significantly.[209] The British Ambassador to the United Nations advised the Foreign Office that '[w]hat we want to do is to create a situation which does not oblige us in practice to do anything about the Communist invasion of Tibet'.[210] Amy Kellam argues that 'Chinese and Western discourses have converged to produce a compelling metanarrative that traditional

[205] Ibid., 245.
[206] India Office Records, 'Status of Tibet: HMG's Policy, October 1945–February 1946', as quoted in Anand, ibid.
[207] India Office Records, 'Status of Tibet: Publicity by China and HMG, May 1943–June 1946', as quoted in Anand, ibid., 244.
[208] Ibid., as quoted in Anand, ibid.
[209] India Office Records, 'Status of Tibet: HMG's Policy, February 1946–February 1949', as quoted in Anand, ibid., 246.
[210] As quoted in Tsering Shakya, 'Tibet and the League of Nations', 10:3 *Tibet Journal* (1999), 48, 55.

Tibet was a primitive, pre-legal society; and … this metanarrative has prejudiced considerations of Tibet's legal status.'[211] Contemporary Western construction of Tibet as a Shangri-La that should be left untouched by industrialisation and Han Chinese settlement aligns with the PRC government's position that industrialisation in Tibet has liberated Tibetans from their traditional serf system and helped them realise genuine self-determination through assimilation with China's high culture and revolutionary regime.[212]

After Chinese troops invaded Tibet in October 1950, the PRC government and the 14th Dalai Lama entered into negotiations that culminated in the Seventeen-Point Agreement in May 1951. Article 3 of the Agreement states that '[t]he Tibetan people have the right of exercising national regional autonomy under the unified leadership of the Central People's Government.'[213] Article 4 states that '[t]he central authorities will not alter the established status, functions and powers of the Dalai

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[211] Amy Kellam, 'Law's Imperial Discourse and the Status of Tibet', 12 *Griffith Law Review* (2003), 190, 191.

[212] It is not disputed that Tibet's social structure before 1951 was pre-modern: Melvyn Goldstein, *A History of Modern Tibet: Decline of the Lamaist State* (Berkeley: University of California Press, 1989); Dawa Norbu, *Tibet: The Road Ahead* (London: Rider, 1998). In pre-1951 Tibet, land was owned by the regime (30.9%), the aristocracy (29.6%), and the monasteries (39.5%): Barry Sautman and Irene Eng, 'Tibet: Development for Whom?', 15:2 *China Information* (2001), 20, 30. However, Warren W. Smith, Jr., explains that the serf system under which Tibet operated was not one of exploitation as it was in Europe: 'Though bound to their estates, agricultural serfs in Tibet had title to their own plots of land and contractual obligations for labor to the estate that could not be arbitrarily altered. They had rights to private possessions and physical mobility, except when labor was required by the estate. Serfs could, by private trade or business, become relatively wealthy and were sometimes even in the position of loaning money or grain to the estate. They also had the right to initiate legal action against the estate owner. The final arbiter in such cases was the Dalai Lama himself. The worst aspect of the system was that estate owners had broad adjudicative rights over their serfs, the only escape from which was to flee or to become a monk. There was no system for returning serfs to the estates from which they had escaped, so some serfs were able to achieve personal freedom as petty merchants or hired labor in this way': *China's Tibet?: Autonomy or Assimilation* (Lanham, MD: Rowman & Littlefield, 2009), 14-15. Wim van Spengen describes Tibet's society as '"feudal" in one way or another' because of the 'contract between lord and vassal, in the form of legitimate and accepted surplus appropriation': *Tibetan Border Worlds: A Geohistorical Analysis of Trade and Traders* (London: Kegan Paul International, 2000), 71. The Dalai Lama himself has affirmed the characterisation of traditional Tibetan social structure as feudal and indicated that if he should return to Tibet 'there will be no going back to the old feudal system': 'Amartya Sen, Dalai Lama Call for Unbiased Reportage', *The Hindu*, 30 January 2001; 'the undesirability of the "old society"' was emphasised by Tibetan monks advocating independence: Ronald D. Schwartz, 'Renewal and Resistance: Tibetan Buddhism in the Modern Era', in Ian Harris, ed., *Buddhism and Politics in Twentieth Century Asia* (London: Pinter, 1999), 229.

[213] Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, signed at Beijing on 23 May 1951, Art.3.

Lama. Officials of various ranks shall hold office as usual.'[214] Article 11 states that '[i]n matters related to various reforms in Tibet, there will be no compulsion on the part of the central authorities. The Local Government of Tibet should carry out reforms of its own accord, and when the people raise demands for reform, they shall be settled by means of consultation with the leading personnel of Tibet.'[215] However, for the purposes of minority nationality autonomy, China defines Tibet as encompassing only the present-day Tibet Autonomous Region where the Dalai Lama used to exercise direct authority, and excluding areas with dominant Tibetan populations which Tibetans traditionally considered to be part of Tibet proper, including Gansu, Qinghai, Sichuan, and Yunnan. One might argue that the Seventeen-Point Agreement was signed by Tibet as a result of China's threat or use of force and that accordingly it was not valid under international law. Conversely, following the ICJ's reasoning in *Temple of Preah Vihear*, Tibet is arguably estopped from claiming that the Agreement is not legally binding when it did not seek to repudiate the Agreement until 1959.

As Chapter III explained, the legitimacy of the communist state, both internally and externally, is predicated upon its antagonism to imperialism. Thus, 'to question the legitimacy of Tibet's incorporation into the PRC is to question the legitimacy of the idea of the Chinese state as constructed by the Chinese Communist Party; it is to raise questions against the cultural and political nationalism that has been fostered within the PRC and that has taken root both inside and outside official party and governmental circles'.[216] It is as much for reasons of legitimacy as Tibet's strategic position and natural resources that China regards the notion of Tibetan independence as completely unacceptable.

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[214] Ibid., Art.4.
[215] Ibid., Art.11.
[216] Colin Mackerras, *China's Ethnic Minorities and Globalisation* (London: RoutledgeCurzon, 2003), 5.

The enigma surrounding Tibet and the force and legitimacy underlying its claim to self-determination are heavily invested (rather unduly) in the person of the Dalai Lama as embodiment of Tibetan Buddhism and traditions and the Tibetan realm. While China accepts the Dalai Lama as a religious figure, and in theory guarantees freedom of religious beliefs in the 1982 Constitution,[217] it does not regard him as the political representative of Tibet or Tibetans and considers all religious practices as anathema to socialism and national unity.[218] In July 1981, Party Chairman Hu Yaobang presented to the Dalai Lama's elder brother, Gyalo Dondup, a five-point policy with a view to direct negotiations with the Dalai Lama, who had fled to India in 1959:

1. The Dalai Lama should be confident that China has entered a new stage of long-term political stability, steady economic growth and mutual help among all nationalities.
2. The Dalai Lama and his representatives should be frank and sincere with the Central Government, not beat around the bush. There should be no more quibbling over the events in 1959.
3. The central authorities sincerely welcome the Dalai Lama and his followers to come back to live. This is based on the hope that they will contribute to upholding China's unity and promoting solidarity between the Han and Tibetan nationalities, and among all nationalities, and the modernization program.

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[217] A distinction between religious beliefs and religious practices or activities inheres in the relevant constitutional provision. Article 36 of the 1982 Constitution states that '[c]itizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination.'

[218] See Luo Zhufeng, ed., *Religion under Socialism in China*, trans. Donald E. MacInnis and Zheng Xi'an (Armonk, NY: M.E. Sharpe, 1991).

4. The Dalai Lama will enjoy the same political status and living conditions as he had before 1959. It is suggested that he not go to live in Tibet or hold local posts there. Of course, he may go back to Tibet from time to time. His followers need not worry about their jobs and living conditions. These will only be better than before.
5. When the Dalai Lama wishes to come back, he can issue a brief statement to the press. It is up to him to decide what he would like to say in the statement.[219]

When the Tibetan delegation returned in October 1984 for a second round of discussions, it rejected the five-point policy and proposed instead that Tibet should become a demilitarised autonomous region in association with China.[220] In an address to the United States Congressional Human Rights Caucus in 1987, the Dalai Lama proposed a five-point plan for Tibet, under which Tibet should be demilitarised and the Central Government should abandon its population transfer policy, respect Tibetans' human rights and freedoms, restore and protect Tibet's environment, and commence negotiations on the status of Tibet and on relations between Tibetans and Han Chinese.[221] The United States government strongly disapproved of the Dalai Lama's use of his visit as a religious leader to present a politically charged agenda, and disclaimed that it supported his five-point plan. In September 1988, China's State Nationality Affairs Commission issued a detailed rejection of the Dalai Lama's five-point plan.[222]

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[219] 49:5 *Beijing Review* (1984), 10, as quoted in Melvyn C. Goldstein, *The Snow Lion and the Dragon: China, Tibet, and the Dalai Lama* (Berkeley: University of California Press, 1997), 68.
[220] Norbu, *supra* n.212, 321.
[221] Dawa Norbu, 'China's Dialogue with the Dalai Lama 1978–90: Prenegotiation Stage or Dead End?', 64 *Pacific Affairs* (1991), 351, 354.
[222] Tsering Shakya, *The Dragon in the Land of the Snows: A History of Modern Tibet since 1947* (New York: Columbia University Press, 1999), 523, n.61.

Subsequently, in an address to the European Parliament in Strasbourg in October 1988, the Dalai Lama reiterated thus:

> The whole of Tibet known as Cholka-Sum (U-Tsang, Kham and Amdo) should become a self-governing democratic political entity founded on law by agreement of the people for the common good and the protection of themselves and their environment, in association with the People's Republic of China.
>
> The Government of the People's Republic of China could remain responsible for Tibet's foreign policy. The Government of Tibet should, however, develop and maintain relations, through its own Foreign Affairs Bureau, in the fields of religion, commerce, education, culture, tourism, science, sports and other non-political activities. Tibet should join international organizations concerned with such activities.
>
> The Government of Tibet should be founded on a constitution of basic law. The basic law should provide for a democratic system of government entrusted with the task of ensuring economic equality, social justice and protection of the environment. This means that the Government of Tibet will have the right to decide on all affairs relating to Tibet and the Tibetans.
>
> As individual freedom is the real source and potential of any society's development, the Government of Tibet would seek to ensure this freedom by full adherence to the Universal Declaration of Human Rights, including the rights to speech, assembly, and religion. Because religion constitutes the source of Tibet's national identity, and spiritual values lie at the very heart of Tibet's rich culture, it

would be the special duty of the Government of Tibet to safeguard and develop its practice.[223]

China responded by firmly stating that negotiations over Tibetan autonomy could not proceed without the Dalai Lama's disclaimer of Tibetan independence.[224] In turn, the Dalai Lama stated that 'I have stated time and again that I do not wish to seek Tibet's separation from China, but that I will seek its future within the framework of the Chinese constitution. Anyone who has heard this statement would realize, unless his or her view of reality is clouded by suspicion, that my demand for genuine self-rule does not amount to a demand for separation. … I have only one demand: self-rule and genuine autonomy for all Tibetans, i.e., the Tibetan nationality in its entirety.'[225]

To bolster the legitimacy of its exercise of sovereignty over minority ethnic groups in its territory, China has fostered a system of minority nationality autonomy. Ethnic groups in China are officially recognised by the PRC government as 'nationalities', and there are, including Han Chinese, 56 nationalities. A nationality is a 'historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture'.[226] The system was devised in the 1949 Common Programme of

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[223] As quoted in Julia Meredith Hess, *Immigrant Ambassadors: Citizenship and Belonging in the Tibetan Diaspora* (Stanford: Stanford University Press, 2009), 58.

[224] The PRC government stated that '[t]here are two points which need to be clarified: 1. We have never recognized "the Kashag Government" which has all along indulged in the activities of the independence of Tibet. We will not receive any delegation or fact-finding group designated by the Kashag [Tibet cabinet] Government. 2. The "new proposal" put forward by the Dalai Lama in Strasbourg cannot be considered as the basis for talks with the Central Government because it has not at all relinquished the concept of the "independence of Tibet". If the Dalai Lama is sincere in improving relations with the Central Government and really concerned for the happiness of the Tibetan people, for the economic development and prosperity of the Tibetan nationality, he should truly give up the "idea of independence". The Dalai Lama should place himself in the great family of the unified motherland and join the Central Government, the People's Government of Tibet and the Tibetan people in discussing the major policies concerning Tibet': as quoted in Tashi Rabgey and Tseten Wangchuk Sharlho, 'Sino-Tibetan Dialogue in the Post-Mao Era: Lessons and Prospects', *Policy Studies* 12 (Washington, D.C.: East–West Center Washington: 2004), 12.

[225] Statement of His Holiness the Dalai Lama on the 47th Anniversary of the Tibetan National Uprising, Office of His Holiness the Dalai Lama, Dharamsala, 10 March 2006.

[226] Mackerras, *supra* n.216, 2.

the Chinese People's Political Consultative Conference.[227] Article 3 of the 1954 Constitution stated that '[t]he People's Republic of China is a unitary multinational state. All the nationalities are equal. Discrimination against or oppression of any nationality, and acts which undermine the unity of the nationalities, are prohibited. All the nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own customs and ways. Regional autonomy applies in areas where a minority nationality live in a compact community. All the national autonomous areas are inseparable parts of the People's Republic of China.'[228] In the 1982 Constitution, it is stated that

> All nationalities in the People's Republic of China are equal. The state protects the lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or

[227] Article 9 of the Common Programme stated that '[a]ll nationalities within the boundaries of the People's Republic of China shall have equal rights and duties.' Article 50, ibid., stated that '[a]ll nationalities within the boundaries of the People's Republic of China are equal. They shall establish unity and mutual aid among themselves, and shall oppose imperialism and their own public enemies, so that the People's Republic of China will become a big fraternal and cooperative family composed of all its nationalities. Nationalism and chauvinism shall be opposed. Acts involving discrimination, oppression, and disrupting the unity of the various nationalities shall be prohibited.' Article 51, ibid., stated that '[r]egional autonomy shall be exercised in areas where national minorities are concentrated, and various kinds of autonomous organizations for the different nationalities shall be set up according to the size of the respective peoples and regions. In places where different nationalities live together and in the autonomous areas of the national minorities, the different nationalities shall each have an appropriate number of representatives in the local organs of state power.' Article 52, ibid., stated that '[a]ll national minorities within the boundaries of the People's Republic of China shall have the right to join the People's Liberation Army and to organize local people's public security forces in accordance with the unified military system of the state.' Article 53, ibid., stated that '[a]ll national minorities shall have the freedom to develop their spoken and written languages, to preserve or reform their traditions, customs and religious beliefs. The people's government shall assist the masses of all national minorities in their political, economic, cultural, and educational development.' The 1952 General Programme for the Implementation of Regional Autonomy for Minorities stated that '[e]ach autonomous area is an integral part of the territory of the People's Republic of China. The autonomous organ of each autonomous area is a local government led by the government of the next higher level, under the unified leadership of the central government.'

[228] 1954 Constitution, Art.3.

> instigate their secession are prohibited. The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities. Regional autonomy is practised in areas where people of minority nationalities live in compact communities; in these areas organs of self-government are established for the exercise of the right of autonomy. All the national autonomous areas are inalienable parts of the People's Republic of China. The people of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs.[229]

Provisions for autonomous rule in minority nationality areas, such as Tibet, are further set out in the 1984 Law on Regional National Autonomy. In particular, Article 19 of the Law states:

> The people's congresses of national autonomous areas shall have the power to enact regulations on the exercise of autonomy and separate regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. The regulations on the exercise of autonomy and separate regulations of autonomous regions shall be submitted to the Standing Committee of the National People's Congress for approval before they go into effect. Those of autonomous prefectures and counties shall be submitted to the standing committees of the people's congresses of provinces or autonomous regions for approval before

[229] 1982 Constitution, Art.4.

they go into effect, and they shall be reported to the Standing Committee of the National People's Congress for the record.[230]

In addition, Article 20 states, '[i]f a resolution, decision, order or instruction of a state organ at a higher level does not suit the conditions in a national autonomous area, the organ of self-government of the area may either implement it with certain alterations or cease implementing it after reporting to and receiving the approval of the state organ at a higher level; the state organ at a higher level shall give the reply in 60 days since the day on which the report is received.'[231] China has asserted that '[r]egional autonomy for ethnic minorities enables them to bring into full play their regional advantages and promote exchanges and cooperation between ethnic minority areas and other areas, and consequently quickens the pace of modernization both in the minority areas and the country as a whole and helps achieve common development of all regions and prosperity for all ethnic groups.'[232]

Tibetans remain the minority nationality to which the Central Government has devoted most of its attention and resources. Tashi Rabgey and Tseten Wangchuk Sharlho note that four of the Nationalities and Religion Bureau departments handle Tibetan affairs exclusively, while affairs that pertain to the other 54 minority nationalities are handled by one department.[233] The authors argue that the priority ascribed Tibetan affairs 'suggests an increased professionalization of Beijing's approach to the Tibet issue, yet it may also create greater bureaucratic impediments to change and innovation. … procedural rigidity and institutional resistance to initiative could exert a conservative force over the United Front's handling of the Dalai

[230] Law of the People's Republic of China on Regional National Autonomy, adopted at the Second Session of the Sixth National People's Congress and promulgated by Order No.13 of the President of the People's Republic of China on 31 May 1984, effective as of 1 October 1984, Art.19.
[231] Ibid., Art.20.
[232] Information Office of the State Council of the People's Republic of China, *White Paper on Regional Autonomy for Ethnic Minorities in China*, February 2005, I. A Unified Multi-Ethnic State, and Regional Autonomy for Ethnic Minorities.
[233] Rabgey and Sharlho, *supra* n.224, 32.

Lama.'[234] China has asserted that '[s]ince regional ethnic autonomy was implemented in 1965 in Tibet, the Tibetan people, in the capacity of masters of the nation and under the leadership of the Central Government, have actively participated in administration of the state and local affairs, fully exercised the rights of self-government bestowed by the Constitution and law, engaged in Tibet's modernization drive, enabled Tibetan society to develop by leaps and bounds, profoundly changed the old situation of poverty and backwardness in Tibet, and greatly enhanced the level of their own material, cultural and political life.'[235] In its 1998 *White Paper on Regional Ethnic Autonomy in Tibet*, China noted that '[a]s the organs of self-government, the Tibet Autonomous Regional People's Congress and the Regional People's Government exercise the power of autonomy according to law. In accordance with the Chinese Constitution and the Law on [Regional National] Autonomy, all areas entitled to [regional national] autonomy enjoy the extensive rights of autonomy, involving legislation, the use of local spoken and written languages, the administration of personnel, the economy, finance, education and culture, the management and development of natural resources, and other aspects.'[236]

The PRC government's interpretation of the rights of minority ethnic groups to self-determination is not at significant variance with that of its imperial or

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[234] Ibid.

[235] Information Office of the State Council of the People's Republic of China, *White Paper on Regional Ethnic Autonomy in Tibet*, May 2004, Foreword. China further asserted that '[h]istorical facts indicate that the institution of regional ethnic autonomy in Tibet was the natural result of social progress in Tibet, and that it accords with the fundamental interests of the Tibetan people and the inexorable law of development of human society. … To institute regional ethnic autonomy in Tibet is the natural requirement for safeguarding national unification and national solidarity, and for the equal development and common prosperity of the Tibetan people and people of other ethnic groups in China. … The institution of regional ethnic autonomy in Tibet is the logical outcome of the Tibetan people's adherence to development along the road of Chinese-style socialism under the leadership of the Communist Party of China, and also the basic institutional guarantee for Tibetans to be masters of their own affairs. … Practice has proved that only by adhering to the leadership of the Communist Party, the socialist road and the system of regional ethnic autonomy can it be possible to truly make the Tibetan people masters of their own affairs': ibid., V. Regional Ethnic Autonomy is the Fundamental Guarantee for Tibetan People as Masters of their Own Affairs.

[236] Information Office of the State Council of the People's Republic of China, *White Paper on New Progress in Human Rights in the Tibetan Autonomous Region*, February 1998, I. Ethnic Regional Autonomy System and the People's Political Rights.

republican predecessor. All three regimes viewed self-determination through the lens of Han Chinese ethnic and cultural superiority; assimilation equals liberation and equality. Nicholas Becquelin observes that increased Han Chinese migration into minority nationality areas has metamorphosed from a political affront to the notion of China as a multi-ethnic State respectful of minority nationality autonomy, to a publicly acknowledged goal.[237]

The ever increasing Han Chinese migration into Tibet serves to dilute Tibetan representation in the local people's congresses, as Han Chinese tend to reside in the cities and Tibetans in rural areas and one urban vote carries the same weight as four rural votes in autonomous regions under the 1979 Election Law as amended in 1995.[238] Pitman Potter argues that the 1982 Constitution justifies 'state-centric governance and gradual diminution of local ethnic identity' and serves 'to entrench policy ideals and approaches that have the potential to marginalize minority nationalities'.[239] Furthermore, Party policy dictates that the leadership role must remain with the Party as 'the faithful representative of the interests of the people of all nationalities, acting as the core that brings together the efforts of the people of all nationalities'.[240] The Preamble to the 2002 Constitution of the Chinese Communist

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[237] Nicholas Becquelin, 'Staged Development in Xinjiang', 178 *China Quarterly* (2004), 358, 359. According to the PRC government, '[i]t must be understood that the question of wanting or not wanting Han cadres and resettlers is, in a large measure, the question of wanting or not wanting socialism and prosperity for the minorities … The opposition to all anti-Chinese tendencies constitutes an important facet of the struggle against local nationalism. In ousting the Chinese, certain people do so under the pretext of the so-called assimilation problem. They describe the efforts exerted by Chinese cadres and people to help the fraternal minorities construct socialism as efforts to "assimilate the minorities". This, of course, is absurd. The gradual fusion of the various nationalities on the basis of equality is the natural law governing social development. … We have all along opposed the assimilation of the minorities by force, because that is oppression. But we will never oppose the natural fusion among the nationalities, because this is the progressive trend of historical development': Wang Feng, 'On the Rectification Campaign and Socialist Education among Minorities', New China News Agency, 28 February 1958, as quoted in Smith, *supra* n.212, 42.

[238] Yash Ghai, Sophia Woodman, and Kelley Loper, 'Is There Space for "Genuine Autonomy" for Tibetan Areas in the PRC's System of Nationalities Regional Autonomy?', 17 *International Journal on Minority and Group Rights* (2010), 137, 162.

[239] Pitman B. Potter, 'Governance of the Periphery: Balancing Local Autonomy and National Unity', 19 *Columbia Journal of Asian Law* (2005), 294, 305

[240] State Ethnic Affairs Commission, *Zhongguo gongchandang guanyu minzu wenti de jiben guandian he zhengce (ganbu duben)* [*The Chinese Communist Party's Basic Standpoints and*

Party explains that leadership by the Party encompasses 'political, ideological and organizational leadership … Acting on the principle that the Party commands the overall situation and coordinates the efforts of all quarters, the Party must play the role as the core of leadership among all other organizations at the corresponding level.'[241] The PRC government had opted not to set a birth limit in Tibet until the mid-1990s, when the official limit was set at three births, as opposed to one birth in inland China, and even then such a limit is not strictly enforced in Tibet.[242] The resulting high fertility has significantly increased population in rural Tibet, decreased land per capita, and increased prices and taxes that cause 'serious structural problems' in rural Tibet.[243] Some who call for greater Tibetan autonomy have described Han Chinese migration into Tibet as 'cultural genocide'.[244]

However, Barry Sautman and Irene Eng argue, the disparity in standards of living in Tibet between Han Chinese and Tibetans has been caused not by deliberate policies that discriminate in favour of Han Chinese, but by an 'urban bias' that manifests particularly among Han Chinese,[245] with the discourse of 'cultural genocide' 'a systematic misreading of the effects of the cultural transformation that attends social and economic change in Tibet'.[246] Similarly, Barbara Erickson, a supporter of Tibetan independence, acknowledges that Tibet is socially stratified not on ethnic lines but by an urban/rural divide and that Tibetan society 'is not an apartheid of wealthy Chinese set above the masses of Tibetans. Nor is it as stratified as the old system. Today it has a large middle class, and the material lives of most

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Policies on the Nationalities Question (Readings for Cadres)] (2002), 155, as quoted in Ghai, Woodman, and Loper, *supra* n.238, 166.

[241] 2002 Constitution of the Chinese Communist Party, Preamble.

[242] Melvyn C. Goldstein, Ben Jiao, Cynthia M. Beall, and Phuntsog Tsering, 'Development and Change in Rural Tibet: Problems and Adaptations', 43 *Asian Survey* (2003), 758, 771-72.

[243] Ibid., 779.

[244] Statement of Lodi Gyari, Special Envoy of His Holiness the Dalai Lama, Washington, D.C., in Senate Foreign Relations Committee, ed., *U.S. and Chinese Policies toward Occupied Tibet* (1992), 102-969, 24; Yeshi Choedon, 'China's National Minorities Policy with Special Reference to Tibet', in K. Warikoo and Dawa Norbu, eds., *Ethnicity and Politics in Central Asia* (New Delhi: South Asian Publishers, 1992), 187.

[245] Sautman and Eng, *supra* n.212.

[246] Barry Sautman, '"Cultural Genocide" and Tibet', 38 *Texas International Law Journal* (2003), 173, 177.

have improved since market reforms.'[247] Sautman and Eng identify stagnant growth in agriculture, underdeveloped infrastructure, widespread illiteracy, and high birth rate among ethnic Tibetans as contributing to Tibet's poor development.[248] Most of the 85,000 Han Chinese who lived in Tibet temporarily, as reflected in the 2000 census, were in fact second-class citizens rather than privileged settlers and engaged in small businesses or construction work for which there was admitted demand from Tibetans, while ethnic minority migrants to Tibetan cities were able to integrate into the community more easily. The authors argue that these Han Chinese migrants are not dissimilar to floating Chinese populations in other regions.[249] Justin Stein has called on China to adopt a deliberative approach to minority nationality issues,[250] which, Baogang He has found, engenders mutual trust between Han Chinese and minority nationalities.[251]

IV. Conclusion

Notwithstanding the passion and blood shed for realisation of peoples' right to decide their ways of life, including their governments and, in appropriate cases, their own States, the right to self-determination in international law remains fundamentally statist and subject to the vicissitudes of international relations and the power of parent, administering and other States. When exploring the potential and limits of what self-determination could bring for a people and for the development of international law, one should not approach it with the rigid mentality that it must translate to independence and statehood as were generally confined to colonial

[247] Barbara Erickson, *Tibet: Abode of the Gods, Pearl of the Motherland* (Berkeley: Pacific View Press, 1997), 52.
[248] Sautman and Eng, *supra* n.212, 38-42.
[249] Ibid., 48-50.
[250] Justin J. Stein, 'Taking the Deliberative Turn in China: International Law, Minority Rights, and the Case of Xinjiang', 14 *Journal of Public and International Affairs* (2003), 1.
[251] Baogang He, 'A Deliberative Approach to the Tibet Autonomy Issue: Promoting Mutual Trust through Dialogue', 50 *Asian Survey* (2010), 709.

situations. International instruments and State practice have affirmed that self-determination may be exercised through participation, on the basis of equality and without discrimination, in the State's internal structures of decision-making, autonomous governance, and respect for the people's human agency and dignity, including by guaranteeing and protecting their political, legal, economic, social, cultural and linguistic systems and particularities, and by providing the people a mechanism to choose their own representatives within the territory's, if not the State's, internal political structures.[252] A State that recognises and protects such exercise is entitled under international law to observance of its sovereignty and territorial integrity. One must not lose sight of the fact that the right to self-determination, and human rights in general, derive authority and force from international law. All relevant rules and principles of international law are to apply. As Martti Koskenniemi has maintained, 'legal rules whose content or application depends on the will of the legal subjects for whom they are valid are not proper legal rules at all but apologies for the legal subject's political interest.'[253]

China's historical circumstances, especially in respect of foreign States' intrusions into its territory, sovereignty and sovereign rights, its territorial and ethnic compositions, and the strategic positions of some parts of its territory render self-determination one of the most prominent concerns in both its internal and external exercises of State sovereignty. In the case of Hong Kong, notwithstanding its entitlement to the right to self-determination under international law, the United Kingdom, with the complicity of the international community, decided that Hong Kong should be reincorporated into China without any meaningful consultation with the people of Hong Kong. Democratic governance, lauded as a norm of customary

[252] As Müllerson, *supra* n.11, 18, has noted, 'the principle of self-determination of peoples in the post-colonial context is not about a right to secession but rather about a right of everybody without racial, ethnic, religious or linguistic distinctions to participate in the political life of their country in equal terms. It is not a right to have oneself excluded; rather it is a right to be included.'

[253] Martti Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990), 4, 8.

international law and a hallmark of legitimacy of a State and its government, was not implemented by the United Kingdom in Hong Kong until the final years of its 155-year colonial rule. Meanwhile, China has opposed and stonewalled democratic development in Hong Kong for fear it would generate calls for political reform on the Mainland. However, to prove that China's exercise of State sovereignty does not conflict with its treaty commitments or human rights or democratic norms – and notably to encourage Taiwan to reunite with China – China has rarely intervened in Hong Kong's internal affairs and its external dealings with other States and international organisations within the confines of Hong Kong's autonomy.

China has adopted a more political approach to Taiwan. Although the authorities on Taiwan maintain that Taiwan is an independent State (before 1994 they claimed to be the sole legitimate government of the State of China in its entirety – including Mongolia and vetoed Mongolia's admission to United Nations membership in 1955 in their capacity as the recognised government of China within the Security Council), they have simultaneously been pursuing negotiations with the PRC government with a view to reunification, while also claiming a right to secession, a matter that remains contested within the international community and one which the ICJ, as the final arbiter and interpreter of international law, refrained from resolving when an opportunity arose from Kosovo. In turn, China has offered Taiwan governance with an even greater degree of autonomy than is extended to Hong Kong. Nevertheless, China remains insistent that independence of Taiwan is not an option and has indicated that it will use force to suppress secessionist movement by or in Taiwan.

Tibet, with its distinct ethnic people as opposed to peoples in Hong Kong and Taiwan, illustrates yet another model self-determination may manifest and be exercised (and undermined) under international law and in Chinese laws and practices. China has recognised Tibetans as a distinct minority people and their right to self-determination in the form of minority nationality autonomy, within the

confines of China's State sovereignty and territorial integrity. China realises the amount of international pressure Tibet's claim to self-determination generates and has devoted most of its resources on minority nationality affairs to Tibet. In order to foster greater integration of Tibet and Tibetans with the rest of China, to advance economic development and standards of living in Tibet, and to make use of Tibet's natural resources for China's own economic development, China has systematically encouraged Han Chinese migration into Tibet. Proponents of Tibet's autonomy argue that the ever increasing Han Chinese population serves to stymie and dilute Tibetans' representation within Tibet and within the national government, exploit Tibet's natural resources, render Tibetans perpetually dependent on and inferior to Han Chinese, and fundamentally destroy Tibet's traditional culture. As noted in Chapter III, while Tibet's traditional cultural norms and values are emphasised as exemplifying its unique status and its right to self-determination, China's traditional cultural norms and values are regarded as affronts to the progressive development of international law.

As one explores how China contributes to, or impedes, the recognition and development of self-determination in the context of its adherence to the principle of State sovereignty, one ought to take note of how China has approached self-determination in territories beyond its own mountains and shores. This chapter has shown that China has remained committed to the principle of State sovereignty in relation to Kosovo and East Timor, and opposes the notion that secession is a right under international law, particularly when foreign States resort to the use of force in aid of secessionist movement. In respect of Kosovo, China even participated in the advisory proceedings before the ICJ, a forum to which it always objects as a mechanism for inter-State dispute settlement or interpretation of international law, to state its position that secession was not a right under international law. China has adopted a more moderate and supportive approach to East Timor, a non-self-governing territory under Chapter XI of the United Nations Charter. China always

objected to Indonesia's invasion and annexation of East Timor in 1975 as a violation of East Timor's right to self-determination and of international law. After a campaign of massacres sponsored by Indonesian military forces against East Timorese immediately following a United Nations-sponsored referendum in August 1999 on whether East Timor wished to opt for autonomy within Indonesia or independence, China supported and contributed to United Nations peacekeeping mission and administration in East Timor. China's support was still conditioned on Indonesia's consent and authorisation by the Security Council that had by then been obtained.

The ways in which China has attempted to reconcile its claim and exercise of State sovereignty in territories entitled to the right to self-determination have major repercussions for the place of self-determination in the current international legal order, for the development and legitimacy of international law, and for the maintenance of international peace and security. As this chapter has shown, China's, other States', and the international community's approaches to self-determination illuminate the reality that self-determination is very often a tool and a language, not of law and rights, but of geopolitics. Given that China has insisted that the United Nations, and the Security Council in particular, is the most, if not only, suitable forum in which self-determination should be discussed and developed, how China has deployed international law in its voting behaviour and argumentation in the Security Council, not only on self-determination and State sovereignty but also generally, reveals and exemplifies its approaches to international law, its conception of international law in the international system, and the relationship between its exercise of State sovereignty and the current international legal order.

Chapter VI: A Keen Observer of the International Rule of Law? International Law in China's Voting Behaviour and Argumentation in the United Nations Security Council*

I. Introduction

Since the Opium War, from an insular imperial regime determined to have its traditions preserved, China has metamorphosed into a major international actor whose contribution to the legitimacy and development of international law ought to be scrutinised and understood. Given the centrality of law in the creation, decision-making processes and procedures, and impact of the United Nations Security Council and its decisions, the deliberative discourses that Security Council Member States engage in that in turn shape their behaviours, and the necessity for China to articulate its reasons publicly for its actions within the Security Council (which may consist in abstentions and vetoes as well as support), the roles that China plays within the Security Council illuminate and clarify its approaches to the current international legal order. China's actions within the Security Council also show how international law may or may not have evolved to encompass certain contentious interpretations of the United Nations Charter, notably the power of the United Nations to form or delegate peacekeeping operations, and the purported right or duty of the international community or a State to use force against another State in the face of human rights violations or a humanitarian catastrophe.

As discussed in Chapter III, while China, as represented by the PRC government in the United Nations since 25 October 1971, was initially hostile to the international organisation as epitome of superpower hegemony, through subsequent socialisation with the United Nations and other international organisations, especially as a Permanent Member of the Security Council, it has navigated its place within the

current international legal order and the roles it may play in shaping the conduct of international relations, the development of international law, and the direction in which the current international legal order ought to proceed.

This chapter first explains how international law serves as a constitutional–normative framework within which the Security Council must operate, followed by a discussion of how the Security Council in turn may serve as a locus of deliberative discourses that delineate, influence and constrain its Member States' behaviours. Then, it challenges the view commonly held by international relations scholars that international law plays a limited role on matters of international peace and security[1] by exploring China's voting behaviour in the Security Council and the arguments it has proffered in justification. This chapter also discusses how China has made use of its Security Council permanent membership to explore possibilities for strengthening the United Nations in the maintenance of international peace and security. Finally, it addresses some scenarios in which China might resort to international legal norms and principles to respond to a draft Security Council resolution aimed at its conduct rather than simply veto it. An appreciation of how China deploys legal argumentation to buttress its positions helps advance 'our understanding of the law, and thus … the identity, objective, and principles of the community'.[2] This chapter shows the importance China, through its voting behaviour and argumentation within the Security Council, ascribes international law as the perimeter within which the current international order ought to function.

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[1] Robert Jervis, 'Security Regimes', in Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1983), 173; Kenneth Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley, 1979), 126-30.

[2] Martti Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1995–1996), 455, 480.

II. Security Council and international law

The United Nations was established to forestall international conflicts and the Security Council was envisaged as a forum where major States, together with specially affected States and a rotating sample of other States,[3] may meet to deliberate and determine the course of action to follow in a situation or dispute by reference to established international norms, principles, rules and procedures, in order that international peace and security may be maintained or restored. The United Nations Charter vests the primary responsibility for the maintenance of international peace and security in the Security Council,[4] and specifically prescribes that the General Assembly shall not make any recommendation without a request of the Security Council regarding a situation or dispute of which the Security Council has been seized.[5] The legitimacy of Security Council decisions derives directly from the Charter, whereby, in discharging its responsibility in accordance with the Charter, the

[3] Under Article 23(1) of the United Nations Charter, it falls upon the United Nations General Assembly to elect ten Members of the United Nations to be non-Permanent Members of the Security Council, 'due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organisation, and also to equitable geographical distribution.' Article 23(2) states that a non-Permanent Member shall be elected for a term of two years, and may not be eligible for immediate re-election. Currently, three non-Permanent Members are elected from among African States and two from among Asian States (with the proviso that one of these five non-Permanent Members must be an Arab State alternately in Africa or Asia), two from among Latin American and Caribbean States, two from among Eastern European States, and two from Western European and other States (such as Australia and Canada).

[4] Ibid., Art.24(1). Although the responsibility conferred on the Security Council for the maintenance of international peace and security is primary (and thus not necessarily exclusive: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *ICJ Reports* 2004, 136, 148-49), under Article 39 of the Charter it is the Security Council alone that has the competence and capacity to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to 'make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Security Council determinations, recommendations or measures are not justiciable. In his separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Order of 13 September 1993*, *ICJ Reports* 1993, 325, 439, Judge *ad hoc* Lauterpacht stated that while there are legal constraints on the Security Council, 'there can be no less doubt that [the Charter] does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination'.

[5] Ibid., Art.12(1).

Security Council acts on behalf of all United Nations Member States,[6] who agree to accept and implement its decisions.[7]

Notwithstanding the veto power of Security Council Permanent Members, the consequential structural inequalities within Security Council decision-making processes and procedures, and the political nature of Security Council determinations as to the existence of a threat to the peace,[8] Simon Chesterman argues that 'a distinction must be made between the exercise of discretion formally provided for in the constituent document of the organization and the arbitrary exercise of the powers that it grants.'[9] A Security Council Member must justify its conduct through 'principled, informed, collective deliberation'[10] by reference to international legal norms and principles lest it face moral and political censure. International law serves an essential contribution to the maintenance of international peace and security through the reliance States place upon it in justifying their policies, practices and actions. The Security Council itself must abide by such rules and principles of international law as are applicable to it, with its functions, competences and powers defined and constrained by the Charter as its constituting treaty. The popular belief, reflected in much international relations scholarship, that the Security Council possesses unfettered powers concerning all matters of international (and even domestic) concern, may override international law or constitutes a 'world legislature'[11] is incorrect and cannot be supported without jeopardising the integrity of the Security Council as a creature and institution of international law, and of the

[6] Ibid., Art.24(1).
[7] Ibid., Art.25.
[8] *The Prosecutor* v. *Dusko Tadic*, Appeal on Jurisdiction, IT-94-1-AR72, 35 ILM 32 (1996), para.29.
[9] Simon Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2008), 331, 351.
[10] Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics & International Affairs* (2006), 405, 434.
[11] See Stefan Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005), 175.

current international order underpinned by the primacy of the United Nations and its constituting Charter.[12]

While many international relations scholars often conflate legitimacy (real or perceived) with legality, legitimacy and legality are two distinct concepts. A perception of an illegitimate process tends to reflect 'subjective conclusions, perhaps based on unarticulated notions about what is fair and just, or perhaps on a conscious utilitarian assessment of what the process means for oneself'.[13] The legitimacy of a decision, of a process through which it is made, and of the organisation that makes it, is important as it comprises 'factors that affect our willingness to voluntarily comply with commands'[14] and embodies 'a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process'.[15] Bardo Fassbender ascribes legitimacy a legal character in cases where 'it affects the authority of a rule-making institution, defined as its ability to have its decisions implemented. In other words, legitimacy becomes a legal category in conjunction with the problem of compliance of someone subject to the law with a legal rule or decision.'[16] In the conduct of international relations, legality cannot be considered in isolation from politics, even in a forum such as the Security Council where law is supposed to possess primacy and constraining impact over discretionary political decision-making. In fact, very often it is law, including the principles of State sovereignty and of non-intervention and the prohibition of the use of force, that gives rise to conflicts and concerns calling for political reconfiguration. As Martti Koskenniemi discerns,

[12] United Nations Charter, Art.103.
[13] David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *American Journal of International Law* (1993), 552, 557.
[14] Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990), 150.
[15] Ibid., 24.
[16] Bardo Fassbender, 'Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq', 13 *European Journal of International Law* (2002), 273, 293.

'"[l]aw" and "discretion" did not exist in separate pigeon-holes in our minds. The legal debate did not "stop" at any point to leave room for a separate political choice; political choices were posed the moment the legal debate started.'[17] Its requisite objectivity notwithstanding, international law in its application to a situation or dispute is ultimately a political act subject to discretion.[18]

That policy plays a determining role in the interpretation and application of international law in a situation or dispute does not alter the fact that the Security Council remains bound by its constituting legal framework, that is, the United Nations Charter. As the International Court of Justice ('ICJ') in its advisory opinion in *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*[19] stated, '[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.'[20] Hans Kelsen argues that the purpose of Security Council enforcement powers for which Article 39 of the Charter provides is the maintenance or restoration of international peace and security, and not necessarily the maintenance or restoration of international law.[21] The Security Council, nevertheless, cannot decide on a course of action however its Members wish without a proper legal basis or beyond its jurisdiction, without jeopardising the legitimacy – and effectiveness – of *all* Security Council decisions that derive from Article 25 of the Charter. The general consent of United Nations Member States, which Article 25 embodies, to submit to, and to agree to undertake, Security Council decisions does not absolve the Security Council from its legal obligation to act in accordance with the Charter, as the same provision

[17] Koskenniemi, *supra* n.2, 475.
[18] Ibid., 489.
[19] *Advisory Opinion*, *ICJ Reports* 1947–1948, 57.
[20] Ibid., 64.
[21] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (New York: Praeger, 1964), 294.

indicates, and the fact that an issue concerns international peace and security does not entitle the Security Council to act as it wishes. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor* v. *Dusko Tadic* stated:

> The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus [subject] to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).[22]

Judge Weeramantry expressed his similar position in the ICJ in *Lockerbie*[23] that '[t]he history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law.'[24] In his dissenting opinion in the ICJ's advisory opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,[25] Judge Fitzmaurice was even more forceful when he pointed out:

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[22] *Tadic*, *supra* n.8, para.28.
[23] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United States of America*), *Provisional Measures*, *Order of 14 April 1992*, *ICJ Reports* 1992, 114.
[24] Ibid., per Judge Weeramantry (diss. op.), 175.
[25] *Advisory Opinion, ICJ Reports* 1971, 16.

> *Even when acting under Chapter VII of the Charter itself*, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war-time occupation of a country or territory cannot operate to do that. … This is a principle of international law that is as well-established as any there can be, – and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual Member States are. The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a country or piece of territory *in order to restore peace and security*, but it could not thereby, or as part of that operation, abrogate or alter territorial rights; – and the right to administer a mandated territory is a territorial right without which the territory could not be governed or the mandate be operated. It was to keep the peace, not to change the world order, that the Security Council was set up.[26]

Reference is had also to the ICJ's reference to South Africa's continued presence in Namibia as 'a situation which the Court has found to have been *validly* declared illegal [by the Security Council]'.[27]

The competences and powers of the Security Council are thus confined to occasions where they are necessary for the maintenance of international peace and security, and not more. The requirement that the Security Council discharge its powers and responsibility only for the maintenance of international peace and security is further confirmed by Article 13(1)(a) of the Charter, whereby it is the General Assembly that is entrusted with the responsibilities, functions and powers to

[26] Ibid., per Judge Fitzmaurice (diss. op.), 294 (emphasis in original).
[27] Ibid., *Advisory Opinion,* 54 (emphasis added).

make recommendations for the development and codification of international law. To hold otherwise, treaty law-making processes will be stymied. In addition, Articles 40, 42, 43(1) and 51 of the Charter require that a Security Council action must be *necessary* for the maintenance of international peace and security; 'the Council's general powers do not provide it with a blank cheque to take measures which would violate fundamental principles and rules of international law, even if these are not specifically referred to in Chapter I or in other provisions of the Charter'.[28] The United Nations International Law Commission has stressed that States cannot violate norms of *jus cogens* by proxy through an international organisation.[29] In his separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judge *ad hoc* Lauterpacht stated:

> The relief which Article 103 may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.[30]

[28] T.D. Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', 26 *Netherlands Yearbook of International Law* (1995), 33, 71.
[29] Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *European Journal of International Law* (2005), 59, 68.
[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* n.4, per Judge *ad hoc* Lauterpacht, 440 (sep. op.).

It is noteworthy that China has voiced support for legal liability to be attached to Member States of an international organisation whose collective decision violates international law.[31]

When China joined the second phase of the Dumbarton Oaks negotiations in 1944 with the United Kingdom, the United States, and the Soviet Union, it proposed that Article 1 of the Charter should include the provision that 'the settlement of international disputes should be on the basis of the principles of justice and international law'. China's proposal was adopted,[32] as a result of which one of the purposes of the United Nations, as stated in the Charter, is 'to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.[33] A corresponding addition was made to Article 2(3) of the Charter, that '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.'[34] That said, while the Security Council must make political decisions in accordance with international law, it is not its role to find legal answers to political problems.[35] Non-compliance with the Charter or with international law is not a basis for the Security Council to assert jurisdiction or competence so long as there is no threat to the peace,[36] and it is for the ICJ to provide legal answers.[37]

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[31] Statement of China in the Sixth Committee of the Sixtieth Session of the United Nations General Assembly, A/C/6/60/SR.11, 23 November 2005, para.53. However, consensus is that no such liability exists under international law: see Rosalyn Higgins, *Report to Institut de droit international*, 66-I *Yearbook of Institut de droit international* (1995), 375; Resolution of Institut de droit international on the Legal Consequences for Member States of the Non-Fulfillment by International Organisations of their Obligations towards Third States, Session of Lisbon, 1 September 1995.
[32] Yuen-Li Liang, 'The Settlement of Disputes in the Security Council: The Yalta Voting Formula', 24 *British Year Book of International Law* (1947), 330, 332-33.
[33] United Nations Charter, Art.1(1).
[34] Ibid., Art.2(3).
[35] See Rosalyn Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 *American Journal of International Law* (1970), 1, 16.
[36] Ibid.
[37] Ibid., 3, citing Articles 33 and 36(3) of the United Nations Charter.

Many speak of the Security Council's 'failure' to pass a draft resolution, or 'failure' of one or more Permanent Members to agree to one, in the face of a threat to international peace and security or a humanitarian catastrophe. The International Commission on Intervention and State Sovereignty argued in its report in 2001 that 'if the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.'[38] What is amiss is that it is precisely the design and process that the Charter embodies and requires that a Security Council decision has the support (or at least acquiescence[39]) of all Permanent Members in order for it to be effective and not become a source of military conflict among Permanent Members themselves, and their veto power is constitutionally built through the Charter into Security Council decision-making processes and procedures. At no times preceding the Kosovo crisis in 1999, the invasion of Iraq in 2003 or the internal conflict in Syria since 2011 was the Security Council unable or incapacitated to act as a result of disagreement among Permanent Members. The possibility of disagreement among Permanent Members

[38] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), 53. As Jonathan E. Davis, 'From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era', 44 *Vanderbilt Journal of Transnational Law* (2011), 217, 257, has noted, the Commission 'launched a series of roundtables worldwide to build consensus on the contours of a right of humanitarian intervention and make the doctrine less susceptible to abuse by grounding it in a normative legal framework', including one at the China Institute of International Studies in Beijing on 14 June 2001 where significant Chinese opposition to such a purported right was expressed. Alex J. Bellamy, who was one of the participants in the Commission initiative, notes that '[t]he Chinese government had opposed *The Responsibility to Protect* throughout the ICISS process and insisted that all questions relating to the use of force defer to the Security Council': 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', 20 *Ethics & International Affairs* (2006), 143, 151. The Commission in its report did acknowledge that the Security Council was the forum most appropriately placed to authorise international intervention to avert massive human rights violations or a humanitarian catastrophe: ibid., 49.

[39] Following debates within the Security Council, consensus was reached that a Permanent Member's voluntary abstention or absence, as opposed to compulsory abstention required where the Permanent Member is a party to a dispute in question, does not constitute a veto: see Yuen-li Liang, 'Abstention and Absence of a Permanent Member in relation to the Voting Procedure in the Security Council', 44 *American Journal of International Law* (1950), 694.

and a Permanent Member's capacity to veto a draft Security Council resolution are core structural parts of the Security Council decision-making process in order to constrain excessive or unilateral exercise of military or political power by one or more individual States and to ensure that any Security Council action has the agreement and co-operation of all major powers.[40]

In the case of Kosovo, two Permanent Members (China and Russia) indicated that they would exercise their vetoes in relation to any United Nations-authorised/-led military action in Kosovo as they expressed their positions that any such action would be incompatible with the Charter and international law, and the Security Council decided collectively not to adopt a resolution authorising military action. The refusal of China and Russia to automatically endorse British/French/United States preferences in fact illustrated that the Security Council 'acquired teeth',[41] and the Security Council's 'special responsibility' for the maintenance of international peace and security was thus met. Daniel Joyner argues that this fundamental facet of the United Nations system is 'wilfully misunderstood by critics of the Security Council's handling of humanitarian intervention cases, who apparently desire the legitimacy of representative authorization for their actions by the Council, but who are unwilling to abide by the denial of that authorization by the same body'.[42] The veto has helped maintain and stabilise Security Council decision-making processes and procedures by providing a check-and-balance exercise among Permanent Members. Without the veto, the Security Council will merely become another device for powerful States to act as they wish with a semblance of international legitimacy; the number of military

[40] While France and the United Kingdom arguably have ceased to be major powers in their own right, they possess substantial influence within the European Union and may serve as conduits through which the European Union *en bloc* asserts within the Security Council its economic and political power and its policies on matters such as human rights, democracy, self-determination, and international peace and security. France also continues to have significant influence in many African States through its relations with its former colonies, as does the United Kingdom through its leadership role in the Commonwealth of Nations.

[41] Nico Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo', 13 *European Journal of International Law* (2002), 323, 334.

[42] Daniel H. Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm', 13 *European Journal of International Law* (2002), 597, 608.

missions, some of which pursued for malevolent purposes, will significantly increase; and the chief purpose of the Security Council – the maintenance of international peace and security – will fail. The real issue is not so much the existence of the veto but '*how* the veto ought to be exercised under the Charter'.[43] Instead of enabling Permanent Members to advance their own national interests or agendas, the veto imposes a duty to 'constantly search for agreement'.[44] In order that the Security Council and its decisions possess the requisite legitimacy and effectiveness, the reasoning that underlies Security Council decisions must be articulated publicly and supported by international legal norms and principles that are shared and respected by all States, as the next section explains.

In the eyes of some, compliance of an international organisation and its members with established norms, principles, rules and procedures in making a decision does not by itself render the organisation, the norms, the principles, the rules, the process or the decision legitimate. Allen Buchanan and Robert Keohane argue that 'an institution should be presumed to be illegitimate if its practices or procedures predictably undermine the pursuit of the very goals in terms of which it justifies its existence. Thus, for example, if the fundamental character of the Security Council's decision-making process renders that institution incapable of successfully pursuing what it now acknowledges as one of its chief goals – stopping large-scale violations of basic human rights – this impugns its legitimacy.'[45]

It is important to keep in mind that a Security Council resolution comes into being only after it is passed with the support or acquiescence of all Permanent Members, and legitimate and effective Security Council decision-making does not

[43] C.L. Lim, 'The Great Power Balance, the United Nations and What the Framers Intended: In Partial Response to Hans Köchler', 6 *Chinese Journal of International Law* (2007), 307, 313 (emphasis in original).
[44] Norman J. Padelford, 'The Use of the Veto', 2 *International Organization* (1948), 227, 228-29.
[45] Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', in Allen Buchanan, *Human Rights, Legitimacy, & the Use of Force* (New York: Oxford University Press, 2010), 105, 119.

always have to result in a resolution. The legitimacy of a Security Council decision rests upon the fact that it is collectively made. A collective decision is not the same as a unanimous decision, much less a decision made in subservience to the wishes of powerful States. As Martha Finnemore has stated, multilateralism manifests more than in co-operation among a number of States, but in co-operation taking place in accordance with established norms, principles, rules and procedures of a general nature.[46] A collective decision requires that all Security Council Members be able to inform Security Council deliberations with their own perspectives with the objective of maintaining international peace and security. That a Permanent Member such as China would veto an otherwise widely supported draft Security Council resolution at the expense of its popularity within the Security Council and among governments around the world speaks volume about the Permanent Member, the Security Council and the current international order governed under the framework of the Charter and international law.

III. Security Council as a locus of deliberative discourses

With its structural flaws and lack of representativeness, the Security Council might not be taken as an exemplar of an institution for deliberative discourses and, in fact, has faced a great deal of criticism and calls for institutional reform. David Caron argues that a Permanent Member's capacity to dilute, stymie or preclude a Security Council decision through its threat or use of veto illustrates that the Security Council from its inception has betrayed its express promise to be the guarantor of international peace and security,[47] while others are concerned that powerful States use

[46] Martha Finnemore, 'Fights about Rules: The Role of Efficacy and Power in Changing Multilateralism', 31 *Review of International Studies* (2005), 187, 195.
[47] Caron, *supra* n.13, 560.

the Security Council to impose 'hegemonic international law'.[48] The problem is exacerbated by the practice of Permanent Members to agree on a decision through informal discussions, from which non-Permanent Members are excluded, before the formal vote. Ian Hurd asserts that Security Council meetings are now reduced to *pro forma* affairs that merely put on record what has already been informally agreed upon by Permanent Members, that the President of the Security Council 'invariably notes in opening an official meeting that "the Security Council is meeting in accordance with the understanding reached in its prior consultations".'[49] Ngaire Woods notes that '[a] further, deeper problem with informal processes is that they are unrecorded. This means that the *reasoning* for a decision is not open to scrutiny by other states, *nor is the position taken by each member*. In these ways, the Council is not accountable to states who are not party to the informal processes even if they are directly affected by the Council's decisions … The experience of the Security Council also highlights that reliance on informal negotiations, which take place behind the scenes, magnifies the unequal resources available to members in order to work effectively to push their own preferences.'[50]

Caron explains that the effectiveness of the Security Council may suffer due to perceptions that it is illegitimate, resulting in failure to pass a draft resolution, failure to pass a stronger draft resolution than is otherwise warranted, difficulty in summoning the necessary domestic and/or international support to implement a resolution, and the weakening of the Security Council generally.[51] Even when the Security Council manages to garner the necessary votes for a decision, its habitual

[48] Detlev F. Vagts, 'Hegemonic International Law', 95 *American Journal of International Law* (2001), 843; see also José E. Alvarez, 'Hegemonic International Law Revisited', 97 *American Journal of International Law* (2003), 873.
[49] Ian Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council', 8 *Global Governance* (2002), 35, 42-43. See also Loie Feuerle, 'Informal Consultation: A Mechanism in Security Council Decision-Making', 18 *New York Journal of International Law and Politics* (1985), 267.
[50] Ngaire Woods, 'Good Governance in International Organizations', 5 *Global Governance* (1999), 39, 50 (emphasis in original).
[51] Caron, *supra* n.13, 558.

tendency to label its actions as 'exceptional', 'without precedent' or 'extraordinary'[52] has reinforced the perception that it merely provides a 'law-laundering service' to legitimise and enforce the unilateral will of powerful States.[53] As Susan Marks discerns, '[i]f all it would have taken to make the war in Iraq legal was a few more votes in the Security Council, then perhaps at least some of the energy that is going into affirming the illegality of the war should be turned to the question of whether there is something wrong with international law.'[54] Referring to the catastrophic United Nations peacekeeping operation in Somalia between 1993 and 1995, Richard Falk warns that a legal but illegitimate decision of the Security Council is likely to be met with opposition from the people whom the decision aims to protect, and United Nations imprimatur does not necessarily translate into local acceptance.[55] Phillip Darby has criticised peacekeeping operations as imperialism in disguise, indeed worse than imperialism, for '[b]ringing development and security together in a single fold opened the doors to attempts to re-engineer the state, to remake whole societies and to recast the identities of ordinary people, all in the interests of "best practice" as laid down by external experts. This is interventionism on a scale beyond the imaginings of the former rulers of empire.'[56] Malcolm Shaw argues that 'the Western state's authoritative deployment of violence is now structurally reinforced by its increasing, if problematic, integration with the legitimate international world

[52] Mariano J. Aznar-Gómez, 'A Decade of Human Rights Protection by the Security Council: A Sketch of Deregulation?', 13 *European Journal of International Law* (2002), 223, 226, citing the positions of Security Council Members when adopting Resolution 688 (1991) regarding Iraq (S/PV.2982, 5 April 1991), Resolutions 770 (1992) and 787 (1992) regarding Bosnia and Herzegovina (S/PV.3106, 13 August 1992; S/PV.3137, 16 November 1992), Resolution 794 (1992) regarding Somalia (S/PV.3145, 3 December 1992), and Resolution 917 (1994) regarding Haiti (S/PV.3376, 6 May 1994).
[53] Richard A. Falk, 'The United Nations and the Rule of Law', 4 *Transnational Law and Contemporary Problems* (1994), 611, 628.
[54] Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence', 19 *Leiden Journal of International Law* (2006), 339, 347.
[55] Falk, *supra* n.53, 627.
[56] Phillip Darby, 'Rolling Back the Frontiers of Empire: Practising the Postcolonial', 16 *International Peacekeeping* (2009), 699, 708.

authority-structure of the United Nations'.[57] The *United Nations Peacekeeping Operations: Principles and Guidelines*[58] state that '[t]he manner in which a United Nations peacekeeping operation conducts itself may have a profound impact on its perceived legitimacy on the ground. The firmness and fairness with which a United Nations peacekeeping operation exercises its mandate, the circumspection with which it uses force, the discipline it imposes upon its personnel, the respect it shows to local customs, institutions and laws, and the decency with which it treats the local people all have a direct effect upon perceptions of its legitimacy.'[59] Increased attention is paid to local agency in peacekeeping and peace-building,[60] as peace must be 'contextualised more subtly, geographically, culturally, in terms of identity, and the evolution of the previous socio-economic polity'.[61]

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[57] Malcolm Shaw, *Theory of the Global State: Globality as Unfinished Revolution* (Cambridge: Cambridge University Press, 2000), 200. Shaw, ibid., 216, argues that '[i]t is clear that the UN depends for both its resources and its political direction on the West, and that the united West is mostly able to mobilize the UN system to its own purposes. Despite the deeply ambiguous relationship between the main component of the West (the USA) and the UN, it is difficult to conceive of either without the other. The mutual dependence of Western power and the UN system is fundamental. Major and minor exercises of Western military power have been legitimated through the UN; the UN has not authorized or undertaken any significant actions against Western interests.'

[58] United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (New York: United Nations, 2008).

[59] Ibid., 36.

[60] See, *e.g.*, Neil Cooper, 'On the Crisis of the Liberal Peace', 7 *Conflict, Security and Development* (2007), 605; Michael Pugh, 'Accountability and Credibility: Assessing Host Population Perceptions and Expectations', in Cedric de Coning, Andreas Stensland, and Thierry Tardy, eds., *Beyond the New Horizon* (Oslo: Norwegian Institute of International Affairs, 2010), 56.

[61] Oliver P. Richmond, *Peace in International Relations* (London: Routledge, 2008), 17. As Shen Guofang, China's Deputy Permanent Representative to the United Nations, stated: 'Poverty leads to social instability, which will in turn be a threat to peace and security at the national and even regional levels … In order to uproot the causes of conflicts, we must help developing countries, especially the least-developed countries, to seek economic development, eradicate poverty, curb diseases, improve the environment and the fight against social injustice … The early realization of the disarmament, demobilization and reintegration of ex-combatants and the promotion of the repatriation, resettlement and the economic recovery of refugees and displaced persons constitute the short-term objectives of peacebuilding. The long-term objectives, however, are the eradication of poverty, development of economy as well as a peaceful and rewarding life for people in the post-conflict countries and regions': Statement of Shen Guofang, Deputy Permanent Representative of China to the United Nations at the Security Council on the Topic of 'Peace-Building: Towards a Comprehensive Approach', 5 February 2001, as quoted in Zhao Lei, 'Two Pillars of China's Global Peace Engagement Strategy: UN Peacekeeping and International Peacebuilding', 18 *International Peacekeeping* (2011), 344, 353.

The legitimacy (and appearance thereof) of a Security Council decision is thus as important as its legality. Ian Johnstone argues that, instead of negotiations for expansion of membership of the Security Council (permanent membership or as a whole) or for revision of voting rules, 'improving the quality of deliberations would enhance the legitimacy and, therefore, effectiveness of Council decision making',[62] be more politically achievable,[63] and enable decisions to be more amenable to those in disagreement 'through the exchange of reasons *that are shared or can be shared* by all who are bound by the decisions taken'.[64] The consensus that results from a deliberative discourse additionally has constitutive effects upon participants,[65] such that the internalising impact that international law may bring to bear on States may materialise. International legal norms and principles and institutional processes and procedures agreed upon by States provide a normative framework for deliberative discourses and for the reasons such deliberative discourses generate. Once international legal norms and principles are internalised in a State's foreign and domestic policies and practices, they become dependent on normative legitimacy and guide the State's conduct, as the State endeavours to maintain a reputation as a trustworthy actor through norm-conforming behaviour.[66] Although equal access is a condition of a deliberative discourse for which the Security Council might not necessarily provide (due to its lack of representativeness, its differentiation between Permanent and non-Permanent Members, and Permanent Members' veto power), a deliberative discourse may still succeed provided that the requirements, and the felt need, for a 'good argument' are shared among all Security Council Members.[67]

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[62] Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit', 102 *American Journal of International Law* (2008), 275, 275.
[63] Ibid.
[64] Ibid., 278 (emphasis in original).
[65] Thomas Risse, '"Let's Argue!": Communicative Action in World Politics', 54 *International Organization* (2000), 1, 10. See also Ronald L. Jepperson, Alexander Wendt, and Peter J. Katzenstein, 'Norms, Identity, and Culture in National Security', in Peter J. Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press, 1996), 33.
[66] Alastair Iain Johnston, 'Treating International Institutions as Social Environments', 45 *International Studies Quarterly* (2001), 487, 490.
[67] Risse, *supra* n.65, 18.

Sincerity is not essential for deliberative discourses to influence state behaviours, provided that international legal norms and principles inhere in the justifications proffered.[68] It has been found to be extremely difficult for participants in a deliberative discourse to make self-serving or self-interested claims without encountering criticism and resistance; participants must rely on commonly accepted norms and principles even when advancing their own interests.[69] While consensus is a goal of a deliberative discourse, it is not a prerequisite to its success or integrity, and disagreements form part and parcel, and may indeed shape the course, of a deliberative discourse and the development of relevant norms, principles, rules and values. Even after a decision has been made, new information may compel that the decision be revisited. A deliberative discourse is thus a dynamic, continuing process. A State is held accountable not only to other States but also to 'what may be called their *moral* constituents, all those individuals who are bound by the decisions they make, whether *de jure* or *de facto*'[70] – that is, transnational corporations, the media, its citizens, citizens in other States, and an 'interpretive community' whose expertise, interests and concerns extend beyond international law and who constitutes an important arbiter of whether the requirements of a deliberative discourse are met.[71] As discussed in Chapter II, in order to possess legitimacy, international law, and the obligations it imposes, must be of a general and abstract character and must not be subject to the shifting political preferences or expediencies of powerful States. For these reasons, during the debate that preceded the invasion of Iraq in 2003, all Permanent Members and most non-Permanent Members of the Security Council invoked international legal norms and principles in advancing their respective

[68] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14 *European Journal of International Law* (2003), 437, 453-55.
[69] Jon Elster, 'Introduction', in Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998), 1. See also Shelley Chaiken, Wendy Wood, and Alice H. Eagly, 'Principles of Persuasion', in E. Tory Higgins and Arie W. Kruglanski, eds., *Social Psychology: Handbook of Basic Principles* (New York: Guilford Press, 1996), 702.
[70] Dennis F. Thompson, 'Democratic Theory and Global Society', 7 *Journal of Political Philosophy* (1999), 111, 120 (emphasis in original).
[71] Johnstone, *supra* n.62, 278-81.

positions. China and Russia insisted that in fighting terrorism the United Nations Charter and international law must still be complied with.[72] When the United States failed to persuade the 'interpretive community' that its intention to invade Iraq was on the basis of its 'war on terrorism' and self-defence, it moved its case to one of enforcing Security Council resolutions regarding weapons of mass destruction in Iraq.[73]

As the next section shows, the forum for deliberative discourses that the Security Council provides enables China to appreciate, adapt and assert the roles it may play in the maintenance of international peace and security and the development

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[72] Rosemary Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas', 29 *Human Rights Quarterly* (2007), 489, 508. Foot further notes, ibid., 512, that '[i]n a more political vein, at a time of overwhelming US material power and a perceived preference for acting unilaterally, both Russia and China are determined to maintain a role for the UN Security Council in addressing international threats to peace and security. Many other states agree with this (though sometimes for different reasons), and this determination reinforces a search for basic consensus. This particular search for agreement has created a focal point around the idea of the UN Security Council playing its part in the struggle against terrorism but within a rights-based framework.'

Equally, Leila Nadya Sadat, 'Terrorism and the Rule of Law', 3 *Washington University Global Studies Law Review* (2004), 135, 142, argues that 'it is not difficult to imagine the corrosive effect that adopting the U.S. view as a matter of international law would have on international peace and security. Under the Bush doctrine, if the government decided to prosecute the "war" against al Qaeda operatives worldwide, it could potentially result in military incursions in any of the sixty countries in which al Qaeda members are reportedly found. It cannot seriously be argued that the U.N. Charter envisaged that a country would be able to use force on such a basis against nearly one-third of the United Nations' member states without prior Security Council authorization. In addition, international law is largely a product of state practice and reciprocity. To put it neatly, should the U.S. view prevail, the doctrine of unilateral self-defense against terrorist attacks could presumably be applied by any country, including, for example, Indonesia, India, Israel, Pakistan, Russia, and China, which have each recently suffered terrorist attacks. The potentially destabilizing effect of the Bush doctrine, if taken to its logical extension, is therefore quite substantial.' As Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985–2004', 4 *Chinese Journal of International Law* (2005), 141, 160, has noted, some States have already coalesced around the United States' 'war on terror' and the international legitimacy that the global fight against terrorism has garnered to define terrorism in such a way as to repress political opponents and conflate them with affiliates of Al-Qaeda. China, for instance, has had no qualm in characterising Uighur separatists in Xinjiang as terrorists. See also Chien-peng Chung, 'China's "War on Terror": September 11 and Uighur Separatism', 81:4 *Foreign Affairs* (2002), 8.

It is worth noting that at the Dumbarton Oaks negotiations in 1944 over the creation of what transpired to be the United Nations, China proposed that 'provision [by a State] of support to armed groups, formed within [that State's] territory, which have invaded the territory of another State; or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive such groups of all assistance or protection', should be considered a threat to international peace and security: as quoted in Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), 51. China's proposal was not adopted.

[73] Johnstone, *supra* n.68, 477-78.

of international law, and facilitates other States and the 'interpretive community' in understanding the rationales underlying China's voting behaviour and argumentation within the Security Council.

IV. China's voting behaviour and argumentation in the Security Council

Samuel Kim suggested in 1979 that China's membership of the Security Council has the effect that 'symbolically, both the image and the prestige of the Security Council in the global community have been made more legitimate, more realistic, more colorful and more relevant. In practical terms, the Security Council's political effectiveness has also been enhanced to the extent that the presence of China has contributed to bridging the gap between authority claims and power capabilities of the Council.'[74] In addition to geopolitical and normative reasons that render China's participation in Security Council deliberations and decisions essential, having China in the fold, as has been borne out by the evolution of China's participation in the United Nations from fervent opposition to firm support, enables China and other Security Council Members, and the international community as a whole, to understand and communicate *with each other* within a legal–institutional framework that binds all States. The social opprobrium that violations of international law elicit serves an instrumental role in bringing about treaty compliance,[75] particularly for States such as China that seek to portray themselves as trustworthy international actors. Furthermore, information obtained through interactions with and within international organisations 'can reduce uncertainty about the credibility of others'

[74] Samuel S. Kim, *China, the United Nations and World Order* (Princeton: Princeton University Press, 1979), 237-38.
[75] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998); Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe', 1 *European Journal of International Relations* (1995), 157; Oran R. Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables', in James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), 160.

commitments, and thus help actors' expectations converge around some cooperative outcome',[76] with the role that the Security Council serves in transmitting information arguably more important than its ability in resolving substantive issues.[77] Above all, participation in international organisations tends to lead States to redefine their national interests in order to meet their treaty obligations. Ann Kent suggests that the extent, and perhaps success, of China's socialisation with international organisations should be measured by 'China's readiness to redefine its actual interests, including its implementation of international norms in domestic law and practice; China's preparedness to renegotiate its sovereignty in response to organizational and treaty pressures; and the degree to which China shows a readiness to shoulder the costs, as well as enjoy the benefits, of organizational participation.'[78]

Since the end of the Cold War, the United States has appeared to hold unmatched influence and power within Security Council decision-making.[79] Barry O'Neill argues that in fact it is China that holds the most influence and power as a Security Council Member – about twice the influence and power enjoyed by any of the other Permanent Members – on account of its veto power and the 'extreme' political positions it tends to hold, as the veto power of the three Western Permanent Members, or four if Russia is included, is often pooled whereas China may singlehandedly defeat a draft resolution notwithstanding Western pressure.[80] O'Neill

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[76] Johnston, *supra* n.66, 490.
[77] Alexander Thompson, 'Coercion through IOs: The Security Council and the Logic of Information Transmission', 60 *International Organization* (2006), 1.
[78] Ann Kent, 'China's International Socialization: The Role of International Organizations', 8 *Global Governance* (2002), 343, 349-50.
[79] Hans Köchler, 'The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order', 5 *Chinese Journal of International Law* (2006), 323. W. Michael Reisman asserts that the United States' dominance within Security Council decision-making (in public and in private) is an open and unquestionable fact: 'The Constitutional Crisis in the United Nations', 87 *American Journal of International Law* (1993), 83, 97.
[80] Barry O'Neill, 'Power and Satisfaction in the United Nations Security Council', 40 *Journal of Conflict Resolution* (1996), 219, 233. Kent concurs with O'Neill's analysis, and argues that within the Security Council 'China is the most powerful state, precisely because it stands alone with a veto at an extreme policy position. Thus, "it is constantly using its veto or, rather, the threat to veto (actually or only implicitly), and so it is constantly making a difference"': ibid., 346, quoting Barry O'Neill, 'Power and Satisfaction in the Security Council', in Bruce

suggests that the power disparity within the Security Council between China and the other Permanent Members would remain the same even if membership of the Security Council were to be enlarged.[81]

The amount of influence and power that China holds within the Security Council is a major reason China has often been singled out for criticism by Western States, scholars and media for impeding the passage of draft resolutions, obstructing the work of the Security Council and stonewalling the development of international law. Such criticism is unfair, as China has rarely vetoed or threatened to veto a draft resolution. As at 30 August 2012, the veto was exercised 269 times. The Soviet Union/Russia vetoed draft Security Council resolutions 127 times, the United States 83 times, the United Kingdom 32 times, France 18 times, and China eight times (including once on 13 December 1955 when it was represented by the authorities on Taiwan, to block Mongolia's admission to United Nations membership on grounds that Mongolia was part of China[82]). China's rare use of its power to veto illustrates the sincerity of its belief that the veto is a means by which powerful States exercise hegemony, as Chapter III discussed.

Sally Morphet argues that China's voting behaviour within the Security Council since 25 October 1971, when the PRC government replaced the authorities on Taiwan as the representative government of China in the United Nations, may be characterised as having developed through four phases.[83] Between November 1971 and 1981, China was adjusting to its position, powers and responsibilities within the

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Russett, ed., *The Once and Future Security Council* (New York: St Martin's Press, 1997), 70, 75.

[81] O'Neill (1996), ibid., 233-34. Pooling of vetoes may occasionally lead to free-riding – a Permanent Member might vote in favour of a draft resolution in the knowledge that its ally takes a contrary position and will veto the draft resolution, even though it privately wishes the draft resolution to be vetoed. The support of non-Permanent Members is also important as it instils a sense of legitimacy in a draft resolution; their disapproval of a draft resolution signifies that the draft resolution is not acceptable to States other than Permanent Members.

[82] Mongolia was admitted to United Nations membership on 27 October 1961 when the Soviet Union agreed to not veto Mauritania's application for United Nations membership on condition that Mongolia be admitted, and the authorities on Taiwan representing China in the United Nations relented under pressure from African States.

[83] Sally Morphet, 'China as a Permanent Member of the Security Council: October 1971–December 1999', 31 *Security Dialogue* (2000), 151.

Security Council. During this period, China vetoed proposed Security Council action twice. China vetoed Bangladesh's initial application for United Nations membership on 25 August 1972, when Bangladesh sought to secede from Pakistan, due to its concern over the legal status of Taiwan and its position that the parent State's consent was essential to a territory attaining independence and statehood. At the Security Council debate, China maintained that '[p]ending the true implementation of the relevant General Assembly and Security Council resolutions and a reasonable settlement of the issues between India and Pakistan and between Pakistan and "Bangladesh", the Security Council should not consider the application.'[84] China drew attention to 'acts of the Soviet social-imperialists' and 'their sinister designs to use others as counters or stakes to maintain and aggravate tension on the South Asian sub-continent'.[85] After Pakistan acknowledged Bangladesh's independence in 1974, China no longer blocked Bangladesh's application for United Nations membership and Bangladesh was admitted without vote. On 10 September 1972, China joined the Soviet Union to veto a draft amendment to a draft resolution that, vetoed by the United States, called for cessation of hostilities between Israel and Syria/Lebanon after the Munich massacre, arguing that '[t]he history of the Middle East since the Second World War is one of incessant aggression and expansion by Israeli Zionism and of the continuous fight of the Palestinian and other Arab peoples against aggression and expansion.'[86] Between 1982 and 1985, China managed its roles *vis-à-vis* both developing States and other Permanent Members with greater ease, and did not oppose any draft resolution. Between 1986 and July 1990 when the Soviet Union collapsed, China began to take a more conciliatory stance with other Permanent Members, and did not oppose any draft resolution.

From August 1990 to 2000, China navigated its roles and powers within the Security Council in the broader context of its relations with other Permanent

[84] S/PV.1660, 25 August 1972, 15.
[85] Ibid.
[86] S/PV.1662, 10 September 1972, para.193.

Members in light of the United States' dominance and Western Permanent Members' increasing tendency to authorise the use of force on humanitarian grounds, and vetoed proposed Security Council action twice. China vetoed a draft resolution on 10 January 1997 on dispatching military observers to the United Nations Verification Mission in Guatemala and a draft resolution on 25 February 1999 on extending the mandate of the United Nations Preventive Deployment Force in Macedonia, for the reason that Guatemala and Macedonia recognised the authorities on Taiwan as the legitimate government of China (although China referred to Taiwan in its explanation of its veto in respect of Guatemala only,[87] and cited the United Nations' limited financial resources and improvements on the ground in its explanation of its veto in respect of Macedonia[88]).

Morphet's analysis corresponds to the level of China's adaptation to international law and its socialisation with the United Nations as a forum through which it may use its influence and power to assert its positions, particularly in respect of the principle of State sovereignty and the importance it attaches to how other States interact with Taiwan.

On draft Security Council resolutions that it did not find correct or amenable, instead of vetoing, China has tended to abstain. By abstaining, a Security Council Member withholds from the proposed action the legitimacy that an affirmative vote from it provides. Given the increasing tendency to treat a Security Council resolution as 'international legislation' and a foundation upon which a norm of customary international law may rapidly crystallise and consolidate, one of the effects and rationales that stems from an abstention is its indication that the proposed action in the opinion of the abstaining State does not comport with certain legal requirements. As at 12 May 2012, China abstained on 38 draft Chapter VII resolutions[89] and 18

[87] S/PV.3730, 10 January 1997.
[88] S/PV.3982, 25 February 1999.
[89] U.N. S.C. Resolutions 678 (1990), 686 (1991), 748 (1992), 757 (1992), 770 (1992), 778 (1992), 787 (1992), 816 (1993), 820 (1993), 883 (1993), 929 (1994), 940 (1994), 942 (1994),

draft non-Chapter VII resolutions[90] since 1990, as opposed to its lone abstention in 1982 during 1971–1989,[91] principally on matters that concerned impositions of non-military sanctions, use of force, establishments of international tribunals, and mandates and scopes of various humanitarian relief missions, on grounds that Security Council action would constitute interference in the relevant States' internal affairs and breach of their State sovereignty. Otherwise, China abstained in 1999 on a draft resolution on Nauru's application for United Nations membership due to Nauru's recognition of the authorities on Taiwan as the legitimate government of China,[92] and in 2000 on a draft resolution on Tuvalu's application for United Nations membership for the same reason,[93] even though it could have vetoed both draft resolutions as it did in 1972 in respect of Bangladesh and in 1955, when it was represented by the authorities on Taiwan, in respect of Mongolia.[94]

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955 (1994), 988 (1995), 998 (1995), 1054 (1996), 1070 (1996), 1101 (1997), 1114 (1997), 1134 (1997), 1160 (1998), 1199 (1998), 1203 (1998), 1207 (1998), 1244 (1999), 1280 (1999), 1284 (1999), 1333 (2000), 1556 (2004), 1564 (2004), 1591 (2005), 1593 (2005), 1672 (2006), 1680 (2006), 1945 (2010), 1973 (2011), and 2023 (2011).

[90] U.N. S.C. Resolutions 688 (1991), 776 (1992), 777 (1992), 781 (1992), 792 (1992), 821 (1993), 825 (1993), 855 (1993), 975 (1995), 1067 (1996), 1077 (1996), 1239 (1999), 1249 (1999), 1290 (2000), 1559 (2004), 1706 (2006), 1757 (2007), and 1907 (2009).

[91] U.N. S.C. Res. 502 (1982); the draft resolution called for immediate cessation of hostilities between Argentina and the United Kingdom and complete withdrawal of Argentine forces from the Falkland Islands/Malvinas.

[92] U.N. S.C. Res. 1249 (1999).

[93] U.N. S.C. Res. 1290 (2000).

[94] The Security Council in its Press Release (SC/6693, 25 June 1999) on its recommendation of Nauru's admission to United Nations membership stated that China explained before the formal vote that it 'attached great importance to the desire of the Republic of Nauru for admission to the United Nations and had seriously studied its application. However, the most essential thing in the admission process was that the purposes and principles of the United Nations Charter should be complied with. New Members should comply with General Assembly resolutions and fulfil their Charter obligations. China could not support the recommendation on admission of the Republic of Nauru to the United Nations … At the same time, considering the long-term interests of the peoples of China and the Republic of Nauru, China would not block the resolution. [China] hoped that when the Republic of Nauru joined the United Nations, it would comply with all the resolutions, including General Assembly resolution 2758 (1971).' Similarly, the Security Council in its Press Release (SC/6807, 17 February 2000) on its recommendation of Tuvalu's admission to United Nations membership stated that before the formal vote 'the representative of China […] in the report of the Membership Committee (S/2000/70) indicated that China could not associate itself with the Committee's recommendation, said his delegation had attached great importance to the desire of Tuvalu to join the United Nations and had made a serious study of its application. A Member State of the United Nations should truly implement the obligations of the United Nations Charter and seriously abide by the resolutions of the General Assembly, which was an important basis on which to judge whether an applicant country had met the standard for membership. He reiterated that the most important thing was that the principles and purposes

Meanwhile, China has taken a more co-operative role with other Permanent Members, even when it comes to its allies on whom other Security Council Members wish to impose sanctions. China voted affirmatively on all three draft Security Council resolutions against nuclear development in North Korea[95] and all three draft Security Council resolutions against nuclear development in Iran[96] between 2006 and 2009. Of the 28 draft Security Council resolutions regarding genocide in Darfur between 2004 and 2008, China voted affirmatively on 22[97] while abstaining on six.[98] China, together with Russia, vetoed draft Security Council resolutions regarding political repression in Burma/Myanmar on 12 January 2007,[99] political repression in Zimbabwe on 11 July 2008,[100] and the Syrian government's suppression of internal unrest on 4 October 2011[101] and on 4 February 2012,[102] on grounds that Security

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of the Charter should be implemented, as well as General Assembly resolution 2758. Flowing from that primary obligation, he could not support the recommendation to the Assembly for acceptance of Tuvalu's membership. At the same time, given his country's long-term shared interests with the people of Tuvalu and the strong wish of the Pacific States to admit that country, his delegation would not block the recommendation. Hopefully, he added, after joining the United Nations Tuvalu could strictly abide by the United Nations Charter and implement the relevant General Assembly resolution.' In 2002, Nauru shifted its recognition to the PRC government as the legitimate government of China, although it reversed its recognition in 2005, while Tuvalu has continued to recognise the authorities on Taiwan as the legitimate government of China.

[95] U.N. S.C. Resolutions 1695 (2006), 1718 (2006), and 1874 (2009). However, Marcus Noland notes that neither North Korea's nuclear test nor United Nations sanctions had meaningful effects on China's trade relations with North Korea: 'The (Non) Impact of UN Sanctions on North Korea', 7 *Asia Policy* (2009), 61.

[96] U.N. S.C. Resolutions 1696 (2006), 1737 (2006), and 1747 (2007). Similar to the effects of United Nations sanctions on North Korea, Michael Jacobson notes that United Nations sanctions on Iran failed to dissuade the Iranian government from continuing its nuclear programme: 'Sanctions against Iran: A Promising Struggle', 31:3 *Washington Quarterly* (2008), 69, 78. Robert A. Pape, 'Why Economic Sanctions Do Not Work', 22:2 *International Security* (1997), 90, has found sanctions to have only modest impact on the sanctioned State's or its regime's behaviours. T. Clifton Morgan and Valerie L. Schwebach, 'Fools Suffer Gladly: The Use of Economic Sanctions in International Crises', 41 *International Studies Quarterly* (1997), 27, 46, argue that '[i]n most cases, a state imposing sanctions on its opponent can expect an outcome that is just about the same as would be obtained without sanctions.'

[97] U.N. S.C. Resolutions 1547 (2004), 1569 (2004), 1574 (2004), 1590 (2005), 1627 (2005), 1651 (2005), 1663 (2006), 1665 (2006), 1679 (2006), 1709 (2006), 1713 (2006), 1714 (2006), 1755 (2007), 1769 (2007), 1779 (2007), 1784 (2007), 1812 (2008), 1828 (2008), 1841 (2008), 1870 (2009), 1881 (2009), and 1891 (2009).

[98] U.N. S.C. Resolutions 1556 (2004), 1564 (2004), 1591 (2005), 1593 (2005), 1672 (2006), and 1706 (2006).

[99] S/PV.5619, 12 January 2007.

[100] S/PV.5933, 11 July 2008.

[101] S/PV.6627, 4 October 2011.

[102] S/PV.6711, 4 February 2012.

Council action would constitute interference in Burma/Myanmar's, Zimbabwe's, and Syria's internal affairs and breach of the three States' sovereignty. China did vote in unanimity with other Security Council Members on 14 April 2012 in favour of authorising up to thirty unarmed military observers to be dispatched to Syria to monitor compliance with the ceasefire agreement between forces loyal and hostile to the Syrian government;[103] on 21 April 2012 of establishing a United Nations Supervision Mission in Syria (with an authorised capacity of up to three hundred unarmed military observers and necessary civilian personnel);[104] and on 20 July 2012 of extending the mandate of the Mission for a final period of thirty days.[105] The Security Council in its Resolution 2059 (2012) indicated that it would be willing to further extend the mandate of the Mission 'only in the event that the Secretary-General reports and the Security Council [confirm] the cessation of the use of heavy weapons and a reduction in the level of violence by all sides sufficient to allow [the Mission] to implement its mandate'.[106] The mandate of the Mission ceased as of 19 August 2012 amidst escalating violence in Syria.

a. China's evolving attitude to international peacekeeping

Despite its rare use of veto, China has received sustained criticism about its frequent abstentions. Nigel Thalakada has described China as pursuing a 'maxi-mini' strategy, maximising its own security and economic benefits while minimising its responsibilities,[107] while Thomas Christensen calls China 'the high church of realpolitik in the post-Cold War world'.[108] Erik Voeten notes that China abstained on

[103] U.N. S.C. Res. 2042 (2012).
[104] U.N. S.C. Res. 2043 (2012).
[105] U.N. S.C. Res. 2059 (2012).
[106] Ibid., para.3.
[107] Nigel Thalakada, 'China's Voting Pattern in the Security Council, 1990–1995', in Russett, *supra* n.80, 83.
[108] Thomas J. Christensen, 'Chinese Realpolitik', 75 *Foreign Affairs* (September/October 1996), 37. See also Alastair Iain Johnston, 'Realism(s) and Chinese Security Policy in the Post-Cold War', in Ethan B. Kapstein and Michael Manstanduno, eds., *Unipolar Politics: Realism and State Strategies after the Cold War* (New York: Columbia University Press, 1999), 261; Andrew Nathan and Robert S. Ross, *The Great Wall and the Empty Fortress:*

draft Security Council Resolution 678 (1990) concerning Iraq's non-compliance with previous Security Council resolutions regarding Kuwait, in exchange for the United States' abstention in a World Bank vote on Chinese loans and security guarantees relating to Taiwan and substantive changes in other draft Security Council resolutions.[109]

Since the humanitarian crises in Bosnia and Herzegovina, Rwanda, Kosovo, and Darfur, the concept of a 'responsibility to protect' has gained currency among Western governments and scholars. The International Commission on Intervention and State Sovereignty in its 2001 report developed '*the idea* sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.'[110] Merely three years had elapsed before the matter was taken up as part of the debate about United Nations institutional reform, when the High-Level Panel on Threats, Challenges and Change stated in its 2004 report[111] that 'there is growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community – with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies'.[112] The Panel spoke of an 'emerging norm of a collective international responsibility to protect'[113] that encompassed not only 'the "right to intervene" of any State but the "responsibility to protect" of every State

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China's Search for Security (New York: W.W. Norton, 1997); Gerald Segal, *Defending China* (New York: Oxford University Press, 1995).

[109] Erik Voeten, 'Outside Options and the Logic of Security Council Action', 95 *American Political Science Review* (2001), 845, 846, fn.8. See also David Malone, *Decision-Making in the UN Security Council: The Case of Haiti, 1990–1997* (New York: Oxford University Press, 1998).

[110] International Commission on Intervention and State Sovereignty, *supra* n.38, VIII (emphasis added).

[111] *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (New York: United Nations, 2004).

[112] Ibid., para.201.

[113] Ibid., para.202.

when it comes to people suffering from avoidable catastrophe'.[114] Anne-Marie Slaughter asserts that underlying a responsibility to protect is a responsibility to be protected, and refusal to receive protection should engage a right of the international community to compel receipt.[115] Firmly believing that her position is not 'a leap into wishing thinking', Louise Arbour argues that 'in existing law, in institutions and in lessons learned from practice', a State has a 'permanent' responsibility to protect individuals, not only within its territory but also within the territory of another State, against abuse.[116]

One must be very cautious when established international legal norms and principles – notably, the principles of State sovereignty and of non-interference in the internal affairs of other States, and the prohibition of the use of force – could be forsaken with such rapidity and ease. Human sufferings, caused by rampant human rights abuses or humanitarian catastrophes, of course need to be addressed, but to distort and undermine the current international legal order, which was devised precisely to forestall and redress human sufferings caused by wars precipitated and encouraged with rhetoric, only aggravates and worsens situations in which vulnerable populations find themselves.[117] The only authorities Arbour has cited in support of her position stated above[118] are the 2005 *World Summit Outcome Document* (of which, it is noted, China voted in favour, and whose drafters included Qian Qichen, China's Foreign Minister at the time, as a member of the International Commission

[114] Ibid., para.201.
[115] Anne-Marie Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', 99 *American Journal of International Law* (2005), 619, 625.
[116] Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', 34 *Review of International Studies* (2008), 445, 447-48.
[117] As Carl Schmitt has argued, '[w]hen a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. … The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one can be reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat': *The Concept of the Political* (Chicago: University of Chicago Press, 1995), 54.
[118] Arbour, *supra* n.116, 449-52.

on Intervention and State Sovereignty),[119] Article I of the Genocide Convention,[120] and the ICJ's dictum in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Bosnia and Herzegovina and Serbia and Montenegro in 2007 that 'if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.'[121] Arbour goes on to assert that Security Council Permanent Members, given their influence and power within and outside the

[119] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution Press, 2008), 45, acknowledges that 'the support that mattered most for the future of the High-Level Panel's recommendations – fairly passive though it was at the time – was probably that from … Qian Qichen; without his immense prestige back in Beijing, it is difficult to believe that, given the traditional strength of its concerns about nonintervention, China would have been quite as relaxed on this issue as it proved to be at the World Summit'. However, notwithstanding China's affirmative vote for, and Qian's participation in the drafting of, the *Document*, I argue that the *Document* does not embody, represent, evidence or contribute to State practice and, *a fortiori*, the emergence of any new norm of customary international law. My position is the same regarding the status of the High-Level Panel on Threats, Challenges and Change's report, *supra* n.111, as a matter of law (customary or otherwise). The fact that a group of government officials and scholars, however diverse, representative or eminent, meet, even under United Nations auspices, to discuss matters of international concern does not confer any of its findings or conclusions the status of law or evince State practice, which must be proven by the existence of general, consistent and widespread practice of States accompanied by the requisite *opinio juris*. The notion that scholars of international law and small groups of policymakers could collectively or singularly alter the meaning of an established norm, rule or principle of international law through creative synthesis and analysis stretches too far the degree of significance to which scholarly or policy opinions may influence the development of international law – it could almost reduce treaty-making and crystallisation of customary norms through State practice to irrelevance. As Alexander Orakhelashvili has stated, 'States create international law and give it to us to examine. We can criticize their decisions but those decisions will still remain law. Again, "international lawyers are allowed to search for constructive solutions to new problems", but in doing so they have to acknowledge that the solutions they search for are not part of international law until and unless these are adopted through the process of international law-making': 'Kosovo and the Pitfalls of Over-theorizing International Law: Observations on Hilpold's Rejoinder', 8 *Chinese Journal of International Law* (2009), 589, 591, quoting Peter Hilpold, 'What Role for Academic Writers in Interpreting International Law? – A Rejoinder to Orakhelashvili', 8 *Chinese Journal of International Law* (2009), 291, 296.

[120] Article I of the Convention on the Prevention and Punishment of the Crime of Genocide states that '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

[121] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Judgment*, *ICJ Reports* 2007, 43, 222. However, Arbour, *supra* n.116, omits to cite the Court's immediately subsequent statement that 'if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which … must occur for there to be a violation of the obligation to prevent': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ibid.

Security Council, have a 'heavier responsibility than other States to ensure the protection of civilians everywhere',[122] and that in the event that a Permanent Member vetoes or threatens to veto 'action *that is deemed necessary by other members* to avert genocide, or crimes against humanity',[123] it may be held to have violated its obligations under the Genocide Convention.[124] At a Security Council debate on 24 March 1999 regarding the NATO intervention in Kosovo, Slovenia argued that the intervention was justified because 'not all permanent members were willing to act in accordance with their special responsibility for the maintenance of international peace and security'.[125]

The High-Level Panel on Threats, Challenges and Change associated the concept of responsibility to protect with the principle of collective security by the Security Council, stating that the Security Council 'can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security"'.[126] The Panel urged Permanent Members 'to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses'.[127] The 2005 *World Summit Outcome Document* adopted by the General Assembly stated that 'we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, *on a case-by-case basis* and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[128] While insistent on Security Council authorisation as prerequisite to any

[122] Arbour, ibid., 453.
[123] Ibid. (emphasis added).
[124] Ibid., 454.
[125] S/PV.3988, 24 March 1999, 6-7.
[126] *Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, *supra* n.111, para.202.
[127] Ibid., para.256.
[128] A/60/L.1 (2005), para.139 (emphasis added).

peacekeeping operation, China in its 2005 official paper on United Nations reform acknowledged that '[e]ach State shoulders the primary responsibility to protect its own population. … When a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis.'[129] However, at a Security Council meeting on 4 December 2006, China signalled its concern that the *World Summit Outcome Document* was 'a very cautious representation of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity … it is not appropriate to expand, wilfully to interpret or even abuse this concept.'[130] China reiterated its position at a Security Council meeting on 27 May 2008:

> when discussing the protection of civilians in armed conflict, the Security Council should approach the concept of the responsibility to protect – and especially its application – with great prudence. The Final Document of the 2005 World Summit devoted a lengthy section to a very careful description of the responsibility to protect civilians from massacres, war crimes, genocide and crimes against humanity. It also indicated that that concept should be further considered by the General Assembly. Many members are currently deeply concerned about the concept of the responsibility to protect, and the relevant discussions should therefore be pursued in the United Nations. The Security Council is in no position to interpret or expand the concept of the responsibility to protect at will, much less to abuse it.[131]

[129] As quoted in Ramesh Thakur, 'R2P after Libya and Syria: Engaging Emerging Powers', 36:2 *Washington Quarterly* (2013), 61, 67.
[130] S/PV.5577, 4 December 2006, 8.
[131] S/PV.5898, 27 May 2008, 9.

It is important to note that the United Nations Charter does not provide for peacekeeping operations. International peacekeeping 'evolved as an alternative to the collective security that the UN was designed to provide but could not.'[132] Taylor Fravel notes that peacekeeping operations 'evolved in the early 1950s as a response to border disputes sparked by decolonization'.[133] China traditionally considered any peacekeeping operation to constitute interference in a State's internal affairs and breach of the State's sovereignty. China insisted that consent of the host State, impartiality of the peacekeeping operation, and non-use of force except in self-defence be essential to any peacekeeping operation the Security Council were to authorise. At a Security Council debate on 7 July 2010 about protection of civilians in armed conflict, China reiterated that '[a]dhering to the three principles of the consent of the country concerned, impartiality and the non-use of force except in self-defence is the key to the success of peacekeeping operations. Any deviation from those basic principles will cause more conflicts and problems, even to the point of jeopardizing the success of the peacekeeping operation concerned, rather than help to protect civilians.'[134]

China abstained on draft Security Council Resolutions 770 (1992), 776 (1992), 781 (1992), 836 (1993), 871 (1993), and 908 (1994) regarding Bosnia and Herzegovina on grounds of the prohibition of the use of force, and on Security Council Resolution 998 (1995) regarding changing the mandate of the United Nations peacekeeping operation in Bosnia and Herzegovina to enforcement action. However, China voted affirmatively on draft Security Council Resolutions 836 (1993), 871 (1993), 908 (1994), 1031 (1995), and 1088 (1996) on grounds that Bosnia and Herzegovina consented to (and later requested) United Nations peacekeeping and that the situation on the ground became exceptional, although it reiterated its opposition to

[132] William J. Durch, 'Building on Sand: UN Peacekeeping in the Western Sahara', 17:4 *International Security* (1993), 151, 151.
[133] M. Taylor Fravel, 'China's Attitude toward U.N. Peacekeeping Operations since 1989', 36 *Asian Survey* (1996), 1102, 1104.
[134] S/PV.6354, 7 July 2010, 28.

the use of force. China also voted in favour of draft Security Council Resolution 1037 (1996) regarding Croatia on grounds that Croatia requested United Nations peacekeeping, while reiterating its opposition to the use of force, and of draft Security Council Resolution 794 (1992) regarding Somalia due to the exceptional nature of the situation on the ground.[135] China abstained on draft Security Council Resolution 975 (1995) regarding Haiti, although it eventually voted in favour of draft Security Council Resolutions 1048 (1995) and 1063 (1996) after Haiti requested peacekeeping assistance. China's Ministry of Foreign Affairs explained that China abstained on draft Security Council Resolution 929 (1994) on establishing a temporary multinational humanitarian operation in Rwanda because '[w]e have consistently argued that the indispensable condition for the UN peacekeeping operations to succeed is to gain consent from the parties concerned and to cooperate with the affected states and regional organizations. It is still hard to ensure that the Security Council's resolution that approves of taking action will gain consent and cooperation from the affected parties.'[136] China abstained on draft Security Council Resolution 955 (1994) on establishing an international tribunal for crimes committed in Rwanda out of concern that the principles of State sovereignty and of non-interference in other States' internal affairs would be undermined.

Concerning the humanitarian crisis and NATO intervention in Kosovo, China abstained on draft Security Council Resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999), and 1244 (1999), and in three of the five instances provided the only non-affirmative vote. Instead of being a watershed in China's acceptance of international peacekeeping and a 'responsibility to protect', the NATO intervention in Kosovo heightened China's concern about the erosion of the principle of State sovereignty in the current international legal order. At a Security Council meeting on

[135] See Stefan Stähle, 'China's Shifting Attitude towards United Nations Peacekeeping Operations', 195 *China Quarterly* (2008), 631, 640.
[136] As quoted in Chengqiu Wu, 'Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Humanitarian Crises', 15 *Journal of Chinese Political Science* (2010), 71, 74.

23 March 1999, the day before NATO commenced bombing over the Federal Republic of Yugoslavia (Serbia and Montenegro), China maintained:

> The question of Kosovo, as an internal matter of the Federal Republic of Yugoslavia, should be resolved among the parties concerned in the Federal Republic of Yugoslavia themselves. Settlement of the Kosovo issue should be based on respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and on guaranteeing the legitimate rights and interests of all ethnic groups in the Kosovo region. … We have always stood for the peaceful settlement of disputes through negotiations, and are opposed to the use or threat of use of force in international affairs and to power politics whereby the strong bully the weak. We oppose interference in the internal affairs of other States, under whatever pretext or in whatever form.[137]

Pang Zhongying argues that '[c]entral to Chinese concerns is the changing nature and context of peace operations – with the potential for mission creep and the move to "coalitions of the willing" – and the implications these would have for international involvement in China's key internal affairs relating, for example, to Taiwan, Tibet, and Xinjiang'.[138] China explained its abstention on draft Security Council Resolution 1160 (1998) on grounds that 'ethnic issues are extremely complicated and sensitive,

[137] S/PV.3988, 23 March 1999, 12.

[138] Pang Zhongying, 'China's Changing Attitude to UN Peacekeeping', 12 *International Peacekeeping* (2005), 87, 88. Similarly, He Yin has stated that '[a]lthough China can be flexible in normative principles like state sovereignty and non-intervention … [i]t is aware that its flexibility regarding these norms may be a "double-edged sword". On the one hand, when properly used, flexibility can provide Beijing with more diplomatic options for dealing with international affairs, prevent unnecessary conflicts with other powers, and yield a favourable environment for its development strategy. On the other hand, when overexploited, it [does] not only jeopardise China's strategic interests regarding state sovereignty (especially the Taiwan Question) but also damages its image as a peace-loving power, especially in the eyes of the developing world': *China's Changing Policy on UN Peacekeeping Operations* (Stockholm: Institute for Security and Development Policy, 2007), 57.

especially in the Balkans. On the one hand, the legitimate rights and interests of all ethnic groups should be protected; on the other, secessionist activities by various extremist elements should be prevented … If the Council is to get involved in a dispute without a request from the country concerned, it may set bad precedent and have wider negative implications.'[139] Indeed, Madeleine Albright, United States Secretary of State at the time, stressed that Kosovo was 'a unique situation *sui generis* in the region of the Balkans' and it was important not to regard it as precedent for similar action in the future.[140] At a Security Council meeting on 10 June 1999 aimed to confirm a ceasefire agreement through draft Security Council Resolution 1244 (1999), China abstained in the vote and stated:

> NATO seriously violated the Charter of the United Nations and norms of international law, and undermined the authority of the Security Council, thus setting an extremely dangerous precedent in the history of international relations.
>
> … Respect for sovereignty and non-interference in each other's internal affairs are basic principles of the United Nations Charter. Since the end of the Cold War, the international situation has undergone major changes, but those principles are by no means outdated. On the contrary, they have acquired even greater relevance. At the threshold of the new century, it is even more imperative for us to reaffirm those principles. In essence, the 'human rights over sovereignty' theory strives to infringe upon the sovereignty of other States and to promote hegemonism under the pretext of human rights. This totally runs counter to the purposes and principles of the United

[139] S/PV.3868, 31 March 1998, 11-12.
[140] United States Secretary of State Madeleine Albright, Press Conference with Russian Foreign Minister Igor Ivanov, Singapore, 26 July 1999, http://secretary.state.gov/www/statements/1999/990726b.html.

Nations Charter. The international community should maintain vigilance against it.

The draft resolution before us has failed to fully reflect China's principled stand and justified concerns. In particular, it makes no mention of the disaster caused by NATO bombing in the Federal Republic of Yugoslavia and it has failed to impose necessary restrictions on the invoking of Chapter VII of the United Nations Charter. Therefore, we have great difficulty with the draft resolution. However, in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that the draft resolution has reaffirmed the purposes and principles of the United Nations Charter, the primary responsibility of the Security Council for the maintenance of international peace and security and the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Chinese delegation will not block the adoption of this draft resolution.[141]

[141] S/PV.4011, 10 June 1999. Construing the NATO intervention as 'an international constitutional moment', Anne-Marie Slaughter and William Burke-White argue that Article 2(4) of the United Nations Charter, which states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations', should now read: '"All states and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose"', which 'articulates a principle of civilian inviolability' that permits and compels humanitarian intervention and has replaced the principle of State sovereignty as a new *Grundnorm* for the 'new' international order: 'An International Constitutional Moment', 43 *Harvard International Law Journal* (2002), 1, 2. Such a fanciful analysis notwithstanding, it is generally agreed among scholars of international law that the NATO intervention was incompatible with both the Charter and customary international law as it contravened the prohibition of the use of force and the principles of State sovereignty, territorial integrity, and non-interference in the internal affairs of other States: see, *e.g.*, Antonio Cassese, '*Ex Iniuria Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *European Journal of International Law* (1999), 23; Jonathan I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', 32 *Vanderbilt Journal of Transnational Law* (1999), 1231; Vera Gowland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', 11 *European Journal of International Law* (2000), 361; Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"', 93 *American Journal of International*

China's opposition to the notion of a right to humanitarian intervention is widely shared among developing States. The Group of 77 in 2000 categorically rejected the existence of such a purported right that 'has no legal basis in the United Nations Charter or in the general principles of international law'.[142]

Nonetheless, China voted in favour of peacekeeping operations authorised under Security Council Resolutions 1264 (1999), 1272 (1999), 1410 (2002) and 1704 (2006) regarding East Timor, Security Council Resolutions 1270 (1999) and 1289 (2000) regarding Sierra Leone, Security Council Resolutions 1291 (2000) and 1671 (2006) regarding the Democratic Republic of the Congo, Security Council Resolution 1386 (2001) regarding Afghanistan, Security Council Resolutions 1464 (2003) and 1528 (2004) regarding Côte d'Ivoire, Security Council Resolutions 1497 (2003) and

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Law (1999), 824; Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *European Journal of International Law* (2001), 437; Alain Pellet, 'Brief Remarks on the Unilateral Use of Force', 11 *European Journal of International Law* (2000), 385; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (1999), 1. The ICJ in *Legality of Use of Force* (*Yugoslavia* v. *United States of America*), *Provisional Measures*, *Order of 2 June 1999*, *ICJ Reports* 1999, 916, 922, emphasised that it was 'profoundly concerned with the use of force in Yugoslavia' which 'under the present circumstances … raises very serious issues of international law'. Even some of the States that participated in the NATO intervention, particularly Germany, cautioned against attributing precedential value to the intervention: Simma, ibid., 12-13. The fact that the NATO intervention was 'collective' is immaterial as 'the Alliance has no greater freedom than its member states' under international law: ibid., 19; to ascribe binding force to a unilateral decision of a majority of Security Council Permanent Members when the Security Council collectively, and as the only international organisation empowered by the Charter to authorise enforcement action for the maintenance of international peace and security, decided against adopting a resolution that would have authorised military intervention in Kosovo was 'tantamount to ignoring the very essence of the decision process within the Security Council': Hilpold, ibid., 449. With the far-reaching consequences that a Security Council decision entails, Hilpold, ibid., stresses that '[a]ny attempt to introduce a majority principle for the permanent members of the Council, too – if only indirectly or with weakened consequences – and thereby abolishing or at least softening their veto power, would not only run counter to the letter of Article 27 of the UN Charter but also to the spirit lying at the heart of the constitutional consensus which permitted the establishment of [the current international order].' Security Council Resolution 1244 (1999), on which China abstained, and which legitimated *ex post facto* the NATO intervention but reaffirmed the sovereignty and territorial integrity of the then Federal Republic of Yugoslavia, did not render the intervention compatible with the Charter or customary international law. On the contrary, the Security Council's *ex post facto* legitimation 'introduces in the international legal order a part of uncertainty which is deeply repugnant to the very function of law in any society and it is impossible to assume that it will not happen again in similar situations in the future': Pellet, ibid., 389. As Oscar Schachter has emphasised, '[w]hen a principle is repeatedly and unanimously declared to be a basic legal rule from which no derogation is allowed, even numerous violations do not become state practice constitutive of a new rule': 'In Defense of International Rules on the Use of Force', 53 *University of Chicago Law Review* (1986), 113, 131.

[142] Declaration of the Group of 77 South Summit, Havana, 10–14 April 2000, para.54.

1509 (2003) regarding Liberia, Security Council Resolutions 1529 (2004) and 1542 (2004) regarding Haiti, Security Council Resolution 1545 (2004) regarding Burundi, and Security Council Resolutions 1590 (2005) and 1769 (2007) regarding Sudan,[143] after previously abstaining on draft Security Council Resolutions 1556 (2004), 1564 (2004), 1593 (2005), 1679 (2006) and 1706 (2006)[144] on grounds that Sudan's consent had not been obtained and pressure on the Sudanese government would only worsen the situation, and out of 'national judicial sovereignty'.[145] Stefan Stähle

[143] See Stähle, *supra* n.135, 641-42.

[144] Ibid., 651; Nicola P. Contessi, 'Multilateralism, Intervention and Norm Contestation: China's Stance on Darfur in the UN Security Council', 41 *Security Dialogue* (2010), 323, 331. At a Security Council meeting regarding draft Security Council Resolution 1679 (2006), China stated that 'if the United Nations is to deploy a peacekeeping operation in Darfur, the agreement and cooperation of the Sudanese Government must be obtained. That is a basic principle and precondition for the deployment of all United Nations peacekeeping operations': S/PV.5439, 16 May 2006. At a Security Council meeting regarding draft Security Council Resolution 1706 (2006), China explained its abstention on grounds that 'having participated in all the consultation processes in a constructive manner, China agreed upon or accepted almost all the contents of the resolution. However, we have consistently urged the sponsors to clearly include "with the consent of the Government of National Unity" in the text of the resolution, which is a fixed and standardized phrase utilized by the Council when deploying United Nations missions': S/PV.5519, 31 August 2006.

[145] U.N. S.C. Res. 1556 (2004), Preamble and paras.1-2 and 7-8; U.N. S.C. Res. 1564 (2004), Preamble and para.12; S/PV.5040, 18 September 2004; S/PV.5519, 31 August 2006. At a Security Council meeting regarding draft Security Council Resolution 1593 (2005) which called for the situation in Darfur to be referred to the International Criminal Court for investigation into human rights violations committed since July 2002, China abstained on grounds that 'out of national judicial sovereignty, we would prefer to see perpetrators of gross violations of human rights stand trial in the Sudanese judicial system. We have noted that the Sudanese judiciary has recently taken legal action against individuals involved. … We are not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government': S/PV.5158, 31 March 2005.

The Rome Statute of the International Criminal Court was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 and entered into force on 1 July 2002. China, Iraq, Israel, Libya, Qatar, the United States, and Yemen voted against adoption of the Rome Statute. Due to the United States' pressure that it would withdraw all of its military personnel from the United Nations peacekeeping mission in East Timor and to a United States veto of a draft Security Council resolution on extending the United Nations peacekeeping mission in Bosnia (see Lu Jianping and Wang Zhixiang, 'China's Attitude towards the ICC', 3 *Journal of International Criminal Justice* (2005), 608, 610), the Security Council in 2002 adopted Resolution 1422 that '[r]equests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise' (para.1). At a Security Council meeting on 31 March 2005, the United States stated unequivocally that 'we have not dropped, and indeed continue to maintain, our long-standing and firm objections and concerns regarding the ICC. We believe that the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions. We reiterate our fundamental objection to the Rome Statute's assertions that the ICC has jurisdiction over the nationals, including government officials, of States that have not

argues that the turning point of China's voting behaviour regarding United Nations peacekeeping was when it supported the Australian-led mission in 1999 to restore peace and security in East Timor and protect United Nations personnel on the ground.[146] Bates Gill and James Reilly assert that '[g]eographic proximity; a desire to respond in some way to anti-Chinese violence in Indonesia; initial involvement with the voting process; and a desire to retain UN authority, and thus Chinese influence, over issues of intervention and the use of force were all likely factors in China's ultimate policy choices.'[147] However, as Chapter V noted, China did reiterate its longstanding position regarding peacekeeping missions that the consent of the host State (in this case, Indonesia) must have been obtained, a position with which Australia, Russia, the United States, Malaysia (a non-Permanent Member of the Security Council at the time) and other non-aligned States concurred.[148]

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become parties to the Rome Statute. Non-parties have no obligations in connection with that treaty unless otherwise decided by the Security Council, upon which Members of this Organization have conferred primary responsibility for the maintenance of international peace and security': S/PV/5158, 31 March 2005, 3.

Lu and Wang, ibid., 611-12, have noted that five considerations inhered in China's refusal to join the International Criminal Court: '(1) The jurisdiction of the ICC is not based on the principle of voluntary acceptance; the Rome Statute imposes obligations on non-State Parties without their consent, which violates the principle of state sovereignty and the Vienna Convention on the Law of Treaties. Furthermore, the complementary jurisdiction principle gives the ICC the power to judge whether a state is able or willing to conduct proper trials of its own nationals. As a result, the Court becomes a supra-national organ. (2) War crimes committed in internal armed conflicts fall under the jurisdiction of the ICC. Further, the definition of "war crimes" goes beyond that accepted under customary international law and Additional Protocol II to the Geneva Conventions. (3) Contrary to the existing norms of customary international law, the definition of "crimes against humanity" does not require that the state in which they are committed be "at war". Furthermore, many actions listed under that heading belong to the area of human rights law rather than international criminal law; this deviates from the real aim of establishing the ICC. (4) The inclusion of the crime of aggression within the jurisdiction of the ICC weakens the power of the UN Security Council. (5) The *proprio motu* power of the Prosecutor under Article 15 of the Rome Statute may make it difficult for the ICC to concentrate on dealing with the most serious crimes, and may make the Court open to political influence so that it cannot act in a manner that is independent and fair.'

[146] Stähle, *supra* n.135, 648.

[147] Bates Gill and James Reilly, 'Sovereignty, Intervention and Peacekeeping: The View from Beijing', 42:3 *Survival* (2000), 41, 50.

[148] See Ian Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations', 18:2 *International Peacekeeping* (2011), 170; Nicholas Wheeler and Tim Dunne, 'East Timor and the New Humanitarian Intervention', 77 *International Affairs* (2001), 805. Some scholars have misconstrued China's support for the United Nations peacekeeping mission in East Timor as a fundamental change of its position regarding humanitarian intervention or international peacekeeping. For example, Allen Carlson contends that China's 'quiet, supportive role in facilitating humanitarian intervention in East Timor' and its votes in favour

China voted affirmatively on draft Security Council Resolution 1296 (2000) on protection of civilians in armed conflict, which stated that 'the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security'.[149] China has maintained that the success or otherwise of United Nations peacekeeping operations is heavily dependent on the 'democratisation of international relations'. At a Security Council debate on 21 June 2001 about the United Nations Secretary-General's report on prevention of armed conflict,[150] China asserted:

> The United Nations should play an important role in the promotion of the democratisation of international relations. Armed conflicts in the Middle East, the Balkans, the Great Lakes region of Africa and other countries and regions could be stopped as early as possible and new conflicts could be prevented if all sides concerned could really follow the basic norms guiding state-to-state relations. Although the role and capacity of the United Nations has its own limitations, as the Secretary-General has pointed out in the report, preventing armed conflict represents an important orientation in the field of maintaining international peace and security as well as an important

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of Security Council Resolutions 1264 (1999) and 1272 (1999) only months after its fierce opposition to NATO intervention in Kosovo constituted evidence that 'Chinese foreign policy circles at this time basically accepted the legitimacy of human rights and humanitarian intervention': *Unifying China, Integrating with the World: Securing Chinese Sovereignty in the Reform Era* (Singapore: National University of Singapore Press, 2008), 176. Evan A. Feigenbaum, 'China's Challenge to *Pax Americana*', 24:3 *Washington Quarterly* (2001), 31, 34, has gone even further to argue that '[i]n mid-1999, the UN experience in East Timor signaled that China's orthodox view of sovereignty might be less intractable than Beijing's rhetoric would otherwise indicate. China sent observers, for example, to participate in a UN peace enforcement operation that violated what was still sovereign Indonesian territory' – even though Indonesia's consent had been obtained, the Security Council had authorised the peacekeeping mission in East Timor, and East Timor had never been part of Indonesia's sovereign territory under international law.

[149] U.N. S.C. Res. 1296 (2000), para.5.

[150] *Prevention of Armed Conflict: Report of the Secretary-General*, A/55/985-2/2001/574, 7 June 2001.

> task of the United Nations. China is willing to make its own contribution, together with other Member States, to strengthening the capacity of the United Nations for the prevention of armed conflict.[151]

China's increased experience with peacekeeping operations has led it to depart from its previous unease. While remaining wary of blurring peacekeeping operations with peace-building activities, China in 2001 indicated its recognition that 'peacekeeping operations, conflict prevention and peace-building activities had become increasingly intertwined',[152] although it insisted that the host State should assume a 'dominant role' in resolving conflict.[153] In 2003, China indicated that '[g]iven the growing complexity of operations, traditional operations were no longer suited for certain types of conflict; the situations in the Democratic Republic of the Congo and in Liberia, for example, had highlighted the need for rapid, early and robust intervention', [154] 'including the use of enforcement measures where necessary'. [155] In 2004, China stated that military force, 'where necessary', [156] constituted an essential part of peacekeeping operations: 'In conflict management, the roles of military action and that of the civilian elements are closely interrelated and predicated on one another. … Military success guarantees the presence of a civilian role, which is an essential and indispensable element in any post-conflict reconstruction.'[157] In 2005, President Hu Jintao stated that China was in support of a 'comprehensive strategy featuring prevention, peace restoration, peacekeeping and post-conflict reconstruction'.[158] Zhang Yesui, China's Ambassador to the United

[151] Statement of Ambassador Wang Yingfan, as quoted in Pang, *supra* n.138, 94.
[152] A/C.4/56/SR.20, 4 December 2001, para.45.
[153] A/C.4/55/SR.20, 5 April 2001, paras.28-29.
[154] A/C.4/58/SR.11, 14 November 2003, para.31.
[155] Ibid., para.33.
[156] Ibid.; see also A/C.4/59/SR.17, 31 December 2004, para.24.
[157] S/PV.5041, 22 September 2004, 26.
[158] S/PV.5261, 14 September 2005, 8.

States, stated at the Munich Conference on Security Policy in 2007 that China's increasing contribution to United Nations peacekeeping operations 'reflected China's commitment to global security given the country's important role within the international system and the fact that its security and development are closely linked to that of the rest of the world'.[159] Major-General Zhang Qinsheng, Deputy Chief of the General Staff of the People's Liberation Army ('PLA'), at the PLA Peacekeeping Work Conference in Beijing in June 2007 stated that 'active participation in the UN peacekeeping operations is … an important measure to display China's image of being a peace-loving and responsible big country and likewise an important avenue to get adapted to the needs of the revolution in military affairs in the world and enhance the quality construction of the army'.[160] Chin-Hao Huang notes that '[i]n May 2009, the PLA General Staff Department announced that it would strengthen the PLA's emergency response system and rapid deployment capacity to respond to the various MOOTW [military operations other than war], including peacekeeping activities. In June 2009 the Central Military Commission, the PLA and five of the seven military area commands met in Beijing to strengthen and improve the PLA's peacekeeping role, discussing ways to streamline the selection, organization, training and rotation of Chinese peacekeepers.'[161] On 26 April 2010, the PLA issued a special report commemorating China's contribution to international peacekeeping in the preceding two decades, which stated that '[u]p to the end of March 2010, the PLA has contributed peacekeepers over 15,000 persons/times to 18 UN peacekeeping missions worldwide … The Chinese peacekeeping troops have built and maintained over 8,000 kilometres of road, constructed 230-odd bridges and given medical treatment to

[159] As quoted in Chin-Hao Huang, 'Principles and Praxis of China's Peacekeeping', 18 *International Peacekeeping* (2011), 257, 260-61.
[160] *PLA Daily*, 22 June 2007, as quoted in Wu Zhengyu and Ian Taylor, 'From Refusal to Engagement: Chinese Contributions to Peacekeeping in Africa', 29 *Journal of Contemporary African Studies* (2011), 137, 150.
[161] Huang, *supra* n.159, 261, citing 'PLA Constructs MOOTW Arms Force System', *PLA Daily*, 14 May 2009, and 'PLA Peacekeeping Work Conference Held in Beijing', *PLA Daily*, 26 June 2009.

patients for 60,000 persons/times in the UN peacekeeping mission areas, playing a positive role in promoting the peaceful settlement of disputes, maintaining the regional safety and stability, and facilitating the economical and social development in some countries.'[162] According to United Nations data, China has increased its personnel contribution to peacekeeping operations twenty-fold and, with more than 2,100 peacekeepers abroad, has more troops under United Nations command than does any other Security Council Permanent Member.[163]

As President of the Security Council during January–June 2010, China convened a thematic debate on 13 January 2010 to explore possibilities for strengthening co-operation and collaboration between the United Nations and regional and sub-regional organisations in the maintenance of international peace and security. In its concept paper,[164] while emphasising the pre-eminence of the Security Council,[165] China indicated its wish to explore the comparative advantages that the United Nations and regional organisations respectively possess and those that they share in the maintenance of international peace and security, in particular in conflict prevention, management and resolution,[166] and how their respective roles and responsibilities may be better defined and delineated in accordance with the Charter.[167] China considered a collaborative partnership between the United Nations and regional and sub-regional organisations to be crucial in preventing, managing and resolving conflicts, including nascent disputes and emerging crises, effectively,[168] and in encouraging States to 'resolve differences and problems peacefully through dialogue, reconciliation, negotiation, good offices and mediation'.[169] Opportunities

[162] 'PLA Contributes a Lot to UN Peacekeeping Operations', *PLA Daily*, 26 April 2010, as quoted in Zhao, *supra* n.61, 346.
[163] United Nations Department of Peacekeeping Operations, 'UN Missions Summary Detailed by Country', 1 October 2010.
[164] Letter dated 4 January 2010 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, S/2010/9, 7 January 2010.
[165] Ibid., para.1.
[166] Ibid.
[167] Ibid., para.2(1).
[168] Ibid., para.2(3).
[169] Ibid.

such a thematic debate may generate aside, it marked the first time that China took the initiative as President of the Security Council to convene a thematic debate (and not due to previous Security Council decisions). According to Security Council Report, a not-for-profit organisation affiliated with Columbia University, Security Council Permanent Members have largely been reluctant about holding thematic debates, which have generally been initiated by non-Permanent Members during their Security Council presidencies.[170]

b. Will China veto a draft Security Council resolution aimed at its conduct?

Due to their veto power, Permanent Members are often taken to be immune to the enforcement powers of the Security Council and, consequently, the constraints of international law. The possibility that China might veto proposed Security Council action aimed at its conduct, such as its violations of human rights, its lack of democratic governance, its treatment of Tibet or its recourse to military force against Taiwan, is one that many have in mind when criticising the legitimacy and effectiveness of the Security Council. As Andrew Hurrell argues, '[l]egitimacy implies a willingness to comply with rules or to accept a political order even if this goes against specific interests at specific times.'[171]

As noted in Chapter III, during the 1970s China repeatedly criticised the United States' and the Soviet Union's tendencies to veto draft Security Council resolutions in order to exercise hegemony. In 1973, Ling Ching stated that '[t]he super-Powers were arguing very hard for their idea that it was only up to the Security Council to decide whether a specific act constituted an act of aggression. Obviously, what they had in mind was invariably their veto power in the Security Council. In the event of their aggression against other countries, they could remain unpunished by

[170] Security Council Report, *Update Report: UN Cooperation with Regional and Subregional Organizations in the Maintenance of International Peace and Security*, 8 January 2010, No.2.
[171] Andrew Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?', 31 *Review of International Studies* (2005), 15, 16.

casting a single negative veto. Consequently it might well be asked whether the whole text of the definition of aggression would not become a mere scrap of paper.'[172]

Pursuant to Article 27(3) of the Charter, a Security Council Member that is 'a party to a dispute' shall abstain in relevant decisions under Chapter VI or under Article 52(3).[173] Yuen-Li Liang, who was Chairperson of the Committee of Experts of the Security Council that met during March–April 1946 to Study the Rules of Procedure of the Security Council, explained that by virtue of the fact that the term 'dispute' and not 'situation' is used in Article 27(3), the Security Council is not under any obligation to invite a non-Member concerned in a 'situation' to participate in its proceedings without vote, unlike Article 32 in a case that constitutes a dispute, and it is for the Security Council alone to decide whether a matter constitutes a dispute.[174]

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[172] 28 G.A.O.R., C.6 (1442nd meeting), para.77 (1973), as quoted in Samuel S. Kim, 'The People's Republic of China and the Charter-Based International Legal Order', 72 *American Journal of International Law* (1978), 317, 344. Similarly, in 1974, An Chih-yüan stated that '[a]s it stood, the definition would enable the super-Powers to take advantage of their position as permanent members of the Security Council to justify their acts of aggression and, by abusing their veto power, to prevent the Security Council from adopting any resolution condemning the aggressor and supporting the victim. … Since an aggressor could veto any draft resolution of the Security Council stating that it had committed an act of aggression, it was difficult to see how the definition could have the effect of deterring a potential aggressor, simplifying the implementation of measures to suppress acts of aggression and protecting the rights and interests of the victim, as provided in the preamble of the draft definition': 29 G.A.O.R., C.6 (1475th meeting), para.16 (1974), as quoted in Kim, ibid., 345-46.

[173] United Nations Charter, Art.27(3).

[174] Liang, *supra* n.32, 347-48. Liang, representing China, submitted a statement regarding the application of Article 27(3), as follows (ibid., 349-51):

> The Yalta Formula provides that when a state is party to a dispute it shall abstain from voting in the non-procedural decisions of the Council under Chapter VI of the Charter concerning such dispute. This requirement for abstention, in the case of a permanent member being a party to a dispute, obviously does not affect the requirement that the remaining permanent members must concur in the decisions.
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> It is also clear that the abstention requirement laid down in Article 27, paragraph 3, is not intended to apply to all matters arising under Article 35, paragraph 1. Thus when a state brings to the attention of the Security Council, by reason of the general interest of that state as a Member of the United Nations, a matter which it considers might endanger international peace and security, the requirement for abstention shall not apply to such Member in any of the decisions of the Council provided for in Article 34 and Article 36. In exercising such a general right, the position of the state bringing the matter to the attention of the Security Council is similar to that of the Secretary-General under Article 99.
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> With respect to the requirement for abstention, however, the distinction between disputes and situations should not extend to those cases in which one state complains that its specific rights have been infringed upon or their enjoyment directly endangered by the action of one or more other states, and alleges that a dispute, the continuance of which

endangers international peace and security, has arisen. Should the other state or states directly involved make the allegation that a situation has arisen as distinct from a dispute, such an attempted distinction shall not affect the requirement for abstention laid down in Article 27, paragraph 3, of the Charter.

The specific function of the Security Council in connexion with the pacific settlement of disputes and situations endangering the maintenance of international peace and security is laid down in Article 36, which states that 'The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment'. The terms of this article indicate that the action contemplated is not based upon a prior determination whether a matter is a dispute or a situation, but upon whether the matter brought before the Council is of such a nature that its continuance is likely to endanger the maintenance of international peace and security. It is clear that Article 36 makes no distinction between disputes and situations in so far as the function of the Council in making recommendations is concerned.

At the time of the Yalta Conference the authors of the voting formula had before them only the text of the Dumbarton Oaks Proposals. An examination of these proposals reveals that the paragraph corresponding to Article 36(1) of the Charter, namely Chapter VIII, Section A, paragraph 5, refers only to disputes and not to situations. In embodying the abstention clause into the voting formula, therefore, it was clearly the intention of the authors to exclude from voting those states involved directly in a matter whose continuance might endanger international peace and security. However, as the term used to describe such matters was 'dispute' in the text of the Dumbarton Oaks Proposals, it was only logical that the term used in the Yalta Formula was 'parties to a dispute'. There is further evidence of the fact that the term 'parties to a dispute' was meant to include 'parties directly concerned in a situation' in cases where the Security Council has to make the determination provided for in Article 34 of the Charter. In a statement issued on 5 March 1945 Mr Stettinius, then Secretary of State said: 'This means that no nation, large or small, if a party to a dispute, would participate in the decisions of the Security Council on questions like the following: "(b) Whether the dispute or situation is of such a nature that its continuation is likely to threaten the peace."'

As stated above, the text of the Yalta Formula was drafted on the basis of the text of the Dumbarton Oaks Proposals in which the term 'situation' did not appear in connexion with the specific function of the Council relative to pacific settlement, as laid down in Chapter VIII, Section A, paragraph 5. At San Francisco this section of the Dumbarton Oaks Proposals was considerably revised while the text of the Yalta Formula remained untouched. Among the many modifications made in Section A of Chapter VIII was the insertion of the term 'or of a situation of like nature' in paragraph 5 of that section. The Summary Report of the Twelfth Meeting of Committee III/2 reveals that the words 'or of a situation of like nature' were intended to give effect to the Australian amendment which proposed that the Security Council should be permitted to deal with both a dispute or a situation the continuance of which was likely to endanger the peace. Thus it is clear that the insertion of the term 'or of a situation of like nature' in Article 36 with reference to the specific function of the Security Council as regards pacific settlement was never intended to be the basis of a differentiation between the duty of states to abstain from voting in a dispute to which they are parties and the absence of such a duty in the case of situations in which they are directly concerned.

The abstention clause in Article 27(3) of the Charter is an embodiment of the principle that, so far as the process of pacific settlement calls for the appreciation by the Council of a question presented to it, a state shall not at once be judge and party in its own cause. If a matter brought to the attention of the Council is sufficiently grave so that the Council considers that its continuance may endanger international peace and security, it may make such a decision exclusive of the votes of the states directly involved. If this decision is in the affirmative, the Security Council may recommend appropriate procedure or methods of adjustment by virtue of a decision which is again exclusive of the votes of the states directly involved. This requirement for abstention, however, does not flow from the fact that the states directly involved are parties to a dispute as distinct from being directly involved in a situation. Rather it is derived from the necessity for

The Article 27(3) abstention requirement does not apply to Chapter VII with which enforcement powers, not recommendatory powers, of the Security Council lie. Reisman thus argues that 'since Article 39 permits the Council, when exercising chapter VII powers, to make either recommendations or decisions as it sees fit, the permanent members of the Council can evade Article 27(3) by operating under chapter VII or … by simply not indicating whether the resolution in question is being adopted under chapter VI or chapter VII.'[175]

As China is able to rely on Article 2(7) of the Charter to shield itself from United Nations interference in its internal affairs, it would not need to veto a draft Security Council resolution intended to condemn its human rights violations, its lack of democratic governance or its treatment of Tibet. The most likely scenario in which China might veto a draft Security Council resolution aimed at its conduct is if the draft resolution were to condemn its use of force against Taiwan and demand that it cease and desist, a draft resolution that undoubtedly would fall under Chapter VII. Article 27(3) does not apply if Taiwan applies for admission to United Nations membership. China will be able to veto Taiwan's admission given admission requires a decision of the General Assembly upon recommendation of the Security Council.[176] China will not be a party to a dispute or situation if a territorial entity, even Taiwan, applies for United Nations membership – as when China, represented by the authorities on Taiwan at the time, was able to veto Mongolia's application for admission to United Nations membership in 1955 on grounds that Mongolia was part

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effective action on the part of the Council on the one hand, and the principle that no state shall be judge and party in its own cause on the other.

If the interpretation is accepted that, with respect to the requirement for abstention, a distinction exists between parties to a dispute and parties directly concerned in a situation, then when a matter is brought to the attention of the Security Council involving a permanent member, that matter can never be considered a dispute within the meaning of the Charter, unless that permanent member chooses to have it so considered. Furthermore, to make the determination of whether a dispute or situation exists subject to the veto power of a permanent member is to defeat the clear intention of the Yalta Formula and to render meaningless the distinction made therein between voting procedures applicable to pacific settlement and voting procedures applicable to enforcement action.

[175] Reisman, *supra* n.79, 93.

[176] United Nations Charter, Art.4(2).

of China. Another scenario in which Article 27(3) might apply is a draft Security Council resolution calling for abolition of the veto that a United Nations Member State might argue to be a cause of international peace and security continuing to be endangered, as it is arguable that as a Permanent Member China constitutes a party to the dispute (even though United Nations institutional reform should properly be construed as a situation). However, even if Article 27(3) were to apply, the other Permanent Members also would be required to abstain, and Article 27(3) requires nine affirmative votes for a decision to be made. Most fundamentally, abolition of the veto cannot take place without an amendment to the Charter, which requires ratifications of all Permanent Members.[177]

V. Conclusion

Recent humanitarian crises in Libya and Syria have made the Security Council the focal point of renaissance and, simultaneously, criticism of the utility, effectiveness and legitimacy of the United Nations and of international law. The Security Council managed to pass seven draft resolutions (six unanimously) imposing sanctions on the Libyan government for its use of violence against its civilians, authorising a no-fly-zone over Libya to protect Libya's civilian population, and establishing a United Nations Support Mission in Libya whose mandate was extended twice.[178] Notwithstanding its general and consistent objection to the International Criminal Court and its abstention on draft Security Council Resolution 1593 (2005) calling for

[177] Ibid., Art.108.

[178] U.N. S.C. Res. 1970 (2011; passed unanimously) imposing sanctions on the Libyan government and referring the situation in Libya since 15 February 2011 to the International Criminal Court; U.N. S.C. Res. 1973 (2011; China, Russia, Brazil, Germany, and India abstained) authorising a no-fly-zone over Libya for the protection of civilians; U.N. S.C. Res. 2009 (2011; passed unanimously) establishing a United Nations Support Mission in Libya; U.N. S.C. Res. 2016 (2011; passed unanimously) terminating military intervention in Libya on 27 October 2011; U.N. S.C. Res. 2017 (2011; passed unanimously) regarding portable surface-to-air missiles in Libya; U.N. S.C. Res. 2022 (2011; passed unanimously) extending the mandate of the United Nations Support Mission in Libya; and U.N. S.C. Res. 2040 (2012; passed unanimously) further extending the mandate of the Mission.

referral of human rights abuses in Darfur to the Court, China on 26 February 2011 voted in favour of draft Security Council Resolution 1970 (2011) referring the situation in Libya since 15 February 2011 to the Court.[179] (With its own opposition to the International Criminal Court, the United States did the same.) China only abstained on draft Security Council Resolution 1973 (2011) – together with Russia, Brazil, Germany, and India – as the draft resolution sought to impose a no-fly-zone over Libya. Alex Bellamy argues that 'Resolution 1973 is especially important because it is the first time that the Security Council has authorized the use of military force for human protection purposes against the wishes of a functioning state.'[180] However, the notion of the international community's responsibility to protect civilians in other States was not referred to in either Security Council Resolution 1970 or 1973, and both resolutions indicated that the responsibility to protect rested with the Libyan government. Aidan Hehir has noted that none of the ten States that voted in favour of draft Security Council Resolution 1973 referred to the responsibility to protect as a legal or normative justification or basis for international intervention in Libya.[181] The three leading statesmen who called for international intervention in Libya – United States President Barack Obama, British Prime Minister David Cameron, and then French President Nicolas Sarkozy – also did not refer to the responsibility to protect in their appeals to their domestic constituents for support of military action.[182] Such restraint, Hehir surmises, might stem from concerns that the international intervention might set a precedent or erode domestic support of military action, but both rationales 'inherently undermine R2P's credentials as a "norm"'.[183] Jennifer Welsh agrees that the fact that the international community's responsibility to protect was not alluded to was significant in

[179] U.N. S.C. Res. 1970 (2011), para.4.
[180] Alex J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', 25 *Ethics & International Affairs* (2011), 263, 263.
[181] Aidan Hehir, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect', 38:1 *International Security* (2013), 137, 147-48.
[182] Ibid., 148.
[183] Ibid.

manifesting that such a notion 'was still contested by some members of the Security Council as an appropriate rationale for military action'.[184] As Finnemore and Kathryn Sikkink have explained, when it comes to evolution of norms, one ought to 'think seriously about the microfoundations on which theoretical claims about norms rest, and evaluate those claims in the context of carefully designed historical and empirical research'.[185]

In respect of Syria, on account of China's joint vetoes with Russia on two occasions, the Security Council collectively, and as the only international organisation empowered by the Charter to authorise enforcement action for the maintenance of international peace and security, decided against adopting resolutions that would have authorised military intervention in the internal conflict in Syria.

While many argue that China through its vetoes in respect of Syria has shown that it is unfit to be a responsible world power as it has misused its role and power within the Security Council to continue to protect an ally from international intervention, China's capacity to veto a draft resolution, and its willingness to do so notwithstanding Western pressure and criticism within the Security Council and international media, is precisely why the veto is constitutionally built into the structure of the United Nations and the current international legal order. Criticism of China's vetoes as recalcitrant ignores the possibility that China might have real interest and sincere intent in ensuring that the legitimacy of international law, the Security Council, its decision-making process and procedures, and its decisions is not jeopardised by any unilateral action that other States might wish to pursue. It ought not to be forgotten that China is the only Permanent Member that is non-Western and plausibly capable of claiming to represent developing States, many of which might rely on China's veto power to protect their own interests.

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[184] Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP', 25 *Ethics & International Affairs* (2011), 255, 255.
[185] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1998), 887, 890.

Interests aside, when China voted on draft Security Council resolutions, both recently and in the past, it referred to relevant international legal norms and principles, which many Western States and scholars preferred not to mention when they were inconvenient, notably, the principles of State sovereignty and of non-interference by the United Nations in the internal affairs of a Member State, as well as the prohibition of the use of force. At the same time, China has shown readiness to be flexible in the application of international law in order for protection of civilians mired in internal conflicts through peacekeeping operations. China now actively supports and participates in peacekeeping operations authorised by the Security Council, provided that the three principles of international peacekeeping – the consent of the host State has been obtained; any peacekeeping operation must be impartial; and force must not be used except in self-defence – are met. Furthermore, China has taken initiatives to explore possibilities for strengthening the United Nations in the maintenance of international peace and security.

If one were to speak of the international rule of law, China through its voting behaviour and argumentation within the Security Council has demonstrated the importance it ascribes international law as the perimeter within which the current international order ought to function. China should not be criticised for impeding the progressive development of international law in instances where progressive development is a code for violations. At a Security Council meeting on 4 May 2011, China emphasised the importance of 'the complete and strict implementation of the relevant resolutions of the Security Council. The international community must respect the sovereignty, independence, unity and territorial integrity of Libya. The internal affairs and fate of Libya must be left up to the Libyan people to decide. We are not in favour of any arbitrary interpretation of the Council's resolutions or of any actions going beyond those mandated by the Council.'[186] At a subsequent Security Council meeting on 10 May 2011, China cautioned that

[186] S/PV.6528, 4 May 2011, 10.

> the strengthening of the protection of civilians in armed conflict must strictly abide by the purposes and principles of the Charter of the United Nations. The responsibility to protect civilians lies first and foremost with the Government of the country concerned. The international community and external organizations can provide constructive assistance, but they must observe the principles of objectivity and neutrality and fully respect the independence, sovereignty, unity and territorial integrity of the country concerned. There must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians.[187]

Bellamy and Paul Williams, however, question how the international community would be able to 'protect civilians from regimes that attack them without targeting, weakening and ultimately changing the behaviour of the regime'.[188] Such concern uttered by Bellamy and Williams illustrates precisely the danger that humanitarian intervention might simply be deployed for the principal purpose of regime change in violation of the principles of State sovereignty and of non-interference in the internal affairs of a United Nations Member State.

On 4 October 2011, China vetoed the first of two draft Security Council resolutions in respect of the internal conflict in Syria as it found that 'under the current circumstances, sanctions or the threat thereof does not help to resolve the question of Syria and, instead, may further complicate the situation. Regrettably and disappointingly, this major and legitimate concern did not receive due attention from the sponsors. As it now stands, the draft resolution focuses solely on exerting pressure on Syria, even threatening to impose sanctions. It does not help to facilitate

[187] S/PV.6531, 10 May 2011, 20.
[188] Alex J. Bellamy and Paul D. Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', 87 *International Affairs* (2011), 825, 848.

the easing of the situation in Syria.'[189] China's vetoes (jointly with Russia) of two draft Security Council resolutions that sought to impose sanctions on Syria, after its support for action authorised by the Security Council and delegated to NATO against Libya, arguably manifested China's concern about civilian casualties caused by NATO in Libya and NATO exceeding its mandate under Security Council Resolution 1973 (2011) by targeting the Gaddafi regime and providing arms to rebel groups.[190] In fact, China's position was taken further by a number of other Security Council Members, notably Russia, Brazil, and India. Russia drew a direct link between NATO's action in Libya and its proposed action in Syria, and asserted that '[t]he international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect.'[191] Brazil released a concept note that warned of 'a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change. This perception may make it even more difficult to attain the protection objectives pursued by the international community',[192] while India concisely charged that 'Libya has given R2P a bad name'.[193] Thus, one should be cautious before criticising the rationales that underlay China's vetoes in respect of Syria, and should not take China's support for peacekeeping operations for granted or assume that China vetoes a draft Security Council resolution out of its own interests or intransigence or the interests of its allies. Instead, Western powers and the international community as a whole ought to reflect on whether their desire to push aggressively for recognition and enforcement of purported norms, such as a right or

[189] S/PV.6627, 4 October 2011, 5.
[190] See Andrew Garwood-Gowers, 'China and the "Responsibility to Protect": The Implications of the Libyan Intervention', 2 *Asian Journal of International Law* (2012), 375, 387.
[191] S/PV.6627, *supra* n.189, 4.
[192] 'Responsibility while Protecting: Elements for the Development and Promotion of a Concept', Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the United Nations Secretary-General, A/66/551-S/2011/701, 11 November 2011, para.10.
[193] As quoted in Garwood-Gowers, *supra* n.190, 391.

duty of humanitarian intervention or a responsibility to protect (or a responsibility to be protected), may actually delay, if not preclude, such purported norms from crystallisation and consolidation, prevent the protection of civilians in internal conflicts, endanger peace within a State, within a region and internationally, and above all undermine the integrity of international law and destroy the foundation upon which protection of civilians and peace depend.

Chapter VII: Conclusion

With its rise to superpower capability, the ways in which China exercises its State sovereignty, both within its territory and on the international plane, have attracted significant concern as to how the most populous State and oldest civilisation may seek to revise or exploit the legal and political rules of the current international order in order to reflect and augment its power and status. Much Western research on the relationship between China and international law posits that international law does not have the capacity to constrain or influence China's state behaviours, or that China does not regard international law as relevant or does not comply with it. China's impact on the development of the current international legal order is typically assumed to be negative; for many, China is changing international law in pernicious ways, including by impeding the development of international law and the workings of international organisations.

In their analyses under the three main theories of international relations (realism, liberalism, and constructivism), Western scholars tend to conclude that China must be contained, either through the use of force or imposition of Western/liberal norms and values, the merits and transplantability of which are rarely questioned. International law is either reduced to irrelevance or used to legitimise containment. China's engagement with international law and international organisations has been scrutinised primarily from the perspective of compliance. Compliance is not merely understood as adherence to international law and institutional rules and procedures, but as convergence with the norms, values, systems and priorities of Western States. China's non-compliance with or rejection of a norm, rule or principle of international law is then taken as proof that it is unable or unwilling to be a responsible international actor. Conversely, China's compliance signifies that Western systems, norms and values are of universal normative and empirical applicability. Proper understanding of how in its exercise of State

sovereignty, including through non-compliance with or rejection of certain international norms and values (actual or purported), China may in fact contribute to the legitimacy, effectiveness and development of international law and international organisations, and how China's engagement with international law within a normative–institutional framework has influenced the ways in which it conceives and exercises its State sovereignty, is in the process blurred and stymied.

In understanding international law, not only does the content of legal rules and decisions matter, but also how they have evolved, how they affect their subjects, and how they may be improved. Chapter I explained how the relationship between China and international law has been overlooked in existing research literature other than through the myopic lens of compliance, and the research framework and methods this thesis adopts in explaining why it is essential that one understands the symbiosis between China's exercise of State sovereignty and the current international legal order in their mutual impact, moderation, conciliation and development. Chapter II addressed major Western biases that pervade dominant discourses of international law and State sovereignty, including the notion that liberal democracy is a requirement or a rule for legitimate exercise of State sovereignty and the critique that State sovereignty is an impediment to the development of international law and the maintenance of the current international legal order. Chapter III examined how China's historical experience with international law has influenced and shaped its approaches to the international legal order, including its conception of State sovereignty, during the last century of imperial rule and under republican, communist, and contemporary socialist-market governments. Chapters IV and V explored how China, in its exercise of internal sovereignty, has contributed to discourses and debates about what human rights, democracy and self-determination are, the forms in which they may manifest and the ways in which they may be augmented or undermined, the impact of international human rights law on a State's behaviours, and how such behaviours in turn shape the development, and our understanding, of

human rights and fundamental freedoms. Chapter VI then discussed China's contribution, in its exercise of external sovereignty, to the maintenance of international peace and security through its emphasis on the primacy of international law in its voting behaviour and argumentation in the United Nations Security Council. This thesis shows that China's exercise of State sovereignty in fact has helped consolidate the development of the current international legal order. The symbiotic relationship in turn informs our understanding of international law and the current international legal order, including the locus in which State sovereignty resides and its continuing significance and implications, and the approaches of other States and the international community that should not escape scrutiny.

One of the reasons State sovereignty has been ascribed a malign character, as discussed in Chapter II, is because China guards its State sovereignty jealously. In order to understand the nature and implications of China's exercise of State sovereignty, it is important that one appreciates why that is the case. As Chapter III explained, China considers State sovereignty as the ultimate bulwark against foreign invasions and intrusions that it endured for over a century since the Opium War. Western views of China's approaches to international law tend to ignore or trivialise China's historical experience and the continuing relevance to many States of the principle of State sovereignty in asserting and defending their national interests and, in some cases, their survival and existence.

As the rise and dominance of the United States in the twentieth century showed, tensions inevitably arise from a rising power's reconciliation and realignment, of its strategies to further augment its power and status, with its desire to maintain international and domestic legitimacy through co-operation with international organisations and observance of international law. Instead of continuing to regard international law as an imperialistic tool conceived and deployed by Western powers, or challenging international law to suit malignant objectives, China has learned to use, adapt, influence and improve international law to its advantage in

defence of its State sovereignty, territorial integrity, and political space within the current international legal order underpinned by the United Nations, and to co-operate with and participate in international organisations and their decisions. China's engagement with the current international legal order enables one to understand the principle of State sovereignty, and what international law is and ought to be. Understanding does not necessarily mean agreement; very often it is through disagreements that one understands, leading to further reflections, through which development and improvements may take place.

Similarly, co-operation is not synonymous with mere compliance or submission. As Chapter IV discussed, when it comes to criticism of its human rights record, China is adamant that international human rights law must be understood in the context of the historical, political, economic, social and cultural peculiarities and circumstances of a State. Western governments and scholars invariably take China's position, which is widely shared among most States in Asia and Africa, to be at variance with international human rights law that they argue demands universal interpretation and application. On the contrary, China's position represents and forms part of how international human rights law ought, in accordance with the United Nations Charter, to be contextualised, understood and applied. Otherwise, international human rights law is merely a camouflage through which Western powers continue to impose their systems, norms and values on unwilling States and peoples in such a way that undermines the liberal principle, and international legal right, of peoples to decide by and for themselves how they wish their States and societies to be governed, and their human agency and dignity.

Of course, China's human rights record is not beyond reproach. In order for China's human rights record to improve, it is essential that China be immersed with human rights norms with the result that human rights norms – and respect for them – become Chinese values. Just as a culture is not static, rigid or isolated in time or in space, norms and values crystallise, evolve and mature through a process of deviation

and consolidation. Such immersion is achievable not through demands that China conform to international human rights norms and submit to international monitoring, but through a bottom-up approach that cultivates a human rights culture within the Chinese populace and the Chinese leadership. We saw in Chapter IV that protection of human rights, such as workers' rights, women's rights, and privacy rights, has become increasingly entrenched in Chinese laws and practices.

The same approach should apply to democratic development in China. Although the Chinese people are not currently able to elect their representatives at the national level and higher offices of the state continue to be in the hands of a select few Party officials, since the Election Law of the Representatives of the National People's Congress and the Local People's Congresses at All Levels was adopted in 1979, all representatives at or below the county level are directly elected. Self-government in villages has been attained incrementally across China since 1998 when the Organic Law of the Village Administration Committees was adopted. Voting has been implemented in every province, with generally enthusiastic turnout and improvements over time in the conduct of elections. Within the confines of Party policies and the limits of their authority, local people's congresses have the power to decide on plans for economic and social development and budgets for their administrative areas, and those of nationality townships may enact specific measures commensurate with the demands of their minority nationalities.

China's history, territorial vastness and ethnic compositions render it inevitable that some peoples within its territory demand, and may be entitled to, the right to self-determination under international law. Given China's firm position on the principle of State sovereignty, its rise to superpower capability, and the strategic interests that other States have *vis-à-vis* China and neighbouring regions, the extent to which China has recognised, implemented or undermined its peoples' right to self-determination has major repercussions for the coherence and development of self-determination as a legal right and of international law generally, and for the

maintenance of international peace and security. As Chapter V discussed, the ways in which China has attempted to reconcile its claim and exercise of State sovereignty over certain parts of its territory with a right the International Court of Justice considers to be a norm of *jus cogens*, and the contradictory and self-interested approaches of other States and the international community to self-determination, illuminate the reality that self-determination ultimately depends on and has been influenced by interlocking, and oftentimes opposing, geopolitical, economic and other factors. From the standpoint of international law, it is irresponsible for governments and scholars to ignore territories that expose contradictions that inhere in international policymaking and legal scholarship on self-determination, or to advocate a territory's entitlement to self-determination and to secession when the territory is not so entitled or when a right to secession may not even exist under international law. The right to self-determination, in order to be enduring, derives from the integrity of international law and requires that such integrity be upheld.

Meanwhile, China's behaviours within the Security Council, as examined in Chapter VI, exemplifies the potential and limits of its engagement with international law and international organisations, including its capacity to influence the substantive and normative development of international law and the roles of an international organisation tasked with maintaining international peace and security. Due to the roles it has played in the amelioration *and* escalation of international conflicts, the Security Council, it is often forgotten, is a creation of a multilateral treaty and is itself bound by legal constraints that the United Nations Charter has delimited and imposed – including, most importantly, the principles of State sovereignty, territorial integrity, and non-interference in Member States' internal affairs.

While communist China previously considered the United Nations to be an imperialistic tool of Western powers to advance their national interests and hegemonic objectives, since the People's Republic of China government replaced the authorities on Taiwan as the representative government of China in the United

Nations in October 1971, China has gradually evolved to accept and embrace the role of the United Nations Security Council as the ultimate forum and arbiter of international peace and security under the framework of the Charter and international law. At the same time, China has shown an understanding of the important roles international organisations play in the maintenance of international peace and security. China's attitude to international peacekeeping, for which the Charter does not explicitly provide, has evolved from complete opposition to firm support provided that the three principles of international peacekeeping –consent of the host State, impartiality of the peacekeeping operation, and non-use of force except in self-defence – are respected. In fact, China has become one of the biggest contributors, in terms of manpower and material resources, to United Nations peacekeeping operations. China has also used its capacity within the Security Council, as a Permanent Member and, recently, President, to initiate discussions about how the United Nations may better situate itself in the maintenance of international peace and security in co-operation and collaboration with regional and sub-regional organisations.

China's exercise of State sovereignty is often maligned as anathema to the progressive development of international law and the stability of the international system. This thesis challenges the assumption that China is a rule-denier or rule-breaker when it comes to international law and international organisations, and has demonstrated a symbiotic relationship between China's exercise of State sovereignty and the current international legal order. It has shown that China's engagement with international law and transnational discourses, on matters of human rights, democracy, self-determination, and international peace and security, has helped shape and influence the development and legitimacy of international law and international organisations, and the maintenance of the current international order as one underlain and governed by the international rule of law.

In addition to issues this thesis has discussed, there remain many areas of

international law *vis-à-vis* China's exercise of State sovereignty that merit and demand proper scrutiny. For example, China's co-operation with the Asia-Pacific Economic Co-operation and the Association of Southeast Asian Nations, its leadership role in the Shanghai Cooperation Organisation, and how these endeavours may translate to or hinder the development of a wider political and economic union in the Asia-Pacific region shed interesting light on how China considers its State sovereignty to be able to further develop and mature in partnership with other States. Space constraints also prevent this thesis from discussing how Xinjiang may be entitled to self-determination and how its entitlement may have been undermined or distorted by China and the international community in the guise of the 'war on terror'. For the same reason, this thesis has not addressed China's claims of State sovereignty over certain island groups in the East China Sea and the South China Sea that illuminate the validity or otherwise of the notion that China is a threat to international peace and security. China's multifaceted approaches to international adjudication over its territorial and maritime disputes with neighbouring States and over economic and investment disputes – and centrally China's attitude to the International Court of Justice – illuminate the extent to which it embraces or resists international law, including international adjudication, in delineating a State's territory and in resolving conflicts among States, and the efficacy of international law and international dispute settlement mechanisms. It is hoped that this thesis may serve as a springboard that generates discussions about these issues, among others.

Bibliography

Cases

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, *Advisory Opinion*, *ICJ Reports* 2010, 403.

Airey v. *Ireland* (1979) 2 EHRR 305.

Application for Review of Judgement No.158 of the United Nations Administrative Tribunal, *Advisory Opinion*, *ICJ Reports* 1973, 172.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Order of 13 September 1993*, *ICJ Reports* 1993, 325.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Judgment*, *ICJ Reports* 2007, 43.

Asylum Case (*Colombia* v. *Peru*), *ICJ Reports* 1950, 266.

Avena and Other Mexican Nationals (*Mexico* v. *United States of America*), *Judgment*, *ICJ Reports* 2004, 12.

Case concerning the Temple of Preah Vihear (*Cambodia* v. *Thailand*), *Merits*, *Judgment*, *ICJ Reports* 1962, 6.

Case of the S.S. Wimbledon, *Judgment*, P.C.I.J. Ser. A (1923), No.1, 15.

Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), *ICJ Reports* 1947–1948, 57.

Continental Shelf (*Libyan Arab Jamahiriya* v. *Malta*), *Judgment*, *ICJ Reports* 1985, 13.

Denunciation of Treaty of November 2nd, 1865, between China and Belgium (*Belgium* v. *China*), P.C.I.J. Ser. A (1927), No 8, 6.

East Timor (*Portugal* v. *Australia*), *Judgment*, *ICJ Reports* 1995, 90.

Fisheries Case (*United Kingdom* v. *Norway*), *ICJ Reports* 1951, 116.

Fisheries Jurisdiction Case (*Federal Republic of Germany* v. *Iceland*), *Judgment*, *ICJ Reports* 1973, 49.

Handyside v. *United Kingdom* (1976) 1 EHRR 737.

Iloilo Claims Case, *Annual Digest of Public International Law Cases* (1925–1926), Case No.254, 336.

In re Altstötter and Others (The Justice Trial), 14 *International Law Reports* (1947), Case No.126, 278.

In re Greifelt and Others, 15 *International Law Reports* (1948), Case No.216, 653.

LaGrand (*Germany* v. *United States of America*), *Judgment*, *ICJ Reports* 2001, 466.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, *ICJ Reports* 1971, 16.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion*, *ICJ Reports* 2004, 136.

Legal Status of Eastern Greenland (*Denmark* v. *Norway*), *Judgment*, P.C.I.J. Ser. A/B, No.53 (1933), 22.

Legality of the Threat or Use of Nuclear Weapons, *Advisory Opinion*, *ICJ Reports* 1996, Vol.I, 226.

Legality of Use of Force (*Yugoslavia* v. *United States of America*), *Provisional Measures*, *Order of 2 June 1999*, *ICJ Reports* 1999, 916.

Medellin v. *Texas*, 552 US 491 (2008).

Military and Paramilitary Activities in and against Nicaragua (*Merits*) (*Nicaragua* v. *United States of America*), *Judgment*, *ICJ Reports* 1986, 14.

Nationality Decrees Issued in Tunis and Morocco (French Zone) on 8 November 1921, *Advisory Opinion*, P.C.I.J. Ser. B (1923), No.4, 3.

North Sea Continental Shelf Cases (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands*), *ICJ Reports* 1969, 3.

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya* v. *United States of America*), *Provisional Measures*, *Order of 14 April 1992*, *ICJ Reports* 1992, 114.

Reference re Secession of Québec [1998] 2 SCR 217.

Roper v. *Simmons*, 543 US 551 (2005).

The Prosecutor v. *Dusko Tadic*, Appeal on Jurisdiction, IT-94-1-AR72, 35 ILM 32 (1996).

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, *Advisory Opinion*, P.C.I.J. Ser. A/B, No.44 (1932), 4.

Western Sahara, *Advisory Opinion*, *ICJ Reports* 1975, 12.

International Instruments – Treaties, Declarations, and Resolutions

Agreement Establishing the World Trade Organisation, done at Marrakesh on 15 April 1994, 33 ILM 1125 (1994).

Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, signed at Beijing on 23 May 1951.

Cairo Declaration, 27 November 1943.

Charter of the United Nations, signed at San Francisco on 26 June 1945.

Convention between Great Britain and Tibet, signed at Lhasa on 7 September 1904.

Convention between Great Britain and China Respecting Tibet, signed at Beijing on 27 April 1906 and ratified at London on 23 July 1906.

Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

Convention on the Elimination of All Forms of Discrimination against Women, adopted by U.N. G.A. Res. 34/180 (1979).

Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature, ratification and accession by U.N. G.A. Res. 260A(III) (1948).

Convention on the Rights of the Child, adopted by U.N. G.A. Res. 44/252 (1989).

Covenant of the League of Nations, signed at Versailles on 28 June 1919.

Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation, 2010.

Cross-Strait Agreement on Medical and Health Cooperation, 2010.

Cross-Strait Economic Cooperation Framework Agreement, 2010.

Cross-Strait Nuclear Power Safety Cooperation Agreement, 2011.

Cross-Strait Customs Cooperation Agreement, 2012.

Declaration of the Group of 77 South Summit, Havana, 10–14 April 2000.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, proclaimed by U.N. G.A. Res. 2625(XXV) (1970).

Declarations and reservations by the United Kingdom made upon ratification, accession or succession of the International Covenant on Civil and Political Rights, 20 May 1976.

Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, adopted by the Ministers and representatives of Asian States in Bangkok during 29 March–2 April 1993 pursuant to U.N. G.A. Res. 46/116 (1991) in the context of preparations for the World Conference on Human Rights to be held in Vienna during 14–25 June 1993.

International Covenant on Civil and Political Rights, opened for signature, ratification and accession by U.N. G.A. Res. 2200A(XXI) (1966).

International Covenant on Economic, Social and Cultural Rights, opened for signature, ratification and accession by U.N. G.A. Res. 2200A(XXI) (1966).

International Labour Organisation Convention No.11 on Right of Association (Agriculture), 1921.

International Labour Organisation Convention No.14 on Weekly Rest (Industry), 1921.

International Labour Organisation Convention No.16 on Medical Examination of Young Persons (Sea), 1921.

International Labour Organisation Convention No.19 on Equality of Treatment (Accident Compensation), 1925.

International Labour Organisation Convention No.22 on Seamen's Articles of Agreement, 1926.

International Labour Organisation Convention No.23 on Repatriation of Seamen, 1926.

International Labour Organisation Convention No.26 on Minimum Wage-Fixing Machinery, 1928.

International Labour Organisation Convention No.27 on Marking of Weight (Packages Transported by Vessels), 1929.

International Labour Organisation Convention No.32 (Revised) on Protection against Accidents (Dockers), 1932.

International Labour Organisation Convention No.45 on Underground Work (Women), 1935.

International Labour Organisation Convention No.80 on Final Articles Revision, 1946.

International Labour Organisation Convention No.100 on Equal Remuneration, 1951.

International Labour Organisation Convention No.111 on Discrimination (Employment and Occupation), 1958.

International Labour Organisation Convention No.122 on Employment Policy, 1964.

International Labour Organisation Convention No.138 on Minimum Age, 1973.

International Labour Organisation Convention No.144 on Tripartite Consultation (International Labour Standards), 1976.

International Labour Organisation Convention No.150 on Labour Administration, 1978.

International Labour Organisation Convention No.159 on Vocational Rehabilitation and Employment (Disabled Persons), 1983.

International Labour Organisation Convention No.167 on Safety and Health in Construction, 1988.

International Labour Organisation Convention No.170 on Chemicals, 1990.

International Labour Organisation Convention No.182 on Worst Forms of Child Labour, 1999.

International Labour Organisation Declaration on Fundamental Principles and Rights at Work and Annex, adopted by the International Labour Organisation General Conference at Geneva on 18 June 1998, 37 ILM 1233 (1998).

Japan's Instrument of Surrender, 2 September 1945.

Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, 29 September 1972.

Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong, 23 ILM 1366 (1984).

Montevideo Convention on the Rights and Duties of States, signed at Montevideo on 26 December 1933.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by U.N. G.A. Res. 54/4 (1999).

Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, done at Vienna on 24 April 1963.

Potsdam Proclamation, 26 July 1945.

Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), signed at Geneva on 8 June 1977.

Rome Statute of the International Criminal Court, adopted at United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

San Francisco Peace Treaty, signed at San Francisco on 8 September 1951.

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.

Treaty of Beijing, 1860.

Treaty of Beijing, 1898.

Treaty of Kiakhta, 1727.

Treaty of Nanjing, 1842.

Treaty of Nerchinsk, 1689.

Treaty of Peace and Friendship between Japan and the People's Republic of China, 1978.

Treaty of Shimonoseki, 1895.

Treaty of Taipei, 1952.

Treaty of the Bogue, 1843.

Treaty of Tianjing, 1858.

Treaty of Versailles, 1919.

Treaty of Wanghia, 1844.

Treaty of Whampoa, 1844.

United Nations General Assembly Resolutions 1514(XV) (1960), 2131(XX) (1965), 2758(XXVI) (1971), 3485(XXX) (1975), 31/53 (1976), 41/13 (1986), 45/150 (1990), 45/151 (1990), 60/251 (2006), and 63/3 (2008).

United Nations Security Council Resolutions 502 (1982), 678 (1990), 686 (1991), 688 (1991), 748 (1992), 757 (1992), 770 (1992), 776 (1992), 777 (1992), 778 (1992), 781 (1992), 787 (1992), 792 (1992), 794 (1992), 816 (1993), 820 (1993), 821 (1993), 825 (1993), 855 (1993), 883 (1993), 917 (1994), 929 (1994), 940 (1994), 942 (1994), 955 (1994), 975 (1995), 988 (1995), 998 (1995), 1054 (1996), 1067 (1996), 1070 (1996), 1077 (1996), 1101 (1997), 1114 (1997), 1134 (1997), 1160 (1998), 1199 (1998), 1203 (1998), 1207 (1998), 1239 (1999), 1244 (1999), 1249 (1999), 1264 (1999), 1272 (1999), 1280 (1999), 1284 (1999), 1290 (2000), 1296 (2000), 1333 (2000), 1422 (2002), 1547 (2004), 1556 (2004), 1559 (2004), 1564 (2004), 1569 (2004), 1574 (2004), 1590 (2005), 1591 (2005), 1593 (2005), 1627 (2005), 1651 (2005), 1663 (2006), 1665 (2006), 1672 (2006), 1679 (2006), 1680 (2006), 1695 (2006), 1696 (2006), 1706 (2006), 1709 (2006), 1713 (2006), 1714 (2006), 1718 (2006), 1737 (2006), 1747 (2007), 1755 (2007), 1757 (2007), 1769 (2007), 1779 (2007), 1784 (2007), 1812 (2008), 1828 (2008), 1841 (2008), 1870 (2009), 1874 (2009), 1881 (2009), 1891 (2009), 1907 (2009), 1945 (2010), 1970 (2011), 1973 (2011), 2009 (2011), 2016 (2011), 2017 (2011), 2022 (2011), 2023 (2011), 2040 (2012), 2042 (2012), 2043 (2012), and 2059 (2012).

Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

Vienna Declaration and Programme of Action, adopted by acclamation on 25 June 1993, A/CONF.157/24 (Part I), 32 ILM 1661 (1993).

World Trade Organisation Singapore Ministerial Declaration, adopted at the World Trade Organisation Ministerial Conference held in Singapore on 13 December 1996, 36 ILM 218 (1997).

Constitutions and Legislation

Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, approved by the Standing Committee of the Eleventh National People's Congress at its Sixteenth Session on 28 August 2010.

Amendment to Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China concerning the Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures, recorded by the Standing Committee of the Eleventh National People's Congress at its Sixteenth Session on 28 August 2010.

Anti-Secession Law, adopted at the Third Session of the Tenth National People's Congress on 14 March 2005.

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China as adopted by the Seventh National People's Congress at its Third Session on 4 April 1990 in pursuance of the Sino-British Joint Declaration, 29 ILM 1519 (1990).

Canadian Charter of Rights and Freedoms (Part I, Constitution Act 1982, S.C.1982, c.79; Canada Act 1982 (United Kingdom), c.11).

Constitution of the People's Republic of China, 1954.

Constitution of the People's Republic of China, 1982.

Criminal Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, as amended at the Fifth Session of the Eighth National People's Congress on 14 March 1997 and promulgated by Order No.83 of the President of the People's Republic of China on 14 March 1997.

Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Cap.2206), adopted at the 24th Session of the Standing Committee of the Eighth National People's Congress on 23 February 1997.

Decision of the Standing Committee of the National People's Congress on Issues relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008, adopted by the Standing Committee of the Tenth National People's Congress at its Ninth Session on 26 April 2004.

Decision of the Standing Committee of the National People's Congress on Issues relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues relating to Universal Suffrage, adopted by the Standing Committee of the Tenth National People's Congress at its Thirty-first Session on 29 December 2007.

Decision of the Standing Committee of the National People's Congress on Approving the 'Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China concerning the Method for the Selection of the Chief

Executive of the Hong Kong Special Administrative Region', adopted by the Standing Committee of the Eleventh National People's Congress at its Sixteenth Session on 28 August 2010.

Election Law of the Representatives of the National People's Congress of the People's Republic of China and the Local People's Congresses at All Levels, adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, as amended for the fifth time in accordance with Decision on Revising the Election Law of the National People's Congress and Local People's Congresses of the People's Republic of China adopted at the Third Session of the 11th National People's Congress on 14 March 2010.

General Principles of the Civil Law of the People's Republic of China, 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.

Hong Kong Bill of Rights Ordinance (Cap.383).

Income Tax Law of the People's Republic of China concerning Joint Ventures Using Chinese and Foreign Investment, adopted at the Third Session of the Fifth National People's Congress and promulgated on 10 September 1980.

Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises, 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, effective as of 1 July 1991.

Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999.

Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the Standing Committee of the Tenth National People's Congress at its Eighth Session on 6 April 2004.

Interpretation of Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress, adopted at the 15th Session of the Standing Committee of the Tenth National People's Congress on 27 April 2005.

Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress, adopted by the Standing Committee of the Eleventh National People's Congress at its 22nd Session on 26 August 2011.

Labour Law of the People's Republic of China, adopted at the Eighth Meeting of the Standing Committee of the Eighth National People's Congress on 5 July 1994 and promulgated by Order No.28 of the President of the People's Republic of China on 5 July 1994, effective as of 1 January 1995.

Law of the People's Republic of China of Civil Procedure, 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, effective on the date of promulgation.

Law of the People's Republic of China of Succession, 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, effective as of 1 October 1985.

Law of the People's Republic of China on Foreign-related Economic Contracts, 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, effective as of 1 July 1985.

Law of the People's Republic of China on Regional National Autonomy, adopted at the Second Session of the Sixth National People's Congress and promulgated by Order No.13 of the President of the People's Republic of China on 31 May 1984, effective as of 1 October 1984.

Law of the People's Republic of China on the Protection of Rights and Interests of Women, adopted at the Fifth Session of the Seventh National People's Congress on 3 April 1992, as amended in accordance with Decision on Amending the Law of the People's Republic of China on the Protection of Rights and Interests of Women adopted at the 17th Meeting of the Standing Committee of the Tenth National People's Congress on 28 August 2005.

Marriage Law of the People's Republic of China, adopted at the Third Session of the Fifth National People's Congress on 10 September 1980, as amended in accordance with Decision Regarding the Amendment of Marriage Law of the People's Republic of China passed at the 21st Session of the Standing Committee of the Ninth National People's Congress on 28 April 2001.

Organic Law of the Village Administration Committees of the People's Republic of China, adopted at the Fifth Meeting of the Standing Committee of the Ninth National People's Congress on 4 November 1998 and promulgated by Order No.9 of the President of the People's Republic of China on 4 November 1998.

Organic Law on Local People's Congresses and Local People's Governments of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on 1 July 1979 and promulgated by Order No.1 of the Chairman of the Standing Committee of the National People's Congress on 4 July 1979, effective as of 1 January 1980, as amended for the fourth time in accordance with Decision on Amending the Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China adopted at the 12th Meeting of the Standing Committee of the Tenth National People's Congress on 27 October 2004.

Taiwan Relations Act of 1979.

Trade Union Law of the People's Republic of China, adopted at the Fifth Session of the Seventh National People's Congress on 3 April 1992 and promulgated by Order No.57 of the President of the People's Republic of China on 3 April 1992, as amended in accordance with Decision on Amending the Trade Union Law of the People's Republic of China adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on 27 October 2001.

Documents – Governments

Common Programme of the Chinese People's Political Consultative Conference, 1949.

Constitution of the Chinese Communist Party, 2002.

General Programme for the Implementation of Regional Autonomy for Minorities, 1952.

Hong Kong Government, *Green Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Government Printer, 1984).

Hong Kong Government, *White Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Government Printer, 1984).

Hong Kong Government, *Green Paper: The 1987 Review of Developments in Representative Government* (Hong Kong: Government Printer, 1987).

House of Commons Debates (*Hansard*), Vol.536, col.159, 4 February 1955.

India Office Records, 'Further Correspondence Respecting the Affairs of Tibet, Part III'.

India Office Records, 'Papers Relating to Tibet' (1904).

India Office Records, 'Status of Tibet: Publicity by China and HMG, May 1943–June 1946'.

India Office Records, 'Status of Tibet: HMG's Policy, October 1945–February 1946'.

India Office Records, 'Status of Tibet: HMG's Policy, February 1946–February 1949'.

Information Office of the State Council of the People's Republic of China, *White Paper on Human Rights in China*, November 1991.

Information Office of the State Council of the People's Republic of China, *White Paper on New Progress in Human Rights in the Tibetan Autonomous Region*, February 1998.

Information Office of the State Council of the People's Republic of China, *White Paper on Progress in China's Human Rights Cause in 2003*, March 2004.

Information Office of the State Council of the People's Republic of China, *White Paper on Regional Ethnic Autonomy in Tibet*, May 2004.

Information Office of the State Council of the People's Republic of China, *White Paper on Regional Autonomy for Ethnic Minorities in China*, February 2005.

Information Office of the State Council of the People's Republic of China, *White Paper on National Human Rights Action Plan of China (2012–2015)*, June 2012.

Mainland Affairs Council, Executive Yuan, Taiwan, *White Paper on Relations across the Taiwan Straits*, July 1994.

Mainland Affairs Council, Executive Yuan, Taiwan, 'Official Position of the Republic of China (Taiwan) on China's Passing of the Anti-secession (Anti-Separation) Law', 29 March 2005.

Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of the Public Opinion Survey on the Third "Chiang–Chen Talks" (April 28–30, 2009)'.

Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of the Public Opinion Survey on the Fourth Chiang–Chen Talks (December 25–27, 2009)'.

Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of Public Opinion Survey on the "Public's View on Current Cross-Strait Relations" (April 29–May 2, 2010)'.

Mainland Affairs Council, Executive Yuan, Taiwan, 'Survey on Public Views on the Fifth Chiang–Chen Talks (July 2–4, 2010)'.

Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of Public Opinion Survey on the "Public's Views on Current Cross-Strait Relations" (September 1–5, 2010).

Mainland Affairs Council, Executive Yuan, Taiwan, 'Summarized Results of the Public Opinion Survey on the "Public's Views on Current Cross-Strait Relations" (May 27–30, 2011)'.

Mainland Affairs Council, Executive Yuan, Taiwan, 'Public Opinion Survey Shows High Support for the Results of the Negotiations at the Seventh Chiang–Chen Talks', 28 November 2011.

Mainland Affairs Council, Executive Yuan, Taiwan, 'The Public Affirms the Achievements of the Eighth Chiang-Chen Talks', 31 August 2012.

Mainland Affairs Council, Executive Yuan, Taiwan, 'The ROC Government's Steady Promotion of Developments in Cross-Strait Relations and the Breadth of Vision and Mind of President Ma's Mainland Policy are the Keys to Peace in the Taiwan Strait', 5 September 2012.

State Ethnic Affairs Commission, *Zhongguo gongchandang guanyu minzu wenti de jiben guandian he zhengce (ganbu duben)* [*The Chinese Communist Party's Basic Standpoints and Policies on the Nationalities Question (Readings for Cadres)*] (2002).

'Supporting Democracy and Economic Reform in the New Independent States', 6 *US Department of State Dispatch* (1995), 119.

Taiwan Affairs Office and Information Office of the State Council of the People's Republic of China, *White Paper: The Taiwan Question and Reunification of China*, August 1993.

Tsering, Tashi, *A Brief Survey of Fourteen Centuries of Sino-Tibetan Relations* (Dharamsala: Central Tibetan Secretariat Office of Information and International Relations, 1988).

United States *Department of State Bulletin*, Vol.22 (1950).

United States *Department of State Bulletin*, Vol.23 (1950).

'Zhonggong zhongyang bangongting guowuyuan bangongting guanyu jinyibu zuobao cunmin weiyuanhui huanjie xuanju gongzuo de tongzhi' ['Circular by General Offices of Party Central Committee and State Council on further improving the work of next round village committee elections'], 14 July 2002.

Documents – International Organisations

A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change (New York: United Nations, 2004).

European Community Arbitration Commission, Opinion No.8 on Questions arising from the Dissolution of Yugoslavia, 31 ILM 1521 (1992).

Globalization and its Impact on the Full Enjoyment of All Human Rights: Preliminary Report of the Secretary-General, 55th Session, 31 August 2000, A/55/342.

Hong Kong Special Administrative Region of the People's Republic of China: Second Periodic Report, CCPR/C/HKG/2005/2, 3 March 2005.

Implementation of the International Covenant on Economic, Social and Cultural Rights, China: Report of the Hong Kong Special Administrative Region of the People's Republic of China, E/1990/5/Add.43, 20 September 1999.

International Commission of Jurists, 'The Aaland Islands Question: Report of the Committee of Jurists', *League of Nations Official Journal: Special Supplement* (1920), 3.

International Commission of Jurists, *The Question of Tibet and the Rule of Law* (Geneva: International Commission of Jurists, 1959).

International Commission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong* (Geneva: International Commission of Jurists, 1992).

International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

Joint statement of 33 'Like-Minded States' at 18th Human Rights Council session, 28 September 2011, http://www.china-un.ch/eng/hom/t859047.htm.

Letter of China's Ambassador Huang Hua to Chairman of the Special Committee, 10 March 1972.

Letter of the United Kingdom's Permanent Representative to the United Nations to the United Nations Secretary-General, 19 December 1972.

Letter dated 4 January 2010 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, S/2010/9, 7 January 2010.

Memorandum prepared for the United Nations Secretary-General in February 1950 on 'Legal Aspects of Problems of Representation in the United Nations', S/1466, 5 S.C.O.R. Supplement, January–May 1950, 18.

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).

Prevention of Armed Conflict: Report of the Secretary-General, A/55/985-2/2001/574, 7 June 2001.

Report of the International Court of Justice (August 1972–July 1973), 28 G.A.O.R. Supp. No.5, 1.

Report of the Secretary-General of the United Nations, *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, 21 March 2005.

Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001.

Resolution of Institut de droit international on the Legal Consequences for Member States of the Non-Fulfillment by International Organisations of their Obligations towards Third States, Session of Lisbon, 1 September 1995.

'Responsibility while Protecting: Elements for the Development and Promotion of a Concept', Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the United Nations Secretary-General, A/66/551-S/2011/701, 11 November 2011.

Statement of China in the Sixth Committee of the Sixtieth Session of the United Nations General Assembly, A/C/6/60/SR.11, 23 November 2005.

Third United Nations Conference on the Law of the Sea Official Records, Vol.V (1976).

United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, E/C.12/1997/8.

United Nations Committee on Economic, Social and Cultural Rights, *Report on its Seventh Session*, E/1993/22, 23 November–11 December 1992.

United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (New York: United Nations, 2008).

United Nations Department of Peacekeeping Operations, 'UN Missions Summary Detailed by Country', 1 October 2010.

United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000).

United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: United Nations Development Programme, 2002).

United Nations Development Programme, 'Forging a Global South', 19 December 2004.

United Nations Human Rights Committee, CCPR/C/SR.1422, 20 July 1995.

United Nations Human Rights Committee, *Consideration of Reports submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights: Hong Kong Special Administrative Region of the People's Republic of China*, CPR/C/HKSAR/99/1, 16 June 1999.

United Nations Human Rights Committee, *Summary Record of its 1803rd Meeting*, CCPR/C/SR.1803, 5 November 1999.

United Nations Human Rights Committee, *Summary Record of its 1805th Meeting*, CCPR/C/SR.1805, 8 November 1999.

United Nations Human Rights Committee, *Summary Record of its 2351st Meeting*, CCPR/C/SR.2351, 31 March 2006.

28 G.A.O.R., C.6 (1442nd meeting) (1973); 29 G.A.O.R., C.6 (1475th meeting) (1974).

A/55/PV.12 (2000); A/60/L.1 (2005); A/63/PV.22 (2008).

A/C.3/63/SR.32 (2008).

A/C.4/55/SR.20, 5 April 2001; A/C.4/56/SR.20, 4 December 2001; A/C.4/58/SR.11, 14 November 2003; A/C.4/59/SR.17, 31 December 2004.

A/HRC/5/1 (2007); A/HRC/15/16 (2010); A/HRC/16/5 (2011).

E/CN.4/2000/SR.23 (2000); E/CN.4/2000/SR.31 (2000); E/CN.4/2000/SR.50 (2000); E/CN.4/2004/SR.21 (2004); E/CN.4/2004/SR.26 (2005).

S/PV.527, 28 November 1950; S/PV.1660, 25 August 1972; S/PV.1662, 10 September 1972; S/PV.1750, 25 October 1973; S/PV.2982, 5 April 1991; S/PV.3106, 13 August 1992; S/PV.3137, 16 November 1992; S/PV.3145, 3 December 1992; S/PV.3376, 6 May 1994; S/PV.3730, 10 January 1997; S/PV.3868, 31 March 1998; S/PV.3982, 25 February 1999; S/PV.3988, 24 March 1999; S/PV.4011, 10 June 1999; S/PV.4043, 11 September 1999; S/PV.5040, 18 September 2004; S/PV.5041, 22 September 2004; S/PV.5158, 31 March 2005; S/PV.5261, 14 September 2005; S/PV.5439, 16 May 2006; S/PV.5519, 31 August 2006; S/PV.5577, 4 December 2006; S/PV.5619, 12 January 2007; S/PV.5898, 27 May 2008; S/PV.5933, 11 July 2008; S/PV.6354, 7 July 2010; S/PV.6367, 3 August 2010; S/PV.6528, 4 May 2011; S/PV.6531, 10 May 2011; S/PV.6627, 4 October 2011; S/PV.6711, 4 February 2012.

SC/6693, 25 June 1999; SC/6807, 17 February 2000.

World Bank, *Managing Development: The Governance Decision* (Washington, D.C.: World Bank, 1991).

Yearbook of the International Law Commission (1963), Vol.II.

Books, Book Chapters, Journal Articles, and Encyclopaedia Articles

Addis, Adeno (2003). 'Economic Sanctions and the Problem of Evil', 25 *Human Rights Quarterly* 573.

Aksakal, Mustafa (2004). 'Not "by those Old Books of International Law, but Only by War": Ottoman Intellectuals on the Eve of the Great War', 15 *Diplomacy and Statecraft* 507.

Alden, Chris (2005). 'China in Africa', 47:3 *Survival* 147.

Aleinikoff, T. Alexander (2004). 'International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate', 98 *American Journal of International Law* 91.

Alesina, Alberto, and David Dollar (2000). 'Who Gives Foreign Aid to Whom and Why?', 5 *Journal of Economic Growth* 33.

Alford, William P. (1999). 'A Second Great Wall: China's Post-Cultural Revolution Project of Legal Construction', 11 *Cultural Dynamics* 193.

Alpermann, Björn (July 2001). 'The Post-Election Administration of Chinese Villages', 46 *China Journal* 45.

Alston, Philip (2006). 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council', 7 *Melbourne Journal of International Law* 185.

Alvarez, José E. (2001). 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', 12 *European Journal of International Law* 183.

Alvarez, José E. (2003). 'Hegemonic International Law Revisited', 97 *American Journal of International Law* 873.

Alexandrowicz-Alexander, Charles Henry (1954). 'The Legal Position of Tibet', 48 *American Journal of International Law* 265.

Anand, Dibyesh (2009). 'Strategic Hypocrisy: The British Imperial Scripting of Tibet's Geopolitical Identity', 68 *Journal of Asian Studies* 227.

Anghie, Antony (1996). 'Francisco de Vitoria and the Colonial Origins of International Law', 5 *Social & Legal Studies* 321.

Anghie, Antony (1999). 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* 1.

Anghie, Antony (2005). *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press).

Apodaca, Clair (1998). 'Measuring Women's Economic and Social Rights Achievement', 20 *Human Rights Quarterly* 139.

Arangio-Ruiz, Gaetano (1972–III). 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 137 *Recueil des cours* 419.

Arbour, Louise (2008). 'The Responsibility to Protect as a Duty of Care in International Law and Practice', 34 *Review of International Studies* 445.

Arrow, Kenneth J. (1963). *Social Choice and Individual Values*, 2nd ed. (New Haven: Yale University Press).

Aznar-Gómez, Mariano J. (2002). 'A Decade of Human Rights Protection by the Security Council: A Sketch of Deregulation?', 13 *European Journal of International Law* 223.

Bacevich, Andrew J. (2002). *American Empire: The Realities and Consequences of U.S. Diplomacy* (Cambridge, MA: Harvard University Press).

Bachand, Rémi, and Thierry Lapointe (2010). 'Beyond Presentism: Rethinking the Enduring Co-constitutive Relationships between International Law and International Relations', 4 *International Political Sociology* 271.

Barnett, Michael, and Raymond Duvall (2005). 'Power in International Politics', 59:1 *International Organization* 39.

Bauer, Joanne R., and Daniel A. Bell, eds. (1999). *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press).

Beck, Ulrich, and Edgar Grande (2007). *Cosmopolitan Europe* (Cambridge: Polity).

Becquelin, Nicholas (2004). 'Staged Development in Xinjiang', 178 *China Quarterly* 358.

Bell, Coral (1984). 'China and the International Order', in Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Oxford: Clarendon Press), 255.

Bell, Daniel A. (1996). 'The East Asian Challenge to Human Rights: Reflections on an East–West Dialogue', 18 *Human Rights Quarterly* 641.

Bellamy, Alex J. (2006). 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', 20 *Ethics & International Affairs* 143.

Bellamy, Alex J. (2011). 'Libya and the Responsibility to Protect: The Exception and the Norm', 25 *Ethics & International Affairs* 263.

Bellamy, Alex J., and Paul D. Williams (2011). 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', 87 *International Affairs* 825.

Bennoune, Karima (2002). 'Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq', 13 *European Journal of International Law* 243.

Besson, Samantha (2006). 'Sovereignty in Conflict', in Stephen Tierney and Colin Warbrick, eds., *Towards an International Legal Community?: The Sovereignty of States and the Sovereignty of International Law* (London: British Institute of International and Comparative Law), 131.

Biersteker, Thomas J., and Cynthia Weber (1996). 'The Social Construction of State Sovereignty', in Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press), 1.

Blix, Hans Martin (1970–II). 'Contemporary Aspects of Recognition', 130 *Recueil des cours* 589.

Bozeman, Adda B. (1960). *Politics and Culture in International History* (Princeton: Princeton University Press).

Bradley, Curtis A., and Mitu Gulati (2010). 'Withdrawing from International Custom', 120 *Yale Law Journal* 202.

Brandstädter, Susanne, and Gunther Schubert (2005). 'Democratic Thought and Practice in Rural China', 12 *Democratization* 810.

Brandt, Loren, and Matthew A. Turner (2007). 'The Usefulness of Corruptible Elections', 19 *Economics and Survey* 453.

Brierly, J.L. (1963). *The Law of Nations*, 6th ed. rev. Humphrey Waldock (Oxford: Clarendon Press).

Brownlie, Ian (1982). 'Recognition in Theory and Practice', 53 *British Year Book of International Law* 197.

Buchanan, Allen (1999). 'The Internal Legitimacy of Humanitarian Intervention', 7 *Journal of Political Philosophy* 71.

Buchanan, Allen (2001). 'From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform', 111 *Ethics* 673.

Buchanan, Allen (2003). 'Reforming the International Law of Humanitarian Intervention', in J.L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press), 130.

Buchanan, Allen (2004). *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press).

Buchanan, Allen, and Robert O. Keohane (2004). 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', 18 *Ethics & International Affairs* 1.

Buchanan, Allen, and Robert O. Keohane (2006). 'The Legitimacy of Global Governance Institutions', 20 *Ethics & International Affairs* 405.

Buchanan, Allen, and Robert O. Keohane (2010). 'The Legitimacy of Global Governance Institutions', in Allen Buchanan, *Human Rights, Legitimacy, & the Use of Force* (New York: Oxford University Press), 105.

Buergenthal, Thomas (1997). 'The Normative and Institutional Evolution of International Human Rights', 19 *Human Rights Quarterly* 703.

Bull, Hedley (1977). *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan).

Burley, Anne-Marie (1990). 'Revolution of the Spirit', 3 *Harvard Human Rights Journal* 1

Burley, Anne-Marie (1992). 'Toward an Age of Liberal Nations', 33 *Harvard International Law Journal* 393.

Burley, Anne-Marie (1992). 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* 1907.

Byers, Michael (1999). *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press).

Byers, Michael, and Simon Chesterman (2000). '"You the People": Pro-Democratic Intervention in International Law', in Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press), 259.

Byers, Michael, and Simon Chesterman (2003). 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law', in J.L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press), 177.

Byers, Michael, and Georg Nolte, eds. (2003). *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press).

Byrnes, Andrew (2000). 'Uses and Abuses of the Treaty Reporting Procedure: Hong Kong between Two Systems', in Philip Alston and James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press), 287.

Cai, Dingjian (1995). 'Constitutional Supervision and Interpretation in the People's Republic of China', 9 *Columbia Journal of Asian Law* 219.

Callahan, William A. (2004). 'Nationalizing International Theory: Race, Class and the English School', 18:4 *Global Society* 305.

Cao, Jingchun (2005). 'Protecting the Right to Privacy in China', 36 *Victoria University of Wellington Law Review* 645.

Carlson, Allen (2008). *Unifying China, Integrating with the World: Securing Chinese Sovereignty in the Reform Era* (Singapore: National University of Singapore Press).

Caron, David D. (1993). 'The Legitimacy of the Collective Authority of the Security Council', 87 *American Journal of International Law* 552.

Carothers, Thomas (1992). 'Empirical Perspectives on the Emerging Norms of Democratic Governance', *Proceedings of the American Society of International Law* 261.

Carr, Edward Hallett (1939). *The Twenty Years' Crisis 1919–1939* (London: Macmillan).

Carrington, Michael (2003). 'Officers, Gentlemen and Thieves: The Looting of Monasteries during the 1903/4 Younghusband Mission to Tibet', 37 *Modern Asian Studies* 81.

Cassese, Antonio (1999). *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press).

Cassese, Antonio (1999). '*Ex Iniuria Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *European Journal of International Law* 23.

Cassese, Antonio (2005). *International Law* (Oxford: Oxford University Press).

Cerna, Christina M. (1995). 'Universal Democracy: An International Legal Right or a Pipe Dream of the West?', 27 *New York University Journal of International Law and Politics* 289.

Chai, Trong R. (1979). 'Chinese Policy toward the Third World and the Superpowers in the UN General Assembly 1971–1977: A Voting Analysis', 33 *International Organization* 391.

Chaiken, Shelley, Wendy Wood, and Alice H. Eagly (1996). 'Principles of Persuasion', in E. Tory Higgins and Arie W. Kruglanski, eds., *Social Psychology: Handbook of Basic Principles* (New York: Guilford Press), 702.

Chakste, Mintauts (1949). 'Soviet Concepts of the State, International Law and Sovereignty', 43 *American Journal of International Law* 21.

Chamberlain, Heath B. (1993). 'On the Search for Civil Society in China', 19 *Modern China* 199.

Chan, Johannes (1998). 'The Status of the Bill of Rights in the Hong Kong Special Administrative Region', 28 *Hong Kong Law Journal* 152.

Chan, Phil C.W. (2004). 'Acquiescence/Estoppel in International Boundaries: *Temple of Preah Vihear* Revisited', 3 *Chinese Journal of International Law* 421.

Chan, Phil C.W. (2006). 'Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage', *Singapore Journal of Legal Studies* 285.

Chan, Phil C.W. (2008). 'Using the WTO for the Protection of Human Rights in China?', 19 *European Business Law Review* 605.

Chan, Phil C.W. (2009). 'The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict', 8 *Chinese Journal of International Law* 455.

Chan, Phil C.W. (2009). 'Keeping up with (which) Joneses: A Critique of Constitutional Comparativism in Hong Kong and its Implications for Rights Development', 13 *International Journal of Human Rights* 307.

Chan, Phil C.W. (2009). 'Hong Kong: Nationality Issues since 1983', in David Pong, ed., *Encyclopedia of Modern China*, Vol.2 (New York: Charles Scribners & Sons), 241.

Chan, Phil C.W. (2009). 'Privacy' in David Pong, ed., *Encyclopedia of Modern China*, Vol.3 (New York: Charles Scribners & Sons), 176.

Chan, Phil C.W. (2009). 'Strikes' in David Pong, ed., *Encyclopedia of Modern China*, Vol.3 (New York: Charles Scribners & Sons), 501.

Chan, Phil C.W. (2013). 'Human Rights and Democracy with Chinese Characteristics?', 13 *Human Rights Law Review* 645.

Chan, Phil C.W. (2013). 'A Keen Observer of the International Rule of Law? International Law in China's Voting Behaviour and Argumentation in the United Nations Security Council', 26 *Leiden Journal of International Law* 875.

Chang, Andy G., and T.Y. Wang (2005). 'Taiwanese or Chinese? Independence or Unification? An Analysis of Generational Differences in Taiwan', 40 *Journal of Asian and African Studies* 29.

Chang, Hsin-Pao (1970). *Commissioner Lin and the Opium War* (Cambridge, MA: Harvard University Press).

Chapman, Audrey R. (1996). 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights', 18 *Human Rights Quarterly* 23.

Charney, Jonathan I. (1999). 'Anticipatory Humanitarian Intervention in Kosovo', 32 *Vanderbilt Journal of Transnational Law* 1231.

Charney, Jonathan I., and J.R.V. Prescott (2000). 'Resolving Cross-Strait Relations between China and Taiwan', 94 *American Journal of International Law* 453.

Chayes, Abram, and Antonia Handler Chayes (1998). *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press).

Chen, Albert H.Y. (1999). 'Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law', 17 *UCLA Pacific Basin Law Journal* 125.

Chen, Albert H.Y. (2000). 'The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives', 30 *Hong Kong Law Journal* 380.

Chen, Feng (2000). 'Subsistence Crises, Managerial Corruption and Labour Protests in China', 44 *China Journal* 41.

Chen, Li (2011). 'Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter', 13 *Journal of the History of International Law* 75.

Chen, Matthew E. (2007). 'Chinese National Oil Companies and Human Rights', 51:1 *Orbis* 41.

Chen, Tiqiang (1984). 'The People's Republic of China and Public International Law', 8 *Dalhousie Law Journal* 3.

Chen, Yi-yan (1996). 'Butong zuqun zhengzhi wenhua de shidai fenxi', 27 *Zhengzhi Xuebao* 83.

Chen, Yi-yan, and Tsai Meng-his (1997). 'Xinshidai xuan min de zhengdang zuxiang yu toupiao juece: Shouju minxuan zongtong de fenxi', 29 *Zhengzhi Xuebao* 63.

Chen, Zhimin (2005). 'Nationalism, Internationalism and Chinese Foreign Policy', 14 *Journal of Contemporary China* 35.

Cheng, Joseph Y.S., and Zhang Wankun (2002). 'Patterns and Dynamics of China's International Strategic Behaviour', 11:31 *Journal of Contemporary China* 235.

Chesterman, Simon (2005). *You the People: The United Nations, Transnational Administration, and State-Building* (Oxford: Oxford University Press).

Chesterman, Simon (2008). 'An International Rule of Law?', 56 *American Journal of Comparative Law* 331.

Chesterman, Simon (2008). 'Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person', 12 *Singapore Year Book of International Law* 199.

Chin, Gregory, and Ramesh Thakur (2010). 'Will China Change the Rules of Global Order?', 33:4 *Washington Quarterly* 119.

Chinkin, Christine (2000). 'The State that Acts Alone: Bully, Good Samaritan or Iconoclast?', 11 *European Journal of International Law* 31.

Chiu, Hungdah (1966). 'Communist China's Attitude toward International Law', 60 *American Journal of International Law* 245.

Chiu, Hungdah (1987). 'Chinese Views on the Sources of International Law', 28 *Harvard International Law Journal* 289.

Chiu, Hungdah (1987). 'Chinese Attitudes toward International Law in the Post-Mao Era, 1978–1987', 21 *International Lawyer* 1127.

Choedon, Yeshi (1992). 'China's National Minorities Policy with Special Reference to Tibet', in K. Warikoo and Dawa Norbu, eds., *Ethnicity and Politics in Central Asia* (New Delhi: South Asian Publishers), 187.

Chong, Alberto, and Cesar Calderón (2000). 'Causality and Feedback between Institutional Measures and Economic Growth', 12 *Economics & Politics* 69.

Chou, Fu-lun (1958). *Chiao hsiieh yii yen chin* [*Teaching and Research*], No.3, 52.

Christakis, Theodore (2011). 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?', 24 *Leiden Journal of International Law* 73.

Christensen, Thomas J. (September/October 1996). 'Chinese Realpolitik', 75 *Foreign Affairs* 37.

Chu, Yun-han (2004). 'Taiwan's National Identity Politics and the Prospects of Cross-Strait Relations', 44 *Asian Survey* 484.

Chung, Chien-peng (2002). 'China's "War on Terror": September 11 and Uighur Separatism', 81:4 *Foreign Affairs* 8.

Clayre, Anthony (1988). 'Mediating: Caring and Control', in Anthony Clayre, ed., *The Heart of the Dragon* (Boston: Houghton Mifflin), 91.

Cobbah, Josiah A.M. (1987). 'African Values and the Human Rights Debate: An African Perspective', 9 *Human Rights Quarterly* 309.

Cohen, Jean L. (2004). 'Whose Sovereignty? Empire versus International Law', 18 *Ethics & International Affairs* 1.

Cohen, Warren I. (2007). 'China's Rise in Historical Perspective', 30 *Journal of Strategic Studies* 683.

Contessi, Nicola P. (2010). 'Multilateralism, Intervention and Norm Contestation: China's Stance on Darfur in the UN Security Council', 41 *Security Dialogue* 323.

Cooper, Neil (2007). 'On the Crisis of the Liberal Peace', 7 *Conflict, Security and Development* 605.

Coplin, William D. (1966). *The Functions of International Law: An Introduction to the Role of International Law in the Contemporary World* (Chicago: Rand McNally).

Cotton, James (2001). 'Against the Grain: The East Timor Intervention', 43:1 *Survival* 127.

Cottrell, Robert (1993). *The End of Hong Kong: The Secret Diplomacy of Imperial Retreat* (London: John Murray).

Craven, Matthew C.R. (1995). 'The European Community Arbitration Commission on Yugoslavia', 66 *British Year Book of International Law* 333.

Crawford, James (1979). *The Creation of States in International Law*, 1st ed. (Oxford: Oxford University Press).

Crawford, James (1994). 'Democracy and International Law', 64 *British Year Book of International Law* 113.

Crawford, James (1998). 'State Practice and International Law in relation to Secession', 69 *British Year Book of International Law* 85.

Crawford, James (2006). *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press).

Crook, John R. (2005). 'Contemporary Practice of the United States relating to International Law', 99 *American Journal of International Law* 479.

Cunliffe, Philip (2007). 'Sovereignty and the Politics of Responsibility', in Christopher J. Bickerton, Philip Cunliffe, and Alexander Gourevitch, eds., *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: Routledge), 39.

Darby, Phillip (2009). 'Rolling Back the Frontiers of Empire: Practising the Postcolonial', 16 *International Peacekeeping* 699.

Davis, Jonathan E. (2011). 'From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era', 44 *Vanderbilt Journal of Transnational Law* 217.

De Aréchaga, E. Jimènez (1978–I). 'International Law in the Past Third of a Century', 159 *Recueil des cours* 1.

De Bary, William Theodore (1991). *Learning for One's Self: Essays on the Individual in Neo-Confucian Thought* (New York: Columbia University Press).

Delahunty, Robert J., and John C. Yoo, (2002). 'The President's Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them', 25 *Harvard Journal of Law and Public Policy* 487.

Delahunty, Robert J., and John Yoo (2005). 'Statehood and the Third Geneva Convention', 46 *Virginia Journal of International Law* 131.

Delahunty, Robert J., and John Yoo (2006). 'Executive Power v. International Law', 30 *Harvard Journal of Law and Public Policy* 1.

Delahunty, Robert J., and John C. Yoo (2008). 'Peace through Law? The Failure of a Noble Experiment', 106 *Michigan Law Review* 923.

Dellavalle, Sergio (2010). 'Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order', 21 *European Journal of International Law* 765.

D'Encausse, Helene Carrere, and Maxime Rodinson (2009). *Islam and the Russian Empire: Reform and Revolution in Central Asia* (London: I.B. Tauris).

Deng, Yong (2008). *China's Struggle for Status: The Realignment of International Relations* (Cambridge: Cambridge University Press).

Donnelly, Jack (1984). 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly* 400.

Donnelly, Jack (1998). 'Human Rights: A New Standard of Civilization?', 74 *International Affairs* 1.

Donnelly, Jack (2007). 'The Relative Universality of Human Rights', 29 *Human Rights Quarterly* 281.

Donno, Daniela (2010). 'Who is Punished? Regional Intergovernmental Organizations and the Enforcement of Democratic Norms', 64 *International Organization* 593.

Doty, Roxanne Lynn (1996). 'Sovereignty and the Nation: Constructing the Boundaries of National Identity', in Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press), 121.

Dowdle, Michael W. (1997). 'The Constitutional Development and Operations of the National People's Congress', 11 *Columbia Journal of Asian Law* 1.

Dowdle, Michael W. (1999). 'Heretical Laments: China and the Fallacies of "Rule of Law"', 11 *Cultural Dynamics*, 287.

Downs, Erica Strecker, and Phillip C. Saunders (1998). 'Legitimacy and the Limits of Nationalism: China and the Diaoyu Islands', 23:3 *International Security* 114.

Downs, George W., and Michael A. Jones (2002). 'Reputation, Compliance, and International Law', 31 *Journal of Legal Studies* S95.

Doyle, Michael (1983). 'Kant, Liberal Legacies and Foreign Affairs', 12 *Philosophy and Public Affairs* 205.

Drew, Catriona (2001). 'The East Timor Story: International Law on Trial', 12 *European Journal of International Law* 651.

Drezner, Daniel W. (2011). 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice', 13 *International Studies Review* 96.

Drury, A. Cooper, and Yitan Li (2006). 'U.S. Economic Sanction Threats against China: Failing to Leverage Better Human Rights', 2 *Foreign Policy Analysis* 307.

Du, Jie (2004). 'Gender and Governance: The Rise of New Women's Organisations', in Jude Howell, ed., *Governance in China* (Lanham, MD: Rowman & Littlefield), 172.

Duara, Prasenjit (2003). *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (Lanham, MD: Rowman & Littlefield).

Dudden, Alexis (2005). *Japan's Colonization of Korea: Discourse and Power* (Honolulu: University of Hawaii Press).

Dugard, John (1987). *Recognition and the United Nations* (Cambridge: Cambridge University Press).

Dunne, Tim (2007). 'Fundamental Human Rights Crisis after 9/11', 44 *International Politics* 283.

Durch, William J. (1993). 'Building on Sand: UN Peacekeeping in the Western Sahara', 17:4 *International Security* 151.

Duursma, Jorris (2002). 'Preventing and Solving Wars of Secession: Recent Unorthodox Views on the Use of Force', in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth de Vos, and John Dugard, eds., *State, Sovereignty, and International Governance* (Oxford: Oxford University Press), 349.

Economy, Elizabeth, and Michel Oksenberg (1999). *China Joins the World: Progress and Prospects* (New York: Council on Foreign Relations).

Edwards, Randle (1977). 'The Old Canton System of Foreign Trade', in Victor H. Li, ed., *Law and Politics in China's Foreign Trade* (Seattle: University of Washington Press), 360.

Edwards, R. Randle (1986). 'Civil and Social Rights: Theory and Practice in Chinese Law Today', in R. Randle Edwards, Louis Henkin, and Andrew J. Nathan, eds., *Human Rights in Contemporary China* (New York: Columbia University Press), 41.

Edwards, R. Randle (1987). 'Imperial China's Border Control Law', 1 *Journal of Chinese Law* 33.

Edwards, R. Randle (1994). 'China's Practice of International Law – Patterns from the Past', in Ronald St John Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers), 243.

Ehrenberg, Daniel S. (1996). 'From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights', in Lance A. Compa and Stephen F. Diamond, eds., *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press), 163.

Ellis, David C. (2009). 'On the Possibility of "International Community"', 11 *International Studies Review* 1.

Elster, Jon (1998). 'Introduction', in Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press), 1.

Erbaugh, Mary S., and Richard C. Kraus (1990). 'The 1989 Democracy Movement in Fujian and its Consequences', 23 *Australian Journal of Chinese Affairs* 145.

Erickson, Barbara (1997). *Tibet: Abode of the Gods, Pearl of the Motherland* (Berkeley: Pacific View Press).

Esherick, Joseph W., and Jeffrey N. Wasserstrom (1990). 'Acting Out Democracy: Political Theater in Modern China', 49 *Journal of Asian Studies* 835.
Erikson, Erik H. (1968). *Identity: Youth and Crisis* (London: Faber & Faber).

Evans, Gareth (2008). *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution Press).

Evans, Tony (2005). 'International Human Rights Law as Power/Knowledge', 27 *Human Rights Quarterly* 1046.

Fairbank, John K. (1953). *Trade and Diplomacy on the China Coast* (Cambridge, MA: Harvard University Press).

Fairbank, John King, ed. (1973). *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press).

Fairbank, John K. (1973). 'The Early Treaty System in the Chinese World Order', in John King Fairbank, ed., *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press), 257.

Falk, Richard A. (1970). *The Status of Law in International Society* (Princeton: Princeton University Press).

Falk, Richard (1988). 'The Rights of Peoples (In Particular Indigenous Peoples)', in James Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press), 18.

Falk, Richard A. (1994). 'The United Nations and the Rule of Law', 4 *Transnational Law and Contemporary Problems* 611.

Fassbender, Bardo (2002). 'Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq', 13 *European Journal of International Law* 273.

Fassbender, Bardo (2004). 'The Better Peoples of the United Nations? Europe's Practice and the United Nations', 15 *European Journal of International Law* 857.

Feigenbaum, Evan A. (2001). 'China's Challenge to *Pax Americana*', 24:3 *Washington Quarterly* 31.

Ferguson, Niall (2004). *Colossus: The Price of America's Empire* (New York: Allen Lane).

Feuerle, Loie (1985). 'Informal Consultation: A Mechanism in Security Council Decision-Making', 18 *New York Journal of International Law and Politics* 267.

Feyzioglu, Tarhan, Vinaya Swaroop, and Min Zhu (1998). 'A Panel Data Analysis of the Fungibility of Foreign Aid', 12 *World Bank Economic Review* 29.

Fielding, Lois E. (1994–1995). 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy', 5 *Duke Journal of Comparative and International Law* 329.

Fields, A. Belden, and Wolf-Dieter Narr (1992). 'Human Rights as a Holistic Concept', 14 *Human Rights Quarterly* 1.

Fifield, Russell H. (1958). 'The Five Principles of Peaceful Co-existence', 52 *American Journal of International Law* 504.

Finnemore, Martha, and Kathryn Sikkink (1998). 'International Norm Dynamics and Political Change', 52 *International Organization* 887.

Finnemore, Martha (2005). 'Fights about Rules: The Role of Efficacy and Power in Changing Multilateralism', 31 *Review of International Studies* 187.

Fleay, Caroline (2006). 'Human Rights, Transnational Actors and the Chinese Government: Another Look at the Spiral Model', 2 *Journal of Global Ethics* 43.

Fletcher, Joseph F. (1973). 'China and Central Asia', in John King Fairbank, ed., *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press), 206.

Foot, Rosemary (2007). 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas', 29 *Human Rights Quarterly* 489.

Forbes, Andrew D.W. (1986). *Warlords and Muslims in Chinese Central Asia: A Political History of Republican Sinkiang* (Cambridge: Cambridge University Press).

Ford, Christopher A. (2010). *The Mind of Empire: China's History and Modern Foreign Relations* (Lexington, KY: University of Kentucky Press).

Fox, Gregory H. (1992). 'The Right to Political Participation in International Law', 17 *Yale International Law Journal* 539.

Fox, Gregory H., and Georg Nolte (1995). 'Intolerant Democracies', 36 *Harvard International Law Journal* 1.

Fox, Gregory H., and Brad R. Roth (2001). 'Democracy and International Law', 27 *Review of International Studies* 327.

Franck, Thomas M. (1990). *The Power of Legitimacy among Nations* (New York: Oxford University Press)

Franck, Thomas M. (1990). 'United Nations Based Prospects for a New Global Order', 22 *New York University Journal of International Law and Politics* 601.

Franck, Thomas M. (1992). 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* 46.

Franck, Thomas M. (1994). 'Democracy as a Human Right', in Louis Henkin and John L.H. Hargrove, eds., *Human Rights: An Agenda for the Next Century* (Washington, D.C.: American Society of International Law), 73.

Franck, Thomas M. (1995). *Fairness in International Law and Institutions* (New York: Oxford University Press).

Franck, Thomas M. (2002). *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press).

Franck, Thomas M. (2006). 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', 100 *American Journal of International Law* 88.

Frank, Andre Gunder (1998). *ReORIENT: Global Economy in the Asian Age* (Berkeley: University of California Press).

Fravel, M. Taylor (1996). 'China's Attitude toward U.N. Peacekeeping Operations since 1989', 36 *Asian Survey* 1102.

French, Patrick (2000). *Younghusband: The Last Great Imperial Adventurer* (London: Flamingo).

Friedmann, Wolfgang (1961–1963). 'The Position of Underdeveloped Countries and the Universality of International Law', 2 *Columbia Journal of Transnational Law* 78.

Fukuyama, Francis (Summer 1989). 'The End of History', *National Interest* 16

Fukuyama, Francis (Winter 1989). 'A Reply to My Critics', *National Interest* 18.

Fukuyama, Francis (1992). *The End of History and the Last Man* (New York: Free Press).

Fuller, Lon L. (1964). *Morality of Law*, rev. ed. (New Haven: Yale University Press).

Funabashi, Yoichi, Michel Oksenberg, and Heinrich Weiss (1994). *An Emerging China in a World of Interdependence* (New York: Trilateral Commission).

Gabrenya, William K., Jr., and Kwang-Kuo Hwang (1996). 'Chinese Social Interaction: Harmony and Hierarchy on the Good Earth', in Michael Harris Bond, ed., *The Handbook of Chinese Psychology* (Hong Kong: Oxford University Press, 1996), 309.

Gaer, Felice D. (2007). 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System', 7 *Human Rights Law Review* 109.

Gao, Xinjun (December 1998). 'Woguo xian xiang liangi zhengzhi tizhi gaige de shuguang – Henan sheng Xinmi shi cunji minzhu zhengzhi zhidu jianshe diaocha' ['The twilight of the reform of political institutions at county and township levels – An investigating report on the construction of village democracy in Xinmi county, Henan province'], 6 *Jingji shehui tizhi bijiao* [*Comparative Economic and Social Systems*] 5.

Garver, John W. (1988). *Chinese–Soviet Relations, 1935–1945* (New York: Oxford University Press).

Garwood-Gowers, Andrew (2012). 'China and the "Responsibility to Protect": The Implications of the Libyan Intervention', 2 *Asian Journal of International Law* 375.

Georgiev, Dencho (1993). 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law', 4 *European Journal of International Law* 1.

Ghai, Yash (1997). 'Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights', 60 *Modern Law Review* 459.

Ghai, Yash (1997). 'The Continuity of Laws and Legal Rights and Obligations in the SAR', 27 *Hong Kong Law Journal* 136.

Ghai, Yash (2004). 'Putting the Cat among the Pigeons: The Politics of the Referendum', 34 *Hong Kong Law Journal* 433.

Ghai, Yash, Sophia Woodman, and Kelley Loper (2010). 'Is There Space for "Genuine Autonomy" for Tibetan Areas in the PRC's System of Nationalities Regional Autonomy?', 17 *International Journal on Minority and Group Rights* 137.

Gill, Bates, and James Reilly (2000). 'Sovereignty, Intervention and Peacekeeping: The View from Beijing', 42:3 *Survival* 41.

Gill, T.D. (1995). 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', 26 *Netherlands Yearbook of International Law* 33.

Gilley, Bruce (2004). *China's Democratic Future: How it will Happen and Where it will Lead* (New York: Columbia University Press).

Glendon, Mary Ann (1999). 'Foundations of Human Rights: The Unfinished Business', 44 *American Journal of Jurisprudence* 1.

Goertz, Gary, and Paul F. Diehl (1992). 'Toward a Theory of International Norms: Some Conceptual and Measurement Issues', 36 *Journal of Conflict Resolution* 634.

Gold, Thomas (1990). 'Party-State versus Society in China', in Joyce K. Kallgren, ed., *Building a Nation-State: China after Forty Years* (Berkeley: Center for Chinese Studies, University of California, Berkeley), 125.

Gold, Thomas (1990). 'The Resurgence of Civil Society in China', 1 *Journal of Democracy* 18.

Gold, Thomas B. (1993). 'Taiwan's Quest for Identity in the Shadow of China', in Steve Tsang, ed., *In the Shadow of China: Political Developments in Taiwan since 1949* (Honolulu: University of Hawaii Press), 169.

Goldsmith Jack L., and Eric A. Posner (1999). 'A Theory of Customary International Law', 66 *University of Chicago Law Review* 1113.

Goldsmith, Jack (2000). 'Sovereignty, International Relations Theory, and International Law', 52 *Stanford Law Review* 959.

Goldsmith, Jack, and Eric A. Posner (2002). 'Further Thoughts on Customary International Law', 23 *Michigan Journal of International Law* 191.

Goldsmith, Jack L., and Eric A. Posner (2002). 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', 31:S1 *Journal of Legal Studies* S115.

Goldsmith, Jack, and Eric A. Posner (2005). *The Limits of International Law* (New York: Oxford University Press).

Goldstein, Avery (1997). 'Great Expectations: Interpreting China's Arrival', 22:3 *International Security* 36.

Goldstein, Avery (2005). *Rising to the Challenge: China's Grand Strategy and International Security* (Stanford: Stanford University Press).

Goldstein, Melvyn (1989). *A History of Modern Tibet: Decline of the Lamaist State* (Berkeley: University of California Press).

Goldstein, Melvyn C. (1997). *The Snow Lion and the Dragon: China, Tibet, and the Dalai Lama* (Berkeley: University of California Press).

Goldstein, Melvyn C., Ben Jiao, Cynthia M. Beall, and Phuntsog Tsering (2003). 'Development and Change in Rural Tibet: Problems and Adaptations', 43 *Asian Survey* 758.

Goldstein, Steven M., and Randall Schriver (2001). 'An Uncertain Relationship: The United States, Taiwan and the Taiwan Relations Act', 165 *China Quarterly* 147.

Gong, Gerrit W. (1984). *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press).

Goodstadt, Leo F. (2005). *Uneasy Partners: The Conflict between Public Interest and Private Profit in Hong Kong* (Hong Kong: Hong Kong University Press).

Gotberg, Brook (2008). 'The End of Conquest: Consolidating Sovereign Equality', in Wayne Sandholtz and Kendall Stiles, eds., *International Norms and Cycles of Change* (New York: Oxford University Press), 55.

Gowlland-Debbas, Vera (2000). 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', 11 *European Journal of International Law* 361.

Guo, Zhenglin, and Thomas Bernstein (2004). 'The Impact of Elections on the Village Structure of Power: The Relations between Village Committees and Village Party Branches', 13 *Journal of Contemporary China* 257.

Habermas, Jürgen (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press).

Habermas, Jürgen (1998) (trans. Ciaran Cronin). 'The European Nation-State: On the Past and Future of Sovereignty and Citizenship', 10 *Public Culture* 397.

Hackworth, Green Haywood (1940). *A Digest of International Law*, Vol.I (Washington, D.C.: United States Government Printing Office).

Hall, Rodney Bruce (1997). 'Moral Authority as a Power Source', 51 *International Organization* 591.

Hall, William Edward (1924). *A Treatise on International Law*, 8th ed. A. Pearce Higgins (Oxford: Clarendon Press).

Hannikainen, Lauri (1988). *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing).

Hannum, Hurst (1990). *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press).

Hannum, Hurst (2011). 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?', 24 *Leiden Journal of International Law* 155.

Hansen, Valerie (2000). *The Open Empire: A History of China to 1600* (New York: W.W. Norton).

Hao, Zhidong (1997). 'May 4th and June 4th Compared: A Sociological Study of Chinese Social Movements', 6:14 *Journal of Contemporary China* 79.

Harding, Harry (1986). 'Political Development in Post-Mao China', in A. Doak Barnett and Ralph N. Clough, eds., *Modernizing China: Post-Mao Reform and Development* (Boulder, CO: Westview Press), 13.

Harris-Short, Sonia (2003). 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child', 25 *Human Rights Quarterly* 130.

Hathaway, James C. (2000). 'America, Defender of Democratic Legitimacy?', 11 *European Journal of International Law* 121.

Hathaway, Oona A. (2002). 'Do Human Rights Treaties Make a Difference?', 111 *Yale Law Journal* 1935.

Hathaway, Oona A. (2005). 'Between Power and Principle: An Integrated Theory of International Law', 72 *University of Chicago Law Review* 469.

Hayot, Eric (2009). *The Hypothetical Mandarin: Sympathy, Modernity, and Chinese Pain* (New York: Oxford University Press).

He, Baogeng, and Yingjie Guo (2000). *Nationalism, National Identity and Democratization in China* (Aldershot: Ashgate).

He, Baogang, and Lang Youxing (2000). 'The Impact of Village Elections on Village Power Structure and its Operation', 16 *Hong Kong Journal of Social Sciences* 115.

He, Baogang (2003). 'The Theory and Practice of Chinese Grassroots Governance: Five Models', 4 *Japanese Journal of Political Science* 293.

He, Baogang (2007). *Rural Democracy in China: The Role of Village Elections* (New York: Palgrave Macmillan).

He, Baogang (2010). 'A Deliberative Approach to the Tibet Autonomy Issue: Promoting Mutual Trust through Dialogue', 50 *Asian Survey* 709.

He, Yin (2007). *China's Changing Policy on UN Peacekeeping Operations* (Stockholm: Institute for Security and Development Policy).

Hehir, Aidan (2013). 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect', 38:1 *International Security* 137.

Henckaerts, Jean-Marie, ed. (1996). *The International Status of Taiwan in the New World Order: Legal and Political Considerations* (London: Kluwer Law International).

Henkin, Louis (1999). 'Kosovo and the Law of "Humanitarian Intervention"', 93 *American Journal of International Law* 824.

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

Hess, Julia Meredith (2009). *Immigrant Ambassadors: Citizenship and Belonging in the Tibetan Diaspora* (Stanford: Stanford University Press).

Hevia, James L. (1995). *Cherishing Men from Afar: Qing Guest Ritual and the Macartney Embassy of 1793* (Durham, NC: Duke University Press).

Heuser, Robert (1994). '"Legal System" and "Rule of Law" in Chinese Legal Science (1978–1992)', in Ronald St John Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers), 359.

Higgins, Rosalyn (1970). 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 *American Journal of International Law* 1.

Higgins, Rosalyn (1994). *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press).

Hill, Christopher (2003). *The Changing Politics of Foreign Policy* (London: Palgrave Macmillan).

Hilpold, Peter (2001). 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *European Journal of International Law* 437.

Hilpold, Peter (2009). 'What Role for Academic Writers in Interpreting International Law? – A Rejoinder to Orakhelashvili', 8 *Chinese Journal of International Law* 291.

Hilsum, Lindsey (2005). 'Re-Enter the Dragon: China's New Mission in Africa', 32 *Review of African Political Economy* 419.

Hintzen, Geor (1999). 'The Place of Law in the PRC's Culture', 11 *Cultural Dynamics* 167

Ho, David Y.F. (1996). 'Filial Piety and its Psychological Consequences', in Michael Harris Bond, ed., *The Handbook of Chinese Psychology* (Hong Kong: Oxford University Press), 155.

Hobson, J.A. (1902). *Imperialism: A Study* (New York: Allen & Unwin).

Hofstede, Geert (2001). *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations across Nations*, 2nd ed. (Thousand Oaks, CA: Sage Publications).

Howell, Jude (1997). 'The Chinese Economic Miracle and Urban Workers', 9 *European Journal of Development Research* 148.

Hoppe, Carsten (2007). 'Implementation of *LaGrand* and *Avena* in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation', 18 *European Journal of International Law* 317.

Horowitz, Richard S. (2005). 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', 15 *Journal of World History* 445.

Howard, Rhoda E. (1993). 'Cultural Absolutism and the Nostalgia for Community', 15 *Human Rights Quarterly* 315.

Hsü, Immanuel C.Y. (1960). *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858–1880* (Cambridge, MA: Harvard University Press).

Hsü, Shuhsi (1926). *China and Her Political Entity: A Study of China's Foreign Relations with Reference to Korea, Manchuria and Mongolia* (New York: Oxford University Press).

Hsuing, James Chieh (1972). *Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice* (New York: Columbia University Press).

Huang, Chin-Hao (2011). 'Principles and Praxis of China's Peacekeeping', 18 *International Peacekeeping* 257.

Huang, Philip (1993). '"Public Sphere"/"Civil Society" in China?', 19 *Modern China* 216.

Huntington, Samuel P. (Summer 1993). 'The Clash of Civilizations?', 72 *Foreign Affairs* 22.

Huntington, Samuel P. (1996). *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster).

Hurd, Ian (2002). 'Legitimacy, Power, and the Symbolic Life of the UN Security Council', 8 *Global Governance* 35.

Hurrell, Andrew (1993). 'International Society and the Study of Regimes: A Reflective Approach', in Volker Rittberger, ed., *Regime Theory and International Relations* (Oxford: Oxford University Press), 49.

Hurrell, Andrew (1999). 'Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World', in Tim Dunne and Nicholas J. Wheeler, eds., *Human Rights in Global Politics* (Cambridge: Cambridge University Press), 277.

Hurrell, Andrew (2005). 'Legitimacy and the Use of Force: Can the Circle be Squared?', 31 *Review of International Studies* 15.

Hwang, Kwang-Kuo (1998). 'Two Moralities: Reinterpreting the Findings of Empirical Research on Moral Reasoning in Taiwan', 1 *Asian Journal of Social Psychology* 221.

Hwang, Kwang-Kuo (1999). 'Filial Piety and Loyalty: Two Types of Social Identification in Confucianism', 2 *Asian Journal of Social Psychology* 163.

Hwang, Kwang-Kuo (2000). 'Chinese Relationalism: Theoretical Construction and Methodological Considerations', 30 *Journal for the Theory of Social Behaviour* 155.

Ignatieff, Michael (1999). *Whose Universal Values: The Crisis in Human Rights* (Amsterdam: Praemium Erasmianium).

Inoue, Tatsuo (1999). 'Liberal Democracy and Asian Orientalism', in Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press), 27

Jackson, Robert H. (2000). *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press).

Jacobson, Michael (2008). 'Sanctions against Iran: A Promising Struggle', 31:3 *Washington Quarterly* 69.

James, Harold (2006). *The Roman Predicament: How the Rules of International Order Create the Politics of Empire* (Princeton: Princeton University Press).

Jennings, Robert Y. (1965). 'Nullity and Effectiveness in International Law', in D.W. Bowett, ed., *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (London: Stevens and Sons), 64.

Jennings, Robert (2002). 'Sovereignty and International Law', in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth de Vos, and John Dugard, eds., *State, Sovereignty, and International Governance* (Oxford: Oxford University Press), 27.

Jepperson, Ronald L., Alexander Wendt, and Peter J. Katzenstein (1996). 'Norms, Identity, and Culture in National Security', in Peter J. Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press), 33.

Jervis, Robert (1983). 'Security Regimes', in Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press), 173.

Jervis, Robert (2003). 'Understanding the Bush Doctrine', 118 *Political Science Quarterly* 365.

Johnston, Alastair Iain (1999). 'Realism(s) and Chinese Security Policy in the Post-Cold War', in Ethan B. Kapstein and Michael Manstanduno, eds., *Unipolar Politics: Realism and State Strategies after the Cold War* (New York: Columbia University Press), 261.

Johnston, Alastair Iain (2001). 'Treating International Institutions as Social Environments', 45 *International Studies Quarterly* 487.

Johnstone, Ian (2003). 'Security Council Deliberations: The Power of the Better Argument', 14 *European Journal of International Law* 437.

Johnstone, Ian (2008). 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit', 102 *American Journal of International Law* 275.

Johnstone, Ian (2011). 'Managing Consent in Contemporary Peacekeeping Operations', 18:2 *International Peacekeeping* 170.

Jones, David A., Jr. (1987). 'A Leg to Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgement of Individual Rights and Local Autonomy', 12 *Yale Journal of International Law* 250.

Jones, Peter (2000). 'Individuals, Communities and Human Rights', 26 *Review of International Studies* 199.

Josephs, Hilary K. (1995). 'Labor Law in a "Socialist Market Economy": The Case of China', 33 *Columbia Journal of Transnational Law* 559.

Jouannet, Emmanuelle (2007). 'Universalism and Imperialism: The True-False Paradox of International Law?', 18 *European Journal of International Law* 379.

Joyner, Daniel H. (2002). 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm', 13 *European Journal of International Law* 597.

Kahn, Paul W. (2000). 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', 1 *Chicago Journal of International Law* 1.

Kaikobad, Kaiyan Homi (1996). 'Self Determination, Territorial Disputes and International Law: An Analysis of UN and State Practice', 1 *Geopolitics and International Boundaries* 15.

Kang, David C. (2010). *East Asia before the West: Five Centuries of Trade and Tribute* (New York: Columbia University Press).

Kaplinsky, Raphael, and Mike Morris (2009). 'Chinese FDI in Sub-Saharan Africa: Engaging with Large Dragons', 21 *European Journal of Development Research* 551.

Katzenstein, Peter (1996). 'Introduction: Alternative Perspectives on National Security', in Peter Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press), 1.

Keith, Ronald C. (1994). *China's Struggle for the Rule of Law* (New York: St Martin's Press).

Kellam, Amy (2003). 'Law's Imperial Discourse and the Status of Tibet', 12 *Griffith Law Review* 190.

Kelly, David, and He Baogang (1992). 'Emergent Civil Society and the Intellectuals in China', in Robert Miller, ed., *The Developments of Civil Society in Communist Systems* (Sydney: Allen & Unwin), 24.

Kelly, John, and Martha Kaplan (2001). *Represented Communities: Fiji and World Decolonization* (Chicago: University of Chicago Press).

Kelsen, Hans (1964). *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (New York: Praeger).

Kennedy, John James, Scott Rozelle, and Yaojiang Shi (2004). 'Elected Leaders and Collective Land: Farmers' Evaluation of Village Leaders' Performance in Rural China', 9 *Journal of Chinese Political Science* 1.

Kennedy, John James (2009). 'Legitimacy with Chinese Characteristics: "Two Increases, One Reduction"', 18 *Journal of Contemporary China* 391.

Kent, Ann (1992). 'The Limits of Ethics in International Politics: The International Human Rights Regime', 16 *Asian Studies Review* 26.

Kent, Ann (1993). *Between Freedom and Subsistence: China and Human Rights* (Oxford: Oxford University Press).

Kent, Ann (1995). 'China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989–1994', 17 *Human Rights Quarterly* 1.

Kent, Ann (1999). *China, the United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press).

Kent, Ann (2002). 'China's International Socialization: The Role of International Organizations', 8 *Global Governance* 343.

Kent, Ann (2002). 'Human Rights in Chinese Foreign Relations: Defining and Defending National Interests', *China Journal* 134.

Kent, Ann (2004). 'China's Growth Treadmill: Globalization, Human Rights and International Relations', 3 *Review of International Affairs* 524.

Kent, Ann (2005). 'Influences on National Participation in International Institutions: Liberal v Non-liberal States', in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, eds., *The Fluid State: International Law and National Legal Systems* (Sydney: Federation Press), 251.

Kent, Ann (2007). *Beyond Compliance: China, International Organizations, and Global Security* (Stanford: Stanford University Press).

Keohane, Robert O. (2002). 'Ironies of Sovereignty: The European Union and the United States', 40 *Journal of Common Market Studies* 743.

Kim, Samuel S. (1978). 'The People's Republic of China and the Charter-Based International Legal Order', 72 *American Journal of International Law* 317.

Kim, Samuel S. (1979). *China, the United Nations and World Order* (Princeton: Princeton University Press).

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

Kim, Samuel S. (1994). 'Sovereignty in the Chinese Image of World Order', in Ronald St John Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers), 425.

Kim, Samuel S. (1998). 'Chinese Foreign Policy in Theory and Practice', in Samuel S. Kim, ed., *China and the World: Chinese Foreign Policy Faces the New Millennium* (Boulder, CO: Westview Press), 3.

Kim, Samuel S. (1999). 'China and the United Nations', in Elizabeth Economy and Michel Oksenberg, eds., *China Joins the World: Progress and Prospects* (New York: Council on Foreign Relations), 42.

Kirby, William C. (1997). 'The Internationalization of China: Foreign Relations at Home and Abroad in the Republican Era', 150 *China Quarterly* 433.

Knack, Stephen (2004). 'Does Foreign Aid Promote Democracy?', 48 *International Studies Quarterly* 251.

Knight, Jack, and James Johnson (1994). 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy', 22 *Political Theory* 277.

Köchler, Hans (2006). 'The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order', 5 *Chinese Journal of International Law* 323.

Koh, Harold Hongju (2003). 'On American Exceptionalism', 55 *Stanford Law Review* 1479.

Kong, Lingjie (2007). 'Online Privacy in China: A Survey on Information Practices of Chinese Websites', 6 *Chinese Journal of International Law* 157.

Koskenniemi, Martti (1990). 'The Politics of International Law', 1 *European Journal of International Law* 4.

Koskenniemi, Martti (1993). 'The Effect of Rights on Political Culture', in Philip Alston, ed., *The European Union and Human Rights* (Oxford: Oxford University Press), 99.

Koskenniemi, Martti (1995–1996). 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* 455.

Koskenniemi, Martti (1996). '"Intolerant Democracies": A Reaction', 37 *Harvard International Law Journal* 231.

Koskenniemi, Martti (2002). *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press).

Koskenniemi, Martti (2002). 'The Lady Doth Protest Too Much: Kosovo and the Turn to Ethics in International Law', 65 *Modern Law Review* 159.

Koskenniemi, Martti (2002). 'International Law and Imperialism', in David Freestone, Surya Subedi, and Scott Davidson, eds., *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures* (The Hague: Kluwer Law International), 197.

Koskenniemi, Martti (2004). 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Review of International Affairs* 197.

Koskenniemi, Martti (2005). 'International Law in Europe: Between Tradition and Renewal', 16 *European Journal of International Law* 113.

Kozhevnikov, Feodor I., ed. (1957; trans. 1961). *International Law: A Textbook for Use in Law School* (Moscow: Institute of State and Law of the Academy of Sciences of the U.S.S.R.).

Kratochwil, Friedrich V. (1989). *Rules, Norms, and Decisions: On the Conditions of Practical Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press).

Krisch, Nico (2002). 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo', 13 *European Journal of International Law* 323.

Krisch, Nico (2005). 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 *European Journal of International Law* 369.

Ku, Charlotte (1994). 'Change and Stability in the International System: China Secures Revision of the Unequal Treaties', in Ronald St John Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers), 447.

Kuziemko, Ilyana, and Eric Werker (2006). 'How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations', 114 *Journal of Political Economy* 905.

Lamb, Alastair (1960). *Britain and Chinese Central Asia: The Road to Lhasa, 1767 to 1905* (London: Routledge and Kegan Paul).

Lamb, Alastair (1986). *British India and Tibet, 1766–1910*, rev. ed. (London: Routledge and Kegan Paul).

Lampton, David M. (2001). *Same Bed, Different Dreams: Managing US–China Relations, 1989–2000* (Berkeley: University of California Press).

Lanteigne, Marc (2005). *China and International Institutions: Alternate Paths to Global Power* (London: Routledge).

Lauren, Paul Gordon (1978). 'Human Rights in History: Diplomacy and Racial Equality at the Paris Peace Conference', 2 *Diplomatic History* 257.

Lauren, Paul Gordon (2007). '"To Preserve and Build on its Achievements and to Redress its Shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council', 29 *Human Rights Quarterly* 307.

Lauterpacht, Hersch (1950). *International Law and Human Rights* (London: Stevens and Sons).

Lawrence, Susan V. (1994). 'Democracy, Chinese Style', 32 *Australian Journal of Chinese Affairs* 61.

Leary, Virginia A. (1996). 'The Paradox of Workers' Rights as Human Rights', in Lance A. Compa and Stephen F. Diamond, eds., *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press), 22.

Lee, Che-Fu (1998). 'China's Perception of the Taiwan Issue', 32 *New England Law Review* 695.

Lee, Ching Kwan (2000). 'The "Revenge of History": Collective Memories and Labor Protests in Northeastern China', 1 *Ethnography* (2000), 217.

Lee, Seung-hwan (1992). 'Was There a Concept of Rights in Confucian Virtue-Based Morality?', 19 *Journal of Chinese Philosophy* 241.

Legro, Jeffrey W. (2008). 'Purpose Transitions: China's Rise and the American Response', in Robert S. Ross and Zhu Feng, eds, *China's Ascent: Power, Security, and the Future of International Politics* (Ithaca, NY: Cornell University Press), 163.

Leng, Shao-Chuan (1977). 'The Role of Law in the People's Republic of China as Reflecting Mao Tse-tung's Influence', 68 *Journal of Criminal Law and Criminology* 356.

Li, Chenyang (1997). 'Confucian Value and Democratic Value', 31 *Journal of Value Inquiry* 183.

Li Hongzhang (1998). *Li Hongzhang Quanji: Zougao*, Vol.3 (Changchun: Shidai wenyi chubanshe).

Li, Lianjiang, and Kevin J. O'Brien (1999). 'The Struggle over Village Elections', in Merle Goldman and Roderick MacFarquhar, eds., *The Paradox of China's Post-Mao Reforms* (Cambridge, MA: Harvard University Press), 142.

Li, Lianjiang (2001). 'Elections and Popular Resistance in China', 15:2 *China Information* 1.

Li, Lianjiang (2003). 'The Empowering Effect of Village Elections in China', 43 *Asian Survey* 648.

Li, Zhaojie (1997). 'The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problems in China', in Benedetto Conforti and Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (Dordrecht: Martinus Nijhoff Publishers), 329.

Li, Zhaojie (2002). 'Traditional Chinese World Order', 1 *Chinese Journal of International Law* 20.

Liang, Yuen-Li (1947). 'The Settlement of Disputes in the Security Council: The Yalta Voting Formula', 24 *British Year Book of International Law* 330.

Liang, Yuen-li (1950). 'Abstention and Absence of a Permanent Member in relation to the Voting Procedure in the Security Council', 44 *American Journal of International Law* 694.

Lichtenstein, Natalie G. (1977). 'The People's Republic of China and Revision of the United Nations Charter', 18 *Harvard International Law Journal* 629.

Lieberthal, Kenneth (1995). *Governing China* (New York: W.W. Norton).

Lieberthal, Kenneth (March/April 2005). 'Preventing a War over Taiwan', *Foreign Affairs* 53.

Lieven, Dominic (2002). *Empire: The Russian Empire and its Rivals* (New Haven: Yale University Press).

Lim, C.L. (2007). 'The Great Power Balance, the United Nations and What the Framers Intended: In Partial Response to Hans Köchler', 6 *Chinese Journal of International Law* 307.

Liming, S. (1994). 'The Younghusband Expedition and China's Policy towards Tibet, 1903–1904', in Per Kvaerne, ed., *Tibetan Studies: Proceedings of the 6th Seminar of the International Association for Tibetan Studies* (Oslo: Institute for Comparative Research in Human Culture), 59.

Lin, Changsheng (1995). *Dalu nongcun cunmin zizhi zhidu yanjiu* [*A Study of the Villagers' Self-Government System on the Mainland*] (Taipei: Xingzhengyuan dalu weiyuanhui).

Lin, Chia-Lung (2008). 'The Importance of China and Identity Politics in Taiwan's Diplomacy', in Steve Tsang, ed., *Taiwan and the International Community* (Oxford: Peter Lang), 51.

Ling, L.H.M. (2006). 'Global Presumptions: A Critique of Sørensen's World-Order Change', 41 *Cooperation and Conflict* 382.

Lipset, Seymour Martin (1994). 'The Social Requisites of Democracy Revisited', 59 *American Sociological Review* 1.

Liu, Fengming (1982). *Xiandai guoji fa gangyao* [*Essentials of Modern International Law*] (Beijing: Mass Press).

Liu, I-chou (December 1993). 'Taiwan de zhengzhi shidai', 21 *Zhengzhi Xuebao* 99.

Liu, I-chou (May 1994). 'Taiwan xuanmin zhengdang xingxiang de shidai chayi', 5 *Xuanju yanjiu* 53.

Liu, Jianfei (2003). 'Zhongguo minzhu zhengzhi jianshe yu Zhongmei guanxi' ['The Construction of Democratic Politics in China and Sino-American Relations'], 2 *Zhanglue Yu Guanli* 76.

Liu, Lydia H. (1999). 'The Desire for the Sovereign and the Logic of Reciprocity in the Family of Nations', 29:4 *Diacritics* 150.

Liu, Lydia H. (2004). *The Clash of Empires: The Invention of China in Modern World Making* (Cambridge, MA: Harvard University Press).

Liu, Nanping (1997). *Opinions of the Supreme People's Court: Judicial Interpretation in China* (Hong Kong: Sweet and Maxwell).

Lu, Jianping, and Wang Zhixiang (2005). 'China's Attitude towards the ICC', 3 *Journal of International Criminal Justice* 608.

Lukes, Steven (1975). *Power: A Radical View* (London: Macmillan).

Luo, Zhufeng, ed. (1991). *Religion under Socialism in China*, trans. Donald E. MacInnis and Zheng Xi'an (Armonk, NY: M.E. Sharpe).

Lynch, Daniel C. (2007). 'Envisioning China's Political Future: Elite Responses to Democracy as a Global Constitutive Norm', 51 *International Studies Quarterly* 701.

Lynch, Marc (2002). 'Why Engage? China and the Logic of Communicative Engagement', 8 *European Journal of International Relations* 187.

MacCormick, Neil (1999). *Questioning Sovereignty: Law, State, and Practical Reason* (Oxford: Oxford University Press).

Mackerras, Colin (2003). *China's Ethnic Minorities and Globalisation* (London: RoutledgeCurzon).

MacKuan, Michael (1990). 'Speaking of Politics: Individual Conversational Choice, Public Opinion, and the Prospects for Deliberative Democracy', in John A. Ferejohn and James H. Kuklinski, eds., *Information and Democratic Processes* (Urbana, IL: University of Illinois Press), 59.

Madsen, Richard (1993). 'The Public Sphere, Civil Society, and Moral Community', 19 *Modern China* 183.

Maier, Charles S. (2006). *Among Empires: American Ascendancy and its Predecessors* (Cambridge, MA: Harvard University Press).

Malone, David (1998). *Decision-Making in the UN Security Council: The Case of Haiti, 1990–1997* (New York: Oxford University Press).

Mancall, Mark (1963). 'The Persistence of Tradition in Chinese Foreign Policy', 349 *Annals of the American Academy of Political and Social Science* 14.

Mancall, Mark (1984). *China at the Center: 300 Years of Foreign Policy* (New York: Free Press).

Manion, Melanie F. (1996). 'The Electoral Connection in the Chinese Countryside', 90 *American Political Science Review* 736.

Manion, Melanie (2006). 'Democracy, Community, Trust: The Impact of Elections in Rural China', 39 *Comparative Political Studies* 301.

Manion, Melanie (2008). 'When Communist Party Candidates Can Lose, Who Wins? Assessing the Role of Local People's Congresses in the Selection of Leaders in China', 195 *China Quarterly* 607.

Manion, Melanie (2009). 'How to Assess Village Elections in China', 18 *Journal of Contemporary China* 379.

Manji, Firoze, and Stephen Marks, eds. (2007). *African Perspectives on China in Africa* (Oxford: Fahamu).

Mansfield, Edward D., and Jack Snyder (1995). 'Democratization and the Danger of War', 20:1 *International Security* 5.

Marek, Krystyna (1968). *Identity and Continuity of States in Public International Law*, 2nd ed. (Geneva: Librairie E. Droz).

Marks, Susan (1997). 'The End of History? Reflections on Some International Legal Theses', 8 *European Journal of International Law* 449.

Marks, Susan (2006). 'State-Centrism, International Law, and the Anxieties of Influence', 19 *Leiden Journal of International Law* 339.

Martin, Ian, and Alexander Mayer-Rieckh (2005). 'The United Nations and East Timor: From Self-Determination to State-Building', 12:1 *International Peacekeeping* 125.

McCormick, Barrett L. (1990). *Political Reform in Post-Mao China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press).

McCormick, Barrett L. (1991). 'The Impact of Democracy in China Studies', 40 *Problems of Communism* 126.

McCorquodale, Robert (1995). 'Negotiating Sovereignty: The Practice of the United Kingdom in regard to the Right of Self-Determination', 66 *British Year Book of International Law* 283.

McDougall, Bonnie S. (2004). 'Privacy in Modern China', 2 *History Compass* 1.

McWhinney, Edward (1962). '"Peaceful Coexistence" and Soviet–Western International Law', 56 *American Journal of International Law* 951.

Mearsheimer, John J. (2001). *The Tragedy of Great Power Politics* (New York: W.W. Norton).

Meron, Theodor (2000). *The Implications of the European Convention on Human Rights for the Development of Public International Law* (Strasbourg: Council of Europe).

Merrills, J.G. (1993). *The Development of International Law by the European Court of Human Rights*, 2nd ed. (Manchester: Manchester University Press).

Meyer, William H. (1996). 'Human Rights and MNCs: Theory versus Quantitative Analysis', 18 *Human Rights Quarterly* 368.

Milner, Wesley T. (2004). David Leblang, Steven C. Poe, and Kara Smith, 'Providing Subsistence Rights at the End of the Twentieth Century: Do States Make a Difference?', in Sabine C. Carey and Steven C. Poe, eds., *Understanding Human Rights Violations: New Systematic Studies* (Aldershot: Ashgate), 110.

Milwertz, Cecilia, and Wei Bu (2007). 'Non-Governmental Organising for Gender Equality in China – Joining a Global Emancipatory Epistemic Community', 11 *International Journal of Human Rights* 131.

Min, Qi (1989). *Zhongguo zhengzhi wenhua* [*Chinese Political Culture*] (Kunming: Yunnan People's Publishing House).

Miners, Norman J. (1991). *The Government and Politics of Hong Kong*, 5th ed. (Hong Kong: Oxford University Press).

Mitchell, Neil J., and James M. McCormick (1988). 'Economic and Political Explanations of Human Rights Violations', 40 *World Politics* 476.

Moore, John Bassett (1906). *Digest of International Law*, Vol.1 (Washington, D.C.: United States Government Printing Office).

Moore, Mick (1994). 'How Difficult is it to Construct Market Relations? A Commentary on Platteau', 30 *Journal of Development Studies* 818.

Moravcsik, Andrew (1995). 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe', 1 *European Journal of International Relations* (1995), 157

Morgan, T. Clifton, and Valerie L. Schwebach (1997). 'Fools Suffer Gladly: The Use of Economic Sanctions in International Crises', 41 *International Studies Quarterly* 27.

Morgenthau, Hans (1962). 'A Political Theory of Foreign Aid', 56 *American Political Science Review* 301.

Morphet, Sally (2000). 'China as a Permanent Member of the Security Council: October 1971–December 1999', 31 *Security Dialogue* 151.

Mu, Ch'ien, trans. Chün-tu Hsüeh and George O. Totten (1982). *Traditional Government in Imperial China: A Critical Analysis* (Hong Kong: Chinese University Press).

Mueller, John, and Karl Mueller (1999). 'Sanctions of Mass Destruction'. 78:3 *Foreign Affairs* 43.

Müllerson, R.A. (1989). 'Sources of International Law: New Tendencies in Soviet Thinking', 83 *American Journal of International Law* 494.

Müllerson, Rein (2009). 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia', 8 *Chinese Journal of International Law* 2.

Murphy, Alexander B. (1996). 'The Sovereign State System as Political–Territorial Ideal: Historical and Contemporary Considerations', in Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press), 81.

Murray, Rachel H. (2004). *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press).

Murray, Rachel (2008). 'Recent Developments in the African Human Rights System 2007', 8 *Human Rights Law Review* 356.

Nathan, Andrew J. (1985). *Chinese Democracy* (Berkeley: University of California Press).

Nathan, Andrew J., and Tianjian Shi (1993). 'Cultural Requisites for Democracy in China: Findings from a Survey', 122:2 *Daedalus* 95.

Nathan, Andrew, and Robert S. Ross (1997). *The Great Wall and the Empty Fortress: China's Search for Security* (New York: W.W. Norton).

Nathan, Andrew J. (1999). 'China and the International Human Rights Regime', in Elizabeth Economy and Michel Oksenberg, eds., *China Joins the World: Progress and Prospects* (New York: Council on Foreign Relations, 1999), 136.

Nau, Henry R. (April/May 2007). 'Why We Fight over Foreign Policy', 142 *Policy Review* 25.

Nayak, Meghana V., and Christopher Malone (2009). 'American Orientalism and American Exceptionalism: A Critical Rethinking of US Hegemony', 11 *International Studies Review* 253.

Neuhold, Hans Peter (1999). 'The Foreign-Policy "Cost-Benefit Analysis" Revisited', 42 *German Yearbook of International Law* 84.

Neves, Marcelo (2007). 'The Symbolic Force of Human Rights', 33 *Philosophy & Social Criticism* 411.

Nie, Jing-bao (2004). 'Feminist Bioethics and the Language of Human Rights in the Chinese Context', in Rosemarie Tong, Anne Donchin, and Susan Dodds, eds., *Linking Visions: Feminist Bioethics, Human Rights, and the Developing World* (Lanham, MD: Rowman & Littlefield), 73.

Nmehielle, Vincent O. (2003). 'The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?', 7 *Singapore Journal of International and Comparative Law* 412.

Noland, Marcus (2009). 'The (Non) Impact of UN Sanctions on North Korea', 7 *Asia Policy* 61.

Norbu, Dawa (1991). 'China's Dialogue with the Dalai Lama 1978–90: Prenegotiation Stage or Dead End?', 64 *Pacific Affairs* 351.

Norbu, Dawa (1998). *Tibet: The Road Ahead* (London: Rider).

Norbu, Dawa (2001). *China's Tibet Policy* (Richmond: Curzon Press), 15.

O'Brien, Kevin J. (2001). 'Villagers, Elections, and Citizenship in Contemporary China', 27 *Modern China* 407.

O'Brien, Kevin J., and Rongbin Han (2009). 'Path to Democracy? Assessing Village Elections in China', 18 *Journal of Contemporary China* 359.

O'Connell, D.P. (1956). 'The Status of Formosa and the Chinese Recognition Problem', 50 *American Journal of International Law* 405.

O'Neill, Barry (1996). 'Power and Satisfaction in the United Nations Security Council', 40 *Journal of Conflict Resolution* 219.

O'Neill, Barry (1997). 'Power and Satisfaction in the Security Council', in Bruce Russett, ed., *The Once and Future Security Council* (New York: St Martin's Press), 70.

Onuma, Yasuaki (2003). 'International Law in and with International Politics: The Functions of International Law in International Society', 14 *European Journal of International Law* 105.

Oppenheim, Lassa (1905). *International Law: A Treatise* (London: Longmans, Green).

Oppenheim, Lassa (1921). *The Future of International Law* (Ithaca, NY: Cornell University Press).

Orakhelashvili, Alexander (2005). 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *European Journal of International Law* 59.

Orakhelashvili, Alexander (2006). *Peremptory Norms in International Law* (Oxford: Oxford University Press).

Orakhelashvili, Alexander (2009). 'Kosovo and the Pitfalls of Over-theorizing International Law: Observations on Hilpold's Rejoinder', 8 *Chinese Journal of International Law* 589.

Ostergaard, Clements Stubbs (1989). 'Citizens, Groups and Nascent Civil Society in China: Towards an Understanding of the 1989 Student Demonstrations', 4:2 *China Information* 28.

Osterhammel, Jürgen (1986). 'Semi-Colonialism and Informal Empire in Twentieth Century China: Towards a Framework of Analysis', in Wolfgang H. Mommsen and Jürgen Osterhammel, eds., *Imperialism and After: Continuities and Discontinuities* (London: Allen & Unwin), 290.

O'Sullivan, Aisling, and Phil C.W. Chan (2006). 'Judicial Review in Ireland and the Relationship between the Irish Constitution and Natural Law', 15:2 *Nottingham Law Journal* 18.

Pack, Howard, and Janet Rothenberg Pack (1993). 'Foreign Aid and the Question of Fungibility', 75 *Review of Economics and Statistics* 258.

Padelford, Norman J. (1948). 'The Use of the Veto', 2 *International Organization* 227.

Palmer, Michael (1993). 'Minors to the Fore: Juvenile Protection Legislation in the PRC', in Michael Freeman, ed., *Annual Survey of Family Law: 1991*, Vol.15 (London: International Society on Family Law), 299.

Palmer, Michael (2000). 'Caring for Young and Old: Developments in the Family Law of the People's Republic of China, 1996–8', in Andrew Bainham, ed., *International Survey of Family Law, 2000* (Dordrecht: Kluwer), 95.

Palmer, Michael (2005). 'Patriarchy, Privacy and Protection: Slowly Conceptualising Domestic Violence in Chinese Law', in Natalia Iu. Erpyleva, Jane Henderson, and M. Butler, eds., *Forging a Common Legal Destiny: Liber Amicorum in Honour of Professor W.E. Butler* (London and New York: Wildy, Simmonds and Hill), 786.

Palmer, Michael (2007). 'On China's Slow Boat to Women's Rights: Revisions to the Women's Protection Law, 2005', 11 *International Journal of Human Rights* 151.

Pan, Baocun (1985). 'On the Scientific Nature of International Law', 5 *Studies in Law* 84.

Pan, Zhongqi (2008). 'China's Changing Image of and Engagement in World Order', in Sujian Guo and Jean-Marc F. Blanchard, eds., *'Harmonious World' and China's New Foreign Policy* (Lanham, MD: Rowman & Littlefield), 39.

Panditaratne, Dinusha (2008). 'Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse since 1997?', 8 *Human Rights Law Review* 295.

Pang, Zhongying (2005). 'China's Changing Attitude to UN Peacekeeping', 12 *International Peacekeeping* 87.

Pape, Robert A. (1997). 'Why Economic Sanctions Do Not Work', 22:2 *International Security* 90.

Paulus, Andreas L. (2004). 'From Neglect to Defiance? The United States and International Adjudication', 15 *European Journal of International Law* 783.

Peerenboom, Randall (1999). 'Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China', 11 *Cultural Dynamics* 315.

Peerenboom, Randall (2004–2005). 'Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia', 15 *Duke Journal of Comparative and International Law* 75.

Peerenboom, Randall (2005). 'Assessing Human Rights in China: Why the Double Standard?', 38 *Cornell International Law Journal* 71.

Peerenboom, Randall (2005–2006). 'Law and Development of Constitutional Democracy in China: Problem or Paradigm?', 19 *Columbia Journal of Asian Law* 185.

Pellet, Alain (2000). 'Brief Remarks on the Unilateral Use of Force', 11 *European Journal of International Law* 385.

Perry, Elizabeth J. (1989). 'State and Society in Contemporary China', 41 *World Politics* 579.

Perry, Elizabeth J. (1994). 'Shanghai's Strike Wave of 1957', 137 *China Quarterly* 1.

Petersmann, Ernst-Ulrich (2004). 'The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?', 7 *Journal of International Economic Law* 605.

Peyrefitte, Alain (1992). *The Immobile Empire* (New York: Knopf).

Pomeranz, Kenneth (2000). *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton: Princeton University Press).

Potter, Pitman B. (2005). 'Governance of the Periphery: Balancing Local Autonomy and National Unity', 19 *Columbia Journal of Asian Law* 294.

Powell, Catherine (2012). 'Libya: A Multilateral Constitutional Moment?', 106 *American Journal of International Law* 298.

Posner, Eric A. (2003). 'Do States Have a Moral Obligation to Comply with International Law?', 55 *Stanford Law Review* 1901.

Posner, Eric A. (2003). 'A Theory of the Laws of War', 70 *University of Chicago Law Review* 297.

Posner, Eric A. (2005). 'Terrorism and the Laws of War', 5 *Chicago Journal of International Law* 423.

Posner, Eric A., and Miguel F.P. de Figueiredo (2005). 'Is the International Court of Justice Biased?'. 34 *Journal of Legal Studies* 599.

Posner, Eric A., and Alan O. Sykes (2005). 'Optimal War and *Jus Ad Bellum*', 93 *Georgia Law Review* 993.

Posner, Eric A., and John Yoo (2006). 'International Law and the Rise of China', 7 *Chicago Journal of International Law* 1.

Pritchard, Earl H. (2000). *The Crucial Years of Early Anglo-Chinese Relations, 1750–1800* (New York: Routledge).

Puder, Markus G. (2001). 'The Grass Will Not Be Trampled Because the Tigers Need Not Fight – New Thoughts and Old Paradigms for Détente across the Taiwan Strait', 34 *Vanderbilt Journal of Transnational Law* 481.

Pugh, Michael (2010). 'Accountability and Credibility: Assessing Host Population Perceptions and Expectations', in Cedric de Coning, Andreas Stensland, and Thierry Tardy, eds., *Beyond the New Horizon* (Oslo: Norwegian Institute of International Affairs), 56.

Pye, Lucian (1990). 'China: Erratic State, Frustrated Society', 69:4 *Foreign Affairs* 56.

Pye, Lucian (1991). 'The State and the Individual: An Overview', 127 *China Quarterly* 443.

Quigley, Harold Scott (1926). 'Extraterritoriality in China', 20 *American Journal of International Law* 46.

Rabgey, Tashi, and Tseten Wangchuk Sharlho (2004) 'Sino-Tibetan Dialogue in the Post-Mao Era: Lessons and Prospects', *Policy Studies* 12 (Washington, D.C.: East–West Center Washington).

Rajagopal, Balakrishnan (2003). *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press).

Ramo, Joshua Cooper (2004). *The Beijing Consensus* (London: Foreign Policy Centre).

Rankin, Mary (1993). 'Some Observations on a Chinese Public Sphere', 19 *Modern China* 158.

Rao, K. Krishna (1962). 'The Sino-Indian Boundary Question and International Law', 11 *International and Comparative Law Quarterly* 375.

Raustiala, Kal, and Anne-Marie Slaughter (2002). 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, eds., *Handbook of International Relations* (London: Sage), 538.

Rawls, John (1993). 'The Law of Peoples', in Stephen Shute and Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books), 42.

Raz, Joseph (1979). 'The Rule of Law and its Virtue', in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press), 210.

Redondo, Elvira Domínguez (2008). 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', 7 *Chinese Journal of International Law* 721.

Reisman, W. Michael (1990). 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law* 866.

Reisman, W. Michael (1992). 'The View from the New Haven School of International Law', 86 *Proceedings of American Society of International Law* 118.

Reisman, W. Michael (1993). 'The Constitutional Crisis in the United Nations', 87 *American Journal of International Law* 83.

Reisman, W. Michael (1999). 'The United States and International Institutions', 41:4 *Survival* 62.

Reisman, W. Michael (2000). 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *European Journal of International Law* 3.

Reisman, W. Michael (2001). 'In Defense of World Public Order', 95 *American Journal of International Law* 833.

Reisman, W. Michael, and Andrea Armstrong (2006). 'The Past and Future of the Claim of Preemptive Self-Defense', 100 *American Journal of International Law* 525.

Richmond, Oliver P. (2008). *Peace in International Relations* (London: Routledge).

Rigger, Shelley (2006). 'Taiwan's Rising Rationalism: Generations, Politics, and "Taiwanese Nationalism"', *Policy Studies* 26 (Washington, D.C.: East–West Center Washington).

Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. (1999). *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press).

Risse, Thomas (2000). 'International Institutions, Non-State Actors, and Domestic Change: The Case of Human Rights', *Recueil des cours de l'académie de droit européen*, Vol.VIII, Book 2 (2000), 1.

Risse, Thomas (2000). '"Let's Argue!": Communicative Action in World Politics', 54 *International Organization* 1.

Roberts, Adam (2008). 'International Relations after the Cold War', 84 *International Affairs* 335.

Rorty, Amélie Oksenberg (1989). 'Relativism, Persons, and Practices', in Michael Krausz, ed., *Relativism: Interpretation and Confrontation* (Notre Dame, IN: University of Notre Dame Press), 418.

Rosemont, Henry, Jr. (1988). 'Why Take Rights Seriously? A Confucian Critique', in Leroy Rouner, ed., *Human Rights and the World's Religions* (Notre Dame, IN: University of Notre Dame Press), 167.

Rosenau, James (2005). 'The Illusion of Power and Empire', 44 *History and Theory* 73.

Rosenstock, Robert (1971). 'The Declaration of Principles of International Law concerning Friendly Relations: A Survey', 65 *American Journal of International Law* 713.

Rotberg, Robert I., ed. (2008). *China into Africa: Trade, Aid, and Influence* (Baltimore: Brookings Institution Press).

Roth, Brad R. (2000). *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press).

Rowe, William T. (1990). 'The Public Sphere in Modern China', 16 *Modern China* 309.

Rubin, Alfred P. (2000). 'Secession and Self-Determination: A Legal, Moral, and Political Analysis', 36 *Stanford Journal of International Law* 253.

Ruskola, Teemu (2010). 'Raping Like a State', 57 *UCLA Law Review* 1477.

Sadat, Leila Nadya (2004). 'Terrorism and the Rule of Law', 3 *Washington University Global Studies Law Review* 135.

Šahovic, Milan (1972). *Principles of International Law Concerning Friendly Relations and Cooperation* (New York: Oceana).

Saul, Ben (2005). 'Definition of "Terrorism" in the UN Security Council: 1985–2004', 4 *Chinese Journal of International Law* 141.

Saul, Matthew (2011). 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?', 11 *Human Rights Law Review* 609.

Sautman, Barry, and Irene Eng (2001). 'Tibet: Development for Whom?', 15:2 *China Information* 20.

Sautman, Barry (2003). '"Cultural Genocide" and Tibet', 38 *Texas International Law Journal* 173.

Sautman, Barry, and Yan Hairong (2007). 'Friends and Interests: China's Distinctive Links with Africa', 50:3 *African Studies Review* 75.

Scannella, Patrizia, and Peter Splinter (2007). 'The United Nations Human Rights Council: A Promise to be Fulfilled', 7 *Human Rights Law Review* 41.

Scelle, G. (1911). 'Studies on the Eastern Question', 5 *American Journal of International Law* 144.

Schachter, Oscar (1982–V). 'International Law in Theory and Practice', 178 *Recueil des cours* 1.

Schachter, Oscar (1986). 'In Defense of International Rules on the Use of Force', 53 *University of Chicago Law Review* 113.

Schmitt, Carl (1995). *The Concept of the Political* (Chicago: University of Chicago Press).

Schraeder, Peter J., Steven W. Hook, and Bruce Taylor (1998). 'Clarifying the Foreign Aid Puzzle: A Comparison of American, Japanese, French, and Swedish Aid Flows', 50 *World Politics* 294.

Schrijver, Nico (2007). 'The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles?', 20 *Leiden Journal of International Law* 809.

Schubert, Gunther, and Chen Xuelian (2007). 'Village Elections in Contemporary China: New Spaces for Generating Regime Legitimacy? Experiences from Lishu County', 3 *China Perspectives* 12.

Schubert, Gunther (2008). 'One-Party Rule and the Question of Legitimacy in Contemporary China: Preliminary Thoughts on Setting up a New Research Agenda', 17 *Journal of Contemporary China* 191.

Schumpeter, Joseph (1947). *Capitalism, Socialism, and Democracy* (New York: Harper).

Schwartz, Benjamin I. (1968). 'The Chinese Perception of World Order: Past and Present', in John King Fairbank, ed., *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, MA: Harvard University Press), 276.

Schwartz, Ronald D. (1999). 'Renewal and Resistance: Tibetan Buddhism in the Modern Era', in Ian Harris, ed., *Buddhism and Politics in Twentieth Century Asia* (London: Pinter), 229.

Scott, Ian (1989). *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong: Oxford University Press).

Segal, Gerald (1995). *Defending China* (New York: Oxford University Press).

Sellers, Mortimer N.S. (2006). *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (New York: Palgrave Macmillan).

Sen, Amartya (1997). *Human Rights and Asian Values* (New York: Carnegie Center on Ethics and International Affairs).

Setear, John K. (1996). 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', 37 *Harvard International Law Journal* 139.

Shambaugh, David (1996). 'Containment or Engagement of China? Calculating Beijing's Responses', 21:2 *International Security* 180.

Shany, Yuval (2005). 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* 907.

Shaw, Malcolm N. (1996). 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 *British Year Book of International Law* 75.

Shaw, Malcolm (2000). *Theory of the Global State: Globality as Unfinished Revolution* (Cambridge: Cambridge University Press).

Shen, Kui, 'Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case"', 12 *Pacific Rim Law and Policy Journal* (2003), 199.

Shen, Yaping, and Chen Kelin (2002). 'Xuanju difang guojia jiguan lingdao ren zhi xiankuang: Jiangxi sheng ji bufen shi xian xiang zhen jianjie xuanju qingkuang de diaocha' ('Electing Local State Leaders: Survey on Indirect Elections at the Jiangxi Provincial Level and in a Sample of Cities, Counties, Townships, and Towns'), in Cai Dingjian, ed., *Zhongguo xuanju zhuangkuang de baogao* [*Report on the Status of China's Elections*] (Beijing: Falü chubanshe), 100.

Shi, Weimin (2000). *Gongxuan yu zhixuan: xiangzhen renda xuanju zhidu yanjiu* [*Open Selection and Direct Election: Research on the Electoral System for Township and Town People's Congresses*] (Beijing: Zhongguo shehui kexue chubanshe).

Shih, Chih-Yu (1993). *China's Just World: The Morality of Chinese Foreign Policy* (Boulder, CO: Lynne Rienner).

Shih, Chih-Yu (2003). *Navigating Sovereignty: World Politics Lost in China* (Basingstoke: Palgrave Macmillan).

Shimazu, Naoko (1998). *Japan, Race, and Equality: The Racial Equality Proposal of 1919* (London and New York: Routledge).

Shu, Xiaoling, and Bian Yanjie (2003). 'Market Transition and Gender Gap in Earnings in Urban China', 81:4 *Social Forces* 1107.

Shue, Vivienne (1998). *The Reach of the State: Sketches of the Chinese Body Politic* (Stanford: Stanford University Press).

Simma, Bruno (1999). 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* 1.

Slaughter Burley, Anne-Marie (1993). 'International Law and International Relations Theory: A Dual Agenda', 87 *American Journal of International Law* 205.

Slaughter, Anne-Marie (1993). 'Law and the Liberal Paradigm in International Relations Theory', *Proceedings of the American Society of International Law* 180.

Slaughter, Anne-Marie (1995). 'International Law in a World of Liberal States', 6 *European Journal of International Law* 503.

Slaughter, Anne-Marie, Andrew S. Tulumello, and Stepan Wood (1998). 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *American Journal of International Law* 367.

Slaughter, Anne-Marie (2000). 'Building Global Democracy', 1 *Chicago Journal of International Law* 223.

Slaughter, Anne-Marie, and William Burke-White (2002). 'An International Constitutional Moment', 43 *Harvard International Law Journal* 1.

Slaughter, Anne-Marie (2005). 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', 99 *American Journal of International Law* 619.

Slaughter, Anne-Marie, and William Burke-White (2006). 'The Future of International Law is Domestic (or, the European Way of Law)', 47 *Harvard International Law Journal* 327.

Sloane, Robert D. (2001). 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights', 34 *Vanderbilt Journal of Transnational Law* 527.

Smith, Rhona K.M. (2011). 'More of the Same or Something Different? Preliminary Observations on the Contribution of Universal Periodic Review with Reference to the Chinese Experience', 10 *Chinese Journal of International Law* 565.

Smith, Warren W., Jr. (2009). *China's Tibet?: Autonomy or Assimilation* (Lanham, MD: Rowman & Littlefield).

Solinger, Dorothy J. (1992). 'Urban Entrepreneurs and the State: The Merger of State and Society', in Arthur Lewis Rosenbaum, ed., *State and Society in China* (Boulder, CO: Westview Press), 121.

Solinger, Dorothy J. (1993). 'China's Transients and the State: A Form of Civil Society?', 21 *Politics and Society* 91.

Sørensen, Georg (2006). 'What Kind of World Order?: The International System in the New Millennium', 41 *Cooperation and Conflict* 343.

Sørensen, Georg (2006). 'What Kind of World Order? A Response to Critics', 41 *Cooperation and Conflict* 393.

Sornarajah, M. (2001). 'The Asian Perspective to International Law in the Age of Globalization', 5 *Singapore Journal of International and Comparative Law* 284.

Sperling, Elliot (2004). 'The Tibet–China Conflict: History and Polemics', *Policy Studies* 7 (Washington, D.C.: East–West Center Washington).

Stähle, Stefan (2008). 'China's Shifting Attitude towards United Nations Peacekeeping Operations', 195 *China Quarterly* 631.

Stein, Justin J. (2003). 'Taking the Deliberative Turn in China: International Law, Minority Rights, and the Case of Xinjiang', 14 *Journal of Public and International Affairs* 1.

Stein, Ted L. (1985). 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard International Law Journal* 457.

Steinberg, Richard H., and Jonathan M. Zasloff (2006). 'Power and International Law', 100 *American Journal of International Law* 64.

Steiner, H. Arthur (1950). 'Mainsprings of Chinese Communist Foreign Policy', 44 *American Journal of International Law* 69.

Stephan, Paul B. (1997). 'Accountability and International Lawmaking: Rules, Rents and Legitimacy', 17 *Northwestern Journal of International Law and Business* 681.

Stephan, Paul B. (2012). 'Rethinking the International Rule of Law: The Homogeneity Fallacy and International Law's Threat to Itself', 4 *Jerusalem Review of Legal Studies* (2012), 19

Stinchcombe, Arthur L. (1990). *Information and Organizations* (Berkeley: University of California Press).

Strand, David (1989). *Rickshaw Beijing* (Berkeley: University of California Press).

Strand, David (1990). 'Protests in Beijing: Civil Society and Public Sphere in China', 39:3 *Problems of Communism* 1.

Strang, David (1996). 'Contested Sovereignty: The Social Construction of Colonial Imperialism', in Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press), 22.

Suhrke, Astri (2001). 'Peacekeepers as Nation-builders: Dilemmas of the UN in East Timor', 8:4 *International Peacekeeping* 1.

Sullivan, Lawrence R. (1990). 'The Emergence of Civil Society in China, Spring 1989', in Tony Saich, ed., *The Chinese People's Movement: Perspectives on Spring 1989* (Armonk, NY: M.E. Sharpe), 126.

Sulmasy, Glenn, and John Yoo (2007). 'Counterintuitive: Intelligence Operations and International Law', 28 *Michigan Journal of International Law* 625.

Suzuki, Shogo (2004). 'China's Perceptions of International Society in the Nineteenth Century: Learning More about Power Politics?', 28 *Asian Perspectives* 115.

Suzuki, Shogo (2009). *Civilization and Empire: China and Japan's Encounter with European International Society* (London: Routledge).

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

Svensson, Marina (1996). *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898–1949* (Lund: Lund University).

Talmon, Stefan (2005). 'The Security Council as World Legislature', 99 *American Journal of International Law* 175.

Tan, Eugene K.B. (2008). 'The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia', 12 *Singapore Year Book of International Law* 171.

Tan, Qingshan (2004). 'Building Institutional Rules and Procedures: Village Election in China', 37 *Policy Sciences* 1.

Tang, Shiping (2008). 'From Offensive to Defensive Realism: A Social Evolutionary Interpretation of China's Security Strategy', in Robert S. Ross and Zhu Feng, eds, *China's Ascent: Power, Security, and the Future of International Politics* (Ithaca, NY: Cornell University Press), 141.

Tanner, Murray Scot (1994). 'The Erosion of Communist Party Control over Lawmaking in China', 138 *China Quarterly* 382.

Tay, Simon S.C. (2008). 'The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment', 12 *Singapore Year Book of International Law* 151.

Taylor, Ian (2006). *China and Africa: Engagement and Compromise* (London: Routledge).

Taylor, Ian (2006). 'China's Oil Diplomacy in Africa', 82 *International Affairs* 937.

Taylor, Ian (2007). 'Governance in Africa and Sino-African Relations: Contradictions or Confluence?', 27 *Politics* 139.

Taylor, Ian (2008). 'Sino-African Relations and the Problem of Human Rights', 107 *African Affairs* 63.

Teitel, Ruti G. (2002). 'Humanity's Law: Rule of Law for the New Global Politics', 35 *Cornell International Law Journal* 355.

Terlingen, Yvonne (2007). 'The New Human Rights Council: A New Era in UN Human Rights Work?', 21 *Ethics & International Affairs* 167.

Terrill, Ross (2003). *The New Chinese Empire* (Sydney: University of New South Wales Press).

Tesón, Fernando R. (1992). 'The Kantian Theory of International Law', 92 *Columbia Law Review* 53.

Thakur, Ramesh (2013). 'R2P after Libya and Syria: Engaging Emerging Powers', 36:2 *Washington Quarterly* 61.

Thalakada, Nigel 'China's Voting Pattern in the Security Council, 1990–1995', in Russett, *supra* n.80, 83.

Thompson, Alexander (2006). 'Coercion through IOs: The Security Council and the Logic of Information Transmission', 60 *International Organization* 1.

Thompson, Dennis F. (1999). 'Democratic Theory and Global Society', 7 *Journal of Political Philosophy* 111.

Thurston, Anne F. (1999). *Muddling toward Democracy: Political Change in Grassroots China* (Washington, D.C.: United States Institute of Peace).

Tibi, Bassam (1994). 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations', 16 *Human Rights Quarterly* 277.

Tierney, Stephen (1999). 'In a State of Flux: Self-Determination and the Collapse of Yugoslavia', 6 *International Journal on Minority and Group Rights* 197.

Tomuschat, Christian (2002). 'Yugoslavia's Damaged Sovereignty over the Province of Kosovo', in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth de Vos, and John Dugard, eds., *State, Sovereignty, and International Governance* (New York: Oxford University Press), 323.

Tsagourias, Nicholas (2006). 'International Community, Recognition of States and Political Cloning', in Stephen Tierney and Colin Warbrick, eds., *Towards an International Legal Community?: The Sovereignty of States and the Sovereignty of International Law* (London: British Institute of International and Comparative Law), 211.

Tsering, Shakya (1999). *The Dragon in the Land of the Snows: A History of Modern Tibet since 1947* (New York: Columbia University Press).

Tsering, Shakya (1999). 'Tibet and the League of Nations', 10:3 *Tibet Journal* 48.

Tunkin, Grigory Ivanovich (1958–III). 'Co-existence and International Law', 95 *Recueil des cours* 1.

Turner, Skinner (1929). 'Extraterritoriality in China', 10 *British Year Book of International Law* 56.

Trebilcock, Michael J., and Robert Howse (2005). 'Trade Policy & Labor Standards', 14 *Minnesota Journal of Global Trade* 261.

Trimble, Phillip R. (1997). 'Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy', 95 *Michigan Law Review* 1944.

Tull, Denis M. (2006). 'China's Engagement in Africa: Scope, Significance and Consequences', 44 *Journal of Modern African Studies* 459.

Tuttle, Gray (2005). *Tibetan Buddhists in the Making of Modern China* (New York: Columbia University Press).

Uchida, Kenzo (1971). 'A Brief History of Postwar Japan–China Relations', 9 *Developing Economies* 538.

Upton, Helen (2007). 'The Human Rights Council: First Impressions and Future Challenges', 7 *Human Rights Law Review* 29.

Vagts, Detlev F. (2001). 'Hegemonic International Law', 95 *American Journal of International Law* 843.

Van Sickle, Alix, and Wayne Sandholtz, 'The Emerging Right to Democracy', in Wayne Sandholtz and Kendall Stiles, eds., *International Norms and Cycles of Change* (New York: Oxford University Press, 2008), 289.

Van Spengen, Wim (2000). *Tibetan Border Worlds: A Geohistorical Analysis of Trade and Traders* (London: Kegan Paul International).

Van Walt van Praag, Michael C. (1987). *The Status of Tibet: History, Rights and Prospects in International Law* (Boulder, CO: Westview Press).

Verdirame, Guglielmo (2007). '"The Divided West": International Lawyers in Europe and America', 18 *European Journal of International Law* 553.

Vincent, R.J. (1986). *Human Rights and International Relations* (Cambridge: Cambridge University Press).

Visweswaran, Kamala (2004). 'Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work', 26 *Human Rights Quarterly* 483.

Voeten, Erik (2001). 'Outside Options and the Logic of Security Council Action', 95 *American Political Science Review* 845.

Von Bernstorff, Jochen (2008). 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law', 19 *European Journal of International Law* 903.

Von Bogdandy, Armin (2004). 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *European Journal of International Law* 885.

Wachman, Alan M. (2001). 'Does the Diplomacy of Shame Promote Human Rights in China?', 22 *Third World Quarterly* 257.

Wacks, Raymond (1989). *Personal Information: Privacy and the Law* (Oxford: Clarendon Press).

Wakeman, Frederic, Jr. (1993). 'The Civil Society and Public Sphere in China', 19 *Modern China* 108.

Walder, Andrew G. (1991). 'Workers, Managers and the State: The Reform Era and the Political Crisis of 1989', 127 *China Quarterly* 467.

Walder, Andrew G., and Gong Xiaoxia, 'Workers in the Tiananmen Protests: The Politics of the Beijing Workers' Autonomous Federation', 29 *Australian Journal of Chinese Affairs* (1993), 1.

Waley-Cohen, Joanna (1999). *The Sextants of Beijing: Global Currents in Chinese History* (New York: W.W. Norton).

Wallace, William (1999). 'The Sharing of Sovereignty: The European Paradox', 47 *Political Studies* 503.

Waltz, Kenneth (1979). *Theory of International Politics* (Reading, MA: Addison-Wesley).

Walzer, Michael (1977). *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books).

Walzer, Michael (2004). *Arguing about War* (New Haven: Yale University Press).

Wang, Jiafu (1998). 'Guanyu yifa zhiguo jianshe shehui zhuyi fazhi guojia de lilun he shijian wenti' ['On Governing the Country in Accordance with Law: Theoretical and Practical Issues in Establishing a Socialist Rule-of-Law State'], in Ministry of Justice, ed., *Zhonggong zhongyang fazhi jiangzuo huibian* (Beijing: Falü chubanshe).

Wang, Jisi (2004). 'China's Changing Role in Asia', in Kokubun Ryosei and Wang Jisi, eds., *The Rise of China and a Changing East Asian Order* (Tokyo: Japan Center for International Exchange), 3.

Wang, Tieya, and Wei Min, eds. (1981). *Guoji fa* [*International Law*] (Beijing: Law Press).

Wang, Tieya (1990–II). 'International Law in China: Historical and Contemporary Perspectives', 221 *Recueil des cours* 195.

Wang, Xu (1997). 'Mutual Empowerment of State and Peasantry: Grassroots Democracy in Rural China', 25 *World Development* 1431.

Wang, Yizhou (2005). *Tanxun quanqiu zhuyi guoji guanxi* [*Exploring Globalist International Relations*] (Beijing: Beijing University Press).

Warren, Samuel D., and Louis D. Brandeis (1890). 'The Right to Privacy', 4 *Harvard Law Review* 193.

Watson, Adam (1992). *The Evolution of International Society: A Comparative Historical Analysis* (London: Routledge).

Wedgwood, Ruth (September/October 2002). 'Gallant Delusions', 101 *Foreign Policy* 44.

Wei, Julie Lee, Ramon H. Myers, and Donald G. Gillin, eds. (1994). *Prescriptions for Saving China: Selected Writing of Sun Yat-sen* (Stanford: Hoover Institution).

Wei, Min, ed. (1986). *Guoji Fa Gailun* [*Introduction to International Law*] (Beijing: Guangmin Daily Press).

Weil, Prosper (1983). 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* 413.

Weller, Marc (2005). 'The Self-determination Trap', 4 *Ethnopolitics* 3.

Welsh, Jennifer (2011). 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP', 25 *Ethics & International Affairs* 255.

Weng, Byron S.J. (1972). *Peking's U.N. Policy: Continuity and Change* (New York: Praeger).

Wesley-Smith, Peter (1997). 'Maintenance of the Bill of Rights', 27 *Hong Kong Law Journal* 15.

Westlake, John (1914). *Collected Papers of John Westlake*, ed. Lassa Oppenheim (Cambridge: Cambridge University Press).

Wheeler, Nicholas, and Tim Dunne (2001). 'East Timor and the New Humanitarian Intervention', 77 *International Affairs* 805.

Wheeler, Nicholas J. (2002). *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press).

White, Gordon (1993). 'Prospects for Civil Society in China: A Case Study of Xiaoshan City', 29 *Australian Journal of Chinese Affairs* 63.

White, Hayden (1978). *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore: Johns Hopkins University Press).

Wilde, Ralph (2008). *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (Oxford: Oxford University Press).

Willoughby, Westel W. (1922). *China at the Conference* (Baltimore: Johns Hopkins University Press).

Wills, John E., Jr. (1984). *Embassies and Illusions: Dutch and Portuguese Envoys to K'ang-Hsi* (Cambridge, MA: Harvard University Press).

Winkler, Adam (1999). 'Just Sanctions', 21 *Human Rights Quarterly* 133.

Woods, Ngaire (1999). 'Good Governance in International Organizations', 5 *Global Governance* 39.

Wright, Mary Clabaugh (1962). *The Last Stand of Chinese Conservatism: The T'ung-Chih Restoration, 1862–1874* (Stanford: Stanford University Press).

Wright, Quincy (1955). 'The Chinese Recognition Problem', 49 *American Journal of International Law* 320.

Wu, Chengqiu (2010). 'Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Humanitarian Crises', 15 *Journal of Chinese Political Science* 71.

Wu, Yu-shan (April 2001). 'Liangan guanxi zhong de Zhongguo yishi yu Taiwan yishi', 4 *Zhongguo Shiwu* 71.

Wu, Zhengyu, and Ian Taylor (2011). 'From Refusal to Engagement: Chinese Contributions to Peacekeeping in Africa', 29 *Journal of Contemporary African Studies* 137.

Xue, Hanqin (2007). 'Chinese Observations on International Law', 6 *Chinese Journal of International Law* 83.

Xue, Hanqin, and Jin Qian (2009). 'International Treaties in the Chinese Domestic Legal System', 8 *Chinese Journal of International Law* 299.

Yahuda, Michael (1996). 'The International Standing of the Republic of China over Taiwan', 148 *China Quarterly* 1319.

Yahuda, Michael B. (1996). *Hong Kong: China's Challenge* (London and New York: Routledge).

Ye, Zicheng (2003). *Zhongguo Dazhanlue* [*The Grand Strategy of China*] (Beijing: Zhongguo shehuishexue chubanshe).

Yoo, John C. (2000). 'The Dogs that Didn't Bark: Why were International Legal Scholars MIA on Kosovo?', 1 *Chicago Journal of International Law* 149.

Yoo, John C. (2000). 'UN Wars, US War Powers', 1 *Chicago Journal of International Law* 355.

Yoo, John (2003). 'International Law and the War in Iraq', 97 *American Journal of International Law* 563.

Yoo, John C. (2003). 'The Status of Soldiers and Terrorists under the Geneva Conventions', 3 *Chinese Journal of International Law* 135.

Yoo, John C., and James C. Ho (2003). 'The Status of Terrorists', 44 *Virginia Journal of International Law* 207.

Yoo, John (2004). 'Transferring Terrorists', 79 *Notre Dame Law Review* 1183.

Yoo, John (2004). 'Using Force', 71 *University of Chicago Law Review* 729.

Yoo, John C. (2006). 'Force Rules: UN Reform and Intervention', 6 *Chicago Journal of International Law* 641.

Yoo, John C., and Will Trachman (2005). 'Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations', 5 *Chicago Journal of International Law* 379.

You, Ji, 'China's Anti-Secession Law and the Risk of War in the Taiwan Strait', 27 *Contemporary Security Policy* (2006), 237.

Young, Oran R. (1992). 'The Effectiveness of International Institutions: Hard Cases and Critical Variables', in James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press), 160.

Zabrovskaia, Larisa V. (1993). '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', 6 *Journal of Historical Sociology* 351.

Zhang, Xiaoming (2011). 'China in the Conception of International Society: The English School's Engagements with China', 37 *Review of International Studies* 763.

Zhang, Yongjin (2001). 'System, Empire and State in Chinese International Relations', 27 *Review of International Studies* 43.

Zhang, Yongjin, and Barry Buzan (2012). 'The Tributary System as International Society in Theory and Practice', 5 *Chinese Journal of International Politics* 3.

Zhao, Lei (2011). 'Two Pillars of China's Global Peace Engagement Strategy: UN Peacekeeping and International Peacebuilding', 18 *International Peacekeeping* 344.

Zhao, Suisheng (2004). *A Nation-State by Construction: Dynamics of Modern Chinese Nationalism* (Stanford: Stanford University Press).

Zhao, Suisheng (2004). 'Chinese Nationalism and Pragmatic Foreign Policy Behavior', in Suisheng Zhao, ed., *Chinese Foreign Policy: Pragmatism and Strategic Behavior* (Armonk, NY: M.E. Sharpe, 2004), 66.

Zheng, Yongnian (1994). 'Development and Democracy: Are They Compatible in China?', 109 *Political Science Quarterly* 235.

Zheng, Yongnian (1999). *Discovering Chinese Nationalism in China: Modernization, Identity, and International Relations* (Cambridge: Cambridge University Press).

Zhong, Yang, Jie Chen, and John M Scheb, II (1997). 'Political Views from Below: A Survey of Beijing Residents', 30 *PS: Political Science and Politics* 474.

Zhou, Gengsheng, *Guoji fa* [*International Law*] (Beijing: Commercial Press, 1981).

Zhou, Xiaoling (1985). 'The United Nations and International Law-Making', 4 *International Studies* 29.

Zhu, Lisun (1985). *Guoji gong fa* [*Public International Law*] (Beijing: Central Broadcasting and Televising University Press).

Zielonka, Jan (2006). *Europe as Empire: The Nature of the Enlarged European Union* (Oxford: Oxford University Press).

Zielonka, Jan (2012). 'Empires and the Modern International System', 17 *Geopolitics* 502.

Žižek, Slavoj (2004). *Iraq: The Borrowed Kettle* (London: Verso).

Zou, Keyuan, 'Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law', 4 *Chinese Journal of International Law* (2005), 455.

Reports and Working Papers

Garfield, Richard, 'Morbidity and Mortality among Iraqi Children from 1990 through 1998: Assessing the Impact of the Gulf War and Economic Sanctions', July 1999, http://www.cam.ac.uk/societies/casi/info/garfield/dr-garfield.html.

Glaser, Bonnie, and Brad Glosserman (September 2008). 'Promoting Confidence Building across the Taiwan Strait: A Report of the CSIS International Security Program and Pacific Forum CSIS', Center for Strategic and International Studies, Washington, D.C.

Higgins, Rosalyn (1995). *Report to Institut de droit international*, 66–I *Yearbook of Institut de droit international* 375.

Price, John, 'A Just Peace? The 1951 San Francisco Peace Treaty in Historical Perspective', Japan Policy Research Institute Working Paper No.78, June 2001.

Sceats, Sonya, with Shaun Breslin, 'China and the International Human Rights System', London: Chatham House, October 2012.

Other Resources

'Amartya Sen, Dalai Lama Call for Unbiased Reportage', *The Hindu*, 30 January 2001.

Chan, Anita, and Jonathan Unger, 'China after Tiananmen: It's a Whole New Class Struggle', *The Nation*, 22 January 1990, 79.

Chen, Lu-hui (2000). 'Taiwan xuanmin zhengdang renting de xingcheng', paper presented at National Chengchi University Election Studies Center Research Symposium.

China's Ambassador Huang Jiahua's speech at New York University School of Law, 11 March 1987.

China's President Hu Jintao's address to a joint sitting of the Parliament of Australia, 24 October 2003, http://www.australianpolitics.com/news/2003/10/03-10-24b.shtml.

Chu, Li-lu. 'Refute the Absurd Theory Concerning International Law by [Chen T'iqiang]', *People's Daily*, 18 September 1957.

Korovin, Evgeny, in a lecture before the Social Science Academy of the Russian Communist Party in May 1947.

Fukuyama, Francis, 'They Can Only Go So Far', *The Washington Post*, http://www.washingtonpost.com/wp-dyn/content/article/2008/08/22/AR2008082202395.html, 24 August 2008.

Liu, Shaoqi, 'On Internationalism and Nationalism', broadcast by North Shensi Radio, 9 November 1948, reprinted in 5:4 *China Digest*, 14 December 1948, 6.

'PLA Constructs MOOTW Arms Force System', *PLA Daily*, 14 May 2009.

'PLA Peacekeeping Work Conference Held in Beijing', *PLA Daily*, 26 June 2009.

'PLA Contributes a Lot to UN Peacekeeping Operations', *PLA Daily*, 26 April 2010.

Press briefing with United States Secretary of State Madeleine Albright, Kuala Lumpur, 26 July 1997.

Privacy International, 'National Privacy Ranking 2007 – Leading Surveillance Societies around the World'.

Security Council Report, *Update Report: UN Cooperation with Regional and Subregional Organizations in the Maintenance of International Peace and Security*, 8 January 2010, No.2.

Statement of His Holiness the Dalai Lama on the 47th Anniversary of the Tibetan National Uprising, Office of His Holiness the Dalai Lama, Dharamsala, 10 March 2006.

Statement of Lodi Gyari, Special Envoy of His Holiness the Dalai Lama, Washington, D.C., in Senate Foreign Relations Committee, ed., *U.S. and Chinese Policies toward Occupied Tibet* (1992), 102-969, 24.

Statement of Shen Guofang, Deputy Permanent Representative of China to the United Nations at the Security Council on the Topic of 'Peace-Building: Towards a Comprehensive Approach', 5 February 2001.

Statement by the Mainland Affairs Council of Taiwan's Executive Yuan on 1 August 1999.

United Nations General Assembly Press Release, GA/11050, 1 March 2011.

United Nations Security Council Press Release, SC/6693, 25 June 1999.

United Nations Security Council Press Release, SC/6807, 17 February 2000.

United States Secretary of State Madeleine Albright, Press Conference with Russian Foreign Minister Igor Ivanov, Singapore, 26 July 1999, http://secretary.state.gov/www/statements/1999/990726b.html.

Wang, Feng, 'On the Rectification Campaign and Socialist Education among Minorities', New China News Agency, 28 February 1958.