

## Hungdah Chiu, China, and International Law: A Life Well Spent

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## KEYNOTE ADDRESS

# Hungdah Chiu, China, and International Law: A Life Well Spent

JEROME A. COHEN<sup>†</sup>

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Chinese and Americans share many things. One of the things we share is a belief in turning a vice into a virtue. This program does that. We have come here to pay a sad tribute to the late Professor Chiu Hungdah, yet, we will benefit from the impressive program that has been organized to celebrate Professor Chiu's memory.

My informal introduction to the program can be divided into three parts. First, I will talk about Professor Chiu, whom I knew very well early in his career and whose subsequent achievements I continue to admire. Second, I will discuss the changes in China's attitude toward international law since the time he and I completed the book *People's China and International Law: A Documentary Study*.<sup>1</sup> And third, I will make a few remarks about China and international law today. This might constitute a transition to the important program that follows.

## I. SOME PERSONAL RECOLLECTIONS OF PROFESSOR CHIU

Let me go back to August 1964, when I joined the Harvard Law School faculty. I left Berkeley's Boalt Hall for Cambridge with considerable reluctance, but for good reasons. There were great members of the Harvard law faculty whom I knew I could learn from, such as Richard Baxter and Louis Sohn in international law, Harold

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

Berman in Soviet law, Lon Fuller in jurisprudence, and Paul Freund in constitutional law. I was also attracted to Harvard's China scholars: the historians John Fairbank and Benjamin Schwartz, the sociologist Ezra Vogel, the economist Dwight Perkins, and others.

I did not know I would find Hungdah at Harvard. He had come from Taiwan to do an S.J.D., a doctorate in law. I was lucky—there he was. By the mid-1960s, it was clear that international law would become critical in China's relations with the world, and in U.S.-China relations, so I wanted to pursue that subject. I was not very up-to-date on international law, but I had studied it at Yale Law School with Myres McDougal, a major figure in the field.<sup>2</sup> After my graduation in 1955, however, I focused for over a decade on questions of criminal justice, both American and, eventually, Chinese.

I had to catch up in order to pursue China and international law, and Hungdah was the perfect mentor. He was a genuine specialist. He was encyclopedic in his knowledge of universal or "Western" international law. He also, of course, was familiar with the record of the Republic of China (ROC) since its establishment in 1912 and after its removal to Taiwan in 1949. Moreover, he knew a huge amount about the People's Republic of China (PRC), which was then often referred to as "Red China." He had a host of materials at his fingertips.<sup>3</sup>

So we started to work together, and for me it was a very satisfying relationship. It was also successful. In 1974, our book, *People's China and International Law*,<sup>4</sup> finally came out after many years of hard labor. It won a prize from the American Society of International Law as the best documentary study in the field in the preceding two years.<sup>5</sup> Especially among political scientists, it had a

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2. See, e.g., Dona A. Hathaway, *The Continuing Influence of the New Haven School*, 32 YALE J. INT'L L. 553, 553 (2007) (discussing the "deep and abiding influence" of the New Haven School of International Law); Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence of War*, 85 AM. J. INT'L L. 117, 117 (1991) (describing McDougal as a "seminal figure," especially with regard to the New Haven School of International Law).

3. For more information about Professor Chiu's materials, see The Papers of Professor Hungdah Chiu, Thurgood Marshall Law Library, the University of Maryland Francis King Carey School of Law.

4. COHEN & CHIU, *supra* note 1.

5. *Past ASIL Award Winners and Honorees*, AM. SOC'Y OF INT'L LAW, [www.asil.org/awardarchives.cfm](http://www.asil.org/awardarchives.cfm) (last visited Mar. 23, 2012).

good reception.<sup>6</sup> We were a little disappointed that very few specialists reviewed it for the law journals, but one problem in establishing a new subject is that there are not many people who want to critique something they don't know much about.<sup>7</sup> Later, when professional contacts with China became possible, we discovered that our book made an impact on the Mainland, as well as in Taiwan.

Although the book came out in 1974, it wasn't until 1979 that I had an opportunity, when at last living in Beijing, to exchange ideas with some of China's experts in international law. I remember meeting Professor Chen Tiqiang, who received a Ph.D. from the University of London before "Liberation" in 1949, and became well known among PRC scholars of international law in the new regime's early years. Like many of his colleagues, however, he had a hard time during the twenty years between the "anti-rightist" movement of 1957 to 1958 and the ascent of Deng Xiaoping in 1978. When we first chatted, Professor Chen said, "we have never met before, but because of your book, I feel we're old friends." That moved me. And, of course, Hungdah later became friendly with, and respected by, many scholars of international law in China.

Professor James Li reminded me that eleven years ago in New York we had a program for the city bar association about Taiwan and international law. Professors Li, Chiu, and Chen Lung-Chu from Taiwan were the panelists, respectively representing three different viewpoints in what turned out to be a lively, extremely informative evening. Despite the controversial topic, from my perch as moderator

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6. Gene T. Hsiao, *People's China and International Law: A Documentary Study*, 61 CHINA Q. 161, 161 (1975) (book review); James Chieh Hsiung, *People's China and International Law: A Documentary Study*, 34 J. ASIAN STUD. 528 (1975) (book review); Alan P. L. Liu, *People's China and International Law: A Documentary Study*, 418 ANNALS AM. ACAD. POL. & SOC. SCI. 166 (1975) (book review); Douglas M. Johnston, *People's China and International Law: A Documentary Study*, 50 PAC. AFF. 504 (1977) (book review); James Townsend, *People's China and International Law: A Documentary Study*, 96 J. AM. ORIENTAL SOC. 448 (1976) (book review). An advertisement for *People's China* in the *Harvard Law Review* quoted China expert Alan S. Whiting's review in the *Asian Student*:

This is a superb survey of the perception and practice of international law as manifested in the writing and behavior emanating from the People's Republic of China down to 1973 . . . a model of documentary compilation and commentary that is indispensable for an understanding of Chinese foreign policy.

88 Harv. L. Rev., no. 6, 1975, at viii.

7. But see George Ginsburgs, *People's China and International Law*, 22 Am. J. Comp. L. 575 (1974) (book review); Shao-Chuan Leng, *People's China and International Law: A Documentary Study*, 69 AM. J. INT'L L. 206 (1974) (book review).

I could see that Hungdah was very comfortable exchanging ideas with experts from the Mainland, as well as the Taiwan independence movement.

Hungdah had many accomplishments. He was a man who lived an open, yet double, life in an unusual sense. He was so productive in scholarship in two languages that one might think that he wrote English articles with his right hand and Chinese articles with his left hand. I am very happy that we now have a volume collecting a lot of his Chinese language op-eds and other shorter pieces.<sup>8</sup> And, of course, I very much appreciated President Ma Ying-Jeou's April 24 tribute,<sup>9</sup> in which he refers to his former teacher's monumental Chinese language study, *Modern International Law*.<sup>10</sup> That book also enhanced Professor Chiu's reputation on the Mainland, which has long noted the academic work done in Taiwan in many fields, including domestic and international law.

In addition to the book we did together, Hungdah contributed to a number of other English language works. One important essay was *The Development of Chinese International Law Terms and the Problem of Their Translation into English*.<sup>11</sup> It was a very interesting article, which showed the absorption of Western international law terms into the Chinese and Japanese languages and the problems of rendering concepts from a very different legal culture into East Asian languages.<sup>12</sup> That paper is still worth studying today. He did another very interesting essay, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, where he compared the treaty practice of the PRC and the ROC.<sup>13</sup> It was one of the early studies demonstrating how similar the positions of the two contending Chinese governments have been with respect to many, but not all,

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8. See generally GUOJIFA LUNJI (國際法論集) [COLLECTION OF INTERNATIONAL LAW ARTICLES (IN HONOR OF THE SIXTY-FIFTH BIRTHDAY OF PROFESSOR HUNGDAH CHIU)] (2011).

9. Ma Ying-Jeou, *Tribute in Memory of Dr. Hungdah Chiu*, 27 MD. J. INT'L L. 1 (2012).

10. HUNGDAH CHIU (丘宏達), XIAN DAI GUO JI FA (現代國際法) [MODERN INTERNATIONAL LAW] (1995).

11. Hungdah Chiu, *The Development of Chinese International Law Terms and the Problem of Their Translation into English*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 139 (Jerome Alan Cohen ed., 1970).

12. See generally *id.*

13. Hungdah Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 239 (Jerome Alan Cohen ed., 1972).

international law questions.<sup>14</sup> Today one of the more important aspects of scholarly work on Chinese law, both domestic and international, is to continue that comparative effort. Many Western China specialists neglect the record of Taiwan's legal achievements, and it is a loss to our scholarship if we do not cure that. Hungdah led us in the right direction.

Hungdah surprised me in 1985 when he came out with an English language book co-authored with Professor Leng Shao-Chuan, an able political scientist at the University of Virginia.<sup>15</sup> It was not on international law, but on criminal justice in China. Of course, a country's domestic criminal justice system has an intimate relationship to many international legal questions, especially human rights and the protection of aliens, but the book's coverage was broader than that and it was very good.

There were other aspects, perhaps lesser known, about Hungdah. He was a talent scout. Some younger people who affiliate with an older scholar often want to become the senior person's exclusive fount of advice; they sometimes feel the need to elbow other people out of the way, so they can be *the* source. Hungdah wasn't like that. He was very open, welcoming, and helpful to others. One thing we shared was an interest in adding new players to a new field, expanding our collective capacity to learn more.

He was constantly introducing me to people. His classmate at National Taiwan University, Chang Wejen, who did an LL.M. at Southern Methodist University and went on to Yale, was especially interesting to me. Like so many of the best students from Taiwan of that era, he was studying *guoji gongfa*, public international law. Of course, I had gone to Yale Law School and studied the same thing, and was actively researching the subject, but I thought that not every law graduate in Taiwan or China who went abroad should study international law, since there are many other academic needs. I noted that whenever Hungdah talked about his friend Wejen, he always said the same thing: "His Chinese is really good." To an American ear, that sounded curious.

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14. *See, e.g., id.* at 267 ("While both the Nationalist and the Communist Chinese denounce those treaties imposed upon China in the nineteenth and twentieth centuries as unequal treaties, their concepts of unequal treaties differ.").

15. SHAO-CHUAN LENG & HUNGDAH CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS* (1985).

Dean Haddon, for example, is an eloquent person. I might say that she is articulate, or a very good speaker, but I would not say “her English is really good.” So, finally, I asked Hungdah, “What do you mean when you say Chang’s Chinese is really good?” He said, “It’s very simple; he has had a classical Chinese education. He did not go to school like the rest of us. He had tutors his family brought to the house; he can read the ancient legal script.” I was already quite interested in comparative legal history. I had tried at Harvard to support promising young scholars in Anglo-American legal history, in order to create a new generation of law teachers who might make legal history a more popular American law school course than it was. I also wanted to see work done in Chinese legal history, which was obviously important, but too little explored in both Chinese and Western publications. I asked Hungdah, “Why don’t you get this fellow up here from Yale, so we can try to brainwash him?” Sure enough, Chang Wejen came up, and we persuaded him to grasp the opportunity to be a pioneer in his generation, and go into China’s legal history. He is still at it, and has become one of the world’s leading experts in this increasingly recognized field, teaching and writing at many Mainland law schools, as well as in Taiwan.<sup>16</sup> He and I have done a few Chinese language dialogues at Peking University and Tsinghua University in recent years, in an effort to show students why history is relevant to contemporary China’s legal system and a better understanding of comparative law generally.<sup>17</sup> Hungdah introduced me to a stream of others who have made major contributions to law and life. Taiwan’s President Ma Ying-Jeou was one of the prizes he brought to Harvard, then C.V. Chen and Nigel Li, two of Taiwan’s most outstanding lawyers today, and others. Since I was chairing the law school’s graduate program, I should have put Hungdah on commission because he was such a good talent scout.

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16. Chang Wejen has taught at National Taiwan University, Tsinghua University, Peking University, UCLA, Harvard, and NYU, among other universities. See *FY Chang Annual Lectures (1998–2011)*, US-CHINA EDUC. TRUST, [http://uscet.net/template/page.cfm?menu\\_id=225](http://uscet.net/template/page.cfm?menu_id=225) (last visited Mar. 29, 2012); *Global Faculty*, N.Y. UNIV. SCH. OF LAW, <http://www.law.nyu.edu/global/globalfacultyandcourses/previousglobalfaculty/index.htm> (last visited Mar. 29, 2012) (providing a brief biography). His major research post has been at Academia Sinica in Taiwan.

17. The Annual F.Y. Chang Lecture brings scholars and jurists to Peking University Law School and Tsinghua University Law School to discuss various topics related to law in China. *FY Chang Annual Lectures (1998–2011)*, US-CHINA EDUC. TRUST, [http://uscet.net/template/page.cfm?menu\\_id=225](http://uscet.net/template/page.cfm?menu_id=225) (last visited Mar. 28, 2012). I have been participating since 2002, and Chang Wejen has been participating since 1999. *Id.*

He played a similarly important role in guiding young people who studied at other institutions, whether in Taiwan or America. I was in Taipei when I learned the news of Hungdah's death, and was amazed how many people there told me the impact he had on them. During Hungdah's last years, every time I visited President Ma, the President showed genuine concern about his mentor's illness. The statement he issued at Hungdah's passing reflected a great deal of thought and feeling.<sup>18</sup>

One other aspect of Hungdah that I admired was his objectivity. We were working in a contentious era. We started in 1966, just as the Cultural Revolution broke out.<sup>19</sup> We completed the book on July 1, 1973, my birthday, and that of the Chinese Communist Party!<sup>20</sup> This was a time of momentous transition in United States–China–Taiwan relations, and particularly a period of maximum anxiety for Taiwan. This was the time of Henry Kissinger's famous 1971 secret trip to Beijing, which was followed in 1972 by President Nixon's decidedly un-secret trip.<sup>21</sup> Nixon generated the world's biggest ballyhoo over it, assuring his re-election.

In our collaboration, Hungdah and I had to describe and analyze many controversial questions. For example, should the United States recognize and establish diplomatic relations with the People's Republic, abandoning the ROC and Chiang Kai-shek, our ally since World War II?<sup>22</sup> Chiang was still trying to convince the American people that the Republic of China was "free China," supposedly a democratic government in contrast to the "people's democratic dictatorship" on the Mainland.<sup>23</sup> Of course, Chiang's propaganda was

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18. Ma Ying-Jeou, *supra* note 9.

19. See Jerome Alan Cohen, *Interviewing Chinese Refugees: Indispensable Aid to Legal Research on China*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 84, 84–85 (Jerome Alan Cohen ed., 1970) (discussing the general difficulties conducting research on "Chinese Communist law").

20. Edward Wong, *By-the-Book Celebration For China's Communists on Party's 90th Birthday*, N.Y. TIMES, July 2, 2011, at A6 (describing the 2011 Anniversary in Beijing).

21. See generally Nancy Bernkopf Tucker, *Taiwan Expendable? Nixon and Kissinger Go to China*, 92 J. AM. HIST. 109 (2005) (detailing Kissinger's and Nixon's trips to China).

22. See RICHARD C. BUSH, UNTYING THE KNOT: MAKING PEACE IN THE TAIWAN STRAIT 110 (2005) (discussing the tension among the PRC, ROC, and the United States).

23. See, e.g., Tay-sheng Wang & I-Hsun Sandy Chou, *The Emergence of Modern Constitutional Culture in Taiwan*, 5 NAT'L TAIWAN U.L. REV. 1, 17 (2010) ("It was important to [Chiang Kai-shek to] have the appearance of a democratic and liberal government because the government in Taiwan represented the free China in contrast to the Communist regime in Mainland China; this was especially important to receive support from the U.S. government.").



nonsense.<sup>24</sup> But many Americans believed it, and there was a big political division in our country over China policy.<sup>25</sup> There was also the long-standing question about Beijing's entry into the United Nations, which finally occurred in October 1971.<sup>26</sup> Our book had to deal with these issues and many other prickly ones, but I never got the feeling that Hungdah was anything but a professional. We differed on these issues. He supported Chiang's Republic of China government. I did not, but we never had one difficulty with politics. He was totally objective, and I was very impressed.

I should also say that I admired his political activism. He was not an "ivory-tower" scholar insulated from public affairs. He sometimes served as a distinguished government official in Taiwan, and, when the time came for the normalization of diplomatic relations between Washington and Beijing in 1979, he played a role in persuading America to adopt the Taiwan Relations Act.<sup>27</sup> That act continues to protect the island to this day. Additionally, his skill in international law helped his government preserve its fabled "Twin Oaks" ambassadorial residence in Washington, against PRC demands to succeed to the property as the newly-recognized government of China.<sup>28</sup>

## II. CHINA'S CHANGING ATTITUDE TOWARDS INTERNATIONAL LAW

Let me now turn to the second part of my remarks—changes with respect to China's theory and practice of international law since Hungdah and I started our cooperation in 1966. As I said, that was

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24. See *id.* at 16 ("No Taiwanese dared to question the authority of Chiang Kai-shek for fear of execution, persecution and imprisonment.").

25. See, e.g., TANG TSOU, *AMERICA'S FAILURE IN CHINA, 1941–50*, at 447–54 (1963) (describing the fault lines between the Truman administration and Republican critics of China policy).

26. See Tucker, *supra* note 21, at 120.

27. See Hungdah Chiu, *Taiwan Relations Act*, in *MODERN CHINA: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND NATIONALISM* 345–46 (Wang Ke-wen ed., 1998) (explaining the Taiwan Relations Act).

28. See Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 *MICH. J. INT'L L.* 765, 776 (2007). In order to avoid "Twin Oaks" from being transferred to the PRC under the principle of automatic "state succession," the ROC sold the property to a pro-Taiwan organization called the Friends of Free China. *Id.* According to author Hsieh, the Taiwan Relations Act in turn "prevented the invalidation of this transfer by declaring that the absence of recognition of [Taiwan] does not affect property interests heretofore or hereafter acquired by or with respect to Taiwan." *Id.* at 776–77 (quoting Taiwan Relations Act, 22 U.S.C. § 3303(b)(3)(A) (2000)). In 1982, the Friends of Free China transferred the Twin Oaks property back to the ROC. *Id.* at 777 n.58.

just when the Cultural Revolution began.<sup>29</sup> It was an unthinkable development, of which we only gradually became aware.

Yet the PRC had demonstrated a revolutionary outlook toward the international community from the time of its establishment in 1949.<sup>30</sup> If the United States had recognized and established diplomatic relations with the PRC from the outset of the communist regime, we might have moderated its hostility. For our own domestic political reasons, however, we did not. The United States also opposed the PRC's entry into the United Nations under any formula.<sup>31</sup> Thus, the United Nations rejected the PRC as the lawful representative of the Chinese people, despite its control of the Mainland.<sup>32</sup> The government of the ROC held onto the Chinese seat in both the Security Council and the General Assembly, even though it lost the civil war.<sup>33</sup> Moreover, immediately after the United Nations rejected the PRC, when the United States decided to pursue the retreating North Korean forces into North Korea and possibly eliminate the buffer state on China's border, the entry of "Chinese People's Volunteers" into the Korean conflict served to enhance the PRC's revolutionary rhetoric against the existing world organization.<sup>34</sup> The United Nations, not only the United States, became China's enemy in Korea.<sup>35</sup>

Although the end of the Korean conflict in 1953 led to a milder, more flexible emphasis on "peaceful coexistence" in Chinese foreign policy during the mid-1950s,<sup>36</sup> Chairman Mao did not abandon the

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29. See, e.g., Craig Dietrich, *Great Proletarian Cultural Revolution*, in *MODERN CHINA: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND NATIONALISM*, *supra* note 27, at 126–27.

30. See COHEN & CHIU, *supra* note 1, at 18–19 (discussing the establishment of the PRC and the PRC's early foreign policy).

31. See, e.g., Lyushun Shen, *The Taiwan Issue in Peking's Foreign Relations in the 1970s: A Systematic Review*, 1 *CHINESE (TAIWAN) Y.B INT'L L. & AFF.* 74, 84 (1981) ("[T]he United States had continually made annual efforts in the U.N., first relying on moratorium tactics and later on the "important question" procedure, to preempt any substantive resolution aimed at offering the China seat to the PRC at the expense of the ROC.").

32. *Id.*

33. See, e.g., Hsieh, *supra* note 28, at 769.

34. See, e.g., Weng Ke-Wen, *Resist America and Assist Korea Campaign (kangMei yuanChao)*, in *MODERN CHINA: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND NATIONALISM*, *supra* note 27, at 284–84.

35. *Id.*

36. China's five principles of peaceful coexistence with other countries included mutual respect for sovereignty and territorial integrity, mutual non-aggression, mutual non-interference in internal affairs, equality and mutual benefit, and peaceful coexistence. Shih-ping Zheng, *Bandung Conference*, in *MODERN CHINA: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND NATIONALISM*, *supra* note 27, at 22.

hope of establishing an international organization of developing countries that might rival the United Nations.<sup>37</sup> China's distrust of the Western-controlled United Nations was matched by its distrust of the international law reflected in UN practice.<sup>38</sup> In that era, PRC views of international law were shaped by the Soviet Union's experts, just as China's domestic legal developments followed the Soviet legal model until the Sino-Soviet split of the late 1950s and the radicalization of the PRC's domestic legal system.<sup>39</sup>

The most distinctive of the theories of international law imported from the Soviet Union stated that there were really three types of international law.<sup>40</sup> There was the bourgeois view of international law, to regulate relations among bourgeois states, there was the international law to govern relations between the socialist world and the bourgeois world, and then, there was socialist international law, to govern relations among the socialist states.<sup>41</sup>

The era of Soviet influence soon passed, and, beginning with the "anti-rightist" movement of 1957 to 1958 and the "Great Leap Forward" campaign that followed it, China entered a domestically more revolutionary situation.<sup>42</sup> Harsh repression of Chinese intellectuals and destruction of China's budding Soviet-style domestic legal system were accompanied by vicious political attacks on the country's main specialists in international law, who had been trained in pre-Liberation days but had adapted to the Soviet era.<sup>43</sup> When the "Cultural Revolution" began in 1966, there was no basis

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37. COHEN & CHIU, *supra* note 1, at 1294–97.

38. See Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STANFORD J. INT'L L. 425, 443 (1992) ("[T]he representation of China at the United Nations by the government of Taiwan . . . intensified the PRC's dissatisfaction with the international legal order.").

39. For the convolutions of China's domestic legal system in that era, see JEROME ALAN COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1963: AN INTRODUCTION* 9–17 (1968).

40. See Hungdah Chiu, *Communist China's Attitude Towards International Law*, 60 AM. J. INT'L L. 245, 256 (1966) (discussing the different views of international law in China at that time).

41. *Id.* In 1957, Professor Chiu Jih-ch'ing explained international law in a similar manner, but stated that there were only two systems, general and socialist. BYRON N. TZOU, *CHINA AND INTERNATIONAL LAW: THE BOUNDARY DISPUTES* 8 (1990).

42. He Gaochao, *Mao Zedong*, in *MODERN CHINA: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND NATIONALISM*, *supra* note 27, at 201–02 (describing the anti-rightist movement and the "Great Leap Forward").

43. See Ranbir Vohra, *Hundred Flowers Campaign*, in *MODERN CHINA: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND NATIONALISM*, *supra* note 27, at 150 (discussing the transition from the Hundred Flowers Campaign to the Anti-Rightist Movement, denouncing intellectuals). See also COHEN & CHIU, *supra* note 1, at 15.

for hope that the PRC would adopt universal standards of international law and join the world community in the near future.

Certainly, China's leaders had good reasons to be cynical about American assertions of international law. During the PRC's first decade, the United States took many illegitimate, covert actions against China in an effort to undermine the new regime.<sup>44</sup> For example, it flew non-communist Chinese and American CIA agents into China to help organize unrest.<sup>45</sup> Also, after training expatriate Tibetans in mountain warfare in Colorado, it dropped them back into their homeland to stoke the fires of resistance.<sup>46</sup>

I personally saw this up close in my senior year at Yale College before I went to law school. In February 1951 the Korean War was going badly for the United States. We college students did not know what our future would be upon graduation. One day a sign went up on the employment bulletin board: the CIA will be here next week to interview graduating seniors, just like Proctor & Gamble or IBM. Of course, we did not know what "the Agency" wanted. About thirty of us went to an introductory meeting in order to find out, but its representative was extremely vague in his remarks. Finally, I said to him, in front of the group, "Can't you at least give us a hypothetical to illustrate what kind of job we might fill? What kind of work are you talking about?" I was a political science major in international relations and I was looking for a desk job in Washington as an intelligence analyst. The CIA recruiter was very annoyed when I pressed him for an example. Finally, he said, "O.K., I'll give you a hypothetical, but mark you, it is purely hypothetical." He then said, "We might want to train you and drop you into China to help organize resistance against the new regime." My jaw must have fallen, and I said, "Gosh, that sounds awfully dangerous." At that, he became indignant and said, "During the last war, (World War II), we (meaning the O.S.S., the predecessor of the CIA) had fewer casualties than the infantry." To which I said, "Do you mean on an absolute or relative basis?" He replied, "I don't think you're seriously interested." I said, "You're right," and walked out.

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44. See Jerome A. Cohen, *Chinese Attitudes Towards International Law—and Our Own*, Proc. AM. SOC. INT'L L. 108, 110–111, 114–15 (1967); Matthew Aid & Jeffrey T. Richelson, *U.S. and China: Collection, Analysis, and Covert Action*, DIGITAL NATIONAL SECURITY ARCHIVE, 1 (Mar. 4, 2012), [http://nsarchive.chadwyck.com/collections/content/CI/intell\\_and\\_china\\_essay.pdf](http://nsarchive.chadwyck.com/collections/content/CI/intell_and_china_essay.pdf) (discussing covert actions in China after the Communist Party took over on October 1, 1949).

45. COHEN & CHIU, *supra* note 1, at 625–28.

46. Aid & Richelson, *supra* note 44, at 30.

Later I heard that at least twelve of my classmates were interested, but six were rejected as insufficiently rugged. One who was not rejected was John T. Downey Jr., a 195-pound tackle on the Yale football team and captain of the wrestling team. Seventeen months after our graduation, his plane was shot down over China, trying to pick up non-Communist Chinese agents whom the CIA had dropped there.<sup>47</sup> I later spent seven years, at the request of our classmates at our fifteenth college reunion in 1966, working to get Jack Downey out of prison, and if you look at the book that Professor Chiu and I did together, you will see material on the Downey case.<sup>48</sup>

So I knew firsthand what the United States was up to, and I can forgive the Chinese government's cynicism about our government's frequent concealment and manipulation of the facts, and its lying about the Downey case and others. For two years, China was silent about Downey's capture and the United States was silent about his mysterious disappearance. We all thought he had been killed—his mother had been told he was missing in action. In November 1954, however, the military tribunal of the Supreme People's Court in Beijing announced he had just been put on trial with some colleagues.<sup>49</sup> They had all been found guilty, and Downey had been sentenced to life in prison.<sup>50</sup> Some of the Chinese who were with him were sentenced to death.<sup>51</sup>

The American government's response was preposterous. The United States said Downey and his colleague, Richard Fecteau, were civilian employees of the Department of the Army who had been lost on an authorized flight between Seoul and Tokyo.<sup>52</sup> It was never explained how they managed to fall into Chinese hands. The U.S. Secretary of State, John Foster Dulles, feigned outrage. He was totally loyal to Chiang Kai-Shek, supremely hypocritical, and determined to try to avoid any step that might implicitly grant legitimacy to the communist regime, even if such a step could secure the release of Downey and Fecteau. The United States protested Downey's and Fecteau's detention and conviction, which it branded as "grossly contrary to the substance and spirit of all recognized international standards," and based upon "political charges . . .

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47. COHEN & CHIU, *supra* note 1, at 626.

48. *Id.* at 625–37, 640–41.

49. *Id.* at 628.

50. *Id.*

51. *Id.*

52. *Id.* at 634.

without foundation,” despite China’s display of ample evidence of their espionage.<sup>53</sup> The United States also claimed that the situation “furnishe[d] further proof of the Chinese Communist regime’s disregard for accepted practices of international conduct.”<sup>54</sup>

If it hadn’t been for Dulles, however, Downey and Fecteau could have been released by 1957. Dulles himself admitted this when he announced that although the PRC had indicated that it would release the prisoners if the United States would allow American newsmen to visit China, he would not approve such an arrangement because, he said, “it would constitute yielding to Chinese ‘blackmail.’”<sup>55</sup> Sadly, that was an offer that should never have been refused. We would have gotten our imprisoned CIA agents out of China and our newsmen into that little-known society, a perfect deal from a later American perspective. Beijing made this offer at a time when both its domestic and foreign policies were relatively relaxed, and it wanted to showcase its accomplishments in order to generate support among the American people.

Within a few months, however, the olive branch was withdrawn. In mid-1957, China entered a more radical phase at home and abroad, one that culminated in the chaos of the Cultural Revolution’s earliest years, 1966 to 1969, and resulted in the alienation of virtually every significant country in the world.<sup>56</sup> In that period, China’s practice of international law reached its nadir, especially with respect to violating the rights of foreigners and foreign diplomats in China.<sup>57</sup>

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53. *See id.* at 629–30.

54. *U.S. Protests Sentencing of Americans by Chinese Communists*, 31 DEP’T ST. BULL. 856, 856 (1954).

55. *See* Daniel Aaron Rubin, *Pawns of the Cold War: John Foster Dulles, the PRC, and the Imprisonments of John Downey and Richard Fecteau 57* (Aug. 16, 2004) (unpublished Ph.D. thesis, University of Maryland, College Park) (on file with Digital Repository, University of Maryland, College Park).

56. COHEN & CHIU, *supra* note 1, at 21. *See also* PETER VAN NESS, *REVOLUTION AND CHINESE FOREIGN POLICY: PEKING’S SUPPORT FOR WARS OF NATIONAL LIBERATION 202–03* (1970) (explaining that the start of the Cultural Revolution brought a change in Chinese foreign policy, which included “Maoist militance” that “left in its wake chaos and violence and a trail of strained, broken, and battered foreign relationships”); Victor D. Lippit, *The Great Leap Forward*, 1 *Modern China* 92, 93 (1975).

57. COHEN & CHIU, *supra* note 1, at 21. The introduction of our book paints the picture:

Amid the prevailing turmoil and xenophobia, diplomatic missions in Peking were targets of frequent demonstrations and occasional damage; diplomats, their staff, and their family members were sometimes mistreated by Red Guards and other popular elements, and a number of foreign nationals were jailed on charges ranging from espionage to disrespect for the image of Chairman Mao.

*Id.* at 21.

Fortunately, public order began to be restored in the fall of 1969, and the PRC launched a campaign to regain international respectability and cultivate the support of other countries for a renewed effort to obtain the Chinese seat at the United Nations.<sup>58</sup> It also undertook an intensive effort to normalize bilateral diplomatic relations with those Western countries that had not yet completed this process.<sup>59</sup> It was not an easy task, since, in Beijing's eyes, that would require those countries to break diplomatic relations with the ROC on Taiwan and to recognize the PRC as the only legitimate government of China.<sup>60</sup> Moreover, Beijing generally insisted that countries that wished to establish diplomatic relations with it had to acknowledge, to varying extents, that Taiwan should be deemed to be part of China.<sup>61</sup>

Canada's normalization of relations with China in October 1970 led the way and gave the PRC an important North American base, from which it could lobby for U.S. recognition.<sup>62</sup> In their normalization agreement, the Canadians succeeded in persuading Beijing to pledge to carry on their relations "in accordance with international practice."<sup>63</sup> It was still too early in the PRC's political recovery for an explicit endorsement of "international law."

The PRC's October 1971 replacement of Taiwan in the UN was the dramatic moment, of course, and would not have been possible if Beijing had not assured all and sundry, at least implicitly, that it would henceforth observe universal standards of international law and practice. Beijing wanted to finally get inside the big tent, and to do so it had to indicate that it would play by the rules. Other countries had decided that the only way to get China to play by the rules was to

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58. *Id.* at 22.

59. *See id.* (regarding the United States). *See also*, Giovanni Bressi, *China and Western Europe*, 12 *ASIAN SURVEY* 819, 831 (1972) ("The aim was to break the nearly total isolation in which China had fallen in the previous two years, still without any substantial shift in strategy. It was therefore natural that Peking wanted to effect a come-back with the West-European countries with whom its relations had been upset.")

60. *See, e.g.*, BUSH, *supra* note 22, at 20 (discussing Beijing's position with respect to negotiations with the United States).

61. *Id.*

62. *See Chinese Embassy in Canada Marks National Day, 40 Years of Sino-Canadian Ties*, XINHUA GEN. NEWS SERV., Oct. 1, 2010, [http://news.xinhuanet.com/english2010/china/2010-10/01/c\\_13538826.htm](http://news.xinhuanet.com/english2010/china/2010-10/01/c_13538826.htm) (noting the October 13, 1970 reestablishment of diplomatic relations between China and Canada).

63. COHEN & CHIU, *supra* note 1, at 241–42. *See also* Mitchell Sharp, Sec'y of State for External Affairs, Speech Before the House of Commons About the Establishment of Diplomatic Relations Between Canada and China (Oct. 13, 1970), in 9 *I.L.M.* 1244.

finally admit it into the big tent. Thus, the PRC began the process of moderating its statements and its practices relating to international law, and trying not only to become a participant in, but also a shaper of, international law in various forums. The book that Hungdah and I did, *People's China and International Law*, reviews the earliest years of this crucial history.<sup>64</sup> To be sure, a big country with the PRC's radical tradition could not fundamentally change direction in a day, and, as the following story suggests, the difficulties encountered in the process should not be underestimated.

On June 16, 1972, I had the good fortune to have dinner with Premier Zhou Enlai. I sat on his left and John Fairbank, the great historian of China, sat on his right. We were both from Harvard and had been members of a Harvard-MIT faculty group of China specialists who, immediately after Richard Nixon's 1968 election, had given the President-elect and his new assistant, our erstwhile colleague Henry Kissinger, a memorandum proposing steps towards a new American policy toward China. During our 1972 dinner with Zhou, we tried to persuade him to start the process of cultural exchange that we had recommended by permitting Chinese to go to Harvard. Zhou was interested, but he thought it was premature in the absence of formal diplomatic relations. He cleverly sparred with us on this and other topics.

Finally, near the end of the dinner, I decided to go off on a different tack. I said to Zhou and to the group of Chinese officials around the table, including his deputy foreign minister, Qiao Guanhua, "Now that you're in the United Nations, you should put somebody on the International Court of Justice." They thought that was the funniest thing that anybody could ever suggest. They thought I was a comedian! What a ridiculous idea that the PRC would want to put someone on that bourgeois institution, the ICJ, where the Chinese representative would surely be outvoted and perhaps not even treated fairly. Their response reflected not only their Communist orientation, but also the distrust that many East Asians have felt toward Western-dominated international tribunals since international law came to East Asia in the latter half of the nineteenth century.

It took a decade, but in 1982 the PRC finally nominated a leading Chinese jurist for the ICJ.<sup>65</sup> Since then, a succession of

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64. COHEN & CHIU, *supra* note 1.

65. See *The Court: All Members*, INT'L COURT OF JUSTICE (Feb. 28, 2012), <http://www.icj-cij.org/court/index.php?p1=1&p3=2>.



Chinese judges have done respected work on that court. However, the process of PRC participation in international adjudication is not complete. Like the United States, China has not accepted the compulsory jurisdiction of the ICJ, nor has it accepted participation in the relatively new International Criminal Court, although it has placed capable representatives on certain ad hoc international criminal tribunals.

### III. SOME CONTEMPORARY INTERNATIONAL LAW ISSUES IN UNITED STATES–CHINA RELATIONS

What are some of the contemporary international law problems that plague Sino-American relations? Many of the international law questions that first alienated the PRC from the United States in the period 1949 to 1950 endure today. We still haven't solved the problems that were created by the insertion of the Seventh Fleet in the Taiwan Strait right after the North Korean invasion of South Korea in June 1950.<sup>66</sup> We took the North Korean attack as a signal that "international communism" was beginning an Asian onslaught, not just in Korea, but also in the Taiwan Strait and Indo-China. U.S. intervention in the Taiwan Strait reversed the major national policy decision that had been announced by President Harry Truman and Secretary of State Dean Acheson, less than six months earlier, that the United States would not interfere in the Chinese civil war.<sup>67</sup> That January 1950 decision was based on the assumption that, although Taiwan's post-World War II status had not yet been formally determined by treaties, the island had been de facto returned to China from Japanese colonialism by the 1945 military arrangements in accordance with wartime commitments.<sup>68</sup>

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66. See RICHARD C. THORNTON, *CHINA: A POLITICAL HISTORY, 1917–1980*, at 229 (1982) ("On June 27 [1950], two days after North Korean forces initiated their offensive, the United States decided to interpose the Seventh Fleet between Taiwan and the mainland, thus preventing the Chinese Communist attack on Taiwan.").

67. See The President's News Conference of January 5, 1950, 1 PUB. PAPERS 11, 11 (1950) ("The United States Government will not pursue a course which will lead to involvement in the civil conflict in China."). See also Dean Acheson, *Crisis in Asia—An Examination of U.S. Policy*, 22 DEP'T ST. BULL. 111, 116 (1950) (reprinting a January 12, 1950 speech before the National Press Club).

68. *Conference of President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill in North Africa*, 9 DEP'T ST. BULL. 393, 393 (1943) [hereinafter *Cairo Declaration*] ("[A]ll the territories Japan has stolen from the Chinese such as Formosa [Taiwan] . . . shall be restored to the Republic of China."); *Proclamation Defining Terms for Japanese Surrender*, 13 DEP'T ST. BULL. 137, 137 (1945) [hereinafter *Potsdam Declaration*] ("The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be

Of course, many Americans are very happy that the United States did interfere in the Taiwan Strait because that prevented a Communist takeover of the island and made possible the eventual development of democracy in Taiwan.<sup>69</sup> The island's gradual progress from authoritarianism to democracy has refuted the oft-heard claims from PRC leaders and many Mainlanders that Chinese are different from Westerners and do not share our views of democracy or human rights. Nevertheless, Beijing still remembers what Mr. Acheson said on January 12, 1950—that intervention in the Taiwan Strait would be seen not only by China's new leaders, but also by other countries of Asia, as interference in the territorial integrity of a great nation.<sup>70</sup> To justify that intervention, in June 1950, the United States suddenly announced a new legal position—that the post-war legal status of Taiwan was still undetermined—substantially contradicting its earlier view.<sup>71</sup>

This was the dilemma that confronted President Nixon on his historic 1972 trip to China—how to deal with the legal status of Taiwan.<sup>72</sup> Today we are still pondering the implications of the joint “Shanghai Communiqué” concluded between the United States and the PRC at that time and the joint communiqués that have followed, including that which led to the establishment of diplomatic relations between Washington and Beijing on January 1, 1979.<sup>73</sup> Every time the United States sells arms to Taiwan in accordance with the duty to protect the island imposed by the Taiwan Relations Act, American domestic legislation, we confront the continuing question of

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limited . . .”); *Instrument of Surrender*, 13 DEP'T ST. BULL. 364, 364 (1945) (documenting that the Emperor would be bound by the *Potsdam Declaration*). See also Y. Frank Chiang, *One-China Policy and Taiwan*, 28 FORDHAM INT'L L.J. 1, 40–42 (2004) (arguing that the PRC's three theories of ownership over Taiwan are not valid under international law); *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 634–39 (1972) (arguing that neither the *Cairo Declaration* nor the *Potsdam Declaration* were legal transfers of title to the ROC).

69. See THORNTON, *supra* note 66, at 229–30.

70. See Acheson, *supra* note 67, at 111–18.

71. Cohen, *supra* note 44 at 113; TANG TSOU, *supra* note 25, at 534–36.

72. See generally Jerome Alan Cohen, *Recognizing China*, 50 FOREIGN AFF. 30 (1971); Tucker, *supra* note 21.

73. See Joint Statement Following Discussions with Leaders of the People's Republic of China, 1 PUB. PAPERS 376 (Feb. 27, 1972) [hereinafter *Shanghai Communiqué*]. See also, Toasts of the President and Chairman Chang Ch'un-ch'iao at a banquet in Shanghai, 1 PUB. PAPERS 379 (Feb. 27, 1972). See also, Hsieh, *supra* note 28, at 774 (“[O]n January 1, 1979, President Jimmy Carter formally announced the decision to terminate relations with the ROC and to recognize the PRC as “the sole legal government of China”).

Taiwan's status in international law.<sup>74</sup> This is because the United States, for the past thirty-three years, has recognized the PRC as the only legitimate government of China, does not maintain formal diplomatic relations with the Republic of China on Taiwan, and, beginning with the Shanghai Communiqué, has not challenged in principle that Taiwan is part of China.<sup>75</sup> Nevertheless, we continue the arms sales over Beijing's protests.<sup>76</sup> These long-standing problems of international and domestic law and politics are not likely to be resolved in the near future.

It is sometimes said that despite the PRC's increasingly sophisticated theory and practice of international law since its entry into the United Nations four decades ago, it still advocates a nineteenth-century view of the state as having untrammelled sovereignty.<sup>77</sup> Yet that is too broad a generalization. The PRC has been understandably sensitive about having its freedom of action limited by modern rules and interpretations to which it has not agreed to be bound. Yet, as I mentioned earlier, in the exercise of its sovereignty the PRC has frequently committed itself to obligations in the international community, whether one considers the United Nations, the World Trade Organization or many human rights and other multilateral documents that inevitably constrain the exercise of its sovereignty, and it has proved to be an able player in the parry and thrust of the application of international law in many contexts.<sup>78</sup>

Recently, however, doubts have arisen. Since the Communist Party's Seventeenth National Congress in the fall of 2007, we have occasionally heard a more radical tone suggesting a rising China's potential contempt for the world community. This has occasionally led to an extreme invocation of sovereignty.

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74. See Hungdah Chiu, *supra* note 27 at 345–46 (explaining the Taiwan Relations Act as “necessary to maintain peace, security, and stability in the Western Pacific . . .”).

75. For the text of the Shanghai Communiqué, see Shanghai Communiqué, *supra* note 73.

76. See, e.g., John Pomfret, *U.S. sells arms to Taiwanese; China Warns of Reprisals, Beijing 'Strongly Indignant' About Sales*, WASH. POST, Jan. 30, 2010, at A8 (reporting on sale of “\$6 billion worth of patriot anti-missile systems, helicopters, mine-sweeping ships and communications equipment to Taiwan in a long-expected move that sparked an angry protest from China.”).

77. See, e.g., Ann Kent, *China's International Socialization: The Role of International Organizations*, 8 GLOBAL GOVERNANCE 343, 346 (2002) (stating that China has an absolute and formal view of sovereignty).

78. See, e.g., *id.* at 344–45 (explaining that “the importance of international organizations in China's foreign relations cannot be overestimated,” that China is an active participant in international law, and that through that participation, the country conducts “lively and astute promotion of its national interests”).

I'll cite just a couple of examples. The most obvious concerns the South China Sea. Although the PRC's vague but disturbingly expansive claim to most of the South China Sea derives from the 1947 so-called "eleven-dotted line" that the Republic of China drew before Communism ousted it from nationwide power, it is Beijing's recent re-assertions of that claim, with slight modification as the "nine-dotted line" but without clarification or persuasive justification, that have come to worry other countries, and not only its immediate neighbors.<sup>79</sup> This concern is over sea boundaries and broad territorial claims to the many islands, islets, reefs and other features that affect those boundaries.<sup>80</sup> It is also over the question whether other states, without China's permission, have the authority under international law to conduct military reconnaissance and marine mapping in the exclusive economic zones claimed by China.<sup>81</sup> This is an issue of great importance to the United States. The conference that created the 1982 United Nations Convention on the Law of the Sea appears to have authorized such activities, over the objection of a small group of countries, without any objection from China at that time.<sup>82</sup> Since then, however, the PRC has staunchly opposed both American aerial

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79. See Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV. & INT'L L. 287, 287–90 (2003) (explaining the history of the "eleven-dotted line," later known as the "nine-dotted line" and "U-shaped line"). See also James Kraska, *I.O. 2.0: Indian Ocean Security and the Law of the Sea*, 43 GEORGETOWN J. INT'L L. 433, 459 (2012) ("Increasing Chinese persistence in advocating special rights based on its now (in)famous [eleven-dotted line] has alienated the entire region.").

80. See, e.g., John Pomfret, *China Renews Claim to South China Sea, Vows Freedom of Passage*, WASH. POST, July 31, 2010, at A7 (explaining that there was a "push" by the United States, Vietnam, and other Southeast Asian countries to challenge China's claims to much of the sea).

81. The concept of exclusive economic zones came from the Latin American countries in the 1950s, and is now in the Convention on the Law of the Sea. See Zou Keyuan, *Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14 INT'L J. MARINE & COASTAL L. 27, 44 (1999). Article 55 of the Convention on the Law of the Sea states that every "coastal state is entitled to have an exclusive economic zone of 200 nautical miles measured from coastal baselines." *Id.* China ratified the Convention on the Law of the Sea in 1996, and declared certain exclusive economic zones. *Id.* In 1998 China passed the Law on the Exclusive Economic Zone and Continental Shelf. *Id.* The extent to which China is entitled to claim exclusive economic zones in the South China Sea and other seas is a very complex question the answer to which will depend on a number of factors yet to be determined through negotiations among conflicting claimants. For analysis of the extent to which China can legitimately bar military reconnaissance and sea bottom mapping by other states within its exclusive economic zones, see for example Jonathan G. Odom, *The True "Lies" of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should Be Concerned*, 18 MICH. ST. J. INT'L L. 411 (2010); Margaret K. Lewis, Note, *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U. L. REV. 1404 (2002).

82. See Odom, *supra* note 81, at 439–42.

and naval reconnaissance, as well as mapping of the sea bottom, in its EEZ, and this has led to at least two very serious military, diplomatic incidents.<sup>83</sup> China has also resisted American efforts to negotiate agreed bilateral rules to avoid such incidents and to deal with them if they should occur, apparently believing that to do so might constitute recognition of the legitimacy of the American activities.<sup>84</sup>

Less obvious has been China's exercise of what it calls its "judicial sovereignty." Concerns on this score go back to the Western powers' nineteenth century imposition of "extraterritoriality" on China, according to which Chinese courts lost jurisdiction over cases involving nationals of many Western countries in the "treaty ports" that Western governments came to dominate, and regarding certain important activities elsewhere in the country.<sup>85</sup> As a result of the Opium War and the series of "unequal treaties" that it introduced, extraterritoriality became a hated incubus for rising Chinese nationalism and fueled a demand for terminating the judicial restrictions and inequality that symbolized China's inferior international status.<sup>86</sup> The United States only ended its extraterritorial rights in China in 1943, in response to the needs of its World War II alliance with Chiang Kai-shek's government.<sup>87</sup>

After establishment of the People's Republic, the propaganda of Chairman Mao's government, in seeking to unify the nation, made the most of what came to be known as China's "century of humiliation."<sup>88</sup> The PRC proudly trumpeted its claim to have restored the nation's sovereignty by allowing no exceptions to the exercise of its judicial power except for those that the government has freely granted in accordance with its acceptance of international practice and treaties. This has appropriately placed China in an international position equal to that of all other respected nations.

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83. See *id.* at 414–16 (describing the 2009 incident in which Chinese ships surrounded the USNS *Impeccable* while it was conducting what the United States perceived to be routine operations in international waters); Lewis, *supra* note 81, at 1408–10 (describing the April 1, 2011 incident in which a U.S. surveillance plane and a Chinese jet fighter crashed).

84. See, e.g., Lewis, *supra* note 81, at 1437–41 (recommending a specific bilateral agreement for use when Chinese and U.S. military forces encounter one another).

85. See Wang Ke-wen, *Extraterritoriality*, in MODERN CHINA: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND NATIONALISM, *supra* note 27, at 126.

86. *Id.*

87. *Id.*

88. See Alison A. Kaufman, China Analyst, Testimony Before the U.S.-China Econ. and Sec. Review Comm'n Hearing on "China's Narratives Regarding National Security Policy" 2 (Mar. 10, 2011).

Recently, however, the PRC has occasionally invoked judicial sovereignty in a way that suggests it may be seeking more than an equal position in the world. Recall, for example, the dispute between Australia and China over the Rio Tinto case, where Mr. Stern Hu, an Australian national originally from China, and three of his Chinese colleagues were prosecuted.<sup>89</sup> One of the charges, commercial espionage, was said to involve “state secrets,” and the Shanghai court handling the case declared part of the trial to be closed to the public.<sup>90</sup> The Australian government was understandably disturbed that its consular officials were also denied the right to attend the secret part of the trial, but it failed to support its protest with available legal argumentation.<sup>91</sup>

The consular agreement between Australia and China for the protection of each party’s nationals, like many Chinese bilateral consular agreements, seemed to call for the admission to any trial of consuls from the country of the person prosecuted, whether the trial was deemed to be open or closed.<sup>92</sup> There was no exception in the agreement.<sup>93</sup>

Drawing on some general language in the agreement, China might have argued that, if properly understood, the agreement should be interpreted to contain an implicit exception for trials involving state secrets in accordance with Chinese law. That would have been a standard type of international law argument, even though it would have been a weak one in the circumstances. But when the Australian government protested, the Chinese government did not make a conventional international law response with respect to the

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89. See, e.g., Jerome A. Cohen & Yu-Jie Chen, Op-Ed., *Law Unto Itself*, S. CHINA MORNING POST, Apr. 1, 2010, at 11 (analyzing the Rio Tinto case).

90. See David Barboza, *Rio Tinto Trial Gets Bribe Evidence, Closed Nature of Session in Shanghai Leaves Questions Unanswered*, INT’L HERALD TRIB., Mar. 24, 2010, at 14 (“Australia had pressed to have its officials attend the commercial secrets part of the trial, and legal experts have sharply criticized China for barring even an Australian consular official from attending that portion.”).

91. *Id.*

92. Agreement on Consular Relations Between the People’s Republic of China and Australia, China-Austl., art. 11, ¶ 1(f), Sept. 8, 1999, [http://www.legislation.gov.hk/bilateral/caaustralia\\_e.pdf](http://www.legislation.gov.hk/bilateral/caaustralia_e.pdf) (“[I]n the case of a trial . . . against a national of the sending State in the receiving State, the appropriate authorities shall make available to the consular post information on the charges against that national. A consular officer shall be permitted to attend the trial or other legal proceedings.”).

93. See Frank Ching, *Why is China Ignoring its Treaty Obligations?*, BUS. TIMES SINGAPORE, Mar. 31, 2010 (“[T]he fact that the Chinese closed part of the trial despite the clear terms of a bilateral agreement is worrisome and casts doubt on the value of China’s signature on any treaty or international accord.”).

agreement. Instead, its Foreign Ministry spokesman airily dismissed the agreement and simply announced that nothing can interfere with China's judicial sovereignty.<sup>94</sup>

What a nonsensical and dangerous position! China, in the exercise of its sovereignty, had freely committed itself to this treaty. Yet, the Foreign Ministry spokesman told the world that even treaties voluntarily concluded by the PRC cannot interfere with its sovereignty, especially judicial sovereignty.<sup>95</sup> To make matters worse, there was an internal Chinese regulation, apparently not discovered by Australia or mentioned by China, stating that, in cases where a consular agreement provides for consular access to trials, that provision should be implemented even if the trial is deemed to be secret.<sup>96</sup> So Chinese domestic law as well as the consular agreement's literal text supported the Australian position, even though the Chinese spokesman implied the contrary.<sup>97</sup>

That is not very comforting for those of us who want to see the PRC play by the rules of the game. Without any public explanation, the PRC took the same position with respect to the secret trial of an American national of Chinese origin, Mr. Xue Feng.<sup>98</sup> Like the Australians, the U.S. government, apparently because of a lack of legal expertise in the relevant department of the American Embassy, failed to mount an informed protest.<sup>99</sup>

Even more troublesome is the number of Chinese who have been locked up by their own government without any legal authority and held, for varying periods and in various places, in complete violation

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94. *Id.* (quoting the Chinese Foreign Ministry spokesman Qin Gang: "the China-Australia Consular Agreement should work on the premise of respect to China's sovereignty and judicial sovereignty. China's judicial authorities decide how to handle the case in light of Chinese laws and the nature of the case, and we should respect their decision.").

95. *Id.*

96. *Id.* ("Article 6(a) of the [Regulations on Handling of Certain Problems in Foreign Related Cases] provides that if China has signed agreements expressly permitting consular [attendance at trials], then foreign consular attendance must be permitted even in closed trials."). See also Cohen & Yu-Jie Chen, *supra* note 89.

97. See *Rio Tinto Case Should Not Be Politicized, Beijing Says*, PEOPLE'S DAILY ONLINE, Mar. 19, 2010, <http://english.people.com.cn/90001/90778/90862/6924731.html>.

98. See Jerome A. Cohen, Op-Ed., *Justice Denied*, S. CHINA MORNING POST (July 21, 2010); Jerome A. Cohen, Op-Ed., *Legal Pitfalls*, S. CHINA MORNING POST (Mar. 2, 2011); Jerome A. Cohen, Op-Ed., *Out in the Open*, S. CHINA MORNING POST (Nov. 26, 2009); Andrew Jacobs, *Beijing Upholds U.S. Citizen's Sentence*, INT'L HERALD TRIB., Feb. 19, 2011, at 8.

99. See Jacobs, *supra* note 98. ("The U.S. Embassy was banned from the courtroom despite a Sino-American agreement that guarantees defendants consular representation.").

of both domestic and international law.<sup>100</sup> The PRC adheres to over twenty international human rights documents. Although it has signed but not yet ratified the most important one, the International Covenant on Civil and Political Rights,<sup>101</sup> it has often violated the provisions of some of the human rights treaties to which it has long adhered, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>102</sup> In some cases, such as that of the repeatedly tortured and “disappeared” human rights lawyer Gao Zhisheng, Foreign Ministry spokesmen have made their government look ridiculous by issuing a series of ludicrous explanations for what amounted to official kidnapping.<sup>103</sup>

So these are seeds of doubt, you might say, about how consistently the PRC is prepared to play by the rules of the international system, rules that it has chosen to adopt through adherence to multilateral treaties, such as the Anti-Torture Convention, and bilateral treaties, such as consular agreements. Interestingly, when I wrote an op-ed about the Rio Tinto case, criticizing the Foreign Ministry for its treatment of the Australian consular agreement, I thought that Foreign Ministry officials might respond.<sup>104</sup> Yet they remained silent, perhaps because they knew it wouldn't pass muster in the world community.

On the other hand, we do see many examples of continuing Chinese pragmatism regarding a rules-based system, even when it comes to dealing with its “core interest” in regaining Taiwan. Of course, although the PRC would never characterize cross-strait

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100. See HUMAN RIGHTS WATCH, “AN ALLEYWAY IN HELL”: CHINA’S ABUSIVE “BLACK JAILS” 12–16 (2009), available at [http://www.hrw.org/sites/default/files/reports/china1109webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/china1109webwcover_1.pdf); Jerome A. Cohen & Eva Pils, *The Fate of China’s Rights Lawyers*, FAR E. ECON. REV. (Dec. 2009), <http://www.feer.com/essays/2009/december51/cohenpils>; Jerome A. Cohen, Op-Ed., *China’s Jailed Champions*, S. CHINA MORNING POST, July 26, 2008, at 15.

101. *But see China Amends Laws for Ratification of Covenant on Civil and Political Rights: Report*, XINHUA GEN. NEWS SERV., July 14, 2011, [http://news.xinhuanet.com/english2010/china/2011-07/14/c\\_13984867.htm](http://news.xinhuanet.com/english2010/china/2011-07/14/c_13984867.htm).

102. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1984), 1465 U.N.T.S. 85.

103. Jerome A. Cohen & Beth Schwanke, Op-Ed., *China’s Missing Human Rights Lawyer*, INT’L HERALD TRIB., Mar. 19, 2010, at 8. Responding to repeated UN demands to report Mr. Gao’s precise location, a Chinese Foreign Ministry spokesman replied: “You can’t expect MoFA’s spokesman to know where everyone is. China has 1.3 billion people, there’s no way I can know where everyone is.” *Id.* See also Jerome A. Cohen & Jared Genser, Op-Ed., *Harmful Effects*, S. CHINA MORNING POST, Jan. 26, 2012, at 11.

104. Jerome A. Cohen & Yu-Jie Chen, Op-Ed., *Law Unto Itself*, S. CHINA MORNING POST, Apr. 1, 2010, at 11.



relations as “international,” the many “semi-official” agreements that have been made between Mainland and Taiwan organizations in the last few years illustrate the Chinese preference for practical arrangements over nationalistic rhetoric. Beijing and equally pragmatic counterparts in Taipei have found a way to successfully negotiate some sixteen agreements on an equal footing, despite the PRC’s insistence that as a formal matter, the “authorities in Taiwan” merely represent a provincial Chinese government, rather than the PRC’s sovereign equal, the Republic of China on Taiwan. Professor Chiu’s former protégé, President Ma Ying-jeou, has to be given enormous credit for this impressive political–legal feat.

I remember seeing both sides of this contemporary Chinese political personality, alternately nationalistic and practical, on my first visit to China in 1972. On about the fourth day, after we had come to know each other, I felt I could have a serious chat with my very intelligent escort from the Academy of Sciences. We were sightseeing at the Ming tombs outside Beijing, on a hillside looking down on the gorgeous valley, and I raised the question of the already bitter dispute between Japan and China over the strategically-located eight piles of rock called the Senkaku islands in Japanese, and Diaoyutai in China. I was living in Japan at the time and had just given a lecture to the Harvard Club of Japan about this dispute, which had aroused dangerous nationalistic passions in Japan, as well as in China and Taiwan. I thought I knew my new Chinese friend well enough to ask him what he thought about the Diaoyutai problem.

He immediately launched into a highly emotional tirade: “China will never allow the Japanese aggressors to occupy one inch of its sacred soil! We will fight them to the death!” He got very excited, and I was getting upset because I had upset him. Yet, somewhat mischievously, I said, “I’m very sorry about this, but I should tell you that last week (May 15, 1972) the U.S. government transferred administrative control over those islands to Japan.” Again, he suddenly changed completely. With a relaxed smile, he said, “Look, one has to be practical. We don’t have to solve this problem today. Any time in the next 500 years will do.”

In very short compass, I saw these two opposing aspects, and that’s what the struggle is going to be about. Which will prevail—the ardent nationalism that so many members of the younger generation in China evince on the internet and social media, or the traditional Chinese practical spirit?

I take hope from some of the good examples we have seen lately. Canada and China recently made an agreement to send back to China supposedly the biggest smuggler in Chinese history, Lai Changxing.<sup>105</sup> In order to get him back, the Chinese government made a number of concessions about how it would treat him.<sup>106</sup> Lai is not a Canadian national, but a Chinese.<sup>107</sup> While I believe that China's concessions were inadequate to protect him, they nevertheless constitute an important precedent showing the world that China can be practical, because it wants to bring back to China all of its allegedly corrupt nationals who have in total absconded with the equivalent of many billions of dollars.

Another type of pragmatic development, less well known, is that American government food and drug inspectors are now operating in China.<sup>108</sup> The FBI also has an office in Beijing.<sup>109</sup> These things would not have been feasible before. They are a reflection of increasing globalization and, specifically, China's needs, respectively, to assure the continuing success of its exports to the United States and to help punish notorious economic offenders who plague Sino-American relations. A lot of useful, practical things are happening.

Of course, China had to make a number of concessions to secure its entry into the World Trade Organization (WTO).<sup>110</sup> Prime

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105. See Jerome A. Cohen, *In Safe Hands?*, Op-Ed., S. CHINA MORNING POST, Aug 3, 2011, at 17.

106. *Id.*

107. See Miro Cernetig, *For Chretien, a Catch-22; If Lai is Deported, He Could Be Executed, But His Presence in Canada Will Rile China*, GLOBE AND MAIL (Can.), Nov. 30, 2000, at A7.

108. See Andrew Jacobs & Mark McDonald, *U.S. Food Inspectors Open Beijing Office*, INT'L HERALD TRIB., Nov. 20, 2008 at 4.

109. Elisabeth Rosenthal, *Threats and Responses: The F.B.I.; Ashcroft Says U.S. Will Place Agents in China*, N.Y. TIMES, Oct. 25, 2002, at A15.

110. A recent article summarizes the concessions:

In the end, China had to make a more comprehensive set of initial commitments than those offered by many developed countries during the Uruguay Round. Not only did China have to sacrifice its principle of acceding unqualifiedly as a developing country, but it also accepted conditions that, in many ways, substantially exceeded those of other developing—and even developed—countries. Most notable was China's agreement to be treated as a “non-market” economy under certain conditions by other WTO members. The so-called China-specific commitments (that is, accession terms that apply to China alone) are unprecedented in the history of the WTO and are unparalleled by those undertaken by any other acceding WTO member.

Xiaohui Wu, *No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization*, 10 CHINESE J. INT'L L. 2 27, 239 (2011) (footnote omitted).

Minister Zhu Rongji knew that for China's economic development and cooperation with the world, WTO entry was critical. Zhu was practical and powerful enough to persuade, indeed pressure, the country's conservative leaders and government agencies and enterprises into making necessary concessions, despite their vested interests. The fruits of his dynamic farsightedness are increasingly apparent. Some day, one or more comparable figures in the Party *politburo* may have the vision, power, and determination to take the risks of sparking significant political–legal reforms, especially concerning China's civil and political rights, the way Zhu Rongji fostered China's economic modernization.

Today, unlike 1960, when I had my first Chinese lesson, or 1972, when I first visited China, there is, on balance, a substantial basis for optimism about China's attitude towards the world community and international law. In 1971, when the PRC assumed China's seat in the United Nations, it was so short of relevant talent that UN Ambassador Huang Hua's wife, whose field was economics rather than law, was asked to represent China on the United Nations' Sixth or Legal Committee. Since then, the Chinese Government has assembled an impressive array of international law experts, and many Chinese specialists in this field now serve in international organizations as well as in academic and research institutions. Chinese law professors and other experts appear to be increasingly influential with their government, and their impact is usually salutary.

I think that a "rising China" can be peacefully accommodated in the international community and that international law is destined to play an important role in bringing this about. Yet, we must remember that the challenge is not only China's, but also our own. As I have already illustrated, the history of Sino-Western relations is replete with examples of Western hypocrisy in the manipulation of international law.<sup>111</sup> We cannot expect China to take international law more seriously than other major states do. The PRC's perceptions of how others play the game will continue to be crucial to its own conduct. Greater fidelity to international law on the part of the United States and other countries, in practice as well as rhetoric, will be essential to stimulating China's further progress in this respect.

I hope that many of us here will continue the valuable work that Professor Chiu Hungdah has done concerning China, Taiwan and

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111. See *supra* Part II.

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international law. That will be the most fitting tribute we can pay to his memory.