

## **International Law with Chinese Characteristics**

### **I. Introduction**

As a victim of Western colonialism and imperialism in the 19th and 20th centuries under “unequal treaties” and “universal” international law, China has—especially since the founding of the People’s Republic in 1949—felt little obligation to faithfully comply with international law for any reason other than self-interest. Whether denouncing it as bourgeois in the early Cold War or disregarding an international law of the sea tribunal’s adverse decision in 2016, the People’s Republic of China has often shown a conflicted loyalty to a system of law it views as foreign. While China did join other developing nations in seeking to create a new system of international law in the 1950’s based on the Five Principles of Peaceful Coexistence, China has recently shown that as a Great Power it is willing to break even these purportedly key fundamentals of international law when it suits its interests. Thus, for the People’s Republic of China, international law is merely the continuation of international politics by other means.

### **II. Debates About A Rising China**

In 2014 Wang Yi, the Foreign Minister of China, declared that his country would be a “staunch defender and builder of the international rule of law,”<sup>1</sup> citing China’s own “Century of Humiliation” under unequal treaties as a motivation to reject a Thucydidean system where “the strong do as they please and the weak suffer what they must.” At the same time, however, Wang admonished national and international judicial institutions to

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<sup>1</sup> Wang Yi, *China, a Staunch Defender and Builder of International Rule of Law*, Ministry of Foreign Affairs of the People’s Republic of China, Oct. 24, 2014, available at [http://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/wjbz\\_663308/2461\\_663310/t1204247.shtml](http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1204247.shtml).

“avoid overstepping their authority in interpreting and applying international law,”<sup>2</sup> expressing China’s simultaneous skepticism of a world order it purported to embrace.

Scholars have long debated whether a rising China will work within the current, Western-designed world order, or will work to fundamentally change it, using new found power to create a system more beneficial to Chinese interests. In *The China Challenge*, Thomas Christensen points out that China has a great interest in maintaining a system that has benefitted it so greatly. He also concedes, however, that global governance will be the “biggest challenge of all” for the international community as China rises. Likewise, Henry Kissinger notes in *On China* that while Chinese leaders have repeatedly emphasized they only seek a peaceful rise, recent actions in the South China Sea and East China Sea have raised serious questions about the sincerity of such benevolent aspirations. And, consistent with the position of structural realists that international law is a reflection of the underlying power dynamic in a system, China expert Taylor Fravel has argued that, unlike land border disputes in the past, a more powerful China has no intention of backing down from its current island claims in the East and South China Seas.<sup>3</sup>

Seeking to compare differing perspectives on international law is certainly not novel. Robert Kagan famously argued in *Of Paradise and Power* that Americans and Europeans have fundamentally different perspectives of how law should interact with the international system: Europeans since the end of the Second World War have advocated for an increased importance of international law as a tool for peaceful world order, while

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<sup>2</sup> *Id.*

<sup>3</sup> M. Taylor Fravel, *Why does China care so much about the South China Sea? Here are 5 reasons*, WASH. POST, July 13, 2016, available at [https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/13/why-does-china-care-so-much-about-the-south-china-sea-here-are-5-reasons/?utm\\_term=.5bc9f51ad42f](https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/13/why-does-china-care-so-much-about-the-south-china-sea-here-are-5-reasons/?utm_term=.5bc9f51ad42f).

the United States has instead relied on its power—military, economic, and beyond—to maintain the *Pax Americana*. But while Europeans and Americans may quibble about actions in the Middle East and sanctions against Russia, the reality is that the commonalities of these two camps—regarding liberal democracy, freedom of navigation, human rights, international norms, and so on—make their differences insubstantial compared to the drastic changes so-called revisionist powers might seek in the international system. States like Russia, China, North Korea, and Iran seek to fundamentally change the international legal system they see as privileging Western notions of sovereignty, morality, and individual rights. Of these, the People’s Republic of China clearly stands out as having the greatest chance of changing the international order that has prevailed since 1945.

As an example of its recent interactions with international law, China soundly rejected—and has continued to disregard—a 2016 ruling by the Permanent Court of Arbitration in The Hague declaring China’s territorial claims in the South China Sea to be illegitimate.<sup>4</sup> The Chinese Foreign Minister explicitly noted the Chinese view of this being nothing more than international politics, saying, “The South China Sea arbitration is completely a political farce staged under legal pretext.”<sup>5</sup> A Chinese scholar has similarly noted:

“Many in the West strive to enshrine the theory of liberalism and construct an

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<sup>4</sup> Wang Yi, *Remarks by Chinese Foreign Minister Wang Yi on the Award of the So-called Arbitral Tribunal in the South China Sea Arbitration*, Ministry of Foreign Affairs of the People’s Republic of China, July 12, 2016, available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1380003.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380003.shtml). Note that China has provided arguments anchored in international law for its refusal to recognize the ruling. In particular, China argues that UNCLOS has no jurisdiction over territorial disputes, and that the tribunal overstepped its authority.

<sup>5</sup> *Id.* The statement attacked the legitimacy of the ruling of the “so-called arbitral tribunal” and the “so-called award”, somewhat reminiscent of President Trump’s infamous twitter attack on a “so-called judge.”

international system wherein democratic states choose to avoid military aggression, while instead interacting, cooperating, and peacefully competing according to set principles, adopting a Lockean approach. However, as China's past practices have shown...China continues to hold state sovereignty and state interests in esteem. In contrast to the West, China essentially considers the international community in a manner more similar to Thomas Hobbes' concept of the Leviathan, whereby one must act for oneself and by oneself. For China, therefore, national interests and sovereignty are supreme, while international law can be manipulated in order to serve the state's needs."<sup>6</sup>

This article will first consider the historical experience of the Chinese nation in its interactions with international law. After examining China's changing views of international law, the article will then consider the current Chinese perspectives on non-intervention and human rights law, while also considering a dissenting Chinese view of international law. After concluding that the Chinese view international law is that of being nothing more than an extension of international politics, the article will discuss possible future implications and challenges as China rises to "find its place in the sun."

### III. History

Many scholars have noted that China's view of international law is uniquely colored by its historical experience. Thus, an analysis of China's current perspective on international law requires familiarity with the nation's historical relationship with international legal systems.

#### A. Pre-1800's: Developing a Notion of "Sovereignty"

Long before East and West met in any meaningful sense, the two civilizations had already begun forming ideas about the proper extent of a sovereign's power. Coleman and Maogoto argue in "*Westphalian*" Meets "*Eastphalian*" Sovereignty that the Chinese conception of sovereignty is fundamentally different than that of the West, and

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<sup>6</sup> Zihang Liu, *How the Chinese View International Law*, International Policy Digest, Aug. 29, 2016, (reviewing He Zhipeng's *The Chinese Notion of International Law*) available at <https://intpolicydigest.org/2016/08/29/how-the-chinese-view-international-law/>.

that these differing conceptions are simply “fruits of different trees.”<sup>7</sup> Particularly, they assert that the West has always viewed sovereignty as being conditional, while China has viewed it as absolute.<sup>8</sup> In support of this theory, they cite the different history of the two regions. In the West, the modern concept of sovereignty is traditionally traced back to the 1648 Peace of Westphalia. After the unprecedented destruction wrought by the Thirty Years War,

“States emerged from the Peace of Westphalia not only with the ability to remain independent of the authority of the Empire and Church, but also an all-consuming desire not to be dominated by any “foreign” entity. However, whilst states argued that their sovereignty was “absolute”, the fact remained that there existed multiple absolute sovereigns, in a community whose members refused to accept a hierarchy: a “welter of competing sovereignties”. Thus the idea of a split legal persona, that is internal sovereignty and external sovereignty, was born as a direct result of this inherent contradiction in Westphalian sovereignty; and this led to the acceptance that a state’s external sovereignty was restricted, but its internal sovereignty was ‘absolute’...Ultimately all sovereigns would be answerable to God for their actions. Over time, as that influence within Western culture as well as politics waned, God as a limitation was replaced with the notion that states’ sovereignty was curtailed, by necessity, by the norms (positivist and natural) of international law.”<sup>9</sup>

Thus, in the West sovereignty was never seen as completely absolute, but, rather, conditioned by natural law—or, later, “international norms”. However, China’s unique history—as well as its religious and philosophical traditions—gave rise to a concept of “sovereignty” defined differently in the Middle Kingdom. Unlike the focus on individual autonomy born by the Protestant Revolution in Europe, Chinese society lacked such a

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<sup>7</sup> ANDREW COLEMAN & JACKSON MAOGOTO, “*Westphalian*” Meets “*Eastphalian*” Sovereignty: *China in a Globalized World*, 3 ASIAN J. OF INT’L L. 237, 245 (2013).

<sup>8</sup> *Id.* “In the West, from its very inception sovereignty was always limited, initially by God, and then through the work of theorists like Grotius, who successfully managed to secularize sovereignty limited by the norms of international law. Even Bodin acknowledged that sovereignty was limited by the “rules of God”, natural law, and the law of nations. No such limitation would seemingly apply to China and Eastphalian sovereignty; in fact, Eastphalian sovereignty jealously guards the right to non-interference”.

<sup>9</sup> *Id.* at 247-248.

focus on the individual or any concept of equality among sovereigns:

“The basic premise within Buddhism, in contrast to Christianity, was the enlightenment of individuals and a means to achieve this, but ... it did not develop the concept of individual freedom as conceptualized in Western culture. Buddhism [o]riginated from a set of psychological and ontological assumptions totally unlike those of a modern Western thought. The Buddhist teaching about the individual denied the very existence of any permanent and substantial self of which rights to freedom of any sort could be predicated ... Confucianism’s teachings [also] influenced Eastphalian sovereignty dramatically ... Confucius’ thoughts on how to assist China emerge from chaos and maintain order were based around a system of respect from an inferior to a superior, extending all the way to the Emperor, the Son of Heaven ... Thus, reinforced by an immensely influential moral spiritual system, “universal sovereignty” prevailed in China, and it was absolute, in both the external and internal application of its political power ... China recognized no equals in the surrounding territories, with Korea, Thailand, Vietnam, and Tibet all acknowledging Chinese sovereignty as vassal states during the Ming dynasty.”<sup>10</sup>

The Chinese Emperor’s power was absolute internally as he controlled *Tianxia* (天下)—or “everything under the heavens”—and the Chinese Empire was the *Zhongguo* (中国), or “Middle Kingdom”, and ruled over surrounding states in a hierarchical relationship. Thus, while Westphalian sovereignty from its inception was limited in both its external and internal aspects (i.e. states were sovereign equals and their rule over their citizens was subject to God’s will), Eastphalian sovereignty was absolute in both senses.<sup>11</sup>

#### B. Early Interactions With European International Law: A Century of Humiliation

As Chinese and European powers began meeting more regularly and significantly in the 18th and 19th centuries, the Middle Kingdom came to be victimized by Western

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<sup>10</sup> *Id.* at 251-254.

<sup>11</sup> *Id.* at 254. Noting that most other societies had used law as a way to constrain Francis Fukuyama wrote in 2016, “[t]he traditional Chinese attitude toward law...struck a different balance than in other societies. Law was understood as an *expression* of state power, rather than as a *constraint* on it.”<sup>11</sup> Francis Fukuyama (2016) Reflections on Chinese governance, *Journal of Chinese Governance*, 1:3, 379-391.

imperialism. Chinese scholars traditionally date the beginning of the decline of the Chinese Empire—and the beginning of the Century of Humiliation—to the First Opium War, which lasted from 1839–1842. The war ended with a Chinese defeat at the hands of the British and was concluded by the Treaty of Nanjing in 1842, which ceded Hong Kong to the United Kingdom and established five other treaty ports along the Chinese coast. Another treaty the next year bestowed most favored nation status upon the United Kingdom and added provisions permitting the extraterritoriality application of British law. Other Great Powers likewise scrambled to get their own slices of the Chinese pie: France secured concessions on the same terms as the British in treaties of 1843 and 1844, and a Second Opium War (1856-186) saw the intervention of the United Kingdom, France, Russia, and—to a limited extent—the United States a few years later. The Second Opium War was concluded by the four Treaties of Tientsin, which opened an additional eleven ports to Western trade.<sup>12</sup>

Continuing through the turn of the 20th Century, the Chinese Empire would be further coerced into more and more “unequal treaties” by Western powers and Japan. After a group of eight foreign powers intervened in China to put down the Boxer rebellion in 1901, the Chinese Empire was forced to sign the Boxer Protocol, which included concessions to Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Japan, The Netherlands, Russia, Spain, and the United States. The Century of Humiliation would continue until the end of the Second World War and the emergence of

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<sup>12</sup> The Chinese initially refused to ratify the treaties, but realized by 1860 know alternative path was viable. The Treaties included provisions that: 1) Britain, France, Russia, and the U.S. would have the right to establish diplomatic legations in Beijing (which was, up to that time, a closed city); 2) Ten more Chinese ports would be opened for foreign trade; 3) All foreign vessels, including commercial ships, would have the right to navigate freely on the Yangtze River; 4) Foreigners had the right to travel in the internal regions of China, which had been prohibited; 5) China was to pay war indemnities to Britain and France.

the People's Republic of China in 1949. After being the victim of so many foreign interventions and "unequal treaties", it was no surprise that the new communist regime wanted to break with the seemingly oppressive international law of the West. Xue Hanqin, a Chinese Judge for the International Court of Justice, wrote that "China's experience since the first Opium War was not merely a piece of history, but more significantly, it explains why China always attaches such importance to the principle of sovereign equality in international affairs."<sup>13</sup> While China had, prior to European contact, viewed itself as the superior in a hierarchy of states, once the Chinese Empire came to be victimized by more powerful states China, ironically, began embracing Westphalian notions of non-intervention and equality of sovereigns.

#### C. Post-Revolutionary China (1949-1978): Rejecting Unequal Bourgeois Treaties

Mao Zedong's 1949 Communist Revolution ended the so-called "Century of Humiliation" in China, although even the Chinese Nationalist government of 1911-1949 had denounced and fought against "unequal treaties" with the West and Japan. Coleman and Maogoto argue that, from the outset, the People's Republic of China's perception of international law was colored by China's historical experience:

"[T]he nineteenth-century humiliations, where norms touted as 'international law' and 'universal' were in fact used to cement European dominance, hegemony, and, in the words of one commentator, Asian 'serfdom'[were not forgotten]...[as imposed by Western powers through colonization, international law's] basic tenets of peace, justice, and equality were grimly tarnished by the cruelty of colonial and imperial governance imposed upon many Asian countries."<sup>14</sup>

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<sup>13</sup> XUE HANQIN, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law*, The Pocket Books of The Hague Academy of International Law (2012) at 57.

<sup>14</sup> COLEMAN & MAOGOTO, *supra* note 7, at 261-262. ("This perception was unaltered by the developments in the twentieth century, the so-called pursuit of the science of international law, led by the US, saw an increase in attention on issues such as human rights and democracy becoming a crusade for a 'right to democracy'". China [saw] many double standards in the West's drive for the universalization of human rights, and the prosecution and pursuit of what they acknowledge as worthy ambitions, as creating an "imbalance". Xue has noted: "When the rule

From the founding of the People Republic of China in 1949, China had a contradictory relationship with international law. On the one hand, China spoke out against traditional international law as a system that primarily protected the interests of imperial and colonial Western powers, while undermining underdeveloped nations.<sup>15</sup> Thus, in some ways, the newly established communist country was an opponent and a challenger to the existing world legal order under European and American dominance—unsurprising given the nation’s history of victimization under Western domination.<sup>16</sup> On the other hand, however, China did not opt to be an outlaw, despite the sometimes questionable statements of its revolutionary government.<sup>17</sup> In fact, the People’s Republic of China expressly endorsed the principles and purposes of the UN Charter and China’s attitude toward international law manifest both pragmatism and idealism.<sup>18</sup>

Because the People’s Republic of China was founded as a socialist state in the early years of the Cold War, China was expected to align with the socialist countries of the Eastern Bloc under the lead of the Soviet Union. However, because of its past history of victimization by European imperialism, China also found much common ground with many of the newly independent and non-aligned states of the Third World.<sup>19</sup> Thus, after first following the lead of the Soviet Union in its early years, China moved toward a non-aligned stance, especially after the Sino-Soviet split starting in 1960’s and China’s reproachment with the United States beginning in the 1970’s.

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of law, democracy, and human rights are being advocated at the international level, they often tend to represent essentially one type of ideology, one form of culture, and one kind of political system”).

<sup>15</sup> XUE, *supra* note 13, at 57.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 58.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 59.

In its formative early years, China's conception of international law took great influence from Soviet theory and practice.<sup>20</sup> Xue Hanqin has noted,

“Soviet experts were invited to teach and their textbooks on international law were used in Chinese universities and legal institutes. The analytical methodology of Marxist theory of class struggle was dominant for legal studies both for domestic legal construction as well as for international relations. Due to its ideological dominance, even in the later years when China broke off from the Soviet Bloc, the Marxist theory of class struggle and proletarian internationalism continued to guide China's legal studies and research.”<sup>21</sup>

Because of this, the international legal system was seen not as universal, but merely as an instrument of capitalism.<sup>22</sup> In this line of thinking, Chinese scholars in the 1950's debated whether there might perhaps exist a single system of international law applicable to all States, regardless of their political system, or whether there should, instead, exist two systems of international law: one socialist international law applicable to socialist states, one bourgeois international law applicable to capitalist states, and, perhaps, a further additional common international law applicable to all.<sup>23</sup> And, in an effort to “start anew” and “clean the house first before guests invited”, China abolished its old legal system and built up its foreign relations from scratch in the years after the communist revolution.<sup>24</sup> China aimed to totally abolish the last vestiges of imperialist privilege and influence over China and to restore the nation's sovereignty and independence.<sup>25</sup> “Unequal treaties” had, for more than a century, deprived China of many of the most basic attributes of sovereignty. Under some of these treaties, imperialist powers—including The United Kingdom, France, Germany, Japan, Russia, and the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 59 n.22.

<sup>24</sup> *Id.* at 60.

<sup>25</sup> *Id.*

United States, among others—enjoyed such rights as the ability to station military forces in China, trading rights in certain coastal areas, and navigational rights in certain internal waterways. As a newly sovereign entity, the socialist nation sought to renounce any agreement to which it would not have consented.

However, as critical as the People’s Republic of China was of international law for its allowance of colonialism and imperialism, the new nation would take account of generally accepted international principles and norms in the handling of its foreign relations and international affairs.<sup>26</sup> In dealing with treaties inherited from Imperial China and the Republic of China, the People’s Republic neither simply accepted all agreements as a matter of succession, nor rejected them in their totality on the ground that they were “unequal treaties”. Instead, in accordance with the principles of equality, mutual benefit, and mutual respect for territorial sovereignty, China adopted a policy to review the prior agreements one-by-one and decided whether to recognize, repeal, or amend the agreements based on their nature and content.<sup>27</sup>

China’s acceptance of international law grew, too, as former colonies gained independence in the 1950’s and 1960’s and began accepting international rules and norms, thus making international law accepted by more than just Western powers. And in 1954 China announced—with India and Burma—the “Five Principles of Peaceful Coexistence.” The Five Principles were:

1. Mutual respect for sovereignty and territorial integrity;
2. Mutual non-aggression;
3. Mutual non-interference internal affairs;
4. Equality and mutual benefit; and
5. Peaceful co-existence.

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<sup>26</sup> *Id.* at 62.

<sup>27</sup> *Id.* at 63.

Thus, even while the People’s Republic of China denounced certain “Western” treaties and agreements, it simultaneously—and emphatically—embraced Westphalian notions of non-intervention and equality among sovereigns. The Five Principles expressed these developing countries’ visions for a new type of interstate relations under international law, and the heads of China and India stated that the Five Principles “should be applied in their relations with countries in Asia, as well as in other parts of the world” and,

“[i]n international relations generally. If these principles are observed by all states, peaceful coexistence of states with different social systems will be assured and the threat of aggression and intervention in internal affairs and fear of such a threat would be substituted by a sense of security and mutual trust.”<sup>28</sup>

Because of its revolution and historical victimization at the hand of colonial powers, China passionately supported the struggles against colonialism, racism, and imperialism of Asian and African countries. For example, notwithstanding traditional theory and law on state recognition, China gave prompt recognition to such African countries as Sudan (1956), Tunisia (1957), Guinea (1958), Togo (1960), Mali (1960), Somalia (1960), Nigeria (1960), and Tanzania (1961).<sup>29</sup> China also strongly supported the Palestinian Liberation Movement and recognized it as a state under international law.<sup>30</sup> In 1955, at the first Asian-African Conference held at Bandung, Chinese premier Zhou Enlai joined leaders of other developing nations in further elaborating the Five Principles into ten, which were subsequently coined the “Bandung Ten Principles”.<sup>31</sup> This agreement on

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 67 n.53.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 67-68, citing Wang Tiewa, *China and International Law: Historical and Contemporary*, in Deng Zhenglai (ed.), *Selection of Wang Tiewa's Essays* (in Chinese), 1993, p. 332. (The ten principles were: 1. Respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations; 2. Respect for the sovereignty and territorial integrity of all

principles by developing states thus combined aspects of anti-imperialism and respect for pluralism. When criticized by some other developing countries for its particular communist ideology, Zhou Enlai responded by saying,

“we respect the right of the people of all countries in choosing their lifestyle and State systems without external interference, while we request other States to do likewise to us. We are of the view that if these principles (the Five Principles) are observed by all, countries of different social systems could live in peace.”<sup>32</sup>

The spirit of these principles contributed to the creation of a universal basis of international law at a time when ideological differences between East and West—and North and South—seemed nearly impossible to bridge. China viewed the Five Principles as not only applying to relations between Asian states alone, but to all states in the international system, without regard to domestic sociopolitical systems and ideologies. And, two decades later when President Nixon first visited the People’s Republic of China in 1972, the two countries agreed to handle their relations in accordance with the Five Principles, despite the enormous differences between their foreign policies and domestic political systems.<sup>33</sup>

#### D. Post-Reform China (1978-2008): Joining the World

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States; 3. Recognition of equality of all nations and of all States, big and small; 4. Abstention from interference or intervention in the internal affairs of other States; 5. Respect for the right of each nation to defend itself singly or collectively in conformity with the Charter of the United Nations; 6. Abstention from the use of arrangements of collective defense to serve the particular interest of any of the big powers and abstention from exerting pressure by any country on other countries; 7. Abstention from acts or threat of aggression or the use of force against the territorial integrity or political independence of any States; 8. Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' choice, in conformity with the Charter of the United Nations; 9. Promotion of mutual interests and co-operation; and 10. Respect for justice and international obligations).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, citing The Joint Communiqué between the People's Republic of China and the United States issued in Shanghai on 28 February 1972 (also called ‘Shanghai Communiqué’), in Ministry of Foreign Affairs (ed.), *Compilation of Treaties of the People's Republic of China*, Vol. 19, Beijing, People's Publishing House, 1977, p. 20.

By 1978, Deng Xiaoping sought to radically change China's domestic policies by introducing market-based reforms to the national economy. After a decade of "Cultural Revolution" and the death of Mao Zedong in 1976, Deng and other elites had realized that drastic changes were needed if China were to ever become a Great Power on the world stage. Directing the People's Republic in a much more capitalistic, Westward-facing direction in an effort to raise China's masses out of poverty, Deng fought off attacks by hardcore leftist ideologues with his famous saying, "It doesn't matter whether a cat is white or black, as long as it catches mice."<sup>34</sup> Along with domestic economic reforms, China also sought changes in its foreign relations. After re-establishing formal diplomatic relations with the United States in the 1970's, China in the following decades would seek to join many of the institutions of the American-led liberal world order and trade with the West and Japan increased dramatically. China continued this course after the end of the Cold War as it experienced enormous economic growth and a rising profile on the world stage. Princeton professor and China expert Aaron Friedberg noted that from the 1978 to the end of the Cold War and,

"for roughly the first 15 years after the end of the Cold War...China's rulers followed the wisdom of Deng Xiaoping, who in 1991 advised that the nation should 'hide its capabilities and bide its time.' China generally sought to avoid confrontation, especially with other major powers, and it embraced the opportunity to enter more deeply into the global economy, most notably by joining the WTO in 2001."<sup>35</sup>

Thus, for the three decades after 1978, China seemed to embrace the American-led world order and international law. Doing so seemed to greatly benefit China, as the

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<sup>34</sup> In other words, who cares if the system is capitalist or socialist, so long as it raises us out of poverty?

<sup>35</sup> Aaron Friedberg, "Testimony before the Senate Committee on Armed Services Hearing on U.S. Policy and Strategy in the Asia-Pacific Region," hearings before the Senate Committee on Armed Services, 115th Congress (2017), *available at* [https://www.armed-services.senate.gov/imo/media/doc/Friedberg\\_04-25-17.pdf](https://www.armed-services.senate.gov/imo/media/doc/Friedberg_04-25-17.pdf).

nation was able to use foreign trade and investment to power enormous economic growth and rising standards of living for its citizens. During this time period China sought to acquiesce in the rules of the international system, not to make them.

#### E. Great Power Status (2008-Present): Making the Rules and Breaking the Rules

However, starting around 2008, China watchers began to note differences in China's behavior. Aaron Friedberg recently testified before the Senate Armed Services Committee that:

“Things began to change in 2008, with the onset of the global financial crisis, and those changes accelerated, and became more firmly institutionalized, in 2013 with the accession of Xi Jinping to the top positions in the party and the state. The financial crisis caused Chinese strategists to revise their assessment of the relative trajectories of China and the United States. Basically, they concluded that the U.S. was declining more rapidly than they had expected, while China was rising more quickly than they had hoped. It was time for China to step up, to become clearer in defining its “core interests” and more assertive in pursuing them ... China is behaving more assertively both because its leaders want to seize the opportunities presented to them by what they see as a more favorable external situation and because they feel the need to bolster their own legitimacy and to rally domestic support by courting controlled confrontations in which they can present themselves as standing up to ‘hostile foreign forces’.

“The fundamentals of Chinese strategy have not changed, but under Xi's leadership there has been a clarification of ends and an intensification of means. Xi and his colleagues have begun to articulate their vision for a new Eurasian order – a system of infrastructure networks, free trade areas, new “rules” written in Beijing, and mechanisms for political consultation – all with China at the center and the United States pushed to the periphery, if not out of the region altogether.”<sup>36</sup>

Taylor Fravel, an expert on Chinese security and foreign policy at MIT, has also noted the change in behavior. Trying to explain why China had been willing to compromise and settle border disputes in the past, but today seems unwilling to do so with regards to islands in the South and East China Seas, Fravel has suggested that,

“Now that China is an economic powerhouse, many citizens expect to see a

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<sup>36</sup> *Id.*

stronger China in general — on land and at sea. Chinese leaders have stoked these nationalist expectations ... [and] thanks to the rise in Internet use and social media, the Chinese public knows far more about the country’s foreign relations — and its disputes. When China was settling land border disputes in the early 1960s and early- to mid-1990s, the leadership could operate largely out of public view, and the Chinese people simply did not know what compromises were being made.”<sup>37</sup>

Whatever the reason, there seems to be a certain consensus among China scholars that China had indeed grown more assertive over the last decade.<sup>38</sup> Such behavior also seems to be visible in its approach to international law.

#### IV. Current Views of International Law

##### A. Sovereignty and Non-Interference

While Chinese officials continue to purport the unchanging applicability of the Five Principles of Peaceful Coexistence, China’s commitment to the principle of non-interference has undergone a fundamental shift as the state has gained power.

In 2004, Wen Jiabao, the Premier of the State Council of the People’s Republic of China, gave a speech celebrating the 50th anniversary of declaration the Five Principles. Wen declared that China was not only a strong supporter of the Five Principles, but also a faithful practitioner of them, noting that even after a half-century the Five Principles were “still shining with the radiance of truth as they continue to guide the conduct of relations

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<sup>37</sup> M. Taylor Fravel, *Why does China care so much about the South China Sea? Here are 5 reasons*, WASH. POST, July 13, 2016, available at [https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/13/why-does-china-care-so-much-about-the-south-china-sea-here-are-5-reasons/?utm\\_term=.5bc9f51ad42f](https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/13/why-does-china-care-so-much-about-the-south-china-sea-here-are-5-reasons/?utm_term=.5bc9f51ad42f).

<sup>38</sup> See also Michael D. Swaine, *China’s assertive behavior part four: the role of the military in foreign crises*, 37 CHINA LEADERSHIP MONITOR (2012); Michael D. Swaine, *China’s assertive behavior part three: The role of the military in foreign policy*, 36 CHINA LEADERSHIP MONITOR 1–17 (2012). Note that this view is not universal, however. See, e.g., Alastair Iain Johnston, *How new and assertive is China’s new assertiveness?*, 37 INTERNATIONAL SECURITY 7–48 (2013).

among states.”<sup>39</sup> Wen cited the 165 agreements China had made with other nations that had incorporated the Five Principles and noted that the Five Principles had even been written into the Constitution of the People’s Republic of China.<sup>40</sup> Wen also noted that it was on the basis of the Five Principles that China had, through peaceful means, resolved boundary disputes with many of its neighbors and maintained peace and stability in Asia.<sup>41</sup> Further praising the Five Principles as consistent with the Charter of the United Nations, Wen made an appeal to the ideals of the Five Principles:

“peace and development can be maintained throughout the world only when the principle of sovereign equality is genuinely observed, when the right to equal treatment by all countries, big or small, rich or poor, strong or weak, is recognized, when the right of all countries, developing countries in particular, to freely choose their road of development is fully respected, and when the legitimate rights, interests and appeals of the small, poor and weak countries are taken into account and earnestly protected.”<sup>42</sup>

Ten years later in 2014 these same points were again reiterated when the Ministry of Foreign Affairs and the Chinese Society of International Law jointly held a conference to commemorate the 60th anniversary of the debut of the Five Principles.<sup>43</sup> Liu Zhenmin, China’s Vice Minister for Foreign Affairs, gave a speech reminiscent of Wen’s 2004 speech and reiterated China’s continuing commitment to the Five Principles.<sup>44</sup> Claiming that the “Five Principles enriched and developed the fundamental principles of

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<sup>39</sup> Wen Jiabao, *Speech by Wen Jiabao, Premier of the State Council of the People's Republic of China, at a Rally Commemorating the 50th Anniversary of the Five Principles of Peaceful Coexistence*, June 28, 2004, available at, <http://www.fmprc.gov.cn/eng/topics/seminaronfiveprinciples/tl40777.htm>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Xu Hong, *The Chair’s Summary of the Colloquium on “The Five Principles of Peaceful Coexistence and the Development of International Law”*, Held in Beijing on May 27, 2014, 13 CHINESE J. INT’L L. 477, para I (2014).

<sup>44</sup> LIU ZHENMIN, *Following the Five Principles of Peaceful Coexistence and Jointly Building a Community of Common Destiny*, 13 CHINESE J. INT’L L. 477, 477-480 (2014).

international law centered on the UN Charter,” Liu also argued that, while the Five Principles epitomized oriental wisdom, the “Five Principles were intended not only for Asia, but world at large,” and that the Five Principles had served as a cornerstone for Chinese foreign policy from 1954 to 2014. Liu went on to say that China would continue to uphold the Five Principles, with a specific focus on upholding the concepts of sovereignty, peace, win-win progress, and justice.<sup>45</sup>

However, despite the similarities between Wen’s 2004 speech and Liu’s 2014 speech, the intervening events of the decade in between the speeches suggested that Liu’s comments about the Five Principles were, by the mid 2010’s, little more than lip service. Alas, while Wen was able to point out concrete examples of Chinese behavior consistent with the principles, Liu failed to provide any. Indeed, while China’s position had actually been evolving slowly over the first two decades of the 21st Century, the period after the 2008 global financial crisis proved very transformative. Critic of the Chinese Communist

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<sup>45</sup> *Id.* (“Today, as part of our efforts to carry forward these Principles, we should uphold four core values enshrined in the Five Principles: *Firstly*, the concept of sovereignty, which forms the foundation of the Five Principles. The principle of sovereignty is about mutual respect for sovereignty, security and core interests, respect for the inherent right of a country to maintain its unity and territorial integrity, mutual respect for social system, ideology and path of development, and seeking common ground while reconciling differences. ... *Secondly*, the concept of peace, which represents the supreme value of the Five Principles. To maintain peace, countries must refrain from invasion and oppose war, aggression, threat or use of force. They must uphold the system of collective security where the Security Council plays the central role, and constantly improve the rules-based regional security and stability architecture. ... *Thirdly*, the concept of win-win progress, which is the ultimate objective of the Five Principles. To achieve win-win progress, countries need to engage in mutually beneficial international cooperation on the basis of equality. They must promote the establishment of a community of common destiny, in which development is achieved and shared by all. Countries should promote economic cooperation on the basis of mutual benefit, and boost common development through their own development, which in turn can be safeguarded by common development. Countries must discard the thinking of clash of civilizations, and promote exchanges between different cultures such as those of tea and coffee ... *Fourthly*, the concept of justice, which is the intrinsic requirement of the Five Principles. The inclusion of the word “mutual” or the prefix “co-” in the Five Principles reflects the unity of rights, obligations and responsibilities. Countries should engage in international relations in accordance with international law).

Party Wuyou Lan wrote that by 2014 China’s “so-called respect for national sovereignty and non-interference in others’ internal affairs is a sham” and that “international law is nothing more than a tool for publicizing and demonstrating the official position” of the communist party.<sup>46</sup> Rather than viewing international law as something to be followed, China instead views it as merely a tool of international politics to be exploited when convenient and denied when obstructive. Likewise, Zhongying Pang had in 2008 somewhat presciently argued that:

“[w]hether rapidly or slowly...China’s foreign policy in general, and its adherence to the principle of ‘non-interference’ in particular, are in a deep process of transition. As its economy grows and becomes more exposed to global risks and uncertainties, Chinese foreign policy makers are being forced to react to the changes and challenges at home and abroad...Beneath its persistent rhetorical commitment to non-interference and nonintervention, however, in practice it seems that China is changing its position in relation to international engagement with political and humanitarian crises and is rethinking its stance on international intervention. Most notably, since the end of the Cold War, China has gradually become increasingly involved in multilateral interventions mandated and organized either by the UN or other appropriate regional organizations operating with the UN Security Council.”<sup>47</sup>

History supports Lan and Pang’s assertions that China’s position on sovereignty and non-intervention had fundamentally shifted. At the beginning of the 21st Century the then new doctrine of the “Responsibility to Protect” was developed by a report of the International Commission on Intervention and State Sovereignty in 2001.<sup>48</sup> At the outset, many Chinese scholars criticized the doctrine and voiced concern that it would simply allow the United States and some European nations to justify their military

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<sup>46</sup> Lan Wuyou, *Chinese Communist Party’s Real Attitude towards International Law*, CHINA CHANGE (Oct. 29, 2014), available at <https://chinachange.org/2014/10/29/the-real-attitude-of-the-chinese-communist-party-towards-international-law/>.

<sup>47</sup> ZHONGYING PANG, *China’s Non-Intervention Question*, 1 GLOBAL RESPONSIBILITY TO PROTECT 237, 239 (2009).

<sup>48</sup> *Id.* at 240.

interventions.<sup>49</sup> Gradually, however, Chinese analysts began to recognize that there might be some benefit in endorsing the concept of a “Responsibility to Protect” as a compromise between the “right of humanitarian intervention” pushed by the West and the traditional non-interference position championed by China—specifically conditioning their support of the doctrine’s use on the existence of specific Security Council approval of the proposed intervention.<sup>50</sup> China subsequently issued a “Position Paper on the United Nations Reforms” in 2005 and stated:

“Each state shoulders the primary responsibility to protect its own population. However, internal unrest in a country is often caused by complex factors. Prudence is called for in judging a government’s ability and will to protect its citizens. No reckless intervention should be allowed. When a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis. Any response to such a crisis should strictly conform to the UN Charter and the opinions of the country and the regional organization concerned should be respected. It falls on the Security Council to make the decision in the frame of UN in light of specific circumstances which should lead to a peaceful solution as far as possible. Wherever it involves enforcement actions, there should be more prudence in the consideration of each case.”<sup>51</sup>

In 2005, the UN Secretary-General’s High Level Panel on Threats, Challenges and Change, which included a senior Chinese member, produced a report entitled *A more Secure World: Our Shared Responsibility* that adopted “emerging norms” like the Responsibility to Protect. China also endorsed a Security Council mandated arms embargo against Sudan due to the humanitarian situation in Darfur in the same year, along with Security Council resolutions permitting the deployment of peacekeeping forces to Sudan and sanctions on North Korea.<sup>52</sup> China’s greatest embrace of the Responsibility to Protect, however, would be in 2011 when it declined to veto a Western-

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 241.

<sup>52</sup> *Id.*

backed Security Council resolution allowing for military intervention in the Libyan Civil War.

Even starting back in the 1990's, however, China had strong record in supporting the deployment of peacekeeping forces, including its own provision of troops to UN peacekeeping operations in Africa, Latin America, the Middle East, and Southeast Asia.<sup>53</sup> China today contributes more troops to UN peacekeeping missions than any other of the permanent members of the Security Council.<sup>54</sup> And, recently, the People's Republic of China has given Africa, specifically, much attention. In late 2014, China committed seven hundred combat troops to South Sudan, marking the first Chinese infantry battalion to take part in a UN peacekeeping mission.<sup>55</sup> China dispatched combat troops to Mali to ease tensions in the country's restive north. It had also provided \$1 million in assistance to the African Union in support of its mediation efforts in there.<sup>56</sup> "In effect, the PRC is slowly but surely giving up its controversial policy of non-interference," wrote Harry Verhoeven at the University of Oxford, "this is not so much the product of a carefully considered foreign policy shift as it is a logical response to both acute security crises on the continent in recent years and China's re-emergence as a global power with ever greater interests, ever further afield."<sup>57</sup>

By March 2017, more than 2,500 Chinese troops, police, and military experts had been dispatched to six UN peacekeeping missions in Africa, four of which are in Darfur, DRC, Mali, and South Sudan; there are also smaller contingents in the Ivory Coast and

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<sup>53</sup> *Id.*

<sup>54</sup> Courtney J. Fung, *China's Troop Contributions to U.N. Peacekeeping*, United States Institute of Peace, 7/26/16, available at <https://www.usip.org/publications/2016/07/chinas-troop-contributions-un-peacekeeping>.

<sup>55</sup> Christopher Alessi & Beina Xu, *China in Africa*, CFR Backgrounder, Updated 4/27/15.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Western Sahara.<sup>58</sup> Xi pledged \$100 million in military aid to the African Union in 2015 and China supports African countries' capacity building in areas like defense and counterterrorism.<sup>59</sup> The killing of Chinese peacekeepers in Mali and South Sudan, the kidnapping of Chinese workers in Cameroon, and the spread of the self-proclaimed Islamic State in Africa have contributed to a growing Chinese security presence.<sup>60</sup> Since 2008, China has supported counter-piracy operations in the Gulf of Aden, off the northeastern coast of Africa.<sup>61</sup> And Djibouti, already home to other foreign military bases, will be the site of China's first permanent naval installation overseas.<sup>62</sup> Thus, while it may have been true during the Cold War that the People's Republic of China practiced the Five Principles it preached, by the second decade of the 21st Century, it has become clear the Beijing is no longer fully committed to the principles of sovereignty and non-intervention.

However, Zhongying Pang posits that China nonetheless still has a strong interest in advocating for non-interference in its words, even if its actions show much disregard for the Five Principles. First, the Five Principles are still seen as "defending China's sovereignty from the 'superpower threat' and other foreign interferences in China's sovereign affairs."<sup>63</sup> Still today, questions regarding Tibet, Xinjiang, and Taiwan plague China's relationship with the West, and by asserting a blanket policy of non-interference in domestic affairs, China can attempt to deflect any criticism of internal policy as merely continued Western imperialist meddling. Second, China's continued verbal support for

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<sup>58</sup> Eleanor Albert, *China in Africa*, CFR Background, Updated 4/17/17.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> PANG, *supra* note 45, at 244.

non-interference helps the country create and maintain a “deep political affinity with the rest of the developing world.”<sup>64</sup> India, Pakistan, the nations of ASEAN, and many African and Latin American countries adhere to the principle of non-interference as a guard against neo-colonialism. The high priority Beijing places on its relationships with nations of the developing world thus necessitates China maintaining a commitment to non-interference.<sup>65</sup> Thirdly, its purported adherence to the principle of non-interference allows China to selectively justify its avoidance of international crises that are simply not matters of importance to the Chinese national interest.<sup>66</sup> For example, in the mid-2000’s, China was able to point to the principle of non-interference in its resistance of intervening in the humanitarian crises taking place in Zimbabwe and Myanmar, which was broadly in line with the positions taken by the majority of southern African countries and ASEAN countries, respectively, during these crises.<sup>67</sup>

But, despite these continued reasons for at least maintaining the lip service fiction of its fidelity to the Five Principles, the People’s Republic of China has clearly faced growing pressure to abandon the principles. Pang argues that the three main drivers of this are global interdependence, China’s changing national interests, and changing geopolitical realities.<sup>68</sup> This seems logical, as the greatest difference between Cold War China and the China of today would be its relative power position in Asia and the world. While China in the early Cold War was very weak, both economically and militarily, China today is undoubtedly the most powerful country in East Asia, and—by many accounts—second only to the U.S. globally. A weak country has a great interest in a

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 246.

norm of non-interference, as it is much more likely to have its own domestic politics tampered with than to be able to benefit from interfering in other countries. But for a powerful country the calculus becomes reversed: no longer worrying about other states interfering in its own politics, and facing an increasing temptation to influence the affairs of other nations, Great Powers have incentive to weaken the norm of non-interference. Thus, from a neorealist perspective, it seems only logical that a state pursuing its national interests would abandon its adherence to the Five Principles as it became powerful: at a certain point the Five Principles are more of a hindrance to China's foreign policy objectives than a useful tool in achieving those goals.

#### B. Human Rights Law

Human rights, however, has proven to be one area in which China has continued emphasize sovereignty and non-interference. China has been heavily criticized over the years for what are seen as gross human rights abuses—most notably perhaps being the Western outcry in the aftermath of the events in Tiananmen Square in 1989. Western nations have sought to lecture the Middle Kingdom on its human rights practices, but while Western states typically purport the “universality” of many rights, China argues that different countries can have different human rights standards. This position partially stems from China's traditional “Eastphalian” sense of internal sovereignty, in which individuals are not seen a the fundamental unit of society and, thus, lack protections from natural law or international norms under the absolute power of the state. Furthermore, as China noted in its early Cold War dealings with other developing nations, China is open cultural relativity in a pluralistic world. In a current world where Western powers are still today accused of “cultural imperialism”, China prefers to judge not, lest it be judged.

Additionally, some Chinese policymakers like to point out—with justification—that during the same time period over which Western countries have labeled China as a major violator of human rights, China has actually managed to raise more people out of poverty than any other country. Indeed, China has seen an enormous economic revolution since the 1970's. From 1990 to 2013 the amount of Chinese citizens living in poverty decreased by more than 300 million.<sup>69</sup> Between 1990 and 2001 adult literacy grew from 78.3 percent to 85.8 percent, while youth literacy in 2003 was 97.9 percent.<sup>70</sup> Xue Hanqin has noted that because China has seen massive increases in living standards over the last few decades, the Western myopic focus on civil and political rights “shows lack of understanding of human rights reality in the developing countries.”<sup>71</sup>

China believes that human rights should be promoted in line with each State's social and economic development, and, thus, unlike the United States, which vigorously supported civil and political rights during the Cold War, China has privileged economic and social rights over civil and political rights. Fittingly, while the United States has never ratified the ICESCR, China has yet to ratify the ICCPR.<sup>72</sup> Because of its focus on economic and social rights, China believes that human rights protection remains in relative terms for every country.<sup>73</sup> While sometimes asserting a belief in “universal” human rights, China's emphasis on “relative terms” *de facto* equates to a belief in the relativity of human rights based on the country. At the 1993 World Conference on Human Rights, China stated:

“The concept of human rights is a product of historical development. It is closely

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<sup>69</sup> XUE, *supra* note 13, at 144-145, n. 334.

<sup>70</sup> *Id.* at 148-149.

<sup>71</sup> *Id.* at 149.

<sup>72</sup> Note however, the both are signatories to the respective unratified treaties.

<sup>73</sup> XUE, *supra* note 13, at 144-145.

associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development stages have different human rights requirements ... one should not and cannot think the human rights standards and models of certain countries as the only proper ones and demand all other countries to comply with them. It is neither realistic nor workable to make international economic assistance or even international economic cooperation conditional on them.”<sup>74</sup>

China and other Asian nations have also emphasized that, in promoting rights and freedoms, there is also a stress on duties and obligations of citizens under the rule of law. As is this case in many non-Western cultures, collective and societal interests are always viewed with deference and the autonomous individual is not viewed as the fundamental unit of society.<sup>75</sup> Because of this, China does not accept the proposition that individuals could justifiably disobey the law simply due to political belief, ideological preference, or ethnic background.<sup>76</sup>

Because China realizes that its concept of human rights (and, for that matter, those of many other non-Western countries) differs from that of Western Europe and the United States, it advocates “mutual respect, non-interference, non-confrontation and constructive dialogues” while opposing double standards practiced against the developing world.<sup>77</sup>

## VI. Dissenting Views

### A. Sienho Yee’s “International Law of Co-progressiveness”

That is not to say, however, that Chinese legal scholars are uniform in their approach to international law. Indeed, there are scholars who take an approach more familiar to Western international jurists. For example, Sienho Yee, professor of

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<sup>74</sup> Speech by Mr. Liu Huaqiu, Head of the Chinese Delegation, Vienna, Permanent Mission of the People's Republic of China to the United Nations in Vienna, 15 June 1993.

<sup>75</sup> *Id.* at 150.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

international law at the Wuhan University Institute of International Law has advocated for an “International Law of Co-progressiveness”, which he defines as international law “that is characterized by a spirit of being all-encompassing, preoccupied with advancements at an appropriate speed in moral and ethical terms ... and having human flourishing as its ultimate goal.”<sup>78</sup> Similar to the American “New Haven School” of international law, which sees “human dignity” as the goal of international law, Yee’s approach seeks to advance “human flourishing to the fullest extent, so that each individual is able and willing to realize his or her own worthwhile pursuit, or perception of the good life.”<sup>79</sup> Yee also argues that not only is his view of international law the way it *should be*, but also that co-progressiveness already *is* part of international law since the end of the Cold War. And unlike the tedious and mechanical approach delineated by adherents of the New Haven School, Yee simply asserts that “where possible, international law should decide a question with a bent for, or a bias in favor of, co-progressiveness.”

However, Yee’s “International Law of Co-progressiveness” seems problematic on two counts, both on the positive observation of co-progressiveness supposedly already existing and the normative assertion of co-progressiveness’s propriety. First, Yee’s assertion that international law already *is* co-progressive seems to be a dubious account of reality, especially since his writing in 2014. In arguing for co-progressiveness’s existence since the end of the Cold War, Yee notes that individuals and non-governmental organizations have become subjects of, and participants in, international law—citing the emergence of the ICTY, ICTR, and ICC, as well as the emergence of

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<sup>78</sup> SIENHO YEE, *An International Law of Co-progressiveness: The Descriptive Observation, the Normative Position and Some Core Principles*, 13 CHINESE J. INT’L L. 477, 485-499 (2014).

<sup>79</sup> *Id.* at 487.

humanitarian interventions and the responsibility to protect, as evidence of law concerning the “human flourishing” of the individual.<sup>80</sup> Yee also notes the acceleration of the idea of “community interest”, the enforcement of international law, and the “great efforts being made to ensure that rights and obligations are respected.”<sup>81</sup> However, in the post Cold War era, and especially in the last few years, it seems that violations of international law have become especially pronounced. Russia has invaded and annexed a portion of another sovereign state, interfered in the elections of other countries, and is continually accused of committing war crimes. The Syrian government of Bashar al-Assad has deployed chemical weapons on multiple occasions, and the government of North Korea has continued to conduct nuclear and ballistic missile tests in violation of international law. China itself has claimed and developed islands in the South China Sea, in violation of the ruling of an international tribunal, and nationalist movements critical of globalism and international law have even risen in many countries of the West—including the United States, the United Kingdom, France, Poland, Hungary, and Turkey. Thus, Yee’s claim of the positive existence of co-progressiveness in international law seems to be in tension with reality, especially over the last few years. Just as Francis Fukuyama’s thesis regarding the “End of History” seems premature—or worse—in retrospect, Yee’s “International Law of Co-progressiveness” seems a bit too optimistic when compared to actual experience.<sup>82</sup>

Second, and perhaps a partial explanation of the prior criticism, Yee’s whole

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 487-488.

<sup>82</sup> See Ishann Tharoor, *The man who declared the ‘end of history’ fears for democracy’s future*, WASH. POST, Feb. 9, 2017, available at [https://www.washingtonpost.com/news/worldviews/wp/2017/02/09/the-man-who-declared-the-end-of-history-fears-for-democracys-future/?utm\\_term=.24ab93651fc9](https://www.washingtonpost.com/news/worldviews/wp/2017/02/09/the-man-who-declared-the-end-of-history-fears-for-democracys-future/?utm_term=.24ab93651fc9).

concept of co-progressiveness seems completely built on Western notions of morality. Notably, Yee’s perspective on the normative appropriateness of co-progressiveness is based on making it possible for “each *individual* [to be able] to realize his or her own worthwhile pursuit, or perception of the good life.” As attractive of an aspiration as this sounds to a Western audience accustomed to John Stuart Mill’s “harm principle”,<sup>83</sup> most cultures do not worship the “harm principle” as the only—or at least primary—basis for morality as the West does.<sup>84</sup> In fact, Western elites are extreme outliers when it comes to their moral foundations, which focus almost exclusively on harm and fairness, and give little priority to other moral foundations such as loyalty, authority, and sanctity.<sup>85</sup> Western scholars and the Chinese themselves have repeatedly noted the systems of morality in China and much of Asia focus much more on the community and the family than the individual. Thus, Yee’s focus on the individual as the fundamental unit of society seems to be somewhat alien to a Chinese—or really, any non-Western—audience. Thus, other Chinese scholars and government officials might easily dismiss Yee’s “International Law of Co-progressiveness” as simply an irrelevant idea coming from a stooge of the West—something Yee’s American educational background would do little to disprove.<sup>86</sup>

## V. **Implications**

As an important and growing nation likely to someday be the most powerful in the international system, China’s view of law-as-politics will have global consequences.

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<sup>83</sup> “The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” JOHN STUART MILL, *On Liberty* (1859).

<sup>84</sup> See generally, JONATHON HAIDT, *The Righteous Mind* (2012).

<sup>85</sup> *Id.*

<sup>86</sup> Yee earned his J.D. for Columbia Law School and B.A. from Brandeis University.

First, as China's power grows—both militarily and economically—its concerns about external powers intervening in its own domestic affairs will lessen. Indeed, this has already begun to occur. As neorealism might predict, a self-interested weak power prefers strong norms of non-intervention and sovereignty, but a self-interested strong power prefers weaker norms as its concerns of foreign intervention in its own politics lessens and its interests in other states grows. Thus, one might expect a continuing infidelity on China's part to the norms of non-intervention and sovereignty as times goes on, despite continuing lip service to the Five Principles.

Second, a presumably more interventionist China is likely to increase the potential for conflict between it and the West. Chinese hacking of American political and economic targets has been notorious over the last decade, and more cyber-warfare is likely to only increase in coming years. China also seems to be intent on developing a true blue-water navy as it has recently commissioned its second aircraft carrier, and Chinese A2AD (anti-access, area-denial) military capabilities seem aimed at pushing the U.S. out of much of the western Pacific.<sup>87</sup> And while the Chinese One-Belt, One-Road initiative will undoubtedly increase Chinese interests in Central Asia and the Middle East,<sup>88</sup> Chinese investment in Africa has already begun undercutting European and American investment in Africa.<sup>89</sup>

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<sup>87</sup> See ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 49–53 (2017), available at [https://www.defense.gov/Portals/1/Documents/pubs/2017\\_China\\_Military\\_Power\\_Report.PDF](https://www.defense.gov/Portals/1/Documents/pubs/2017_China_Military_Power_Report.PDF).

<sup>88</sup> U.S. interests in these areas may be simultaneously decreasing, however, as U.S. forces leave Afghanistan and increasing domestic energy production lessens American interests in the Middle East.

<sup>89</sup> This in itself has undermined U.S. and European efforts at encouraging heightened labor and human rights standards in developing countries. While Western countries often impose labor standards as conditions for loans and aid, Chinese offers investments with “no stings attached”, which often proves to be a more attractive offer.

Third, hegemonic stability theory predicts that international law will become more fragmented in the absence of American hegemony. Indeed, there is already evidence of this occurring if one considers such developments as the Chinese supported AIIB (Asian Infrastructure Investment Bank), which was vigorously opposed by the United States.<sup>90</sup> One might also expect a proliferation of Central and South Asian multilateral treaties and perhaps international organizations as the One-Belt, One-Road initiative makes its way from East Asia to the Middle East. Most concerning for those concerned about human rights, however, would be the possibility of China undermining the international human rights system. While certainly not perfect, the U.S. has generally been very supportive of advancing human rights in the world, spending more than a century “making the world safe for democracy.” While the West has been able to effectively use its economic and military power to advance human rights (especially civil and political rights) throughout the developing world since the Second World War, a world dominated by China—and, possibly, other non-Western powers such as India or Russia—would be unlikely to have as great support for international human rights instruments such as the ICCPR, although perhaps there would be an increased interest in the economic and social rights provided by the ICESCR. If China’s recent behavior in treating international law as the mere continuation of international politics by other means is predictive of the future, human rights norms will likely not go far beyond China’s own interests—a concerning prospect given the likely resilience of its one-party non-democratic government. Just as the U.S. tried to make the world in its image after the Second World War and the Cold War, it will be important to see what values, if any,

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<sup>90</sup> Exclusion has also occurred on the American side. One of the selling points of the now-defunct Trans-Pacific Partnership was that by excluding China, the United States—with some of its partners—would be able to write the rules of trade and investment for the region.

China aims to export abroad.

## VI. Conclusion

As a victim of international aggression and intervention from the mid-19th to mid-20th century, the People's Republic of China announced its commitment to the Five Principles of Peaceful Coexistence soon after the Communist Revolution of 1949 and generally played by these rules during the Cold War. However, while still paying lip service to the Five Principles, a newly powerful China has shown itself to now be willing to flaunt international law at its convenience. While the China of the 1950's perhaps sincerely believed in the importance of the Five Principles as a way of preventing the kind of abuse China faced in its Century of Humiliation, the China of today has seemed to outgrow this view of international law. China's view of international law, thus, is fundamentally that of it being nothing more than international politics.

This, though, begs the obvious question of whether the Middle Kingdom is unique in this regard. And, in one sense, it seems to be a truism that states follow international law because it is in their interest—even if, e.g., a small European state complies with international law that is against its immediate interest, this state does so because it believes that strengthening a general norm of *pacta sunt servada*—following one's treaty commitments in good faith—is in its long-term interest. But the relevant question is not whether China is unique in its pursuit of interest via international law, but rather whether China's position vis-à-vis the current international legal system is the same as that of Europe or the United States. And the answer to this is clearly “no”.

Kagan noted in *Of Paradise and Power* that Europeans and Americans seemed to be drifting apart in their approach to international relations, but it should be noted that

this was more a difference of *means* than a difference of *ends*. While weaker European states have recently considered international law and institutions to be the best way of securing individual protections and rights for its citizens, the United States has perceived the world in more anarchic terms and found military and economic strength to be more useful methods for achieving these ends. But, these ends were—and are—essentially the same.<sup>91</sup> China, on the other hand, has national interests fundamentally in tension with Western values of self-determination and individual human rights—the very values the lay the foundation for much of the contemporary international legal system. Unlike the United States and Europe, China was essentially “not at the table” when much of current international law was written. Thus, much of what is now considered international law can be accurately accused of having a Western bias, and in areas of law such as sovereignty and human rights, China has clear interests in challenging the current legal norms. While the United States and its allies retain a fundamental interest in maintaining the structure and legitimacy of the current system, China has less obvious incentives in maintaining this status quo.

Institutionalists like Princeton’s John Ikenberry have argued the rules and norms laid out by the United States after 1945 will be enough to keep a rising China from seeking a fundamental reorganization of international society.<sup>92</sup> After all, many

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<sup>91</sup> Some might question the United States continued interest in these ends after 2016 given the election of Donald Trump and the “America First” agenda. While populist-nationalism no doubt calls into question the United States commitment to the liberal world order in existence since the end of the Second World War, few fundamental changes—the Paris Climate Deal perhaps being an obvious exception—have actually materialized. The United States has not withdrawn from the WTO or NAFTA, nor has it left any of its military alliances, and while renegotiated trade deals and alliance burden sharing will likely occur, there is simply not yet enough evidence to conclude a major shift in American interests has occurred.

<sup>92</sup> G. John Ikenberry, *The rise of China and the future of the West: can the liberal system survive?*, *Foreign affairs* 23–37 (2008).

developing countries have benefitted enormously from the world order created by the United States, and China is arguably the biggest beneficiary. Thus, just as countries like Brazil, Estonia, and South Korea seek continuity in the international legal system that has existed since the signing of the Atlantic Charter, so too will China seek to keep the rules the same as they have been since World War II's conclusion.

Such a position, however, underestimates the abilities of a powerful, revisionist power like the People's Republic of China. Under Xi Jinping, China has been much more willing to explicitly announce its dream of a "national rejuvenation" and its aims to become a leading global power by the centennial of the People's Republic. Indeed, as Yan Xuetong at Tsinghua University has argued, China has recently moved from a strategy of "Keeping a Low Profile" to that of actively "Striving for Achievement."<sup>93</sup> And if the Chinese Communist Party is willing to substantially amend its own rules to allow for Xi to stay in power beyond the traditional two 5-year terms,<sup>94</sup> it seems to hardly be a stretch for the People's Republic of China to attempt to fundamentally change the international legal order as well.

Thirty years from now, there is no doubt that international law will still exist as a vital foundation of international relations. What is more questionable, however, is whether the international legal norms we have today remain fundamentally unchanged, or

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<sup>93</sup> Yan Xuetong, *From Keeping a Low Profile to Striving for Achievement*, 7 THE CHINESE JOURNAL OF INTERNATIONAL POLITICS 153–184 (2014).

<sup>94</sup> Chris Buckley & Keith Bradsher, *China Moves to Let Xi Stay in Power by Abolishing Term Limit*, THE NEW YORK TIMES, February 25, 2018, *Term Limit*, THE NEW YORK TIMES, February 25, 2018, <https://www.nytimes.com/2018/02/25/world/asia/china-xi-jinping.html> (last visited Mar 15, 2018).

whether the world will instead have international law with “Chinese characteristics.”<sup>95</sup>

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<sup>95</sup> After 1978, the PRC undertook massive economic reforms that moved the country away from a centrally planned economy toward a much more market-focused system. Realizing that this move seemed to be in direct tension with the PRC’s identity as a socialist state, it was declared that this economic liberalization was not a move away from socialism, but instead merely “socialism with Chinese characteristics.” Many see this phrase as simple lip service to socialism, while China—in actuality—fundamentally moved away from the discredited system. Thus, “international law with Chinese characteristics” would suggest a nominally unchanged, but *de facto* fundamentally altered, international legal order more conducive to Chinese interests.