

## Maryland Journal of International Law

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Volume 27 | Issue 1

Article 16

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# China's "Attitude" toward Human Rights: Reading Hungdah Chiu in the Era of the Iraq War

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### Recommended Citation

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## ARTICLE

# China's "Attitude" toward Human Rights: Reading Hungdah Chiu in the Era of the Iraq War

DONGSHENG ZANG<sup>†</sup>

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China observers in the United States generally share two observations on China today: that China has made impressive progress in economic development in the past three decades, and that China has maintained a poor human rights record since the 1989 Tiananmen Massacre. On the economic front, China overtook Japan and became the second largest economy in 2010. In a joint study with China's Development Research Center of the State Council, the World Bank recently predicted that even if the Chinese economy grows a third as slowly in the future, it will outstrip the United States

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in terms of overall GDP before 2030.<sup>1</sup> Along with its growing economy, China has gained more voting power in both the World Bank and the International Monetary Fund (IMF), and has increased its profile in G20 meetings.<sup>2</sup> On the human rights front, both Human Rights Watch and the U.S. State Department reported continuous deterioration of human rights in China.<sup>3</sup> In its 2010 country report on human rights, the State Department noted a “negative trend” in key areas of China’s human rights record, including suppression of civil society, censorship of the Internet, and violation of ethnic minorities’ rights. The World Bank also warned in its report that China must adopt an approach that better balances economic and social development to sustain economic growth.

Great fear arises, however, when the above two elements are put together. Questions about the ramifications of China’s rise and the future of world order are repeatedly raised. Does China represent a totally different set of values? With its newly acquired capacity, will China reshape the global order based on those values? These seem particularly relevant questions given the perplexing international order we are facing in the era of Iraq War.<sup>4</sup> On the other hand, China

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1. WORLD BANK, CHINA 2030: BUILDING A MODERN, HARMONIOUS AND CREATIVE HIGH-INCOME SOCIETY 3 (Feb. 2012). A similar prediction was offered by Arvind Subramanian, *The Inevitable Superpower: Why China’s Dominance Is a Sure Thing*, FOREIGN AFF., Sep.–Oct. 2011, at 66 (projecting that the gap between China and the United States in 2030 will be similar to that between the United States and its rivals in the mid-1970s, the heyday of U.S. hegemony, and greater than that between the United Kingdom and its rivals during the halcyon days of the British Empire, in 1870), and Steven Rattner, Op-Ed., *Will China Stumble? Don’t Bet on It*, N.Y. TIMES, Dec. 3, 2011, at A23. This is a contrast with the “pessimist views.” Salvatore Babones, *The Middling Kingdom: The Hype and the Reality of China’s Rise*, FOREIGN AFF., Sep.–Oct. 2011, at 79; SUSAN SHIRK, FRAGILE SUPERPOWER: HOW CHINA’S INTERNAL POLITICS COULD DERAIL ITS PEACEFUL RISE (2007); MINXIN PEI, CHINA’S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY (2006).

2. In April 2010, the World Bank decided to raise China’s voting stake from 2.78 percent to 4.42 percent, which is higher than some Western countries including Germany, France and Britain. *World Bank Gives More Clout to a Rising China*, WASH. POST, Apr. 26, 2010, at A6. In November 2010, the IMF’s board of directors decided to elevate China to number three in voting power, above traditional IMF powers such as Germany, Britain, and France. *IMF Expands Power of Emerging Markets, Elevates China to No.3*, WASH. POST, Nov. 6, 2010, at A14. On the rise of the G20 meetings in global governance issues, see Alan S. Alexandroff & John Kirton, *The ‘Great Recession’ and the Emergence of the G-20 Leaders’ Summit*, in RISING STATES, RISING INSTITUTIONS: CHALLENGES FOR GLOBAL GOVERNANCE 177–95 (Alan S. Alexandroff & Andrew F. Cooper eds., 2010).

3. HUMAN RIGHTS WATCH, WORLD REPORT 2012, at 314–27 (2012), available at <http://www.hrw.org/world-report-2012> (last visit Mar. 10, 2012); U. S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: CHINA (Apr. 11, 2011).

4. This perplexing order is reflected in the topic of a symposium hosted by the *Maryland Journal of International Law* in May 2010. *Multilateralism and Global Law*:

often portrays its development path as something unique, or, "with Chinese characteristics." For some, though, Beijing's slogan of a "peaceful rise" may sound more alarming than assuring. This phrase may just betray the secret that there is enormous uncertainty about the future. In other words, China's own rhetoric often reinforces rather than mitigates the fear of a reshaped international order.

This article aims to challenge the way these questions are framed. By examining human rights as an example in the area of international law, this article argues that while China continues to be defensive on human rights, either by overstressing the notion of sovereignty,<sup>5</sup> or by limiting human rights to a developmentalist point of view, a major shift emerged in its basic legal and political strategy in its relations with the United States on human rights after the invasion of Iraq in 2003. It shifted from a defensive discourse to an offensive discourse by embracing the legal norms and standards established by existing international law and demanded that the United States comply with them. The popular view about China in the United States still insists on an old-fashioned conceptual framework. It creates new fears and yet offers little new insights. The so-called "realism"—characteristic of the Bush Administration's political philosophy within neocon policy circles—is simply out of touch with reality.

In this context, Professor Hungdah Chiu's writings on China's attitude toward international law during the Vietnam War Era are illuminating. Chiu's early writings were written in the midst of heated debates about whether America should recognize Communist China and permit the People's Republic to take China's seat in the

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*Evolving Conceptions of International Law and Governance*, 25 MD. J. INT'L L. 1 (2010) (Symposium).

5. Professor James Zhaojie Li observed in 2001 that "[t]he most recurring theme in the Chinese human rights discourse is the primacy of state sovereignty—no state sovereignty no human rights." Li Zhaojie, *Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order*, 5 SING. J. INT'L & COMP. L. 314, 324 (2001). This can be seen in the works of Professor Wang Tieya, China's most prominent international law scholar:

The PRC sticks to the doctrine of sovereignty not only because China has bitter experiences of its sovereignty being ruthlessly encroached upon by foreign powers in the past, but that it also has the conviction that the principle of sovereignty is the only main foundation upon which international relations and international law can be established and developed.

Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUEIL DES COURS 195, 290 (1990). For a discussion on the important contributions of Wang Tieya see Zhaojie Li, *Teaching, Research, and the Dissemination of International Law in China: The Contribution of Wang Tieya*, 31 CAN. Y.B. INT'L L. 189 (1993).

United Nations. They demonstrated an interesting struggle of a sensitive mind, between competing identities, and between law and politics. Chiu started his inquiry with a clear goal—to determine Communist China’s attitude toward international law. From all perspectives, it looked obvious that China was a trouble maker in 1966, and the fear about China in the United States was serious.<sup>6</sup> Legally, China was very much excluded from all major international institutions—the United Nations in particular. But China had detonated an atomic bomb in October 1964 and was exporting its revolutionary ideology by supporting African and Asian independence movements that subsequently became a powerful force in the United Nations in supporting the People’s Republic of China’s (PRC) membership. From January 1965, China even intensified negative polemics against the United Nations with support from the newly independent countries.<sup>7</sup> While Chiu’s works between 1966 and 1968 seemingly confirmed the sentiments of the Vietnam War era, a close reading of them reveals ambiguity and doubts, as well as personal struggles. Chiu was not alone in this period, as China specialists in the United States—many of whom were conservative—almost unanimously opposed the Johnson Administration’s policy on Vietnam. It was these doubts that led to a reexamination of Chiu’s original assumptions. Chiu’s struggles in 1966–1968 shed light in understanding a similar issue: China’s attitude toward international law.

Part I of this article is a careful rereading of Professor Hungdah Chiu’s writings in the 1966–1968 period. Part II extends Chiu’s insights into an “interactional approach” to international law. Part III offers an example from perhaps an unlikely field of international law—human rights. It aims to demonstrate how an interactional approach better explains China’s strategic shift in human rights discourse in the first decade of the twenty-first century. Drawing from the analysis, Part IV concludes by offering some reflections on the implications of this change.

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6. ROSEMARY FOOT, *THE PRACTICE OF POWER: US RELATIONS WITH CHINA SINCE 1949* 221 (1995) (discussing U.S. intelligence assessments that China was capable of developing weapons and fighting wars in border regions, but incapable of feeding its population or developing an industrial economy).

7. See Byron S. Weng, *Communist China’s Changing Attitudes toward the United Nations*, 20 *INT’L ORG.* 677, 696–97 (1966) (reviewing China’s relationship with the United Nations since 1949). Elsewhere, Weng describes China’s efforts as a search for an alternative to the “imperialist” dominated United Nations. See generally BYRON S. WENG, *PEKING’S UN POLICY: CONTINUITY AND CHANGE* (1971).

## I. CHINA'S "ATTITUDE" IN CONTEXT: 1966–1968

Between 1966 and 1968, Chiu published two articles in the *American Journal of International Law* on China's policy in international law: "Communist China's Attitude toward International Law,"<sup>8</sup> and "Communist China's Attitude toward the United Nations."<sup>9</sup> Both articles were based on a meticulous survey of literature, including statements by political figures such as Premier Zhou Enlai and Foreign Minister Chen Yi, to the views of scholars on international law. The 1966 article compared China's position on major international law issues with those of the Soviet Union, and came to the conclusion that Communist China was "more dogmatic in applying Marxist-Leninist theory to international law and less responsive to the recent development of international law in the Western world."<sup>10</sup> The 1968 article was largely a survey of China's often negative views of the United Nations in the 1960s.<sup>11</sup>

Without any context, the two articles could easily be read as an embodiment of the sentiments of the Vietnam War period. It may even fit well with Chiu's own political connection with the Kuomintang (KMT). Chiu was born in 1936 in the Republic of China and his father was a KMT member of the legislature. When the KMT lost the civil war with the Communists in 1949, his family moved to Taiwan with Chiang Kai-shek. In his career as a scholar in the United States, Chiu maintained ties to the KMT. The political ties with the KMT may help explain the framing of Chiu's "attitude" inquiry and may even explain the seemingly clear claims of those two articles. His family background and political affiliation, however, also created ambiguity for him, and help illuminate his struggles, perhaps even more powerfully. The ambiguity comes from two questions. First, who speaks for Communist China? Second, who is playing politics with international law? Chiu's ties with the KMT forced him to question the clarity of his claims in the two articles.

Chiu was not the only one troubled by the two questions. He was encouraged, influenced, pushed, and perhaps also troubled by different people around him while working on the two articles in 1965 at Harvard Law School. A close reading of the articles shows

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8. Hungdah Chiu, *Communist China's Attitude toward International Law*, 60 AM. J. INT'L L. 245 (1966) [hereinafter Chiu, *International Law*].

9. Hungdah Chiu, *Communist China's Attitude toward the United Nations: A Legal Analysis*, 62 AM. J. INT'L L. 20 (1968) [hereinafter Chiu, *United Nations*].

10. Chiu, *International Law*, *supra* note 8, at 266.

11. Chiu, *United Nations*, *supra* note 9.

such influence and reveals his internal struggles with the two questions. Furthermore, Chiu's struggles were beyond his immediate circle. The year 1966 was a crucial moment for China specialists in the United States because of their participation in the debate of Vietnam War—fourteen of them were invited to the Senate Foreign Affairs Committee to testify. The struggles of Chiu and the others in his immediate circle were on vivid display in the Senate hearings.

#### A. *Chiu's Immediate Circle*

After his college education in Taiwan, Chiu completed his LL.M. degree at Harvard Law School in 1962. Chiu continued to study at Harvard for his S.J.D. (Doctor of Juridical Science) under Professor Louis B. Sohn and completed his dissertation on public international law in 1964.<sup>12</sup> It was probably after his dissertation that he started working on the 1966 article as a Research Associate at Harvard's East Asian Research Center during 1964–1965.

During this period, Chiu had two close associates. One was Jerome A. Cohen, who joined the faculty at Harvard Law School in August 1964. Chiu worked with Cohen almost immediately on the question of China's attitude toward international law and was able to produce a paper in 1966 for a seminar.<sup>13</sup> Their collaboration gave rise to a related but much larger project that led to the seminal two-volume book—*People's China and International Law*—which was not published until 1974.<sup>14</sup> Another close associate was R. Randle Edwards, who first met Chiu in 1961 at Professor Sohn's class on international law and become a close friend after. In 1961, Edwards enrolled in the J.D. program and later became a research associate like Chiu. Edwards closely read and edited Chiu's papers, and was given a special recognition in the 1968 article.<sup>15</sup>

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12. Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* (1964) (S.J.D. dissertation on file with Harvard Law School Library). It was published as a monograph in 1966 in *The Hague*, HUNGDAH CHIU, *THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES, AND THE SPECIAL LEGAL ASPECTS OF THE TREATIES SO CONCLUDED* (1966) [hereinafter CHIU, *CAPACITY*].

13. Jerome A. Cohen & Hungdah Chiu, *China's Attitude toward International Law* (1966) (unpublished manuscript) (on file with Harvard Law School Library).

14. JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* (1974).

15. Chiu, *United Nations*, *supra* note 9. In the Acknowledgement, Chiu thanked Edwards for the editorial assistance to his dissertation: "The tedious work of correcting the errors of someone whose native tongue is not English has been undertaken by his friend, Mr. R. R. Edwards . . ." *Id.*

In addition to Cohen and Edwards, two groups of people played a significant role in the articles' creation. One group was international lawyers including, Professors Richard R. Baxter and Louis B. Sohn, and Wolfgang G. Friedmann and Richard Falk, whose works were cited and discussed by Chiu in his 1966 article. The other group was China specialists including John K. Fairbank, Benjamin I. Schwartz, and A. Doak Barnett.

*B. Who Speaks for Communist China?*

Chiu set out to discern Communist China's attitude toward international law, and it seemed, at least at the outset, there was a clear answer. On the surface, the two articles presented a variety of sources to make China's attitude clear. They both surveyed an emerging body of literature, between 1957 and 1965, showing enormous interest in international law among the political leaders, foreign policy makers, as well as leading scholars in Mao's China. One aspect of Chiu's work was his meticulous survey of publications from mainland China. Some of the names cited in the two articles—such as Chou Fu-lun (Zhou Fulun), Ying T'ao (Ying Tao), K'ung Meng (Kong Meng), Lin Hsin (Lin Xin)—were the younger generation of international law theorists in Mao's China.<sup>16</sup> Those names have long been forgotten in China today. Some other names, such as Chou Keng-sheng (Zhou Gengsheng), also cited and discussed extensively, however, is more interesting and perhaps intriguing.

Chiu was apparently following Zhou Gengsheng closely during this period of time. In January 1965, Chiu had published a review of Zhou's recent book, *Trends in the Thought of Modern English and American International Law*, which was published in China in 1963.<sup>17</sup> Considering the scarcity of information about China in the United States at the time, Chiu was very well informed and up to date. In the review, however, Zhou was introduced as "a prominent Communist Chinese jurist," even though it was acknowledged that Zhou was educated in Paris and "wrote several books on international

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16. Nearly twenty years after, Chen Tiquang (or Ch'en T'i-ch'iang), an international lawyer who participated in the discussion of international law, more as a target of critiques, reflected in great detail on this period from 1957 to 1960. Chen Tiquang, *The People's Republic of China and Public International Law*, 8 DALHOUSIE L.J. 3, 11–15 (1984).

17. Hungdah Chiu, *Book Review*, 59 AM. J. INT'L L. 170 (1965) (reviewing CHOU KENG-SHENG, *TRENDS IN THE THOUGHT OF MODERN ENGLISH AND AMERICAN INTERNATIONAL LAW* (1963)).



law which were widely used in Chinese universities in the 1930s,<sup>18</sup> long before the Communists took power in China in 1949. In fact, Zhou had first studied at Waseda University in Japan, and earned doctoral degrees from the University of Edinburgh and the University of Paris. But he was more than a successful textbook writer in Republican China. Zhou was a law student in Paris in 1919 during the Versailles Conference in Paris, when China was humiliated by the Western powers when they refused China's demand that Japan return Shandong province to China, and that Western powers relinquish extraterritoriality, legation guards, and foreign lease holds in China. Zhou played an active role in organizing Chinese students in Europe to protest against the Western powers, and successfully prevented the Chinese delegation from signing the Versailles Treaty. After his return to China, Zhou was among the first international lawyers to write about sovereignty as an intellectual endeavor in China's anti-colonialism movement.

Additionally Zhou was no stranger to the KMT ruling elite. From 1939 to 1945, Zhou spent five years in the United States, attending the Institute of Pacific Relations Annual Conferences as a Chinese delegate and an advisor to the Chinese delegation for founding the United Nations. During this period, Zhou published a pamphlet *Winning the Peace in the Pacific*,<sup>19</sup> where he proposed a regional international organization called the "Pacific Association of Nations" that included China, Soviet Russia, United States, Japan, and other nations. During this period, Zhou was a frequent house guest of Dr. Hu Shi, who was then Republican China's Ambassador to the United States. Dr. Hu Shi did not think Zhou was a communist. In his foreword to Zhou's pamphlet, Dr. Hu Shi had this to say about Zhou as a person:

Ever since his student days, he has been a warm admirer of the democratic institutions and ways of life of Great Britain, the United States and the democracies of Western Europe. His scholarship, political independence and intellectual integrity have won him the high respect of

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18. *Id.* at 170 n.2.

19. S. R. CHOW, WINNING THE PEACE IN THE PACIFIC: A CHINESE VIEW OF FAR EASTERN POSTWAR PLANS AND REQUIREMENTS FOR A STABLE SECURITY SYSTEM IN THE PACIFIC AREA (1944). An earlier statement of the ideas appeared in 1942. S. R. Chow, *The Pacific after the War*, FOREIGN AFF., Oct. 1942, at 71.

Chinese government leaders as well as of the Chinese student world.<sup>20</sup>

In fact, a large number of well-established Western-educated international lawyers in Republican China chose to stay on mainland China when the Communist Party took power. Between 1949 and 1957, they were at least tolerated by the revolutionary regime. Between 1957 and 1965, when a more radical official position emerged, some of those Western-educated international lawyers, such as Chen Tiquang, were persecuted. Others, like Zhou, followed the radical move unwillingly and stayed in power. Yet continuity with the themes of Republican China was still there. It is reasonable to imagine that, in the mid-1960s, when he was working on the two articles, Chiu may well have been struck by the similarity between "Communist China" and "Free China" in their views on international law. To label Zhou as a spokesman of the "Communist China," though technically correct, must have been a crude choice of words.

At Harvard, R. Randle Edwards most likely influenced Chiu. Edwards had become interested in a similar question and was able to write a paper in 1963 for a seminar on contemporary China taught by John K. Fairbank.<sup>21</sup> In that article, Edwards surveyed a rich body of literature concerning the 1957-1960 debate in China, increasing the profile of Zhou's writings. Edwards, however, did not find anything particularly dogmatic in "Communist" China's views on international law: "the PRC's attitude toward international law is not one of total rejection but is selective and pragmatic, not unlike that of Western nations."<sup>22</sup> Neither was there anything particularly Chinese or communist about this attitude:

Throughout its thirteen-year history [from its founding], the PRC has demonstrated an ability and willingness to view international relations in terms of international law and to comply with such procedures of international law as it deemed in its best interest, an attitude not dissimilar to that of Western nations.<sup>23</sup>

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20. Hu Shih, *Foreword to CHOW*, *supra* note 19, at vi.

21. Randle Edwards, *The Attitude of the People's Republic of China toward International Law and the United Nations*, 17 *PAPERS ON CHINA* 235 (1963) (on file with the Fung Library of Harvard University).

22. *Id.* at 235.

23. *Id.* at 263.

Since Chiu set his goal in the 1966 article to determine the “Communist” aspects of China’s attitude in international law, Edwards’ view must have been a surprise for Chiu. As a result, they may have had a lot of spirited discussions.<sup>24</sup>

The other influence came from Jerome A. Cohen, Chiu’s collaborator on *People’s China and International Law*. Cohen’s view on the same question in this period was clearly stated in a panel discussion in February 1967 at the American Society of International Law, where he explained the idea of “attitude”:

[I]f, as it appears, the Chinese Communists regard international law as an instrument of policy to be used when useful, to be adapted when desirable, and to be ignored when necessary, we should not overlook the extent to which this attitude reflects their perception of how others play the game.<sup>25</sup>

Some years after, in an essay reflecting on ethnocentrism in international law, Cohen recalled this period of doing research on China’s “attitude” toward international law:

By the late 1960s, my own research into China’s experiences with and attitudes toward international law had yielded an unanticipated by-product. I had intended to document the extent to which the theory and practice of the [PRC] appeared distinctive in comparison with the record of Western and other Asian countries, as well as that of previous Chinese governments including the Chiang Kaishek regime remaining on Taiwan. I had also expected

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24. For Edwards, this was the beginning of a series of historical studies on China’s attitudes toward international law. In 1994, the same year Cohen reflected on ethnocentrism in international law, Edwards concluded:

[T]hat the laws and historical records of the early and mid-Qing Dynasty (1644-1911) show, instead, a respect for the concept of sovereign equality of nations. The efforts of twentieth century Chinese scholars and statesmen to move China into the mainstream of international law and relations does not represent a sharp break with earlier principles and practices. Rather, it builds upon a rich and sophisticated tradition comprised of rules and practices, in many respects, common to those sanctioned by Western international law.

R. Randle Edwards, *China’s Practice of International Law—Patterns from the Past*, in *ESSAYS IN HONOR OF WANG TIEYA* 243, 244 (Ronald St. John MacDonald ed., 1994).

25. Jerome Alan Cohen, *Chinese Attitudes toward International Law and Our Own*, 61 *AM. SOC’Y INT’L L. PROC.* 108, 113 (1967). See also Jerome Alan Cohen, *Chinese Participation in the United Nations: Changing Realities and the Imperatives of New Policy*, 65 *AM. SOC’Y INT’L L. PROC.* 1 (1971).

to find an "hypocrisy gap" between the PRC's principles and practices—apparent to some degree in every nation, as in every individual. What surprised me, however, was the extent to which the United States also suffered from this hypocrisy gap, demonstrated by its violation and manipulations of international legal principles in dealing with China's new revolutionary regime.<sup>26</sup>

Thus, a significant change in tone occurred in Chiu's 1966 article, compared with his 1965 book review. In the concluding remarks of the 1966 article, Chiu rejected the idea that China's position on international law was inherently determined by Marxism-Leninism. Rather, Chiu pointed out, one has to look at the historical context: "[t]he bitter attack on the Western view that international law is a law among *civilized* countries is obviously a reaction to the oppressive measures which China has suffered in the past."<sup>27</sup> This became clearer in the 1968 article. There, the underlying message was to reject any position inherently derived from China's political ideology: "It is . . . readily apparent that Peking's statements and attitudes are strongly colored by deep-seated resentment at having been barred for so long from participation in the United Nations."<sup>28</sup>

For Chiu, the issue did not simply go away. His struggles in the 1966 and 1968 articles may have prompted his interests in comparing the KMT and Communist views in a book chapter published in 1972.<sup>29</sup> Today historians have a better grasp of the fact that in the 1920s and 1940s international law was a highly contentious issue in the political struggle between the KMT and the Communists in China.<sup>30</sup> But in 1972, Chiu seemed a lot more conscious of not falling into a partisan position. He concluded that while the KMT and the

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26. Jerome Alan Cohen, *Ethnocentrism and the Teaching of International Law*, in *ESSAYS IN HONOR OF WANG TIEYA* 191, 192–93 (Ronald St. John MacDonald ed., 1994) [hereinafter Cohen, *Ethnocentrism*].

27. Chiu, *International Law*, *supra* note 8, at 266.

28. Chiu, *United Nations*, *supra* note 9, at 21.

29. Hungdah Chiu, *Comparison of the Nationalist and Communist Chinese View of Unequal Treaties*, in *CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES* 239 (Jerome A. Cohen ed., 1972) [hereinafter Chiu, *Comparison*].

30. The political rivalry between the Nationalist and Communist Parties on the "unequal treaties" during the 1920s and 1940s was discussed in great detail in DONG WANG, *CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY* (2005). Chen Tiquang noted: "The only field in which Chinese international lawyers made intensive study was the question of unequal treaties and special rights of foreign powers in China. These works had a nationalistic ring, pursued with the hope of finding a way to put some restraint upon imperialist oppression." Chen Tiquang, *supra* note 16, at 8.

Communists shared resentments regarding the “unequal treaties,” they differed in the way they challenged them. The KMT adopted a more legalistic approach, while the Communists preferred more political language.<sup>31</sup> This conclusion, it seems, finally addressed his struggles in the 1966 and 1968 articles.

### C. *The Politics of International Law*

The second question that bothered Chiu was the distinction between law and politics. In setting the goal of figuring out the “attitude” of Communist China towards international law was the implicit assumption that somehow international law represented the objective, universal, and logical standards that ought to be used to measure the behavior of Communist China in order to understand the latter’s “attitude.” Chiu’s conclusions in both his 1966 and 1968 articles seemed clear. Yet, the clarity is equally deceptive. A close reading of the two articles and their contexts shows Chiu had inescapable struggles with the very notion of international law as the appropriate metric. The context here is his relations with two international scholars, Louis B. Sohn and Myres McDougal.

As indicated earlier, Chiu’s doctoral study at Harvard was with Louis B. Sohn between 1962 and 1965. Sohn’s intellectual focus during this period was reflected in his collaboration with Grenville Clark on the book *World Peace through World Law*,<sup>32</sup> an influential classic in the World Federalist peace movement. The book first appeared in 1958, and was subsequently revised in 1960 and again in 1966—paralleling Chiu’s study with Sohn. Chiu was apparently influenced by Sohn in the former’s choice of dissertation topic: “The Capacity of International Organizations to Conclude Treaties,”<sup>33</sup>

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31. Chiu concluded in his chapter, “[B]oth the Nationalist and the Communist Chinese denounce those treaties imposed on China in the nineteenth and twentieth centuries as unequal treaties, their concepts of unequal treaties differ.” Chiu, *Comparison*, *supra* note 29, at 267.

32. GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (enlarged ed., 1966). Historian of the World Federalist movement Joseph Preston Baratta notes that the book *World Peace through World Law* as “one of the classics of the movement.” JOSEPH PRESTON BARATTA, *THE POLITICS OF WORLD FEDERATION: UNITED NATIONS, UN REFORM, ATOMIC CONTROL* 3 (2004). Sohn’s early involvement in the World Federalist movement includes his participation in the Dublin Conference on United Nations in October 1945. *Id.* at 147–53.

33. CHIU, *CAPACITY* *supra* note 12. Chiu expressed his gratitude in his early works thanking him for his teachings in the United Nations Law class. Hungdah Chiu, *Succession in International Organizations*, 14 INT’L & COMP. L.Q. 83 (1965) (“He is grateful to Professor Louis B. Sohn . . . for the experience and training received from taking his course on United Nations Law.”).

which had more to do with Sohn's core interests than what the Republic of China in Taiwan needed at the time. The substance of the dissertation clearly suggests that Chiu totally immersed himself in the question world legal order in the manner of a competent and sophisticated international lawyer. In the entire two-hundred page dissertation, few references were made to China.<sup>34</sup> Chiu was also influenced by Sohn's involvement in the disarmament activities—he wrote a seminar paper on China's policy on nuclear tests that was published in 1965.<sup>35</sup>

If Chiu was inspired by Sohn, as his mentor at school, and even a role model as a great international lawyer actively taking part in the world affairs, Chiu may also have had some struggles with Sohn's idea of international law. During this period, Sohn remained ambiguous on China and in connection with it, Vietnam. On the one hand, as an intellectual leader of the World Federalist movement, Sohn was opposed to isolationist policy as a matter of principle and advocated UN membership for all major countries.<sup>36</sup> In *World Peace through World Law*, Clark and Sohn reiterated that "the plan would not even become operative until active and permanent support had been pledged by a great majority of all nations," including the PRC and the Soviet Union.<sup>37</sup> On the other, however, the United World Federalists did not confront President Lyndon B. Johnson on his policy on the Vietnam War.<sup>38</sup> In early 1966, a group called the Lawyers Committee on American Policy toward Vietnam issued a letter to President Johnson,<sup>39</sup> challenging the legality of the war in

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34. See generally CHIU, *CAPACITY*, *supra* note 12.

35. Hungdah Chiu, *Communist China's Attitude towards Nuclear Tests*, 21 CHINA Q. 96 (1965).

36. See generally Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381 (1964) (arguing against a policy of exclusion at the United Nations by noting the failures of the League of Nations' exclusion policies). This was in line with the United World Federalist (UWF), which has adopted a universalist approach since 1954. See Ernest S. Lent, *The Development of United World Federalist Thought and Policy*, 9 INT'L ORG. 486, 492 (1955).

37. CLARK & SOHN, *supra* note 32, at xviii.

38. In March 1965, UWF wrote to President Johnson to offer its acquiescence to the Vietnam War. *UWF on Vietnam*, FEDERALIST, Mar. 1965, at 6. Baratta noted that the world federalist movement became divided long before the Vietnam War. It became clear in the early 1950s, the Korean War: "Everyone had to choose sides at a time of actual war in Korea and threatened war in Europe. Even the peace movement divided. UWF was transformed into a tame, respectable supporter of the UN as the U.S. employed it in the Cold War." BARATTA, *supra* note 32, at 512.

39. An article in *War/Peace Report* noted in its March 1966 issue that "[m]ost of the debate over the Vietnam War has been on questions of morality and strategy, but in recent

Vietnam.<sup>40</sup> In response, on February 14, Sohn joined four law academics—including Richard R. Baxter and Myres S. McDougal—in writing a letter to the President,<sup>41</sup> dismissing the challenges. However, one month later, in March 1966, Sohn wrote a letter to Senator J. William Fulbright,<sup>42</sup> urging that the United States recognize the government in Beijing. In an April issue of *War/Peace*

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weeks the argument has sharpened over whether the U.S. position is legal under international law.” *Is U.S. Involvement in Vietnam Legal?*, WAR/PEACE REPORT, Mar. 1966, at 16.

40. The legal and policy rationales of the Vietnam War were challenged by some of the most respected international lawyers, including the late Quincy Wright, Richard Falk, and Wolfgang G. Friedmann. Quincy Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT’L L. 750, 754 (1966) (“Whatever motivations may have been influential, it is clear that international law does not recognize ideological differences, and that by a state in the internal affairs of another state, even on invitation of the government which it recognizes...violates traditional international law and the United Nations Charter.”); Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122 (1966); Richard Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1095 (1967) (“I would contend that the American military involvement resulted from a series of geo-political miscalculations, as well as from a process of decision insensitive to world order considerations.”); Wolfgang G. Friedmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT’L L. 857, 869 (1965) (“The Legal Adviser’s argument is one of policy, not of law, and it seeks to justify what is patently, by standards of international law, an illegal action, in terms of ultimate policy objectives of the United States.”); Wolfgang G. Friedmann, *Intervention, Civil War and the Role of International Law*, 59 AM. SOC’Y INT’L L. PROC. 67, 74 (1965) (“[I]n the absence of a functioning international peacekeeping and order machinery, it is policy, not law, that determines the actions of states with regard to intervention in civil war . . . .”); Richard A. Falk, *United States Foreign Policy and the Vietnam War: A Second American Dilemma*, 3 STAN. J. INT’L STUD. 78, 78 (1968) (“[T]he United States, as a consequence of the Vietnam War, is at a critical crossroads and, finally, that the world order proposals outlined [competitive diplomacy and a framework for world order] can help resolve the second American dilemma.”). The anti-war outcry was widespread in Europe. In West Germany, anti-war protests against the Vietnam War were often conflated, in the wake of the Adolf Eichmann trials, with condemnation of the Nazi past. TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 419 (2005) (“Indeed, attacking ‘Amerika’ (*sic*) for its criminal war in Vietnam served almost as a surrogate for discussion of Germany’s own war crimes.”). Wilfried Mausbach, *Auschwitz and Vietnam: West German Protest against America’s War during the 1960s*, in *AMERICA, THE VIETNAM WAR, AND THE WORLD: COMPARATIVE AND INTERNATIONAL PERSPECTIVES*, 279 (Andreas W. Daum, Lloyd C. Gardner & Wilfried Mausbach eds., 2003). In Japan, Edwin O. Reischauer, the American Ambassador to Japan from 1961–1966, noted that escalation of the U.S. bombing of North Vietnam early in 1965 produced a huge popular outcry of protest: “The Japanese people, who had seen their own cities wiped out by American bombers only twenty years ago, not unnaturally identified themselves with the Vietnamese being bombed.” EDWIN O. REISCHAUER, *BEYOND VIETNAM: THE UNITED STATES AND ASIA* 4 (1968).

41. William W. Bishop, et al., *Letter to President Lyndon Johnson* (Feb. 14, 1966), 112 CONG. REC. 3842 (Feb. 26, 1966).

42. Louis B. Sohn, Letter to Senator James W. Fulbright, (1966) reproduced in U.S. POLICY WITH RESPECT TO MAINLAND CHINA: HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE; EIGHTY-NINTH CONGRESS, SECOND SESSION ON U.S. POLICY WITH RESPECT TO MAINLAND CHINA, at 649–50 (1966).

*Report*, an antiwar journal based in New York, Sohn proposed that all the divided countries at the time—the two Chinas, the two Koreas, the two Vietnams and the two Germanys—be admitted to the United Nations; that the governments of East Germany, South Vietnam, North Korea and Formosa (Taiwan) be admitted to the UN subject to the condition of a five-year probation. During the probationary period, the peoples of these divided countries would determine whether to unite.<sup>43</sup> Sohn even suggested that the Mao's China—along with West Germany, India and Japan—be granted permanent membership at the UN Security Council with a slightly diluted veto power.<sup>44</sup>

For Sohn, treating the anti-communist Republic of China and communist North Korea alike and giving Mao's China the privileged position of permanent UN Security Council membership was a practical solution to a tough problem in the real world. Chiu did not comment on Sohn's proposals in his 1966 and 1968 articles. But his silence explains his difficulty with Sohn's ideas of international law. For Chiu—given his connection with the KMT in Taiwan—Sohn's proposal must have seemed surprisingly instrumentalist, perhaps even unprincipled. For a long while from the 1950s to the 1960s, both the KMT in Taiwan and the communists in mainland China rejected similar proposals.<sup>45</sup> In a book published in 1967, Chen Lung-chu noted, “[w]hile the Chinese Communists and the Nationalists have assailed one another in the most unqualified language, they have at least one contention in common concerning Formosa. They declare in unpremeditated concert that there is only ‘one China,’ not ‘two Chinas’ or ‘one China, on Formosa.’”<sup>46</sup> Thus it was impossible for Chiu to take the proposal with ease because of Chiu's connection with KMT. Chiu's difficulty goes further. Conceptually, underlying

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43. Louis B. Sohn, *China, the U.N. and the U.S.*, WAR/PEACE REPORT, Apr. 1966, at 10, 10–11. In 1966, the concept of “two Chinas” became popular among the policy circles in the United States. See generally UNA-USA NATIONAL POLICY PANEL, CHINA, THE UNITED NATIONS AND UNITED STATES POLICY: A REPORT OF A NATIONAL POLICY PANEL (1966) (concluding that Taiwan and China were two states under the UN Charter).

44. Sohn proposed a concurrent change of the voting rules of the Security Council, which would retain the veto of the permanent members only with respect to binding decisions of the Security Council and enabling the Security Council to make recommendations by a vote concurred in by majority of the permanent members and a majority of the non-permanent members. Sohn, *supra* note 43, at 11.

45. Akira Iriye, *Dilemmas of American Policy towards Formosa*, 15 CHINA Q. No. 51, 51 (1963) (“America's policy towards Formosa has come under fire in recent months from all three groups of Chinese.”).

46. LUNG-CHU CHEN & HAROLD D. LASSWELL, FORMOSA, CHINA AND THE UNITED NATIONS 87 (1967).



Chiu's analysis of Communist China's "attitude" toward international law was the assumed distinction between law and politics. Given Chiu's admiration for his mentor, his inspiration to be a competent and sophisticated international lawyer, he had good reasons to believe a more principled and legal solution could be found to address the China issue. Sohn's proposal seemed a crude demonstration of political maneuver—not by Communist China but by his own mentor and role model.

Another international lawyer Chiu had difficulty with was Myres McDougal, the Yale law professor who wrote the letter to President Johnson together with Sohn in February 1966. On March 4, the State Department prepared a legal memorandum titled "The Legality of United States Participation in the Defense of Viet-Nam."<sup>47</sup> In May, in his capacity as President of the American Bar Association, McDougal was invited to testify before the U.S. Senate on the lawfulness of the Vietnam War,<sup>48</sup> where he argued that it was justified under international law. In the meantime, McDougal was strongly opposed to China's membership in the United Nations. In a long article published in October 1966 in the *American Journal of International Law*, McDougal considered China's membership a threat to international law: "[a] transfer of China's United Nations seats could affect the advancement of human rights, the development of international law. . . ."<sup>49</sup>

On its face, Chiu's 1966 article seemingly was in line with McDougal's arguments. However, Chiu not only found McDougal unconvincing, but also that the latter's instrumental view of law resembled that of Communist China. In a footnote, Chiu noted that "[a] few Western writers, however . . . advocate a theory on the role of law which is essentially the same as that of Communist (Soviet or Communist Chinese) writers."<sup>50</sup> He referred to McDougal as the

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47. *The Legality of United States Participation in the Defense of Vietnam*, 60 AM. J. INT'L L. 565 (1966).

48. John Norton Moore, James L. Underwood & Myres McDougal, "The Lawfulness of Military Assistance to the Republic of Viet-Nam" (May 1966), brief of the American Bar Association, 112 CONG. REC. 14,943 (1966). A summarized version of this testimony was published shortly after. John Norton Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AM. J. INT'L L. 1 (1967).

49. Myres McDougal & Richard M. Goodman, *Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution*, 60 AM. J. INT'L L. 671, 672 (1966).

50. Chiu, *International Law*, *supra* note 8, at 249 n.10. On this, Chiu may have been influenced by his collaborator Jerome A. Cohen. When recalling his student years at Yale Law School, Cohen remarked:

primary example of this view: “[f]or instance, Professor McDougal and his followers have consistently argued that law is an instrument of policy.”<sup>51</sup> Chiu then quoted at length a critical summary of McDougal’s viewpoints from Richard Falk,<sup>52</sup> an unsympathetic critic of McDougal during the debates on the Vietnam War in the 1960s. Chiu then proceeded to make his own comment, with an unflinching sarcastic tone: “[i]t is interesting to note that no writer in Communist China has ever either cited McDougal’s writings or commented on his view.”<sup>53</sup> Chiu then raised the question of whether the United Nations had the legitimate power and authority to decide the issue: “Both the Republic of China and Communist China hold the view that the United Nations is not competent to consider the ‘question of Taiwan (Formosa).’”<sup>54</sup>

Chiu’s explicitly critical comment on McDougal is a good revelation of Chiu’s struggles with the ideas of international law and the politics behind them. In the process of working on his 1966 and 1968 articles Chiu experienced the tension between his ideal of international law and the politics behind it. In both of the articles, his meticulous survey of literature led him to clear conclusions that Mao’s China was playing politics with international law. But that would not have been a surprise for any observer of Mao’s China. What he really has learned, hidden in between the lines, was the political maneuver of international law, by people right around him, on his side.

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I had the good fortune to study with Professor Myres S. McDougal, who created an innovative system for analyzing international legal problems. Yet, as others have noted, the vice of the McDougal approach, at least as applied by the Master and some of his disciples, is that in concrete cases it generally concludes that my country, right or wrong, is right. ‘Reasonableness’ in a nationalistic cocoon reaches pre-ordained results.

Cohen, *Ethnocentrism*, *supra* note 26, at 192.

51. Chiu, *International Law*, *supra* note 8, at 249 n.10.

52. Richard A. Falk, Book Review, 8 NATURAL LAW FORUM 171 (1963) (reviewing MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION AND INTERNATIONAL COERCION. Falk’s critique of McDougal was not hostile. On other occasions, Falk came to McDougal’s defense when the latter faced unfair critiques, e.g., Richard A. Falk, Editorial Comment, *International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal*, 59 AM. J. INT’L L. 66, 66–71 (1965).

53. Chiu, *International Law*, *supra* note 8, at 249 n.16.

54. Chiu, *United Nations*, *supra* note 9, at 35–36 n.44. Chen Lung-chu also noted this: “[Another] argument put forth by both governments is that the question of Formosa is a domestic matter of China and outside the competence of the United Nations by Article 2(7) of the U.N. Charter, to be settled exclusively between the Nationalist government and the Communist government.” LUNG-CHU CHEN & LASSWELL, *supra* note 46, at 89.

D. *The Senate Hearings in 1966*

Chiu's struggles must be understood in the broader context of Asian studies in the United States during the acrimonious debates in the era of the Vietnam War, in which a collective revolt against the Johnson Administration was emerging in the 1966 and 1968 period. This is most vividly reflected in the United States Senate Foreign Relations Committee hearings in March 1966, where fourteen expert witnesses were invited.<sup>55</sup> Chaired by Senator J. William Fulbright, the Committee was already seeing an emerging dove position of dissent in the U.S. Senate who were openly critical of the Vietnam War.<sup>56</sup>

The hearings covered a wide range of issues, including: China's membership in the United Nations; China's relations with the Third World; the U.S. trade embargo against China; Sino-Soviet relations; and Taiwan's status. Even though they were asked to address pressing questions such as explaining China's foreign policy and predicting China's reaction to American policy in Vietnam,<sup>57</sup> these Asia specialists also took the opportunity to clarify the fundamental misperceptions regarding China in the policy circles in Washington. To a surprising degree, the testimonies of these experts totally resonated with Chiu's struggles on two basic issues: first, what is Communist China? Is it communist first or are Chinese first? Second, what is on its agenda in terms of international order?

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55. U.S. POLICY WITH RESPECT TO MAINLAND CHINA: HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE (89th Congress, Second Session, March 1966) [hereinafter, SENATE HEARINGS]. A collection of edited excerpts of these testimonies was compiled by Professor Akira Iriye in U.S. POLICY TOWARD CHINA: TESTIMONY TAKEN FROM THE SENATE FOREIGN RELATIONS COMMITTEE HEARINGS, 1966 (Akira Iriye ed., 1968). The fourteen expert witnesses included: A. Doak Barnett, John K. Fairbank, Benjamin I. Schwartz, John M. H. Lindbeck, Brig. Gen. Samuel B. Griffith II, Morton H. Halperin, Alexander Eckstein, Donald S. Zagoria, Harold C. Hinton, Hon. Walter F. Judd, George E. Taylor, David N. Rowe, Hans J. Morgenthau, and Robert A. Scalapino. See also *The Great China Debate Begins*, 6 WAR/PEACE REPORT, Apr. 1966, at 3 (1966).

56. Senators Frank Church (D-Idaho), Wayne Morse (D-Ore.), and Ernest Gruening (D-Alaska), represented the "dove position" of dissent in the Senate. David F. Schmitz & Natalie Fousekis, *Frank Church, the Senate, and the Emergence of Dissent on the Vietnam War*, 63 PACIFIC HIST. REV. 561, 562 (1994). For discussions on political dissent in the Vietnam debate in the U.S. Senate, see VIETNAM AND THE AMERICAN POLITICAL TRADITION: THE POLITICS OF DISSENT (Randall Bennett Woods ed., 2003); and RANDALL B. WOODS, J. WILLIAM FULBRIGHT, VIETNAM, AND THE SEARCH FOR A COLD WAR FOREIGN POLICY (1998).

57. The expert witnesses did reach a policy consensus, "containment without isolation," a term coined by Barnett. SENATE HEARINGS, *supra* note 55, at 13.

In his testimony on day one, A. Doak Barnett, professor of government at Columbia University, told Senator Fulbright: "I think that the history of the last hundred years has created in the minds of all Chinese a feeling that China has been the pawn of colonial imperial powers, and that China has to reassert its identity, reassert its role in the world . . . ." <sup>58</sup> Barnett stressed that the resentment was not based on communist ideology. He continued, "I say all Chinese because I think if you read some of Mao's books, but then also read Chiang Kai-shek's book called 'China's Destiny,' you will find that in both of these books there is a deep resentment of the history of colonialism against China in the nineteenth century." <sup>59</sup>

This was echoed by John Fairbank, who noted that in the 19th century "we Americans prided ourselves on championing China's modernization and self-determination. We considered ourselves above the nasty imperialism and power politics of the Europeans. We developed a self-image of moral superiority." <sup>60</sup> However, this was only because of the U.S. "open door" policy that enabled Americans "to share all the special privileges of foreigners in China under the unequal treaties without fighting for them." <sup>61</sup> But this was not how America was perceived: "We have been part and parcel of the long-term Western approach to east [sic] Asia and ought to see ourselves in that perspective . . . ." <sup>62</sup> He then turned to the contemporary situation in Vietnam, observing "striking" similarities to the colonial wars of the past. <sup>63</sup> Fairbank was most explicit: "Stuck in a dirty war today, we would do well to lower our self-esteem, be not so proud, acknowledge our Western inheritance of both good and evil, and see ourselves as hardly more noble and not much smarter than the British and French in their day . . . ." <sup>64</sup> He also noted: "Vietnam today gives us a more severe crisis of moral conscience partly because during most of our history we felt morally superior to the imperialist powers of the 19th century." <sup>65</sup> Fairbank subsequently summarized: "Even if Communism had never been invented, we would probably face today

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58. *Id.* at 17.

59. *Id.*

60. SENATE HEARINGS, *supra* note 55, at 103 (statement of John K. Fairbank).

61. *Id.* at 103.

62. *Id.* at 104.

63. *Id.*

64. *Id.* at 106.

65. *Id.* at 105.

a good deal of Chinese hostility. The origin of the Peking-Washington impasse cannot be blamed wholly on Marx and Lenin.”<sup>66</sup>

Benjamin Schwartz, a distinguished historian of China, reiterated the indigenous elements in the rise of Mao and the Chinese revolution: “The development of [China’s revolutionary] strategy on the part of Mao and others was a gradual and groping process, there was no preexistent blueprint. Neither Communist theory [nor] Russian practice provided any clear ‘operational code.’”<sup>67</sup> Schwartz had noted that despite its Sino-centric notion of world order in its long past, by the end of the Qing Dynasty, major intellectuals such as Yan Fu and Liang Qichao had already been prepared to think of China as one nation-state among others.<sup>68</sup> The rise of Mao, Schwartz argued, did not change this general position. Rather, Mao’s embrace of Marxism-Leninism was an endeavor to deal with a pressing dilemma China was facing. On the one hand, having abandoned the traditional views, China looked to the West for guidance; on the other hand the teacher (the imperialist West) is constantly taking advantage and attacking its pupils.<sup>69</sup> During the 1960s, this fight for “sovereignty” continued in Mao’s efforts to escape from Soviet control and efforts to establish China’s own status in the communist world.<sup>70</sup> Schwartz pointed out in an essay published in April 1966: “[a] candid survey of the span of Chinese history leads to no firm

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66. John K. Fairbank, *Why Peking Casts Us as the Villain*, in CHINA: THE PEOPLE’S MIDDLE KINGDOM AND THE U.S.A. 103, 111 (1967).

67. SENATE HEARINGS, *supra* note 55, at 183 (statement of Benjamin Schwartz).

68. “For at least a small but decisive segment of China’s population, the bases of the traditional conception of China’s place in the world had decisively collapsed.” Benjamin Schwartz, *The Maoist Image of World Order*, 21 J. INT’L AFF. 92, 95 (1967). *See generally* BENJAMIN SCHWARTZ, IN SEARCH OF WEALTH AND POWER: YEN FU AND THE WEST (1964).

69. SCHWARTZ, *supra* note 68, at 98.

70. In response to Senator Hickenlooper’s question at the hearings, Schwartz stated: “One of the things that fascinates me about the Chinese press is that even when discussing Vietnam they devote almost as much attention to their relations with the Soviet Union—to their exasperation with the Soviet Union—as they do to their relations with us.” SENATE HEARINGS, *supra* note 55, at 202. *See also* SCHWARTZ, *supra* note 68, at 100. After many archives have been made available, we now have a lot more detailed information on the rivalry and struggles between Mao’s China and the Soviet Union during the Vietnam War period. Eva-Maria Stolberg, *People’s Warfare versus Peaceful Coexistence? Vietnam and the Sino-Soviet Struggle for Ideological Supremacy*, in AMERICA, THE VIETNAM WAR, AND THE WORLD: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 237 (Andreas W. Daum et al. eds., 2003).

conclusions on the question of whether the Chinese are more or less belligerent or more or less fanatical than Westerners . . . ." <sup>71</sup>

Though the public hearings failed to change the course of American foreign policy immediately, they had a significant impact on public opinion.<sup>72</sup> Conceptually, the public hearings, like Chiu's 1966 and 1968 articles on China's attitudes toward international law, challenged the notion that China as a communist regime had any intrinsic position on international law. Rather, Chiu's use of the word "attitude"—understood by its context—implicitly calls for an interactional approach in the understanding of the position. After all, attitude, as the state of mind, is partially the product of interactive processes.<sup>73</sup>

## II. AN INTERACTIONAL APPROACH

When "attitude" is used to indicate an intrinsic position predetermined by identity, the use of identity perpetuates circular claims. What Chiu, Cohen, Edwards, Schwartz, and Fairbank did together in 1966–1968 was a surprisingly postmodernist deconstruction of the identity label "Communist China." Instead, they all pointed to an interactive approach as an alternative explanation: that China's "attitude" was better understood as a response to its prior experiences, particularly its humiliation by the Western powers in the nineteenth century.<sup>74</sup> These insights, though contested by historians for their limits,<sup>75</sup> can serve as a point of departure for us to build a

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71. BENJAMIN I. SCHWARTZ, *Chinese Visions and American Policies*, reprinted in *COMMUNISM AND CHINA: IDEOLOGY IN FLUX* 186 (1968).

72. FOOT, *supra* note 6, at 100–02.

73. As George H. Mead pointed out:

We must regard mind, then, as arising and developing within the social process, within the empirical matrix of social interactions. We must, that is, get an inner individual experience from the standpoint of social acts which include the experience of separate individuals in a social context wherein those individuals interact. The processes of experience which the human brain makes possible are made possible only for a group of interacting individuals: only for individual organisms which are members of a society; not for the individual organism in isolation from other individual organisms.

GEORGE H. MEAD, *MIND, SELF & SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 133 (1934).

74. This was particularly embodied in a documentary history of China. See generally *CHINA'S RESPONSE TO THE WEST: A DOCUMENTARY SURVEY, 1839-1923* (Ssu-yü Teng & John K. Fairbank eds., 1954).

75. For critiques of the "response" theses, see PAUL A. COHEN, *DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST* 9–56 (1984). Paul A.

bridge toward a more general theory—an interactional approach in international law articulated by lawyers in the late 1960s and early 1970s.

At the time of the Vietnam War debates, an interactional approach in sociology was initially developed by Herbert Blumer, who coined the term “symbolic interactionism.”<sup>76</sup> In legal theory, this approach was further developed by the late Lon L. Fuller.<sup>77</sup> According to Fuller, in a typical legal relationship—between two parties to a contract, or between litigants and the judge in a trial, or between lawgiver and subject in a kingdom—“the central purpose of law is to furnish base lines for human interaction.”<sup>78</sup> It is “human interactions [that] give substance and shape to the law.”<sup>79</sup> Fuller warned: “the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order.”<sup>80</sup> Also, “[w]hen this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen’s duty to observe the rules.”<sup>81</sup> In rejecting

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Cohen contended that American historians on China remained West-centric in the “response” literature:

My argument is not that the West’s actual historical role was unimportant but rather that it has been blown out of proportion in comparison with other factors and misstated, and that both the overstatement and misstatement have been a consequence largely of the conceptual paradigms with which Americans have approached China.

*Id.* at 5.

76. HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* (1969). See also JEROME S. BRUNER, *ACTS OF MEANING* (1990).

77. See generally Lon L. Fuller, *Human Interaction and the Law*, in *THE RULE OF LAW* (Robert P. Wolff ed., 1971) [hereinafter Fuller, *Human Interaction*]; Lon L. Fuller, *Some Unexplored Social Dimensions of the Law*, in *THE PATH OF THE LAW FROM 1967*, at 59 (Arthur E. Sutherland ed., 1968) (arguing that human interactions give substance and shape to the law) [hereinafter Fuller, *Unexplored Social Dimensions*]; LON L. FULLER, *THE MORALITY OF LAW* (revised ed. 1969) [hereinafter FULLER, *MORALITY OF LAW*]; LON L. FULLER, *ANATOMY OF THE LAW* (1968). A good collection of Fuller’s works is *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* (Kenneth I. Winston ed., 2001).

78. Fuller, *Human Interaction*, *supra* note 77, at 201. This was best demonstrated in Fuller’s contract theory, Lon L. Fuller & Willam R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52 (1936); Lon Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799, 809 (1941) (“In all these cases there may be an element of exchange in the background, just as the whole of society is permeated by a principle of reciprocity.”).

79. Fuller, *Unexplored Social Dimensions*, *supra* note 77, at 59.

80. FULLER, *MORALITY OF LAW*, *supra* note 77, at 209. “It [the new analytical jurisprudence] does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen as simply acting on the citizen—morally or immorally, justly or unjustly, as the case may be.” *Id.* at 192.

81. *Id.* at 40.

legal positivist tradition in identifying law with coercive power, Fuller used an analogy:

If a gunman says, "Your money or your life," it is certainly expected that if I give him my money, he will spare my life. If he accepts my purse and then shoots me down, I should suppose his conduct would not only be condemned by moralists, but also by right-thinking highwaymen. In this sense, not even an "unconditional surrender" is really unconditional . . . .<sup>82</sup>

Fuller's insight has recently been applied to international law by Jutta Brunnée and Stephen J. Toope who have developed an interactional theory of international law.<sup>83</sup> They regard the conception of reciprocity as "the very heart" of their theory.<sup>84</sup> For Brunnée and Toope, an interactional theory based on Fuller's idea of reciprocity departs from the traditional view of international law that is focused on the structure of legal treaties or the framework of international organizations. From the vantage point of interactional theory: (a) international law becomes horizontal rather than hierarchical because every member has an equal obligation to follow the rules and fulfill its promises; (b) reciprocity means that fulfillment of obligations becomes the center; and (c) fulfillment of obligations does not necessarily mean a uniform enforcement imposed from above, but rather it allows a diversity of ways for the fulfillment. They explain: "Like Fuller, we accept that power and force are salient to law, but they do not explain the sense of obligation that must exist in international society for legal enforcement to be possible and effective."<sup>85</sup> Reciprocity also means that legal norms are not tested by the structure, but also by their fulfillment. Thus, "Fidelity to law depends on the reciprocal

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82. FULLER, MORALITY OF LAW, *supra* note 77, at 139.

83. JUTTA BURNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010) [hereinafter BURNNÉE & TOOPE, LEGITIMACY]; Jutta Brunnée & Stephen J. Toope, *Interactional International Law: An Introduction*, 3 INT'L THEORY 307 (2011); Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an International Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000). On Fuller's contribution to interactional theory of international law, see BURNNÉE & TOOPE, LEGITIMACY, *supra*, at 20–33.

84. BURNNÉE & TOOPE, LEGITIMACY, *supra* note 83, at 7.

85. *Id.* at 34.



fulfillment of duties.”<sup>86</sup> Failure in fulfillment, or “claims of legal ‘exceptionalism’ by powerful states can be corrosive.”<sup>87</sup>

Interactional theory of international law was by international lawyers from America’s closest ally—Canada (Brunnée was a professor at University of Toronto and Toope President and Vice-Chancellor of the University of British Columbia). The book begins with a scene of London, Berlin, Melbourne, Madrid, New York, and other cities around the world in 2003: “millions of people around the world marched in the streets of their towns and cities to protest the impending invasion of Iraq by a ‘coalition of the willing’ led by the government of the United States of America.”<sup>88</sup> Similar to Fuller’s analogy of the gunman and his victim story, Brunnée and Toope argue that if the *realpolitik* pundits were right that the world is a jungle, then “there is law in the jungle . . . and the law of jungle is not made only by the strongest: nor is it broken with impunity.”<sup>89</sup>

Interactional theory of international law provides a valuable perspective that can contribute to the current debates on international law. In many aspects, this perspective adds to the critique of the realist tradition that started with Henry Kissinger. First, interactional theory echoes the fundamental value that might does not equal right.<sup>90</sup> It challenges the self-rightness, often shared by both conservatives and the liberals in the United States. For example, despite all that has happened in Guantánamo, Abu Ghraib, and other scandals, the talk of “acculturation” still insists that *other* states must embrace human rights,<sup>91</sup> as if these other states have nothing to say about human rights in the Bush Administration. Thus, even though this “acculturation” concedes some element of interaction, it is largely based on an implicit notion of interaction characterized as one-way traffic. Second, interactional theory of international law may

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86. *Id.* at 38.

87. *Id.* at 40.

88. *Id.* at 1.

89. BRUNNÉE & TOOPE, LEGITIMACY, *supra* note 83, at 5.

90. Peter G. Danchin, *Beyond Rationalism and Instrumentalism: The Case for Rethinking U.S. Engagement with International Law and Organization*, 28 SAIS REV. 79 (2008).

91. See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Ryan Goodman, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003). For critiques of Goodman and Jinks’ theory, see Jose E. Alvarez, *Do States Socialize*, 54 DUKE L.J. 961 (2005); Harold Hongju Koh, *Internalization through Socialization*, 54 DUKE L.J. 975 (2005).

also contribute to the critique of realism by arguing that the *realpolitik* mentality is not realistic enough to take into account the legitimacy costs. For example, Brunnée and Toope offer detailed analysis of how other countries reacted to the Bush Administration's positions on climate change, torture, and the use of force.<sup>92</sup>

The remainder of this article aims to follow the realist critique of *realpolitik* approach by discussing how China reacted to the Bush Doctrine by making major strategic shifts in the area of international law on human rights. The key component of such a shift was that China started incorporating, in rhetoric and legislation, norms of international human rights law. This strategic shift cannot be explained by the nature of China's political regime, nor by the so-called "Asian values."<sup>93</sup> It is rather motivated by China's response to the War on Iraq. This motivation determines, strategically, the substance of the shift, which was to embrace international norms, and exploit the failures of the Bush Doctrine for China's own political gain. As a consequence, what is unforeseen by the traditional theory in the wake of the Iraq War is a completely new form of international politics in the multipolar world.

### III. CHINA'S ATTITUDES TO HUMAN RIGHTS

There are three strategic shifts. During stage one, between 1989 and 2001, China was under international pressure to maintain human rights dialogue. For China, the main task during this period was to reintegrate into the international community. In stage two, after September 11, 2001 but before news broke of torture at Guantánamo and Abu Ghraib in 2004, China and the United States collaborated on their own "wars on terror." In stage three, after mid-2004, the Bush Administration and China split over torture scandals each accusing

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92. BURNNÉE & TOOPE, LEGITIMACY, *supra* note 83, chs. 4–6.

93. One popular use of the "Asian value" theory to explain China's ideological "threat" was manifested in Eric A. Posner & John C. Yoo, *International Law and the Rise of China*, 7 CHICAGO J. INT'L L. 1, 3 (2006). Posner and Yoo predicted, specifically:

Right now China does not seem concerned about ideological conflict with the West. But if it becomes an issue, then China will most likely advance a version of the Asian values argument of a few years back, according to which Asians (or certain Asians) prefer a society in which order trumps human rights. . . . There is not yet any philosophy that extols capitalism and rejects democracy, but perhaps one will be supplied when China needs an ideology that will mobilize international support among the enemies of the U.S.

*Id.* at 11–12.

each other of human rights violations. Subsequently, China's rhetoric and legislative efforts on human rights intensified.

A. *Return to the International Community*

China's rise at the turn of the century is inescapably under the shadow of the 1989 Tiananmen Massacre.<sup>94</sup> Facing widespread condemnation from the rest of the world, China's official position on international law has been defensive. It sought refuge in a notion of "sovereignty," however unconvincing for international lawyers.<sup>95</sup> Martial law was imposed until January 1990, armed People's Liberation Army soldiers were visible in Beijing's streets, and political dissenters were jailed. China looked no different from Chile in 1973 under General Augusto Pinochet. In the aftermath of 1989, despite China's insistence on "sovereignty" and its "Chinese characteristics," it did not totally cut itself off from international human rights norms. In November 1991, China published its first White Paper on Human Rights<sup>96</sup> when Beijing was under the most pressure from the West. The White Paper addressed people's subsistence rights, political rights, economic, cultural, and social rights, human rights in judicial process, labor rights, religious freedom, ethnic minorities' rights, human rights in family planning, people with disability, and China's participation in international human rights events. No doubt, the White Paper denied the existence of political prisoners. There was also an effort to reclaim legitimacy by reminding the people of China's colonial past. Not only did it endorse the idea that human rights could be a legitimate agenda item

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94. EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA 616–39 (2011). See generally ZHAO ZIYANG, PRISONER OF THE STATE: THE SECRET JOURNAL OF PREMIER ZHAO ZIYANG (Bao Pu, Renee Chiang & Adi Ignatius trans., 2009); TIMOTHY BROOK, QUELLING THE PEOPLE: THE MILITARY SUPPRESSION OF THE BEIJING DEMOCRACY MOVEMENT (1992); BEIJING SPRING, 1989, CONFRONTATION AND CONFLICT: THE BASIC DOCUMENTS (Michel Oksenberg et al. eds., 1990). On the impacts of Tiananmen on China, see DINGXIN ZHAO, THE POWER OF TIANANMEN: STATE-SOCIETY RELATIONS AND THE 1989 BEIJING STUDENT MOVEMENT (2001).

95. Thus it was very courageous for Wang Tiewa to state at The Hague during his lectures at the Academy in 1990, shortly after Tiananmen, that "[d]oubts have sometimes been cast upon the possible acceptance of international law by developing countries . . . [t]he main attitude of the developing countries, as illustrated by that of the PRC, is rather to adopt the international law as a whole, to apply its principles and rules and promotes its development." Wang Tiewa, *supra* note 5, at 355.

96. INFORMATION OFFICE OF THE STATE COUNCIL, HUMAN RIGHTS IN CHINA (1991), <http://www.china.org.cn/e-white/7/index.htm>.

in diplomacy;<sup>97</sup> it even endorsed the basic contents of human rights—though it tried to twist them by focusing on economic rights.

During the 1990s, China launched a series of domestic law reforms and signed a number of international human rights treaties. China substantially reformulated its Criminal Procedural Code in 1996 and the Criminal Code in March 1997, where efforts were taken to incorporate some human rights rules.<sup>98</sup> In October 1997, China signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) in October 1998. As Andrew Nathan concluded, by the end of the 1990s, China had by and large accepted human rights as a normal part of its diplomacy agenda:<sup>99</sup>

Beijing's response to international human rights pressures demonstrated realism, central coordination, strategic consistency, and tactical flexibility. China's policy combined resistance and selective concessions, in a mixture designed simultaneously to rally Third World support, especially in multilateral settings, to appeal to advocates of *realpolitik* in the West, and to construct policy dilemmas for human rights advocates.<sup>100</sup>

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97. James D. Seymour, a human rights observer on China, noted in the early 1990s that "publication of the white paper [of 1991] amounted to an implicit acknowledgement that human rights (however defined) are a legitimate international concern." James D. Seymour, *Human Rights in Chinese Foreign Relations*, in *CHINA AND THE WORLD: CHINESE FOREIGN RELATIONS IN THE POST-COLD WAR ERA* 211 (Samuel S. Kim ed., 3d ed. 1994). In the meantime, however, China also intensified its efforts to block international efforts on human rights. See generally Samuel S. Kim, *Human Rights in China's International Relations*, in *WHAT IF CHINA DOESN'T DEMOCRATIZE? IMPLICATIONS FOR WAR AND PEACE* (Edward Friedman & Barrett L. McCormick, eds. 2000).

98. On the revision of the Criminal Procedure Code and Criminal Code, see H. L. Fu, *Criminal Defense in China: The Possible Impact of the 1996 Criminal Procedural Law Reform*, 153 *CHINA Q.* 31 (1998); Ding Jian Cai, *China's Major Reform in Criminal Law*, 11 *COLUM. J. ASIAN L.* 213 (1997); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURAL LAW* (1996); Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 *CHINA Q.* 135 (1995).

99. Andrew J. Nathan, *China and the International Human Rights Regime*, in *CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS* 136, 160 (Elizabeth Economy & Michel Oksenberg eds., 1999). For similar views, see Peter Van Ness, *Addressing the Human Rights Issue in Sino-American Relations*, 49 *J. INT'L AFF.* 309 (1996); *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA* (Peter Van Ness ed., 1999); Samuel S. Kim, *China and the United Nations*, in *CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS* 42 (Elizabeth Economy & Michel Oksenberg, eds. 1999).

100. Nathan, *supra* note 99, at 148. See also ANN KENT, *CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* (1999). In broader areas:

There was a practical reason for this basic strategy: Western human rights discourse with China had one piece of powerful leverage—international trade. China had started the process of “resuming” its status as a founding member of the General Agreement on Tariffs and Trade (GATT) in July 1986.<sup>101</sup> By the middle of 1989, China’s accession to GATT had been widely anticipated.<sup>102</sup> The Tiananmen incident in June, however, disrupted the process: a GATT working party session, scheduled for July 1989, was first put off to September, and then further delays ensued.<sup>103</sup> It would take ten years—until 1999, when a final deal was reached between the United States and China—that accession was in sight again. For fifteen years, a federal statute in the United States, known as the Jackson-Vanik Act, required that every year the President submit to Congress a report indicating that no human rights violations had occurred in China in order for China to have access to the U.S. market.<sup>104</sup> This annual review of human rights conditions in China did not end until 2001, when the Act was amended after U.S.-China deal on accession to the World Trade Organization (WTO).<sup>105</sup> Human rights discourse also changed the nature and substance of the

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the nagging question of whether China accepts the basic legitimacy of the current rules of international organizations and norms and whether it will seek to drastically alter them once admitted. Thus far, the answer seems to be that China’s mere act of seeking admission to current global institutions represents a willingness to acknowledge their legitimacy, generally play by the rules, and seek to be a member of the ‘club.’ As long as China has basically constructive relations with the other big powers, we can expect that this will remain the case.”

David M. Lampton, *A Growing China in a Shrinking World: Beijing and the Global Order*, in *LIVING WITH CHINA: U.S./CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 120, 131–32 (Ezra F. Vogel ed., 1997).

101. Julia Ya Qin, *China and the GATT: Accession Instead of Resumption*, 27 *J. WORLD TRADE* 77 (1993); Guiguo Wang, *China’s Return to GATT*, 28 *J. WORLD TRADE* 51 (1994).

102. According to Harold Jacobson and Michel Oksenberg:

[u]ntil the summer of 1989, many participants believed that at some point a decision would be made to sign a protocol even if all the issues were not completely resolved, and they believed that this would occur before or simultaneously with the conclusion of the Uruguay Round. “The fact that the U.S. legislation giving the President negotiating authority would expire at the end of 1990 established a practical deadline for the Uruguay Round.”

HAROLD JACOBSON & MICHEL OKSENBURG, *CHINA’S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER* 103 (1990).

103. *Id.* at 102.

104. 19 U.S.C. § 2432(a)–(e) (2006).

105. Normal Trade Relations for the People’s Republic of China, Pub. L. 106-286, 114 Stat. 880 (codified in scattered sections of 19 U.S.C.). See also Proclamation No. 7516, 67 Fed. Reg. 479 (Dec. 27, 2011).

accession negotiations: more demanding commercial concessions were added,<sup>106</sup> backed up by a threat of trade embargo.

On the other hand, China did not merely stay defensive on human rights. Shortly after it signed the ICESCR in 1997 and the ICCPR in 1998, China started responding to the annual human rights reports by the U.S. State Department. First, the China Society for Human Rights Studies—a semi-official institution—issued a report titled *Human Rights in Name, Swaying Power in Reality*.<sup>107</sup> In addition to pointing out factual errors, the report explicitly challenged the U.S. position that human rights were universal norms.<sup>108</sup> In February the following year, again in response to the U.S. State Department's human rights report, the State Council's Information Office (SCIO) released a report *U.S. Human Rights Record in 1999*.<sup>109</sup> Largely based on Western media reports, the white paper addressed four categories covered by human rights conventions: civil and political rights; social and economic rights; racial discrimination; and violation of the rights of women and children. In subsequent years, SCIO would continue its rhetoric on human rights, thus making its annual report an institutionalized channel of "communication" between the United States and China.

### B. *Response to the Bush Doctrine*

After the September 11th tragedy, China's response to the Bush Doctrine, as noted by Peter Van Ness, came in three stages: avoidance, collaboration, and strategic response.<sup>110</sup> China quickly found common ground with the Bush Administration: combating

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106. "WTO-Plus" obligations have been hotly debated. See, e.g., Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483 (2003) (noting that China's Accession Protocol contains a large number of special provisions that have significantly revised WTO rules of conduct when applied to China trade).

107. *China Issues Commentary on US Human Rights Report*, BEIJING REV. Mar. 23–29, 1998, at 11.

108. *Id.* at 14 ("In fact, it is the United States which takes itself as an 'exception to the principle of universality' of the Universal Declaration of Human Rights.").

109. INFORMATION OFFICE OF THE STATE COUNCIL, U.S. HUMAN RIGHTS RECORD IN 1999 (2000), available at <http://www.china-embassy.org/eng/zt/ppflg/t36620.htm>.

110. Peter Van Ness, *Bush's Search for Absolute Security and the Rise of China*, in BUSH AND ASIA: AMERICA'S EVOLVING RELATIONS WITH EAST ASIA 97 (Mark Beeson ed., 2006); Peter Van Ness, *China's Response to the Bush Doctrine*, 21 WORLD POL'Y J. 38 (2005); CONFRONTING THE BUSH DOCTRINE: CRITICAL VIEWS FROM THE ASIA-PACIFIC (Peter Van Ness & Mel Gurtov eds., 2005).

terrorism.<sup>111</sup> Between 2001 and 2002, China supported President Bush on a series of UN Security Council votes.<sup>112</sup> In return, on August 26, 2002, the U.S. State Department designated the Eastern Turkistan Islamic Movement (ETIM) as a terrorist group associated with Al-Qaida, Usama bin Laden, or the Taliban allowing its assets to be frozen under Executive Order 13224.<sup>113</sup> The ETIM's members consist mainly of Uighurs—Muslim Chinese citizens from Xinjiang province. Soon after, with Bush Administration support, UN Security Council Resolutions 1267 and 1390 gave ETIM a similar designation.<sup>114</sup> Initially, some officials in the Bush Administration were suspicious and raised questions regarding the human rights of the Uighurs during meetings with Chinese officials,<sup>115</sup> but cooperation from China seemed more important. Both sides wanted to internationalize their “war on terror”: the United States wanted China's support, and China took the opportunity to demand recognition of the legitimacy of its domestic program.

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111. On September 12, 2001, Chinese President Jiang Zemin, in a telephone conversation with President Bush, promised to cooperate with the United States to combat terrorism. On September 20, China offered “unconditional support” to the United States in fighting terrorism. See SHIRLEY A. KAN, CONG. RESEARCH SERV., RL 33001, U.S.-CHINA COUNTERTERRORISM COOPERATION: ISSUES FOR U.S. POLICY 1 (2010). At a hearing before the Senate Foreign Relations Committee, Secretary of State Colin Powell said: “President Jiang Zemin was one of the first world leaders to call President Bush and offer his sorrow and condolences for the tragic events of September 11. And in the almost 5 months since that date, China has helped in the war against terrorism.” FOREIGN POLICY OVERVIEW AND THE PRESIDENT'S FISCAL YEAR 2003 FOREIGN AFFAIRS BUDGET REQUEST 27 (S. Hrg. 107-299), Feb. 5, 2002.

112. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) condemning the 9/11 terrorist attacks); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 29, 2001) (affirming global efforts to combat terrorism); S.C. Res. 1378, U.N. Doc. S/RES/1383 (Dec. 6, 2001) (condemning the Taliban); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002) (freezing funds and assets of Usama bin Laden, members of the Al-Qaida organization, and the Taliban). For a discussion of the link between the above-cited U.N. Security Council resolutions and China's domestic “anti-terror” policy see Michael Clarke, *Widening the Net: China's Anti-Terror Laws and Human Rights in the Xinjiang Uyghur Autonomous Region*, 14 INT'L J. HUM. RTS. 542 (2010).

113. Executive Order 13224 permits the President of the United States to designate and block property of persons who commit, threaten to commit, or support terrorism.

114. *Eastern Turkistan Islamic Movement: Narrative Summaries of Reasons for Listing*, SEC. COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267 (1999) AND 1989 (2011) CONCERNING AL-QAIDA AND ASSOCIATED INDIVIDUALS AND ENTITIES, available at <http://www.un.org/sc/committees/1267/NSQE08802E.shtml>.

115. Francis Taylor, State Department's Coordinator for Counter-Terrorism, visited Beijing in December 2001, and Richard Armitage, Deputy Secretary of State, visited Beijing in August 2002. Both raised questions of the human rights of the Uighurs, KAN, *supra* note 111, at 5-6. In April 1999, Amnesty International issued a report on human rights violations in Xinjiang. AMNESTY INT'L, PEOPLE'S REPUBLIC OF CHINA: GROSS VIOLATIONS OF HUMAN RIGHTS IN THE XINJIANG UIGHUR AUTONOMOUS REGION (1999).

In the 2000s, China's diplomacy gradually loosened its rigid adherence to the notion of sovereignty.<sup>116</sup> It has been increasingly involved in UN peacekeeping operations since the 1990s,<sup>117</sup> even supporting UN humanitarian intervention in East Timor. On Xinjiang, China had started working with Central Asia republics and Russia, and had formed a regional framework called the Shanghai Cooperation Organization (SCO) in June 2001, shortly before September 11. SCO included a component on terrorism.<sup>118</sup> After the 9/11 tragedy, China moved quickly to be part of the global framework on terrorism. On November 13, 2001, the day when President Bush signed a military order allowing U.S. military detention of non-citizens pursuant to the war on terror,<sup>119</sup> China signed two international treaties on terrorism: the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of the Financing of Terrorism.<sup>120</sup>

For a while, the United States and China's cooperation went largely unnoticed. China amended its Criminal Code on December 29, 2001 to strengthen penalties on crimes related to terrorism.<sup>121</sup> In March 2002, Amnesty International raised human rights concerns regarding China's post-9/11 crackdown on Xinjiang "separatists."<sup>122</sup>

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116. Allen Carlson, *More Than Just Saying No: China's Evolving Approach to Sovereignty and Intervention*, in *NEW DIRECTIONS IN THE STUDY OF CHINESE FOREIGN POLICY* 217 (Alistair Iain Johnston & Robert Ross eds., 2006) [hereinafter Carlson, *More Than Just Saying No*]; Allen Carlson, *Moving Beyond Sovereignty? A Brief Consideration of Recent Changes in China's Approach to International Order and the Emergence of the Tianxia Concept*, 20 *J. CONTEMP. CHINA* 89 (2011).

117. Stefan Stähle, *China's Shifting Attitude towards United Nations Peacekeeping Operations*, 195 *CHINA Q.* 631 (2008); Carlson, *More Than Just Saying No*, *supra* note 116, at 221–24.

118. Shanghai Convention on Combating Terrorism, Separatism and Extremism, June 15, 2001, <http://www.unhcr.org/refworld/docid/49f5d9f92.html>. This convention was signed by the Republic of Kazakhstan, the People's Republic of China, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan, and the Republic of Uzbekistan. Michael Clarke, *China, Xinjiang and the Internationalisation of the Uyghur Issue*, 22 *GLOBAL CHANGE, PEACE & SEC.* 215, 215 (2010).

119. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

120. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 *I.L.M.* 249 (1998); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 *I.L.M.* 270 (2000).

121. Amendment III to the Criminal Law of the People's Republic of China (promulgated by the People's Nat'l Cong., Dec. 29, 2001, effective Dec. 29, 2001), [http://english.gov.cn/laws/2005-10/11/content\\_75958.htm](http://english.gov.cn/laws/2005-10/11/content_75958.htm).

122. AMNESTY INT'L, *PEOPLE'S REPUBLIC OF CHINA: CHINA'S ANTI-TERRORISM LEGISLATION AND REPRESSION IN THE XINJIANG UIGHUR AUTONOMOUS REGION* (2002).



In 2002, U.S. forces captured 22 Uighurs during “Operation Enduring Freedom” in Afghanistan, and then incarcerated them at Guantánamo Bay. This did not become an issue in U.S.-China relations until 2004 when, in its annual report, the State Department noted: “The [Chinese] Government used the international war on terror as a pretext for cracking down harshly on suspected Uighur separatists expressing peaceful political dissent and on independent Muslim religious leaders.”<sup>123</sup> In May 2004, Amnesty International reported that the Bush Administration had permitted Chinese officials to visit Guantánamo Bay in 2002 and participate in interrogations in which Uighur detainees with Chinese citizenship were subjected to sleep deprivation, forced sitting for many hours, and intimidation.<sup>124</sup> This disclosure exacerbated the already embarrassing scandals of torture in Abu Ghraib, which first broke on CBS’s *60 Minutes* on April 28, then a few days later in the *New Yorker* magazine.<sup>125</sup> In August, Secretary of State Colin Powell assured the general public that the Uighurs would not be going back to China, and that “we are trying to find places for them.”<sup>126</sup>

Legally, where to put the detainees when they were released became a significant question after the Supreme Court decided on June 28, 2004 that federal courts have jurisdiction to hear detainees’ habeas corpus petitions.<sup>127</sup> Abu Bakker Qassim and A’del Abdu Al-Hakim, two Uighurs originally from Xinjiang province petitioned for a writ of habeas corpus on March 10, 2005.<sup>128</sup> The government conceded that the petitioners were “no longer enemy combatants,” and the parties agreed that the petitioners should be released. The court struggled on the issue of whether they could be released into the United States.<sup>129</sup> However, “[i]t is undisputed that

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123. U.S. DEP’T STATE, 2003 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (Feb. 25, 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm>.

124. *Group Says Chinese Saw Detainees*, WASH. POST, May 26, 2004, at A16; KAN, *supra* note 111, at 14.

125. SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004) (collecting a number of Hersh’s *New Yorker* pieces).

126. KAN, *supra* note 111, at 14.

127. *Rasul v. Bush*, 542 U.S. 466 (2004).

128. *Qassim v. Bush*, 382 F. Supp. 2d 126 (D.D.C. 2005).

129. Judge Robertson noted that:

As a practical matter, however, it is a safe prediction that any order requiring the immediate release of these petitioners would be appealed, that the Court of Appeals would enter a stay, as it did in *Guantánamo Detainee Cases*, and that whatever processes are now underway for alleviating the conditions of petitioners’ detention and arranging for their relocation to another country would be put on hold pending the appeal.

the government cannot return these petitioners to China, because they would be persecuted there."<sup>130</sup> On May 5, 2006, the two petitioners (together with the other three Uighurs) were released to Albania, despite China's demand for their return.

This would become a recurring theme. Subsequently Huzaifa Parhat, another Uighur detainee, filed a petition for writ of habeas corpus in July 2005, then again in December 2006.<sup>131</sup> The Federal Court of Appeals for the D.C. Circuit later ordered his release.<sup>132</sup> In *Kiyemba v. Obama*, seventeen Uighur detainees brought petitions for writs of habeas corpus; while the court ultimately ordered their release, it was similarly reluctant to release the detainees to China because of their fears of mistreatment.<sup>133</sup> China, of course, fiercely protested any non-China transfer.<sup>134</sup>

### C. *China's Critique of United States on Torture*

The U.S.-China dispute over Uighur detainees set the framework for human rights discourse between the two countries. Despite all the rhetoric about torture and irrelevance of international law—backed by the secret torture memos—the Bush Administration was embarrassed by Amnesty International's disclosure that they had allowed Chinese intelligence and military officials to interrogate and torture the Uighurs in Guantánamo.

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*Qassim*, 382 F.Supp. 2d at 128–29. On rehearing, the court stated further indicated its reluctance to order the Uighurs' release into the United States: "An order requiring their release into the United States—even into some kind of parole 'bubble,' some legal-fictional status in which they would be here but would not have been 'admitted'—would have national security and diplomatic implications beyond the competence or the authority of this Court." *Qassim v. Bush*, 407 F. Supp. 2d 193, 203 (D.D.C 2005).

130. *Qassim* 382 F.Supp.2d at 128.

131. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

132. *Id.* at 854.

133. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). The United States Supreme Court, after learning that each of the remaining petitioners had received and rejected at least two offers of resettlement, vacated the Court of Appeals' decision and remanded the case to the lower courts to "determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Kiyemba v. Obama*, 130 S.Ct. 1235, (2010) (*per curiam*). The Court of Appeals found that no further proceedings were necessary and reinstated its prior opinion as modified, 605 F.3d 1046 (C.A.D.C.2010) (*per curiam*), *cert. denied*, *Kiyemba v. Obama*, 131 S.Ct. 1631 (2011).

134. Throughout the period, China's Foreign Ministry spokesmen, Qin Gang and Ma Zhaoxu, repeatedly demand that the United States extradite the Uighurs back to China: *China Demands US Return Uighurs*, BBC News, Jun. 11, 2009, available at <http://news.bbc.co.uk/2/hi/8094658.stm>.

China probably thought of itself as the “right-thinking highwayman” who just witnessed a terrible crime; but now the gunman is pointing to the highwayman by saying: he has blood on his hands! If the Chinese officials were there in Guantánamo in 2002, they probably had firsthand observation of torture in practice. Thus they may well have good reasons to be outraged when they were singled out as the main focus of the torture scandals. Their repeated protests over the failure of the United States to return the Uighur detainees to China was probably based not only on their “traditional” notion of sovereignty, but on their discontent with the Bush Administration’s human rights double standard. Therefore, the disputes over the Uighur detainees created an inescapable and urgent need to talk back, by resorting to human rights norms in the existing framework of international law.

At the UN Security Council, China joined Russia and France in opposing the war on Iraq, with frequent reference to international law.<sup>135</sup> After the U.S. invasion of Iraq, China began to ratchet up the rhetoric on human rights.<sup>136</sup> Notably, the 2008 report picked the United States as an “anti-system” party:

The United States is inactive towards its international human rights obligations under the international treaties. The U.S. signed the International Covenant on Economic, Social and Cultural Rights 31 years ago, the Covenant on the Elimination of All forms of Discrimination against Women 28 years ago, and the Convention on the Rights of the Child 14 years ago, but none of the above treaties has been approved yet.<sup>137</sup>

This is accompanied by the incorporation of human rights into the official reference framework. In March 2004, China’s legislature passed a Constitutional Amendment, adding a paragraph to Article 33: “The State respects and preserves human rights.” A similarly vague but nevertheless significant sentence was added to the new

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135. Tang Jiaxuang, China’s Foreign Minister between 1998 and 2008, wrote a personal account of diplomacy during this period of time. TANG JIAXUANG, *HEAVY STORM AND GENTLE BREEZE: A MEMOIR OF CHINA’S DIPLOMACY* (2011).

136. *E.g.*, STATE COUNCIL INFORMATION OFFICE, HUMAN RIGHTS RECORD OF THE US IN 2005, [http://english.peopledaily.com.cn/200603/09/eng20060309\\_249259.html](http://english.peopledaily.com.cn/200603/09/eng20060309_249259.html) (addressing controversial wiretapping under the U.S. PATRIOT Act, Guantánamo, and the killing of civilians in Iraq and Afghanistan).

137. STATE COUNCIL INFORMATION OFFICE, THE HUMAN RIGHTS RECORD IN THE UNITED STATES IN 2008, 2009, [http://news.xinhuanet.com/english/200902/26/content\\_10904741.htm](http://news.xinhuanet.com/english/200902/26/content_10904741.htm).

CPC Charter in October 2007. In April 2009, SCIO issued the "National Human Rights Action Plan," setting out an all-around plan for human rights development in China in the next two years.<sup>138</sup>

*D. The Logic of "Soft Power" Discourse*

This intense engagement with the United States over human rights was not merely an effort to justify China's demand of the Uighurs. It is part of a much broader and ambitious project—China's "soft power."

Coined by Joseph S. Nye Jr., soft power refer to the phenomenon in which a country's culture, ideology, and institutions are so attractive that it has the ability to co-opt other countries to develop preferences or define their interests in ways consistent with one's own nation.<sup>139</sup> In the wake of the fall of the Berlin Wall, Nye had meant to advocate a liberal view of power politics for the United States by deemphasizing military competition and emphasizing more institutional building as the Cold War came to the end. But the concept was soon picked up in China by Wang Huning—a professor at Fudan University who was on his way to Beijing to become a senior advisor to Jiang Zemin.<sup>140</sup> Wang was suspicious that Nye's argument was thinly-veiled American imperialism; nevertheless, he recognized that the notion was useful because it could be used to strengthen China's own identity.

China's first taste of its "soft power" was the 1997–1998 Asian Financial Crises, when Premier Zhu Rongji's decision not to devalue the Renmimbi received international praise. China was looked upon as a "responsible power" in international affairs. In subsequent years, China quickly returned to the international community: in July 2001, China was awarded the opportunity to host the 2008 Summer Olympic Games, and in December of the same year, China joined the WTO. In 2004, a paper by a Goldman Sachs executive, titled "The

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138. State Council Information Office, *National Human Rights Action Plan of China (2009-2010)*, CHINA DAILY, Apr. 14, 2009, at 7.

139. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004); JOSEPH S. NYE, JR., *BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER* (1990). Young Nam Cho & Jong Ho Jeong, *China's Soft Power: Discussions, Resources, and Prospects*, 48 *ASIAN SURVEY* 453 (2008); David M. Lampton, *China's Rise in Asia Need Not Be at America's Expense*, in *POWER SHIFT: CHINA AND ASIA'S NEW DYNAMICS* 306 (David Shambaugh ed., 2006).

140. JOSEPH FEWSMITH, *CHINA AFTER TIANANMEN: FROM DENG XIAOPING TO HU JINTAO* 151 (2008) (discussing China's response to Huntington).

Beijing Consensus” became popular in China,<sup>141</sup> firing up a growing obsession and fantasy with the “China model” or “China path.” During the 2008 global financial crisis, there was a popular saying in China, “Only China can save capitalism,” a paraphrase of a popular slogan in Mao’s era, “Only socialism can save China.”<sup>142</sup> China as a “responsible power” appeared frequently in official media. For instance, when covering China’s efforts on global financial stability, a *People’s Daily* report on March 30, 2009 was titled “Showcasing the Image of a Responsible Power.”<sup>143</sup>

In the midst of this growing confidence and assertiveness, the “soft power” campaign also included a Chinese edition of the “cultural war” targeting Western hegemony in sociopolitical discourse—or *huayu quan* [话语权]. In 2009, the *People’s Forum*,<sup>144</sup> argued that the secrets of Western hegemony in discourse lay in its conceptual frameworks that are laden with Western values. Now that the global financial crisis has proved that the “Washington Consensus” is broken, it is time for Chinese scholars to come up with their own theories, with Chinese characteristics. The incorporation of human rights into the Constitution, even the aforementioned Party’s Charter, was only the first step. The expected next step was the conceptual “innovation” in human rights as well. Wang Chen, head of SCIO, encouraged “innovation” in human rights theory in a speech at a 2011 national conference on human rights.<sup>145</sup> He noted that as China’s national power grows, Chinese values and development path continue to gain attention, thereby increasing China’s importance in international affairs. The goal for the Chinese human rights theorists, Wang announced, was to

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141. JOSHUA COOPER RAMO, THE FOREIGN POLICY CENTRE, THE BEIJING CONSENSUS, (2004). On the interests in China model, see Suisheng Zhao, *The China Model: Can It Replace the Western Model of Modernization?* 19 J. CONTEMP. CHINA 437 (2010).

142. Michael Wesley, *Made in China*, GRIFFITH REVIEW: AFTER THE CRISIS, Sep. 29, 2009, <http://griffithreview.com/edition-25-after-the-crisis/made-in-china>. According to Wesley, the saying is: “In 1921, only socialism could save China. In 1978, only capitalism could save China. In 1991, only China could save socialism. In 2009, only China can save capitalism.”

143. *Zhanshi Fuzhenren Daguo Xingxiang* [*Demonstrating the Image of a Responsible Power*], RENMIN RIBAO [PEOPLE’S DAILY], Mar. 30, 2009, at 3.

144. “*Lilun Baquan*” *Geng Zhide Jingti* [“*Conceptual Hegemony*” *More Threatening*], RENMIN LUNTAN [PEOPLE’S FORUM], Mar. 1, 2009, at 13.

145. Wang Chen, *Zai “Zhong’guo Renquan Lilun yu Shijian de Fazhan he Chuangxin” Lilun Yantaohui shang de Jianghua* [*Speech at the Conference on Development and Innovation in China’s Human Rights Theories and Practice*], RENMIN RIBAO [PEOPLE’S DAILY], Aug. 26, 2011, at 8.

build China's human rights conceptual framework, so as to respond to critiques of human rights conditions in China, gain more understanding and recognition of China's progress in human rights, defend China's ideological security and national security by preventing intellectual infiltration by Western hostile sources.<sup>146</sup>

Clearly, in this national strategy, "soft power" is deployed as a mobilizing slogan to rally support of the Party/State establishment and reclaim legitimacy by presenting a Chinese alternative to the Western models. Human rights was clearly part of this development.

Despite its many efforts, however, it is still too early to tell if China can invent a totally different conceptual framework that can justify its current practice and, in the meantime, justify its critiques of the existing hegemon.<sup>147</sup> The empty chair at the Nobel Peace Prize ceremony in December 2010 seems to suggest the formidable challenge for such a conceptual "innovation." What is clear, however, is that as a mobilization tool, "soft power" is heavily dependent on a discursive logic based on at least some shared understandings.<sup>148</sup> Conservative thinkers like Eric Posner and John Yoo noted China's endeavors to present the Chinese alternative, but that is only one side of the story.<sup>149</sup> What they failed to see is that, in order to be convincing, "soft power" is compelled by their own logic to base their arguments on a common ground with those of the current hegemon. It was for this reason that China was inescapably drawn to the international norms in its critique of the Iraq war, Guantánamo, and Abu Ghraib; and it will continue to do so as long as it still has "soft power" in mind. Identity-based rhetoric fails to recognize that human rights discourse is a two-way communication in which the other side is eager to talk back.

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146. *Id.* at 8.

147. Joseph S. Nye Jr., *China Undoes Its Charm Offensive*, WASH. POST, Mar. 25, 2011, at A17; Joseph S. Nye, Jr., Op-ed., *Why China Is Weak on Soft Power*, INT'L HERALD TRIB., Jan. 18, 2012. China has invested heavily in this area. See DAVID M. LAMPTON, *THE THREE FACES OF CHINESE POWER: MIGHT, MONEY AND MINDS* 137–63 (2008); JOSHUA KURLANTZICK, *CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD* (2007).

148. "Shared understanding" is a key element of interactional theory of international law. See BURNNÉE & TOOPE, *LEGITIMACY*, *supra* note 83, ch. 2.

149. See generally Posner & Yoo, *supra* note 93.

## CONCLUSION

By the end of 2011 (when this article was written), it is still hard to conclude that the “era” of the Iraq War is over. It is true that on December 15, the last American troops withdrew from Iraq. The American troops, however, did not leave the region in anticipation of the growing tension with Iran, which is allegedly developing weapons of mass destruction.<sup>150</sup> Guantánamo is yet to be closed, and some speculate that it may stay open for quite a while.<sup>151</sup> The debate on torture is far from over. President Barak Obama ordered the end of “enhanced interrogation techniques” but decided not to prosecute violations of federal criminal law.<sup>152</sup> A survey of the independent voters in May 2011 suggested that a large proportion of them were in favor of the “enhanced interrogation techniques.”<sup>153</sup> In the Republican Party’s primaries in 2011, none of the presidential candidates disapproved of water boarding.<sup>154</sup>

Martti Koskenniemi made a point in 2003 on argumentation of norms in international law<sup>155</sup> that can further shed light on this point. Koskenniemi observed that international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their own preferences and counteract those of their opponents.<sup>156</sup> Often hegemonic powers also dominate international law through these kinds of contestations. But this does not render legal discourse meaningless. This is because there are some fundamental rules in legal discourse that even the hegemon is not free to break:

Engaging in legal discourse, persons recognize each other as carriers of rights and duties who are entitled to benefits from or who owe obligation to each other not because of

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150. *Dangerous Tension with Iran*, N.Y. TIMES, Jan. 13, 2012, at A22.

151. Editorial, *Guantánamo’s Next Decade*, WASH. POST, Jan. 13, 2012, at A19.

152. Kenneth Roth, Op-Ed., *Torture We Can’t Ignore*, WASH. POST, Jul. 12, 2011, at A17; Mark J. McKeon, *Why We Must Prosecute: Torture Is a Breach Of International Law*, WASH. POST, Apr. 28, 2009, at 23. *But see Cheney Offers Sharp Defense of C.I.A. Interrogation Tactics*, N.Y. TIMES, Aug. 31, 2009, at A1.

153. *Some Call It Torture. In One Poll, Most Call It Justified*, WASH. POST, May 18, 2011, at A2. The killing of Bin Laden even resurrected the debate on the use of torture. *Laden Raid Revives Debate on Value of Torture*, N.Y. TIMES, May 4, 2011, at A1.

154. Editorial, *The Torture Candidates*, N.Y. TIMES, Nov. 15, 2011, at A30.

155. Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMB. REV. INT’L AFF. 199 (2004). Joan Fitzpatrick, *Speaking Law to Power: The War against Terrorism and Human Rights*, 14 EUR. J. INT’L L. 241 (2003).

156. Koskenniemi, *supra* note 155, at 199.

charity or interest but because such rights or duties belong to every member of the community *in that position*.<sup>157</sup>

In the human rights discourse, it is a particularly intriguing test when the challenges came from a "right-thinking highwayman" that has its own questionable record, because the highwayman may well have some inside knowledge about the gunman. And so does the gunman about the highwayman. It is exactly their finger-pointing to each other that provides the best moments for outside observers to make sense of what is going on. In other words, it is not this "attitude" or that "attitude" toward human rights that is true or interesting; taken in isolation, neither "attitude" offers any meaningful information. It is the interactive process that sheds the most light on the meanings of both. This is like the complex words that William Empson, the English linguist, has most brilliantly discussed. Empson explained that the true meaning of a complex word such as a pun or a metaphor only "occurs when two ideas, which are connected only by being both relevant in the context, can be given in one word simultaneously."<sup>158</sup>

The identity-based rhetoric is deployed to obscure the situation by shifting the focus of attention on the questionable record to destroy the creditability of such a highwayman, so that there is no need to listen to what he has to say about what the gunman did. John Fairbank noted in his "Assignment for the 70's" speech that "China is the most pronounced case of 'otherness' on which we need perspective."<sup>159</sup> That statement still seems true in 2011. But he was quite mistaken in believing that we just need more information about China. Today, information about China abounds, in the media, executive boardrooms, conferences, academic journals, and seminars. Contemporary studies have forcefully demonstrated that China's international behavior is not different from that of other countries, or even shows more consistency than that of the United States in the era of the Iraq War.<sup>160</sup> This is exactly what earlier critics none other than

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157. Koskenniemi, *supra* note 155, at 214.

158. WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITY* 102 (2d ed. 1966).

159. John K. Fairbank, *Assignment for the 70's*, 74 AM. HIST. REV. 861 (1969).

160. For example, in a recent study of China's and United States' behavior in global order related areas—use of force, macroeconomic policy surveillance, non-proliferation of nuclear weapons, climate change, and financial regulation—Rosemary Foot and Andrew Walter came to the conclusion that "[s]ince the reform era, China has moved from a position of generally low behavioral consistency towards gradually higher levels in the majority of the areas covered in this study." ROSEMARY FOOT & ANDREW WALTER, *CHINA, THE UNITED STATES, AND GLOBAL ORDER* 275 (2010). The two scholars noted, however, that "[t]here has



R. Randall Edwards had argued in 1963.<sup>161</sup> Nevertheless, more information does not mitigate China's "otherness." The key is not "attitude" itself; rather, it is the attitude in the talk of the other's attitude—a phenomenology of "attitude"—that has been missing.

In this context, one great benefit in rereading Chiu's articles from the 1966–1968 period, once his struggles are made more explicit, is to learn from his sensibility and reflective self-questioning. His own background—family, political or intellectual—gave him no reason to identify with or even to be sympathetic to Mao's China. So he started with the question of Communist China's attitude toward international law—a religious fever of the Vietnam War Era. The inquiry, however, led to doubts. Chiu's two associates, Jerome A. Cohen and R. Randall Edwards, who confronted the "attitude" question more directly, helped him develop the doubts. The doubts became so clear that the experts who were invited to the 1966 Senate Foreign Relations Committee—many of whom were politically conservative, some even hawkish—voiced their concerns by revealing the absurdity of the Johnson Administration's perception of China. That ability of self-questioning, though not lost in area studies,<sup>162</sup> must be revitalized time and again to continue the dialogue, because resorting to identity—"who we are" or "who they are"—is seductively tempting and simple. Just as in language, we are inclined to find meaning "in" the word itself. William Empson complained, "There is a main puzzle for the linguist about how much

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been no similar trend towards rising levels of behavioral consistency in the case of the United States, where the picture is much more mixed." *Id.* at 275. Among non-China specialists, Professor G. John Ikenberry notes that China "is increasingly working within, rather than outside of, the Western order." G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?* FOREIGN AFF., May–Jun. 2011, at 32, 32.

161. See *supra* text accompanying note 21.

162. E.g., William P. Alford, *The Inscrutable Occidental: Roberto Unger's Use and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986); William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180 (1984); William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986). Subsequent developments include PHILIP C. C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED (2001); PHILIP C. C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING (1996); MARK A. ALLEE, LAW AND LOCAL SOCIETY IN LATE IMPERIAL CHINA: NORTHERN TAIWAN IN THE NINETEENTH CENTURY (1994); Madeleine Zelin, *A Critique of Rights of Property in Prewar China*, in CONTRACT AND PROPERTY IN EARLY MODERN CHINA 17–36 (Madeleine Zelin, Jonathan K. Ocko & Robert Gardella eds. 2004). On earlier legal history see, Karen Turner, *The Theory of Law in the Ching-fa*, 14 EARLY CHINA 55 (1989); Karen Turner, *Rule of Law Ideas in Early China?* 6 J. CHINESE L. 1 (1992); R. P. Peerenboom, *Natural Law in the "Huang-Lao Boshu,"* 40 PHIL. E. & W. 309 (1990).

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is 'in' a word and how much in the general purpose of those who use it, but it is this shrubbery, a social and not very conscious matter . . . that one would expect to find only able to survive because somehow inherent in their words."<sup>163</sup>

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163. WILLIAM EMPSON, *THE STRUCTURE OF COMPLEX WORDS* 158 (2d ed. 1989).