Beyond History and Sovereignty

China and the Future of International Law

Wim Muller

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, September 2013 (defence)

European University Institute
Department of Law

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Summary

Since the beginning of its 'reform and opening up' policy in 1978, the People's Republic of China has grown into a major power in international relations. This thesis explores the implications of this development for public international law, which itself has grown and undergone structural changes since the end of the Second World War. The number of actors has grown, the place of the individual has been enhanced and efforts have been made towards the development of normative hierarchy and in the views of some even constitutionalisation. Yet the PRC has retained an outlook firmly rooted in the concept of state sovereignty, emphasising non-interference and equality of states. This approach stems from the history of China's encounter with the international legal order in the nineteenth century, when its own sinocentric world order fell victim to its violent encounter with western international law. The current international legal order still retains traces of the legacy of imperialism, although international law has also served as a vehicle for the realisation of the humanitarian ideals of its practitioners and participants. In China's sovereigntist approach to international law, the rhetoric and the interests of the developing world play a major role, as China tries to combine the sometimes contradictory roles of a 'responsible great power' on the one hand, and leading developing nation on the other. This thesis analyses its practice in international human rights law, the law of armed conflict, international criminal law, and various areas related to international peace and security, at normative levels from general political and diplomatic discourse to the acceptance and interpretation of positive law. This analysis demonstrates that China brings a welcome alternative voice to a still western-centric international legal system. Its defensive adherence to sovereignty, however, creates the risk of normative erosion or dilution in various areas in which it claims to have accepted existing international norms. China is not yet a creator of new norms, but has grown very adept at modifying and reshaping existing norms, both legal and societal, to bring them more in line with its preferences. This presents both challenges and opportunities.

To my parents

袁以慧

Franciscus Clemens Antonius Muller

In memory of

Christopher Kevin Boyle

(1943 – 2010)

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List of abbreviations

AJIL	American Journal of International Law
ARATS	Association for Relations Across the Taiwan Straits
ARF	ASEAN Regional Forum
ASEAN	Association of South East Asian Nations
AsJIL	Asian Journal of International Law
ATT	Arms Trade Treaty
AYBIL	Asian Yearbook of International Law
BIT	bilateral investment treaty
BRIC	Brazil, Russia, India, and China
BRICS	Brazil, Russia, India, China and South Africa
BWC	Biological Weapons Convention
CAT	Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCP	Chinese Communist Party
CCPR	Committee on Civil and Political Rights (Human Rights Committee)
CCW	Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CERD	Committee for the Elemination of all forms of Discrimination
CESCR	Committee on Social, Economic and Cultural Rights
CHR	UN Commission on Human Rights
CICC	Coalition for the International Criminal Court
CJIL	Chinese Journal of International Law
CPC	Communist Party of China
CRPD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
CMW	Convention on the Rights of Migrant Workers
CTBT	Comprehensive Nuclear Test Ban Treaty
CTBTO	Comprehensive Nuclear-Test-Ban Treaty Organization

CQ	The China Quarterly
CWC	Chemical Weapons Convention
DSB	WTO Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea
ECOSOC	Economic and Social Council
ECFA	Cross-Straits Economic Cooperation Framework Agreement
EEZ	Exclusive economic zone
EJIL	European Journal of International Law
FMPRC	Ministry of Foreign Affairs of the People's Republic of China
GONGO	Government-organised non-governmental organisation
HKSAR	Hong Kong Special Administrative Region
HRIC	Human Rights in China
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HRW	Human Rights Watch
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention for the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Center for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission

ILO	International Labour Organisation
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East (Tokyo)
ITLOS	International Tribunal for the Law of the Sea
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
NGO	Non-governmental organisation
NPC	National People's Congress
NPT	Nuclear Non-Proliferation Treaty
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PLA	People's Liberation Army
PRC	People's Republic of China
R2P	Responsibility to Protect
RATS	Regional Anti-Terrorist Structure of the SCO
ROC	Republic of China
SAR	Special Administrative Region
SCO	Shanghai Cooperation Organisation
SCSL	Special Court for Sierra Leone
SEF	Straits Exchange Foundation
TWAIL	Third World Approaches to International Law
UN	United Nations
UNAMID	United Nations Assistance Mission in Darfur
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNPROFOR	United Nations Protection Force

UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Authority in East Timor
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
WHO	World Health Organisation
WMD	weapons of mass destruction
WTO	World Trade Organization

1 Introduction: China's 'rise' and international law

1.1 Breakfast in Durban

On 28 March 2013, Xi Jinping,[1] two weeks after assuming the presidency of the People's Republic of China (PRC), found himself at a breakfast meeting in Durban, South Africa, with nine African presidents, the prime minister of Ethiopia, the speaker of Algeria's National Assembly and the Chairperson of the African Union Commission. These leaders had travelled to South Africa to participate in, in the words of the Chinese Ministry of Foreign Affairs, a "dialogue" with the leaders of the BRICS countries (Brazil, Russia, India, China and South Africa). Indeed, South Africa was host to the Fifth BRICS Summit.[2]

The PRC Ministry of Foreign Affairs (FMPRC) provides an account of the meeting on its website.[3] According to this account, after Xi expressed his happiness at the opportunity to exchange views with these leaders, they "spoke actively" and "all hailed the traditional friendship with China." They spoke of the tasks which Africa faced to "achieve sustainable development". Cooperation between Africa and China was "built on the basis of mutual trust, mutual benefits, win-win results, and non-interference in each other's internal affairs." Moreover, the investment and assistance China had brought to Africa had "greatly promoted the economic and social development of African countries and [was] welcomed by the African people." Although at this point it is not clear if the report is still summarising the views expressed by the African leaders, but certainly suggests it is, it also notes that "claims that China is engaging in 'neo-colonialism' in Africa are groundless." Rather, "African countries want to learn from the successful experience of China's development" and hope "that China will continue to speak up for Africa in the international arena", and expressed "the belief that China will play a greater constructive role in the peace and

1 习近平. In line with usage in the PRC, this thesis uses simplified Chinese characters and *pinyin* Romanisation unless otherwise noted.

2 Fifth BRICS Summit, Durban, South Africa, 26-27 March 2013. See <http://www.brics5.co.za/> [6.4.2013]

3 'During the Breakfast Meeting with the Leaders of African Countries, President Xi Jinping Stresses That There Is No Perfect Tense Only Continuous Tense for China-African Relations', 28 March 2013, Ministry of Foreign Affairs of the People's Republic of China. <http://www.fmprc.gov.cn/eng/zxxx/t1026805.shtml> [31.3.2013]

prosperity in Africa." In sum, "Africa-China relations will continue to be a model of cooperation for developing countries."

In reply, President Xi held a speech in which he noted the "new and critical phase" which peace and development in Africa had entered, where its economy was prospering but challenges remained. "Xi expressed the belief that Africa is bound to usher in a brighter future as long as Africa can maintain peace and stability and find the path of development suited to their own actual conditions." Against the background of an "international situation" which was "undergoing profound and complex changes", he reiterated a number of commitments with regard to Africa, the first of which was China's support for "African countries to solve the regional issues on its own", offering a mediating role for China and encouraging them "to solve the problems through dialogue and consultation." In addition, the Chinese government would encourage Chinese enterprises to expand investment in Africa and "continue" to ask them "to actively fulfill their social responsibilities." China would "always be a staunch supporter of African unity" and supported its regional and sub-regional organisations. And finally, "China will always be a firm supporter to promote Africa's equal participation in international affairs."

This admittedly rather dry account of a meeting which will most likely not change history is nonetheless illustrative of many issues which are at the heart of this thesis. It is as useful an introduction into the jargon of official Chinese foreign policy pronouncements as any news release on the Foreign Ministry website, and contains many phrases which can almost be qualified as mantras of China's official foreign policy, such as an "international situation" undergoing "complex and profound changes".[4] Even more numerous are references to "mutual trust", "mutual benefit" and most importantly "non-interference in internal affairs", which reflect the Five Principles of Peaceful Coexistence, the cornerstone of China's foreign policy and position in international law.[5] The principle of non-interference is also linked to the emphasis on dialogue and consultation as methods for

4 See, for example, also the first sentences of Position Paper of the People's Republic of China at the 67th Session of the United Nations General Assembly, 19 September 2012, FMPRC. <http://www.fmprc.gov.cn/eng/zxxx/t970926.htm> [31.3.2013]; Statement by the Chinese Delegation at the General Debate of the United Nations Conference on the Arms Trade Treaty, 6 July 2012, <http://www.un.org/disarmament/ATT/statements/docs/20120709/20120706_China_E.pdf> [2.4.2013]

5 See 中华人民共和国宪法 [Constitution of the People's Republic of China], 12 April 1982, last amended 14 March 2004, preamble. See *infra*.

international dispute settlement.

Moreover, the statement alludes to actual concerns about a relatively recent trend in Chinese foreign policy and how it is perceived in the wider world: the expansion of China's activities into Africa, notably in terms of investment, infrastructural support and exploitation of natural resources. The dismissal of the possibility that this entails Chinese 'neo-colonialism' not only serves to distinguish China from the former European colonial powers and the association of Western development aid, and the conditionality often attached to this, with unwarranted (or unwanted) interference, but is also aimed at alleviating concerns that China is only acting in its own interest and only exploiting Africa for its resources. The explicit reference to Chinese government efforts to ask Chinese companies to fulfil their social responsibilities addresses human rights related concerns which have been raised in recent years in this respect.[6]

Finally, two other main features of Chinese foreign policy come to the fore in the account of President Xi's breakfast meeting. One is the mutual confirmation of the "traditional friendship" between China and African countries, which reflects an alignment between the PRC and developing countries which dates back to the time when they were still known as the 'Third World'. The other feature is related and consists of the framing of the relationship in terms of development, now referred to as 'sustainable development' in line with the current vocabulary within the United Nations and the wider 'international community'.

Most of all, the meeting is illustrative of a realignment in the international order which is currently taking place, in which China engages with African countries during an event in which the BRICS, an informal multilateral forum consisting of five 'rising powers', none of them from what is commonly referred to as the West, convene. All these developments form the background of this thesis which focuses on one development in particular: the 'rise' of China.

6 For example by Human Rights Watch, *"You'll Be Fired If You Refuse": Labor Abuses in Zambia's State-owned Copper Mines* (November 2011). <http://www.hrw.org/reports/2011/11/04/you-ll-be-fired-if-you-refuse> [31.3.2013]

1.2 The impact of the 'rise' of China on international law

The economic and military 'rise' of the PRC and its elevation to great power status in international relations hardly needs an introduction at this point. This being said, both the terms 'rise' and 'great power status' are imprecise notions, and the undercurrent of threat implicit in the word 'rise' makes the use of this terminology suspect if a context is lacking. As a cautionary measure, the word 'rise' therefore remains in quotation marks in this thesis and is used as shorthand to describe China's rapid relative growth in power in the last decades.[7] In recent years, China has become the world's second-largest economy (even though in terms of GDP per capita it still ranks lower than many countries, considering that it is the world's most populous country) after experiencing rapid economic growth since the institution of the 'reform and opening up' policy in 1978.[8] China's 'rise' has generated a lot of attention in scholarship on international relations, including the question what it entails for the international order.[9] This thesis asks a more specific question, which is what consequences the 'rise' of China has for the international *legal* order.[10]

An answer to this question inevitably requires entering a number of existing debates on the nature and relevance of international law, a discipline which appears unable to shake off existential debates on its epistemological and ontological issues. Indeed, one central theme of this thesis concerns the different perceptions which exist among actors and practitioners of international law about its foundations and purposes, which are informed by their different cultural and political backgrounds and explained from a historical

7 See also Sheena Chestnut and Alastair Iain Johnston, 'Is China Rising?' in: Eva Paus and Penelope B. Prime and Jon Western (eds), *Global Giant: Is China Changing the Rules of the Game?* (New York, NY: Palgrave Macmillan, 2009) 237-259. See *infra*, 1.3.2.

8 'China overtakes Japan as world's second-biggest economy', *BBC News*, 14 February 2011. <http://www.bbc.co.uk/news/business-12427321> [31.3.2013] See also the World Bank's overview of China, which ranks it as 114th in terms of GDP per capita for 2011, at <http://www.worldbank.org/en/country/china/overview> [31.3.2013].

9 See, inter alia, Alastair Iain Johnston , 'Is China a Status Quo Power?', *International Security* 27 (2003) 5-56; Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007); Mark Leonard, *What Does China Think?* (London: Fourth Estate, 2008); James Kynge, *China Shakes the World: The Rise of a Hungry Nation* (Revised edition; London, Phoenix 2009); Eva Paus, Penelope B. Prime and Jon Western (eds), *Global Giant: Is China Changing the Rules of the Game?* (New York, NY: Palgrave Macmillan 2009); Gregory Chin, and Ramesh Thakur, 'Will China Change the Rules of Global Order?', *The Washington Quarterly* 33:4(2010) 119-138; Wang Jisi, 'China's Search for a Grand Strategy: A Rising Great Power Finds Its Way', *Foreign Affairs* 90 (2011) 68-79. See also *infra*, chapter 3.

10 There has been a lot less scholarship on this. See below, section 1.5, for an overview of the scholarship which does exist on this topic.

perspective. At the outset, however, it is important to note that public international law exists and functions every day as a body of positive law, despite these existential issues. Not only that, international law norms, institutions, and actors have proliferated over the past sixty years. Since all these are functioning every day, a large part of this thesis is devoted to China's recent practice in international law. The way in which this is done is not neutral and will be set out in the remainder of this introduction.

This observation, that international law exists and is in use every day, serves as the starting point before the discussion turns to its underlying premises. It serves a dual purpose in international society, which is also at the root of the disillusionment that is often expressed regarding international law, especially outside the world of its practitioners. International law has often disappointed those who engage with it hoping that it will bring them what they consider justice, and conversely, it has given hope to many who thought that in the end, what happened in the world was determined by naked power. The dynamic underlying this essential feature of international law is the tension between, on the one hand, international law as a project, in the view of some political and in the view of others something beyond politics, but always aimed at making and remaking, and improving, the world order; on the other, international law in its role as the codification of the existing order, a safeguard, a conservative factor that acts not as an instrument of, but an obstacle to change.

This thesis locates one major actor in international relations and analyses its position in the wider field in which it is operating, which itself has undergone significant change in the period under discussion. Considering the purpose that international law serves (and which is discussed in more detail in the next section and chapter 3) as a conduit (or tool and language) for the aspirations and disagreements of the various actors, and the diversity of those actors and their aims, it is unsurprising that they have different positions. However, the depth of these differences is sometimes underestimated. The significance of China as an actor has grown and continues to grow, and it is important to locate its international legal discourse in relation to the mainstream, where it is not quite located just yet. The analysis presented here focuses on China as one actor which is becoming increasingly important and has a growing potential to influence the direction of the

international legal order. In this way, it also contributes to the debate in international relations scholarship on whether China is a 'norm-maker' or a 'norm-taker'; in other words, whether and how international norms – in this case, international legal norms – change China, and vice versa.

This introductory chapter provides the framework for the discussion. It will first set out some key concepts and provide a characterisation of the contemporary international legal order, followed by a description of the major developments in this order of the last half-century which are relevant to the analysis, before describing the methodology followed and the work that this thesis builds upon.

1.3 Conceptual and analytical framework

1.3.1 Continuity and change and the notion of progress

There is a long line of scholarship in international law which analyses change and continuity in the international legal system through a more or less interdisciplinary perspective, combining history, the theory and practice of international law, and insights and methodologies from international relations.[11] International lawyers have needed to engage with these simply to understand what it is that they are doing. The discipline has been through various cycles in its mainstream turning from naturalism,[12] grounded in morality, to different kinds of positivism,[13] informed by undue optimism or undue cynicism regarding its idealistic streak, an obsession with power or at least an 'empirical turn',[14] to a return to morality, but always based on unspoken assumptions about its potential to make

11 Borrowed from Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999) 4.

12 Most notably the pre-19th century international law of Grotius and Vattel, which to an extent has a present-day proponent in Cançado Trindade. See e.g. Antônio Augusto Cançado Trindade, 'International Law for Humankind: towards a new Jus Gentium (II)', Recueil des Cours 317 (2005) 11-312.

13 Notably Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967) 320-347 and H.L.A. Hart, *The Concept of Law* (Corrected reprinted edition; Clarendon Press: Oxford, 1972) 208-231.

14 Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship', *AJIL* 106 (2012) 1-46. This trend is especially present in the United State. See Guglielmo Verdirame, '"The Divided West": International Lawyers in Europe and America', *EJIL* 18 (2007) 558. Its imprints are visible in the works of the 'New Haven School' (Myres McDougal and W. Michael Reisman) and have strongly influenced Rosalyn Higgins. See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994). Other examples include attempts to use rational choice theory in international law.

the world a better place and to bring justice to as many people as possible.[15] This thesis locates China and a mainstream in Chinese scholarship on such a cycle, along with two major currents in Europe and the United States.

All of this scholarship moves between the two purposes of international law, as a constraint on behaviour and as an instrument of change. This was already the case, for example, when the American legal scholar Manley Hudson devoted an important work to the notion of what he considered progress in international organisation, a concept recently revisited by the current generation of scholars.[16] Koskenniemi famously framed this characteristic as a tension between factual description and political prescription, described as apology and utopia.[17] And the two roles of international law are present in Article 13(1) of the United Nations Charter (which in its preamble promotes "social progress"), which calls for the General Assembly to encourage both "the progressive development of international law and its codification" and the mandate of one of its most important institutions, the International Law Commission (ILC), which is tasked with the same.[18]

In 1964, Wolfgang Friedmann detected "many profound changes that have affected contemporary international law to such an extent that it is today something very different even from what it was a generation ago."[19] In his view, it was important to distinguish

15 '[I]nternational law is, like every other human endeavor, going around in circles. At present, the profession is inclined to fantasize its existence in the terms of Kelsen's elegant rhetoric, but I believe that the increasing power of critical international legal studies and of the so-called new scholarship in international law points the way to a renewed immersion of the profession in the murky interdisciplinary worlds of diplomatic politics, international ethics and perhaps even political theology. This is, after all, where international law began in the 16th and 17th centuries.' Anthony Carty, 'Did International Law really become a Science at the End of the 19th Century?' in: Luigi Nuzzo and Miloš Vec (eds.), *Constructing International Law: The Birth of a Discipline* (Frankfurt am Main: Vittorio Klostermann, 2012) 229-247, at 247. For a very recent attempt to reconcile international law and morality, see (posthumously published) Ronald Dworkin, 'A New Philosophy for International Law', *Philosophy & Public Affairs* 41 (2013) 1-30.

16 Manley O. Hudson, *Progress in International Organization* (Stanford, CA: Stanford University Press, 1932); Russell A. Miller and Rebecca M. Bratspies, *Progress in International Law* (Leiden: Martinus Nijhoff 2008); Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: T.M.C. Asser Press 2009).

17 Martii Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Reissue with a new epilogue; Cambridge: Cambridge University Press, 2005) 17.

18 Charter of the United Nations, 26 June 1945, entry into force 24 October 1945; Statute of the International Law Commission, adopted by the UN General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Article 15 of the ILC Statute distinguishes between codification and progress primarily to the extent that there is state practice in a given area.

19 Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964), xiii.

between the international law of "coexistence", which governed diplomatic inter-state relations, and the international law of "co-operation", which was characterised by the "pursuit of common human interests." A logical extension of this model would lead from coexistence, through cooperation, to 'community' as the next step – i.e., international law as the law of the international community, based on its shared values.[20] Louis Henkin made the role of law explicit by asserting that "the progress of civilization may be seen as movement from force to diplomacy, from diplomacy to law."[21] In diplomatic terms, the parallels for these three types of international law would be bilateralism, multilateralism and integration – the European Union representing something of a model for other forms of multilateral cooperation. In legal terms, striving for an international law of community is a quintessentially constitutionalist outlook. However, it is not inevitable that the 'international community' will actually evolve into something that truly deserves that name, even if it is believed by many that this would be the best way to tackle problems which cut across national boundaries and require a global approach to solve. The most important structural feature of the international legal order which may dampen the optimism of constitutionalists who either believe that the international order should move in the direction of verticalisation, legal hierarchy and supranationality, is the very resilient principle of state sovereignty, which receives ample attention in this thesis.

The desire for change and the aim of progress imply a narrative of improvement that belies the ups and downs of history, but is firmly embedded in the language of international law. The notion of 'progress' also implies an objective end point, or at least an objective sense of something 'better' that international law should be contributing to. It also implies

20 For example, Bruno Simma, 'From Bilateralism to Community Interest in International Law', *Recueil des Cours* 250 (1994) 217-384. Another term which has been introduced by a leading Chinese international lawyer is 'co-progressiveness'. It could not be more obvious that a progress narrative is embedded in this notion, which was also designed by the author to describe the international law that will come out of the post-Cold War era, "a law which is all encompassing, preoccupied with advancements in moral and ethical terms more than in other respects and [...] having human flourishing as its ultimate goal." Sienho Yee, 'Towards an international law of co-progressiveness' in: Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 18-39, at 39. Also noteworthy is that in his Hague Lecture in 1990, Wang Tieya made explicit the goal for "international law [...] to make its own progress", in this case adapting to new circumstances in the form of other than European and Christian civilisations. Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours* 221 (1990) 195-369, at 355.

21 Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edition; New York: Columbia University Press, 1979) 1.

that much has already been achieved, more or less objectively, by international law. However, common agreement on what constitutes progress is missing in international society, leaving only a collection of narratives which may or may not overlap in their notion of what is or is not progress, and its corrolaries of stagnation and regression.[22]

1.3.2 The 'rise' of China as a threat

The question which is asked most about the impact of the 'rise' of China in the West is indeed whether it will lead to stagnation, impede progress in the achievements made in international law, or even roll back achievements which have already been made and thus lead to regression.[23] The achievements in question almost always have to do with human rights, or, more broadly the rights of individuals, considering the 'humanisation' which has taken place in international law since the Second World War. As will be set out in more detail below,[24] this is one of the progressive narratives underlying much of the current Western approach to international law and is intertwined, to a greater or lesser degree, with some of the other ones. Interestingly enough, it will become clear that China is operating based on another narrative of progress, couched primarily in terms of development but no less linear than the narratives dominant in the West, as can also be seen in the words of Xi Jinping's breakfast speech. The crucial concept in international law which distinguishes China's approach from the western ones is sovereignty: as will be seen, many western approaches are part of a post-sovereign narrative, while China is insisting on the importance of the sovereign equality of states.[25]

The question whether the 'rise' of China constitutes a threat to the current international order and, as is the focus of this thesis, also the international legal order, is

22 See in particular Skouteris, *The Notion of Progress*, *supra* note 16, 9-21. The notion of 'progress' is also questioned by R.P. Anand, 'Changing Dimensions of International Law: An Asian Perspective', *Collected Courses of the Xiamen Academy of International Law* 1 (2006) 17-158, at 158.

23 Exemplified by such titles as Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007); Mireille Delmas-Marty , 'Present-day China and the Rule of Law: Progress and Resistance', *CJIL* 2 (2003) 11-28; Alastair Iain Johnston, 'Is China a Status Quo Power?', *International Security* 27 (2003) 5-56; and implicit in Katrin Kinzelbach, 'Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000-2010)', *Netherlands Quarterly of Human Rights* 30 (2012) 299-332. See also *infra*, 3.3.

24 See *infra*, 1.3.4.1.

25 See, in particular, chapter 4, which elaborates on Wim Muller, 'China's sovereignty in international law: from historical grievance to pragmatic tool', *China-EU Law Journal* 1:3-4 (2013) 35-59.

often asked even though it is obviously problematic, as it departs from the assumption that the whomever or whatever the rise of China threatens, must be a good thing. However, reality is more complex. Even on the assumption that the increased importance of individuals in international law and the growing importance of human rights are a good thing (as is indeed taken in this thesis as a general position), this does not mean that other actors are necessarily 'superior' to China in this respect, if only because states which have styled themselves as champions of human rights are not free of issues of their own, especially since the first decade of this century. It is astonishing how often a perceived dichotomy between China and the rest of the world is taken for granted without questioning. In fact, this dichotomy is part of the discourse and of the wider normative framework which is analysed and described here, and this thesis aims at providing a more nuanced understanding without falling back on complete relativism or reflexive moral equivalence. There are two main two aspects to the perceived 'China threat', one when it is seen in military and economic terms, the other from a normative perspective, primarily in the field of human rights. The focus of this thesis is the latter, but it should be clear from the outset that the perception or presentation of China as a threat is a problem in itself. The way in which we speak about a development obviously shapes its perception, including on the side of the object of the description.[26]

1.3.3 Legal Orientalism in perceptions of international law

This brings us to the second major theme of this thesis. Perceptions in the West of the rise of China as a threat to progress carry cultural connotations, which are all the more relevant because of the darker side of the legacy of the international legal order. Not only is the international legal order historically European in origin, with the framework of the Westphalian state system supplemented by a liberal value system which can be traced back to the European Enlightenment, in the last two centuries international law has also been used as a tool of western imperialism, providing ideological support for colonialism and the infringement of the sovereignty and self-determination of non-western peoples even before

26 Indeed, for a counterreaction see An Chen, 'On the Source, Essence of "Yellow Peril" Doctrine and Its Latest Hegemony "Variant" – the "China Threat" Doctrine: From the Perspective of Historical Mainstream of Sino-Foreign Economic Interactions and Their Inherent Jurisprudential Principles', *Journal of World Investment & Trade* 13 (2012) 1-58.

they were aware of possessing them, or at least defined them in these terms. This illustrates the second point, which is that despite this legacy, international law has provided for tools and a vocabulary which these peoples, or more accurately actors within these societies, subsequently used to 'liberate' themselves, even whilst being assimilated into this international legal order, which itself changed as a result. The development of international law after the Second World War is thus illustrative of this complex process of global interaction, including the discourse of international human rights.[27]

The encounters between very different cultures and societies which this entailed also shaped and reshaped the perceptions they had of each other, and the way they constructed and reconstructed their identities as a result. As described in this thesis, this certainly happened in the encounter between the West and China, even more so as it entailed a clash between two world orders. The Chinese order was so different from the European order that China has served as a perfect 'Other' to Western observers, a tendency which has been reinforced by the history of the PRC and which is present in Chinese leaders and academics themselves, despite, or partially explaining,[28] the emphasis on 'Chinese characteristics'. This phenomenon has most famously been described by Edward Said as 'Orientalism', a "style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the time) 'the Occident'" which consists of several interdependent ways in which Europe defined itself versus the Orient, which fulfilled the

27 See Koskenniemi, *From Apology to Utopia*, *supra* note 17, chapter 2, for the effect of liberalism on international law. For the relationship between international law and imperialism and its contemporary legacy, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press 2001); Antony Anghie, 'The Evolution of International Law: colonial and postcolonial realities' in: Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.), *International Law and the Third World: Reshaping Justice* (London and New York: Routledge-Cavendish, 2008) 35-49; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Brett Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization', *Journal of the History of International Law* 7 (2005) 1-23; Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?', *Journal of the History of International Law* 10 (2008) 181-209 (for a useful corrective to Anghie and Bowden); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011). See for the human rights link Rajagopal, Part 3, and Christian Reus-Smit, 'Human rights and the social construction of sovereignty', *Review of International Studies* 27 (2001) 519-538; Mark Goodale and Sally Engle Merry (eds.), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

28 As is discussed in more detail in chapter 3, China is still actively shaping its contemporary identity.

role of the 'Other' as its 'cultural contestant', a place that was quintessentially different, maybe not in fact, certainly in the mind of the observer.[29]

China has served as the 'Other' in the imagination of its European observers for centuries, and an orientalist mindset has informed and continues to inform Western observers of Chinese law. The legal Orientalism to which China has been subjected, was explored by Teemu Ruskola in an essay from the perspective of comparative law.[30] Although his focus is therefore on China's domestic law and Western perceptions of the nature of the legal system which it has built up since the beginning of the reform era in 1978, this legal orientalism is equally present in Western perceptions of China's approach to public international law. In this period, it has also been fed by Chinese lawyers themselves, aware of the gap created in China's legal development through the tumultuous decades after the establishment of the PRC, especially during the Cultural Revolution.[31]

Ruskola notes the historic claim often made by Western observers that China did not have an indigenous tradition of 'law', a claim which has fed back into contemporary obervations by Chinese about their own history but has long been discredited by historians of Chinese law and made place for more nuanced studies of the history of law in China, in which care has to be taken not to impose Western definitions of law on similar phenomena in Chinese history. Still, the continued existence of this prejudice demonstrates, in Ruskola's view, 'how the West has constructed its cultural identity against China in terms of law.'[32]

> I suggest that by considering legal Orientalism as an ongoing cultural tradition we can understand better why even today claims about the status of Chinese law are so relentlessly *normative*. Why is it that the statement that China lacks 'law' (again, however defined) is almost never simply a factual claim but constitutes an implicit indictment of China and its cultural traditions?[33]

As may be clear from the discussion above, the categories which are constructed in

29 Edward W. Said, *Orientalism* (London: Routledge and Kegan Paul, 1978), 1-3. Although Said was writing primarily about the Near East, his insights can be applied to the wider Orient, including the encounter between the West and China, certainly insofar as the process of 'othering' is concerned.

30 Teemu Ruskola, 'Legal Orientalism', *Michigan Law Review* 101 (2002) 179-234. See also Samuli Seppänen, 'Narcissistic Law: Legal Fictions and the Law of the People's Republic of China', *Finnish Yearbook of International Law* XV (2004) 83-110, which also describes how Orientalist views on the side of western observers influences their approach to the legal system of the PRC.

31 See *infra*, chapter 2.

32 Ruskola, 'Legal Orientalism', *supra* note 30, 184.

33 *Ibid*., 185 (emphasis in original).

Orientalist discourses are mutually constitutive opposites, such as occidental versus oriental or traditional versus modern. A corrolary of the legal Orientalism regarding China, is that it also influences the side which is subject to it, and it is arguable that there is an 'occidentalism' in China mirroring the orientalist outlook of the 'West', and that parts of China's self-image can be considered orientalist. This phenomenon of self-orientalising was also noted by Said.[34]

The purpose that the notion of legal Orientalism serves in this thesis is to inform the analysis of China's approach to international law and to explain prejudices and perceptions which exist both on the side of Western observers as well as in Chinese discourses, both official and in scholarship. It seems to be the most useful notion to capture some of the cultural differences which exist and cannot be pinpointed with precision, but the existence of which is nonetheless very concrete to any observer. Ruskola himself notes the relevance of postcolonial legal analysis to international law, giving as an example the "legal construction of particularistic national identities and their relationship to 'universal' international norms."[35] In this thesis, universalism in international law will be treated as a descriptive category as well as an aspiration, and universality of international law is distinguished analytically from universality of human rights. The concept of legal Orientalism helps inform the positions taken in this respect.

A second purpose which the notion of legal Orientalism serves, is to warn us against the essentialisation of one discourse or another.[36] A tendency exists on the Western side to equate positions taken in Chinese scholarship with the official PRC government position in international law, while it is quite obvious that this would never be done with an Italian or Dutch international lawyer.[37] Conversely, a tendency among Chinese scholars also exists to distinguish only one 'western' position and thus apply a kind of 'occidentalism'. One

34 Said, *Orientalism*, *supra* note 29, 325; Ruskola, 'Legal Orientalism', *supra* note 30, 197.

35 Ruskola, 'Legal Orientalism', *supra* note 30, 199.

36 The same is true for other 'grand narratives', including assuming a "totalizing 'Western discourse'" which Cavallar criticises in the work of, inter alia, Anghie. Cavallar, 'Vitoria, Grotius, Pufendorf', *supra* note 27, 207. For divergence among Western positions, see Guglielmo Verdirame, '"The Divided West": International Lawyers in Europe and America', *EJIL* 18 (2007) 553-580.

37 Although some of the work by Chinese scholars may encourage this by offering an explanation of 'the' Chinese position: Xue Hanqin, 'Chinese Contemporary Perspectives on International Law — History, Culture and International Law', *Recueil des Cours* 355 (2012) 41-233; Xue Hanqin, 'Chinese Observations on International Law', *CJIL* 6 (2007) 83-93; Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours* 221 (1990) 195-369.

purpose of this thesis is too bring more nuance into this picture.

The relevance of the notion of Orientalism and its explanatory value with regard to cultural factors will be made throughout this thesis.[38] The notion will also help to deal with the vagueness of the category of 'culture', which is hard to define and susceptible to indeterminacy. It may be noted however that its relevance is also borne out by the importance ascribed to culture by both prominent Chinese international lawyers who have taught a course on China and international law at the Hague Academy of International Law. Wang Tieya noted in 1990 that "it appears that there are some elements which have constant effect on the PRC in its dealing with problems of international law. These elements have apparently historical and cultural colour and thus may be crucial in the study of the subject of international law in China."[39] Xue Hanqin, the current Chinese judge in the International Court of Justice (ICJ), did the same in the title of her 2010 lecture: "Chinese Contemporary Perspectives on International Law — History, Culture and International Law". In Xue's words, contrary to domestic legal systems, in international law the law is "not imposed on states, but accepted mainly through voluntary acts" and the "fact that States adopt different positions on various issues of international law cannot always be explained by legal reasoning, as the answer often lies elsewhere."[40] Xue identifies history and culture as pertinent factors in her analysis of the socio-historical context in which specific countries relate to international law.

1.3.4 Changes in the international legal order

Having set out the two key notions of progress and legal Orientalism to shape the discussion of different perceptions of changes in the international legal order, it is time to identify the actual developments which have been and are taking place in this order and may be affected by the rise of China, or in other words the increase of its relative power and influence in normative developments in international law. As recalled above, Friedmann already noted significant changes in the international legal order in 1964. In the first decades after World

38 For different Saidian perspectives on international law, see Rajagopal, *International Law from Below*, *supra* note 27, 9. For other approaches to the Other and international law, see Anne Orford (ed.), *International Law and its Others* (Cambridge: Cambridge University Press, 2006).

39 Wang, 'International Law in China', *supra* note 37, 203.

40 Xue, 'Chinese Contemporary Perspectives', *supra* note 37, 53.

War II, the legacy of that war, the subsequent Cold War and the process of decolonisation transformed the international legal order, followed by a period which has been perceived by some as a multipolar world while described by others as a period of United States hegemony.[41] The most relevant changes for the purpose of this thesis are discussed in this section.

1.3.4.1 The rise of the individual

The most important change which has taken place since the Second World War is the increased importance of the position of the individual, both in the doctrine as well as different substantive areas of international law. The orthodox account, which still holds up under recent scholarship, is that in the nineteenth and early twentieth centuries, international law was seen taking place exclusively between states and individuals were no subjects of international law, in that they could not derive rights or obligations directly from it, although there were occasional exceptions.[42] This doctrinary position only became less rigid after the Second World War, when humanitarian concerns also led to the expansion of international humanitarian law and the establishment of human rights law and international criminal law.[43] This has been heralded in some quarters, especially by human rights oriented international lawyers, as the 'humanisation' of international law.[44] Some writers are more idealistic about this development than others, and opinions also differ regarding the extent to which this development has taken place. There is a discernable gap between human rights oriented lawyers and more traditional general international lawyers.[45] The 'humanisation' of international law is believed to run counter

41 See chapters 2 and 3.

42 Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2011) 343-344.

43 Both fields of course had earlier historical antecents, discussed in chapters 5 and 6, respectively.

44 Theodor Meron, *The Humanization of International Law* (Leiden and Boston: Martinus Nijhoff, 2006). See also Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford: Oxford University Press, 2008); Theodor Meron, 'International Law in the Age of Human Rights: General Course on Public International Law', *Recueil des Cours* 301 (2003) 9-489; Antônio Augusto Cançado Trindade, 'International Law for Humankind: towards a new Jus Gentium (II)', *Recueil des Cours* 317 (2005) 11-312; Menno T. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in: Menno T. Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press 2009) 1-22, at 3.

45 Notably Alain Pellet, who coined the word 'human rightism' or '*droit de l'hommisme*' as something to be concerned about in a quaint article. Alain Pellet, '"Human rightism" and international law', *Italian Yearbook of International Law* 10 (2000), 3-16. For a more measured view weighing the pros and cons of the

to a state-centric international legal system and to diminish the importance of state sovereignty.

The 'humanisation' of international law also provides for one of the narratives of progress under discussion in this thesis. It is often assumed, or at least feared, in the West that the rise of China will be a threat to the achievements made in the development of international human rights. Perceptions of its human rights record in the West remain negative, focusing on curtailments of civil and political freedoms and China's political system, which is anything but a liberal democracy and not certain to become one. In reality, China's record on human rights is more mixed. It can boast of genuinely impressive achievements which, to this day, receive insufficient credit in the 'West': it has, as it likes to repeat in many statements, lifted hundreds of millions of people out of hunger and poverty in recent decades, and significantly improved the quality of life of many. In this way, it has done a lot more for economic and social rights than many states which champion human rights and focus more on civil and political rights. However, even if the Chinese government is right that international human rights diplomacy should strike a greater balance between economic, social and cultural rights on the one hand and civil and political rights on the other, this is no excuse not to respect those civil and political rights, especially if they are in binding international treaties, and the Chinese government is still not doing all that it could do to safeguard those. By its acts, it may even be reducing the effectiveness of international human rights protection, potentially causing regression and possibly not acting in accordance with general international law.

As will be set out in chapters 2 and 5, the philosophy of human rights has already dealt with this imbalance, in part thanks to the efforts of countries like China. By accepting the universality, indivisibility and interrelatedness of all human rights, most prominently in the Vienna Declaration of 1993, the resolution of this issue in human rights philosophy also found its way into human rights diplomacy. It is present in international legal discourse, but the issues of resource allocation, the due diligence inherent to rights subject to progressive development, and political priorities continue to make the exact application of these human rights controversial. It is here that China may have a negative normative impact due to its

diminished state-centrism of contemporary international law, see Parlett, *The Individual*, *supra* note 42, 365-372.

retention of authoritarian instincts.

Since 1989, the issue of human rights has never been absent in discussions about China. It was always an issue in the relationship between China and the United States and in its relationship with Europe, competing with economic and strategic interests. It was the one issue that threatened to derail China's efforts to use the Beijing Olympics of 2008 to present itself to the world as a newly arisen friendly giant. Due to the highly politicised and sometimes sharply emotional nature of exchanges on human rights issues, it is often forgotten that a body of international law underlies these debates. And even when the law is discussed, it is often misrepresented for political purposes. Since the PRC became the representative of China in the United Nations in 1971 and certainly since it started its 'reform and opening up' policy in 1978, it has had to position itself and come to terms with the international legal system and notably with the developments within it aimed at protecting the individual.

1.3.4.2 Normative hierarchy, community interests and the constitutionalisation of the international legal order

In the same period during which the PRC was coming to terms with itself as a revolutionary state, public international law was transformed by the increased importance of human rights and the limited recognition of legal subjectivity for individuals described in the previous subsection. As a result, the current structure of international law, which is still based on a conception of a horizontal order of sovereign independent states who are only bound by their consent (often referred to in shorthand as the '*Lotus*'[46] structure, for the case in which this was formulated most clearly), sits uneasily with the increased measure of legal personality which individuals enjoy. The increasing importance of human rights and the legal consequences of norms adopted in human rights treaties is an unfolding process which challenges notions of sovereignty, the principle of non-interference, and the relation between states and individuals. These norms are perhaps the best, but not the only examples of developing notions of community interests in international law.

In a separate development, the recognition of some level of community interest has

46 PCIJ, *The Case of the S.S. 'Lotus' (France v. Turkey)*, Series A No. 10, 7 September 1927, at 18. See also e.g. Malcolm N. Shaw, *International Law* (5th Edition; Cambridge: Cambridge University Press, 2003) 44-45.

led to the introduction of some concepts into public international law designed to protect these interests and create a measure of normative hierarchy: the notions of obligations *erga omnes* and peremptory, or *ius cogens*, norms.[47] The notion of obligations *erga omnes* enabled states to invoke these obligations even if the state in question is not directly affected, while norms of a *ius cogens* character allow no derogation and prevail in case of conflict with other norms which themselves are not of *ius cogens*. Although not all *erga omnes* obligations or rules of *ius cogens* are of a human rights character, most of them are.[48] Both concepts have been accepted in international law and enable it to go beyond being a network of bilateral obligations. However, the full consequences have not yet been fully developed.[49] Recognition of *ius cogens* by the International Court of Justice (ICJ), for example, has had limited practical effect.[50] These consequences include the question how a breach of an obligation *erga omnes* should be invoked and what the legal consequences of such a breach are. However, it has long been understood that the development of the concepts of *ius cogens* norms and *erga omnes* obligations, in creating more hierarchy between norms in international law, can play an important role in strengthening human rights norms and other norms aimed at the protection of individuals, and possibly even contribute to the constitutionalisation of the

47 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, *ICJ Reports* 1970, 3, para. 33; Articles 53 and 64, Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, *ICJ Reports* 2006, 6, para. 64; ILC Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, Annex and UN Doc A/56/49(Vol.I)/Corr.4. See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) 276-280.

48 Kamminga, 'Final Report', *supra* note 44, 4-7.

49 For an early influential sceptical view, see Prosper Weil, 'Towards Relative Normativity in International Law?', *AJIL* 77 (1983) 413-442. For an early exploration by a Chinese international lawyer, see Li Haopei, '*Jus cogens* and international law' in: Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 499-522. This article was first published in 1982 in Chinese and in 1983 in English. See also Simma, 'From bilateralism to community interest', *supra* note 20, 285-320.

50 For example, in the *Armed Activities* case (*supra* note 47, paras. 64 and 69), the Court for the first time used the notion of *ius cogens* and characterised the substantive obligations in the Genocide Convention (Convention on the Prevention and Punishment of the Crime of Genocide, 11 December 1948, UNTS 78, 277) as peremptory norms. However, it did not find Rwanda's reservation to the jurisdictional clause in Article IX to be invalid and noted that no norm presently existed which required a state to consent to the jurisdiction of the Court in order to settle a dispute regarding the Convention: "the fact that a dispute relates to compliance with a norm having such a [peremptory] character [...] cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute." In cases since then, the peremptory character of some norms has been reaffirmed but this has not had a decisive impact on the outcome of those cases.

international legal order.[51] Indeed, it has been argued that human rights norms themselves can be treated as a global constitution.[52]

Human rights also play a fundamental role in other constitutionalist discourses, which are especially prevalent among European or Europe-based international lawyers.[53] Simma and Fassbender have put forward the UN Charter as a constitution.[54] This global constitutionalism in Europe is obviously to an extent informed by the experience of European integration and has more descriptive and more prescriptive variants, some of which emphasise values (and in this respect, the importance of these values is echoed in some North American neoliberal discourses on international law[55]) while others emphasise international institutions.[56]

The emergence of a measure of normative hierarchy and the constitutionalist discourse that has accompanied this in Europe raise two questions for the analysis in this thesis. The first one is how China's practice in international law relates to the notions of peremptory norms and *erga omnes* obligations. The second one is how China's approach to international law relates to the constitutionalist discourse. This raises particular issues since this discourse (and the American neoliberal approaches with an emphasis on human rights values) reflect a distinctly liberal agenda which is placed at the top of the normative

51 See Ian D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Antwerpen: Intersentia, 2001), in particular chapter 4.

52 Martin Scheinin, 'Impact on the Law of Treaties' in: Menno T. Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press 2009) 23-36, at 29-31.

53 For example Ernst-Ulrich Petersmann, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organisation Jurisprudence and Civil Society', *LJIL* 19 (2006) 633-668; Erika de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', *LJIL* 19 (2006) 611-632; Bardo Fassbender, *The United Nations Charter as the constitution of the international community* (Leiden: Martinus Nijhoff, 2009). De Wet is South African, but was educated in Germany and is now at the University of Amsterdam.

54 Simma, 'From Bilateralism to Community Interest in International Law', *supra* note 8, in particular 256-261; Bardo Fassbender, *The United Nations Charter as the constitution of the international community* (Leiden: Martinus Nijhoff, 2009). As Koskenniemi notes, the debate about turning the UN Charter into a constitution of the world has been particularly "vocal" in Germany. Martii Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', *EJIL* 16 (2005) 113-124, at 117 (which just calls it "vocal"). Bandeiro Galindo describes it as a "near obsession". George Rodrigo Bandeira Galindo, 'Martii Koskenniemi and the Historiographical Turn in International Law', *EJIL* 16 (2005) 539-559, at 544 fn 12.

55 For example, Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995). See also Verdirame, 'The Divided West', *supra* note 36, and Jean d'Aspremont, 'International law in Asia: the limits to Western constitutionalist and liberal doctrines', *Asian Yearbook of International Law* 13 (2007) 27-49, at 29.

56 See also d'Aspremont, 'International Law in Asia', *supra* note 55, 28-29.

pyramid. This agenda is universalist in that it claims to be based on universal values, but not universal in being historically contingent and rooted in the European Enlightenment and earlier European intellectual history. It favours liberal democratic states, while China is not a liberal state and not a democracy (even if it considers itself one). This thesis shows how China counters this discourse with a sovereigntist approach to international law which harkens back to the *Lotus* approach, but does so rhetorically in the name of pluralism and respect for diversity in international society.

1.3.4.3 Non-state actors and participation in international law

Another structural change in the international legal order is to do with the actors who make use of it, against a background of globalisation. Leaving aside for now the question of international legal personality, it is clear that recent decades have seen a proliferation of actors participating in – or resisting – the international (legal) order.[57] Apart from intergovernmental organisations, actors as diverse as non-governmental organisations (NGOs), multinational corporations, minorities and indigenous peoples, and, on the shadow side, transnational crime networks and terrorist networks, present challenges to the state-centric framework of international law. In particular, NGOs have become active participants in various international law-making processes.[58] As noted before, individuals are another important type of non-state actor.[59] The term 'non-state actors' has received ample criticism in the literature as a negative category encompassing all entities which do not have full international legal personality, but has still remained as shorthand.[60]

As an analytical category in this thesis, the proliferation of actors is noted as a fact which explains the increasing complexity of international law. As a country depending on trade, China is dealing with multinational enterprises. As a former empire turned state with borders which still have not been fully defined, and encompassing 56 different officially recognised ethnicities, China is also dealing with national minorities, some of whom have

57 For resistance, see Rajagopal, *International Law from Below*, *supra* note 27.

58 Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007) 41-97. See also Eric Suy, 'New Players in International Relations' in: Gerard Kreijen et al. (ed.), *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002) 373-386.

59 See also Robert McCorquodale, 'An Inclusive International Legal System', *LJIL* 17 (2004) 477-504.

60 For example Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accoommodate Non-State Actors?" in: Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 3-36.

separatist tendencies. And international NGOs play an important role in China in areas as diverse as human rights and legal reform, as well as the environment.

1.3.4.4 Fragmentation and the unity of international law

The proliferation of actors is linked to the proliferation of international law, as well as institutions such as international courts and tribunals. This has led to increased specialisation in different fields, such as trade and investment law, human rights, humanitarian law, and environmental law, which has led to a debate in scholarship on the question whether the unity of international law is under threat, and general international law is losing out against self-contained regimes and regionalism, leading to fragmentation. The question is whether coherence and pluralism can go together.[61] This development is also noted here to be included in the analysis of China's position in international law.

1.3.5 The rule of law, national and international

In terms of the subject matter under discussion in this thesis, two further developments must also be noted. Although the exact relationship is diffuse, China's approach to international law is linked to its approach to law at the domestic level. This is due in part to historic reasons, as China's rapid creation of a legal system in the last few decades started at the same moment that China started engaging with the outside world, with the 'reform and opening up' policy in 1978.[62] China's domestic legal reform has received a lot more attention in scholarship than its behaviour in international law.[63] In scholarship on public international law, the relationship between international law and domestic law in the domestic legal order of a state can be an important indicator of the attitude of the state in question with regard to its international obligations, which is also relevant to an assessment of that state as a normative actor. With the advent of human rights norms, which if not

61 See, e.g., Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international: Cours générale de droit international public', *Recueil des Cours* 297 (2002), 9-489; ILC, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, Finalized by Martii Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006; Xue Hanqin, 'Fragmented Law or Fragmented Order?', *Finnish Yearbook of International Law* XVII (2006), 55-61; Martii Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *LJIL* (2002) 553-579.

62 See chapters 2 and 3.

63 See below, section 1.5.

formally, certainly on substance can be used by individuals in national legal systems to claim their rights, the implementation of international legal norms in the domestic order has become even more relevant. The main focus on human rights in China, in scholarship, by international NGOs, in diplomatic exchanges such as the EU-China human rights dialogue, and academic collaboration projects, has been on this aspect of human rights.[64] This kind of attention goes beyond the formal application of international norms in the domestic order (which in China, as will be shown, is still not clearly defined) and is strongly intertwined with another international discourse which has grown in importance in the past decade, which is that of the rule of law. The rule of law is in turn part of a wider paradigm of 'good', and by now 'global governance', through which the human rights discourse has converged with the discourse of development.[65]

China has proven to be a particularly interesting case. In the turmoil of the Cultural Revolution, the legal system which still remained in the PRC was swept away and the rule of law was only reintroduced in China when it initiated the reform policy in 1978.[66] It has rapidly built up a legal system which is still not fully embedded in its society. One hypothesis of this thesis is that there must be a connection between China's domestic challenges in establishing a truly functioning rule of law, and the way it conducts itself internationally – possibly in the realm of distinguishing between diplomacy and law. At the substantive level, as stated, international human rights law and standards are at the heart of China's efforts to improve the rule of law.

The contentious nature of the definition of rule of law and the varieties of its conceptions – thin and thick – have been documented many times.[67] As mentioned, strengthening the rule of law has become part of the international agenda in various

64 For one overview, see Yuwen Li, 'The Influence of International Organisations on the Protection of Human Rights in the Chinese Legal System' in: Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Antwerp: Intersentia, 2008) 179-197. See also *infra*, chapters 2 and 5.

65 See Rajagopal, *International Law from Below*, *supra* note 27, 216-219.

66 See, *inter alia*, Stanley B. Lubman, *Bird in a Cage: Legal reform in China after Mao* (Stanford, CA: Stanford University Press, 1999); Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press 2002); Zou Keyuan, *China's Legal Reform: Towards the Rule of Law* (Leiden: Brill 2006).

67 See e.g. Randall Peerenboom, 'Varieties of rule of law: An introduction and provisional conclusion' in: Randall Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France and the U.S.* (London: Routledge 2004) 1-55.

developmental and governance discourses.[68] This may well be thanks in part precisely due to the lack of a clear definition, as the notion of the rule of law will usually invite positive associations and like 'good governance' and 'sustainable development', the term is sufficiently vague for different actors to agree on its desirability without necessarily agreeing on its content.[69]

The notion of 'rule of law' relevant to the present discussion is more diffuse than the various definitions which have developed over time in doctrine, as it has as much to do with perception as with substance. The starting point is therefore the use of the notion within the United Nations, which has its own Rule of Law Unit.[70] This unit, which resides under the Secretary-General, originated within the UN framework for transitional justice, which is reflected in the first UN documents which provide for a working definition of the rule of law, as these have to do with transitional societies. Since the term 'rule of law' is not found in the UN Charter, debate has been taking place within the UN on its definition for the past decade.[71] A first definition was provided in a 2004 report on transitional justice.

68 See e.g. Michael Zürn, André Nollkaemper and Randall Peerenboom, 'Rule of Law Dynamics in an Era of International and Transnational Governance' (September 26, 2011). Amsterdam Law School Research Paper No. 2011-28. Available at SSRN: <http://ssrn.com/abstract=1933701 or http://dx.doi.org/10.2139/ssrn.1933701>. See also Jörg Friedrichs, 'The neomedieval renaissance: global governance and international law in the new Middle Ages' in: Ige F. Dekker and Wouter G. Werner (eds), *Governance and International Legal Theory* (Leiden/Boston: Martinus Nijhoff, 2004) 3-36. For an overview of how the 'international rule of law' entered into the vocabulary of the Security Council, see Bardo Fassbender, 'The Role for Human Rights in the Decision-making Process of the Security Council' in: Bardo Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford: Oxford University Press, 2011) 74-97, at 75-79.

69 For a similar point, see Teemu Ruskola, 'Law Without Law, or Is "Chinese Law" An Oxymoron?', *William & Mary Bill of Rights Journal* 11 (2002-2003) 655-669, at 657-658.

70 See <www.unrol.org> [16.10.2012]. The Rule of Law Unit is the secretariat of the Rule of Law Coordination and Resource Group, chaired by the Deputy Secretary-General. It describes itself as follows: "Members of the Group are the principals of the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA), United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the United Nations Office on Drugs and Crime (UNODC). The Group serves an important coordination function, while the operational role remains squarely with the individual UN entities. [...] The Group's role is to ensure coherence and minimize fragmentation across all thematic rule of law areas, including justice, security, prison and penal reform, legal reform, constitution-making, and transitional justice."

71 This subsection benefits from a presentation given by Mr Edric Selous, Director of the Rule of Law Unit in the Executive Office of the UNSG, 'The General Assembly and the Rule of Law', at a conference on Chinese and European Perspectives on the Rule of Law and International Law, organised by the Leuven Centre for Global Governance Studies and the School of Law of Tsinghua Law School in Brussels on 12 December 2012.

> For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[72]

This definition served a working purpose within the UN, but to obtain a definition with more political support, debate has been taking place within the General Assembly, culminating in a resolution in November 2012.[73] The declaration contained in this resolution fails to provide a definition of the rule of law, but does name a number of important aspects of the rule of law, both at the domestic and international level. This includes the equal application of the rule of law to all states, and international organisations and the UN, "and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions." Furthermore, "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law."[74] In addition, "human rights, the rule of law and democracy are interlinked and mutually reinforcing" and "belong to the universal and indivisible core values and principles of the United Nations."[75]

1.3.5.1 International rule of law

This definition of rule of law at the domestic level does not necessarily help us arrive at a satisfactory definition of the *international* rule of law. The 'international rule of law', which has also become part of the international discourse on the rule of law, can mean different things. First, international institutions like the UN promote the rule of law and help societies to strengthen their rule of law, in particular in the context of post-conflict societies. Second, as can be seen from the UN definition above, certain international norms, particularly in the area of human rights, are also promoted as contributing to the rule of

72 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616.

73 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 30 November 2012, UN Doc A/RES/67/1.

74 *Ibid*., par. 2.

75 *Ibid*., par. 5.

law. This still does not mean that the international legal system itself can be described as a rule of law society. It is unclear which of the criteria applied domestically would need to be satisfied. Academic literature navigates between describing the international rule of law as in an embryonic or early stage, analogous to a primitive society, or as an aspiration.[76] The term is used frequently, but without necessarily stating that the international rule of law already exists.

In any case, UN documents seem to conflate a limited understanding of the rule of law with desirable policy outcomes and even justice, as is evidenced in the way the 2005 World Summit Outcome Document states that "good governance and the rule of law at the national *and international* levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger."[77] In a fairly recent article, Chesterman arrives at three possible usages of the 'international rule of law'.

> First, the 'international rule of law' may be understood as the application of rule of law principles to relations between States and other subjects of international law. Secondly, the 'rule of international law' could privilege international law over national law, establishing, for example, the primacy of human rights covenants over domestic legal arrangements. Thirdly, a 'global rule of law' might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.[78]

After warning about overuse of the rule of law to support other goals like democracy and human rights at the domestic level and thus rob it of its meaning, he concludes that at the international level the rule of law remains, for the time being, a mere aspiration.[79]

There is an obvious connection between the achievement of an international rule of law as an aspiration and constitutionalist approaches to international law. The two are identified here as distinct discourses because of the different contexts in which they operate, while acknowledging the overlap.

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76 For example, Philip Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (London: Cameron May, 2005). See also Kelsen, *Pure Theory*, *supra* note 13.

77 World Summit 2005 Outcome Document, UN Doc A/RES/60/1, 24 October 2005, para 11. (Emphasis added)

78 Simon Chesterman, 'An International Rule of Law?', *American Journal of Comparative Law* 56 (2008) 331-362, at 355-356.

79 *Ibid*., 360-361.

1.3.6 A pluralist and changing legal order

In sum, the view of the international legal order at the outset of this thesis is of an order which is in the process of coming to terms with its own legacy and holds out a promise which is not yet fulfilled and can only be fulfilled with a requisite amount of self-awareness. Although it is sympathetic to the liberal values which underlie both the system of international law as well as international human rights, it does not look at them uncritically; in any case the analysis aims to avoid conflation of the descriptive and the prescriptive, and leave the latter as much as possible to the conclusion.[80] It does aim to take into account critiques of the Western-centric nature of international law, which is made easy by the fact that these critiques are very present in the official Chinese discourse. The Chinese position on international law has reflected the two most important alternative discourses of the twentieth century, the Marxist or Soviet approach[81] and the development-oriented approach which has become known as the 'Third World Approaches to International Law' (TWAIL), based primarily on the criticism that the international legal system unfairly favours the global 'North'.[82] The Marxist approach fell out of favour by the end of the Cold War.[83] However, it influenced the thinking of TWAIL scholars as well and shared a common agenda in challenging 'mainstream' approaches.[84]

As discussed in more detail in chapter 2, the Soviet approach to international law influenced the PRC's early approach to international law, both conceptually and on substance. China's official position reflected many of the concerns of TWAIL scholars in the 1970s. This thesis will show how many of the TWAIL legacies remain even today. The 'Chinese' approach to international law described in this thesis is the approach of the

80 Echoing the cyclical nature of international legal scholarship as noted by Carty, *supra* note 15, the same risk was already identified by Richard Falk in 1970. See Richard A. Falk, *The Status of Law in International Society* (Princeton, NJ: Princeton University Press, 1970) 537.

81 Used for shorthand here; obviously, they are not identical and Marxist legacies are still relevant in a while the Soviet approach is more of historical interest.

82 Makau Mutua, 'What is TWAIL?', *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000) 31-38. See also Anand, *supra* note 22.

83 Although it was revisited in Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), following a theme issue in the legal theory section of *LJIL* 17 (2004).

84 See e.g. B.S. Chimni, 'An outline of a Marxist course on public international law' in: Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008) 53-91, at 90. Chimni is a TWAIL scholar as well. See B.S. Chimni, 'Asian Civilizations and International Law: Some Reflections', *Asian Journal of International Law* 1 (2011) 39-42, at 42.

Chinese government, which consists of a blend of socialist or communist approaches to international law, 'third world' approaches dominated by considerations of development, informed by Chinese history and tradition as an underlying context.

The analysis offered in this thesis, finally, also aims to contribute to the universality of international law. Although the origins of the international legal system are historically contingent and rooted in Europe, the international legal order, in terms of participation, has never been more universal than it is now, with the membership of the United Nations including almost the entire population of the planet.[85] This thesis will also provide an answer to the question if a 'Chinese approach' to international law is part of a wider 'East Asian' approach. Together with the analysis of other approaches, it will explore universality from a descriptive point of view in exploring the question if China's different obviously positions also translate into a fundamentally different conceptual approach to international law, in addition the the question of universal values.[86] To be universal in the aspirational sense of the word, international law will necessarily need to be pluralist and accommodate the cultural diversity among states and, more problematic from the PRC perspective, within states as well.

1.4 Methodology, sources and structure

The analysis of the impact of the rise of China as a major actor in the international legal order touches on questions of international law as well as international politics, the relationship between these two, the difference between rhetoric and law, and normative development both in the meaning employed by international lawyers – *i.e.,* the making of international law – and political scientists, who have an altogether more flexible notion of what constitutes a norm.[87] The developments identified in the previous section cannot be

85 With, among other exceptions, one notable Chinese-related exception of the population of Taiwan, over which the PRC government does not exercise effective control (see next chapter) even if it does claim to be representing it.

86 See, inter alia, Jonathan I. Charney, 'Universal International Law', *AJIL* 87 (1993) 529-551; C.G. Weeramantry, *Universalising International Law* (Leiden and Boston: Martinus Nijhoff, 2004). See also Pierre-Mary Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', *EJIL* 16 (2005) 131-137; Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner', *EJIL* 20 (2009) 265-297; D'Aspremont, 'International Law in Asia', *supra* note 55.

87 See, e.g., Friedrich V. Kratochwil, 'How Do Norms Matter?' in: Michael Byers (ed), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2001) 35-68.

properly studied without taking an interdisciplinary approach. At the same time, as this is a thesis about international law, it retains a major positivistic element.

1.4.1 History

The importance of history to the current thesis has already been introduced in previous sections. References to recent history are a frequent occurrence in China's diplomatic and international legal practice. These references echo concerns which have been raised elsewhere in the literature on international law. Historical arguments feature prominently in the TWAIL critique when drawing attention to some of the allegedly western-centric aspects of international law. In addition, since the end of the Cold War, the 'turn to history' or 'historiographical turn' in international law has been noted in many quarters.[88] The perceptions of the People's Republic of China of the international order and of international law have undergone considerable change in the past half century, and this has had a noticeable influence on its practice. For these reasons, history is a dominant theme in this thesis. Chapter 2 is devoted to the history of China and the international legal order, with a parallel discussion on the role of the individual in that order. Historical aspects will also receive attention in other chapters.

1.4.2 Discourse analysis

The historiographical aspects inform the thesis of China's role as a normative actor. In the previous section the various concepts framing this analysis were set out, implying an analysis of the language of the law in two ways: on a meta-level, to identify the broader context in which the actors operate, and at the level of positive law.

The method used for the first analysis is best described as a form of discourse analysis. A 'discourse' in this context means "a particular way of talking about and understanding the world (or an aspect of the world)",[89] which is a simpler way to express the meaning of the notion as it has been used by Michel Foucault, who defined it in these terms.

88 Often, reference is made to Koskenniemi, *Gentle Civilizer*, *supra* note 27. See also Koskenniemi, 'Tradition and Renewal', *supra* note 54; Bandeira Galindo, 'Historiographical Turn', *supra* note 54.

89 L. Philips and M. Jørgensen, quoted in Skouteris, *Notion of Progress*, *supra* note 16, 23.

> We shall call discourse a group of statements in so far as they belong to the same discursive formation; it does not form a rhetorical or formal unity, endlessly repeatable, whose appearance or use in history might be indicated (and, if necessary, explained); it is made up of a limited number of statements for which a group of conditions of existence can be defined. Discourse in this sense is not an ideal, timeless form that also possesses a history; the problem is not therefore to ask one-self how and why it was able to emerge and become embodied at this point in time; it is, from beginning to end, historical — a fragment of history, a unity and discontinuity in history itself, posing the problem of its own limits, its divisions, its transformations, the specific modes of its temporality rather than its sudden irruption in the midst of the complicities of time.[90]

As an interpretive or deconstructive technique, discourse analysis has especially found favour in critical studies, including in critical legal studies.[91] It is also crucial to the study of Orientalism.[92] International law is seen as one discourse in this thesis, and the Chinese approach is distinguished as one discourse from the other approaches under discussion. In addition, the interaction of this discourse with closely related discourses, notably those of human rights and global governance, serve to explain China's positions. It also helps to navigate between the language of diplomacy and the language of law.

1.4.3 Normative change and positive law

The discourse analysis helps inform the analysis of China's positions in relation to positive international law, which is understood as the law deriving from the sources of international law, for which reference is usually made to Article 38(1) of the Statute of the International Court of Justice.[93] This does raise the question if these are also the sources of international law in the Chinese view, which although maybe more of a question in earlier decades can easily be presumed to be the case, and as will be discussed Chinese approaches may be more

90 Michel Foucault, *The Archeology of Knowledge* (London: Routledge Classics, 2002; first published 1969) 131. See also Michel Foucault, *Discipline and Punish: the Birth of the Prison* (London: Penguin Books, 1991; first published 1975). Koskenniemi, *From Apology to Utopia*, *supra* note 17, 11.

91 See Koskenniemi, *From Apology to Utopia*, *supra* note 17; Rajagopal, *International Law from Below*, *supra* note 27.

92 Said, *Orientalism*, *supra* note 29, 3 and 94. See also Ruskola, 'Legal Orientalism', *supra* note 30.

93 Statute of the International Court of Justice, Annex to the UN Charter. Article 38(1) reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

orthodox than those in the west considering the very positivist discourse in which Chinese international lawyers operate.[94]

International law is therefore understood to be the positive law that is laid down in treaties and customary international law, and the fields of international law which serve as case studies are analysed from this perspective. Given everything which has been stated before about the analysis of the international legal order, it will come as no surprise that this thesis takes note of the controversies which exist with regard to the formation of international law, in particular customary international law and its alleged circular nature. The process of 'humanisation' has also raised discussion with regard to the issue of consent, as it challenges the *Lotus* model. These doctrinary issues, and what positions China has taken on them, are part of the analysis.

Chapter 3 will provide a deeper discussion of different understandings of normativity in international relations and international law. Here, it suffices to identify norms as *legal norms* which are found either in *lex lata* – positive law – or are *de lege ferenda* - in the process of becoming law. For the former, the analysis will focus on China's role in the making of international law, e.g. in treaty negotiations and its positions with regard to the interpretation of existing legal norms. Both its attitude towards the creation of new international institutions, especially for the settlement of disputes and its relation to existing institutions and their jurisprudence are taken as indications of its own position and attitude. The difference between norms in international law and in international relations becomes more relevant, but also more blurred, in the discussion of its positions in customary international law and possible indicators of its position; China's position with regard to what is commonly but inappropriately called 'soft law' is part of that discussion.[95]

1.4.4 Structure, choice of subject matter and sources

The next three chapters of the thesis set up the general framework in which China's

94 Hungdah Chiu, 'Chinese Views on the Sources of International Law', *Harvard International Law Journal* 28(1987) 289-307, at 295. See also Bing Bing Jia, 'The Relations between Treaties and Custom', *CJIL* 9 (2010) 81-109; Bing Bing Jia, 'Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict' in: Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 77-95, at 77-85. See also *infra*, 2.3.1.

95 See *infra*, 3.2.3.

approach to international law is explained. Chapter 2 gives a historical account of the PRC and the international legal order, with specific attention to developments related to the role of the individual. Chapter 3 provides an account of Chinese foreign policy, introduced by a selected overview of recent scholarship in international relations which has dealt with the rise of China and its normative consequences. Chapter 4 analyses the role of the concept which lies at the heart of China's position in international law and is simultaneously often presented as the antithesis of what the 'humanisation' discourse is aimed against: sovereignty. The remaining three chapters are devoted to China's state practice in the three areas of law most relevant for the individual: chapter 5 on human rights, chapter 6 on international humanitarian law and international criminal law, and chapter 7 on peace and security, including China's Security Council practice and its counterterrorism practice. Chapter 8 provides the conclusion.

The picture that has emerged from the analysis of these fields is that China has a fairly unified stance on international law. The fields of practice not covered by this thesis but particularly relevant to understand China's practice are international environmental law – Xue Hanqin devotes considerable attention in her Hague Lecture to sustainable development – and international trade law, notably WTO practice. Substantive, time and space constraints have precluded their inclusion in this thesis, especially since WTO practice has become a specialisation of its own and is now the major field of specialisation for Chinese international lawyers. They are briefly addressed in chapter 4 on sovereignty, which also deals with doctrinal issues and China's approach to them.

The descriptions of Chinese practice are based as much as possible on primary sources in the form of UN documents and official statements by the Chinese government and regional organisations, It has turned out that this practice is still relatively limited. It is supplemented by the work of other scholars. Relatively little use has been made of reports by NGOs, which might be expected especially in the field of human rights. The reason for this is that the focus of the thesis is on normative development and official positions in international law, while, as will be seen in chapter 5 on human rights, it is mainly when it comes to assessment of facts and not so much the underlying law where very different assertions are made by the Chinese government on the one hand and NGOs on the other.

The point will be made that international law as it is allows for this, although it is obviously problematic and linked to some of the structural deficiencies of the international legal order as it currently is.

A deliberate choice was also made to rely as much as possible on materials available in English, although the importance of Chinese is obviously growing as scholarship within China on international law proliferates and the Chinese government makes use of the fact that Chinese is an official UN language.[96] In addition, linguistic difficulties can be expected in the future due to the nature of the Chinese language, its difference from English and French, and the wider differences in conceptual understanding even when the terminology looks superficially the same. However, that would be a topic for a separate thesis.[97]

1.4.5 Definition of 'Chinese'

Although the primary focus of this thesis is on the positions and practice of the People's Republic of China in international law, due account of the 'Chinese approach to international law', to the extent that it exists, cannot be taken without taking a broader view. The PRC is the continuation of two earlier entities, the imperial Chinese state and its successor the Republic of China (ROC), which after losing control over the Chinese mainland has continued to exist until today on the island of Taiwan. Both entities can be characterised as 'Chinese', and the same can be said about entities like Hong Kong and Macau, which returned to Chinese sovereignty in 1997 and 1999 respectively, and even Singapore, a state where the Chinese element is dominant in politics and society. Apart from these political entities and their official positions, there is a wide body of scholarship by Chinese authors on international law. PRC scholars tend to stay close to official government positions, but the views they express in scholarship are not identical, and can indicate the direction in which official thinking is evolving, but also constitute a critique, just like the

96 One important study published in Chinese is Yang Zewei's *Guojifa shilun* [Study on the History of International Law] (Beijing: Higher Education Press, 2011), reviewed in Guo Ran, '*Study on the History of International Law, YANG Zewei*', *Journal of the History of International Law* 14 (2012) 147-156.

97 See Deborah Cao, 'Is the Chinese Legal Language more Ambiguous and Vaguer?' in: Anne Wagner and Sophie Cacciaguidi-Fahy (eds), *Obscurity and Clarity in the Law: Prospects and Challenges* (Aldershot: Ashgate, 2008) 109-125. See also Sun Shiyan, 'The International Covenant on Civil and Political Rights: One Covenant, Two Chinese Texts?', *Nordic Journal of International Law* 75 (2006) 189-209, which notes the existence of different 'authentic' Chinese language versions of various international human rights treaties.

views of, say, American scholars are not to be confused with those of the United States. However, PRC scholars do have a relatively strong tendency to identify with the Chinese state and the Chinese Communist Party (CCP), and refer more freely to phrases like "the Chinese position" or "China believes" than scholars from other countries would.

In addition, scholars with a Chinese heritage, not necessarily from the PRC, have played significant roles in international legal scholarship, as evidenced for example in what remains the standard work on general principles of international law.[98] These scholars may be more representative of the tradition in which they received their international legal education, although at the same time even today, many leading international legal scholars receive their education in a limited number of institutions. Finally, Chinese international lawyers have been prosecutors and judges in international institutions, and pronounced views which may or may not be taken as evidence of a distinctly Chinese approach to international law.

Taking into account all these different factors, this thesis takes official expressions by the PRC government as its point of departure. Account will be taken of pronouncements by Chinese scholars, especially when they are explicitly intended as elucidation of the Chinese position in international law, such as the Academy lectures of Wang Tieya and Xue Hanqin. Other writings by Chinese scholars will be taken into account where they may clarify a point or be indicative of a trend in scholarship, with due caution.

1.5 Previous scholarship on China and the international legal order

In the late 1960s and throughout the 1970s, there was considerable attention in international legal scholarship to the PRC's attitude to public international law, resulting in a number of studies on the topic, many of them by the late Hungdah Chiu.[99] The most

98 Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge: Grotius Publications, 1987 [originally published 1953]). Bin Cheng is now emeritus professor of air and space law in University College London. A 1984 article by Chen Tiqiang describes him as a "foreign" international lawyer. Chen Tiqiang, 'The People's Republic of China and Public International Law', Dalhousie Law Journal 8 (1984) 3-31, at 10.

99 Hungdah Chiu, 'Communist China's Attitude Toward International Law', *AJIL* 60 (1966) 245-267; Hungdah Chiu and R. R. Edwards, 'Communist China's Attitude Towards the United Nations: A Legal Analysis', *AJIL* 62 (1968) 20-50. Chiu wrote several articles and a monograph on the PRC's treaty law, at a time when the PRC was not a UN member and before the Vienna Convention on the Law of Treaties was concluded or entered into force: Hungdah Chiu, 'The Theory and Practice of Communist China with

extensive study is a documentary study by Jerome Cohen, for many decades the most important scholar on Chinese law, and Chiu,[100] who also devoted a number of articles to the renewed interest in international law following the beginning of the 'reform and opening up' policy in 1978.[101] This is also when the study of international law was taken up within China again.[102] In the mid-1980s, interest also started to turn to human rights, particularly after 'Tiananmen' but also in the years before.[103] In 1990, Wang Tieya, one of the few surviving Chinese public international lawyers of his generation, taught a course on Chinese approaches to international law at the Hague Academy.[104] In the 1990s, in the wake of 'Tiananmen', more and more scholarship turned to human rights. Occasional articles on China and international law appeared, asking by and large similar questions to the ones underlying this thesis. Some of these extended into studies of China's relationship to international mechanisms.[105] These studies fit in the interdisciplinary model of analysis of

Respect to the Conclusion of Treaties', *Columbia Journal of Transnational Law* 5 (1966) 1-13; Hungdah Chiu, 'Certain Legal Aspects of Communist China's Treaty Practice', *Proceedings of the Annual Meeting (American Society of International Law)* 61 (1967) 117-125; Hungdah Chiu, *The People's Republic of China and the Law of Treaties* (Cambridge, MA: Harvard University Press, 1972). Jerome Alan Cohen (ed.), *China's Practice of International Law: Some Case Studies* (Cambridge, MA: Harvard University Press, 1972); Suzanne Ogden, 'The Approach of the Chinese Communists to the Study of International Law, State Sovereignty and the International System', *C Q* 70 (1977) 315-337; Samuel S. Kim, *China, the United Nations, and World Order* (Princeton, NJ: Princeton University Press 1979); Hungdah Chiu, *Agreements of the People's Republic of China: A Calendar of Events 1966-1980* (New York, NY: Praeger, 1981).

100 Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (Princeton, NJ: Princeton University Press, 1974).

101 Hungdah Chiu, 'Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987', *International Lawyer* 21 (1987) 1127-1166; Hungdah Chiu, 'Chinese Views on the Sources of International Law', *Harvard International Law Journal* 28 (1987) 289-307

102 Wang Tieya, 'Teaching and Research of International Law in Present Day China', *Columbia Journal of Transnational Law* 22 (1983-1984) 77-82, at 77.

103 R. Randle Edwards, Louis Henkin and Andrew J. Nathan, *Human Rights in Contemporary China* (New York: Columbia University Press, 1986); Roberta Cohen, 'People's Republic of China: The Human Rights Exception', *Human Rights Quarterly* 9(4) (1987), 447-549.

104 Wang , 'International Law in China'.

105 See, in particular: Ann Kent, *Between Freedom and Subsistence: China and Human Rights* (Hong Kong: Oxford University Press 1993); James Feinerman, 'Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?' *C Q* 141 (1995) 186-210; Ann Kent, *China, the United Nations, and Human Rights* (Philadelphia, PA: University of Pennsylvania Press 1999); Jacques deLisle, 'China's Approach to International Law: A Historical Perspective', *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000) 267-275; Ming Wan, *Human Rights in Chinese Foreign Relations: Defining and Defending National Interests* (Philadelphia, PA: University of Pennsylvania Press 2001); Gerald Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (Singapore: World Scientific, 2006); Pitman B. Potter, 'China and the International Legal System: Challenges of Participation', *C Q* 191 (2007) 699-715 and James Li Zhaojie, 'Commentary on "China and the International Legal System: Challenges of Participation"', *C Q* 191 (2007) 716-719. Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford, CA: Stanford University Press 2007). Kent's research has taken her to China's more general attitude to international law. See in

how the international order works. However, many are less concerned with the general Chinese position in international law, and do not answer the question whether there is an all-encompassing approach that spans the Chinese government's attitude to both human rights-related areas of international law and other areas. Since the late 1990s, interest in Chinese law in general has also grown, coupled with a great scholarly interest in the development of the rule of law within China, with a strong focus on effectiveness of and compliance with the law. Inevitably, these studies have also addressed the issue of human rights, but more within the rule of law paradigm, and they have been less concerned with the external dimension of China's engagement with human rights.[106]

At the same time, following the decline during and in the aftermath of the Cultural Revolution, Chinese scholarship on international law has started to pick up.[107] As noted before, Wang Tieya taught at the Hague Academy in 1990. A Chinese self-assessment of the contemporary Chinese position and contribution on international law can be found in 2010's volume of the *Chinese Journal of International Law* by Wang Zonglai and Hu Bin. By their own admission, the study of international law is currently underdeveloped, and they call for expansion.[108] At the same time, other Chinese writers have also started writing about the general Chinese position.[109] This included Xue Hanqin, one of China's most prominent

particular Kent, *Beyond Compliance* and Ann Kent, 'China's Changing Attitude to Norms of International Law and its Global Impact' in: Pauline Kerr, Stuart Harris and Qin Yaqing (eds), *China's 'New' Diplomacy: Tactical or Fundamental Change?* (New York, NY: Palgrave Macmillan 2008) 55-76.

106 See Lubman, *Bird in a Cage*, *supra* note 66; Peerenboom, *China's Long March, supra* note 66; Zou, *China's Legal Reform*, supra note 66. See also Jan Michiel Otto, Maurice V. Polak, Jianfu Chen and Yuwen Li (eds.), *Law-Making in the People's Republic of China* (The Hague: Kluwer, 2000); J. Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* (The Hague: Kluwer 1999); Jonas Grimheden, *Themis* v. *Xiezhi*: Assessing Judicial Independence in the People's Republic of China under International Human Rights Law, Doctoral Thesis, Lund University, Lund 2004; Peerenboom, *China Modernizes*, *supra* note 9; Randall Peerenboom, 'The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability', *Chicago Journal of International Law* 7 (2006-2007), 17-50.

107 Wang Tieya was one of the few who kept the study of international law in China alive throughout the upheaval of 20th century Chinese history and at signficiant personal cost, and ended his career as judge at the ICTY. See: R. St. J. Macdonald, 'Introduction: Wang Tieya: Persevering in Adversity and Shaping the Future of Public International Law in China' in: Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 1-29.

108 Wang Zonglai and Hu Bin, 'China's Reform and Opening Up and International Law', *CJIL* 9 (2010), 193-203.

109 Bing Bing Jia, 'A Synthesis of the Notion of Sovereignty and the Ideal of the Rule of Law: Reflections on the Contemporary Chinese Approach to International Law', *German Yearbook of International Law* 53 (2010) 11-61.

international lawyers and since 2010 judge in the International Court of Justice.[110] In 2011, she followed in Wang's footsteps and taught a course on China and international law at the Hague Academy.[111] Although these works provide a lot of insight into the basic principles of Chinese foreign policy and its basic positions in international law, they remain general and are often low on detail on specific issues. Their explanations of Chinese positions tend to be brief or even nonexistent. To an extent, this is probably deliberate, as scholars need to remain careful not to touch on 'sensitive' issues, and the Chinese government is also fairly economic in its public statements. Often, these statements are no more than recitations of long-established mantras, sometimes not even explicitly applied to the situation at hand. This is apparent from many different sources, such as those cited in the systematised overview that the *Chinese Journal of International Law* in recent years has started offering on China's practice in public international law.[112]

American scholars have also started writing on the relationship between China and international law again. However, some articles seem to conflate international law with international relations and merely offer a discussion in terms of power relations, and offer nothing more than a poorly substantiated exercise in speculation.[113]

To the knowledge of this author, this thesis is the most wide-ranging overview of Chinese practice in international law written by a non-Chinese scholar since the work of Cohen and Chiu in the 1970s and 1980s. Partial studies on compliance and participation exist (notably the works of Gerald Chan and Ann Kent), but these focus more on international relations aspects than on general international law. The International Law Programme at Chatham House has also initiated a programme on China and the

110 Xue, 'Chinese Observations on International Law', *supra* note 37.

111 Xue, 'Chinese Contemporary Perspectives', *supra* note 37.

112 Hu Qian, 'Chinese Practice in Public International Law: 2002', *CJIL* 2 (2003) 667-715; Zhu Lijiang, 'Chinese Practice in Public International Law: 2006 (I)', *CJIL* 6 (2007), 475-506; Zhu Lijiang, 'Chinese Practice in Public International Law: 2006 (II)', *CJIL* 6 (2007), 711–768; Zhu Lijiang, 'Chinese Practice in Public International Law: 2006 (III)', *CJIL* 7 (2008), 197–225; Zhu Lijiang, 'Chinese Practice in Public International Law: 2007 (I)', *CJIL* 7 (2008), 485–507; Zhu Lijiang, 'Chinese Practice in Public International Law: 2008', *CJIL* 8 (2009) 493-551; Zhu Lijiang, 'Chinese Practice in Public International Law: 2009', *CJIL* 9 (2010) 607-662. Zhu Lijiang, 'Chinese Practice in Public International Law: 2010 (II)', *CJIL* 10 (2011) 883-895; Zhu Lijiang, 'Chinese Practice in Public International Law: 2011', *CJIL* 11 (2012) 541-607.

113 For example Eric A. Posner and John Yoo, 'International Law and the Rise of China', *Chicago Journal of International Law* 7 (2006-2007) 6-15. A similar perspective, but with far more substance, can be found in Julian Ku, 'China and the Future of International Adjudication', *Maryland Journal of International Law* 27 (2012) 154-173.

International Human Rights System, from the perspective of general international law. Following a first report published in October 2012, this programme has now reached its second stage.[114]

1.6 Final introductory remarks

In sum, this thesis is about how a major change in international relations – the rise of the People's Republic of China as a great power – affects the international legal order. This question goes to the heart of the mixed nature of international law, which has both served as a set of rules that govern the relationships between states, but has also become an instrument of change used by different actors attempting to effect change on a global level. It also serves to illustrate an apparent contradiction between the role of international law as the expression of international relations or diplomacy, which lives by obfuscation, and its aspiration to provide certainty, and aims for clarity. As such, it is situated in the middle of various overlapping discussions in scholarship, addressing the 'crisis' of international law, the fragmentation of international law, the proliferation of actors, the rise of the individual, the end of sovereignty, and even whether international law still exists.

It aims to enable better mutual understanding between international lawyers from diverse backgrounds and contribute to a better understanding of the system. It also aims to strengthen certain features of the system, i.e. its underpinnings (values, human rights) and its universality. The reality-check provided by an analysis of China's interaction with the system allows us both to understand the system better and to imagine where it may be going. Ultimately, it aims to make the process of international legal change more understandable.

If after reading this thesis, both non-Chinese scholars and practitioners of international law have a better sense of how international law is viewed in China, and Chinese scholars and practitioners of international law have a better sense of how international law is seen outside of China, it will have fulfilled its purpose.

114 Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (London: Chatham House 2012)

2 China and the International Legal Order: A History

2.1 Introduction

History is central to any discussion on China's relationship to international law. It is also the starting point for any discussion on international law by Chinese scholars themselves.[115] Both China's practice and rhetoric in international law are strongly informed by history, mainly through the official narrative of the People's Republic. Chinese fondness for historical parallels in general must also be noted.[116] In addition, as set out in the introduction, for an understanding of China's approach to international law it is crucial to pay attention to the historical role of international law as a legitimising device for Western imperialism during the time that it was introduced to China, as well as its role as a vehicle for ideological controversies during the Cold War. The changing international political context in which China's approach to international law took shape is historically and socially contingent, and a satisfactory analysis must therefore take history into account.[117] As noted, recent years have seen renewed attention for the historical analysis of international law, challenging dominant narratives of progress and idealism with a more sober assessment of the actual role that international law has played, including the issues raised by TWAIL scholarship.[118]

This chapter describes how the initial nineteenth-century encounter between China and the current international legal order was the encounter between two clashing world

115 Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours* 221 (1990) 195-369; Xue Hanqin, 'Chinese Contemporary Perspectives on International Law — History, Culture and International Law', *Recueil des Cours* 355 (2012); Li Zhaojie, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order', *Singapore Journal of International & Comparative Law* 5 (2001) 314-326. Chen Tiqiang, 'The People's Republic of China and Public International Law', *Dalhousie Law Journal* 8 (1984) 3-31, at 3. In the other publications by Chinese scholars cited in this thesis and more specifically in this chapter, history almost always has a very prominent role.

116 Jacques deLisle, 'China's Approach to International Law: A Historical Perspective', *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000) 267-275, at 267.

117 Cf Christian Reus-Smit, 'Politics and International Legal Obligation', *European Journal of International Relations* 9 (2003) 591-625, at 594.

118 See chapter 1.3.3 and 1.4.1.

orders, both of which considered themselves universal. The encounter led to the collapse of the Chinese world order in a way that was particularly traumatic to China. While the international legal order which originated in Europe became the global order, China went through one and a half century of upheaval, described by Xue Hanqin as "a most turbulent, humiliating and miserable period for the nation."[119] International law also underwent changes in this period, as did China's approach to and use of it.

For the analysis in this chapter, four periods are distinguished. The first starts in the nineteenth century, in which China witnessed the decline and fall of the last imperial dynasty, the Qing (1644-1911). Before and throughout most of the the nineteenth century, China was still at the centre of its own world order, and certainly remained there in its own perception, even when this order clashed with that of the Western powers, resulting in the collapse of the Chinese order. It is during this period, foreign encroachment and 'gunboat diplomacy' and the, in Chinese eyes, resulting 'century of humiliation', that China first became acquainted with international law.

The second period begins with the Xinhai Revolution of 1911, which signalled the end of the Chinese empire and the establishment of the Republic of China (ROC). From 1911 to 1949, the ROC struggled to establish control over all of China, when first China broke apart in the period of warlords, followed by challenges to the ruling Nationalist party (KMT) by the Communist Party of China (CCP).[120] This period is therefore marked by internal upheaval, civil war and ultimately foreign invasion, when China was invaded by Japan, a conflict which eventually became part of the Second World War. In these decades, China also deepened its engagement with western conceptions of law, and the Nationalist government actively engaged and tried to be part of the international legal order. Under a temporary truce between the KMT and the CCP, the ROC emerged as one of the victorious powers in the Second World War and was one of the founding members of the United

119 Xue, 'Chinese Contemporary Perpectives', *supra* note 115, 51.

120 As noted above, *supra* note 1, in conformity with PRC usage, Chinese words are usually transcribed using the *pinyin* method of transcription. However, historically other transcription methods have been used, notably the Wade-Giles method which is still common in Taiwan and among overseas Chinese. In this chapter, when for historical or other reasons names are more familiar in other variants (e.g., Chiang Kai-shek rather than Jiang Jieshi), including contemporary acronyms, those more familiar variants are used. In this case, the Nationalist Party (中國國民黨 in traditional Chinese; 中国国民党 in simplified characters) would in *pinyin* be the *Guomindang* and thus the GMD, but it is generally known as KMT. The CCP (also abbreviated as CPC) is known in Chinese as *Zhongguo Gongchandang* (中国共产党).

Nations.

The Chinese Civil War restarted after World War II. Following the Communist victory, the People's Republic of China (PRC) was established in 1949. This is the starting point of the third period. Revolutionary fervour and social upheaval went hand in hand in the decades after, in which the PRC was relatively isolated from the outside world but supported revolution in its foreign policy. An initial socialist legal system set up in the 1950s collapsed during the Cultural Revolution (1966-1976). For most of this period, the PRC was excluded from the United Nations, as the question of the representation of China in the organisation was only resolved in its favour in 1971, when it replaced the ROC, which had continued to exist on Taiwan. For a long time, the PRC was preaching revolution in international relations, although it was less active in pursuing this aim.

This period of turmoil ended with the beginning of the 'reform and opening up' period from 1978 onwards, which marks the beginning of the fourth period, which lasts into the present day. Although some of the main developments from that point are also discussed in this chapter, this year is the starting point of China's contemporary approach to international law. The remainder of this thesis will therefore explore this period in more depth.

The 150 years under discussion here have been nothing if not eventful for both the world and China, summarised succinctly by Li Zhaojie.

> In the space of one and a half century, China was reduced from a 'Middle Kingdom' at the center of the universe to a semi-colonial society at the hands of foreign imperialism; then it emerged as an independent republic and eventually becomes a major world power.[121]

Parallel to the episodes described above, Li notes the Self-Strengthening Movement of 1861-1895, political reform and revolution from 1898 to 1912, intellectual revolution around 1917-1923 and the rise of the PRC in 1949 as the climactic events which shaped China's transformation from sinocentrism to the embrace of sovereign equality and independence.[122]

Given the focus of this thesis on the role of the individual in international law, the

121 Li, 'Legacy of Modern Chinese History', *supra* note 115, 314.
122 *Ibid*, 314-315.

discussion will at times pay specific attention to human rights. Their importance to China's position in international law has grown especially since 1989.

2.2 China and the international legal order before 1949

2.2.1 Imperial China: invasion, humiliation, unequal treaties

Imperial China positioned itself ideologically in the centre of the world – it is well known that the Chinese name for China, Z*hongguo*[123], means "Middle Kingdom". Surrounding smaller and less powerful states in Asia were seen to be in a relationship with China as a sort of vassals, owing tribute to the emperor who ruled with the Mandate of Heaven. Remnants of this sinocentric and exceptionalist self-image survive until today among the Chinese establishment. This Confucian view of world world order contained universalistic elements; it saw China's central position in the world as the natural way of things.[124] The Celestial Empire of China was also considered the only civilised country, which had little, if anything to learn from other countries but had much to teach the rest of the world instead.[125]

Imperial China's self-image came under increasing strain in the nineteenth century, when western powers, determined to open up China's economic potential for themselves,

123 Chinese: 中国.

124 For detailed discussion, see Li Zhaojie, 'Traditional Chinese World Order', *CJIL* 1 (2002) 20-58; Wang, 'International Law in China', *supra* note 115, 205-225; Samuel S. Kim, *China, the United Nations, and World Order* (Princeton, NJ: Princeton University Press 1979), 19-42. See also Wang Gungwu, *China and the world since 1949: The Impact of Independence, Modernity and Revolution* (London: Macmillan 1977) 1-8. It has been debated whether international law existed in ancient China. Wang Tieya notes this debate (at 205), including negative answers by Arthur Nussbaum, *A Concise History of the Law of Nations* (Revised Edition; New York: The Macmillan Company, 1954) 3 and Oppenheim, as well as positive ones, and notes that the first person who noted the idea of existence of international law in ancient China was W.A.P. Martin, who introduced modern international law to China (see below). It is submitted here that it should be taken into account that some historians of international law such as Nussbaum may be overly concerned to, somewhat anachronisitically, fit present-day notions of what constitutes 'international law' on the past. This is not to deny the legitimacy of attempts to identify parallels in different rule systems which governed the relationships between states in different times and places. Other conceptual deficiencies in older histories of international law may include reliance on obsolete world views, such as the primitive-civilisation dichotomy and the attribution of propensity for "moderation in warfare" to factors such as "racial disposition" by Nussbaum (at 1 and 5).

125 Yang Zewei, 'Western International Law and China's Confucianism in the 19th Century. Collision and Integration', *Journal of the History of International Law* 13 (2011) 285–306, at 287. In this article, the Jesuit missionary Matteo Ricci, who traveled to China in the late 16th century and became one of the first Western scholars who learned Chinese, is mistakenly referred to as "Mathew Ricci" (288). Its description of the tributary system as not based on the use of force unless in exceptional circumstances and a certain principle of non-intervention may be somewhat anachronistic, although it is described accurately as hierarchical and a form of cultural imperialism (293-294).

ultimately resorted to force and invasion to achieve this. In the process, China's self-image clashed with the then-prevalent western conception of international law.[126] Episodes which are still generally considered traumatic in Chinese history were justified from the point of view of the western powers by ideologies deriving from international law. One crucial and oft-mentioned episode is the Macartney mission of 1793, in which China's view of itself as the centre of the world clashed with the European conception of sovereign equality of states held by the British envoy Lord George Macartney, who famously refused to *kowtow* to the Emperor.[127] Macartney's refusal has been taken to symbolise the clash between the Western system of sovereign equals and the hierarchical, Confucian Chinese system in which Western missions, such as the Dutch which preceded the English ones, were treated as tributary missions just like those of China's neigbouring countries, even though this was more fiction than fact. To the Chinese, the *kowtow* was part of etiquette and symbolised respect and good faith to the emperor.[128]

After the Opium War (1839-1842), China signed the Treaty of Nanjing (1842) with Great Britain, the first of a series of unequal treaties signed after military defeats following foreign encroachments into Chinese territory. In 1860, a joint Anglo-French military expedition to Beijing resulted in the burning of the Summer Palace, again followed by Chinese concessions laid down in a treaty.[129] These treaties were signed under coercion and provided for non-reciprocal privileges for Western powers in many areas, including a system of extraterritoriality, trade ports, lease of territories (such as Hong Kong and Macau), foreign customs commissioners, most-favoured nation treatment, navigation rights on coastal and inland waters, stationing of foreign troops, religious and educational

126 Some earlier encounters with the international legal system did take place in the seventeenth century, *inter alia* when the Dutch were trying to send envoys in comformity with the "law of all nations" and China signed the treaty of Nerchinsk with Russia, in 1689 in which the Chinese emperor conceded to not treat the Russians as tributaries. However, subsequently international law was no longer mentioned in official or unofficial sources until 1839. Wang Tieya, 'International law in China', *supra* note 115, 226-228.

127 The *kowtow* (Chinese: 叩头, *kòutóu* or 磕头 *kētóu)* is a series of prostrations which involves knocking the head on the floor or at least ensuring that it touches the ground; the term translates as "knock head".

128 Teemu Ruskola, 'Canton is not Boston: The Invention of American Imperial Sovereignty', *American Quarterly* 57 (2005) 859-884, at 867-868; Yang, 'Western International Law', *supra* note 125, 295-296. See also Kim, *China, the UN*, *supra* note 124, 20; Jack Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000) 140.

129 Kim, *China, the UN*, *supra* note 124, 30-31 and 37.

privileges. The unequal treaties broke the Confucian order.[130] Their three main features – extraterritoriality, foreign settlements and concessions – preserved the domestic sovereignty of the Chinese government, but provided for special privileges to western commercial and religious interests.[131] The way in which they diminished the Chinese Empire's sovereignty is also an illustration of the relativity of the concept, and has been described as an illustration "how law dynamically both constitutes and deconstitutes sovereigns at both national and international levels."[132]

The initial encounters of China with public international law must be seen as a clash between two systems, "between two diametrically opposed images of world order."[133] The public international law as it first came to China was the *European* public international law. It was thus seen by China's rulers as a mechanism to justify foreign incursions and to impose unequal treaties, and only Western states apparently were considered 'civilised'. Following the Opium Wars, the Qing court did start to make use of it to defend itself against foreign invasions, but it would not be before the end of the Empire that Chinese authorities started to appeal regularly to international law to promote China's interests.[134] The conservative Chinese elite had difficulty understanding and accepting ideas which were completely alien to the East Asian way of conducting foreign relations and even after accepting certain commitments, it would sometimes take a long time before China implemented or otherwise acted upon them.[135]

International law was introduced to China by an American missionary, William Alexander Parsons Martin.[136] In 1864, he translated Henry Wheaton's *Elements of International Law*[137] into Chinese, the first Chinese-language book on international law and the first formal

130 Yang Zewei, 'Western International Law', *supra* note 125, 298.

131 John King Fairbank, *Trade and diplomacy on the China coast: the opening of treaty ports, 1842-1854* (Cambridge, MA: Harvard University Press, 1964) 462.

132 Ruskola, 'Canton is not Boston', *supra* note 128, 861.

133 Kim, *China, the UN*, *supra* note 124, 37.

134 Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford, CA: Stanford University Press 2007), 34-35. See generally Brett Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization', *Journal of the History of International Law* 7 (2005) 1-23.

135 Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (Princeton, NJ: Princeton University Press, 1974) 6.

136 Known in Chinese as Ding Weiliang, 丁韙良.

137 Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science* (Philadelphia: Carey, Lea and Blanchard, 1836)

and systematic introduction of international law in China. The title of the Chinese translation translates as "Public Law of All Nations".[138] Martin hoped both that the heathen Chinese might accept Christ by learning about the legal principles of Christian civilisation, but also that it would enable the Chinese to cope with Western diplomats and traders who couched their demands in the language of international law, and recognise that the extent to which this law was applied to them varied from the treatment accorded to 'civilised' Christian states. This was exactly the reason why some Western diplomats in China opposed him.[139]

Qing scholars recognised the significance of international law, but were divided on its potential benefits to China.[140] As the Qing government increased its use of international law in the late nineteenth century, the results varied. It became acutely aware of international law's limits in the face of China's lack of military, political and economic power. Even if it used international law, China did not try to change it or modify its rules.[141] It cited international law in a number of cases, notably in its declaration of war during the Sino-Japanese War of 1894, which condemned Japan's invasion of China for being in breach of treaties and international law.[142] China also participated in the international legal order by joining the Universal Postal Union in 1897 and sending delegations to the Hague Peace Conferences of 1899 and 1907.[143] It joined the International Institute of Agriculture and became a party to various multilateral conventions in fields including the laws of war and peaceful settlement of disputes, as well as sending representatives to the Association for the Reform and Codification of the Law of Nations.[144]

Contemporary observers were not blind to China's diminished sovereignty. Explicit links have been drawn to China's perceived inferiority at the civilisational level, or at least

138 *Wangguo Gongfa* (traditional:萬國公法; simplified: 万国公法). Eric Yong-Joong Lee, 'Early Development of Modern International Law in East Asia – With Special Reference to China, Japan and Korea', *Journal of the History of International Law* 4 (2002) 42-76, at 47.

139 Cohen and Chiu, *People's China*, *supra* note 135, 7.

140 Yang, 'Western International Law', *supra* note 125, 299-300.

141 Cohen and Chiu, *People's China*, *supra* note 135, 8-10. See also Chen, 'The PRC and Public International Law', *supra* note 115, 6-7.

142 Yang, 'Western International Law', *supra* note 125, 301.

143 Kent, *Beyond Compliance*, *supra* note 134, 34-35. China, Japan and Siam were the only East Asian nations represented. See Arthur Eyffinger, 'Caught Between Tradition and Modernity: East Asia at The Hague Peace Conferences', *Journal of East Asia and International Law* 1 (2008) 7- 46, at 9.

144 Cohen and Chiu, *People's China*, *supra* note 135, 10.

its use as a rationale to justify China's less than full international subjectivity by some Western scholars. Japan was also described as less civilised, but after the war of 1895 it was accepted as a full subject of international law, and even as a Great Power, as is illustrated by the 1905 edition of Oppenheim's *International Law*.[145] Oppenheim divided states into five classes: (1) European states; (2) American states, Liberia, and Haiti; (3) Turkey; (4) Japan; (5) Persia, Siam, China, Korea, and Abyssinia. This fifth class was considered not to have reached a condition which enabled their governments and people to understand international law.[146] That states such as China, Persia, Siam and Korea, were only considered half-civilised or less was a predominant view, but not uncontested.[147]

2.2.2 Republic of China, 1911-1949

The traditional Chinese world order collapsed fully with the Xinhai Revolution of 1911, after which China reconstituted itself as the Republic of China (ROC), officially established on 1 January 1912.[148] In his inaugural declaration, Sun Yat-sen, the founding father and first president of the ROC, expressed its goal "'to obtain the rights of a civilized state' and 'to place China in a respectable place in international society.'"[149] The ROC inherited continued incursions on its sovereignty, and would fall victim to more foreign invasions with even more serious consequences. However, it also manifested itself on the international stage by participating in the Paris Peace Conference following World War I in 1919, helping to draft the Covenant of the League of Nations, and becoming a founding member of the International Labour Organisation.[150] However, within the League it had to suffer another

145 Suzanne Ogden, 'The Approach of the Chinese Communists to the Study of International Law, State Sovereignty and the International System', *CQ* 70 (1977) 315-337, at 316-317. See also Gerry Simpson, *Great Powers and Outlaw States: Unequal sovereigns in the international legal order* (Cambridge: Cambridge University Press, 2004) 56, 278-316 for discussion of the way in which unequal sovereigns have been legalised in international law; *infra*, section 4.4.3.

146 Chen, 'The PRC and Public International Law', *supra* note 115, 5.

147 Gao Feng, 'China and the principle of sovereign equality in the 21st century' in: Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 224-239, at 226.

148 Surrounding states still sent tribute missions even a few years before those events. The last tribute mission came from Nepal in 1908. Wang Tieya, 'International Law in China', *supra* note 115, 224-225.

149 Quoted in Cohen and Chiu, *People's China*, *supra* note 135, 12. Sun Yat-sen is known under various names and titles, but the most commonly used one in the West is 孫逸仙, transcribed in Mandarin as Sun Yixian and Cantonese as Sun Yat-sen. The majority of Chinese references is to 孫中山 (Sun Zhongshan). See also *supra* note 120.

150 ILO country profiles, <http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:0::NO:::#C> [10.4.2013]. Kent, *Beyond Compliance*, *supra* note 134, 35.

humiliation in seeing the former German concessions transferred to Japan, an event which diminished the Nationalist government's legitimacy and contributed to the May Fourth movement of 1919 which included the first propagation of Marxism and the foundation of the Communist Party of China (CCP). This did not prevent the ROC from participating actively in the League.[151] It also appeared as a respondent before the Permanent Court of International Justice in a case brought against it by Belgium concerning *Denunciation of the Treaty of 2 November 1865 between China and Belgium.*[152]

The ROC valued international law and used it with limited results, such as the gradual dismantling of the structure of extraterritorial rights, concessions and other privileges which had been accorded to foreign powers (of which the *Denunciation* case is an example). However, it also suffered disappointments.[153] The League of Nations failed to act when Japan invaded and occupied Manchuria in 1931 and proved unable to fulfil its purpose of maintaining peace and security.[154] At the same time, China was torn apart by civil war, which culminated in a conflict between the Nationalists of the KMT (*Guomindang*), led by Chiang Kai-shek[155], and the Communist Party of China (CCP) led by Mao Zedong.[156] In the face of Japanese invasion, the warring factions formed a United Front, which crucially sent a united delegation to the United Nations Conference in San Francisco in 1945. There is therefore a signature of a representative of the CCP on the final text of the United Nations Charter. Two years before, China had for the first time been accepted as an equal among the great powers or 'Big Four', in part because of its importance in the war against Japan. US President Franklin D. Roosevelt considered China crucial to the post-war collective security

151 Robert Heuser, 'China and Developments in International Law: Wang Tieya as a contemporary', *Journal of the History of International Law* 4 (2002) 142-158, at 146-147.

152 PCIJ, *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium* , Series A Nos. 8, 14, 16 and 18. The case ended before a judgment was rendered after China and Belgium concluded a new treaty in 1926. See also Heuser, 'China and Developments' *supra* note 151, 145.

153 Cohen and Chiu, *People's China*, *supra* note 135, 12-13. Chen Tiqiang downplays the extent to which international law mattered to the ROC. See Chen, 'The PRC and Public International Law', *supra* note 115, 8. However, most other accounts detail the ROC's careful efforts to dismantle the unequal treaty system through international law.

154 Lee, 'Early Development, *supra* note 138, 53-54. Kent, *Beyond Compliance*, *supra* note 134, 35.

155 Chinese: 蒋介石 . In Mandarin, Chiang is usually known as Jiang Jieshi. Since he is commonly known in the West under the Cantonese romanisation of his name and this was the transcription used in UN documents dealing with issues relating to the ROC and the PRC, this rendering is the one used here. See also *supra* note 120.

156 Chinese: 毛泽东.

system.[157]

The struggle between the KMT and the CCP was almost resolved by the conquest of mainland China by the CCP in 1949 and the promulgation of the PRC. However, the Republic of China survived on Taiwan, leaving two competing governments in place which both claimed to be the sole legal representative of China, in the United Nations and beyond. It would take 22 years for the Chinese government which had effective control of almost all of China's territory and ruled over a fifth to, at times, a quarter of the world's population, to replace the Chinese government which only controlled the island of Taiwan and a few other small islands, and a population slightly larger than that of, say, the Netherlands. However, in 1949 and throughout the 1950s this outcome did not seem predetermined, and various episodes of armed conflict still followed.

While its domestic position came under increasing pressure, the Republic of China did participate actively in the United Nations from its foundation, including in the legal sphere, where the ROC actively contributed to the development of international law and participated in international organisations.[158] It submitted proposals to the San Francisco Conference to the effect that the UN Charter "should provide specifically that adjustment or settlement of international disputes should be achieved with due regard for principles of justice and international law."[159] An ROC proposal requiring all states to accept compulsory jurisdiction of the International Court of Justice (ICJ) had been opposed by the USA and the USSR during the drafting of the Charter.[160] The ROC also contributed actively to the process of the establishment of the International Law Commission (ILC).[161] At The Hague, the Chinese ambassador submitted – rather brief, but usually as one of the first states – written observations on behalf of his government in the advisory proceedings before the International Court of Justice concerning *Conditions of Admission of a State to Membership in the*

157 Ann Kent, *China, the United Nations, and Human Rights* (Philadelphia, PA: University of Pennsylvania Press 1999), 40. The name of the official is Dong Biwu (董必武), who attended with his colleague Qiao Guanhua (乔冠华). See also Kent, *Beyond Compliance*, *supra* note 134, 36-37; *Yearbook of the United Nations 1946-47*, 44 (where Dong Biwu's name is spelled in Wade-Giles transcription as Tung Pi-Wu). The signed version of the UN Charter is available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> [8.4.2013]

158 Cohen and Chiu, *People's China*, *supra* note 135, 12-13.

159 *Yearbook of the United Nations 1946-47*, 12.

160 Cohen and Chiu, *People's China*, *supra* note 135, 13.

161 *Yearbook of the United Nations 1947-48*, 208.

United Nations (Article 4 of the Charter) and *Reparation for Injuries Suffered in the Service of the United Nations*.[162] More significantly, the Chinese representative in the Commission on Human Rights of the Economic and Social Council (ECOSOC), P.C. Chang,[163] played a major role in the drafting process of the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948. He was also the first vice-president of the Commission on Human Rights.[164] China also participated in the negotiation of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.[165]

Discussion of the civil war in China in the General Assembly went along lines to be expected in the context of the Cold War, with an item concerning "Threats to the Political Independence and Territorial Integrity of China" making it to the agenda by September 1949.[166] Opinions on whether the struggle between the CCP and KMT was essentially domestic in nature and whether USSR involvement could be seen as interference in China's internal affairs were answered along expected lines. However, even though both the Nationalists and the Communists had been disappointed in the League of Nations, both had supported the establishment of the UN. After the PRC was proclaimed on 1 October 1949, the new government expressed support for the UN Charter and expected to replace the Nationalists who had "usurped" their seat in the UN.[167]

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162 *ICJ Pleadings, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, 14; *ICJ Pleadings*, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 13. Available at <www.icj-cij.org>.

163 Wade-Giles: Peng Chun Chang; pinyin: Zhang Pengchun, 張彭春 (traditional); 张彭春 (simplified). See also <http://www.un.org/depts/dhl/udhr/members_pchang.shtml>.

164 For detailed accounts of his role, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, NY: Random House 2001); Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (Philadelphia, PA: University of Pennsylvania Press 1999); both rely in part on the first-hand account from John P. Humphrey, *Human Rights & the United Nations: a great adventure* (Dobbs Ferry, NY: Transnational Publishers 1984). See also *Yearbook of the United Nations 1946-47*, 524.

165 11 December 1948, UNTS 78, 277. Signed on 20 July 1949, but ratified by the Republic of China only on 19 July 1951. The PRC only became a party on 18 April 1983, probably through ratification since the signature predates the establishment of the PRC on 1 October 1949 – see below. Details can be found on <treaties.un.org>.

166 *Yearbook of the United Nations 1948-49*, 294-298; *Yearbook of the United Nations 1950*, 381-385.

167 Kent, *Beyond Compliance*, *supra* note 134, 36-37; Kim, *China, the UN*, *supra* note 124, 409; Hungdah Chiu and R. R. Edwards, 'Communist China's Attitude Towards the United Nations: A Legal Analysis', *AJIL* 62 (1968) 20-50, at 21; *Yearbook of the United Nations 1950*, 385.

2.2.3 The Korean War and the question of China's representation

Although there was a certain sympathy for the new revolutionary government among the members of the United Nations, any likelihood that the PRC would replace the ROC as the representative of China disappeared with the advent of the Korean War in June 1950. Before the outbreak of hostilities, a number of members of the Security Council had already recognised the new regime. The USSR boycotted the Security Council from 13 January to 1 August, claiming that it was doing this in support of the PRC, which had notified the Security Council on 8 January 1950 that it considered the presence of the "Kuomintang delegation" illegal and that this delegation should be expelled from the Council. A draft resolution introduced by the Soviet Union proposed not to accept the credentials of the ROC representatives. Making good on a threat to do so, the USSR ceased its participation in the work of the Council when the draft resolution was rejected.[168]

This boycott enabled the Security Council to authorise the military action which was subsequently taken by a United States-led coalition following North Korea's attack on South Korea.[169] The Republic of China was an important member of that coalition.[170] As the PRC and the ROC became more involved in the armed conflict on opposing sides, draft resolutions were tabled not only on "aggression against the Republic of Korea", but also "aggression against Taiwan (Formosa)" by the United States. During the deliberations surrounding this issue, representatives of the PRC were allowed to take part in Security Council meetings, albeit not as representatives of China but under Article 32 of the UN Charter, according to which any non-member state can be invited to discussions concerning a dispute to which it is a party.[171] Subsequently, when the Security Council proved unable to pronounce on the matter due to Soviet opposition, it was left to the General Assembly to adopt a resolution in which it found that "the Central People's Government of the People's

168 *Yearbook of the United Nations 1950*, 52.

169 Resolution 83 (1950), UN Doc S/1511. There has been subsequent debate about the question whether this decision was legal. The fallout included the General Assembly's "Uniting for Peace" Resolution 377 (V). The ICJ accepted that there was a practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolution in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971*, 16, par. 22.

170 *Yearbook of the United Nations 1950*, 220-225.

171 *Ibid.*, 220-264. See UNSC Resolutions 84, 85, 87 and 88 (1950), UN Docs. S/1657; S/1892; S/1836. See also Kent, *Beyond Compliance*, *supra* note 134, 37-39.

Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there has itself engaged in aggression in Korea".[172] Earlier, it had decided that membership issues in the UN should primarily be decided by itself or its Interim Committee, "in the light of the Purposes and Principles of the Charter and the circumstances of each case".[173] Throughout the 1950s, the General Assembly or its Interim Committee accepted US proposals to postpone or not to consider the question, and the political balance in the GA was very much against the USSR.[174]

The Korean War therefore left the PRC officially branded as an aggressor state and unable to take the Chinese seat in the United Nations. While continuing to support the principles and purposes of the UN Charter, it took a far more sceptical view of actual UN practice.[175]

2.2.4 The Republic of China in the United Nations, 1949-1971

The political circumstances of the Cold War left the ROC regime on Taiwan to continue to take part in the UN as the representative of China and to contribute to the work of the organisation, including its development of international law.

The political turmoil surrounding China's representation also had some impact in non-political UN organs. At the opening meeting of the second session of the International Law Commission, Vladimir Koretsky, the member from the Soviet Union, attempted to have Shuhsi Hsu, the member from China, ejected as a representative "of the vestiges of the Kuomintang reactionary clique". The Chairman, Manley Hudson, pointed out in response that members of the ILC did not represent states and served in their personal capacity, being elected by the General Assembly upon nomination by member states. Since he found no support among the other members, it was Koretsky who ended up leaving the meeting

172 UNGA Resolution 498 (V), adopted at its 327th plenary meeting on 1 February 1951.

173 UNGA Resolution 396 (V), adopted at its 325th plenary meeting on 14 December 1950.

174 See e.g. GA Res. 505 (VI), 1 February 1952, UN Doc A/RES/505(VI), in which a large majority of the General Assembly determined that the USSR had "failed to carry out" its Treaty of Friendship and Alliance with China of 14 August 1945 by supporting the PRC. Kent, *Beyond Compliance*, *supra* note 134, 38-39.

175 Chiu and Edwards, 'Communist China's Attitude', *supra* note 167, 22; Kent, *Beyond Compliance*, *supra* note 134, 38-39.

and not participating in the second session.[176] Hsu went on to serve until 1961. Both the ILC and the ICJ had Chinese members originating from the Republic of China until 1966 and 1967, respectively. Chinese members from the PRC only took their positions in both judicial bodies in 1985 and 1982.[177]

To the United Nations, in which the aim of universal membership was still a topic of debate in the 1960s,[178] the absence of a government representing such a large portion of the world's population presented challenges to its authority and legitimacy. The Republic of China was generally regarded "as a cooperative member which shared the values of the organization and participated dutifully in the shaping of international law and international organizations," but there was unease about the situation, including in legal scholarship.[179]

During its "cooperative" membership, the Republic of China was a member of the Commission on Human Rights from 1947 to 1963.[180] It thus participated in the drafting process of the Convention on the Elimination of all forms of Discrimination (ICERD),[181] and the two general treaties, the International Covenant on Civil and Political Rights (ICCPR)[182] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[183]. It signed ICERD on 31 March 1966 and ratified the treaty on 10 December 1970. Furthermore, it signed the ICCPR and ICESCR on 5 October 1967. Representatives of various communist states objected to the validity of this signature, stating that the only government authorised to represent and assume obligations on behalf of China was the PRC government, which led

176 Koretsky did not return the year after for health reasons and resigned the next year, to be succeeded by F. I. Kozhevnikov, by which time Hsu had been elected vice-chairman of the ILC. *Yearbook of the International Law Commission 1950-I*, 1; *Yearbook of the International Law Commission 1951-I*, 1. *Yearbook of the International Law Commission 1952-I*, 1-3.

177 The ICJ judges were Hsu Mo (徐 谟 or Xu Mo, 1946-1956) and Vi Kuiyuin Wellington Koo (traditional Chinese: 顧 維 鈞 or Gù Wéijūn, 1957-1967, vice-president from 1964-1967). See, for ILC membership, <http://untreaty.un.org/ilc/guide/annex2.htm> [2.6.2009] and for the ICJ <www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> [2.6.2009].

178 See Chiu and Edwards, 'Communist China's Attitude', *supra* note 167, 41; *Yearbook of the United Nations 1971*, Foreword by Secretary-General Kurt Waldheim.

179 For example F.B. Schick, 'The Question of China in the United Nations', *ICLQ* 12 (1963) 1232-1250, which inter alia suggest putting the question to the ICJ for an advisory opinion. See also Kent, *Beyond Compliance*, *supra* note 134, 43.

180 See <http://www2.ohchr.org/english/bodies/chr/membership.htm> [2.6.2009].

181 7 March 1966, UNTS 660, 195.

182 16 December 1966, UNTS 999, 171 and 1057, 407.

183 16 December 1966, UNTS 993, 3.

to a reaction from ROC representatives stating that it had participated in the General Assembly and contributed to the formulation of the Covenants.[184]

Throughout the 1960s, the United States found other procedural ways to keep the PRC out of the UN. In 1961 it invoked, with the support of a number of other states, Article 18 of the UN Charter, making election of new members and expulsion of members an "important question" which required a two-thirds majority rather than the usual simple majority. This approach helped to neutralise the repeated attempts led by the Soviet Union to achieve "Restoration of Lawful Rights of People's Republic of China in the United Nations".[185] The United States presented the PRC as believing "in a philosophy of violence and fanaticism", which had "carried out aggressive military actions against Korea, against the Republic of China and Taiwan and against South and South-East Asia." It contrasted the ROC as a state which did act in accordance with the principles and purposes of the UN Charter and the PRC as one which did not.[186] The question of China's representation stayed on the agenda every year until finally, in 1971, there were sufficient votes for the General Assembly to adopt Resolution 2758 (XXVI),[187] which recognised that "the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council" and decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the

184 See <treaties.un.org>. The Republic of China only ratified both treaties on 13 February 2008. See <http://www.taipeitimes.com/News/taiwan/archives/2008/02/14/2003401163> [2.6.2009]. Since the ROC is not recognised by the UN, however, the UNSG could not accept these ratifications in his capacity as depositary. The Taiwanese government established an alternative monitoring system to verifying its compliance with the ICCPR and ICESCR by inviting a nine-member "International Group of Independent Experts" to Taipei in April 2013, consisting of Chinese law expert Jerome A. Cohen and human rights experts (and current and former mandateholders of in the UN human rights system) Nisuke Ando, Shanthi Dairiam, Asma Jahangir, and Manfred Nowak (ICCPR) and Philip Alston, Theo van Boven, Virginia Bonoan-Dandan, Eibe Riedel, and Heisoo Shin (ICESCR). These experts examined Taiwan's own human rights report and NGO reports, and published Concluding Observations.Joseph Yeh, 'English translation of Taiwan's first human rights paper released', *The China Post*, 19 December 2012, <http://www.chinapost.com.tw/taiwan/national/national-news/2012/12/19/364544/English-translation.htm> [31.12.2012]. Full details are available in English on the website of the Taiwanese Ministry of Justice: <http://www.humanrights.moj.gov.tw/np.asp?ctNode=33232&mp=205> [16.02.2013]

185 See, for example, *Yearbook of the United Nations 1961*, 124-125.

186 *Ibid.*, 126.

187 1967th plenary meeting, 25 October 1971.

United Nations and in all the organizations related to it."

Although ultimately the question was settled as a matter of representation and the PRC took the place of the ROC, other options had also been tabled, including attempts to allow the PRC to join the UN but without expelling representatives of the ROC.[188] It should be noted that since 1971, a situation has been in place which is still unique in international law and not easily reconcilable with some of its fundamental principles. From the point of view of the PRC, the territorial integrity of the state is compromised by the continued occupation of part of it by the remnants of the government it replaced. The PRC government has never exercised control over that part of its territory. It maintains a policy which explicitly keeps open the option of using force to (re)unify China. Meanwhile, the government-in-exile in *de facto* control of part of its territory, the ROC, can be said to satisfy all three "objective" criteria from the 1933 Montevideo Convention which are generally seen as the requirements to be accepted as a state under the declaratory theory of statehood.[189] However, this *de facto* state is deprived of many ways to assert its interests at the international level.[190] This raises potential issues in areas of law such as self-determination and other human rights. Although officially the ROC government retains its position that it is the government of China (despite the independence-minded Democratic People's Party having held power for a while), evidence that the population of Taiwan predominantly self-identifies as Taiwanese could raise issues under the law of self-determination. Moreover, it continues to affect the position that the PRC takes with regard to other international law questions in which the right to self-determination is at issue.

188 Kent, *Beyond Compliance*, *supra* note 134, 46-48. See also the relevant sections in the *Yearbook of the United Nations* throughout the decade.

189 Montevideo Convention on the Rights and Duties of States, 26 December 1933, LNTS 165, 19. Article 1 states: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." The first three are seen as the 'objective' criteria. The last criterion remains more of a problem.

190 For legal arguments in favour of Taiwan's acceptance by the UN as an independent state, see Jordan J. Paust, 'UN Principles in Theory and Practice: Time for Taiwanese Self-Determination to Ripen into More Widely Recognized Statehood Status and Membership in the UN and the Prohibition of Armed Force Against Taiwan' in: Lung-Chu Chen (ed.), *Membership for Taiwan in the United Nations* (New York, NY: New Century Institute 2007) 3-18. One complicating factor is that Japan only ceded the territory of the island of Formosa (Taiwan) to China in 1951, and therefore to the 'wrong' government representing China. See also James Crawford, *The Creation of States in International Law* (2nd Edition; Oxford: Clarendon Press 2006).

Although the question of China's representation and the existence of two effective governments on its territory[191] raises international legal issues and its resolution could have contributed to the development of legal norms, this has not happened, as the parties involved took positions which kept the those issues from being discussed. Despite political developments which included the election of a government by a party in favour of declaring Taiwanese independence, the ROC government has not moved from the official position that there is only one China. In the meantime, the United States has supported the status quo in periods of tension, *inter alia* by sending of its Seventh Fleet to the Formosa Straights, but presented this as a measure in the context of UN efforts in Korea. The PRC government periodically protests against the Taiwan Relations Act which sustains US support of the ROC as well as acts by other states which , but does not go beyond public statements that this interferes with China's internal affairs. In these and other debates, the argumentation used has not appealed to any principles which could have contributed to legal development.[192]

2.2.5 Epilogue: the ROC since 1971

Since 1971, the Republic of China has made various efforts to rejoin the United Nations, but any of these attempts is unlikely to succeed as long as the PRC maintains its veto power. Although states remain which recognise the ROC and not the PRC, they are a minority at this point, and the effective government of the Taiwanese population is to a large extent unrepresented in international law, although it attempts to participate.[193] The election of the more independence-minded Democratic Progressive Party (DPP)[194] to power in the 2000s did not lead to a change in the formal position of the ROC government, even if the party made more assertions of Taiwanese self-determination. Since the return of the KMT to power, relations between the ROC and the PRC have improved significantly, leading to agreements regarding travel and other matters. However, these agreements take place

191 Or four, if the SARs of Hong Kong and Macau are counted as well.

192 Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press, 1999) 262-263. The main area of international law involved in the status of Taiwan remains that of recognition. See e.g. Hungdah Chiu, 'The International Law of Recognition and the Status of the Republic of China', *Journal of Chinese Law* 3 (1989) 193-203. Both the PRC and the ROC have pursued active policies of trying to ensure recognition by different states through economic and other incentives.

193 See Pasha L. Hsieh, 'An Unrecognized State in Foreign and International Courts: the Case of the Republic of China on Taiwan', *Michigan Journal of International Law* 28 (2006-2007) 765-814.

194 Chinese (traditional): 民主進步黨 (*Mínzhǔ jìnbù dǎng*).

outside the purview of international law but rather under the neutrally termed 'cross-Strait relations' (referring to the Taiwan Strait, the sea between Taiwan and the Chinese mainland), in the form of agreements between the CCP and the KMT or related associations rather than the PRC and ROC governments.[195] The PRC continues to assert its claim to Taiwan under international law.[196] It has gone as far as adopting an Anti-Secession Law, specifically directed at Taiwan, in 2005, which stresses "peaceful re-unification" in all articles except for article 8, which provides that "in the event that the 'Taiwan independence' secessionist forces" cause Taiwan's secession for China, "non-peaceful means and other necessary measures" will be used.[197]

2.3 The People's Republic of China and the United Nations

2.3.1 The People's Republic of China and the United Nations, 1949-1971

As was mentioned above, initially the leadership of the PRC expressed support for the principles and purposes of the UN Charter. It cited the Charter with approval in various friendship treaties, even when it became disillusioned with the actual practice of the United

195 Chinese (traditional): 海峽兩岸關係; (simplified): 海峡两岸关系 (*Hǎixiá Liǎng'àn guānxì*). The CCP-KMT fora take place under the banner of "Cross-Straits Economic Trade and Culture Forum" (两岸经贸文化论坛), which have taken place yearly since 2006. They are covered by the official Chinese state media and described as "sponsored by Taiwan's Kuomintang (KMT) Party and the Chinese mainland's Communist Party of China (CPC)". See e.g. 'Backgrounder: Cross-Strait Economic, Trade and Culture Forum', *People's Daily Online*, 10 July 2010. <http://english.people.com.cn/90001/90776/90785/7060188.html> [11.4.2013]; '17 joint proposals for cross-Straits ties adopted', Xinhua, 30 July 2012, <http://www.china.org.cn/china/2012-07/30/content_26059982.htm> [11.4.2013] In 2010, the sides concluded an agreement known as the Cross-Straits Economic Cooperation Framework Agreement (ECFA, 两岸经济合作架构协议(定)), with the PRC represented by the Association for Relations Across the Taiwan Straits (ARATS, 海峡两岸关系协会) and the ROC by the Straits Exchange Foundation (SEF, 海峡交流基金會), both semi-official organisations set up to handle technical or business matters across the Strait. ECFA looks like a treaty in all but form. An English translation is provided by the ROC's Ministry of Economic Affairs: <http://www.moea.gov.tw/Mns/populace/news/News.aspx?kind=1&menu_id=40&news_id=19723> [11.4.2013] See also Zhichao Chen, 'The Cross-Strait Economic Cooperation Framework Agreement: Deliberation on Economic, Political and Legal Aspects', *Journal of East Asia and International Law* 4 (2011) 153-172.

196 See e.g. 'Foreign Ministry Spokesperson Hua Chunying's Remarks on the Taiwan-Related Issue Which Arose at Japan's Memorial Ceremony of the March 11 Earthquake', 11 March 2013, FMPRC. <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1020675.shtml> [11.4.2013] China objected to Japan's inclusion of representatives of the 'Taipei Economic and Cultural Representative Office in Japan', the *de facto* embassy of Taiwan in Japan, in a ceremony to commemmorate the second anniversary of the earthquake of 11 March 2011, after which both the PRC and the ROC ("China's Taiwan region" in the words of the PRC) provided assistance to Japan.

197 Anti-Secession Law of the People's Republic of China, adopted at the Third Session of the Tenth National People's Congress on 14 March 2005, *AYBIL* 11 (2006) 247-349.

Nations.[198] To an extent, China's attitude towards the United Nations ran parallel with its attitude towards international law, or the international legal order, in general. Samuel Kim distinguishes between three stages in the PRC's attitude before it became a member:

> the first stage (1945-58) was marked by a strong interest in the United Nations and firm support of the Charter; the second stage (1958-64) witnessed a gradual "hardening" of the Chinese conceptualization of international legal order; and the third stage (1965-69) set in motion a process of negative polemics against the United Nations followed by a total lack of interest.[199]

In these years, the Chinese leadership and Chinese international law scholars had a thoroughly ideological view of international law. One author observes that the PRC was even more dogmatic in applying marxist-leninist theory to international law than Soviet scholars.[200] In this view, law was seen as an instrument of the ruling class, or the "superstructure of a particular economic base", and internally the PRC leadership considered that law was an instrument of the state which should undergo various revisions to better serve the purposes of the Communist Party. International law could similarly be seen as an instrument which could be useful to achieve foreign policy objectives. "Bourgeois" international law – seen in the West at the time as the law of peaceful coexistence or the legal basis for orderly international relations – was considered a "theoretical instrument to defend the aggressive or colonial policy of the strong capitalist countries, to do its best to maintain the capitalist 'world order' and to oppose legal principles of socialism."[201] A further critique of international law was aimed at the notion of international law being a law of the "civilised" nations, which was obviously connected to the humiliating treatment which China had undergone at the hand of western powers in its recent history.[202] As the Soviet Union and China grew apart in the 1960s, Chinese scholars increasingly criticised what they considered Soviet "revisionist" thinking and early support for socialist law doctrine died a quiet death.[203]

198 Kent, *Beyond Compliance*, *supra* note 134, 38-39; Chiu and Edwards, 'Communist China's Attitude', *supra* note 167, 22-23; Kim, *China, the UN*, *supra* note 124, 408.

199 Kim, *China, the UN*, *supra* note 124, 408.

200 Hungdah Chiu, 'Communist China's Attitude Toward International Law', *AJIL* 60 (1966) 245-267, at 267.

201 Ho Wu-shuang and Ma Chün, quoted in *ibid.*, 249.

202 *Ibid*., 250-251. It should also be noted that Lauterpacht's 8th edition of Oppenheim's *International Law* still maintained the division in classes of states. See Chen, 'The PRC and Public International Law', *supra* note 115, 5.

203 Kim, *China, the UN*, *supra* note 124, 406-407. Heuser, *supra* note 151, 150.

One specific area of divergence between the Soviet Union and China was in the area of the sources of international law, where the Chinese maintained a stricter understanding and a more limited scope than the Soviet view which was expanding and started to resemble the Western view, gradually accepting general principles, decisions of international organisations and subsidiary sources. On the other hand, China primarily recognised treaties and implicitly accepted custom as sources of international law, but did not recognise any other sources. It also did not consider that international law had any other subjects than states, not even international organisations and certainly not individuals.[204] This position has softened since.[205]

2.3.2 The Five Principles of Peaceful Coexistence

The most valuable principle in international law was, according to China's scholars, sovereignty. It positioned itself between two positions it defined as "absolute sovereignty", which meant that a state could do anything that pleased it, and "restrictive sovereignty", according to which in China's view sovereignty was "relative, divisible, and subject to restriction and abandonment". China's own position could be called "reciprocal sovereignty" or "mutual respect for sovereignty", which meant that "other states respect our sovereignty and we respect the sovereignty of other states".[206] Sovereignty was at the basis of the principles China formulated to guide its foreign policy and which are today still promoted as the basis of its foreign policy and its position in international law: the Five Principles of Peaceful Coexistence. They were first included in the preamble to a treaty with India.[207] The Five Principles are:

– Mutual respect for each other's territorial integrity and sovereignty,

204 Kent, *Beyond Compliance*, *supra* note 134, 41, relying mostly on Chiu, *supra* note 200, 257-260. Kent, Chiu, and Kim (at 408-409) seem to differ on the significance of a 1958 anthology of reference materials edited by the Institute of Diplomacy in Beijing, which listed a number of resolutions as sources of international law, to which Kim may attach too much importance. See also Hungdah Chiu, *The People's Republic of China and the Law of Treaties* (Cambridge, MA: Harvard University Press, 1972) 4-5.

205 Hungdah Chiu, 'Chinese Views on the Sources of International Law', *Harvard International Law Journal* 28 (1987) 289-307.

206 Kent, *Beyond Compliance*, *supra* note 134, 41-42.

207 Agreement (with exchange of notes) on trade and intercourse between Tibet Region of China and India, Beijing, 29 April 1954, UNTS 299, 57. They had originally been presented in the Common Program of the Chinese People's Political Consultative Conference on 29 September 1949. See Lee, 'Early Development', *supra* note 138, 70.

- Mutual non-aggression,
- Mutual non-interference in each other's internal affairs,
- Equality and mutual benefit, and
- Peaceful coexistence.

In 1955, twenty African and Asian states adopted the Five Principles during the Asian-African Conference at Bandung which contributed to the establishment of the Non-Aligned Movement in 1961. They were supplemented by the Ten Principles of Bandung.[208]

Contemporary western writers such as Wolfgang Friedmann did not consider the Five Principles a particularly significant contribution to international law. In 1964, Friedmann dismissed the existence of a specific 'Asian' contribution to international law. Although he agreed that the newly independent Asian states had made special contributions to international law in the fields of transition from colonies to independent states; self-determination; neutralism; and peaceful coexistence, in his opinion none of these fields expressed any set of characteristic Asian values. "The emancipation from colonial status to independence is a process of nationalist liberation, which repeats the

208 Adopted 24 April 1955. These principles regurgitate the Five Principles of Peaceful Coexistence and the principles and purposes of the UN Charter, and notably include an explicit reference to human rights:

1. Respect for fundamental human rights and for the purposes and the principles of the Charter of the United Nations.
2. Respect for the sovereignty and territorial integrity of all nations.
3. Recognition of the equality of all races and of the equality of all nations large and small.
4. Abstention from intervention or interference in the internal affairs of another country.
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 interests of any of the big powers, abstention by any country from exerting pressures on other countries.
7. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country.
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' own choice, in conformity with the Charter of the United Nations.
9. Promotion of mutual interests and cooperation.
10. Respect for justice and international obligation.

The countries which adopted the principles were Burma, Ceylon, India, Indonesia, Pakistan, Afghanistan, Cambodia, Peoples' Republic of China, Egypt, Ethiopia, Gold Coast, Iran, Iraq, Japan, Jordan, Laos, Lebanon, Liberia, Libya, Nepal, Philippines, Saudi Arabia, Sudan, Syria, Thailand, Turkey, Democratic Republic of Vietnam, State of Vietnam and Yemen. See <http://www.aapsorg.org/site/docs/asian/statements/To50thAnnBandung.htm> [04.07.2012] and <http://www.chinadaily.com.cn/english/doc/2005-04/23/content_436882.htm> [4.07.2012]

tendencies apparent in other parts of the world in earlier periods."[209] He saw the Five Principles of Peaceful Coexistence in the same light: "the concept of 'peaceful co-existence' is essentially a platitude expressing the foundations of an international law based on a society of sovereign national states with different political systems. In so far as it means more, *i.e.*, a philosophy of non-violence, its hollowness has already been demonstrated by the experience of the few years that have followed the Bandoeng Conference."[210] By this he meant the Sino-Indian war of 1962.

Other contemporary observers also noted that the principles expressed had already been accepted by most states as part of international law for a long time. Be that as it may, the PRC continued to push for incorporation of the Five Principles in treaties, joint communiqués and declarations.[211] Even so, it has been noted that the Five Principles lost their significance in the 1960s and 1970s until the Chinese government restored them to their status from 1982 onwards, although with a fresh interpretation.[212] On their fiftieth anniversary in 2004, Premier Wen Jiabao[213] praised the "abiding resilience" of the Five Principles.[214]

Due to its exclusion from the United Nations, China did not have many opportunities to engage in multilateral diplomacy other than the Bandung conference and a conference in Geneva in 1954, as well as the Enlarged Geneva Conference on the Laotian Question. It was not able to participate in many international organisations without becoming a member of the UN first. In the words of one observer, China's isolation led its foreign policy to "shrink into a narrow and self-regarding preoccupation with ideological issues and Cold War competition, heavily colored by its paranoia about containment and encirclement, through which its perceptions of the outside world were distorted and refracted."[215] China was able

209 Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964) 323.

210 Ibid., 323-324.

211 Chiu, *Law of Treaties*, *supra* note 204, 3-4.

212 Samuel S. Kim, 'Sovereignty in the Chinese Image of World Order' in: Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 425-445, at 431-432.

213 温家宝

214 'Carrying Forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development', Speech by Wen Jiabao Premier of the State Council of the People's Republic of China At Rally Commemorating the 50th Anniversary of The Five Principles of Peaceful Coexistence, 28 June 2004.

215 Kent, *Beyond Compliance*, *supra* note 134, 44.

to comment on UN activities and resolutions as an outsider, but could not influence and shape them. From its initial support for the UN Charter but scepticism about UN practice, it grew more radical and started to see the UN as an American project to create a supranational organisation for its own purposes. It also did not believe in international dispute settlement mechanisms such as the ICJ, which in any case contained "an element of the Chiang Kai-shek clique", and when Indonesia left the UN in 1965 the Chinese premier Zhou Enlai[216] declared that the UN needed to be replaced with another, "revolutionary" one.[217]

As the PRC had thus reached the third stage of "negative polemics followed by a total lack of interest" in its relationship with the UN, it was finally accepted as the correct representative of China. China had by then developed a permanent "sense of national grievance" due to its exclusion from the UN for two decades. After the PRC had entered the organisation, one observer from the early 1970s remarked that "it suffers, more or less consciously, from having been rejected by the UN for twenty-two years and ignored by other international institutions, from being recognized by a minority of states, and from being slandered and vilified by the others."[218]

During this period of exclusion, domestically China underwent several episodes of revolutionary turmoil, in which law itself was virtually abolished and international law was not studied – international law teaching was only restored in 1979.[219] The first PRC textbook on international law would only appear in 1981. Its author, Wang Tieya[220], fell out of favour during the Cultural Revolution (1966-1976), just like his colleagues such as Chen Tiqiang[221], who notes that international law studies already fell out of favour as early as 1957.[222]

216 周恩来

217 *Ibid.*, 44-45; Kim, *China, the UN*, *supra* note 124, 412-413.

218 Quoted in Kent, *Beyond Compliance*, *supra* note 134, 43. This perspective is somehow completely ignored by Julian Ku, 'China and the Future of International Adjudication', *Maryland Journal of International Law* 27 (2012) 154-173, who somehow fails to mention the PRC's exclusion and speaks of a "self-imposed isolation from the international community" (160), which only explains half of it.

219 Chiu, 'Sources', *supra* note 205, 290; Wang Tieya, 'Teaching and Research of International Law in Present Day China', *Columbia Journal of Transnational Law* 22 (1983-1984) 77-82, at 77.

220 王铁崖

221 陈体强

222 Chiu, 'Sources', *supra* note 205, 293. R. St. J. Macdonald, 'Introduction: Wang Tieya: Persevering in Adversity and Shaping the Future of Public International Law in China' in: Ronald St. John Macdonald (ed), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 1-29. See also Heuser, 'China and Developments', *supra* note 151, 149.

2.3.3 The People's Republic of China in the United Nations: the 'learning period'

The PRC's entry into the United Nations was a major step both for the PRC and for the UN, which suddenly took a giant step towards universal membership. Premier Zhou Enlai set the tone for the initial approach which the PRC would follow in the next decade when stating that it did not know the UN very well, and that China would have to be "very cautious". Throughout the 1970s, this was its attitude in the United Nations. It started to participate, but did so in a careful and measured way and adopted a "modest, self-assigned role as a learner".[223] China's representative to the 26th session of the UNGA in 1971 still said that "over a long period of time in the past, one or two superpowers had utilized the UN to do things in contradiction with the UN Charter and against the wishes of the peoples of various countries." Huang Hua, head of the Chinese delegation to the UN at that time, had been told by Mao Zedong to spend his time researching and understanding the organisation. Over the course of the decade, China first used the UN to conduct more bilateral diplomacy, and its representatives gained an understanding of the UN's multilateralism over the course of the decade. By the beginning of the reform period, "China's perception of the organization became more objective."[224] The PRC changed from critical outsider into an insider with "a distinct role as the defender of the interests of small and medium-sized countries against the forces of imperialism, colonialism and neo-colonialism."[225]

One early act of the PRC was to urge the United Nations Special Committee on Decolonization (C-24) to adopt a resolution recommending the deletion of Hong Kong and Macao from the list of colonies, arguing that the original treaties had been unequal and were therefore invalid. Since the United Kingdom, which was administering Hong Kong, did not share this position – UK maintaining that it's 99-year lease over Hong Kong had been validly concluded – the Joint Declaration in 1984 did not mention the treaty, but significantly did refer to the "restoration" of Hong Kong.[226]

223 Kent, *Beyond Compliance*, *supra* note 134, 48-49.

224 Pang Sen, 'A New Stage in the Development of China-UN Relations' in: Wang Yizhou (ed.), *Transformation of Foreign Affairs and International Relations in China, 1978-2008* (Leiden and Boston: Brill, 2011) 149-183, at 152-153.

225 Ogden, 'Approach', *supra* note 145, 321.

226 Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc A/8723/Rev.1. Approved in GA Res 2908 (XVII), 2 November 1972, UN Doc GA/RES/2908 (1972), para 3. See Shi Jiuyong, 'Autonomy of the Hong Kong Special Administrative Region', *LJIL* 10 (1997) 491-500, at 492. The Joint Declaration of

China was politically active in the General Assembly and in the Fifth Committee, where it had to deal with the question of the debt left by the ROC. In May 1972, China refused to pay for UN peacekeeping operations which had taken place of which it disapproved. However, it did pay its regular budget contributions and also requested the UN to accept Chinese as an official UN language, which made it responsible financially for Chinese interpreters and translators.[227]

China was least active in the legal organs of the GA and of the UN. Writing in 1979 in the first thorough assessment of how the PRC had functioned in the organisation it had entered at the beginning of the decade, Samuel Kim wondered how, in view of the dismal state of international law as an academic discipline in contemporary China, China could ever be ready for membership in the ICJ or the ILC. He noted how of all Main Committees in the General Assembly, Chinese participation in the Sixth Committee was lowest (although not non-existent), how the PRC failed to present candidates for the ICJ in 1972 and 1975, even though they would certainly be voted in, and how it responded to friendly inquiries from the Office of Legal Affairs at the UN Secretariat that it was not yet ready to field candidates for the ICJ or the ILC. He noted that the most prominent international law scholars in the PRC were dead or purged, and there was a notable lack of legal experts in the Chinese Foreign Ministry as well as its Permanent Mission. China failed to attend many UN meetings and conferences on questions of international law, although it did take part in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts, which eventually resulted in the Additional Protocols I and II to the Geneva Conventions (themselves ratified by the Republic of China in 1949 and subsequently accepted by the PRC). It also took part in the Working Group on a Draft Charter of Economic Rights and Duties of States. In the Sixth Committee, the only subjects to which it responded where highly politicised ones such as the definition of aggression, review of the UN Charter, and international terrorism.[228] One significant international law-making conference in which China did participate and which led it to take in many recent developments in international law, was the Third UN Conference on the Law of the Sea

19 December 1984 took the form of a unilateral declaration of both sides.

227 Kent, *Beyond Compliance*, *supra* note 134, 49-50. See Kim, *China, the UN*, *supra* note 124, 97-177 for an extensive overview of China's UNGA activities.

228 Kim, *China, the UN*, *supra* note 124, 416-419.

(UNCLOS-III).[229] In the General Assembly, China's votes on human rights issues reflected its political alignment. It supported resolutions on self-determination, decolonisation, opposition to apartheid, racial discrimination and discrimination against women, as well as sanctions against apartheid South Africa.. However, it absented itself from human rights resolutions on El Salvador and Chile and did not support sanctions against Cuba and Libya.[230]

Kim's pessimism was expressed exactly at in the year which Wang Tieya describes as "a landmark year" in which teaching and research in international law were restored in the PRC's universities, a Chinese Society for International Law was established and work on a Chinese journal of international law and a textbook on international law was begun.[231] The decades after would indeed show that Kim's assessment of 1979 was too pessimistic, but it remains a useful reminder of how far the PRC has come in what is still a relatively short timespan.

The concept of 'socialist international law' was openly rejected by Chinese scholars by the early 1980s and Soviet theories were denounced as serving a "hegemonist policy".[232] However, Soviet policies were detached from legitimate aspects of marxist-leninist thinking, and prominent Chinese international lawyers continued to denounce imperialism, both from the Soviet side as well as from the capitalist world, signalling China's alignment with the developing world.[233]

2.3.3.1 Representation and China's participation in multilateral treaties

Another question related to the change in the government representing 'China', was to what extent the PRC would consider itself bound by multilateral treaties of which the UN Secretary-General was the depositary, which the ROC had signed on China's behalf. On 29 September 1972, the Secretary-General received a telegram from the Minister of Foreign Affairs of the PRC which stated that

> 1. With regard to the multilateral treaties signed, ratified or acceded to by the defunct

229 Kim, 'Sovereignty', *supra* note 212, 432.

230 Kent, *China, the UN, supra* note 157, 41-42.

231 Wang, 'Teaching and Research', *supra* note 219, at 77. The journal in question is presumably the *Chinese Yearbook of International Law*, as the *Chinese Journal of International Law* was only established later.

232 Heuser, *supra* note 151, 150.

233 Chen, 'PRC and Public International Law', *supra* note 115, 16-20.

> Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.
>
> 2. As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of 'China' are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to.[234]

Since then, the Secretary-General has included this note in the "Historical Information" in UN treaty publications, which continued to reflect treaty actions as taken by the authorities representing China at the time. As far as treaties of the first category are concerned, China took no treaty action concerning the Charter of the United Nations and the Statute of the International Court of Justice, although it is safe to assume that it recognised these treaties. China accepted the ROC's signing of the Genocide Convention on 20 July 1949, even though it denounced the ROC's ratification in 1951 and only ratified this treaty itself on 18 April 1983.[235]

The second paragraph made clear that the PRC considered any treaty action taken by the ROC after 1 October 1949 "null and void", as the action to take after studying these multilateral treaties was "accession". Subsequent practice confirms that the PRC did not consider itself bound by the signatures and ratification of the three other human rights treaties in existence at the moment it replaced the ROC as China's representative. It stated that it "had been illegal for the Chiang Kai-shek clique to sign that Covenant in the name of China and the Chinese government assumed no obligation thereunder."[236] Although it was not a treaty, China adopted the same attitude to the Universal Declaration on Human Rights.[237] Several technical ILO Conventions to which the ROC had acceded before 1 October 1949 remained in force and are still in force today, unless they have been superseded by a subsequent convention.[238]

234 UNTS, Historical information, available at <http://treaties.un.org/Pages/HistoricalInfo.aspx?#%22China%22> [3.6.2009].

235 See above.

236 UN Doc. E/AC.7/SR.699 (30 May 1972), Quoted in Kent, *China, the UN, supra* note 157, 41.

237 *Ibid.*

238 These are: Minimum Age (Sea) Convention, 1920 (No. 7), automatically denounced on 28 April 1999; Right of Association (Agriculture) Convention, 1921 (No. 11), Weekly Rest (Industry) Convention, 1921 (No. 14), Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15), automatically denounced on

2.3.3.2 Aligning with the 'Third World'

The PRC's infrequent participation in multilateral treaties seemed to reflect not so much disagreement with the substance of these treaties, but a measure of skepticism about the international legal order as such. As described above, the Marxist notion of international law saw law primarily as legitimising acts by the exploiting class or nation. China remained skeptical about UN politics, even if it realised that developing nations – then still referred to as the 'Third World' - had become a growing force in the UN. The fact that China itself had entered, in fact gave a voice to developing nations on the Security Council for the first time. Kim describes China's participation throughout the UN and UN-sponsored conferences in the 1970s as "highly politicized legalism",[239] through which China showed a strong interest in the emerging right to development.[240] It therefore became clear that China was aligning with the third world approaches to international law (TWAIL), and in the decades after China would indeed tie itself in with these kinds of approaches and try to present itself as a champion of the rights of developing countries. One recent observer acknowledges that even though China itself was not a state created through the processes of self-determination, it "played a leading role through solidarity with the newly independent states of Africa and Asia in advancing the causes espoused by these states",[241] including the

28 April 1999; Equality of Treatment (Accident Compensation) Convention, 1925 (No. 16); Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19); Seamen's Articles of Agreement Convention, 1926 (No. 22); Repatriation of Seamen Convention, 1926 (No. 23); Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27); Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32); Underground Work (Women) Convention, 1935 (No. 45); Minimum Age (Industry) Convention (Revised), 1937 (No. 59), automatically denounced on 28 April 1999; Final Articles Revision Convention, 1946 (No. 80). <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404> [10.4.2013] It should be noted that they only applied to the PRC in theory from 1949 to 1971, when the ILO followed the UN in recognising the ROC's membership. Following the PRC's replacement of the ROC in the ILO, the relevant ILO bodies decided to restore China's rights in October 1971, before knowing if the PRC wished to do so and it took ten more years before the PRC started to participate fully and contribute financially to the organisation. See Kent, *Beyond Compliance*, *supra* note 134, 186-187.

239 Kim, *China, the UN*, *supra* note 124, 426-428.

240 Oscar Schachter, 'The Evolving International Law of Development', *Columbia Journal of Transnational Law* 15 (1976) 1. This right was first codified in Article 22 of the African Charter on Human and Peoples' Rights (Banjul Charter), adopted 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3 rev. 5, ILM 21 (1982). The UN adopted it in Declaration on the Right to Development, GA Res 41/128, 4 December 1986, UN Doc A/RES/41/128.

241 M. Sornarajah, 'Power and Justice: Third World resistance in international law', *Singapore Year Book of International Law* 10 (2006) 19-57, at 19. The same author claims that international norms which China thus helped shape along with the 'third world' included self-determination in its anti-colonialist guise and the doctrine of permanent sovereignty over natural resources (UNGA Resolution 1803 (XVII), 14 December 1962). However, any influence the PRC exerted over these norms can only have occurred in

package of norms referred to as the New International Economic Order (NIEO), in which these states aimed at increasing their economic independence by seeking to regain control over their natural resources and nationalising foreign entities which were exploiting these resources.[242] The qualifier "through solidarity" seems to indicate however that China's "leading role" was not so much as a norm-maker but rather through its political support.[243] Contemporary observers did not China's new interest in "development along 'progressive' lines: changes which tend to increase the representation in international organizations of the small and middle-sized nations, those which enable or encourage 'progressive' forces of nationalism to establish their independence and equality, and those which incorporate 'socialist' principles of 'mutual aid.'"[244]

Samuel Kim ends his assessment of China's relationship with the international legal order by concluding that

> Chinese legal practice has shown a contradictory mixture of qualified acceptance of traditional international law, on the one hand, and a revisionist challenge to destroy the old legal order and to establish a new one, on the other. [...] [I]n a curiously opportunistic manner, China, without saying so, has embraced the sovereignty-centered system of the Westphalia legal order. A tendency to carry the logic of state sovereignty to an appealing but untenable extreme makes China somewhat anachronistic in the politics of establishing a new international legal order. Both conceptually and psychologically, China seems to be suffering from a siege mentality that goes back to the traumatic period of unequal treaties. [...] In strategic terms [...] the sovereignty-centered image of international legal order may be incompatible with the normative commitment of China to a new international legal order.[245]

He also noted that China's advocacy of international egalitarianism was somewhat incongruent with her own position, as China was no longer an underdog.[246] It is, however,

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external fora, as these norms were shaped before the PRC replaced the ROC in the UN.

242 UNGA Resolution 3201 (S-VI), UN Doc A/RES/S-6/3201, 1 May 1979; This includes Charter of Economic Rights and Duties of States, UNGA Resolution 3281 (XXIX), 12 December 1974. Antony Anghie, 'The Evolution of International Law: colonial and postcolonial realities' in: Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.), *International Law and the Third World: Reshaping Justice* (London and New York: Routledge-Cavendish, 2008) 35-49, at 44. See also Kim, *China, the UN*, *supra* note 124, Chapter 5; Mohammed Bedjaoui, *Towards a New International Economic Order* (New York, NY: Holmes and Meir, 1979). For a recent look back at the limited achievements of the NIEO, see Margot E. Solomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice', *ICLQ* 62 (2013) 31-54.

243 Accounts of these episodes generally do not reserve a major role for China as a norm-maker. See e.g. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) 78-88.

244 Ogden, 'Approach', *supra* note 145, 336.

245 Kim, *China, the UN*, *supra* note 124, 465-466.

246 *Ibid.*, 466.

not unlikely that the Chinese leadership still saw itself very much as an underdog, especially in light of its "siege mentality".

2.3.4 From the beginning of the reform era to 'Tiananmen'

The beginning of the 'reform and opening up' policy by Deng Xiaoping[247] in 1978 marks the beginning both of a period of dramatic change within China, as well as a change in its approach to foreign affairs. For one, domestically, China rediscovered law and the rule of law. After the establishment of the PRC, attempts had started at constructing a socialist legal system (to replace the 'bourgeois' legal system of the ROC, which continues to exist on Taiwan),[248] which was severely undermined by the Cultural Revolution to the extent that it all but destroyed the nascent Chinese legal system. After 1978, a new legal system was constructed, modeled after a western style of rule of law.[249] It may be expected that as China started developing the rule of law internally, this would help its external familiarity and comfort with international law. In addition, Deng introduced a less pessimistic and more outward-looking foreign policy which allowed it to take major steps in multilateral diplomacy and its participation in the UN.[250] And as noted above, the study of international law resumed.

The PRC did not recognise the declaration which the ROC had made in 1946 accepting the compulsory jurisdiction of the ICJ under the Optional Clause (Article 36(2) ICJ Statute), but did decide to propose a national to the bench.[251] In 1985, Ni Zhengyu[252] was appointed as judge in the ICJ, where he served until 1994, when he was succeeded by Shi

247 邓小平

248 See Jianfu Chen, 'Coming Full Circle: Law-Making in the PRC from a Historical Perspective' in: Jan Michiel Otto, Maurice V. Polak, Jianfu Chen and Yuwen Li (eds), *Law-Making in the People's Republic of China* (The Hague: Kluwer, 2000) 19-40.

249 Zou Keyuan, *China's Legal Reform: Towards the Rule of Law* (Leiden: Brill 2006) 1. See also Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press 2002); J. Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* (The Hague: Kluwer 1999) 31-55.

250 Pang, 'A new stage', *supra* note 224, 150-152.

251 Heuser, *supra* note 151, 157.

252 倪征奥

Jiuyong[253], who himself was succeeded by Xue Hanqin[254] in June 2010.[255] Judge Ni was also the first national of the PRC to be appointed to the ILC, where he served from 1982 until 1984, to be followed by various other Chinese international lawyers.[256] In this period, China also became more active in international human rights diplomacy. After starting to attend its sessions as an observer in 1979, it was elected to the Commission on Human Rights in 1981 and was a member from 1982 until the Commission was succeeded by the Human Rights Council in 2006 (and of which China was a member from the beginning). A Chinese national joined the Sub-Commission on Prevention of Discrimination and Protection of Minorities as an independent expert in 1984.[257] More generally, the decade saw an increase in the participation of China in UN activities, which ran parallel to the domestic departure from revolution. International society also no longer required revolutionary transformation according to Chinese foreign policy. Deng Xiaoping's "four modernisations" required a peaceful international environment and included an enhanced position for China in the international community, in particular in international organisations. The 'international community' also changed its attitude to China: while in the previous decade, following the Cultural Revolution, it had been treated as a renegade or "rogue" state, it now received a far more favourable treatment.[258] From the 1970s onwards, China also increased its participation in international organisations and multilateral conventions of a law-making nature.[259]

With regard to human rights related issues in the UNGA, China changed its absence from sessions discussing human rights to abstaining from voting, which indicated that it was prepared to be involved in their discussion. It also involved itself more in human rights diplomacy and became more active in the UN Commission on Human Rights. Through these activities, China became increasingly aware of the challenge that international human

253 史久镛. See Shi Jiuyong, 'The Role of the International Court of Justice in the Peaceful Settlement of International Disputes', *Collected Courses of the Xiamen Academy of International Law* 1 (2006) 1-13.

254 薛捍勤

255 See <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> [3.6.2009].

256 See <http://untreaty.un.org/ilc/guide/annex2.htm> [3.6.2009].

257 See <http://www2.ohchr.org/english/bodies/chr/membership.htm> [8.6.2009].

258 Pang, 'A New Stage', *supra* note 224, 150-151. Kent, *Beyond Compliance*, *supra* note 134, 52-53. Hungdah Chiu, 'Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987', *International Lawyer* 21 (1987) 1127-1166, at 1128.

259 For an overview, see Chiu, 'Post-Mao Era', *supra* note 258, 1151-1159.

rights diplomacy and law might pose to its sovereignty, as well as the possibility that they could be used by great powers to interfere in a state's internal affairs.[260] At the same time, China started doing one thing which would potentially impinge on its sovereignty by joining multilateral human rights convention, of which it joined 8 until 1989, including a number of 'core' UN human rights treaties.[261]

Although some authors at the time had started to raise the question why the People's Republic had not been subjected to greater human rights scrutiny. There was a lack of access to the country and to information, leading to Sinologists rather than human rights organisations conducting most of the studies and activity on human rights in China. Several favourable prejudices also shielded China in the West, including reverence for its civilisation, sympathy on the political left for its socialist experiment as well as China's recent tragic history.[262] one observer describes the period from 1988 to early 1989 "a high point in China's international human rights activities."[263] Compared to what came before, it certainly is. Its earlier, sceptical, attitude towards the Universal Declaration was also adjusted, with China's Foreign Minister praising it at the General Assembly in 1988 and organising to celebrate its 40th Anniversary in Beijing.[264] However, outside observers essentially had many questions about China's attitude towards human rights.[265]

2.3.5 Tiananmen and its aftermath: the 1990s

On 4 June 1989, the government of the People's Republic of China violently ended a popular movement for more freedom and democracy[266] on and around Tiananmen Square in Beijing,

260 Chiu even cites this concern as the reason why China omitted individuals from a translation of an English-language international textbook. *Ibid*., 1133.

261 See *infra*, chapter 5. Working Group on the Universal Periodic Review, Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1, UN Doc. A/HRC/WG.6/4/CHN/2, 16 December 2008, 2.

262 Roberta Cohen, 'People's Republic of China: The Human Rights Exception', *HRQ* 9(4) (1987), 447-549, at 454, 459.

263 Kent, *China, the UN, supra* note 157, 45.

264 *Ibid*. , 44; Ann Kent, *Between Freedom and Subsistence: China and Human Rights* (Hong Kong: Oxford University Press 1993) 102-103.

265 See e.g. R. Randle Edwards, Louis Henkin and Andrew J. Nathan, *Human Rights in Contemporary China* (New York: Columbia University Press, 1986) 2-3 and 35.

266 The movement focused on democracy and an end to corruption, but demands for and discussion of human rights were relatively rare. Marina Svensson, *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898-1948* (Lund: Department of East Asian Languages, Lund University 1996) 304.

in what has become known as the June Fourth Incident to the Chinese authorities and the Tiananmen Square Massacre to most others.[267] Apart from its domestic ramifications, the use of force to silence a peaceful movement representing broad strands of Chinese society, marked a turning point in the relation between the Chinese regime and the outside world, just when the reform and opening up policy had started to yield some results and China's isolation had been coming to an end.[268] This partly explains why the event had a far more serious impact on the perception of the state of human rights in China in the outside world than the previous humanitarian catastrophes which had occurred in the short history of the People's Republic and possibly entailed serious and potentially worse or father reaching violations of human rights, including the famines of the Great Leap Forward (1958-1962) and the excesses of the Cultural Revolution (1966-1976). The full extent of both is still not known, although many of the abuses of the Cultural Revolution have been denounced by subsequent PRC leaderships.[269]

The decision of the Chinese leadership to repress the democracy movement under the eyes of the international press and after a period in which the image of the PRC had improved significantly, was a turning point in China's engagement with the "international community" and placed it at the defensive whenever its human rights record came under scrutiny.[270] Immediately after the events, governments condemned the Chinese

267 Even though most of the actual killing did not take place on the square itself. See, for example, BBC News, "Tiananmen killings: Was the media right?", *BBC News*, 2 June 2009. <http://news.bbc.co.uk/2/hi/asia-pacific/8057762.stm> [2.6.2009]

268 Detailed discussion in Kent, *Freedom and Subsistence*, *supra* note 264; Kent, *China, the UN, supra* note 157.

269 For the Cultural Revolution and the 'anti-rightist campaign' (1957-1958), see e.g. Cohen, 'Exception', *supra* note 262, 448-449. For the Great Leap Forward, see, *inter alia*, Frank Dikötter, *Mao's Great Famine: The History of China's Most Devastating Catastrophe, 1958-1962* (New York, NY: Walker & Company, 2010). The exact nature of possible human rights violations is beyond the scope of this chapter, and involves questions of state responsibility, intent, and foreseeability. Possible rights affected would be subsistence rights as well as civil and political rights, and the question which of these applied at the time and to what extent would require a thorough factual and legal analysis. Dikötter claims that "coercion, terror and systematic violence were the foundation of the Great Leap Forward" and in addition to the Great Famine associated with this period, millions died as a result of torture or summary execution. (at xii-xiii) Iit is safe to say that both episodes have been major humanitarian catastrophes and the responsibility – historically as well as legally – of the Chinese state and the CPC remains a taboo subject within present-day China. However, changes in its archive laws have opened up a wealth of information to historians such as Dikötter (at xi-xii).

270 For discussion of the democracy movement and further references see Kent, *Freedom and Subsistence*, *supra* note 264, 167-192. See also Zhao Ziyang, *Prisoner of the State: the Secret Journal of Chinese Premier Zhao Ziyang* (London: Simon & Schuster, 2009) for the only available account from a member of the leadership.

governments' actions unilaterally as well as in multilateral forums. Within the UN, the Sub-Commission of the CHR adopted a resolution on 29 August 1989 which expressed its concern "about the events which took place recently in China and about their consequences in the field of human rights" and requested the Secretary-General to transmit information provided by the Chinese government and other sources to the Commission, an act without precedent.[271] There had not been nor has there since been such a resolution which was critical of a permanent member of the Security Council.[272] The collective international response also took the form of symbolic and economic sanctions, both collectively and individually.[273]

As the Cold War was ending, the international environment also changed, allowing human rights to come more to the forefront within the UN as states were operating less within the context of their relationship with one or the other superpower. In this new situation, China was forced to the defensive over a far larger amount of international criticism of its domestic human rights record than it had expected. As a result, its new attitude grew to be formal and legalistic, insisting on its sovereignty, when it came to human rights, but more flexible, also regarding its sovereignty, in other respects, specifically in international economic cooperation.[274]

As part of China's response through public diplomacy, the Information Office of the State Council, China's cabinet, started issuing White Papers on various subjects, many of them covering human rights issues. In November 1991, the first White Paper on Human Rights in China was issued, followed until 2000 by twelve other human rights-related White

271 Sub-Commission resolution 1989/5, 29 August 1989, UN Doc. E/CN.4/Sub.2/1989/L.31. See Kent, *Freedom and Subsistence*, *supra* note 264, 190-191. Ming Wan, *Human Rights in Chinese Foreign Relations: Defining and Defending National Interests* (Philadelphia, PA: University of Pennsylvania Press 2001) 4-5.

272 Hurst Hannum, 'Reforming the Special Procedures and Mechanisms of the Commission on Human Rights', *HRLR* 7 (2007) 73-92, 85.

273 The term 'sanction' is used here as a generic term for countermeasures, without entering into the debate on the legality or illegality and proper qualification of specific actions taken. For discussion of this issue, see Nigel White and Ademola Abass, 'Countermeasures and Sanctions' in: Malcolm D. Evans, *International Law* (2nd Edition; Oxford: Oxford University Press 2006) 509-532. Whereas in 1993 Kent qualifies these sanctions as being aimed at improving the condition of civil rights in China, in 1999 she describes them rather as a "temporary expedient to punish China for Tiananmen rather than a continuing deterrent for future abuses". Kent, *Freedom and Subsistence*, *supra* note 264, 213. Kent, *China, the UN, supra* note 157, 49-50.

274 Kent, *China, the UN, supra* note 157, 50-51; Kent, *Beyond Compliance*, *supra* note 134, 54-55. Wan, *Human Rights*, *supra* note 271, 6.

Papers which dealt with such issues as criminal reform, Tibet, Taiwan, the situation of women, family planning, national minorities and the "progress of human rights in China".[275] From the first White Paper of 1991, China chose to emphasise subsistence rights and downplay the importance of civil and political rights. The 1991 White Paper, moreover, was couched in very defensive language. It lashed out against the "the British, French, Japanese, US and Russian imperialist powers" who "waged hundreds of wars on varying scales against China" from 1840 to 1949. This history was explored in more detail, to stress the importance of the "national independence" which China regained in 1949.

> The Chinese nation, which makes up one-fourth of the world's population, is no longer one that the aggressors could kill and insult at will. The Chinese people have stood up as the masters of their own country; for the first time they have won real human dignity and the respect of the whole world. The Chinese people have won the basic guarantee for their life and security. [...]
>
> However, to protect the people's right to subsistence and improve their living conditions remains an issue of paramount importance in China today. China has gained independence, but it is still a developing country with limited national strength. The preservation of national independence and state sovereignty and the freedom from imperialist subjugation are, therefore, the very fundamental conditions for the survival and development of the Chinese people.[276]

In the following years until the present, the Chinese government has retained the emphasis on subsistence rights and development, although by now the rhetoric on the wrongs committed against China in the past has been scaled down significantly.

2.3.6 Vienna, universality and 'Asian values'

The Chinese human rights discourse emphasised sovereignty, subsistence rights and development, and was obviously intended as a counterweight to the perceived 'western' human rights discourse, which in the eyes of the Chinese, overemphasised civil and political rights at the expense of stability and subsistence rights. Although China had accepted quite a few human rights treaties and continued to join them, it showed clear unease with some aspects of the international human rights regime. The confrontation between the alleged

275 Wan, *Human Rights*, *supra* note 271, 17-18. Most of these White Papers are available online on the website of the *People's Daily* (*Renmin Ribao*, 人民日报) at <english.peopledaily.com.cn/whitepaper/home.html> as well as China's official human rights website: <www.chinahumanrights.org/Whitepapers/index.htm> [9.6.2009].

276 Information Office, State Council of the PRC, Human Rights in China, White Paper, November 1991. See <http://english.peopledaily.com.cn/whitepaper/4.html> [9.6.2009].

'eastern' and 'western' view reached its high (or low) point at the World Conference on Human Rights which was held in Vienna in 1993, when China, together with a number of other Asian states (notably Singapore), attempted to take the initiative in the human rights debate by challenging the universality, equality, indivisibility and interdependence of human rights. The ensuing debate is generally brought under the heading of the 'universality' or 'Asian values' debate and has been the subject of extensive study.[277] It should be noted that although this debate dominated human rights discourse in the 1990s, arguments about Western states going too too far in protecting individual rights at the expense of the collective already date back to the 1970s. China had also made challenges to universalism in the 1970s, but this issue had receded in the 1980s, only to return after Tiananmen.[278]

One month before the Vienna Conference, a regional Preparatory Meeting was held at Bangkok in March 1993. Ahead of this meeting, the Chinese government encouraged academic debate and even set up an 'NGO' to generate debate on human rights issues from philosophical, legal and diplomatic perspectives.[279] The meeting took place against a background of deteriorating relationships between the North and South and ethnic conflict. It was also widely felt that in the previous decade issues such as self-determination, development and economic, social and cultural rights had been neglected. China was influential in emphasising the importance of the relationship between human rights and development, which was also done by Latin American, African, and Asian states. Western states feared that this would lead to watering down of concepts such as the universality of human rights and diminish rather than strengthen existing mechanisms for the protection of human rights.[280]

Ahead of the Bangkok preparatory meeting, it was difficult for Asian governments to

277 See Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff 2001). See also Joanne R. Bauer and Daniel A. Bell, *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press 1999); Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edition; Ithaca, NY: Cornell University Press 2003).

278 Kim, 'Sovereignty', *supra* note 212, 438.

279 Discussed in detail in Kent, *China, the UN, supra* note 157, 146-169. Government-sponsored NGOs like these are sometimes also known as GONGO's or government-organised non-governmental organisations.

280 Kent, *China, the UN, supra* note 157, 163.

find common ground. Eventually, it led to the Bangkok Declaration.[281] The statement, while affirming the Asian states' "commitment to the principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights as well as the full realization of all human rights throughout the world" emphasised "non-selectivity" in the application of human rights, "a positive, balanced and non-confrontational approach in addressing and realizing all aspects of human rights", "respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure". It also argued for unique Asian factors, of a historical, economic and cultural nature, that should determine human rights standards. The Declaration became the subject of considerable Western and NGO (including from Asian NGOs) criticism, although it was more enlightened than a Chinese statement made earlier during the conference.[282]

A month later, the Vienna Conference brought states and NGOs together to discuss human rights in the world after the Cold War. The resulting Vienna Declaration and Programme of Action[283] has since been influential in steering the focus of states towards implementation of human rights and establishing effective human rights mechanisms. China played an important role in the proceedings as Vice-Chairman of the Conference. It dominated the agenda from the beginning, in part because of the decision of the Austrian government, later cancelled by the UN, to invite the Dalai Lama and other Nobel Peace laureates to be present at the opening ceremonies. In his speech to the conference, the Chinese ambassador resorted to tough and uncompromising language, which reflected China's 1991 White Paper more than the Bangkok Declaration, presenting the principle of state sovereignty as the basis for realisation of citizens' human rights, emphasising socialist values, calling for the elimination of colonialism, racism, apartheid, massive and gross violations of human rights as a result of foreign invasion and occupation, safeguarding the right of small and weak countries to self-determination and the right of developing countries to development. It also reiterated the priority of the rights to subsistence and

281 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration), available at: <http://law.hku.hk/lawgovtsociety/Bangkok%20Declaration.htm> [9.6.2009]

282 Kent, *China, the UN, supra* note 157, 166. See also Michael C. Davis, 'Human Rights in China: China and the *Bangkok Declaration*', *Buffalo Journal of International Law* 2 (1995-1996) 215-230, at 216.

283 UN Doc. A/CONF.157/23, 12 July 1993.

development. Again in line with the White Paper, China stressed that different historical stages had different human rights requirements. Finally, and this seems to reflect the Bangkok Declaration, all rights, including civil and political rights, were described as interdependent, equally important, indivisible and indispensable.[284]

The Vienna Declaration went a long way towards settling some of the debates which had raged before. One of these was the belief that there was a 'trade-off' between development and human rights, which dates back to the development literature of the 1960s and defines human rights in narrow, political terms. Asian states like China, Singapore and Malaysia gave this a cultural dimension in the 'Asian values' debate.[285] The Vienna Declaration came out in favour of universality and accepted the right to development, but insisted that this could not be used as a justification for human rights abuses. It also expressed strong support for vulnerable groups. The Declaration was certainly relevant from a normative point of view. It can be considered an achievement that China was one of 171 states which adopted a final document which reaffirmed and in some cases strengthened the basic principles of a Universal Declaration which had been adopted in 1948by less than one-third of that number, and not by the PRC.[286] This fact can also be considered relevant in the formation or confirmation of the status of these norms under customary international law.

To China, its involvement in the Vienna Conference was another step in its increasing participation in the international human rights system. It marked the transition from a defensive stance following the fallout from Tiananmen to active engagement. Its involvement in the promotion of the right to development, the debate on universality, and the issue of priority of subsistence rights and economic, social and cultural rights, meant that it was also becoming more active as a normative actor. In this sense, the either China's issuing of its White Paper of 1991 or its participation in the Vienna Conference in 1993 can be taken as a starting point for the current era in China's participation in the international human rights regime.[287]

284 Kent, *China, the UN, supra* note 157, 170-182. Davis, 'Human Rights', *supra* note 282, 226-229.

285 See e.g. Rajagopal, *International Law from Below*, *supra* note 243, 219.

286 Kent, *China, the UN, supra* note 157, 185.

287 Within the domestic context, 1992 would be a candidate as the year in which the "socialist market economy" was born and China opened itself to foreign models and harmonisation of its legislation with

Also after Vienna, China continued to be the subject of a draft resolution every year in the Commission on Human Rights. As a result of multilateral and bilateral efforts, notably trade relations with the EU and the United States, it made gestures in the area of human rights, sometimes involving the release of dissidents, but also in the form of legally relevant acts, such as further ratifications of human rights treaties. Thanks in part to its increasing economic power but also because of effective diplomacy, China managed to neutralise the annual threat posed by a country-specific resolution against it by 1997.[288] China participated to an extent with the special procedures of the Commission, allowing visits from several of its mandateholders.. It was a supporter of the transformation of the Commission on Human Rights into the Human Rights Council.[289]

In other respects, after 1989 also cooperated or did not obstruct developments which were intended to contribute to the protection of individuals in international law. It voted in favour of the Security Council resolution creating the International Criminal Tribunal for former Yugoslavia (ICTY), although it abstained from the creation of the International Criminal Tribunal for Rwanda (ICTR).[290] Chinese nationals have served as prosecutors and judges at the ICTY, some of whom were already prominent international lawyers, such as Wang Tieya and Li Haopei[291], and some who are now occupying prominent positions in Chinese academia. China also took an active part in the negotiations for the Rome Statute of the International Criminal Court (ICC) and although it did not join the ICC, it has remained closely involved.[292] In the area of peace and security, China changed from an opponent to an active contributor to UN peacekeeping.[293] In the Security Council, it has displayed varying degrees of flexibility with regard to intervention.[294]

China has not shown a lot of activity on controversial international legal issues

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Western systems. See Mireille Delmas-Marty, 'Present-day China and the Rule of Law: Progress and Resistance', *CJIL* 2 (2003) 11-28, at 25-26.

288 Wan, *Human rights*, *supra* note 271, 121-122. See also Kent, *China, the UN, supra* note 157, 250.

289 Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007) 83-84. The report of the Special Rapporteur on Torture is UN Doc. E/CN.4/2006/6/Add.6. See *infra*, 5.2.1.1 for further discussion.

290 Delmas-Marty, 'Present-day China', *supra* note 287, 26. See for further discussion *infra,* 6.3.2.

291 李浩培

292 See *infra*, 6.3.

293 See *infra*, 7.2.1.

294 See *infra*, 7.2.

which have come before international judiciary organs. It did not participate in the advisory proceedings on *Legality of the Threat or Use of Nuclear Weapons* or *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, despite a strong stance against nuclear weapons and longstanding support for Palestinian rights, respectively.[295] It did, however, file written observations in the request for an Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, and appeared before the ICJ for the first time in that case.[296] Although the carefully measured arguments China presented were not surprising in light of its own unresolved territorial issues and the presence of (at least potentially) separatist movements within its territory, its mere appearance before the ICJ is significant and may be an indication that China will increase its resort to international legal dispute settlement mechanisms.[297]

From the 1970s onwards, China also started engaging with other regimes than the human rights regime, notably the Conference on Disarmament and the UN Environment Programme.[298] After a tortuous process, the PRC managed to supplant the ROC in the World Bank and the IMF in 1980.[299]

2.4 The path to WTO membership of 'four Chinas'

The Republic of China was one of the 23 original signatories of the General Agreement on Tariffs and Trade (GATT). Following the Nationalist defeat in the Chinese civil war, the ROC government announced its withdrawal from the GATT system in 1950, and applied for and was granted observer status in 1965, a status which was withdrawn in 1971 following the ROC's replacement by the PRC in the UN in 1971. In 1986 the PRC, taking the position that the ROC withdrawal had been illegal, notified the GATT of its wish to 'resume' its status as contracting party. Although there was some legal merit to this point, it was clear that the PRC could not simply resume China's membership because its economic and trade policies were not in line with certain basic GATT rules. In 1987, a Working Party on China's status

295 *ICJ Reports* 1996, 226; *ICJ Reports* 2004, 136.

296 Verbatim record (uncorrected) of the oral pleadings of the People's Republic of China (Xue Hanqin), *Accordance of the Unilateral Declaration of Independence in Regard of Kosovo* (Advisory Opinion), International Court of Justice, 7 December 2009, CR 2009/29.

297 See *infra*, section 4.5, for more discussion.

298 Kent, *Beyond Compliance*, *supra* note 134, chapters 2 and 4.

299 *Ibid*., 105-107.

was established under GATT, which was converted in 1995 into a WTO Working Party following GATT's replacement by the World Trade Organization (WTO). The negotiations for the 'resumption' of membership - which with hindsight was treated as a 'normal' membership application - were complicated by the Tiananmen events in June 1989 and by Taiwan's application for admission in January 1990; Taiwan was by then one of the largest trading nations in the world.[300]

Following bilateral negotiations between China and existing WTO members and the completion of a report and a Protocol of Accession by the Working Party, the path was finally cleared for China to join the WTO, after 15 years of negotiation. Taking advantage of the possibility of other entities than sovereign states joining the WTO (Article XXXIII GATT and Article XII WTO Agreement), the Organisation was joined by "four Chinas". The PRC joined in November 2001, but Hong Kong and Macau remained as separate customs territories; although China had resumed its sovereignty over both by then, Hong Kong had become a GATT Contracting Party in 1986 and a founding member of the WTO in 1995. It became a separate customs territory after China resumed its sovereignty in 1997 and remains a separate WTO member under the name of 'Hong Kong, China'. Similarly, when Portugal acceded to the GATT, it also specified its acceptance of the Agreement to all its separate customs territories, including Macau. When China resumed sovereignty in 1999 and Macau became an SAR like Hong Kong, it retained its separate membership of the WTO under the name 'Macau, China'.[301]

Most interestingly, the possibility for customs territories to join the WTO enabled Taiwan to join the organisation as well. Taiwan applied under the name 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu' (TPKM). China immediately objected to this application, calling it "utterly illegal". However, Taiwan's application became part of the negotiations for China to join the WTO as well. In September 1992, the Chairman of the WTO General Council concluded that there was a consensus among the GATT contracting

300 Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* (4th revised edition; Boston and Leiden: Martinus Nijhoff, 2003) §87; WTO, 'WTO successfully concludes negotiations on China's entry', Press Release Press/243, 17 September 2001, <http://www.wto.org/english/news_e/pres01_e/pr243_e.htm> [25.3.2013]; Chien-Huei Wu, *WTO and the Greater China: Economic Integration and Dispute Resolution* (Leiden and Boston: Martinus Nijhoff, 2012) 10.

301 Wu, *WTO and the Greater China*, 5-7; WTO Press/243.

parties to continue the work of the Working Party on the PRC's status and to establish a Working Party for Chinese Taipei. He also noted that all contracting parties "had acknowledged the view that there was only one China", as expressed in UNGA Resolution 2758. It was therefore also agreed that 'Chinese Taipei' should not join the GATT before China itself.[302] Both China and Taiwan acceded to the WTO in 2001, Taiwan one day later than the PRC. As 'Chinese Taipei', Taiwan became a member of the WTO as a customs territory on 1 January 2002. Although it has lost some of political sensitivity, some practical and legal issues regarding the membership of Taiwan remain, including whether Taiwan would be able to lodge a complaint against China, its own central government.[303] As a result, the WTO has 'four Chinas' among its members, or it could be said that there are four members of the Greater China in the WTO. It is also the most significant international organisation with universal Chinese membership.[304]

2.5 Concluding observations

Reflecting China's increasing acceptance of and participation in the international legal system, discussion of China's attitude towards the UN has turned more and more from diplomatic and political issues to legal issues. Ann Kent has described this alternatively as China's "socialisation" and argues that both China and the UN have undergone learning processes, and China has undergone some norm internalisation.[305] Although the question of China's norm internalisation is distinct from the question of its normative acceptance and contribution to normative development in international law, the extent of the internalisation of norms in China is relevant to gauge its attitude towards the other two. The next chapters will demonstrate how China's adherence to sovereignty remains a barrier

302 GATT, Minutes of Meeting — Held in the Centre William Rappard on 4-5 November 1992 (27 October 1992) C/M/259 3.

303 Wu, *WTO and the Greater China*, 12-15.

304 The ROC claims membership of 27 intergovernmental organisations. One of these, which also has the 'other three China's' among its membership, is APEC (Asia-Pacific Economic Cooperation). <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx> [26.3.2013] Following the SARS outbreak of 2002-2003, during which the PRC was preventing the ROC from participating directly in the World Health Organisation (WHO), the ROC government campaigned actively to participate in the WHO. Following an improvement in its relationship with the PRC, the WHO made arrangements in January 2009 for Taiwan to become a party to its International Health Regulations, the WHO's health alert system. See the website of the ROC's Ministry of Foreign Affairs: <http://www.taiwan.gov.tw/ct.asp?xItem=27190&ctNode=1922&mp=1001> [26.3.2013]

305 Kent, *China, the UN, supra* note 157 and Kent, *Beyond Compliance*, *supra* note 134.

towards the acceptance of international legal norms to their full effect. However, it will also be shown that China's domestic reform process and build-up of the rule of law does show that international law is having a domestic impact in China.

Considering that the PRC only entered the United Nations in 1971 and at the time was perceived as an outsider or even (in the terminology of the 1990s) a 'rogue state', especially in the first years after 1989, its evolution into a respected member of the organisation has been quite remarkable. Using a combination of quiet but effective diplomacy and responsible, albeit low-profile, behaviour in legal affairs, China has probably achieved its aim of being seen as a responsible member of the international community. Its original revolutionary fervour has long left, and as will be explored in more depth in the next chapter, at this moment China is very much a status quo power.

3 China's foreign policy and the politics of international law

3.1 Introduction

The previous chapter described how China got to know international law as an alien system of rules of invading powers. The late Qing rulers as well as the leadership of the ROC learned from the beginning that international law was only of relative benefit, leading to the initial rejectionist stance of the PRC. In light of this history, it is not surprising that current Chinese foreign policy thinking is still predominantly realist in outlook, with a strong awareness of the importance of power and emphasis on the competition of clashing national interests. In the last two decades, from the beginning of China's (re)emergence as a major power, there has been thinking not only outside of China but also within about the way it can affect the international order given its increasing importance.[306] To help understand the normative aspects of China's 'rise' and the relative importance of international law in this process, it is therefore important to look at the place of international law in China's overall foreign policy against the background of the general debate on the relationship between international law (IL) and international relations (IR).

As noted in chapter 1, while scholarship on China's general position in international law has been relatively scarce in recent years, there has been no shortage in IR on the rise of China and its implications for the international system.[307] This chapter does not explore this literature exhaustively. There is a lot of overlap between various studies which can be boiled down to a limited number of questions and approaches. Many of these studies, especially from the United States, betray an strong preoccupation with the question whether China' s rise is a threat to the existing international order; it is therefore no surprise that in addressing the outside world and the West in particular, the Chinese government has been

306 See notably the contributions in William A. Callahan and Elena Barabantseva, *China Orders the World: Normative Soft Power and Foreign Policy* (Washington, DC: Woodrow Wilson Center Press, 2011) and Yan Xuetong, *Ancient Chinese Thought, Modern Chinese Power* (Princeton and Oxford: Princeton University Press, 2011).

307 See *infra*, 1.2.

emphasising its peaceful intentions. It did this first by adopting the short-lived official slogan of 'peaceful rise', which subsequently developed into 'peaceful development', until the current promotion of a 'harmonious world', combined with reassurances that China does not 'seek hegemony'.[308] Although a sceptical or even paranoid mind may not wish to take such assurances at face value and IR analysis should take the actual behaviour of states into account, rather than merely the official statements of governments, there can be a double standard at play when the state being analysed is culturally and ideologically very different from the observer. It has been pointed out that to the West, China is a quintessential 'Other' given its long history and civilisation developed relatively independently from the western world.[309] Conversely, because China is seen as so different, notions such as the 'China Model', the 'Beijing Consensus', or a wider 'East Asian model' largely defined by China, have also been promoted.[310]

Both models, especially at their most caricatural, suffer from the drawback that the perspective on China seems predefined by the wish on the part of the observer to see China as a threat or a model. In line with the rest of this thesis, this chapter attempts to take a more sober look at the changing place of China in the world. It focuses primarily on normative actors associated with China, on official Chinese foreign policy, and on perceptions of China's place in international relations, both outside and inside of China. It provides an overview of China's foreign policy priorities and describes how it perceives its interests in foreign affairs. To connect this with the rest of the thesis, the chapter sets out with a description of the relationship between international law and international relations, with a special focus on the issue of normative development, taking into account the fluid line from IR scholarship on normative change to IL scholarship on law-making, enforcement and compliance.

In light of the central question of this thesis, the most relevant IR literature is that which deals with the question of the implications of China's rise for the international order, which is a question the majority of these publications try to answer. Although the notion of normative change has a different meaning in international relations than it does in

308 See *infra*, 3.3.

309 *Infra*, 1.3.2-1.3.3.

310 See for example Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007).

international law, due to the informal and broader understanding of what constitutes a norm in international relations and political science literature, questions regarding the implications of China's rise have to do, more often than not, with politically contentious areas of international law, where either the relevant law is unclear, compliance is low, or enforcement is weak. The most notable example is the law on the use of force, where far reaching consequences and problematic practice come together, in particular in regard to humanitarian intervention and the related 'responsibility to protect'.[311] Human rights law is another example, and also presents a clash between Western conceptions and China's sovereigntist approach.[312] Questions of the underlying values of the 'international community', whether such a thing as an 'international community' even exists, and the role of law as an independent factor are also relevant, in particular because although Chinese government representatives frequently refer to international law in diplomatic statements, it remains unclear where for China diplomacy ends and international law begins.

Taking account of IR and political science scholarship, this chapter therefore sets out to answer a number of interrelated questions: how China sees the international system and the role of law within this system; how China defines its foreign policy interests, how law fits in China's foreign policy and to what extent it shapes this policy, and how China's view of its interests shapes its approach to international law-making. These questions will be addressed to the extent relevant to this topic; this chapter is therefore not a comprehensive overview of Chinese foreign policy.

The first section addresses general questions on the relationship between international relations and international law, or, in other words, the politics of international law. Its purpose is to understand the role of law in international society, and what a rising China may do with it to serve its self-defined interests (and indeed how its perceptions of its interests may change). The second part describes China's foreign policy, both from the point of view of external observers, the Chinese government itself, and Chinese observers, including Chinese IR scholars. It also provides an overview of the main questions and approaches in IR scholarship on China's rise, and adopts an approach informed by history and anti-hysteria for the remainder of the discussion in the third section, which provides an

311 See *infra*, 7.2.2.

312 See *infra*, chapter 5.

overview of Chinese and non-Chinese views of PRC diplomacy, its current trends, and how the relationship between PRC diplomacy and its practice in public international law.

3.2 International relations and international law

3.2.1 Two disciplines that describe the same: of divergence and convergence

The relationship between international law and international relations as disciplines has often been contentious, even though they are very much part of each other. Scholars from both sides have noted at times that they have an insufficient understanding of the other, yet the overlap is clear from the many publications in which both have found a place. In recent years, convergence has become the norm again[313] This contentious relationship can be explained through the fact that at least part of international relations as a discipline emerged out of the disappointment of international lawyers with the law and an accompanying departure from formalism.[314] This development is associated with classical realist IR scholars such as E.H. Carr, Hans Morgenthau and Hedley Bull. International law in the period between the first and second world war is associated with idealism, or even utopianism, as many international lawyers were driven by a belief that the building of international institutions and strengthening an international rule of law would contribute to the achievement of lasting world peace.[315] Although realist disillusionment with the failure of the international legal project to achieve these aims resulted in a divergence between the two disciplines for several decades, especially at the height of the Cold War, the two disciplines have started to converge again in the 1990s.[316] It should be noted that the divisions between different 'schools' have never been particularly clearcut and minor differences are sometimes emphasised at the expense of major similarities. The (over-)emphasis on power by realists has been dampened again by an understanding of the

313 See, e.g., Jeffrey L. Dunoff and Mark A. Pollack, What Can International Relations Learn from International Law? (April 9, 2012) Working paper, <http://ssrn.com/abstract=2037299>; Veronica Raffo, Chandra Lekha Sriram, Peter Spiro and Thomas Biersteker, 'Introduction: International law and international politics – old divides, new developments' in: Thomas J. Biersteker, Peter J. Spiro, Chandra Lekha Sriram and Veronica Raffo (eds), *International Law and International Relations: Bridging theory and practice* (Abingdon, Oxon: Routledge, 2007) 1-23, at 3-4.

314 Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press 2001) 465.

315 *Ibid*. See *infra*, 1.3.1 and 1.3.4.2.

316 Raffo *et al.*, 'Introduction', *supra* note 313, 3-4.

significance for international law (and awareness of at least *some* relevance for international law was never fully absent), while idealists have also become more aware of the dimension of power politics. The approach to these matters taken here is rather agnostic and only serves to answer the question under discussion, but it is inevitable that some positions will be associated more closely with one school of thought than another.

The different traditions and orientations in IR scholarship sometimes seem so diverse that it is not easy to distinguish between them.[317] However, a general consensus exists that there are currently three main orientations: realism, rationalism and constructivism.[318] Excessive emphasis on power as is commonly associated with realism risks underestimation of the power of norms, and international law, as a factor influencing the behaviour of states. Both in IR and IL, the worldview of the author sometimes leads to a confusion between the prescriptive and the descriptive. The idealist or utopian streak in international law is still present and has emerged in international relations as well, most notably in liberal approaches, including cosmopolitanism, democratic peace theory, and theories on international organisations. It is no surprise that this approach leads back to international law, in particular the belief that it can be used to shape the world.[319] As such, it is also connected to global constitutionalism.[320] In a way, it can be said that IR has come full circle, as evidenced by the development of its other two main schools of thought – rationalism (expressive of liberalism, sometimes also referred to as neoliberal institutionalism)[321] and constructivism – and the increased attention for normative and institutional questions in recent years, which has led to a renewed appreciation of international law. Even realism does not fit the stereotype anymore of only looking at dimensions of power.

317 See, for example, Ian Clark, 'Traditions of Thought and Classical Theories of International Relations' in: Ian Clark and Iver B. Neumann (eds), *Classical Theories of International Relations* (Houndmills, Basingstoke and London: Macmillan, 1996) 1-19.

318 Christian Reus-Smit, 'The politics of international law' in: Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14-44, at 15-24. Unusually, Robert Crawford only identifies two dominant discourses: idealism and realism. Robert M.A. Crawford, *Idealism and Realism in International Relations: Beyond the discipline* (London and New York: Routledge, 2000) 5.

319 See, for example, Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', *AJIL* 87 (1993) 205-239.

320 See *infra*, 1.3.4.2.

321 Rationalism is described by Reus-Smit as finding expression "principally in neoliberal institutionalism". Christian Reus-Smit, 'The politics of international law' in: Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14-44, at 18.

In the meantime, it has been unfortunate that IL and IR scholars have often talked past each other. Kratochwil considers that the "formation of a discipline of international politics was not only a departure from old understandings of an exemplary history, or of history as 'progress', but it also created a totally implausible conception of politics and law that increasingly impoverished inquiries in both fields."[322] Other IR scholars have also criticised theorists within their own discipline for not taking sufficient account of legal theory and the multifaceted way in which law functions in society.[323]

In China, international lawyers appear to have a keen understanding of the political context in which they operate, as is evidenced by the way in which this is provided in many writings on international law in general.[324] When the study of international law was taken up in China from the beginning of the reform era, IR was immediately made part of the curriculum as described by Wang Tieya.

> Students in the international law section are required to take certain core courses in their discipline as well as foreign language (primarily English) instruction. In our opinion, *international law is a branch both of law and of international relations*. Therefore, students are required to study not only law but also international relations and economics.[325]

Although he is known primarily as an international lawyer, Wang also contributed significantly to the development of political science in China.[326] In this regard, China is not unexceptional – some study of other disciplines is quite common in law curricula elsewhere. However, IR has also evolved as a separate discipline in China since the beginning of the reform era, and the extent to which it has modeled itself after scholarship in the West

322 Friedrich V. Kratochwil, 'How Do Norms Matter?' in: Michael Byers (ed), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2001) 35-68.

323 For example Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge: Cambridge University Press, 2010) 56-60. Unfortunately, this study seems unclear about some of the divisions within law, and mistakenly discusses some domestic law issues under the rubric of international law.

324 For example Bing Bing Jia, 'A Synthesis of the Notion of Sovereignty and the Ideal of the Rule of Law: Reflections on the Contemporary Chinese Approach to International Law', *German Yearbook of International Law* 53 (2010) 11-61; Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours* 221 (1990) 195-369; Xue Hanqin, 'Meaningful Dialogue Through a Common Discourse: Law and Values in a Multi-Polar World', *AsJIL* 1 (2011) 13-19; Xue Hanqin, 'Chinese Contemporary Perspectives on International Law — History, Culture and International Law', *Recueil des Cours* 355 (2012) 41-233.

325 Wang Tieya, 'Teaching and Research of International Law in Present Day China', *Columbia Journal of Transnational Law* 22 (1983-1984) 77-82, at 78 (emphasis added).

326 Baoxu Zhao, 'Professor Wang Tieya As I Know Him', *Journal of the History of International Law* 4 (2002) 216-219, at 217.

indicates that some of the divisions in the West now exist in China as well.[327] Their assessment of the relative importance of law can be expected to reflect this.

The view taken in this thesis aligns best with the constructivist approach to international relations, which sees law as one of the means in which political struggles are expressed.[328] This leads us to the question of what exactly is meant when we speak about the 'politics of international law'.

3.2.2 The politics of international law

The phrase 'the politics of international law' has a double meaning: "the way in which politics informs, structures, and disciplines the law" on the one hand, which is most prevalent among IR scholars, and "the idea of politics *within* law, the idea that law can be constitutive of politics, that politics may take a distinctive form when conducted within the realm of legal reasoning and practice."[329] This latter meaning will be most familiar to international lawyers and to practitioners of international law as omnipresent within their decisionmaking process. Within the discipline, it has been addressed most explicitly by scholars with a background in critical legal studies.[330] Any practicing lawyer will also recognise this as the part of international law that is written about less often than it is spoken of – in corridors, at the water cooler, after work, in academic seminars in candid sessions, at Chatham House, especially when the Rule applies. These politics take place at a lower and higher level, varying from considerations of a tactical or strategical nature, to the level of what we actually want to achieve in the long term.

The two meanings described above may obscure a deeper truth, namely that law and politics cannot really be separated. In the practice of international law, the element of choice is always present on the part of the practitioner. This is the main argument

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327 See Qin Yaqing, 'Development of International Relations Theory in China: Progress and Problems' in: Wang Yizhou (ed.), *Transformation of Foreign Affairs and International Relations in China, 1978-2008* (Leiden and Boston: Brill, 2011) 429-459. The author deplores the fact that a 'Chinese' theory of IR has not yet developed and describes the way in which Western IR theories have served as an example to Chinese scholarship.

328 See *infra*, 1.3.1.

329 Christian Reus-Smit, 'The politics of international law' in: Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14-44, at 14.

330 Notably Koskenniemi under the same title: Martii Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011).

underlying the indeterminacy of the law as emphasised by Koskenniemi and other critical scholars.[331] Indeterminacy should however not be confused with uniqueness – even if different outcomes are possible, that does not mean that anything goes.[332] Rather than pre-determining the outcome, legal rules shape the decision-making process and provide a framework within which political decisions are taken.

In international law, some of the additional constraints on political freedom present in domestic legal systems are missing or insufficiently developed,[333] most notably decision-making bodies with sufficient authority to end legal arguments. As will be seen in the next chapters, this is particularly visible in the case of China, which in addition consistently refuses to consent to the jurisdiction of most the international judicial institutions and other dispute settlement bodies which do exist (with the notable exception of the WTO) and has a contentious relationship with other international institutions with a judicial dimension, such as human rights treaty bodies. In line with what has been referred to as the *Lotus* model, the understanding and interpretation of international legal norms then remains a horizontal matter between sovereign states, with nu superior actor in a position to take an authoritative position. Even when there is no disagreement between states on what the law is, there is also a lack of effective enforcement mechanisms.

The question then becomes in what way the law matters, and what distinguishes legal from other norms. Various authors have pointed at the importance of the sense of obligation that comes with international legal norms.[334] It is not difficult to see that, at the very least in rhetoric, states tend to attach more importance to legal than other norms, which indicates that law is more than just rhetoric.

The question of the role of rhetoric is connected to that of the vagueness of some of the terminology in international law. Deliberate vagueness or use of terms with broad meanings may serve political purposes, but increases the indeterminacy of the vocabulary of the international order even more. Notions such as 'development', 'rule of law', 'global

331 *Ibid*., v-vi.

332 Kratochwil, 'How do Norms Matter?', *supra* note 322, 46-47.

333 See also *ibid*., 48.

334 Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edition; New York: Columbia University Press, 1979); Christian Reus-Smit, 'Politics and International Legal Obligation', *European Journal of International Relations* 9 (2003) 591-625, at 591-592.

governance' and 'responsibility to protect' are inherently vague or have become so even if they had a clear original meaning, because they are used in so many different ways, and the fact that the seemingly noble aims underlying these notions find a lot of support, hides the differences in understanding of these notions among their supporters.[335] To anyone involved in negotiations or the drafting of resolutions (especially 'soft law', or non-legally binding normative documents), this is stating the obvious. However, it does not make the normative environment of which international law is a part, any clearer.

Vague or not, the notions mentioned in the previous paragraph play a large role in the contemporary discourse of legitimate statehood. These discourses are an integral part of the current international system; it is the perception of legitimacy that comes from the norms underlying these notions which explains why they are important, because they provide a moral argument to defend the reason the state exists to begin with.[336]

In sum, in aligning with constructivist approaches to IR, in this thesis international law is treated as a social construct, a system to regulate the relations between states which reflects the nature of international society, and as a vocabulary in which political objectives of various actors are expressed. It is therefore aware of the tensions between the two purposes for which a multitude of actors – not only states, but also international organisations, groups and individuals – try to use international law to suit their political interests. It is aware of the historical legacy of the international legal framework, reflected in its conceptual makeup, which is western in origin, as well as its rhetorical legacy, which carries the imprint of imperialism, among others, and is therefore perceived very differently by different actors, despite the presence of an aspiration of universality in the system. Not all actors are equally committed to this universality, and may define it differently as well. Some are downright sceptical.[337]

335 See *infra*, 1.3.5. See also Teemu Ruskola, 'Law Without Law, or Is "Chinese Law" An Oxymoron?', *William & Mary Bill of Rights Journal* 11 (2002-2003) 655-669, at 657-658.

336 For an argument along these lines about modern human rights discourse, see Christian Reus-Smit, 'Human rights and the social construction of sovereignty', *Review of International Studies* 27 (2001) 519–538, at 520. In more detail: Christian Reus-Smit, *The Moral Purpose of the State* (Princeton, NJ: Princeton University Press, 1999).

337 See for example Jean d'Aspremont, 'International law in Asia: the limits to Western constitutionalist and liberal doctrines', *AYBIL* 13 (2008) 27-49, who argues that whereas western international lawyers have a value-based understanding of international lawmaking, Asian scholars prefer an interest-based understanding.

To locate China in this international legal system, it should be noted that the positions ascribed to 'China' and 'the Chinese' in this thesis are identified with the government of the People's Republic.[338] Of course, within the PRC there are actors and constituencies with different political agendas than the government in Beijing. Not even the government itself is a monolith, although it poses less problems in the current analysis to treat it as one. The PRC government is therefore located in a political context which is shaped by the rhetoric and the rules of international law. Other actors, and the PRC itself, consider it bound by its rules, but even though there is a price to be paid for non-compliance, there is some space within which this price could be acceptable.

The PRC government's perceptions of its interests will also be shaped by the relative importance it attaches to international law. It is argued in this thesis that so far, it has been very important to the PRC government to be seen as taking its international obligations seriously, even if it defines these obligations in a relatively narrow way. It goes without saying that this perception may change in light of domestic and international developments, and the purpose of the remainder of this chapter is to get a sense of the most likely direction of this change.

Apart from the theoretical approaches, international relations is also useful in en ampirical sense when analysing the role of one major state as a normative power. An important distinction is in the informal way in which IR scholars treat normative change and development, and indeed the informal meaning given to the word 'norm', while lawyers tend to look for normative change in the development of positive law. This thesis operates on the fluid border between the two, where also unsavoury concepts such as 'soft law' are located. At a more conceptual level, it is important to note that in this area, where rhetoric and hypocrisy are intertwined with acceptance, internalisation and compliance, is relevant and significant, contrary to what some realists argue, and more in line with constructivist than liberal views, which tend to confuse prescription and description. Indeed, constructivism seems the only approach to international relations which takes due accounts of the various factors which shape a state's foreign policy, including values and identity, presented as historical contingent social constructs.[339]

338 See also *infra*, 1.4.5.

339 Zhu Zhiqun, *China's New Diplomacy: Rationale, Strategies and Significance* (Surrey: Ashgate 2010) 15. See the

3.2.3 Norms in international relations and international law

In an analysis of normative development, what needs to be taken into account are three aspects of international legal norms: (1) their creation; (2) their identification; (3) their interpretation and application. International legal norms are defined as those norms deriving from the sources of international law, usually with reference to Article 38(1) of the Statute of the International Court of Justice.[340] The two main sources are treaty law and custom.[341] Legal norms can be developed or even transformed through interpretation, especially when an teleological and evolutive approaches to treaty interpretation are taken, by states themselves but also by international bodies.[342] The identification and creation of treaty law are easier to trace than that of custom, as they are laid down in formal documents and have a depositary, while the process of treaty-making is often documented through the *travaux préparatoires*, conference reports and commentaries. These also serve a purpose, albeit supplementary, in interpreting the provisions of these treaties.[343] A political analysis would take into account the positions which various actors take with regard to these aspects of law-making.[344] This is a relatively straightforward exercise, especially compared to the way in which law-making through customary international law is analysed. There, the creation and identification of norms are more intermingled and often part of the same discussion, as which norms exactly are norms of customary international law, or where the difference lies between those norms which are expressions of comity and those which are legal, is not always equally clear and subject to disagreement among different actors, depending on the strength of evidence of *opinio juris* and state practice. It is a well-

previously cited works by Reus-Smit and Kratochwil. For the specific impact of human rights norms in international relations, see Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton, NJ: Princeton University Press, 2001).

340 See *infra*, 1.4.3.

341 The issues with regard to general principles are left aside here. See generally Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge: Grotius Publications, 1987 [originally published 1953]). The sources in Article 38(1)(d) are subsidiary sources, and can be considered in the current discussion as describing normative development, and are used as such.

342 Carlos Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin and Heidelberg: Springer, 2007); Jonas Christoffersen, 'Impact on General Principles of Treaty Interpretation' in: Menno T. Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009) 37-61.

343 Article 32 Vienna Convention on the Law of Treaties, 23 May 1969, entry into force 27 January 1980, UNTS 1155, 331.

344 See for example Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007); Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse and Agency* (New York, NY and Houndmills, Basingstoke: Palgrave Macmillan, 2008).

known problem among practitioners that of the constituent elements of customary international law, *opinio iuris* and state practice, one is often missing. As a result, the law is often generated by those who have a specific interest in its formation, and it is here where a bias in favour of the global North or western countries is still perceived, not least by TWAIL international lawyers and by the PRC, as is evident in this thesis.[345] One question in this regard concerns the nature of consent, as in principle – especially if sovereignty is adhered to according to the 'Lotus' model – states can only be bound by rules when they have consented to be bound.[346]

Regarding the formation of customary international law, there has long been debate on the role of instruments which are not formally legally binding but which may have legal effect, either by indicating the development of customary international law (*de lege ferenda*) or by reflecting a crystallising consensus. A prime example are resolutions of the UN General Assembly, where the vote count is also a relevant factor. These kinds of normative expressions are often described as 'soft law', although the term itself has been criticised. Indeed, if the distinguishing feature of a legal rule is that it has binding force, the term 'soft law' becomes inherently self-contradictory.[347]

When normative arguments are made in international relations, especially with regard to dominant rules or what constitutes the international 'mainstream', the empirical problems are the same or at least very similar when it comes to customary international law, 'soft law' and other international norms. In international law, recourse can be had to official statements, especially those purported to express the official state position, to identify what the norms are. In international relations and political science, in recent

345 For discussion of the issues surrounding customary international law, see inter alia Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999); Bin Cheng, '*Opinio juris*: a key concept in international law that is much misunderstood' in: Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 56-76; Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Reissue with a new epilogue; Cambridge: Cambridge University Press, 2005), chapter 6.

346 See, in addition to the works cited in the previous note, in this regard O.A. Elias and C.L. Lim, *The Paradox of Consensualism in International Law* (The Hague: Kluwer, 1998); Andrew T. Guzman, 'Against Consent', *Virginia Journal of International Law* 52 (2012) 747-790.

347 See Prosper Weil, 'Towards Relative Normativity in International Law?', AJIL 77(3) (1983) 413-442, at 414-420. See also Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', *EJIL* 19 (2008) 1075-1093; Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law', *LJIL* 25 (2012) 313-334.

decades attention has also turned to the question of compliance to test not only what states say, but also what they do.[348] In this thesis, however, the focus is squarely on what states say as this is what makes international law, even if states are not in compliance with these rules. This was famously expressed by the ICJ in *Nicaragua*, where the Court stated that for a rule to be established as customary, it would be "sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule".[349] In the teaching of international law, an analogy which is often used to explain this point is that in domestic law, the fact that murders happen does not mean that their prohibition is no longer the law.[350]

Political science and international relations take a wider approach to norms. To take one definition:

> International norms are standards of appropriate behavior for actors with a given identity in world politics. They are collective in the sense that they are the standards by which actors in international society expect or agree to be judged, but not necessarily in the sense that actors always comply or even that they accept the moral or causal premises upon which the standards are based.[351]

This description does not differ much from what has been stated about legal norms, except that the norms do not derive from a clearly defined source, as a result of which there is even more space to disagree about and debate the exact content of the norms.

In addition to specific norms, the looser notion of norms used by political scientists provides more space to analyse the role of vaguer notions which reflect a wider international mainstream or consensus. As has been mentioned before, for the purpose of

348 See Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edition; New York: Columbia University Press, 1979). For China, see in particular Gerald Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (Singapore: World Scientific, 2006) and Ann Kent, *China, the United Nations, and Human Rights* (Philadelphia, PA: University of Pennsylvania Press 1999) and *Beyond Compliance: China, International Organizations, and Global Security* (Stanford, CA: Stanford University Press 2007), which contains an overview of the current literature at 6-30..

349 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), *ICJ Reports 1986*, 14, para 186.

350 This can also be taken too far. Although it could easily be argued that the use of torture and inhuman or degrading treatment by the United States after 11 September 2001 eventually reaffirmed the prohibition of torture in international law, as the US government engaged in attempts to hide or redefine its actions whilst consistently maintaining that it does not torture, it would still have been preferable for these violations of the norm never to have happened.

351 Thomas, *Helsinki Effect*, *supra* note 339, 7.

the analysis in this thesis the most important of these are 'good governance' and 'rule of law', although 'sustainable development' and 'responsibility to protect' can also be considered part of this. These notions have become part of the mainstream international discourse and there is wide agreement on their desirability, even if their exact normative content is not always equally clear or agreement on the specifics is lacking, for example on the role of human rights norms within the notion of rule of law, or whether humanitarian intervention is part of the responsibility to protect.[352] Another term which is equally important both to the west and China is 'democracy', although most western observers will maintain that China is not a democracy while its own government will claim that it is. Due to the lack of a formal source for these norms, there may also be disagreement on what exactly constitutes the international mainstream or consensus.

With this overview of the various types of norms under discussion in this thesis in mind, the rest of this chapter turns to a discussion of the main facets of Chinese foreign policy in relation to various perceptions of the international, western-dominated mainstream. Some of the specifics will be addressed in the substantive chapters.

3.3 China's foreign policy

As recalled, recent scholarship on the PRC's foreign relations is inevitably concerned with the consequences of its 'rise', or to put it in more concrete terms its rising economic and military power (and potential 'soft power'[353]). The PRC will inevitably use its position to influence global norms and could conceivably change the nature of the international order. Perspective on the proper way to analyse this question naturally differ, and are of course connected with the way in which the international order is perceived.[354] One way to frame it

352 See *infra*, 7.2.2.

353 See e.g. William A. Callahan and Elena Barabantseva, *China Orders the World: Normative Soft Power and Foreign Policy* (Washington, DC: Woodrow Wilson Center Press, 2011). See generally Joseph Nye, *Soft Power: The Means to Success in World Politics* (New York, NY: Public Affairs, 2004). Nye originally coined the term in 1990.

354 See, *inter alia,* Alastair Iain Johnston, 'Is China a Status Quo Power?', *International Security* 27(2003) 5-56; Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007); Mark Leonard, *What Does China Think?* (London: Fourth Estate, 2008); Gregory Chin and Ramesh Thakur, 'Will China Change the Rules of Global Order?', *The Washington Quarterly* 33:4 (2010) 119-138; Allen Carlson, 'Moving Beyond Sovereignty? A brief considerations of recent changes in China's approach to international order and the mergence of the *tianxia* concept', *Journal of Contemporary China* 20(68) (2011) 89-102; Wang Jisi, 'China's Search for a Grand Strategy: A Rising Great Power Finds Its Way', *Foreign Affairs* 90 (2011) 68-79; James Kynge, *China Shakes the World: The Rise of a Hungry Nation*

is to ask if China is a 'status quo' or 'revisionist' power: does it define its interest within the current framework or is it looking to change it?[355] Given the opacity of decisionmaking in China, there is a lot of room for speculation and it is unsurprising that assessments have differed. As noted, the present thesis aligns with those who consider that China is essentially a status quo power, which does show reservations towards certain aspects of the international order but works to change it primarily within the existing framework.[356] Despite the sometimes sensationalist titles, the majority of scholarship seems to be in agreement on this, with the prominent exception of segments of the American political right.[357] However, realists in the US also do not think about a potential great power rivalry between the US and China as an unavoidable zero-sum game.[358]

Qin Yaqing, a leading IR scholar in China, breaks down the perceived 'China threat' in three propositions: that China's increasing capabilities will change the international power structure and upset its balances; that China's rapid economic growth will make it so hungry energy and other resources, and flood worldwide markets with its products, and thus create conflicts with other countries; and that as an institutional actor, China will look to challenge current institutions out of dissatisfaction with the current order and not submit to a Western-dominated order. Each of these propositions, Qin finds, are flawed as China's material capabilities have not reached the level where it can challenge the international system or a dominant country, China has actually integrated itself into the

(Revised edition; London, Phoenix 2009); Eva Paus, Penelope B. Prime and Jon Western, *Global Giant: Is China Changing the Rules of the Game?* (New York, NY: Palgrave Macmillan 2009).

355 Johnston, 'Status Quo Power?', *supra* note 354. Pauline Kerr, 'Debating China's Diplomatic Role in World Politics' in: Pauline Kerr, Stuart Harris and Qin Yaqing (eds), *China's "New" Diplomacy: Tactical or Fundamental Change?* (New York, NY: Palgrave Macmillan 2008) 1-11, at 1.

356 See e.g. Stuart Harris, 'China's Strategic Environment: Implications for Diplomacy' in: Pauline Kerr, Stuart Harris and Qin Yaqing (eds), *China's 'New' Diplomacy: Tactical or Fundamental Change?* (New York, NY: Palgrave Macmillan 2008) 15-31, at 27. Wang, 'Grand Strategy', *supra* note 354 and other authors are mostly in agreement on this.

357 For an example in the field of international law, see Eric A. Posner and John Yoo, 'International Law and the Rise of China', *Chicago Journal of International Law* 7 (2006-2007) 6-15.

358 Including Henry Kissinger, who also offers a balanced assessment. He identifies alarmist voices within American thinking (primarily neoconservatives) on international affairs that see China's rise as necessarily incompatible with American security in the long run, as well as triumphalism on the Chinese side which mirrors this expectation of conflict. However, he notes that neither government has endorsed these views, although "they provide a subtext of much current thought." Kissinger himself rejects this thinking of relations between the US and China as a zero-sum game, noting China's primary focus on its domestic challenges. Henry Kissinger, *On China* (New York, NY: The Penguin Press, 2011) 514-530.

international economic system, most importantly by joining the WTO, and that China has integrated itself into international society, as indicated, inter alia, by its membership in multilateral international conventions.[359]

3.3.1 From a low profile to a 'harmonious world'

The previous chapter has provided an overview of the history of the PRC's engagement with the international order and by extension its foreign affairs. As in many other respects, the starting point of China's current foreign policy is the beginning of the 'reform and opening up' period from 1978 onwards, when economic growth was placed at the centre of China's diplomacy and it ended its policy of seclusion and shed its revolutionary attitude, which in foreign affairs translated as a desire to export the Chinese revolution.[360] This desire was let go, and China adopted a foreign policy emphasising its peaceful intentions and the importance of non-interference. It kept a low profile, which is often described by referring to Deng Xiaoping's exhortation to "bide our time and build our capabilities", which has sometimes been translated to suggest a more ominous meaning.[361] The prevailing strategy was described in China as "bringing in".[362] While this was considered necessary at the early stage of China's development, this policy has changed since. Following the backlash from 'Tiananmen', the leadership of President Jiang Zemin and Premier Zhu Rongji had to restore China's international position and increased China's activity in both regional and wider international affairs. The leadership of President Hu Jintao[363] and Premier Wen Jiabao[364], which emphasised the concept of a 'harmonious society' domestically and towards the end also in world affairs, took the decision not to shy away from taking the lead if needed. The

359 Qin Yaqing, 'International Factors and China's External Behavior: Power, Interdependence, and Institutions' in: Pauline Kerr, Stuart Harris and Qin Yaqing (eds), *China's 'New' Diplomacy: Tactical or Fundamental Change?* (New York, NY: Palgrave Macmillan 2008) 33-53.

360 Wang Yizhou, 'Introduction' in: Wang Yizhou (ed.), *Transformation of Foreign Affairs and International Relations in China, 1978-2008* (Leiden and Boston: Brill, 2011) 1-36, at 4; Pang Sen, 'A New Stage in the Development of China-UN Relations' in: Wang Yizhou (ed.), *Transformation of Foreign Affairs and International Relations in China, 1978-2008* (Leiden and Boston: Brill, 2011) 149-183, at 150-151.

361 "*tao guang yang hui*" (韬光养晦). See Leonard, *What does China think?*, *supra* note 354, 87. See also M. Taylor Fravel, 'Regime Insecurity and International Cooperation: Explaining China's Compromises in Territorial Disputes', *International Security* 30 (2005) 46-83, at 75; Wang Jisi, 'China's Search for a Grand Strategy: A Rising Great Power Finds Its Way', *Foreign Affairs* 90 (2011) 68-79, at 73.

362 "*yin jin lai*" (引进来).

363 胡锦涛

364 温家宝

earlier strategy was replaced by one described as "going out".[365] The most recent leadership change brought to power President Xi Jinping and Premier Li Keqiang. From a couple of years before the leadership change, there has been an increased perception of China as becoming "more assertive".[366] Although this has some basis in China's actual behaviour, the effect has been overstated in certain circles and says as much about the way China is perceived in certain circles of IR observers as about a gradual change in China's behaviour.[367] Indications are that Xi Jinping is continuing a line in which China is gradually becoming more comfortable with its enhanced international status and using it to its advantage. The slogan that he has launched to define his leadership ideology, the 'Chinese dream', is claimed to have an international dimension as well.[368]

China's diplomacy since the early 1990s has been described as China's 'new' diplomacy, in light of the reorientation that took place following the fallout from the Tiananmen Square events.[369] To break out of China's initial isolation, the government promoted a "good neighbour diplomacy"[370] which sought to strengthen its relations with its neighbours first, which included the shelving of territorial disputes. By the middle of the decade, as the PRC's economy grew, awareness of China's great power status increased and talk turned to "great power diplomacy"[371], combined with talk of "revitalising the nation".[372]

365 "*zouchuqu*" (走出去). See Zhu, *China's New Diplomacy*, *supra* note 339, 5-7.

366 See for example Thomas J. Christensen, 'The Advantages of an Assertive China: Responding to Beijing's Abrasive Diplomacy', *Foreign Affairs* 90 (2011) 54-67.

367 Alastair Iain Johnston, 'How New and Assertive Is China's New Assertiveness?', *International Security* 37 (2013) 7-48.

368 "*Zhongguo meng*" (中国梦). See e.g. Wang Yiwei, 'Debunking ten misconceptions of the ideal of the Chinese dream', *Global Times*, 11 April 2013. <http://www.globaltimes.cn/content/774320.shtml> [1.5.2013] The author claims that "the Chinese dream is so inclusive that it will be conducive to other countries, especially developing countries, to help them realize their own dreams." This again reflects China's emphasis on the developing world. The rest of this piece also reflects recurring themes: it speaks of the "fading away" of American and European dreams "because of the massive consumption of resources and the European debt crisis", insists that it does not signify China's abandoning of the communist ideal, and claims that it entails more than "just a dream of constitutionalism, human rights or of democracy" and more than "modernization" and "rejuvenation", and dismisses "China's rise" as "an outdated Western term". The article still reflects the preoccupation in China of speaking to the west and modelling itself against the west with its "socialism with Chinese characteristics".

369 Zhu, *China's New Diplomacy*, *supra* note 339; Pauline Kerr, Stuart Harris and Qin Yaqing (eds), *China's 'New' Diplomacy: Tactical or Fundamental Change?* (New York, NY: Palgrave Macmillan 2008); Fravel, *supra* note 361, 83.

370 "*mulin waijiao*" (睦邻外交)

371 "*daguo waijiao*" (大国外交)

372 "*zhenxing zhonghua*". Zhu, *China's New Diplomacy*, *supra* note 339, 1.

In the 2000s, the short-lived idea of a "peaceful rise", first propagated in 2003,[373] stressed China's intention not to allow its increasing power to feel like a threat to its neighbours and to the world. Although 'peaceful rise' was only an official slogan for a short while and replaced first with "peaceful development"[374] and then with "harmonious world" (as part as the "Three Harmonies"[375] of Hu Jintao) soon after, as the word 'rise' was considered to imply too much potential conflict, it kept a longer life in the writings of observers in the West, in response to whom it had been coined to begin with.[376]

In practice and allowing for some subtle shifts in ideology accompanying the change in rhetoric, China's 'new diplomacy' can be summarised as being "chiefly motivated by the need to secure energy and commodity resources, to search for new markets for Chinese exports and investment, to isolate Taiwan internationally, and to project China's image as a responsible and peaceful power."[377] The urge to isolate Taiwan, in addition, increases or decreases depending on the party in power there.[378]

3.3.2 Public diplomacy

Official expressions of Chinese foreign policy positions tend to be formulaic, general and repetitive. They can be found on the website of the Chinese Ministry of Foreign Affairs (FMPRC)[379] and related sites, such as the Permanent Representation of China at the United Nations.[380] The Information Office of the State Council started releasing White Papers (such as the 1991 White Paper on human rights and on China's 'peaceful development'[381]) from the early 1990s in which it explains Chinese policy on various subject matters, which are clearly meant for external consumption and also released in English. Semi-official views

373 "*heping jueqi*" (和平崛起)

374 "*heping fazhan*" (和平发展)

375 "*san he*" (三和)

376 Zhu, *China's New Diplomacy*, *supra* note 339, 11-13. See also Bonnie S. Glaser and Evan S. Medeiros, 'The Changing Ecology of Foreign Policy-Making in China: The Ascension and Demise of the Theory of "Peaceful Rise"', *CQ* 190 (2007) 291-310, at 293.

377 Zhu, *China's New Diplomacy*, *supra* note 339, at 6. See also Harris, *supra* note 356, at 28.

378 See chapter 2.

379 <www.mfa.gov.cn> or <www.fmprc.gov.cn>

380 <www.china-un.org>

381 See *infra*, 2.3.5 and chapter 6. See also Information Office of the State Council, China's Peaceful Development, September 2011. <http://news.xinhuanet.com/english2010/china/2011-09/06/c_131102329.htm> and Information Office of the State Council, 'China's Peaceful Development Road', 22 December 2005, <http://english.peopledaily.com.cn/200512/22/eng20051222_230059.html>.

attributable to the CCP and by extension the Chinese government can be found in the state-owned press, including the *People's Daily*[382], the *Global Times* and the *China Daily*[383], both of which have English-language online editions. They also often carry news from Xinhua, the official state press agency, which also often conveys official thinking.[384] Unsigned editorials in these papers can be treated as expressions of Chinese views aimed at external consumption. The increasing output of these sources are, among others, evidence, of the importance that China places in its public diplomacy.

The views expressed in these sources are evidence of Chinese normative positions, some of which can also be construed as evidence of the Chinese *opinio iuris* under international law. As stated before, regardless of whether these expressions reflect reality (or hide 'true motives', which the more paranoid spectre of IR analysis might want to believe), they should be taken at face value for their normative content. The government's sincerity need not be questioned based on the principle of good faith. However, even from this vantage point, interpretation is necessary as since many of these views tend to be phrased in general terms and written with deliberate imprecision. As with other forms of rhetoric, these obfuscating devices also spill over into the language China uses in international law. In fact, diplomacy and international law seem to exist in the same continuum, as will be especially prominent in the description of China's human rights practice in chapter 5.

One example of such an unsigned editorial restates what has been the official Chinese foreign policy stance for the past two decades.

> China is a newcomer on the diplomatic stage of major powers. It is still unfamiliar with how to use its power and how to deal with provocations from smaller countries. Facing giants like the US and Europe, China is accustomed to acting with care. It never stirs up trouble willingly, instead, when a crisis occurs, China's first reaction is to seek to defuse tension.

Presenting China as a bastion of reasonableness, the author does not shy away from lashing out against the US and Europe.

> China interprets "good" foreign relations as being relations of mutual benefit and mutual respect, but it seems the US and Europe don [*sic*] not follow the same logic. They

382 *Renmin Ribao* (人民日报) <www.peopledaily.com.cn>
383 *Zhongguo Ribao* (中国日报) <www.chinadaily.com.cn>
384 新华 <www.xinhuanet.com>

> are pursuing a relationship with China always in their utmost interests, even at the cost of disputes with China.

Taking this as the point of departure, the author then makes a case for a realist Chinese foreign policy which prioritises China's "national interests" above everything else.

> China's development should be able to face the world and brave any storm. [...] China does not need to satisfy the West at the expense of its own interests. China will not provoke the US and Europe, but it has its own principles to follow. Chinese officials should take opportunities to make the world understand these. It is very difficult and challenging for Chinese diplomats and leaders to deal with the US and Europe. Pure cooperation is a utopia while overall confrontation is also undesirable.

At least, the article does define China's national interests as including "political stability, social solidarity and sustainable economic development."[385] This by and large conforms to China's interests as described by observers not directly linked to the government, such as Wang Jisi, who describes China's core interests as sovereignty, security and development.[386]

The editorial is illustrative of a certain default mode on the part of Chinese official thinking – taking an eminently reasonable, but somewhat overly defensive posture. The Chinese government likes to emphasise China's relative inexperience – first as a developing country, now as a relatively recent major power. Chinese observers of the PRC's foreign policy also tend to emphasise that China is not yet ready to be an active global player.[387] This serves to diminish outside expectations of what China can do, and to avoid the impression that China is willing to take on any responsibility other than when it has no choice. The references to 'provocations' by smaller countries and the 'giant' EU and US paint China as responding to external pressures, but not being assertive or aggressive of its own volition. At the same time, given this context any action taken by China is seen as deliberate, and carrying a message. The editorial cited above came at a time when the expected successor of Hu Jintao as president, Xi Jinping, was on a visit to the United States, and two weeks after China, together with Russia, vetoed the adoption of a resolution condemning alleged human rights violations committed by the government of Syria, against an international consensus

385 'National interests may trump prior goodwill', *People's Daily*, 15 February 2012, <http://english.peopledaily.com.cn/90780/7730020.html> [17.02.2012]. The piece is attributed to the (also state-run) *Global Times*.

386 Compare Wang, 'Grand Strategy', *supra* note 361, at 71.

387 See e.g. Michael Fullilove, 'China and the United Nations: The Stakeholder Spectrum', *The Washington Quarterly* 34(3) (2011) 63-85, at 65.

consisting of the United States, other western states, and most members of the Arab League.[388]

3.3.3 Peace and sovereignty, and 'core interests'

In diplomacy as in law, sovereignty is paramount, and the previously mentioned Five Principles of Peaceful Coexistence also underlie China's diplomacy.[389] The preamble of China's 1982 Constitution is a good point of departure as a statement of intent of China's foreign policy, and includes the Five Principles.

> China's achievements in revolution and construction are inseparable from the support of the people of the world. The future of China is closely linked to the future of the world. China consistently carries out an independent foreign policy and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries; China consistently opposes imperialism, hegemonism and colonialism, works to strengthen unity with people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies, and strives to safeguard world peace and promote the cause of human progress.[390]

What China calls its foreign policy of peace is a notion of peace which is primarily associated with stability, or the absence of conflict, which serves China's aim of development.

> China's desire for world peace is both an end in itself and a means to achieve its objective of economic development and peaceful rise in the world. Without a generally peaceful and stable international order, China's economic development would have been out of the question.[391]

A more elaborate explanation of this position was provided in a speech by Dai Bingguo, the member of the State Council responsible for foreign policy, at the Second Biennial Conference of the Asian Society of International Law in Beijing in 2011.

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388 See e.g. Jonathan Marcus, 'Syria resolution: The diplomatic train-wreck', *BBC News*, 5 February 2012, <http://www.bbc.co.uk/news/world-middle-east-16894752> [17.02.2012]

389 See *infra*, 2.3.2.

390 Constitution of the People's Republic of China [中华人民共和国宪法], Adopted at the Fifth Session of the Fifth National People's Congress of the People's Republic of China and Promulgated for Implementation by the Proclamation of the NPC on December 4, 1982 (Beijing: Foreign Languages Press, 2004), Preamble, at 6-7. Note that there are different English translations of the PRC Constitution and the edition used differs at points from e.g. <http://english.people.com.cn/constitution/constitution.html> [1.6.2012]

391 Victor Zhikai Gao, 'Foreword' in: Zhu, *China's New Diplomacy*, *supra* note 339, ix-x, at ix.

> The Chinese government has clearly stated its strong commitment to the path of peaceful development. This is a strategic choice made in the light of the trend of the times and our fundamental interests. It will not change in 100 years or even 1000 years. Peaceful development, in a nutshell, means to pursue harmony and development at home and peace and cooperation abroad. It is all about maintaining a peaceful international environment for one's own development and contributing to world peace through one's own development. In this sense, there is a close link between China's path of peaceful development and international law.[392]

In the same speech, he also affirmed China's position as a status quo power.

> China's peaceful development takes place within the existing international architecture, and it has benefited much from the solid foundation and guarantee international law provides.[393]

This notion of peace seems rather limited compared to more expansive notions which incorporate elements of the rule of law, human rights, or other elements which may or may not be included in wider definitions of global governance. It is also essentially conservative, aimed at preserving a status quo which is seen as in line with China's interests.

The core interests identified by Wang – sovereignty, security and development – indicate that the priorities of the Chinese leadership are primarily with domestic affairs.[394] Foreign Minister Qian Qichen even remarked in 1990 that "Diplomacy is the extension of internal affairs".[395] The Ministry of Foreign Affairs and relevant officials have also tended to be of lesser importance.[396] Preserving domestic stability is paramount, which is easily understood in terms of the turmoil which characterised China from the nineteenth century through the Cultural Revolution. As a state with a large territory and encompassing 56 officially recognised national minorities, maintaining domestic stability is a considerable challenge. As a former empire, China can still be characterised as an 'empire state', with at its core the dominant ethnic majority of the Han Chinese, who make up more than 90 percent of its population, surrounded by a large periphery of minorities.[397] This includes the Tibetans and the Uighurs in Xinjiang. Maintaining domestic stability is intricately

392 Dai Bingguo, 'Asia, China and International Law', *CJIL* 11 (2012) 1-3, at 2, para 8.

393 *Ibid*, 2, para 9.

394 Wang, 'Grand Strategy', *supra* note 361, 69.

395 Quoted in Fravel, 'Regime Insecurity', *supra* note 361, 76.

396 Chatham House, 'International Law Summary: China and the International Human Rights System', 29 October 2012. See the summary of the contribution by Stephanie Kleine-Ahlbrandt. <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/291012summary.pdf> [12.7.2013]

397 Fravel, 'Regime Insecurity', *supra* note 361, 55.

interwoven with the imperative of maintaining China's territorial integrity. Not only the Tibet issue, but also the 'reunification' with Taiwan remain primary concerns. Taiwan is described as part of the "sacred territory" of the PRC in the preamble to its Constitution and "reunifying the motherland" is the "inviolable duty" of "all Chinese people".[398]

3.3.4 Territory and security

Another legacy of being a former empire is that many of China's borders have not been clearly defined and it still has a large number of territorial disputes with neighbouring countries. The legal dimensions of these disputes are discussed in the next chapter.[399] Here, it is useful to note that China's territorial disputes can be divided in three categories: homeland disputes, since 1949 involving Taiwan, Hong Kong, and Macau; frontier disputes, deriving from ambiguous land borders at the time of establishment of the PRC; and offshore island disputes. On homeland disputes, China has never compromised. Hong Kong and Macau were returned to China by the United Kingdom and Portugal respectively, in 1997 and 1999. In its frontier disputes, China has compromised at least once in each dispute since 1949 and official doctrine has linked the defence of China's frontiers with internal political stability. It has found it useful to cooperate with neighbours to cull rebel activity, to limit possible miscalculations during pacification campaigns, and to increase cross-border trade. The record on offshore island disputes is more mixed. There are four disputes over island groups which arise from ambiguous claims of sovereignty over small islands, rocks and reefs which have never been administered by any of the states which claim sovereignty. The relevance of these islands is nowadays that maritime rights can be derived to the resources in adjacent waters, as well as some military relevance. The resolution of sovereignty conflicts regarding these islands is not very relevant to domestic security in China and the PRC has been less inclined to compromise in this regard – China has consistently adopted delaying strategies and never offered to compromise in its disputes over these islands. Talks have not touched on sovereignty but were focused on escalation control instead.[400]

In the wider world, China's policy, since it abandoned its revolutionary posture at

398 PRC Constitution, *supra* note 390, preamble at 5.

399 See *infra*, 4.5.3.

400 Fravel, 'Regime Insecurity', *supra* note 361, 59-62.

the dawn of the reform era, has been nonconfrontational and friendly and cooperative with countries regardless of their political or ideological orientation, in order to attract investment and boost trade. "A peaceful international environment, an enhanced position for China in the global arena, and China's steady integration into the existing economic order would also help consolidate the CCP's power at home."[401]

What is clear from the above, is that China's thinking on foreign policy since 1978 has been evolutionary and it responds to its changing position by gradual repositioning rather than by setting out, let alone announcing, bold new policies. This is also the case, for example, in the "new security concept" which China has developed since the end of the Cold War in response to the geopolitical changes which have occurred since then, and which was first articulated in 1997.[402] The Chinese government describes its concept as "established on the basis of common interests and [...] conducive to social progress." In a brief position paper in which it outlines its approach, it appears to take a holistic approach which aligns with thinking present in the UN, focusing on multilateral cooperation under UN leadership, peaceful resolution of territorial and border disputes, reform and improvement of existing international economic and financial organisations, emphasis on non-traditional security areas such as terrorism and organised crime, and disarmament.[403]

It appears that most of the discussion on China's rise, both internationally but also within China, is focused on security-related issues and treats other issues from a security-centric perspective, reflecting a predominantly realist approach to IR. The consensus is that China is growing into its role as a great power and potential superpower slowly but steadily and its foreign policy reflects this. Its main focus has been not to be perceived as a threat and it has expanded its international activities to further this aim. Hence, it takes a pragmatic approach and uses both bilateral relations and multilateral fora, notably the UN, to safeguard its interests.[404] The place of 'soft power' and public diplomacy in this regard is also to safeguard China's interests as defined in a narrow way.

401 Wang, 'Grand Strategy', *supra* note 361, at 70.

402 "*xin anquan guan*" (新安全观). Glaser and Medeiros, 'Changing Ecology', *supra* note 376, at 295.

403 Ministry of Foreign Affairs, 'China's Position Paper on the New Security Concept', <http://www.fmprc.gov.cn/ce/ceun/eng/xw/t27742.htm> [1.4.2013]

404 See e.g. Position Paper of the People's Republic of China at the 67th Session of the United Nations General Assembly, 19 September 2012, <http://www.fmprc.gov.cn/eng/zxxx/t970926.htm> [1.5.2013]

3.3.5 New thinking about China's role

However, in Chinese foreign policy and academic circles, thinking is also developing now on a more expansive role for China, including, as part of China's quest to shape its modern identity (the 'Chinese characteristics'), how its proper role should be seen. In the 1990s, Chinese IR scholarship was primarily realist in outlook and focused on China's national interests, even if those interests were defined differently by different authors. The debate suffered from censorship and self-censorship, blurring the distinction between official positions and those taken by scholars.[405] This seems to have become less in the subsequent decade, when the debate on China's international role became lively and often contradictory, and involved not just academic and policy circles, but was also shared to an extent with broader society. Among other things, it showed that China's claim to be a 'newcomer', mentioned above, is very real and reflects an uncertainty about the contemporary Chinese identity, which is still taking shape.[406] In this regard, part of the Chinese tradition is being rediscovered and attempts are being made to adjust this to the contemporary world. As the rediscovery of tradition tends to serve contemporary goals and agendas, it can be expected that different streams of thinking within China will promote different aspects of classical or ancient thought appealing to their preferences.

Only recently has IR thinking in China started to move beyond western-defined categories, fueled in part by the rediscovery of classical thought, such as for example the notion of *tianxia*, which literally translates as "beneath the heaven" or "all under heaven" and expresses an all-inclusive concept of world order. An influential essay on the concept by Zhao Tingyang has been the starting point for a debate in which Chinese IR scholars discuss the proper place of China in the world, both as a result of its own changing position as well as the developments associated with globalisation.[407] Other traditional concepts are also

405 Yong Deng, 'The Chinese Conception of National Interests in International Relations', *CQ* 154 (1998) 308-329, at 309.

406 David Shambaugh, 'Coping with a Conflicted China', *Washington Quarterly* 34 (2011) 7-27. Shambaugh mentions China's national broadcaster's CCTV airing of a 12-part documentary on Rising Powers (*Daguo Jueqi*), which portrayed the rise of Portugal, Spain, the Netherlands, France, Great Britain, Germany, Russia, the Soviet Union, Japan and the United States in 2006 to contextualise China's rise. (8) The documentary has also been made available on DVD and offers its viewer an interesting Chinese-coloured perception of history.

407 Carlson, 'Moving Beyond Sovereignty?', *supra* note 354, 96-98. See also Cai Tuo, 'Transmission of Globalization Ideas in China and their Influences' in: Wang Yizhou (ed.), *Transformation of Foreign Affairs and International Relations in China, 1978-2008* (Leiden and Boston: Brill, 2011) 367-427, at 379-380. See also

being introduced into current IR thinking, as Chinese IR scholars are still searching for "an original Chinese IR paradigm", as all major western theories have been introduced and studied in China.[408]

In the IR discussions on China's evolving foreign policy, the role of international law is receiving relatively little attention.[409] This is probably due in part to the realist outlook and the security related focus of most of this scholarship. The role of international law grows significantly if China's engagement with multilateral institutions is also seen as factoring in the norms generated by those institutions. What is striking, is that external assessments of China's behaviour as an international citizen have changed over the past decade. In the 1990s, due to the focus on human rights and the fallout from 'Tiananmen', China was seen as a violator of human rights and by extension of international law. At the same time, the United States still enjoyed a – slightly exaggerated – positive reputation as a champion of human rights, as it seemed more inclined to humanitarian intervention in the conflicts raging at the time and generally strongly supported international law in its rhetoric, if not always in action. Following the change of administration in the United States and in particular after the events of 11 September 2001 an the subsequent invasion of Iraq, the United States was no longer seen in such a favourable light. At the same time, states like

Callahan and Brabantseva, *supra* note 306.

408 Qin Yaqing, 'Development of International Relations Theory in China: Progress and Problems' in: Wang Yizhou (ed.), *Transformation of Foreign Affairs and International Relations in China, 1978-2008* (Leiden and Boston: Brill, 2011) 429-482, at 478. See also Yan Xuetong, *Ancient Chinese Thought, Modern Chinese Power* (Princeton and Oxford: Princeton University Press, 2011). Yiwei Wang, 'China: Between copying and constructing' in: Arlene B. Tickner and Ole Wæver, *International Relations Scholarship Around the World* (Abingdon and New York, NY: Routledge, 2009) 103-119.

409 One notable exception is Duan Jielong, 'The Concept of the "Harmonious World": An Important Contribution to International Relations' in: Sienho Yee and Jacques-Yvan Morin, *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Leiden and Boston: Martinus Nijhoff, 2009) 59-64. In this brief speech, the Director General of the FMPRC Treaty and Law Department blended the concept of 'harmonious world' with China's international legal positions, highlighting six aspects: (1) "the concept of 'harmonious world' safeguards international law and the basic norms of international relations", *i.e.* state sovereignty and non-interference;, but also advocates "safeguarding lasting peace of the world and enhancing the cooperative idea of promoting the world's harmonious development; (2) "respecting the UN Charter and the basic human rights and freedom provided for in human rights conventions"; (3) the international rule of law, opposing "double standards"; (4) sustainable development and "paying attention to the harmony between human beings and nature"; (5) "respecting and safeguarding the diversity of the world and modes of development", which includes that "various civilizations, religions and development roads should live in harmony" and (6) multilateral cooperation and strengthening the UN, including through reform and "promoting democracy in international relations". All of these are standard positions taken by China in international law; see chapters 2 and 4.

China and other opponents of the Iraq war were invoking international law and using its language in their rhetoric to voice their opposition, strengthening the international legal system in the process.[410] China has also grown more responsive in responding to situations which receive a lot of worldwide attention (or at least in the western world), where at the very least it wants to be seen as playing a positive role, although whether this is more than just 'window-dressing' is generally assessed by its domestic behaviour as well.[411]

The disadvantage of the reasoning in the previous paragraph is that it appears limited to one area of international law. It does demonstrate that the perception of a state's compliance with international law also depends on the behaviour of other states. More generally, the attitude and behaviour of the United States looms large in China's perception of world order, including its perception of the USA as a hegemon. It is somewhat ironic that those observers most fearful of the rise of China seem to be located primarily on the American political right, and that the fears of Chinese unilateralism or 'changing of the rulebook' which they express seem to reflect fears that China will start behaving like the United States itself, if not now, eventually.[412] The underlying question is whether China is merely making "strategic use of the ideology of international law" and will eventually carve out exceptionalist positions for itself.[413] It has been argued that China is doing this already, and some believe that a certain measure of exceptionalism is inherent in any actor in a

410 Along these lines Ann Kent, 'China's Changing Attitude to Norms of International Law and its Global Impact' in: Pauline Kerr, Stuart Harris and Qin Yaqing (eds), *China's 'New' Diplomacy: Tactical or Fundamental Change?* (New York, NY: Palgrave Macmillan 2008) 55-76. For an account which demonstrates the continuity in US policy, which brings the validity of the perception of the US turning 'rogue' after 2001 into question, see Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012). The best-known critique of the US is probably Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (Updated edition; London: Penguin, 2006).

411 See infra, 7.2. See also Stephanie T. Kleine-Ahlbrandt and Andrew Small, 'China, the Unlikely Human Rights Champion', *Policy Innovations*, 14 February 2007, <http://www.policyinnovations.org/ideas/commentary/data/HumanRightsChampion> [10.05.2013]

412 See Posner and Yoo, *supra* note 357. One account which relates China's positions directly to those of the US, with regard specifically to the International Criminal Court, is Lu Jianping and Wang Zhixiang, 'China's attitude towards the ICC', *JICJ* 3 (2005) 608-620. For the United States, see Michael Byers and George Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003). See also M. Sornarajah, 'Power and Justice: Third World resistance in international law', *Singapore Year Book of International Law* 10 (2006) 19-57. Posner and Yoo, Bradford and Posner.

413 Scott, *US Power*, *supra* note 410, 224-230, which finds some similarities between Chinese and US positions.

relatively large position of power.[414] In China's case, considering its emphasis on sovereign equality and its claim to champion the interests of the developing world, especially, Africa, there would be a price to be paid for such behaviour.

3.3.6 Cultural diversity and pluralism as international norms

In the discussion so far, China has not been seen to be promoting many norms, other than subscribing, as set out in chapter 2, to notions of development, through which it also aligned with the broad international themes of global governance and the rule of law (as explored in subsequent chapters), and its general, broad principles, such as 'harmonious world' and the Five Principles. One norm which China does promote actively is that of pluralism and respect for cultural diversity in international society, which can be seen as a corrolary both of its adherence to the principle of non-interference and an outcome of the call for a 'harmonious world'. It aligns with a long-ingrained belief that like China, each country must find its own development path without foreign interference. If states want to learn from other states, they should take the initiative themselves. This is a rather defensive posture, which benefits from being rather principled as well as reflecting China's own experience. The question here is whether China will be able to maintain this posture as its interests and those of its companies expand around the world.[415]

The emphasis on culture, together with the shaping of the Chinese identity which ist taking place as described in the previous section, serve as a reminder that whichever way this identity takes shape, it will be defined in Chinese terms, making 'Chinese characteristics' increasingly concrete and presenting a challenge to the liberal western order.[416] Although this could entail a 'clash of civilisations'[417] and some observers expect as much, true pluralism would rather lead to a dialogue between, or among civilisations.[418] The

414 Anu Bradford and Eric A. Posner, 'Universal Exceptionalism in International Law', University of Chicago Public Law Working Paper No. 290 (February 2009). <http://ssrn.com/abstract=1551355>. Chris Alden and Daniel Large, 'China's Exceptionalism and the Challenges of Delivering Difference in Africa', *Journal of Contemporary China* 20(68) (2011) 21-38.

415 Frans-Paul van der Putten, 'Harmony with Diversity: China's Preferred World Order and Weakening Western Influence in the Developing World', *Global Policy* 4 (2013) 53-62.

416 See Andreas Bøje Forsby, 'An End to Harmony? The Rise of a Sino-Centric China', *Political Perspectives* 5 (2011) 5-26. See also Peerenboom, *China Modernizes*, *supra* note 310.

417 Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, NY: Simon & Schuster 1996).

418 As promoted, *inter alia*, by the Iranian President Mohammad Khatami at the end of the 1990s, picking up

terms 'peaceful coexistence' and 'mutual respect', which in addition to being promoted by China have long been part of the vocabulary of international law, imply as much.

3.4 Final remarks

Perhaps the most important conclusion to be drawn from the discussion above is that the PRC's foreign policy is less comprehensive and strategic than is often assumed by western observers. The priority of the Chinese leadership, including the current one, firmly remains with domestic issues. Despite China's rise and established position as a great power and the most likely next superpower, its government is showing continuing reluctance to assume a greater role in international affairs. It sovereigntist approach to international relations and international law, which will be analysed in more detail in the next chapter, reflects this reluctance to engage with issues beyond its borders, except where it feels that a Chinese interest is at stake. Chinese interests are narrowly defined: at the core, China's territorial integrity is paramount, which means that the issue of Taiwan and possible separatism in Tibet and Xinjiang, as well as the many territorial disputes with neighbouring countries, remain so-called 'hot-button' issues. A second interest is the safeguarding of growth, which has been the same since the beginning of the reform policy in 1978 and has led, *inter alia*, to China's joining the World Trade Organisation. China's activities in Latin America and Africa are also at the service of its domestic economic growth, primarily aimed at securing resources and support whilst offering something in return.

Although there has been thinking about the consequences of China's rise in Chinese academic circles, none of the streams identified in this chapter seems dominant although any of them finds at least rhetorical adherence at higher levels. But in fact, China's foreign policy still lacks sophistication as its domestically focused leadership is still coming to terms with its expanded role on the world stage.[419] A lively debate has developed within Chinese

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a term originally introduced by Hans Köchler in a 1972 letter to UNESCO. See Hans Köchler, 'Civilization and World Order: The Relevance of the Civilizational Paradigm in Contemporary International Law' in: Sienho Yee and Jacques-Yvan Morin, *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Leiden and Boston: Martinus Nijhoff, 2009) 65-78. For the letter of 26 September 1972, see <http://www.i-p-o.org/Koechler-letter-UNESCO-26Sep1972.jpg> [13.5.2013], using the term "*dialogue entre les différentes civilisations*".

419 Along the same lines: Zheng Wang, 'Does China Have a Foreign Policy?', *International Herald Tribune*, 18 March 2013, <http://www.nytimes.com/2013/03/19/opinion/does-china-have-a-foreign-policy.html> [18.03.2013].

academia and policy circles on the role China has to play and this debate is becoming increasingly public. In the meantime, China's leaders remain essentially pragmatic. Many of China's ventures abroad reflect a desire to be seen as a good international citizen, a good member of the 'international community'. Hence China's participation in international peacekeeping and its engagement with international human rights. Its participation in international efforts against piracy in Somalia can be seen as reflecting both pragmatism and a defence of its interests in ensuring the security of supply routes. It has set in motion an attempt to develop some Chinese 'soft power' with Confucius Institutes and other efforts to promote Chinese culture. However, it is clear that there is no comprehensive grand strategy or masterplan in which China is planning to take over the world. More likely, China will develop continue to shape its contemporary identity and as this becomes more pronounced and 'Chinese characteristics' come more to the fore, these will affect the international order in more subtle ways.

In the absence of such a sophisticated strategy, the main risks associated with Chinese foreign policy lie in sudden crises which may be difficult to contain, combined with the Chinese leaderships' tendency to encourage nationalist sentiment in the general population when faced with international difficulties, such as when a US spy plane was caught or when some other clandestine activities such as the hacking of foreign corporations are brought into the limelight, or when territorial or World War II-related tensions with Japan flare up. In such cases, there is always a risk of conflict.

4 Sovereignty

4.1 Introduction

The importance of the concept of sovereignty in China's international legal discourse can only be understood properly with a reference to history, as set out in the previous two chapters.[420] It is a historical irony that a European term with feudal origins,[421] which underwent several changes in meaning after it was adopted as an underlying principle of organisation of the Westphalian state system, became the cornerstone of the foreign policy of the paramount non-Western power with an ideology originating in marxism-leninism (itself of course also European).[422] This chapter sets out to explain how this came about and what China's present-day insistence on the importance of sovereignty entails for the future of international law, and in particular that part of international law which seems most at odds with state sovereignty: the protection of individuals.

As recalled in previous chapters, sovereignty is the one principle that is invoked most by China in international legal discourse. At the same time, there is probably no concept that is more multifaceted in international legal discourse than sovereignty. It is a key term not only in law, but also in politics, and has different manifestations within states and between them.[423] Although there is no agreement on what exactly sovereignty is or means, there is wide agreement that there is no agreement. Indeed, every account of sovereignty starts with noting this, and then providing an incomplete description. It has

420 Portions of this and other chapters have earlier appeared as Wim Muller, 'China's sovereignty in international law: from historical grievance to pragmatic tool', *China-EU Law Journal* 1:3-4 (2013) 35-59.

421 See for a useful discussion of the wider context in pan-European legal history: Antonio Padoa-Schioppa, 'Conclusions: Models, Instruments, Principles' in: Antonio Padoa-Schioppa (ed), *Legislation and Justice* [The European Science Foundation: The Origins of the Modern State in Europe, 13-18th Centuries] (Oxford: Clarendon Press, 1997) 335-369, noting the "destructiveness" of the "principle of absolute sovereignty" at 367.

422 As for example noted as an issue in Chinese-European relationships by Zhongqi Pan, 'Managing the conceptual gap on sovereignty in China-EU relations', *Asia Europe Journal* 8 (2010) 227-243, in particular at 236.

423 "Sovereignty is a central concept in international relations (IR), international law (IL), political theory, political philosophy and modern history. Indeed it predates the separation of those disciplines." See Melea Lewis, Charles Sampford and Ramesh Thakur, 'Introduction' in: Trudy Jacobsen, Charles Sampford and Ramesh Thakur, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008) 1-15.

even been noted that where there is a certain consensus on what related ideas and concepts sovereignty is about, those concepts and ideas themselves are subject to controversy.[424] Another issue on which there is agreement, is that the sovereignty is transforming due to the process of globalisation and increased interconnectedness in the world, and that the concept has been under attack. The nature of the attacks differ – some authors advocate the abolition of states and sovereignty with it.[425] Others have suggested replacing the word, in order to clarify its underlying values and "break out its normative content", so that it would be a bit clearer what exactly we are talking about.[426]

This chapter will provide another incomplete discourse on sovereignty, and include an overview some aspects of sovereignty which are relevant to the way China uses the concept in international law and diplomacy. It aims to answer the questions why sovereignty is so important for China, what sovereignty means to the Chinese government, domestically and internationally, and which legal consequences flow from the Chinese use of sovereignty. As noted, there is a vast wealth of literature on sovereignty as it remains one of the most contested issues of international law today. This chapter has no pretence of tapping this wealth exhaustively, but will refer to some key works which are most helpful in explaining China's position, as well as its impact on the continuing transformation of sovereignty in contemporary international life.

By answering the question what consequences China's stance on sovereignty has, this chapter also hopes to address at least in part the criticism aimed at the contemporary sovereignty debate that it has no practical import.[427]

4.2 The debate on sovereignty in recent literature

Whereas the current debate on sovereignty started as an attack, this has evolved, by now,

424 George Pavlich and Charles Barbour, 'Introduction' in: *After Sovereignty: on the Question of Political Beginnings* (Abingdon and New York: Routledge, 2010) 1-11, at 2.

425 Philip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990), para 13.2.

426 Louis Henkin, 'The Mythology of Sovereignty' in: Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 351-358, at 352.

427 See, e.g., ibid. Pavlich and Barbour, *supra* note 424, 2 and John Doyle, 'New Models of Sovereignty for Contested States: Some Empirical Evidence of Non-Westphalian Approaches' in: Howard M. Hensel (ed.), *Sovereignty and the Global Community: the Quest for Order in the International System* (Aldershot: Ashgate, 2004) 151-165, at 151.

into a call for a 'reconception' of the concept. The attack started at the end of the Cold War, or maybe even earlier, and had subsided by the early 2000s.[428] During that time, a lot of studies were published which placed the contradictory uses of the concept of sovereignty into a context. Historical studies demonstrated the way in which sovereignty had been used to defend opposing rights and meanings. International relations and international law re-assessed what sovereignty meant in their respective disciplines. Political theorists and philosophers re-examined the political roots of sovereignty, from its association with personal rule to notions of popular sovereignty, and domestic legitimacy.[429]

The sovereignty debate is intimately tied to the assessment of the future of the nation-state. The modern state system may be Westphalian in origin, but the nation-state is a nineteenth-century idea, and the contradictions inherent in this idea have not been resolved. The nation-state was proclaimed dead by the same people who thought that sovereignty as a concept should be abolished, but then it was realised that the reality of the current international framework was a bit more resilient.

As has been described in the previous chapters and will be set out in more detail in this one, the People's Republic of China has been very attached to the principle of sovereignty since its founding, emphasising that it makes up the essence of the Five Principles of Peaceful Coexistence, and referring to it in many public statements.[430] The relative importance of its sovereignty, and with it the Five Principles, has not been constant, but from 1982 the Five Principles have been placed at the heart of Chinese foreign policy, with a fresh interpretation that claims that they reflect the principles of the UN Charter. In the period after the Tiananmen Incident, in the view of one observer in 1994, "the old conception of State sovereignty has returned with a vengeance to the Chinese leadership afflicted with a siege mentality that goes back to the semi-colonial period of unequal treaties."[431] This made the Chinese government the major actor which swam against the tide in a decade in which many, especially from the global human rights community, were

428 Donnelly states "[a]t least since the 1970s, analysts have touted the decline of sovereignty in the face of [...] globalization." Jack Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000) 141.

429 See the references throughout this chapter.

430 See *infra*, 2.3.2 and 3.3.3.

431 Samuel S. Kim, 'Sovereignty in the Chinese Image of World Order' in: Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 425-445, at 431-432.

attacking sovereignty with full force. Apart from the realisation that there was not a clear alternative to the system of sovereign states, this may well have contributed to a more balanced debate. In the first decade of this century, the Report of the UN High-Level Panel and the subsequent UNSG report *In larger freedom* reaffirmed at the highest international policy level, that the system of sovereign states is not going away soon.[432]

The assessments of the use of sovereignty are intimately tied with the issue of international interventions, even if this is only one aspect of the notion of sovereignty. Sovereignty was the 'deadest' when the 'international community' allowed large scale violations of human rights and crimes against humanity, including genocide, to occur in former Yugoslavia and in Rwanda (while ignoring many other crises, such as famine in North Korea, and human rights violations in Burma/Myanmar) and engaged in an ill-conceived and incompetently executed, UN Charter violating intervention in Kosovo. Following the launch of its "War on Terror", the United States became a champion of imperial sovereignty, not respecting the sovereignty of other states much and violating that of Iraq in particular. By then sovereignty was alive again on other sides as well, as enthusiasm for "humanitarian intervention" waned and the "responsibility to protect" (R2P) was watered down.[433]

Currently, most literature on sovereignty is concerned with carefully describing its different manifestations and calling for a "reconception" to deal with the practical difficulties caused by the current organisation of the international order. The problems are known: transnational crime, international terrorism, diseases that do not respect borders, migration; all in the process of 'globalisation', a term used to describe increasing interconnectedness of the world. Part of China's very real resistance to some aspects of globalisation (while embracing others) consists of acts asserting its sovereignty domestically, including by attempts to regulate the Internet within its borders through the 'Great Firewall'.

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432 Report of the High-Level Panel on Threats, Challenges and Changes, A More Secure World: Our Shared Responsibility, UN Doc A/59/565, 2 December 2004; Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, UN Doc A/59/2005/Add.3, 26 May 2005.

433 See *infra*, 7.2.2.

4.3 China's take on sovereignty, in its own words

Sovereignty is one of the cornerstones of Chinese foreign policy as well as its position in international law, as evidenced by its prominent place in the Five Principles of Peaceful Coexistence, included in the Preamble of the Chinese constitution. As noted in the previous chapter, one authoritative account of Chinese foreign policy defines China's core interests as sovereignty, security and development.[434] China has been called the 'last bastion' of Westphalia, and in the view of one observer a content analysis by an alien on the annual UN debate on the state of the world might even lead this visitor to conclude that sovereignty is a Chinese idea.[435] Even so, as has been set out in the previous chapter, China's government as well as its mainstream intellectuals are keenly aware of western discourses on sovereignty and the challenges of globalisation and proposing their own ways of facing them.[436]

In the view of Chinese scholars of the 1950s and 1960s, partly following the Soviet approach, the most valuable principle in international law was sovereignty, positioned between two positions defined as "absolute sovereignty", which meant that a state could do anything that pleased it, and "restrictive sovereignty" according to which sovereignty was "relative, divisible, and subject to restriction and abandonment". China's own position could be called "reciprocal sovereignty" or "mutual respect for sovereignty", which meant that "other states respect our sovereignty and we respect the sovereignty of other states".[437] Kim qualifies this position as "both self-serving and self-limiting".[438] Kent sees flaws in this way of reasoning, as sovereignty can, in her view, never be absolute whereas on the other hand the principle of *pacta sunt servanda*, which China subscribed to, is an expression of the restrictive sovereignty rejected by it.[439] Although this is an understandable point of criticism, the PRC position can be easily understood as reflecting China's prior history in

434 Wang Jisi, 'China's Search for a Grand Strategy: A Rising Great Power Finds Its Way', *Foreign Affairs* 90 (2011) 68-79, at 71.

435 Yongjin Zhang, 'Ambivalent Sovereignty: China and Re-Imagining the Westphalian Ideal' in: Trudy Jacobsen, Charles Sampford and Ramesh Thakur, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008) 101-115, at 101. Kim, 'Sovereignty', *supra* note 431, 428.

436 See, e.g., Cai Tuo (ed), *Chinese Perspectives on Globalization and Autonomy* (Leiden and Boston: Brill, 2012). See also Zhang, 'Ambivalent Sovereignty', *supra* note 435 and Pan, *supra* note 422.

437 Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford, CA: Stanford University Press 2007), 41-42.

438 Samuel S. Kim, *China, the United Nations, and World Order* (Princeton, NJ: Princeton University Press 1979) 415.

439 Kent, *Beyond Compliance*, *supra* note 437, 42.

international law. The conditionality implied by "reciprocal sovereignty" seems to make respect for another state's sovereignty depend on the extent to which China would trust another state to respect its own sovereignty. In that case, it would be logical to only enter into treaties and subject oneself to the principle of *pacta sunt servanda* with states which are sufficiently trusted. It also provides for a rationale to explain why China feels free to reply to the United States' annual report on human rights, which often features strong criticism of China, with a report with its own assessment of the USA's human rights record.[440]

In more recent years, the doctrine of unequal treaties has been mentioned less often, but it appears that the Chinese doctrinary position on sovereignty has not changed much. Since the dominant discourse on sovereignty has recently been the one proclaiming its end, it is not surprising that representatives of the Chinese position take a slightly defensive position when explaining China's adherence to the concept.

This is the case, for example, in a 2007 speech entitled "Chinese observations on international law" by Xue Hanqin, which opens with some observations on the notion of sovereignty.

> I am fully aware that in the contemporary discourse of international law, advocacy of respect for sovereignty may not be a very popular theme to begin with, but as I have also observed that [sic] oftentimes China's adherence to the principle of sovereignty is simply misinterpreted in the west as a disregard of the development of international law, or worse still, considered an excuse to evade its international responsibility.[441]

She then goes on to provide an essentially historical explanation for the importance China attaches to sovereignty, and to emphasise the difference in its meaning for Europeans on the one hand, and the developing world on the other, essentially defining sovereignty as crucial to the independence, or the external exercise of self-determination, of developing

440 For the human rights reports of the U.S. Department of State, see <http://www.state.gov/j/drl/rls/hrrpt/>. The most recent report on China can be found at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186268> [25.3.2013]. It claims that "[d]eterioration in key aspects of the country's human rights situation continued". The full text of China's report is also available: State Council Information Office, 'The Human Rights Record of the United States in 2011', <http://news.xinhuanet.com/english/china/2012-05/25/c_131611554.htm>. [25.3.2013] Its introduction states that "[a]s in previous years, the reports are full of over-critical remarks on the human rights situation in nearly 200 countries and regions as well as distortions and accusations concerning the human rights cause in China. However, the United States turned a blind eye to its own woeful human rights situation and kept silent about it. The Human Rights Record of the United States in 2011 is hereby prepared to reveal the true human rights situation of the United States to people across the world and urge the United States to face up to its own doings."

441 Xue Hanqin, 'Chinese Observations on International Law', *CJIL* 6 (2007) 83-93, at 84, para. 4.

countries and safeguarding the diversity of the international order.

Taking note of the existing controversy surrounding sovereignty and the future of the Westphalian system, Xue points out that "for Europeans, the system by now is over 360 years old, but for non-European countries, particularly for the Asian and African countries, it is only 60 years old." While Europe has been undergoing a process of integration, in this process the concept of sovereignty is "undeniably changing, but not diminishing" as evidenced by the results of the Dutch and French EU constitutional referenda.[442] Contrary to Europe, for developing countries international law is "based on a foreign legacy".

> After their independence from colonial rule, mostly after WWII, these new states accepted international law as the normative framework to conduct their international relations. They did so not only because as a condition for recognition they had to, but also because they did consider fundamental principles of the legal system as enshrined in the UN Charter reflected certain values they had been fighting for: sovereignty, equality, democracy and self-determination. International law entitled them to maintain political independence and territorial integrity, and empowered them to establish the political system of their own choice, which are of fundamental importance to these new nations.[443]

After emphasising the importance of sovereignty to safeguarding the diversity and pluriformity of international life, Xue then goes on to assert that China "strongly upholds the principle of sovereignty, because it believes in diversity and mutual respect in international political life" and links this explicitly to China's "historical past as well as its vision of the future world order." Recalling the importance of the Five Principles of Peaceful Coexistence to China's "foreign policy of independence and peace" and acknowledging that they "by and large reiterate the fundamental principles of international law as provided in the Purposes and Principles of the UN Charter", she states that their "essence" is the principle of sovereignty.[444] In her Hague lectures, Xue elaborated on this point, referring explicitly to the TWAIL literature.

> China's advocacy and consistent practice in international relations for sovereign equality among States, regardless of their size, wealth and might, exhibits its idealism

442 *Ibid*., 84-85, para. 7.

443 *Ibid*., 85, para. 8. See also Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice', *ICLQ* 62 (2013) 31-54, at 33-34 for the belief among developing nations that sovereignty could serve as an important protection for economically and politically vulnerable states from the global South against more powerful ones from the North, even if its use in practice has been questionable.

444 Xue, 'Chinese Observations', *supra* note 441, 85-86, para. 10.

> for international law; despite its criticism of the colonialist and imperialist content and practice of international law, it accepts a normative order based on consistent and objective standards and criteria applicable to all States.[445]

Xue's views are virtually identical to oft-repeated statements by Chinese officials, as is evidenced throughout this thesis. They were expressed in very similar words by Li Zhaojie, and reflect the point made by Wang Tieya in his Hague Academy lecture.[446] Explicit historical references may be found to such historical traumas as 'gunboat diplomacy'.[447] In the words of Wang Tieya:

> The PRC sticks to the doctrine of sovereignty not only because China has bitter experiences of its sovereignty being ruthlessly encroached upon by foreign powers in the past, but that it also has the conviction that the principle of sovereignty is the only main foundation upon which international relations and international law can be established and developed. The Chinese put emphasis on sovereignty because it is the hard-worn prize of their long struggles for their lost sovereignty. They take sovereignty as a legal barrier protecting against foreign domination and aggression.[448]

There is no denying the validity of the point that the developing world is not as used to enjoying its sovereignty as the states of Europe and that there are historical reasons for developing countries to feel strongly about their sovereignty.[449] This certainly includes China, as is also explained in chapter 2 – in particular, the 'century of humiliation', followed by civil war, foreign invasion, and exclusion of the PRC government from the United Nations for the first two decades of its existence. With regard to the latter, however, it should be pointed out that the PRC has maintained its insistence on the inviolability of sovereignty from its founding.[450] Indeed, maintaining China's sovereignty has been crucial to any Chinese government, regardless of its ideology.[451] One Chinese writer presents the achievement of sovereign equality by all states as a sign of the slow progress of humankind.[452]

445 Xue Hanqin, 'Chinese Contemporary Perspectives on International Law — History, Culture and International Law', *Recueil des Cours* 355 (2012) 41-233, at 66.

446 Li Zhaojie, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order', *Singapore Journal of International & Comparative Law* 5 (2001) 314-326, at 321-322.

447 See also Zhang, 'Ambivalent Sovereignty', *supra* note 435, 102.

448 Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours* 221 (1990) 195-369, at 290. Li Zhaojie uses virtually the same words in Li, 'Legacy', *supra* note 446, 322.

449 See *infra*, section 1.3.3 and chapter 2.

450 See also Wang Tieya, 'International Law in China', *supra* note 448, 288; Kim, 'Sovereignty', *supra* note 431, 429.

451 Li, 'Legacy', *supra* note 446, 318.

452 Gao Feng, 'China and the principle of sovereign equality in the 21st century' in: Sienho Yee and Wang

All this being said, it still remains unclear what exactly is meant by sovereignty, and which aspects of sovereignty in particular China is clinging to most. It is to this question that we must now turn.

4.4 What does sovereignty mean?

As recalled above, the meaning of sovereignty is a matter of continuing controversy. What is clear, is that sovereignty is not a fact, but an idea, or concept.[453] It is not possible to tell what sovereignty *is*, but it is possible to describe what it means.[454] While the 'end of sovereignty' has been proclaimed many times, especially since the end of the Cold War, it has proved to be an enduring concept in international legal discourse from the seventeenth century onwards.[455] Various authors have offered non-exhaustive enumerations of the different meanings in which sovereignty has been used.[456] For example, Krasner lists four: international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdepence sovereignty.[457] It could however be said that some of these four forms overlap: in Krasner's definition, 'international legal sovereignty' only refers to "the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence", whereas 'Westphalian sovereignty' refers to "political organization based on the exclusion of external actors from authority structures within a given territory".[458] Most international lawyers would probably equate international legal sovereignty with Westphalian sovereignty.

Current writers on sovereignty usually identify the beginning of modern conceptions of sovereignty with the birth of the modern Westphalian state and political

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Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 224-239, at 227.

453 Ulrich Haltern, *Was bedeutet Souveränität?* (Tübingen: Mohr Siebeck, 2007), VII.

454 *Ibid*. See also Wouter G. Werner, 'State sovereignty and international legal discourse' in: Ige F. Dekker and Wouter G. Werner (eds.), *Governance and International Legal Theory* (Leiden/Boston: Martinus Nijhoff, 2004), 125-157, at 155.

455 *Ibid*., 126.

456 For example Oscar Schachter, 'Sovereignty – Then and Now' in: Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 681-688.

457 Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999) 3. He repeats the same usages later, mentioning that these are the "at least" four ways in which it has been 'commonly used', at 9.

458 *Ibid*., 3-4.

thinkers like Jean Bodin, John Locke and Thomas Hobbes. However, there are earlier antecedents for thinking about sovereignty, even if it is not called by that name, and clearcut accounts which start with a seventeenth-century narrative discount the transformations that have taken place since Westphalia, the fact that the nation-state did not arrive until the nineteenth century, and that some of the political ideas have been read anachronistically or did not have the influence that is sometimes attributed to them.[459] Given the European origins of the international legal framework, it is also not surprising that non-European conceptions of state power and authority have not yet been written into contemporary conceptions of sovereignty, even though there is a clear need to do this.[460] This would be particularly desirable in the case of China, which after all, still carries the name that indicates its central place in the world order that it inhabited for millennia before its encounter with the rest of the world.[461] The preoccupation of Chinese international legal scholars with traditional Chinese conceptions of world order indicates that this topic is not only of historical interest.[462] It is relevant in tangible and intangible ways in the present and crucial to an understanding of the self-image of China.

For the purposes of this thesis, an exhaustive historical account of the different guises of sovereignty throughout the ages is unnecessary. What is relevant, is the division between the domestic use of sovereignty and the meaning in which it is used in the relations between states, to at least understand the context in which Chinese legal discourse on sovereignty has to be seen.

4.4.1 Politics and popular sovereignty

Between politics and international law and international relations, one source of tension between different meanings of sovereignty comes from the distinction between popular sovereignty and state sovereignty based on the effective control of territory.[463]

459 For a useful historical problematisation of narratives on sovereignty, see Wayne Hudson, 'Fables of Sovereignty' in: Trudy Jacobsen, Charles Sampford and Ramesh Thakur, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008) 19-31.

460 See, *inter alia*, *ibid*., 31; Lewis, Sampford and Thakur, 'Introduction', *supra* note 423.

461 *Zhongguo* or 'Middle Kingdom'. See *infra*, 2.2.

462 See, for example, Wang, 'International Law in China', *supra* note 448, 205-225; Li Zhaojie, 'Traditional Chinese World Order', *CJIL* 1 (2002) 20-58. See also the accounts in studies on China's diplomacy, e.g. Kim, *China, the UN*, *supra* note 438, 19-48 and *infra*, chapter 2 and 3.3.5.

463 Lewis, Sampford and Thakur, 'Introduction', *supra* note 423, 1.

In contemporary usage in democracies, domestic discourse on sovereignty tends to focus on popular sovereignty, raising questions of legitimacy, representation, and participation of the governed. In the case of China, an immediately arising issue is the fact that China is not a (liberal) democracy. Rather, popular sovereignty is identified with the state, and effectively with the Chinese Communist Party, as reflected in the numerous statements which recall how only in 1949 the "Chinese people" achieved "national liberation". Article 2 of the Constitution of the PRC asserts that "All power in the People's Republic of China belongs to the people" and defines the organs through which "the people exercise state power".

Either consciously or subconsciously, western observers will have associations with popular sovereignty on their minds even if strictly speaking this is not the use to which the concept is put in the context of legal discourse, in particular when China invokes its sovereignty in relation to human rights related issues. To the Chinese government, no domestic considerations of popular sovereignty are at play when it invokes its sovereignty at the international level. After all, it is the sole legitimate representative of all of China, including its ethnic minorities. Any criticism aimed at China, and any perceived attempt to address an issue related to its domestic order, are therefore treated by the Chinese government as an attack on China's sovereignty and an unwarranted interference in its internal affairs. They can also be seen as an attack on the legitimacy of Communist Party rule. Since the Communist Party is equated with the liberty of the Chinese people, criticism of the Chinese government challenges not the legitimacy of its rulers, but the legitimacy of China itself.[464]

This type of reflex is not unique to China. In the history of European human rights protection, states have also seen criticism of their human rights record as an attack to themselves, and this reaction can also be used to nip any debate in the bud, thus giving rise to allegations of hypocrisy. The first way for the state to hide behind the veil of sovereignty is therefore to conflate considerations of political legitimacy with outside interference

464 For an example of this view, see Chen Min, 'Why China Won't Listen', *The New York Times*, 15 November 2011, <http://www.nytimes.com/2011/11/16/opinion/why-china-wont-listen.html> [9.1.2012]. According to the author, the Chinese government equates 'sovereignty' with "the absolute, non-negotiable right to rule over a billion subjects. When sovereignty is in play, there is no longer a right or wrong side of an issue, just winning or losing".

against its sovereignty as such. However, this is not the only veiling technique. To understand other possible techniques, a closer look is necessary to the meanings of sovereignty in the international order.

A milder way of expressing these considerations of domestic sovereignty is to once again draw attention to China's recent history of social upheaval and chaos, in particular of the Cultural Revolution. It is an axiom within the Chinese government that more political turmoil and instability has to be prevented at all cost, and that government authority and powers of control are therefore to be strengthened. Internal stability is also seen as an international responsibility by the government, and this is most evident in the Chinese government's human rights rhetoric, as will be discussed in more detail in the next chapter.[465]

4.4.2 Sovereignty in the international order

One way to clarify the meaning of sovereignty in international legal discourse is to have it preceded by another word. Hence, the late Ian Brownlie discussed not sovereignty, but territorial sovereignty in his textbook on international law.[466] Sovereignty is thus associated with the exercise of control over territory. It also evokes associations with ownership, which led international jurists to use modes analogous to ownership to describe the acquisition of territory.[467] Various authors have expressed dissatisfaction with the use of the word 'sovereignty'. Brownlie, when discussing sovereignty and also 'jurisdiction', points out that "the student is faced with a terminology which is not employed very consistently in legal sources such as works of authority or the opinions of law officers, or by statesmen, who naturally place political meanings in the foreground."[468] To him, 'sovereignty' is the "normal complement of state rights, the typical case of legal competence", whereas 'jurisdiction' is used for "particular rights". "In brief, 'sovereignty' is legal shorthand for legal personality of a certain kind, that of statehood [...]".[469] Dugard also primarily associates sovereignty with

465 Li, 'Legacy', *supra* note 446, 323-324.

466 Ian Brownlie, *Principles of Public International Law* (6th Edition; Oxford: Oxford University Press, 2003), chapter 6 .

467 John Dugard, *International Law: A South African Perspective* (2nd Edition; Landsdowne: Juta, 2000) 113. See also Brownlie, *Principles*, 106.

468 Brownlie, *Principles*, *supra* note 466, 106.

469 *Ibid*.

exclusive control over territory and, quoting Max Huber in the *Island of Palmas* case,[470] stresses the use of sovereignty in connection to the independence of states, and also states that he avoids the term 'sovereignty' "wherever possible as it has an elastic meaning which varies according to the discipline and context in which it is used."[471] Other authors distinguish sovereignty in international legal discourse by specifying that we are speaking of 'state sovereignty'.[472]

The consensus among international legal scholars is therefore that sovereignty is associated with notions of independence. This implies that sovereignty is a relative notion, as independence presupposes that there are other entities to be independent from. In the view of Wang Tieya, when sovereignty is under attack, it is rather the doctrine of *absolute sovereignty* that is criticised: the notion of an absolute, uncontrolled state. In the international context, that would be an aggressive, expansionist state.[473] It is clear that this is not the sovereignty which is current in international law, as it is based on the sovereign equality of states, with its corrolaries of non-interference in internal affairs and prohibition of aggression. The sovereignty of each state is therefore restricted by the sovereignty of other states, in the same way that the liberty of an individual in a liberal state is restricted by the liberty of others.[474] It is also clear from the discussion here and above that China does not adhere to an absolute notion of sovereignty, although this is often attributed to it.[475]

From the above, it is clear that sovereignty is intimately connected with the existential aspects of the state. It is not merely recognition of the existence of the state, or "a representation of a state of affairs", but also "a *claim to authority*; a claim which has been institutionalized, defined and redefined within the framework of international law."[476] Reality departing from the legally institutionalised state of affairs is a major cause of

470 *The Island of Palmas Case (or Miangas) (United States of America v. The Netherlands)*, PCA, 4 April 1928, arbitrator: M. Huber.

471 Dugard, *supra* note 467, 112 fn 3.

472 Kim, 'Sovereignty', *supra* note 431; Werner, 'State sovereignty', *supra* note 454.

473 Wang, *'International Law in China', supra* note 448, 291-292.

474 A parallel noted by Martii Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Reissue with a new epilogue; Cambridge: Cambridge University Press, 2005) 224 and Werner, 'State sovereignty' *supra* note 454, 126, and earlier by Henkin, 'Mythology', *supra* note 426, 353-355.

475 See above, 4.3. See also Gao Feng, 'sovereign equality', *supra* note 452, 226.

476 Werner, 'State sovereignty', *supra* note 454, 133 (emphasis in original). See also Kim, 'Sovereignty', *supra* note 431.

difficulty regarding sovereignty, as is clear from the existence of the notion of 'failed states', as well as recognition issues regarding governments following civil wars, with which China has first hand experience.

It is also the reality of existential inequality between states which is often mentioned by critics of sovereignty to challenge the concept. After all, isn't sovereign equality a mere fiction if the world consists of states as diverse as Liechtenstein and the United States, which enormous differences in population, territory, natural resources, economies, military capabilities, and so forth?

However, both small, militarily weak states and big, powerful states will refer, in their international relations to their sovereign rights. Small states may actually invoke their sovereignty to object to undue interference by larger, more powerful states. Large and powerful states may assert their sovereign right to take certain types of action. Disputes between states are often expressed in terms of opposing sovereign rights. Just like in a liberal society, where individuals are not equal either but enjoy equality before the law, sovereign equality of states does not mean that all states are actually equal in international law.

In the international legal order, however, there are legal consequences to this existential inequality between states. A better understanding of the way in which sovereignty works may yield a better understanding of the impact China's changing position in international relations may have on its definition of its own sovereignty.

4.4.3 Sovereign equality and existential inequalities

In the above, a parallel has been drawn between the sovereignty of states and individual liberty in a liberal society. One major difference between a liberal society and the international legal order, is that in a liberal society citizens can compensate for their relative powerlessness vis-à-vis other citizens by having recourse to institutions of the state. International society, as is commonly known and often discussed, lacks similar mechanisms. They are not completely absent, but the ones which exist are incomplete, often leaving states to rely on self-help. The international legal order has therefore been compared to primitive societies, and this situation is a reason for many lawyers to argue

that "international law is not law". Constitutionalist international lawyers in particular try to promote the strengthening of international institutions.[477]

As a result, in spite of all proclamations of sovereign equality, inequalities between states are part and parcel of the international legal order. This is recognised by most. What is recognised less often, is that the inequality between states and the dominance of certain more powerful states is, in many ways, legally accepted and has been embedded in the international legal order for centuries.[478] The discussion in the previous chapters shows that Chinese observers cannot be more aware of this. In the analysis of Gerry Simpson, the interplay between sovereign equality and existential inequality can be seen in the opposing uses to which sovereignty has been put. Identifying the language of 'rogue', 'criminal' or 'outlaw' states in writings as early as those of Grotius, he argues that the hegemony of the great powers, and the exclusion of certain states as 'rogue' states, has been "legalised" in international law since 1815. He identifies three "separable elements" of sovereign equality: formal equality, legislative equality and existential equality, and argues that the latter two have, in practice, been heavily qualified, by "exercises of legalised hegemony" and an "anti-pluralist conception of international community", both originating in the early nineteenth century.[479] In international law-making, for example, great powers have a relatively larger influence both in the formation of customary international law and in securing a special position for themselves in treaty negotiations, even if formally speaking all states are equal. On the point of existential equality, it has been most clear that this equality was restricted when states were excluded from 'the club' of the international community because they were not 'civilised', 'peace-loving', or for other reasons undesirable in the view of the dominant states in the 'international community'. The 'anti-pluralism' identified by Simpson is a specifically liberal form of anti-pluralism. In his view, since the late 1990s it is predominantly states which were perceived to be anti-liberal that were excluded: 'criminal states', that sponsored terrorism, or non-democratic, authoritarian states.[480]

The interesting position that China finds itself in now, is that it has properties which,

477 See *infra*, 1.3.5.

478 Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

479 *Ibid*., 56.

480 *Ibid*., 278-316.

in the current analysis of how sovereignty works, point both at great power status, signifying a higher position on the legal hierarchy, but also still remaining elements of 'outlawry', as China remains a nondemocratic state, with a non-western tradition as well. Although time and again the Chinese government has stated that China does not "seek hegemony" (although it is obsessed with returning to its "rightful place"), it is currently the only state which is a serious contender to supplant the hegemony of the United States, and could maybe afford itself the unilateral instincts which the US has permitted itself in international relations, including certain readings of international law.[481] At the same time, pluralism is strongly promoted by China in international law and international relations.[482]

4.5 Sovereignty in China's practice

As is clear from the above, aside from a term that covers several legal notions connected to independence, autonomy and territorial control, sovereignty is also connected to notions of identity. In light of its recent history, it is no surprise that China has manifested itself as a great champion of sovereignty, considering also that it has outstanding issues regarding its territorial integrity. In addition to the Soviet and TWAIL traditions, the insecurities of China's leadership with regard to its own legitimacy also explain the importance sovereignty has in Chinese international legal discourse.[483] In this section, a number of Chinese legal positions on doctrinary issues will be discussed, as well as practice which flows directly from the corrolaries of sovereignty: territorial integrity and peaceful settlement of disputes. Human rights are discussed in the next chapter, while the issues of non-interference, humanitarian intervention and the 'responsibility to protect' are discussed in chapter 7.

4.5.1 Sovereignty and international legal personality

The principle of sovereign equality of states underlies the entire framework of international law. States are the only full subjects of international law, possessing full sovereignty and full

481 See Michael Byers and George Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003). See also *infra*, 3.3.5.

482 See *infra*, 3.3.6.

483 See *infra*, 3.3.5. See also Malcolm N. Shaw, *International Law* (5th Ed.; Cambridge: Cambridge University Press, 2003) 33-36 for a discussion on Soviet and Third World approaches, including the Chinese one.

international legal personality. In recent decades, it has been recognised that other participants in the international legal system can also possess a certain measure of international legal personality, giving rise to the issue of non-state actors.[484] The most likely participants to enjoy at least a certain measure of international legal personality are international organisations and individuals. Many international organisations have provisions in their constitutional treaties providing for international legal personality (examples EC and post-Lisbon EU), and the implied legal personality of international organisations was recognised as early as 1949 by the ICJ in the *Reparation for Injuries* case.[485] A few years before, Sir Hersch Lauterpacht had called for recognition of individuals as subjects of international law.[486] Although, in particular in the context of supranational organisations, it can be said that states have transferred parts of their sovereignty (from a functional perspective) to these organisations, this does not mean that these organisations now enjoy sovereignty.[487]

China has long been vehemently opposed to the notion that individuals are subjects of international law, despite the development of international human rights law and international criminal law, which have endowed individuals with rights and obligations at the international level. However, China's position is that it is up to states to guarantee the implementation of the rules laid down in these fields.[488] Referring to Wang Tieya in his 1981 Chinese language textbook on international law, Kim explains the Chinese position as follows.

> The proposition that individuals have finally become subjects of international law in the post-Holocaust and post-Nuremberg era is ruled out of court on all counts in the Chinese international law literature and policy pronouncements. Such a view is considered theoretically untenable and practically infeasible because it pits the principle of State sovereignty against the principle of human rights in mutually

484 See infra, 1.3.4.1. See also, *inter alia*, Robert McCorquodale, 'An Inclusive International Legal System', *LJIL* 17 (2004) 477-504.

485 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *ICJ Reports* 1949, 174, at 179. "Accordingly, the Court has come to the conclusion that the [UN] Organization is an international person."

486 H. Lauterpacht, *An International Bill of the Rights of Man* (NY, Columbia University Press 1945). See also H. Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950) 61.

487 Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* (4th revised edition; Boston and Leiden: Martinus Nijhoff, 2003), §§1-5, starts out with emphasising the remaining importance of state sovereignty.

488 See *infra*, chapter 5 for more discussion.

> conflictive terms. The principle of State sovereignty is always prior and superior to the principle of human rights because only the former can guarantee the implementation of the latter.[489]

Based on the same source, Hungdah Chiu reaches the same conclusion and cites the same rationale.[490]

In its pleadings before the ICJ in the proceedings on the declaration of independence of Kosovo, China acknowledged that states are no longer the only subjects of international law, but insists that they are the most important ones, stressing the connection to their sovereignty: "As the most important subjects of international law and as members of the international community, sovereign States stand on territory as their foundation and the exclusive domain for the exercise of their sovereignty."[491] Based on the contuining importance it attaches to sovereignty and the primacy of states in its pronouncements on human rights law and humanitarian law (see the next chapters), it does not seem that the government had anything other in mind than international organisations.

It should be noted that the Chinese government has explicitly accepted that "it is necessary to appropriately manage the relationship among maintaining common interests of the whole mankind, protecting national interests and safeguarding the interests of individuals."[492] Although statements like these seem carefully crafted to avoid any suggestion of legal implications, they recognise the legitimacy of the various actors.

4.5.2 Ius cogens *and obligations* erga omnes*; sources of international law*

Recognition of community interests is connected to acceptance of the notion of peremptory norms of international law. According to Kim, China gradually accepted the principles of *ius cogens* in the course of its participation in the Third UN Conference on the Law of the Sea (UNCLOS-III, 1973-1982), as well as the common heritage of mankind. He sees this as a

489 Kim, 'Sovereignty', *supra* note 431, 439, quoting Wang Tieya, *Guojifa* (国际法), (Shijiazhuang, Falu chubanshe, 1981) 267-268. This quote is repeated almost verbatim in Li, 'Legacy', *supra* note 446, 324.

490 Hungdah Chiu, 'Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987', *International Lawyer* 21 (1987) 1127-1166, at 1133.

491 Verbatim record (uncorrected) of the oral pleadings of the People's Republic of China (Xue Hanqin), *Accordance of the Unilateral Declaration of Independence of Kosovo* (Advisory Opinion), International Court of Justice, 7 December 2009, CR 2009/29, par. 16.

492 Zhu Lijiang, 'Chinese Practice in Public International Law: 2007 (I)', *CJIL* 7 (2008), 485–507, at 488, para. 8.

relaxation of China's conception of state sovereignty.[493] Indeed, Li Haopei published an article on *ius cogens* in 1982.[494] China acceded to the Vienna Convention on the Law of Treaties in 1997, thus implicitly accepting the notion of *ius cogens* if it had not done so before.[495] Having accepted the notion of community interests in international law in this way, the question is to what extent China sees the safeguarding of these interests as a legal matter as well as a diplomatic matter. In diplomacy, China often recognises the importance of multilateralism.

In a 2007 statement on the ILC Articles on State Responsibility, the Chinese representative praised the "value orientation" of the Articles of "safeguarding the interest of a state as well as the common interest of the international community", explicitly using provisions on breaches of obligations under peremptory norms of general international law, as laid down in Articles 40 and 41, as an example, as well as the possibility of invocation of responsibility by another than the injured state (Article 48). However, China objected to allowing non-injured states to invoke the responsibility of a state which violates such a norm, as "[t]his practice could [...] be easily abused." Rather, it suggested establishing "a collective authorization mechanism under which relevant States other than the injured State may invoke State responsibility and take legitimate measures." This mechanism should obtain authorisation from the UN or another body which could represent the international community.[496]

As for peremptory norms themselves, China still found problems with the draft articles. Noting that serious breaches do not entail greater responsibility in the current formulation, the Chinese government suggested to include "provisions on the specific meaning of serious breaches as well as provisions on the proportioned responsibility commensurate with different breaches." In the current formulation, it seems, it was unclear in the view of China that non-violating states should not recognise a "lawful situation

493 Kim, 'Sovereignty', *supra* note 431, 432.

494 Published in English in 1982, and republished: Li Haopei, '*Jus cogens* and international law' in: Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 499-522.

495 Vienna Convention on the Law of Treaties, 23 May 1969, entry into force 27 January 1980, UNTS 1155, 331. Ratification status at <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en> [20.01.2012]

496 Ma Xinmin, 'Statement on Responsibility of States for Internationally Wrongful Acts (2007)', *CJIL* 7 (2008) 563-566, at 564-565, paras 3, 6.

created by a breach of international obligations", should not help maintain that situation and help to end this breach. Unfortunately, it is unclear from this account what the Chinese government considers the current legal obligations.[497]

Recently, China remarked in the context of the validity of reservations to treaties and the ILC draft guidelines on the topic, that "there were significant differences of opinion as to the scope of [peremptory] norms [of general international law] and who should determine it." For this reason, it stated that the expression should be deleted from a draft guideline on permissibility of interpretative declarations.[498] Although this point has a certain validity, it seems that even though China has recognised the notion of peremptory norms, for the time being it is trying to restrict its use.

In an overview of the status of international law in China's domestic legal system, the authors claim that the concept of "fundamental principles of international law" is "widely used and accepted in China", and that rather than "treating general principles of international law as a separate source of international law, fundamental principles of international law are regarded as higher law and constitute parts of *jus cogens* in most cases."[499] The authors mention the Five Principles of Peaceful Coexistence and the seven principles contained in the UN Declaration on Friendly Relations as well as those in the Charter of Economic Rights and Duties of States as examples of what China considers fundamental principles of international law.[500] They also claim that these are implicitly incorporated into the preamble of the PRC Constitution. This explanation lacks clarity and seems to suffer from some conceptual confusion, as it seems unlikely that they intended to say that all or most of the provisions of especially the Charter of Economic Rights and Duties constitute *ius cogens*. There is no doubt that some of these principles reflect peremptory norms, but there is no indication in China's *opinio iuris* or practice about the

497 *Ibid*, para 7.

498 Zhu Lijiang, 'Chinese Practice in Public International Law: 2009', *CJIL* 9 (2010) 607-662, para 4. See also Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, 19 May 2011, UN Doc A/CN.4/L.779. This version does not contain the expression "peremptory norms".

499 Jerry Z. Li, and Sanzhuan Guo, 'China' in: Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press 2011) 158-194, at 159.

500 *Ibid.* See GA Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, UN Doc A/RES/25/2625 and GA Res 3281 (XXIX), Charter of Economic Rights and Duties of States, 12 December 1974, UN Doc A/RES/29/3281. See *infra*, 2.3.3.2.

specific rules that it does consider to have this status. It is also possible that these principles have been referred to as "fundamental principles" in diplomatic rhetoric without assigning a specific legal status to them.

4.5.3 Territorial integrity

One major reason why China is so strongly wedded to the principle of sovereignty, is that it has a number of outstanding issues with its territorial integrity which are yet to be resolved, a historical legacy of an empire turned nation-state, foreign occupation and civil war.[501] The best known of these are the issues of Taiwan[502] and Tibet, but in addition, China has territorial disputes with Japan over the Diaoyu islands, Vietnam over the Xisha islands, the Philippines over the Nansha Islands (also known as the Spratly islands) and Huangyan Islands, and Malaysia over the Danwan Reef in the Nansha islands. Its border with India remains disputed. Moreover, it has gone to war with India and Vietnam partly because of these issues. According to Kim, "China has more territorial disputes than any other major or middle-ranking power in the world."[503]

China defines each of its irredentist claims in absolutist terms and almost identical language. Each of the disputed territories has been Chinese "inalienable" territory since "ancient times" or "times immemorial". With the paradoxical vocabulary which usually comes with territorial disputes, it finds it necessary to say that "China has undisputable sovereign rights over them". Any attempt at internationalisation of such conflicts is treated as an unwarranted interference in China's internal affairs. Any attempt by another claimant to exercise its claim to disputed territory is "illegal and invalid".[504] For each of its territorial disputes, China has expressed its intention to resolve the matter peacefully, through consultation in accordance with rules of international law. However, the unilateral language it uses to assert its claims has the legal implication that even though it is reluctant to use force to assert its claims, China would not consider this illegal. The fact that it actually has resorted to the use of force in the past will not be reassuring to other states with claims. It has adopted legislation which appears to authorise its military to use force in support of its

501 See *infra*, 3.3.4.
502 See *infra*, 2.2.4 and 2.3.3.1.
503 Kim, 'Sovereignty', *supra* note 431, 442.
504 Zhu, 'Chinese Practice: 2009', *supra* note 498, paras 5-11.

sovereignty in these disputed areas. Many statements have been made by China and by Chinese scholars that China will never occupy foreign soil and is against the use of force, as has also been seen in the previous chapters. Its expansive definition of its own territory combined with the uncompromising, unilateral language in which it expresses these claims are the only source of doubt on the sincerity of those statements.[505]

China's diplomacy with regard to its territorial claims has been shifting back and forth in recent years, in which periods of increased assertiveness have alternated with periods with a more moderate approach. Explanations for this vary from internal political considerations and power struggles to China's reactions to neighbouring's state actions and concerns about its own image, or its wider strategy of avoiding conflict. The most relevant question with regard to China's attitude to international law would be whether China is prepared to settle these disputes in accordance with international law, and possibly even using international legal mechanisms.[506]

4.5.3.1 ASEAN and the South China Sea

The significance of the various in the South China Sea has increased in recent decades as a result of the rights coastal states derive from the Law of the Sea as laid down in UNCLOS of 1982. In addition to the disputes on sovereignty over the various islands, states have also made overlapping and conflicting claims under UNCLOS. China has couched its claims mainly in historical terms, asserting historical rights which have not gone uncontested by the other states claiming sovereignty.[507] In this respect, it has stated that in its view UNCLOS "does not entitle any country to extend its exclusive economic zone or continental shelf to

505 Kim, 'Sovereignty', *supra* note 431, 436-437. Also Zhang, 'Ambivalent sovereignty', *supra* note 435, 113.

506 M. Taylor Fravel, 'All Quiet in the South China Sea: Why China is Playing Nice (For Now)', *Foreign Affairs*, 22 March 2012, <http://www.foreignaffairs.com/articles/137346/m-taylor-fravel/all-quiet-in-the-south-china-sea> [08.04.2012]. See also M. Taylor Fravel, 'Regime Insecurity and International Cooperation: Explaining China's Compromises in Territorial Disputes', *International Security* 30 (2005) 46-83. In 2009, China adopted a law on Island Protection which includes all islands over which sovereignty is disputed. See Jianyuan Su and Yiwei Lu, 'The Law of the People's Republic of China on Island Protection 2009', *International Journal of Marine and Coastal Law* 25 (2010) 425-436, at 433-435.

507 For a Chinese perspective, see Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications', *AJIL* 107 (2013) 98-124, followed by an analysis of these claims: Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea', *AJIL* 107 (2013) 124-141. For a general overview from the perspective of UNCLOS, see Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea', *AJIL* 107 (2013) 142-163.

the territory of another country, and it does not restrain or deny a country's right which is formed in history and abidingly upheld."[508] One observer criticises this position as threatening "the entire legal regime established under UNCLOS" considering how large the area is and how many states are involved.[509] Moreover, China's reference to historical factors - which it only started to make officially in 1998[510] - has been criticised as "the indeterminacy of its legal position as evidenced by the deliberate use of ambiguous terminology and tacit reliance on principles nor recognized by international law".[511]

In 2002, China and ASEAN adopted a Declaration on the Conduct of Parties in the South China Sea.[512] The Declaration is not binding under international law and contains, according to its preamble, a number of principles "to enhance favourable conditions for a peaceful and durable solution of differences and disputes among countries concerned". It starts by reaffirming the parties'

> commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;[513]

It goes on to declare that the parties

> undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;[514]

In addition, the parties "undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability" and calls for a slew of

508 Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011, FMPRC, 16 September 2011, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t860126.htm> [13.5.2013]

509 Beckman, 'Maritime Disputes', *supra* note 507, 163.

510 Dupuy and Dupuy, 'China's Historic Rights', *supra* note 507, 129. The historical claims have been made earlier unofficially. See for example Teh-Kuang Chang, 'China's Claim of Sovereignty Over Spratly and Paracel Islands: A Historical and Legal Perspective', *Case Western Reserve Journal of International Law* 23 (1991) 399-420.

511 *Ibid.*, 141.

512 Phnom Penh, 4 November 2002, <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> [20.2.2013]

513 *Ibid*., para 1.

514 *Ibid*., para 4.

communicatory activities among officials in order to "build trust and confidence between and among them", while also providing that certain activities will only be undertaken in cooperation.[515]

The peaceful intentions expressed in the Declaration did not always prevent the parties involved from rhetoric and actions to assert their claims. Recent developments cast doubt on China's commitment to UNCLOS as expressed in the Declaration. Although it did not make a reservation to the dispute settlement procedures in Part XV of UNCLOS when it ratified the treaty in 1996,[516] China did make a declaration ten years later in accordance with Article 287 UNCLOS:

> The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.[517]

Other states have made similar declarations, which allows parties to the treaty to choose their preferred means of dispute settlement at any time upon or after ratification.[518] The categories of disputes listed in Article 298 have to do with disputes concerning Articles 15 (delimitation of the territorial sea), 74 (delimitation of the exclusive economic zone (EEZ) between states with opposite or adjacent coasts) and 83 (delimitation of the continental shelf between states with opposite or adjacent coasts) relating sea boundary delimitations, or involving historic bays or titles; military activities, and disputes which are currently under the Security Council. It appears that for disputes concerning other subject matter, arbitration as provided for under Annex VII to UNCLOS remains compulsory by virtue of Article 287(3).

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515 *Ibid*, para 5.

516 Upon ratification on 7 June 1996, China made a declaration in which it claimed an exclusive economic zone (EEZ) as required by UNCLOS. In addition, it announced that it would "effect, through consultations, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability." Furthermore, China "reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992" and reaffirmed the UNCLOS provisions on the right to innocent passage.
See <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification> [20.2.2013]

517 Declaration made after ratification (25 August 2006); *ibid*.

518 For other declarations, see <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en> [20.2.2013]

China reached an agreement with Vietnam in October 2011 on "basic principles guiding the settlement of maritime issues", which emphasised the importance of international law, and UNCLOS in particular. China and Vietnam have since established a working group, tasked with demarcating and developing disputed territories.[519]

4.5.3.2 The Philippine attempt at arbitration

In January 2013, the Philippines decided to seek arbitration under UNCLOS over its competing territorial claims with China about the Nansha or Spratly Islands.[520] Apparently, the Philippine government believed that other peaceful methods of settling the territorial dispute had been exhausted and the requirements of UNCLOS had been met. On 19 February 2013, China notified the Philippines that it "rejects and returns the Philippines' Notification and Statement of Claim".[521] In the view of the Chinese government, "[t]he note and related notice not only violate the consensus enshrined in the Declaration on the Conduct of Parties in the South China Sea (DOC), but are also factually flawed and contain false accusations." Its spokesman also reiterated China's commitment to addressing the dispute through bilateral talks.[522]

These exchanges reflect the problem that disagreements about the proper way to settle a dispute can turn into a kind of dispute themselves, given also that the question whether other avenues has been exhausted can also be a matter of disagreement between the parties to a dispute. It is clear that China is not interested in relinquishing control over the issue to a third party, while the Philippines believe it has more to gain from this avenue. The language of the Declaration on the Conduct of Parties in the South China Sea is sufficiently vague to support both China's and the Philippines' assertions on how to

519 Fravel, 'All Quiet', *supra* note 506. For a recent overview of the issue between China and Vietnam, see Junwu Pan, 'Territorial Dispute between China and Vietnam in the South China Sea: A Chinese's Lawyer's Perspective', *Journal of East Asia and International Law* 5 (2012) 213-234, which does not mention this agreement.

520 'China reiterates islands claim after Philippine UN move', *BBC News*, 23 January 2013, <http://www.bbc.co.uk/news/world-asia-21163507> [20.2.2013]

521 Republic of the Philippines, Department of Foreign Affairs, 'The Department of Foreign Affairs' Statement on China's Response to the Philippines' Arbitration Case', 19 February 2013, <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/7465-the-department-of-foreign-affairs-statement-on-chinas-response-to-the-philippines-arbitration-case> [20.2.2013].

522 'China rejects Philippines' arbitral request', *China Daily*, 19 February 2013, <http://www.chinadaily.com.cn/china/2013-02/19/content_16238133.htm> [20.2.2013].

proceed. The procedures prescribed by UNCLOS become compulsory when "no settlement has been reached by recourse to section 1", but it is unclear at which moment this is the case.

Despite China's rejection of the arbitration, the arbitration proceedings are moving forward in accordance with the provisions of UNCLOS. In March 2013, ITLOS president Shunji Yanai appointed a second judge to the panel, leaving three more positions to be filled.[523] At the end of April, three more arbitrators were appointed.[524] The PRC government continued to insist that the arbitral tribunal would not have jurisdiction as the dispute between China and the Philippines is about territory, while the UNCLOS procedures have to do with the law of the sea.[525] The provisions of Annex VII allow the arbitration to go forward upon the request of the Philippines; the president of the International Tribunal for the Law of the Sea (ITLOS) can appoint members to the panel if China refuses to do so.[526] In case one party does not appear before the arbitral tribunal, the proceedings can continue. The tribunal must satisfy itself that it has jurisdiction and also that the claim is well founded in fact and law.[527] Usually, these decisions are rendered together. It can be argued that China would be acting more in accordance with UNCLOS – certainly its spirit – if it would cooperate in appointing the arbitral tribunal and argue that it has no jurisdiction.[528] One observer speculated, based on the assumption that China's jurisdictional argument was stronger than its argument on the merits, that the Chinese government did not believe it has much to lose from walking away, even if this would lead to a "default judgment" against it.[529]

523 Tarra Quismundo, 'Sea tribunal names judge to PH arbitration case vs China over Spratlys area', *Philippine Daily Inquirer*, 25 March 2013. <http://globalnation.inquirer.net/70257/itlos-names-judge-to-ph-arbitration-case-vs-china-over-spratlys-area> [29.3.2013].

524 'Arbitrators appointed in the arbitral proceedings instituted by the Republic of the Philippines against the People's Republic of China', ITLOS Press Release, 25 April 2013, ITLOS/Press 191.

525 'Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea', 26 April 2013, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml> [30.4.2013]

526 Article 3(d) Annex VII to UNCLOS.

527 Article 9 Annex VII to UNCLOS.

528 See also comments by Donald C. Clarke, 'China rejects arbitration with Philippines under UNCLOS; can it?', Chinese Law Prof Blog, 19 February 2013, <http://lawprofessors.typepad.com/china_law_prof_blog/2013/02/china-rejects-arbitration-with-philippines-under-unclos-can-it.html> [20.2.2013].

529 Julian Ku, 'Goodbye UNCLOS Dispute Settlement? China Walks Away from UNCLOS Arbitration with the

These events are one of the clearest manifestations yet of China's reluctance to engage with independent international dispute settlement mechanisms, even though it might well prevail and participation in the procedure would demonstrate a true commitment to the international rule of law. It can either be seen as a lack of trust on China's part that it will get a fair hearing, or as a way for a great power to hold out and obtain a better result for itself through other, non-legal means in the long run.

4.5.3.3 The Diaoyu or Senkaku islands dispute with Japan

Since the end of 2012, China's dispute with Japan over the Diaoyu or Senkaku Islands in the East China Sea has also risen to international prominence. Although the dispute was older, the significance of the islands only grew after the 1970s when the surrounding seas were found to be rich in resources and developments in the law of the sea indicated that the sovereign over those islands would by extension have rights over the resources in question.[530] The leaderships of the PRC and Japan in the 1970s and 1980s decided however not to stir up the matter, while the islands were administered by Japan after the United States has ceded control over them in 1972 without itself taking position on who possessed sovereignty. A brief crisis in 1996 did not have serious consequences.[531]

Both before and after that period, the dispute has received considerable attention in scholarship. Although both China and Japan justify their claims to sovereignty over the islands by invoking international law. While Japan's claim is based on the assertion that the islands were *terra nullius* before it took sovereignty, China claims that it did have rights and Japan's establishment of sovereignty in the 19th century was illegal. Japan also argues that

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Philippines', Opinio Juris, 19 February 2013, <http://opiniojuris.org/2013/02/19/goodbye-unclos-dispute-settlement-china-walks-away-from-unclos-arbitration-with-the-philippines/> [20.2.2013] For a summary of China's claim and view on UNCLOS regarding this issue, see Tang Rui, 'Letters: Huangyan Island Belongs to China', *Wall Street Journal*, 26 June 2012, <http://online.wsj.com/article/SB10001424052702304870304577488713068832048.html?mod=googlenews_wsj#articleTabs%3Darticle> [20.2.2012].

530 Dai Tan, 'The Diaoyu/Senkaku Dispute: Bridging the Cold Divide', *Santa Clara Journal of International Law* 5 (2006) 134-168, examining the islands in the context of UNCLOS III.

531 For background, see, *inter alia*, Ian Buruma, 'A Dangerous Rift Between China and Japan: As the U.S. Urges restraint, Asia's two great powers play politics with the past and court a crisis', *Wall Street Journal*, 10 May 2013, <http://online.wsj.com/article/SB10001424127887324326504578465032155562000.html?mod=WSJ_hps_LEFTTopStories> [10.5.2013]; Erica Strecker Downs and Phillip C. Saunders, 'Legitimacy and the Limits of Nationalism: China and the Diaoyu Islands', *International Security* 23 (1998-1999) 114-146; J. Ashley Roach, 'China's Straight Baseline Claim: Senkaku (Diaoyu) Islands, *ASIL Insights* 17(7), 13 February 2013

the islands were not part of territories it ceased from China under the 1895 Treaty of Shimonoseki at the end of the Sino-Japanese War, considered an unequal treaty by China and in any case reversed after the Second World War. From China's perspective, in addition, the claim may rest in part on the assertion that the islands are part of Taiwan, which has also acted to assert its own claim. In any case, the relevant law has made the outcome of any litigation very unpredictable, which probably explains why neither side has shown much interest in bringing the case to international adjudication.[532]

4.5.3.4 Participation in the ICJ advisory proceedings on Kosovo

China's outstanding issues with regard to its territorial integrity are also the most likely explanation why, for the first time in the history of the PRC, it decided to appear before the International Court of Justice in the proceedings on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion).[533] China's participation in the proceedings is significant because it is the first time it decided to take part in legal proceedings; for example, it did not participate in the proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,*[534] despite its support for the Palestinian cause in the past. As may be expected, in its written[535] and oral pleadings[536] it has espoused a very traditional approach to international law, emphasising sovereignty, the importance of territorial integrity of states and downplaying the importance of concepts such as humanitarian intervention and self-determination, especially in connection to a possible right to secession. The ICJ did not address these issues

532 Carlos Ramos-Mrosovsky, 'International Law's Unhelpful Role in the Senkaku Islands', *University of Pennsylvania Journal of International Law* 29 (2007-2008) 903-946, at 907. See also, more recently, Hui Wu and Dan Zhang, 'Territorial Issues on the East China Sea: A Chinese Position', *Journal of East Asia and International Law* 3 (2010) 137-149 and Shigeyoshi Ozaki, 'Territorial Issues on the East China Sea: A Japanese Position', *Journal of East Asia and International Law* 3 (2010) 151-174, neither of which advocates international adjudication: Wu and Zhang suggest separating the Diaoyu/Senkaku dispute from maritime delimitation and postponing it, while Ozaki suggest settling it through negotiation. Unsubstantiated rumours suggest that Japan has been more willing to submit the dispute to international adjudication in private talks, but it has not made unequivocal statements to this effect in public.

533 *ICJ Reports* 2010, 403.

534 *ICJ Reports* 2004, 136.

535 Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo, 16 April 2009, <www.icj-cij.org>.

536 CR 2009/29 (Xue), 7 December 2009.

in its eventual Opinion.[537]

4.5.4 Peaceful settlement of disputes and international adjudication

As the previous section shows, China is very reluctant to submit any of its territorial disputes to independent judicial mechanisms. It has a stated practice of not accepting any provisions in treaties on such methods of dispute settlement.[538] It has not accepted the compulsory jurisdiction of the ICJ under Article 36(2) of its Statute, although it is hardly alone in this: only around one-third of the member states of the UN have done so.[539] It appeared before the ICJ once, in the advisory proceedings on Kosovo described in the previous subsection. It has also accepted, to an extent, the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) as described in the previous section. Its participation there has been limited to a submission in the advisory proceedings on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area*.[540] China has also been reluctant to accept any rights of individual petition to or independent inquiry by human rights treaty bodies (as will be seen in the next chapter) and has stayed out of the International Criminal Court even if taking an active interest in its establishment and first decade of existence.[541]

In remarks to the China-ASEAN Forum on Legal Cooperation and Development in 2011, Ma Xinmin, Counselor in the Department of Treaty and Law of the FMPRC, stated that China recognised that "diplomatic means such as negotiation, consultation, inquiry, mediation and conciliation and legal means such as arbitration and adjudication are

537 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, 403. See also Bing Bing Jia, 'The Independence of Kosovo: A Unique Case of Secession?', *CJIL* 8 (2009) 27-46. Jia argues that remedial self-determination was not the basis for Kosovo's secession, but rather international intervention through the UNSC. This seems a convincing position, which would also be helpful to China in its own territorial matters as a SC member.

538 Summary record of the 1469th meeting: China, UN Doc CERD/C/SR.1469, para 2. See also *infra*, 5.3.4.3. See also Julian Ku, 'China and the Future of International Adjudication', *Maryland Journal of International Law* 27 (2012) 154-173, 161-162.

539 Declarations Recognising the Jurisdiction of the Court as Compulsory, International Court of Justice: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> [22.9.2011]

540 ITLOS Seabed Disputes Chamber, Case No. 17, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area*, Advisory Opinion of 1 February 2011. Written Statement of the People's Republic of China, 18 August 2010. See <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_China.pdf> [14.5.2013]

541 See *infra*, 5.3.4.3 and 6.3.3.

commonly used in settling treaty disputes and other international disputes" and that all these means could be applied to settle treaty disputes, interestingly, "except inquiry, because the latter mainly involves disputes on facts."[542] He then provides an explanation of the way China conducts its treaty dispute settlement, stating that China has developed these mechanisms fairly late as it is "closely linked with the historical process of China's integration into the international community."[543] China is not a party to any treaty on treaty dispute settlement, but in many of the more than 340 international conventions and 22,000 bilateral treaties which China had concluded, there were specific provisions on dispute settlement which can be divided in three categories:

(1) through negotiation and consultation, mostly in bilateral treaties involving national sovereignty including extradition, mutual legal assistance, mutual visa exemption, consulair affairs and bilateral technical treaties;

(2) negotiation, consultation and arbitration, predominantly in non-political bilateral treaties including investment protection and international technical conventions, where arbitration is only used at the request of one party if negotiation and consultation did not suffice to settle the dispute. China did does not accept arbitration and has made reservations in treaties on human rights, counterterrorism and transnational organised crime;

(3) negotiation, consultation, arbitration and other means (such as mediation and consultation) involving a third party, such as the WTO dispute settlement process and various free trade agreements (FTAs), both China-ASEAN and bilateral.[544]

Negotiation and consultation are the "primary and priority means" and voluntary arbitration is "an important supplement". Mediation and conciliation are "applied with caution", because China prefers not to involve third parties other than the contracting parties to the treaty and compulsory jurisdiction of international judicial organs is not accepted.

542 Ma Xinmin, 'China's Mechanism and Practice of Treaty Dispute Settlement', *CJIL* 11 (2012) 387-392, at 388, para. 4.

543 *Ibid*., 388, para. 5.

544 *Ibid*., 388-390, paras. 6-7.

> China does not accept compulsory jurisdiction of the International Court of Justice (ICJ), and has never signed any special agreements with other countries on submitting disputes to the ICJ. In concluding bilateral agreements, we have never agreed to submit any disputes to the ICJ. In participating in multilateral conventions, we have made reservations without exception on the provisions concerning compulsory jurisdiction. For the system of compulsory binding dispute settlement provided in the United Nations Convention on the Law of the Sea, we made an "opt-out" declaration under the Convention. As for optional jurisdiction of the ICJ in technical treaties related to economic cooperation and trade, science and technology, aviation, environment, transport and culture, China has not made reservations. But since optional jurisdiction requires agreement among Contracting Parties in a dispute, China has never agreed to submit any disputes to the ICJ. So there is no precedent for China to submit disputes to international judicial organs.[545]

However, Ma does maintain that China "attaches great importance to the significant role of international judicial organs in upholding world peace and justice", pointing out that Chinese judges are working in international tribunals and "have made great contributions."[546]

Ma thus makes explicit that "equality and voluntarism" are preconditions for treaty dispute settlement practiced by China, claiming it as "an embodiment and a natural requirement of China's independent foreign policy of peace." Additionally, he invokes the "high importance" China places on "national sovereignty" and its opposition to "external interference". China tries to avoid involvement of third parties because it "firmly believes that consensus between the relevant parties is the fundamental way to address the disputes." He also claims that this "carries forward the fine tradition of Chinese culture", in which for "several thousands of years, the Chinese people have always cherished peace". "We Chinese are reluctant to bring cases to courts and always prefer solving disputes through non-confrontational means."[547] No additional explanation is given.

In practice, China's preferred mode of dispute settlement therefore remains bilateral negotiations and consultations. China has not used good offices, but has tried to use conciliation. It rejected arbitration in its border skirmish with India in 1962, stating that only direct negotiations could settle an issue as vital to national sovereignty as a border dispute. While before 1980 China usually made reservations to arbitration clauses in

545 *Ibid.*, 390-391, para. 8.
546 *Ibid*., 391, para. 9.
547 *Ibid.*, 392, paras. 10-11.

treaties, it began to do this less often.[548] As is apparent from the discussion in this thesis so far, this has to do at least in part with a lack of trust the international system, which is rooted in the PRC's own history of treatment as a second-class member and exclusion of the international order. There may also be a belief that the system is still 'rigged' in favour of the West.[549] For human rights in addition, there is the perception of the existence of a double standard.[550]

In addition to the limited acceptance of arbitration under UNCLOS described in the previous section, the two major exceptions in this regard are China's agreement, as part of its joining the WTO, to be subject to its dispute settlement procedures, and a limited and gradual acceptance of arbitration under the International Center for the Settlement of Investment Disputes (ICSID), which China only started to include in bilateral investment treaties (BITs) after initial hesitation.[551] Both exceptions have to do with international trade, which is so important to China's development policies that China overcame its reluctance.

China's participation in WTO dispute settlement (discussed in the next section) has been used in Chinese scholarship to advocate more participation in other forms of international adjudication.[552] For the time being, however, it seems unlikely that the government will change its policy soon and China's sovereigntist approach to international law makes it more likely that when it chooses a multilateral regime, it will opt for the most limited participation in adjudication possible, like it has done in these regimes as well as the

548 Kong Qingjiang, 'International Dispute Settlement: The Chinese approach and practice, and their implications' in: Muthucumaraswamy Sornarajah and Jiangyu Wang, *China, India and the International Economic Order* (Cambridge: Cambridge University Press 2010) 314-329. at 319-325.

549 Trust in the fairness and objectivity of proceedings is identified as a factor in the "capacity of a more centrally based law-creating consciousness to influence international behavior" by Richard A. Falk, *The Status of Law in International Society* (Princeton, NJ: Princeton University Press, 1970) 4. As a context-sensitive and non-quantifiable factor, its relative weight is difficult to assess, but the mode of analysis used in this thesis may be helpful towards understanding its relevance.

550 See chapter 5. See also Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007) 163-183.

551 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, UNTS 575, 159. China signed this convention on 9 February 1990. It has never been involved in an ICSID arbitration procedure. See also Guiguo Wang, 'China's Practice in International Investment Law: From Participation to Leadership in the World Economy', *Yale Journal of International Law* 34 (2009) 575-587, at 584-585; Kong Qingjiang, 'Bilateral Investment Treaties: the Chinese Approach and Practice', AYBIL 8 (2003) 105-136, at 129-132. Ku documents a few additional exceptions in early PRC treaty history in which it accepted compulsory arbitration. Ku, 'International Adjudication', *supra* note 538, 162.

552 Ku, 'International Adjudication', *supra* note 538, 169-170.

human rights treaty regime, where periodic reporting cannot be avoided.[553] In this regard, China's behaviour is quite similar to that of the United States, which has preferred international adjudication for economic matters but avoids and counters it in others. Ironically, China's participation in UNCLOS has been used in the US as an argument against US ratification for fear of "possible manipulation of international adjudication".[554]

As China is currently the only potential rival of the United States and occupies a similar position as a permanent member of the Security Council, its participation in international adjudication would also put various IR assumptions about international law to the test. The question remains to what extent China sees it as in its interest to actually settle some of its disputes using the mechanisms and principles prescribed by international law.

4.5.5 The WTO exception

China has been a member of the WTO since November 2001, joining after a long and arduous accession procedure.[555] As stated in the previous section, dispute settlement under the WTO Dispute Settlement Body is the most intrusive form of international dispute settlement that China has ever accepted.[556] This is not the only reason why WTO membership had a significant impact on China's sovereignty. China's domestic legal system has also needed to adapt to implement the rules required by the WTO.[557] The extent to which the WTO intrudes into the domestic sphere is summarised by Julia Ya Qin as follows.

> The WTO claims broad jurisdiction over trade in goods, trade in services, and trade-related intellectual property rights, and its rules penetrate into the traditionally domestic regulatory space of sovereign nations more than those of any other international organization ever did. Furthermore, the WTO is equipped with a dispute

553 The same conclusion is reached by Ku, *ibid.*, 171, although he does not mention the human rights treaty regime.

554 *Ibid.*, 172. Of course, the circumstances in which the US retreated from ICJ jurisdiction during the proceedings in the *Nicaragua* case are different from the PRC withdrawing the ROC's acceptance of compulsory jurisdiction. Similarities in the attitude to the ICC are discussed *infra*, 6.3.3. Both states have also had less friendly exchanges with human rights treaty bodies. See generally also Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012)

555 See *infra*, 2.4.

556 Ku, 'International Adjudication', *supra* note 538, 167.

557 Esther Lam, *China and the WTO: A Long March towards the Rule of Law* (Alphen aan den Rijn: Kluwer Law International, 2009). See also Kong Qingjiang, *China and the World Trade Organization: A Legal Perspective* (Singapore: World Scientific, 2002).

> settlement mechanism that features compulsory adjudication and binding decisions upon its 150-plus members.[558]

As a participant in the WTO, Qin finds that China has in the first decade of its membership mainly been "a 'system maintainer' rather than a 'system reformer'", remaining rather passive in the WTO rulemaking and dispute settlement processes and the greatest impact China has had on the world trading system remains the fact that it joined.[559] This belies fears that existed during the accession process and is similar to the assessment elsewhere that China is primarily a status quo power, or not so much a 'norm-maker' or 'norm-taker' but something in between.[560]

4.5.5.1 WTO dispute settlement

The WTO dispute settlement procedure is laid down in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).[561] As of May 2013, China has been involved in 11 cases as a complainant, in 30 cases as a respondent and in 98 cases as third party.[562] China initiated its first case as a complainant as early as March 2002,[563] although in this case it joined seven co-complainants with a strong case and a strong team.[564] China's initiated its second case as a complainant in September 2007, again against the United States.[565] Most of its cases have been against the United

558 Julia Ya Qin, 'China, India and WTO law' in: Muthucumaraswamy Sornarajah and Jiangyu Wang, *China, India and the International Economic Order* (Cambridge: Cambridge University Press 2010) 167-216, at 167. Although this is certainly true at the global level, Qin does seem to forget about the existence of the EU and the EC before it.

559 *Ibid*., 168-169.

560 As Rosemary Foot has said in the context of peace and security; see *infra*, chapter 7.

561 Annex 2 of the Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, UNTS 1869, 401.

562 See WTO, dispute settlement – disputes by country/territory, <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> [14.5.2013]. This does not include the cases involving Taiwan ('Chinese Taipei'), Hong Kong and Macau.

563 WTO, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, DS252. China joined the European Communities, Japan, Korea, Switzerland, Canada, Venezuela and Norway, and was subsequently joined by Mexico and New Zealand.

564 Qin, 'China, India and WTO law', *supra* note 558, 189-190.

565 WTO, *United States – Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, DS368.

States,[566] and the rest against the European Union.[567] Policy considerations have obviously played a role in the bringing of some cases, and some may also have been a direct response to cases brought against China by the respondent, such as the United States. China itself initially followed a litigation avoidance strategy (which also entailed avoiding panel reports by using mediation and conciliation), but began to change this from 2006 onwards.[568] Since then, a trade war has been taking place between the United States and China, but one which is waged exclusively through the initiation of WTO Dispute Settlement Body (DSB) procedures, which therefore serve their purpose as a method of peaceful dispute settlement.[569] China's fortunes, in addition, have been mixed, and it has not always prevailed, but chosen to adhere to decisions which were not in its favour and, by and large, to implement these decisions.[570] Overall, China's participation in WTO dispute settlement has been rated seen as having a positive effect on China, and a potentially positive effect on its confidence in international dispute settlement in general.[571]

Of the cases in which China has been involved before the WTO DSB, so far there has been one with certain human rights connotations, albeit indirectly, and seen by China in part in the context of cultural differences. In the *China – Publications and Audiovisual Products* case, initiated by the United States, the Appellate Body found that China's state import monopoly in cultural products (such as books, magazines, newspapers, CDs and DVDs) was

566 WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, DS379; *United States – Certain Measures Affecting Imports of Poultry from China*, DS392; *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, DS399; *United States – Anti-Dumping Measures on Shrimp and Diamond Sawblades from China*, DS422; *United States – Countervailing Duty Measures on Certain Products from China*, DS437; *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, DS449.

567 WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, DS397; *European Union – Anti-Dumping Measures on Certain Footwear from China*, DS405; *European Union and certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, DS452.

568 Qin, 'China, India and WTO law', *supra* note 558, 190-194. Kristie Thomas, 'China and the WTO Dispute Settlement System: From Passive Observer to Active Participant?', Working Paper (2011), <http://ssrn.com/abstract=1866259>.

569 Julia Ya Qin, 'China and International Rule of Law: A Decade of WTO Membership', keynote speech at the 7th Annual Conference of the European China Law Studies Association, Helsinki, 24 September 2012 (unpublished conference paper on file with author), 3.

570 Ku, 'International Adjudication', *supra* note 538, 168-169. The first case which China lost was WTO Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, 15 December 2008, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R. China informed the DSB in August 2009 that it had stopped the implementation of the offending legislation and subsequently withdrew it. See <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds339_e.htm> [14.5.2013]

571 Chi Manjiao, 'China's Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts', *Journal of International Economic Law* 15 (2012) 29-49, at 48.

inconsistent with its trading rights commitments under its Accession Protocol and did not satisfy the requirements of the public morals exception of the GATT 1994.[572] Although China's measures were found by the Appellate Body to be part of a content review mechanism to protect public morals and this could be justified by the GATT 1994, the manner in which this happened had to be consistent with the WTO agreement.[573] Upholding the earlier conclusion of the Panel, the Appellate Body concluded that China had not demonstrated that its measures were necessary to protect public morals.[574] Although the Chinese government has taken measures to amend its regulations on the right to import cultural products, they have not met WTO requirements, as this would effectively require China to dismantle its state import monopoly, and effectively restructure its censorship regime, allowing domestic and foreign private entities to engage in importing 'sensitive' products. This does not mean that China is required to change its censorship criteria or reduce its political censorship, but it does mean that it has to organise it differently than through the current system. Two Chinese commentators have criticised the Appellate Body for taking a narrow textual approach in its Report instead of a more holistic one.[575]

The issue of principle which has been raised by the case is therefore not whether a state is allowed to have a censorship regime to protect public morals. However, the case does raise the issue of the purpose of the trading rights obligations under the WTO. Qin raises the question if the mission of the WTO is to promote free trade, or to promote the free market as a value in itself. In the latter case, "[i]nstead of being concerned with mere trade liberalization, the WTO is also concerned with setting 'correct' norms for domestic economic governance, irrespective of the direct impact of such norms on international trade".[576] The latter approach would align more with those who see the WTO from a constitutionalist point of view and part of a multilevel constitutional framework which

572 WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 21 December 2009, WT/DS363/AB/R.

573 *Ibid*., paras. 231-233.

574 *Ibid*., para. 337

575 Julia Ya Qin, 'Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence – A Commentary on the *China – Publications* Case', *CJIL* 11 (2011) 271-322, at 272-273, paras. 3-4 and 283, para. 35.. See also Xiaohui Wu, 'Case Note: *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363/AB/R)', *CJIL* 9 (2010) 415-432, at 427, para. 18.

576 Qin, 'Pushing the Limits', *supra* note 575, 304-305, paras. 85-87.

shapes the form of multilevel trade governance.[577]

China has continued working with the DSB and in direct negotiations with the United States to comply with the recommendations and rulings, asking for understanding given "the complexity and sensitivity of the dispute". At a meeting on 24 May 2012, China stated that it had taken all necessary steps and was in full compliance, but the United States did not believe that a final resolution had been reached, although "significant progress" had been made.[578]

4.5.5.2 Domestic legal reform

The governance dimension of the WTO has been very visible in China from its entry into the WTO, and has, as noted above, been another way in which it has taken a flexible approach with regard to its sovereignty. In a way, this was a continuation of the legal reforms already initiated in 1978 with the beginning of the 'reform and opening up' era, which were after all aimed primarily at creating a 'socialist market economy' and thus to attract foreign investment.[579] Even though the transformation of China's legal system in the timespan of twenty years had been remarkable, it still left a lot to be desired by the time China was negotiating its accession, resulting in the negotiation of China-specific rules in China's Accession Protocol which have been described as 'WTO-plus' rules and 'WTO -minus' rules, which imposed, respectively, stricter rules than required by the WTO agreements, and importing members to use special protection against Chinese exports by deviating from and lowering the standards of WTO multilateral disciplines on trade remedies. These rules became part of WTO law.[580] In addition to China-specific rules, the WTO also set up a special Transitional Review Mechanism (TRM) to monitor China's post-accession legal and trade

577 See e.g. Chien-Huei Wu, *WTO and the Greater China: Economic Integration and Dispute Resolution* (Leiden and Boston: Martinus Nijhoff, 2012) 18. Wu refers in particular to the framework suggested by Petersmann. See for example Ernst-Ulrich Petersmann, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organisation Jurisprudence and Civil Society', *LJIL* 19 (2006) 633-668. In this framework, human rights concerns would play a greater role as constitutional values.

578 See <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm> [14.5.2013]

579 For an overview, see Yan Wang, *Chinese Legal Reform: The case of foreign investment law* (London and New York: Routledge, 2002).

580 Qin, 'China, India and WTO law', *supra* note 558, 172-172. Qin criticises the country-specific rules for having done harm to WTO jurisprudence. See Qin, 'Rule of law', *supra* note 568, 10. It has also been argued that this has led to an institutionalised unequal status for China which should be reconsidered. Xiaohui Wu, 'No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization', *CJIL* 10 (2011) 227-270.

measures, a mechanism no other WTO has been subject to.[581]

At the same time, Chinese policymakers also used WTO accession to push through certain legal reforms.[582] Many laws and regulations were reviewed in the years preceding accession, and also after China joined.[583] Many commentators agree that WTO accession has thus contributed to improving the rule of law in China and strengthening the Chinese legal system through its rules-based approach, contributing to a growing legal consciousness in Chinese society.[584]

For all these efforts, however, China's impact on the WTO, conversely, has remained relatively limited. In a comparison with India's WTO practice, Qin concludes that India has had a much greater impact, attributing this to a large extent to differences in legal culture.

> China's accession and post-accession practices [...] have the imprint of a weak legal culture and authoritarian institutions at home. Largely free from public scrutiny, China's WTO policies are set by the top government leaders. The wisdom of such policies is therefore at the mercy of the visions and understandings of the political elites. Generally weak in their sense of law, Chinese leaders tend to undervalue international legal processes and trust instead more power and diplomacy-based bilateral dealings.[585]

4.5.6 International law in the domestic legal order

A final issue concerning China's practice related to sovereignty is the role international law plays in its domestic legal order. The previous subsection alluded to the role WTO law played in influencing legal reform in China, a topic which will be explored in the next section as well. The question here concerns positive law, and the way the relationship between international law and domestic law is perceived in the domestic order and how Chinese legal doctrine deals with this. The question has gained particular relevance in human rights law, as the norms in human rights treaties are addressed to individuals and these treaties are therefore considered to be have more than a contractual dimension, which has been a problem for China..[586] There has been a lot of unclarity regarding the

581 Lam, *supra* note 557, 80-81.

582 *Ibid*., 201.

583 Gerald Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (Singapore: World Scientific, 2006) 100-102.

584 *Ibid*., 200-203. Qin, 'Rule of law', *supra* note 568, 5-8.

585 Qin, 'China, India and WTO law', *supra* note 558, 211.

586 See *infra*, chapter 5.

status of international law in Chinese domestic law, both with regard to customary law and treaty law. Moreover, the approach taken has evolved over the past decades, due in a large part to concerns related to protecting China's sovereignty.

The Constitution of the PRC is silent on the domestic status of treaties and customary international law.[587] Constitutional provisions themselves are also not enforceable in Chinese courts and the constitution does not provide for judicial review of law and regulations.[588] In 1997, Li Zhaojie noted that "in China the picture is not very clear in regard to the domestic validity of international customary law. But it is beyond question that international treaties derive their validity in domestic law by virtue of their adoption."[589] However, the latter turns out not to be as clear as stated by Li. China adheres to neither the monistic or dualistic view;[590] monistic views have been rejected in scholarship as denying state sovereignty while the dualist theory was criticised for focusing too much on formal antagonism between international and municipal law. Instead, a "dialectical model" was proposed which was derived from Soviet doctrine with two separate spheres "infiltrating and supplementing each other".[591]

These doctrinal considerations notwithstanding, for many years commentators maintained, like Li above, that international treaties were incorporated into the domestic legal system without requiring a domestic act, and all their provisions were directly applicable, a position which could be qualified as almost purely monistic. One observer even called it "a remarkable concession of sovereignty not equaled even by Western democracies", although this is somewhat exaggerated.[592] However, this theory of "adoption"

587 For 'fundamental principles' see *infra*, 4.5.2.

588 Li and Guo, 'China', *supra* note 499, 161-162.

589 Zhaojie Li (James), 'The Role of Domestic Courts in the Adjudication of International Human Rights: a Survey of the Practice and Problems in China' in: Benedetto Conforti and Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague etc.: Martinus Nijhoff, 1997), 329-352, at 346.

590 The relevance of this distinction has been questioned, in particular in relation to human rights treaties. The more relevant question is whether the norms in the treaties are actually applied by domestic courts in their substantive decisions. See Martin Scheinin, 'Domestic Implementation of International Human Rights Treaties: Nordic and Baltic Experiences' in: Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), 229-243, at 231.

591 Björn Ahl, 'Chinese Law and International Treaties', *Hong Kong Law Journal* 39 (2009) 735-750, at 737-738.

592 Ann Kent, *China, the United Nations, and Human Rights* (Philadelphia, PA: University of Pennsylvania Press 1999) 97.

of a treaty, in which the treaty took effect automatically, was mostly abandoned in the 1990s and never saw much application in practice. This was the result of changes in doctrine following anticipation of China's joining the WTO, when it was found that the wholesale applicability of the WTO Agreement and its annexes in domestic Chinese law was undesirable.[593]

Two other theories have since been taken, a theory of "transformation" and a "hybrid form", which is a synthesis of "adoption" and "transformation". The assumption behind "transformation" is that an act of transformation needs to take place to make the provisions of a treaty applicable in the domestic order. This could also be the case, in some views, when the legislator takes treaty obligations into account when drafting a national law. Transformation can take place selectively, including some provisions but leaving others out. In this view, both the WTO Agreement and international human rights treaties require a transformation of treaty obligations into Chinese law. In the "hybrid form", it is assumed that directly applicable (or self-executing) treaty provisions become binding without an additional domestic act, but provisions which are not directly applicable require a transformation. The criteria for direct applicability remain unclear. This view is supposed to lead to a "dialectical unity" with "Chinese characteristics".[594]

This doctrinal unclarity explains why in its practice before UN human rights treaty bodies, Chinese delegations have taken different positions regarding the question whether the norms contained in these treaties are applicable before its domestic courts, some of which even seemed self-contradictory.[595] For example, in 2000, the Chinese government described its position as follows to the Committee Against Torture.

> China adhered to the principle of *pacta sunt servanda*. Under the Chinese legal system, the international instruments to which that country was party were considered part of Chinese law and legally binding. In the event of conflict between an international instrument and a domestic law, the provisions of the international instrument took

593 *Ibid*., 740-742. Chen Yifeng also notes that the topic of treaty implementation is dealt with in "books and articles published from the 1990s onwards." Chen Yifeng, 'The Treaty-Making Power in China: Constitutionalization, Progress and Problems', *AYBIL* 15 (2009) 43-69, at 44.

594 Ahl, 'International Treaties', *supra* note 591, 742-743.

595 See, e.g., Summary record of the 252nd meeting, para 6, UN Doc CAT/C/SR.252/Add.1; Summary record of the 1164th meeting,UN Doc CERD/C/SR.1164 (1996), para. 44; Summary record of the 1459th meeting, UN Doc CERD/C/SR.1459 (2001), paras. 4 and 47 ; Summary record of the 419th meeting, UN Doc CEDAW/C/SR.419 (2002), para 36; Summary record of the 1062nd meeting, UN Doc CRC/C/SR.1062 (2005), para. 30. The delegate in the exchange with CEDAW was Xue Hanqin.

> precedence, unless contrary reservations applied. The Convention against Torture, having been ratified by the Standing Committee of the National People's Congress, was binding on Chinese law-enforcement and judicial organs. Special domestic measures nevertheless had to be taken to give effect to the provisions of international treaties.[596]

Reporting to the Committee on the Rights of the Child, it added that '[o]nly in cases which are not covered by the domestic law, stipulations of the international conventions will be cited in the court decision.'[597] The apparent contradiction between the assertion that international instruments are part of domestic law but still need implementation reflects the doctrinary discussion noted above, a discussion which has resulted in subtle shifts in China's position.[598] Clearly, the issue is not as settled as made out in front of the treaty bodies.[599] In addition, there is also a lack of clarity with regard to the question which norm will prevail in case of conflict between a domestic law and a treaty provision. The explanation provided to CAT above, that the provisions of the treaty instrument take precedence unless "reservations" apply, appears to be taken from domestic laws, Article 142 of the General Principles of Civil Law and Article 236 of the Civil Procedure Law.[600] It is not clear whether the "reservations" referred to are once that China has made upon ratification of the treaty or provisions of domestic law which differ from the treaty provisions.

In China's legislative practice, four actions by the state are relevant for the application of treaties: the publication of the treaty text, the adoption of statutory reference norms by the legislature, the issuance of judicial interpretation by the Supreme People's

596 Summary record of the 419th meeting: China, Poland, UN Doc CAT/C/SR.419 (2000).

597 Reply to list of issues: China, UN Doc CRC/C.21/WP.5 (1996), para 2 .

598 These contradictions are also apparent from scholarship. See, in addition to Li, 'Domestic Courts', *supra* note 589, 342, Wang Chenguang, 'Introduction: An Emerging Legal System' in: Wang Chenguang and Zhang Xianchu (eds), *Introduction to Chinese Law* (Sweet & Maxwell Asia, 1997), 1-29, 22; Zhu Yikun, *Concise Chinese Law* (Beijing: Law Press, 2003) [朱羿锟, 简明中国法 (北京: 法律出版社 2003)] 533; Kent, *Beyond Compliance*, *supra* note 437, 61; Xue Hanqin and Qian Jin, 'International Treaties in the Chinese Domestic Legal System', *CJIL* 8 (2009) 299-322. This last article, by Xue and Qian, seems to have shifted position during its various incarnations. It was first announced as part of David Sloss and Derek Jinks (eds), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009), but has not made it into the book (see at 3, fn. 6). The Cambridge University Press website still includes the contribution in the table of contents. See <http://www.cambridge.org/gb/knowledge/isbn/item2428167/?site_locale=en_GB> [16.5.2013] The present author relied on an earlier SSRN version dated 9 July 2008: <http://ssrn.com/abstract=1157501> [1.4.2010] and is grateful to Otto Malmgren for sharing his findings on its history with him. See Otto Malmgren, 'Constructing Enforcement - the Role of International Human Rights Treaties in Chinese Law', conference paper on file with the author.

599 Sophia Woodman, 'Human rights as "foreign affairs": China's reporting under human rights treaties', *Hong Kong Law Journal* 35 (2005) 179-203, at 183-189.

600 Referred to by Li and Guo, 'China', *supra* note 499, 168.

Court, and the harmonisation of domestic legislation with international obligations. The publication must be in the Gazette of the Standing Committee of the NPC. Statutory reference norms are provisions in statutes which under certain circumstances prescribe the application of norms of international law in a particular area of domestic law. Publication of the treaty is a necessary precondition for this. This has acted as a bar on the direct application of the WTO Agreement, since this Agreement was not published in the Gazette of the NPC Standing Committee. Judicial interpretations by the Supreme People's Court can sometimes fulfil a legislative rather than an adjudicative function, and are assumed sometimes to be able to act as a substitute for statutory reference norms; they may also mandate or exclude the direct applicability of a treaty. Harmonisation, finally, entails adaptation of existing laws and regulations to a treaty, which is independent from the aforementioned procedures but does not necessarily exclude them. Harmonised laws and treaties referred to by a statutory reference norm may be applicable in parallel, raising the question of which provision would prevail in case of conflict.[601]

In this complex and somewhat unpredictable practice, it turns out that provisions of human rights treaties are not self-executing. Treaty provisions can therefore not be applied directly, but need to be transformed. The implementation of these provisions is scattered around different laws, making it unclear which provisions have been implemented and which ones have not.[602] In light of the practice of recent years, it is possible that direct application of human rights treaties in Chinese courts may not happen at all.[603]

The hierarchy between treaty norms and statutory norms also remains unclear. In one analysis, three cases are identified in which Chinese laws can refer to treaties: either a clause along the lines described above in Civil Law and China's response to CAT, laws with an unconditional clause in which treaties take precedence over Chinese laws, and laws which refer to treaties but do not specify the priority. In case of the first category, it is also yet unclear who has the authority to determine the conflict. It is for example unclear if courts can do this, since they also do not have a right of judicial review as mentioned above.[604]

601 Ahl, 'International Treaties', *supra* note 591, 744-748.

602 Li and Guo, 'China', *supra* note 499, 172-174.

603 Sanzhuan Guo, 'Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects', *CJIL* 8 (2009) 161-179, at 178.

604 Li and Guo, 'China', *supra* note 499, 175 and 179.

In sum, China's practice, although idiosyncratic and not representing either a monist or a dualist approach, does not concede more sovereignty than that of any state which automatically accepts some or all treaty provisions as self-executing.[605] On the contrary, it limits the effectiveness of treaty implementation in China's domestic legal system.[606] The distinction of the international and national legal orders has been adopted as China's official position. [607]One example of a case in which this actually led to China not fulfilling an international obligation, is the much-publicised *Rio Tinto* case, in which an Australian national (of Chinese origin) was denied consular assistance despite the Australian-Chinese consular agreement. A Chinese government spokesman explicitly invoked China's judicial sovereignty in claiming that the Chinese court had taken the proper decision under Chinese law, which had offered the Chinese judge a lot of leeway to make his own consideration.[608]

However, the position which China has officially taken as reflected in front of human rights treaty bodies does enable it to respond consistently to their oft-repeated criticism that its domestic legislation should be brought in line with the relevant convention, rather than assuming it already is.[609] If practice in China is not fully in conformity with the convention because legislation has not yet been adopted, China can always point at the direct applicability of non-incorporated treaty provisions. The question remains to which extent this is actually done by Chinese courts. In the view of at least one scholar, a "harmonising process to bring domestic law into full line with international law is still needed" and the Chinese leadership, although aware of the effects of globalisation and its accompanying relative weakening of the nation state, is not yet ready to deal with these developments, in particular in human rights law.[610]

Political considerations aimed at preserving China's judicial sovereignty not only

605 See also Xue and Qian, 'International Treaties', *supra* note 598, 12-13.

606 Ahl, 'International Treaties', *supra* note 591, 750.

607 Statement by Ms. Guo Xiaomei Counsellor and Legal Adviser of the Chinese Mission to the United Nations At the Sixth Committee of the 67th Session of the UN General Assembly On The Rule of Law at the National and International Levels, FMPRC, 11 October 2012, <http://www.china-un.org/eng/chinaandun/legalaffairs/sixthcommittee/t978368.htm> [20.5.2013]

608 See Björn Ahl, 'Die Anwendung völkerrechtlicher Verträge in China – zur innerstaatlichen Bedeutung des chinesisch-australischen Konsularabkommens', *Archiv des Völkerrechts* 48 (2010) 383-395, at 384.

609 Concluding comments of the Committee on the Elimination of Discrimination against Women: China, paras 9-10, UN Doc CEDAW/C/CHN/CO/6 (2006). CAT has repeatedly called for China to incorporate the definition of torture of art 1 CAT in its legislation.

610 Zou Keyuan, *China's Legal Reform: Towards the Rule of Law* (Leiden: Brill, 2006) 248.

play a role in its limitation of the applicability of human rights law, but also of WTO law.[611] Both observers from within and outside of China have called for further strengthening of the legal system and the courts, which is part of the continuing debate on legal reform and strengthening the rule of law in China as discussed in the next section.

4.6 Sovereignty and Chinese definitions of rule of law

In the introduction, some remarks were already made about China's efforts to build up the rule of law and its connection to international discourse on the rule of law.[612] The issue is briefly revisited here in the context of the discussion on sovereignty. As the discussion in the previous sections has made clear, legal reform has been a requirement for China's reform policy, and to comply with WTO law and human rights law, further legal reform has been promoted in China. It is connected to various aspects of sovereignty in a number of ways. First, in many respects the legal system which China has constructed since 1978 is modeled after western concepts and examples, even if they have to be adapted "with Chinese characteristics". Second, the legitimacy of the current Chinese leadership is intertwined with the kind of rule of law it creates within the society, but at the same time the legal system provides its citizens for ways to challenge its legitimacy. A discussion of all aspects of the way in which legal reform and Chinese efforts to strengthen the rule of law are intertwined with the way in which Chinese society is reshaping itself go beyond the discussion in this thesis, but are noted as one factor which shapes China's outlook on international law and its use of sovereignty.[613]

While China is allowing itself to be shaped by international norms on the rule of law, it also has an influence on how the rule of law at the international level is now defined. In its 2008 White Paper on the rule of law, the Chinese government takes an expansive view of the notion. Not only does it assert the primacy of the Communist Party and the importance of the CCP's leadership to the "socialist legal system with Chinese characteristics" , it also describes other aspects of governance in order not to leave out any development which may

611 Ahl, 'International Treaties', *supra* note 591, 749-750.

612 See *infra*, 1.3.5.

613 See for more discussion Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press 2002); Leïla Choukroune, 'Global "Harmonious Society" and the Law: China's Legal Vision in Perspective', *German Law Journal* 13 (2012) 497-510.

be relevant to improving the rule of law in China. It mentions the 'institutionalisation' of democracy and making "laws to ensure democracy". It speaks of "awareness of law", "law enforcement for the people as an essential requirement", "fairness and justice as a value to be pursued", of a "Constitution-centered socialist legal system", the "reliable legal protection" for human rights, by which are means, as usual "subsistence and development" first, but also "citizens' basic rights and freedoms" and "the right of all members of society to equal participation and development." With a nod to Hu Jintao's contribution to official CCP ideology, the White Paper also states that the rule of law "promotes economic development and social harmony". And finally, it mentions improvements in "[a]dministration by law and fair administration of justice", "[r]estraint of and supervision over the use of power" and the aspirational nature of the rule of law in the sense that despite all the achievements, there is also room for further improvement. The White Paper thus takes a holistic approach and summarises China's entire legal system under the banner of socialist rule of law.[614]

The White Paper therefore ticks all the boxes for the UN's thick definition of the rule of law, which can be considered endorsed by the Chinese government, even if it may have a different understanding of the meaning of some of its aspects, such as the meaning of 'democracy' and the content of human rights. One aspect of the international rule of law as described in the previous section which can be found in the White Paper, is that it mentions all the international human rights treaties which China has signed up to as contributing to improvements in the rule of law in China.

As for the rule of law in the international legal order, at least two recent statements by the Chinese government indicate strong support for the concept. When China appeared before the International Court of Justice (ICJ) in the advisory proceedings on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the Chinese government (represented by Xue Hanqin, now the Chinese judge in the ICJ), made a point of dismissing arguments by other states that the Court's opinion would have no practical effect as "lack[ing] respect for the rule of law in international relations."[615]

614 Information Office, State Council, China's Efforts and Achievements in Promoting the Rule of Law, White Paper, 28 February 2008. <http://www.china.org.cn/government/news/2008-02/28/content_11025486.htm> [26.5.2013]

615 ICJ, Verbatim record (uncorrected) of the oral pleadings of the People's Republic of China (Xue Hanqin),

In a recent position paper for the UN General Assembly, the Chinese government stated that it "is the goal of all countries to achieve the rule of law at the national and international levels." Echoing the language it often uses with regard to human rights, it also said that countries "are entitled to independently choose the models of rule of law that suit their national conditions and may learn from each other for common development." As for the international rule of law, it was "necessary to uphold the authority of the Charter of the United Nations, strictly abide by the universally recognized principles and rules of international law, insist on the consistent application of international law, avoid double standards, improve the law-making process and promote democracy in international relations."[616] The references to avoiding double standards and to 'democracy in international relations' are particular example of TWAIL language that remains part and parcel of Chinese diplomatic expressions.[617] It can be seen here that implicit references to state sovereignty are linked to the international rule of law.

On 30 November 2012, the General Assembly adopted a declaration on the rule of law at the national and international levels.[618] Although it did not provide a definition of the rule of law, the declaration contained many elements and is significant as reflecting a wide political consensus. It also reflects almost the entirety of current UN discourse, linking rule of law to development and including virtually all UN activities in the text. Two paragraphs on the importance of human rights were included, even though some states, including China, resisted a strong human rights formulation.[619]

China's discourse on the rule of law has many elements in common with its

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion), 7 December 2009, CR 2009/29, par. 28.

616 Position Paper of the People's Republic of China At the 66th Session of the United Nations General Assembly, 9 September 2011, available at <http://www.fmprc.gov.cn/eng/wjdt/wshd/t857763.htm>. See also Duan Jielong, 'Statement on the Rule of Law at the National and International Levels (2007)', *CJIL* 7 (2008) 509-512, for a statement made before the UNGA Sixth Committee in 2007 and Statement by Guo Xiaomei, *supra* note 607.

617 See, for example, B.S. Chimni, 'Asian Civilizations and International Law: Some Reflections', *Asian Journal of International Law* 1 (2011) 39-42.

618 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc A/RES/67/1, 30 November 2012. Adopted without a vote.

619 Presentation by Mr Edric Selous, Director of the Rule of Law Unit in the Executive Office of the UNSG, 'The General Assembly and the Rule of Law', at a conference on Chinese and European Perspectives on the Rule of Law and International Law, organised by the Leuven Centre for Global Governance Studies and the School of Law of Tsinghua Law School in Brussels on 12 December 2012. See paras. 5 and 6 of the Declaration.

discourse on human rights, which is analysed in detail in the next chapter. It emphasises the rights of states to choose their own way to achieve the rule of law, similar to their right to choose their own development path. At the international level, promoting the 'international rule of law' is the same for China as espousing the principles it always proclaims.

4.7 Conclusion

China's insistence on the sanctity of sovereignty is not free of certain ironies and paradoxes. China learned about the western notion of sovereignty only by losing its own. Then, through its position that the Chinese people only attained sovereignty with the Communist revolution of 1949, it used a western concept to mark the moment when the Chinese people were finally free to be themselves. Furthermore, it accepts a framework which elsewhere has been heavily criticised for robbing exactly those who are not deemed to have sovereignty under international law of a voice, notably entities and groups in the developing world.[620] At the same time, China has positioned itself as a leading nation within that group, adopting the rhetoric of developing nations, including calls for "democracy in international relations", i.e. reduction of the dominance of Western states, and "non-selectivity" when it comes to criticising other states.

In a way, these contradictions are inherent to the concept of sovereignty itself. Since the current organisational framework of world order still depends on acceptance of independent states with functioning governments exercising effective control over a defined territory, and no alternative model with the same level of legitimacy has been found to channel the aspirations of groups of individuals, politically speaking sovereignty will remain with states for the time being. At the same time, these states have less control over certain activities taking place within their borders, and, as the 'Arab Spring' has shown, have to be permanently mindful of their own legitimacy. Although the Chinese Communist Party also faces challenges to its legitimacy, for the time being its population is accepting it

620 See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Simpson, *supra* note 478; Robert McCorquodale, 'International Community and State Sovereignty: An Uneasy Symbiotic Relationship' in Colwin Warbrick and Stephen Tierney (eds), *Towards an International Legal Community* (London, BIICL 2006) 241-265, at 249-250.

as the legitimate representative of the sovereign Chinese people, separatist movements in Tibet and Xinjiang and the presence of a different government in Taiwan notwithstanding.

To the Chinese government, sovereignty at home means the legitimacy of the government by the Chinese Communist Party, which now depends on economic growth, stability, and subsistence. From the vantage point of Chinese history, these elements always constituted the "Mandate of Heaven", and many observers have noted that from that point of view, the struggles of the current government show a remarkable similarity to those of the different imperial dynasties to retain their legitimacy. Domestically, sovereignty is also a weapon against 'splittists' and dissidents, while the CCP still tries to keep a former empire together as a nation-state with only one "imagined community" rather than 56, the number of minorities China has.[621] In its relationships with the outside world, sovereignty to China means independence and non-interference in what it considers Chinese affairs. It recognises the need to engage with the outside world, wants to show this world a friendly face whilst safeguarding its interests, but insists on taking care what it considers its own business.

In international law, the result of this stance is that the major rising power in international relations today clings to an outlook on international law which to many of its students no longer applies – the *Lotus* model of independent sovereign states which are free to do anything they want and can only be bound by their consent. To an extent, this rhetoric which has been qualified as "China's hard legal positivist or statist view on international law"[622] or a "sovereignty-centered neorealist approach"[623] masks that the Chinese government has realised and accepted that this model has become untenable, and just like other actors and states, it is trying to come to terms with this.[624] China has sacrificed a large extent of its sovereignty, by signing up to the international economic

621 Also Kim, 'Sovereignty', *supra* note 431. The term "imagined communities" was famously used by Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

622 Michael C. Davis, 'The Reluctant Intervenor: The UN Security Council, China's Worldview, and Humanitarian Intervention' in: Michael C. Davis, Wolfgang Dietrich, Bettina Scholdan and Dieter Sepp, *International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics* (Armon, NY: M.E. Sharpe, 2004) 241-253, at 247.

623 Kim, 'Sovereignty', *supra* note 431, 436.

624 See also Zhang, 'Ambivalent Sovereignty', *supra* note 435, 115.

regime and the international human rights regime.[625]

How this will turn out, is anything but clear. Some observers predict the inevitable victory of western style liberalism, which would mean that China's stance on sovereignty would become more like that of the current European states, but others perceive the coming of an 'East Asian Model', where the state will remain more important.[626] China's practice with regard to its sovereignty, including its treatment of international law in its domestic order, indicates that the Chinese leadership believed it could benefit economically by giving up parts of its sovereignty, but tries to retain as much domestic control as possible.[627] At the international level, sovereignty also acts as a safeguard for China's independence, couched in terms of pluralism and diversity.[628] Other observers might see confirmation of Koskenniemi's description of sovereignty as an example of the indeterminacy of international law, although more recently he seems to have stressed its symbolic meaning.[629] For the time being, it seems that we can expect more statements about the importance of sovereignty and non-interference, while the extent to which China is ceding ground will have to be gleaned from practice, in particular in sensitive areas such as human rights.

625 As found by both Kim, 'Sovereignty', *supra* note 431, 428-431 and 440, and Zhang, 'Ambivalent sovereignty', *supra* note 435, 112. Of course, voluntarily limiting sovereignty is also an exercise of sovereignty.

626 See Peerenboom, *China Modernizes*, *supra* note 550, for discussion of the feasibility of this model. See also *infra*, chapter 3.

627 Kim, 'Sovereignty', *supra* note 431, 428-431.

628 See for this perspective also Brad R. Roth, Sovereign Equality and Moral Disagreement (New York: Oxford Universty Press, 2011).

629 Koskenniemi, *Apology*, *supra* note 474; Martti Koskenniemi, 'What Use for Sovereignty Today?', *AsJIL* 1 (2010) 61-70.

5 Human rights

5.1 Introduction

The historical and sovereigntist overviews set out in the previous chapter sets the stage for the discussion on China's position in international human rights law in this chapter.[630] Human rights are no doubt the most contentious topic in China's image in the outside world, especially in the West. As described in chapter 2, after the beginning of the reform era human rights issues in China received relatively little attention until the events of which culminated in the 'Tiananmen Incident' of 4 June 1989, after which the PRC was pushed on the diplomatic defensive. For the discussion of China's normative position in human rights law, the starting point is China's White Paper of 1991,[631] which remains at the root of China's current positions.

Although China is less defensive and less aggressive about wrongs committed with regard to China in the past than it was in the early 1990s, what remains is the emphasis on the priority of subsistence and development rights and the principle of sovereignty. It is no longer couched as a discourse against universality or in terms of Asian values, but rather as a different approach to the universality, indivisibility, interdependence and equality of human rights.[632] In its efforts to be seen as a responsible member of the international community, China was not as aggressive in presenting this viewpoint in the 1990s as the 'Asian Tiger' states.[633] It is however a viewpoint that it presents consistently.

In 2004, China adopted a number of amendments to its 1982 Constitution, one of

630 This chapter is a revised and expanded versions of Wim Muller, 'Chinese practice in UN treaty monitoring bodies: principled sovereignty and slow appreciation', Hitoshi Nasu and Ben Saul (eds.), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 87-104.

631 Information Office, State Council of the PRC, Human Rights in China, White Paper, November 1991. <http://china.org.cn/e-white/7/index.htm> [30.3.2010]

632 This is also reflected in China's recent UPR report before the Human Rights Council and the National Human Rights Action Plan it issued as a follow-up: Information Office, State Council of the PRC, National Human Rights Action Plan of China (2009-2010), 13 April 2009, <http://www.china.org.cn/archive/2009-04/13/content_17595407.htm> [1.4.2010]. The National Human Rights Action Plan of 2012-2015 casts this as a principle of "practicality". See Information Office, State Council of the PRC, National Human Rights Action Plan of China (2012-2015), 11 June 2012, <http://www.china.org.cn/government/whitepaper/node_7156850.htm> [09.07.2012].

633 Randall Peerenboom, 'The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability', *Chicago Journal of International Law* 7 (2006-2007) 17-50, at 35.

which was to add a paragraph to Article 33 stating: "The state respects and safeguards human rights."[634] In recent years, the Beijing Olympics of 2008 and the award of the 2010 Nobel Peace Prize to Liu Xiaobo, as well as a number of episodes involving the artist Ai Weiwei, drew worldwide attention to China's human rights record again. In 2012, major crackdowns on human rights defenders, even human rights lawyers, were reported in international media, variously attributed to the approaching transfer of power to the next generation of Chinese leaders, or to increased internal unrest. As the policy of the Chinese government in these kinds of cases is to respond with outright denials or a brief reference to domestic laws and no independent verification of the facts is possible, these events do not receive much attention in this chapter, even though they are obviously essential to an understanding of China's compliance with its international human rights obligations, specifically in the area of civil liberties and political rights.

The focus of this chapter is on the normative positions which China takes in the fields of international human rights and the related question of its willingness to accept institutionalised restrictions to its sovereignty. It is therefore less concerned with China's human rights diplomacy, except to the extent that it affects the legal positions, and with the more general issue of Chinese human rights philosophy, which is receiving a lot of attention in scholarship.[635] It concludes, perhaps unsurprisingly, that in the near future this is unlikely. It will show again how sovereignty to China is the paramount principle of international law. The first part of the chapter recapitulates China's position in international human rights diplomacy and international human rights law, identifying

634 "国家尊重和保障人权。" Amendments to the Constitution of the People's Republic of China, adopted at the 2nd session of the 10th National People's Congress and promulgated for implementation by proclamation of the NPC on 14 March 2004. See also 'State practice of Asian countries in the field of international law', *Asian Yearbook of International Law* 11 (2003-2004) 147-242, at 151, where "保障" (*bǎozhàng*) is translated as "protect" rather than "safeguard". The translation here follows the 5th edition of the bilingual edition of the PRC Constitution published by the Foreign Language Press (外文出版社), Beijing in 2004.

635 An extensive study of China's human rights diplomacy, especially in the Human Rights Council, has been done by Chatham House. See Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (London: Chatham House, 2012). It contains a wealth of empirical information, including on voting patterns and alignments. For the philosophy of human rights, see *inter alia* Xia Yong, *The Philosophy of Civil Rights in the Context of China* (Leiden and Boston: Martinus Nijhoff, 2011); Xu Xianming, 'The Hundred-Year Journey of the Concept of Human Rights in China' in: Asbjørn Eide, Jakob Th. Möller and Ineta Ziemele, *Making Peoples Heard: Essays on Human Rights in Honour of Gudmunder Alfredsson* (Leiden and Boston: Martinus Nijhoff, 2011) 599-608; Marina Svensson, *The Chinese Conception of Human Rights: The Debate on Human Rights in China*, 1898-1948 (Lund: Department of East Asian Languages, Lund University 1996).

those aspects which are the focus of the second part.

As described in chapter 2, after it took up its UN seat in 1971, the PRC embarked on institutional learning, adopting a cautious approach. A favourable diplomatic climate reversed after the violent suppression of the democracy movement centered on Tiananmen Square in 1989. The PRC's human rights record was subjected to unprecedented scrutiny in the political human rights bodies of the United Nations, and the extremely critical attitude it was subjected to in the Commission on Human Rights also spilled over into the treaty monitoring bodies. In response to the international pressure, China issued its rather defensive White Paper on human rights in 1991.[636] Since then, its attitude to international human rights institutions is aptly described as 'engagement and resistance'.[637]

Starting with the White Paper, China's position in international human rights diplomacy as well as international human rights law – the Chinese government does not seem to distinguish between the two – has been remarkably consistent. It has taken a number of principled positions, represented by key phrases which are repeated over and over again in communications with treaty bodies, the Commission on Human Rights and later the Human Rights Council, and other fora. At the same time, China has taken an increasingly active role in international human rights activities. As noted, it was a proponent of 'Asian values' during the Vienna World Conference on Human Rights in 1993, although certainly not the most enthusiastic one, after which its most defensive phase was over. China hosted the Fourth World Conference on Women in Beijing in 1995 and in recent years played a major role in the establishment of the Human Rights Council, subjecting itself as one of the first states to the Council's new Universal Periodic Review (UPR) mechanism.[638] Shortly after its UPR, it also adopted a National Human Rights Action Plan

636 Human Rights in China, *supra* note 631.

637 Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007) 83; see generally Ann Kent, *Between Freedom and Subsistence: China and Human Rights* (Hong Kong: Oxford University Press 1993); Ann Kent, China, the United Nations, and Human Rights (Philadelphia, PA: University of Pennsylvania Press 1999); Gerald Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (Singapore: World Scientific, 2006); Ann Kent, *Beyond Compliance: China, International Organizations, and Global Security* (Stanford, CA: Stanford University Press 2007).

638 China's national report for the UPR: National Report submitted in accordance with paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1, 10 November 2008, UN Doc. A/HRC/WG.6/4/CHN/1 (UPR Report).

(2009-2010),[639] as called for in the Vienna Declaration and Programme of Action in 1993.[640] The Action Plan of 2009 was followed by a National Human Rights Action Plan (2012-2015) in June 2012.[641]

5.2 Diplomatic and legal framework

5.2.1 From engagement through resistance to initiative

5.2.1.1 General Assembly, Commission on Human Rights and Human Rights Council

In the 1970s, China supported General Assembly Resolutions on self-determination, decolonisation, opposition to apartheid, racial discrimination and discrimination against women. It also supported UN sanctions against South Africa. Initially, it absented itself from human rights resolutions on El Salvador and Chile and did not support sanctions against Cuba and Libya. It voted for UNGA resolutions condemning torture, including the Declaration against Torture, which was adopted in 1975 as a prelude to the Convention Against Torture in 1984.[642]

The PRC started attending sessions of the UN Commission on Human Rights as an observer in 1979. It was elected to the Commission on Human Rights in 1981 and remained a member from 1982 until the Commission was succeeded by the Human Rights Council in 2006.[643] China was a member of the Council from the beginning until 2012, when it could not be reelected due to the limitation on any Council member serving at most two consecutive terms.[644] A Chinese national was elected to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed in 1999 into the Sub-Commission on the Promotion and Protection of Human Rights) in 1984.[645] In the 1980s, China changed

639 National HR Action Plan 2009, *supra* note 632.

640 Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, UN Doc A/CONF.157/23 (1993).

641 National HR Action Plan 2012, *supra* note 632.

642 GA Res 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975, UN Doc A/10034 (1975). Kent, *China, the UN*, *supra* note 637, 41-42.

643 See <http://www2.ohchr.org/english/bodies/chr/membership.htm> [8.6.2009].

644 See <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx> [15.5.2013]

645 Ms Gu Yikie, replaced in 1987 by Tian Jin, and then in 1994 by Fan Guoxiang. As the Sub-Commission was an expert panel, members served in their personal capacity. Both Tian and Fan were career

its absence from sessions discussing human rights in Chile, El Salvador and Guatemala to abstaining from voting, which indicated that it was prepared to be involved in their discussion. It supported the appointment of a rapporteur to examine human rights in Afghanistan in 1984 over the objections of the USSR and the Eastern bloc that this constituted unwarranted interference in internal affairs and supported a Commission resolution in 1985 to investigate the human rights situation in Chile, although it did not do this for El Salvador and Iran.[646] China's engagement with the Commission obviously also meant that it became more aware of the challenge that international human rights diplomacy and law might pose to its own sovereignty, which despite its agreement with the earlier investigations led it adopt the position that although the UN should use appropriate methods to show its concern and prevent abuses, but prevent great powers from using them as a pretext to interfere in a state's internal affairs.[647] China's political preferences are a likely explanation for its different voting behaviour, but it is significant that it referred to international standards. The PRC also referred to human rights standards in public fora to criticise the USSR for the imprisonment and exiling of dissidents, and Taiwan for the suppression of democracy advocates.[648]

China voted for the General Assembly resolution on the Indivisibility and Interdependence of Economic, Social and Cultural Rights of 1985.[649] This resolution was intended to redress the perceived imbalance between these rights and civil and political rights, an imbalance which would from 1991 onwards become a staple of Chinese human rights diplomacy, although the UN resolution itself emphasises the equal importance of both categories of rights more than later Chinese statements have done.[650] The principle was also incorporated in the 1993 Vienna Declaration.[651]

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diplomats. Kent, *China, the UN*, *supra* note 637, 55.

646 CHR Resolution 1984/55, UN Doc E/1984/14, UN Doc E/CN.4/1984/77, 10 and 94 ; CHR Resolution 1986/63, UN Doc E/1986/22, E/CN.4/1986/65. See also Roberta Cohen, 'People's Republic of China: The Human Rights Exception', *HRQ* 9 (1987), 447-549, at 537-538.

647 Kent, *China, the UN*, *supra* note 637, 44.

648 Cohen, 'Human Rights Exception', *supra* note 646, 537. Ironically, those democracy advocates in Taiwan were most likely the advocates of Taiwanese independence in later years.

649 GA Res 40/114, Indivisibility and interdependence of economic, social, cultural, civil and political rights, 13 December 1985, UN Doc A/RES/40/114. After this resolution was adopted, it was reaffirmed yearly. See e.g. GA Res 44/130, 15 December 1989, UN Doc A/RES/44/130.

650 See also Kent, *China, the UN*, *supra* note 637, 43-44.

651 *Supra* note 640, para. I.5.

In the 1990s, China's human rights diplomacy was dominated by the fallout from 'Tiananmen', followed by 'Asian values' debate, and subsequently the efforts to stave off the annual draft resolution against it in the CHR.[652] One of China's aims in the latter years of the CHR and in the negotiations leading up to the establishment of the Human Rights Council. The Human Rights Council was established in part because the efforts of countries with bad human rights records to avoid censure by securing a seat on the CHR had become an embarrassment and had tainted the reputation of the Commission. One aim of the new Council was to avoid this, although the negotiations regarding its establishment presented an opportunity to countries which wanted to avoid public criticism of their human rights records, including China. China therefore engaged in heavy lobbying to avoid what it called "finger-pointing" and replace it with an emphasis on "dialogue and cooperation". This included partially successful efforts to increase the voting threshold for resolutions critical of a specific country. In addition, the new geographical distribution of the HRC, with a greater share of seats for the Africa and Asia groups and a diminished share for the West, was also more favourable to China.[653] Subsequently, had its share of diplomatic successes in the HRC, not visibly taking the lead, initially, but gaining support for its approach. It worked for a diminished focus on specific countries in general and to avoid criticism of China in particular, emphasised the primacy of states within the UN, and made a point of projecting China's solidarity with the developing world.[654]

During the 18th session of the Human Rights Council in 2011, China unexpectedly and for the first time took the initiative by making a statement on behalf of itself and more than 30 other states during the session on peaceful protests. The statement emphasised the duties of governments to maintain public security, public order and "social stability" as well as emphasising international human rights cooperation with full respect for the principle of non-interference. In addition, it warned of the dangers of "misuse of social media" in this respect, even referring to a statement made by the British Prime Minister during recent riots in the UK.[655] This was followed at the 19th session by a joint statement during a panel

652 See *infra*, 2.3.5 and 2.3.6.

653 Sceats and Breslin, 'Human Rights System', *supra* note 635, 10-11. The Asia and Africa groups have 26 out of 47 seats, and the West 7, although East Europe has 6 in addition. See also Peerenboom, *China Modernizes*, *supra* note 637, 83-84.

654 Sceats and Breslin, 'Human Rights System', *supra* note 635, 18-24.

655 Joint Statement at the Panel on the Promotion and Protection of Human Rights in the Context of

discussion on freedom of expression and the internet. It pointed out that the freedom of expression is not absolute and has limitations which should be exercised "in strict accordance with international law", referring to the ICCPR (which China is not a party to) and the ICERD. "The Internet is often used to propagate terrorism, extremism, racism, xenophobia, even ideas of toppling legitimate authorities. Moreover, the Internet is used by some groups to distort facts, exaggerate situations and provoke violence, in an attempt to escalate tension wherever it appears and gain political benefits." It also referred to the "digital divide" which prevented people from developing countries to access information through the internet.[656]

Since then, China has continued making joint statements during subsequent sessions of the HRC. During the 20th session of the HRC, it made a joint statement during an exchange with the Special Rapporteur on human rights and counterterrorism, condemning the use of "indiscriminate force" and calling for avoidance of "illegal practices like torture, renditions, deprivation of justice and targeted and extrajudicial killings [...] and to respect the sovereignty and territorial integrity of all States in the shared campaign against terrorism." It pointed at "serious concerns on the use of drones", thus indirectly addressing the United States.[657]

More joint statements have followed, reflecting the building of new coalitions designated as "a group of like minded countries". At the 22nd session, China spoke on behalf

Peaceful Protests, 13 September 2011, <http://www.china-un.ch/eng/rqrd/thsm/t859047.htm> [19.5.2013] Report of the Human Rights Council on its eighteenth session, 22 October 2012, UN Doc A/HRC/18/2, at 92, para. 75. The other states were, according to the UN report, Algeria, Bangladesh, Bahrain, Belarus, Bolivia, Congo, Cuba, the Democratic People's Republic of Korea, Djibouti, Ecuador, Iran, Kuwait, Laos, Malaysia, Mauritania, Myanmar, Namibia, Nicaragua, Pakistan, the Philippines, Qatar, the Russian Federation, Saudi Arabia, Sri Lanka, the Sudan, Tajikistan, Uganda, Venezuela, Viet Nam, Yemen and Zimbabwe. China itself also mentions Angola. See Sceats and Breslin, 'Human Rights System', *supra* note 635, 29.

656 Joint Statement at the Panel on Freedom of Expression on the Internet, 29 February 2012, <http://www.china-un.ch/eng/hom/t910174.htm> [19.5.2013] Also on behalf of Algeria, Bangladesh, Belarus, Burundi, Cambodia, Congo, Cuba, Democratic People's Republic of Korea, Ethiopia, Iran, Laos, Malaysia, Mauritania, Myanmar, Namibia, Nicaragua, Pakistan, Palestine, Philippines, Russian Federation, Saudi Arabia, Sri Lanka, Sudan, Turkmenistan, Venezuela, Uzbekistan, Viet Nam, Yemen, and Zimbabwe. See Sceats and Breslin, 'Human Rights System', *supra* note 635, 29.

657 Joint Statement during the ID with the SR on Human Rights and Counter Terrorism, 20 June 2012 <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/20thSession/OralStatements/15.%20China%20%28on%20behalf%20of%20a%20group%20of%20States%29%20NEW%20VERSION.pdf> [19.5.2013]. On behalf of Bangladesh, Belarus, China, Cuba, Egypt, Indonesia, Iran, Malaysia, Myanmar, Pakistan, Russia, Sri Lanka, Sudan, Venezuela and Vietnam. See Sceats and Breslin, 'Human Rights System', *supra* note 635, 31.

of such a group during a High-Level Panel on the 20th anniversary of the Vienna Declaration and Programme of Action. After reiterating China's usual points on human rights as described in the next section, the statement reiterated that in the UN's human rights activities the challenges remained the "double standards, politicization, naming and shaming" which ran "counter to purposes and principles of the Charter of the United Nations, deviates from the spirit of the VDPA, and is not conducive to international cooperation on human rights and the healthy development of the international human rights cause." It called for "dialogue and cooperation in human rights, in the spirit of equality and mutual trust, inclusiveness and learning from each other".[658] This summarises China's last twenty years of human rights diplomacy.

China has participated to an extent with the special procedures of the CHR and now the HRC, allowing visits from the Working Group on arbitrary detention (twice) and the Special Rapporteurs on the right to education, torture, and the right to food. A visit of Special Rapporteur on freedom of religion was agreed in 2004, but has not taken place. Many other mandateholders of special procedures have not yet received a positive reply to requests to visit.[659]

5.2.1.2 Treaties

The PRC accepted the Republic of China's signature under the Genocide Convention on 20

658 Statement by H.E. Ambassador Liu Zhenmin, Permanent Representative of China, on behalf of a group of like minded countries, 25 February 2013. <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/22ndSession/OralStatements/China.pdf> [19.5.2013] The group consisted of Algeria, Angola, Bahrain, Bangladesh, Belarus, Bolivia, Brunei, Cambodia, China, Cuba, Djibouti, Ecuador, Egypt, Ethiopia, India, Indonesia, Iran, Kazakhstan, Kuwait, Laos, Malaysia, Myanmar, Nicaragua, Pakistan, Philippines, Russia, Saudi Arabia, Singapore, South Africa, Sri Lanka, Sudan, Thailand, Uganda, United Arab Emirates, Venezuela, Viet Nam and Zimbabwe.

659 In chronological order, the special procedures visited China in following order: Working Group on arbitrary detention (6-16 October 1997, UN Doc EC/N.4/1998/44/Add.2); Special Rapporteur on the right to education (9-19 September 2003, UN Doc E/CN.4/2004/45/Add.1); Working Group on arbitrary detention (18-30 September 2004, UN Doc E/CN.4/2005/6/Add.4); Special Rapporteur on torture (20 November to 10 December 2005, UN Doc E/CN.4/2006/6/Add.6, see also below); Special Rapporteur on the right to food (15-23 December 2010). A visit of Special Rapporteur on freedom of religion was agreed upon in 2004, but the visit has not yet taken place. A number of special procedures have requested a visit, but have not yet received a positive reply: SR on freedom of association and assembly (2002 and 2011), SR on toxic waste (2005), SR on health (2006); SR on extrajudicial, summary or arbitrary executions (2005, reminder in 2008); independent expert (IE) on extreme poverty (2005); SR on human rights defenders (2008); IE on minority issues (2009); IE on access to safe drinking water and sanitation (2010); IE on foreign debt (2011 and 2012); SR on independence of judges and lawyers (2011). See <http://www.ohchr.org/EN/HRBodies/SP/Pages/CountryvisitsA-E.aspx> [28.02.2013].

July 1949, but denounced the ROC's ratification in 1951 and only ratified the treaty itself on 18 April 1983.[660] It became party to seven more human rights treaties before 1989:[661] the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW, 4 November 1980)[662]; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 29 December 1981);[663] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT; 4 October 1988).[664] It also acceded to two treaties on the status of refugees and two against apartheid. China participated in the working groups which drafted CAT and the Declaration on the Protection of the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, as well as the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Migrant Workers (ICRMW).[665]

In 1992, China co-sponsored the resolution calling for the adoption of and also became a party to the Convention on the Rights of the Child (CRC).[666] It signed the International Covenant on Economic, Social and Cultural Rights (ICESCR)[667] on 27 October 1997 and ratified it on 27 March 2001. It also signed the International Covenant on Civil and Political Rights (ICCPR)[668] on 5 October 1998.[669] China's signature of these two latter treaties was in part the result of its diplomatic efforts to stave off a resolution against it in the CHR,[670] and may also be partially linked to the transfer of sovereignty over Hong Kong, which it regained from the United Kingdom in 1997, and Macao, which it regained from

660 See *infra*, 2.3.3.1.

661 Working Group on the Universal Periodic Review, Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1, UN Doc. A/HRC/WG.6/4/CHN/2, 16 December 2008, 2.

662 Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 1 March 1980, UNTS 1249, 13 (entered into force 3 September 1981).

663 International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, UNTS 660, 195 (entered into force 4 January 1969).

664 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, UNTS 1465, 85 (entered into force 26 June 1987).

665 Kent, *China, the UN*, *supra* note 637, 44-45 and 267, n. 103.

666 Convention on the Rights of the Child, opened for signature 20 November 1989, UNTS 1577, 3 (entered into force 2 September 1990).

667 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, UNTS 993, 3 (entered into force 3 January 1976).

668 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, UNTS 999, 171 (entered into force 23 March 1976).

669 See <treaties.un.org>.

670 See *infra*, 2.3.6.

Portugal in 1999. Both colonial powers had extended the reach of these treaties over what became Special Administrative Regions (SAR). With regard to both SARs, China notified the Secretary-General of the UN as the depositary of these treaties that they would continue to apply over them.[671] With regard to Hong Kong, the United Kingdom made clear in its last report that it had agreed with China that the provisions of the ICCPR (and the ICESCR) would remain in force after the transfer of sovereignty. This had been laid down both in the annext to the Joint Declaration between the two governments as well as in article 39 of Hong Kong's Basic Law. This included the obligation to report to the Human Rights Committee.[672] It thereby contributed in practice, although not in *opinio juris*, to the development of automatic succession of human rights treaties.

China has not yet ratified the ICCPR, claiming that it is "carrying out necessary legislative, judiciary and administrative reforms to create conditions for early ratification"[673] There is indeed an increasing amount of scholarship within China on the implications of the ICCPR for its domestic legislation, although one observer has expressed concern that there is a lack of proper understanding among Chinese academics about the role of the Human Rights Committee in providing authoritative interpretations of the treaty.[674] Compared to other treaty monitoring bodies, the Human Rights Committee has the broadest substantive scope and has been the most active and influential in developing jurisprudence and refining standards through its general comments. This may also be seen as a challenge by China in light of its reluctance to submit itself to external supervision.

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671 See <treaties.un.org>. See also Kent, *China, the UN*, *supra* note 637, 196-197.

672 CCPR, Fourth periodic reports of States parties due in 1994 (Hong Kong): United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/95/Add.5, 7 August 1995, paras. 372-275. See *infra*, 5.3.3.

673 UPR Report, *supra* note 638, para. 11. This has been China's standard position since it signed the treaty. An additional complication may become the question of the authentic Chinese translation of the ICCPR, as the Chinese text most commonly used inside China is not the authentic text as accepted by the General Assembly in 1966. See Sun Shiyan, 'The International Covenant on Civil and Political Rights: One Covenant, Two Chinese Texts?', *Nordic Journal of International Law* 75 (2006) 189-209. Something similar has happened with the ICESCR and the UDHR, and this author has also encountered different Chinese versions of the Genocide Convention. Linguistic issues always play a role in the law, and translation issues add to the inherent indeterminacy of the language. See also Deborah Cao, 'Is the Chinese Legal Language more Ambiguous and Vaguer?' in: Anne Wagner and Sophie Cacciaguidi-Fahy (eds), *Obscurity and Clarity in the Law: Prospects and Challenges* (Aldershot: Ashgate, 2008) 109-125, which argues that societal and linguistic factors which make the Chinese language more indeterminate than its English counterpart.

674 Sun Shiyan, 'The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification', *CJIL* 6 (2007), 17-42, at 34-42.

In 2008, China became party to the Convention on the Rights of Persons with Disabilities (CRPD)[675] and the two substantive Optional Protocols to the CRC.[676] China has not signed the Convention on Enforced Disappearances (CED).[677] It still has not signed the ICRMW, but it is hardly alone in this.[678]

As a result, China is now party to the core treaties except for the ICCPR and the CED. However, it has hardly accepted any optional protocols, in particular those providing for supervisory mechanisms such as the right to individual petition. The picture that emerges from this is fairly consistent. It appears that China does take its international obligations seriously. It has not ratified the ICCPR as an act of 'window-dressing'.[679] It goes through the trouble of making reservations, not just on procedural issues but also on substance such as with the ICESCR. Although reservations are undesirable and may even be irreconcilable with the object and purpose of a treaty, at least they are more transparent than a ratification followed by non-implementation.[680] China has made reservations to all dispute settlement clauses in these treaties and not accepted any right of state complaint or individual petition, effectively making periodic reporting the only monitoring procedure which it has accepted.[681]

675 Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, UNTS 2515, 3 (entered into force 3 May 2008).

676 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, opened for signature 25 May 2000, UNTS 2173, 222 (entered into force 12 February 2002); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, UNTS 2171, 227 (entered into force 18 January 2002). A third optional protocol concerns a communications procedure and has not been signed by China.

677 International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature 20 December 2006, UN Doc A/RES/61/177 (entered into force 23 December 2010).

678 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, opened for signature 18 December 1990, UNTS 2220, 3 (entered into force 1 July 2003). The ICRMW has 35 signatories and 46 state parties as of May 2013, according to <treaties.un.org>.

679 A similar argument is made by Katie Lee, 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges', *CJIL* 6 (2007) 445-474. Lee believes that China will ratify the ICCPR, given that it has made various public announcements that it will.

680 Along similar lines: Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Dordrecht: Martinus Nijhoff 1995) 3.

681 See *infra*, 5.3.4.3.

PRC and treaties on human rights[682]				
Treaty	*Signature*	*Ratification/ accession*	*Reservations*	*Parties*
Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, UNTS 78, 277	20 July 1949[683]	18 April 1983	Art IX	142
International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966 (adopted by the UNGA on 21 December 1965), UNTS 660, 195		29 December 1981		175
Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, New York, 15 January 1992		10 July 2002		43
International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, UNTS 993, 3		27 October 1997	Art 8(1)a	160
International Covenant on Civil and Political Rights, New York, 16 December 1966, UNTS 1991, 171	5 October 1998			167
International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973		18 April 1983		108
Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981)	17 July 1980	4 November 1980	Art29(1)	187
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 10 December 1984, UNTS 1465, 85 (entered into force 26 June 1987)	12 December 1986	4 October 1988	Art 20 Art 30(1)	150
International Convention against Apartheid in Sports, New York, 10 December 1985, UNTS 1500, 161	21 October 1987			72
Convention on the Rights of the Child, New York, 20 November 1989, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)	29 August 1990	2 March 1992	Art 6	193
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. New York, 25 May 2000, UNTS 2173, 222	15 March 2001	20 February 2008		147
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, New York, 25 May 2000 UNTS 2171, 227	6 September 2000	3 December 2002		158
Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, UNTS 2515, 3	30 March 2007	1 August 2008		153

682 Most of the information in this table is derived from treaties.un.org and updated until 1 July 2012. There is some debate about the place of Refugee law and the 1951 Refugee Convention, to which China is party, in human rights law. This is not discussed here, although refugee-related issues have come up in relation to China's practice under the other treaties.

683 ROC signature. The ROC's subsequent ratification in 1951 was denounced.

5.2.2 China's 'basic position' on human rights

The key phrases referred to in the introduction to this chapter which reflect China's 'basic position' in human rights and have remained more or less the same since 1991, can be illustrated by a number of quotations, taken from various reports submitted by China over the years, including its 1991 White Paper and its National Human Rights Action Plans.

5.2.2.1 Normative acceptance

> China has always recognized and observed the Charter of the United Nations and te goal and principle of promoting human rights. It appreciates and supports United Nations efforts to encourage universal respect for human rights and fundamental freedoms. It has participated actively in the drafting and elaboration of international human rights instruments within the framework of te United Nations system.[684]

Statements like these, made in almost every document on human rights which it issues, demonstrate China's acceptance of international human rights norms – leaving aside the issues of interpretation, application and compliance. In terms of normative acceptance, it is important to recall that breach of the norms through human rights violations does not diminish the status of the norm and can in fact reaffirm them.[685]

5.2.2.2 History, priorities, and progressive realisation: universality with Chinese characteristics

Another recurring theme is the oft-referred to official historical narrative of the PRC, in which its government emphasises that China is an ancient nation, recalls its continuing agony over the humiliations it suffered at the hands of the imperialist powers in the nineteenth century, followed by the significance of the Communist revolution of 1949 in which the "Chinese people" finally won self-determination, which in this case is also cast as the best guarantee for human rights for the Chinese.[686]

> In 1949, the People's Republic of China was founded and the Chinese people won national independence and liberation. Since then, the Chinese people have become the

684 Supplementary report submitted to the United Nations on the implementation of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, UN Doc CAT/C/7/Add.14 (1993), para. 60.

685 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (Merits), *ICJ Reports 1986*, 14, para 186. See *infra*, 1.4.3 and 3.2.3.

686 See *infra*, chapters 2 and 4.

> masters of the country in the true sense, and a *fundamental social and political system for the promotion and protection of human rights* has been established.[687]

Connected to this is the assertion that the "Chinese people" have their own take on human rights and priorities. The 'universality debate' is thus shifted from human rights norms themselves to the specific way they are applied and their relative priority. In the most recent Action Plan of 2012, this is presented as in line with a "principle of pursuing practicality", in which "[t]he Chinese government respects the principle of universality of human rights, but also upholds proceeding from China's national conditions and new realities to advance the development of its human rights cause on a practical basis."[688] Although China has held this position for a long time, it is the first time that it has presented it as a principle with a name.

> China respects the principle of the universality of human rights and considers that all countries have an obligation to adopt measures continuously to promote and protect human rights in accordance with the purposes and principles of the Charter of the United Nations and the relevant provisions of international human rights instruments, and *in the light of their national realities*.[689]

Furthermore, the "international community should respect the principle of the indivisibility of human rights and *attach equal importance to civil and political rights and economic, social and cultural rights* as well as the *right to development*." In the UPR report and its National Human Rights Action Plans, China explicitly prioritises economic, social and cultural rights over civil and political rights, explaining that "in the light of the basic realities of China, [it] gives priority to the protection of the people's rights to subsistence and development". It "encourages the coordinated development of economic, social and cultural rights as well as civil and political rights, and the balanced development of individual and collective rights."[690] As noted above, this position of China's was already foreshadowed in the 1980s. In the 2012 Action Plan, the prioritisation of developmental rights is brought under a "principle of comprehensive advances", which entails acceptance of "all types of human rights as interdependent and inseparable" and promoting "the coordinated development of economic, social and cultural rights as well as civil and political

687 UPR report, *supra* note 638, para. 3 (emphasis added). See also, e.g., Core Document Forming Part of the Reports of States Parties: China, UN Doc HRI/CORE/1/Add.21 (1993), para. 13.

688 Action Plan 2012, *supra* note 632, <http://www.china.org.cn/government/whitepaper/2012-06/11/content_25619560.htm> [9.7.2012]

689 UPR report, *supra* note 638, para. 6 (emphasis added).

690 Action Plan 2009, *supra* note 632.

rights, and the balanced development of individual and collective human rights."[691]

The underlying understanding of the reach of human rights law is more limited than many European states and treaty bodies would have it: "in the light of their national realities" is potentially a huge clawback clause. China's language also suggests that the "purposes and principles of the Charter" and, more importantly, the "provisions of relevant treaties" are guidelines or benchmarks rather than obligations in and of themselves. The emphasis on the "indivisibility" of human rights seems primarily to refer to one aspect of this term, the equal importance of economic, social and cultural rights to civil and political rights.[692] This can be traced back both to China's socialist legacy as well as its own imperial tradition, according to which the ability to provide subsistence was an important source of legitimacy for ruling dynasties.[693] An implicit assertion here, which was made frequently during the 1990s debate on 'Asian values', is that states need to have achieved a certain level of development before human rights and democracy can be fully respected.[694]

The issue of priority reflects the fundamental importance attached to development. The UPR report points out that China is 'the world's largest developing country'.[695] It further points out that since the start of China's policy of 'reform and opening up' in 1978, the 'Chinese people, who once lacked basic necessities, are now enjoying relative prosperity.'[696] It mentions that China was the first country in the world to meet the poverty reduction target set in the UN Millennium Development Goals.[697] The section on "difficulties and challenges" again opens with the statement that "China is a developing country."[698] The sections on vulnerable groups such as women, children and minorities focus heavily on

691 Action plan 2012, *supra* note 632.

692 For other meanings of "indivisibility", see Daniel J. Whelan, "Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights", Economic Rights Working Paper 7, The Human Rights Institute, University of Connecticut, April 2008.

693 Kent, *Freedom and Subsistence*, *supra* note 637, 30-50.

694 This is a main argument of the "Singapore school", although it is made in varying ways. See discussion in Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff 2001) 38-40. A similar point was made by the late Chinese leader Deng Xiaoping, as is evidenced in the third volume of his speeches which spans the period from 1982 to 1992. Ming Wan, *Human Rights in Chinese Foreign Relations: Defining and Defending National Interests* (Philadelphia, PA: University of Pennsylvania Press 2001) 23. See also *infra*, 2.3.6.

695 UPR Report, *supra* note 638, para. 3.

696 *Ibid.*, para. 7.

697 *Ibid.*, para. 20.

698 *Ibid.*, para. 80.

development, education and health care and are almost silent on political rights for minorities other than claiming that they do have them.[699] In the section on Future Objectives, which is elaborated upon in the National Human Rights Action Plan of 2009, China clearly states that its priorities remain the same: poverty reduction, employment, social security, health care, the development of ethnic minority areas, concern for special groups, the environment, and food safety are all mentioned before "deepening political structuring", stressing "citizens' orderly participation in political affairs", expansion of democratic rights, and advancing the rule of law.[700]

As stated above, this development discourse seems to imply that even provisions which are treated by other states and the treaty bodies as immediate obligations are treated by China as guidelines, benchmarks, or goal to be reached in the long term. China took this position explicitly in the negotiations on the drafting of the CRPD. Raising the issue of priority, it took the position that if reference was made to the progressive realisation of economic, social and cultural rights, the same should apply to the realisation of civil and political rights and that for developing countries like China, the realisation of economic, social and cultural rights was 'more pressing', even though both categories of rights were not prerequisites for each other.[701]

The issue of priority also reflects the frustration of the Chinese government with what it considers the one-sided focus on the civil and political rights and perceives to be an unfair application of a double standard to China in the field of human rights, especially of its minorities, even though it has made remarkable achievements in the area of subsistence rights and economic and social rights for many more people, and does not receive enough credit for this. This argument is not without merit and has found a sympathetic hearing with a number of observers.[702]

699 *Ibid.*, paras. 63-79.

700 *Ibid.,* paras. 90-102.

701 4th Session of the ad hoc committee, UN Convention on the Rights of People with Disabilities, Daily summary of discussions related to Article 4, Volume 5, No 2, 24 August 2004, available at <http://www.un.org/esa/socdev/enable/rights/ahc4sumart04.htm> [19.04.2010].

702 Peerenboom, *China Modernizes*, *supra* note 637, 163-183.

5.2.2.3 Selective, politicised application of human rights and the need for 'objectivity'

An issue related to this last point is the selective use of human rights for political purposes by other states (and NGOs), which has had a strong impact on China's position on human rights diplomacy, given its history in the CHR. In China's view, human rights diplomacy should be conducted taking into account that

> [g]iven differences in political systems, levels of development and historical and cultural backgrounds, *it is natural for countries to have different views* on the question of human rights. It is therefore important that countries engage in *dialogue and cooperation* based on *equality and mutual respect* in their common endeavour to promote and protect human rights.

This means that China 'is committed to engaging in *exchanges and cooperation* [...] and to promoting the adoption by the international community of a *fair, objective and non-selective* approach to the handling of human rights issues.'[703] In front of treaty bodies, China also emphasises "constructive dialogue" conducted in an "objective" way.

By focusing on cooperation and emphasising the specificity of the Chinese situation, China insists on the importance of its sovereignty in determining how best to implement human rights and insists that the government is in the best position to judge this.

> Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region.

This is the basis for China's complaints about "interfering in other countries' internal affairs on the pretext of human rights."[704] It should be noted that the reasoning behind this position shows a parallel to the 'margin of appreciation' doctrine as known in the case-law of the European Court of Human Rights.

703 UPR report, *supra* note 638, para 8 (emphasis added).

704 *Human Rights in China*, *supra* note 631, Preface; see also Brems, *supra* note 694, 50-54.

China's treaty reporting history					
Treaty and report	*Due date*	*Received*	*Document number*	*Examined*	*Concluding observations*
Commitee Against Torture (CAT)					
Initial	2 November 1989	1 December 1989	CAT/C/7/Add.5	27 April 1990	A/45/44
Additional	31 December 1990	8 October 1992	CAT/C/7/Add.14	22 April 1993	A/48/44
2nd	2 November 1993	2 December 1995	CAT/C/20/Add.5	3 May 1996	A/51/44
3rd	2 November 1997	4 May 1999	CAT/C/39/Add.2	4 May 2000	A/55/44
4th	2 November 2001	14 February 2006	CAT/C/CHN/4 CAT/C/HKG/4 CAT/C/MAC/4	7 November 2008	CAT/C/CHN/CO/4 CAT/C/HKG/CO/4 CAT/C/MAC/CO/4
CAT: additional	21 November 2009	17 December 2008 7 January 2010 (HKG) 8 March 2010 (MAC)	CAT/C/CHN/CO/4/Add.1 & Add.2 CAT/C/HKG/CO/4/Add.1 CAT/C/MAC/CO/4/Add.1		
CAT: 5th	21 November 2012				
Human Rights Committee (CCPR)					
Initial (HKG)	18 August 1999	11 January 1999	CCPR/C/HKSAR/99/1	1 November 1999	A/55/40
Supplementary (HKG)		1 November 1999	CCPR/C/HKSAR/99/1/Add.1		
Initial (Macau)	31 October 2001	11 May 2011	CCPR/C/CHN-MAC/1		
2nd (HKG)	31 October 2003	14 January 2005	CCPR/C/HKG/2005/2	20 March 2006	CCPR/C/HKG/CO/2
2nd (Macau)	31 October 2006				
Additional (HKG)	1 April 2007	23 July 2007	CCPR/C/HKG/2005/Add.1		
3rd (HKG)	31 October 2010	31 May 2011	CCPR/C/CHN-HKG/3		
3rd (Macau)	31 October 2011				
4th	31 October 2015				
Committee on the Elimination of Discrimination against Women (CEDAW)					
Initial	3 September 1982	25 May 1983	CEDAW/C/5/Add.14	29 March 1984	A/39/45
2nd	3 September 1986	22 June 1989	CEDAW/C/13/Add.26	23 January 1992	A/47/38
3rd and 4th	3 September 1990 3 September 1994	29 May 1997 25 November 1998 (HKG)	CEDAW/C/CHN/3-4 Corr.1 & Add.1 CEDAW/C/CHN/3-4/Add.2 (HKG)	1 February 1999	A/54/38/Rev.1

5th and 6th	3 September 1998 3 September 2002	4 February 2004	CEDAW/C/CHN/5-6 Add.1 & Add.2	10 August 2006	CEDAW/C/CHN/CO/6
7th and 8th	3 September 2010				
Committee on the Elimination of Racial Discrimination (CERD)					
Initial	28 January 1983	22 February 1983	CERD/C/101/Add.2 & Add. 3	20 July 1983	A/38/18
2nd	28 January 1985	12 June 1985	CERD/C/126/Add.1	14 March 1986	A/42/18
3rd	28 January 1987	28 December 1987	CERD/C/153/Add.2	9 August 1990	A/45/18
4th	28 January 1989	30 March 1990	CERD/C/179/Add.1		
5th, 6th and 7th	28 January 1991 28 January 1993 28 January 1995	15 January 1996	CERD/C/275/Add.2	8 August 1996	A/51/18
8th and 9th	28 January 1997 28 January 1999	3 October 2000	CERD/C/367/Add.4 (Parts I-III)	31 July 2001	A/56/18
10th, 11th, 12th, 13th	28 January 2001 28 January 2003 28 January 2005 28 January 2005	24 June 2008	CERD/C/CHN/13 CERD/C/HKG/13 CERD/C/MAC/13	7 August 2009	CERD/C/CHN/CO/10-13
Additional	25 August 2010	13 September 2010	CERDC/CHN/CO/10-13/Add.1		
14th, 15th, 16th	28 January 2013				
Committee on Economic, Social and Cultural Rights (CESCR)					
Initial (HKG)	30 June 1999	4 July 1999	E/1990/5/Add.43	27 April 2001	E/2002/22
Initial	30 June 2002	27 June 2003	E/1990/5/Add.59	27 April 2005	E/C.12/1/Add.107
Additional (HKG)	30 June 2003				
2nd; 2nd (MAC) 3rd (HKG)	30 June 2010	30 June 2010	E/C.12/CHN/2 E/C.12/CHN-MAC/2 E/C.12/CHN-HKG/3		
3rd; 4th (HKG)	30 June 2015				
Committee on the Rights of the Child (CRC)					
Initial	31 March 1994	27 March 1995	CRC/C/11/Add.7	28 May 1996	A/53/41
Additional	1 December 1997				
2nd	31 March 1999	27 June 2003	CRC/C/83/Add.9 (parts I-II)	19 September 2005	CRC/C/CHN/CO/2
3rd and 4th	31 March 2009	16 July 2010	CRC/C/CHN/3-4 CRC/C/CHN-HKG/2 CRC/C/CHN-MAC/2		
5th	31 March 2014				
OPAC: initial	20 March 2010	17 November 2010	CRC/C/OPAC/CHN		

			/1		
OPSA: initial	3 January 2005	11 May 2005	CRC/C/OPSA/CHI/1 (and part II)	19 September 2005	CRC/C/OPSC/CHN/CO/1
Committee on the Rights of Persons with Disabilities (CRPD)					
Initial	1 September 2010	30 August 2010	CRPD/C/CHN/1 CRPD/C/CHN-HKG/1 CRPD/C/CHN-MAC/1	27 September 2012	CRPD/C/CHN/CO/1
2nd	1 September 2014				

5.3 China's treaty reporting practice

5.3.1 Introduction

As described in the previous section, leaving aside the question to what extent the rights protected by human rights treaties have become customary international law, China is legally bound by most of the core UN human rights treaties, and obliged to refrain from acts which would defeat the object and purpose of the ICCPR, which is in any case applicable on parts of its territory.[705] In its National Human Rights Action Plan of 2009, it sets out its position on these obligations.

> China cherishes the important role played by international instruments on human rights in promoting and protecting human rights. So far, China has acceded to 25 international conventions on human rights. China will earnestly fulfill its obligations to those conventions, submit timely reports on implementing the conventions to the treaty bodies concerned, hold constructive dialogues with these treaty bodies, take into full consideration the proposals raised by them, and adopt rational and feasible ones in the light of China's actual conditions.[706]

Almost identical language is used in the Action Plan of 2012.[707]

The CEDAW, the ICERD, the CAT, the CRC, the ICESCR and the ICCPR each have supervisory treaty bodies, most of which have been established by the treaties themselves except for the Committee on Economic, Social and Cultural Rights (CESCR), which was

705 Art. 13 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, UNTS, 1155 331 (entered into force 27 January 1980), reflecting customary international law.

706 Action Plan 2009, *supra* note 632, <http://www.china.org.cn/archive/2009-04/13/content_17595407_26.htm> [1.4.2010].

707 Action Plan 2012, *supra* note 632, <http://www.china.org.cn/government/whitepaper/2012-06/11/content_25619845.htm> [9.7.2012]

established by the UN Economic and Social Council.[708] These treaty bodies supervise the compliance of state parties, monitor progress in and scrutinise implementation, assist in assessing achievements, help identify gaps in implementation, and suggest changes to law, policy and practice. They also try to stimulate and inform national human rights dialogue and have, if states accept it, the right to provide individual redress. In the monitoring process, they inevitably also interpret the treaties, thereby playing an important role in establishing the normative content of human rights and in giving concrete meaning to individual rights and state obligations.[709] Although they are not judicial institutions, to an extent they perform judicial functions and cannot be ignored in the process of international law-making.[710] Sometimes they are therefore referred to as "quasi-judicial bodies". They have referred to themselves as "legal bodies" and their work as "legal examination"; in a meeting with the president of the Human Rights Council in 2007, the chairpersons of the treaty bodies described them as "exclusively an independent legal mechanism".[711] Although all treaty bodies are composed of a mix of legal and subject matter experts, each has a strong legal dimension. Lawyers have been most dominant in the Human Rights Committee (CCPR) and CAT.[712] By stating that it will adopt "rational and feasible" measures after "full consideration" of the suggestions by treaty bodies, the Chinese government distances itself from the vertical approach implied in the self-image of the treaty bodies, reserves a margin of discretion in advance to reject findings that go too far in its eyes and maintaining a horizontal relationship in line with its position on sovereignty. It is not the only state to do this.[713]

708 In the remainder of this chapter, treaty bodies will be referred to with the same acronym as their treaty, except for the Committee on Social, Economic and Cultural Rights (CESCR) and the Committee for the Elimination of Racial Discrimination (CERD).

709 Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', *Vanderbilt Journal of Transnational Law* 42 (2009) 905-947, at 907-908.

710 See also Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007) 154-157; in China this is not always well understood: see Sun, 'Understanding and Interpretation', *supra* note 674.

711 Report of the chairpersons of the human rights treaty bodies on their nineteenth meeting, UN Doc A/62/224, 13 August 2007, para. 8; Mechlem, 'Treaty Bodies', *supra* note 709, 913.

712 *Ibid*, 916-917.

713 For example, in its General Comment 24, the Human Rights Committee stated that the task to determine the compatibility of reservations with the object and purpose of the ICCPR "necessarily" fell to itself. CCPR, General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, UN Doc CCPR/C/21/Rev.1/Add.6. In response, the United States and the United Kingdom submitted observations. The US criticised the CCPR for going "much too far".

Since China has made reservations to dispute settlement clauses and has not accepted any optional right of individual petition or inter-state complaint, either provided for in the treaties themselves or in optional protocols, China's periodic state reports are the only means through which the treaty bodies can monitor the situation in China. As the members of the committees are free to use other sources, they often do so by referring to information supplied either by the special mechanisms of the former Commission on Human Rights and now the Human Rights Council, such as the Special Rapporteur on the question of torture or the working group on arbitrary detention, or by non-governmental organisations such as Amnesty International, Human Rights Watch, Human Rights in China, and others.

5.3.2 General observations

China's interaction with the treaty bodies can be divided in a number of phases in which the nature of its reporting and dialogue with the committees changed, partly due to developments in China, partly through the Chinese delegates and members of the committees getting used to each other, and partly because of changes in the machinery of state reports due to the practice of all states taking part in it.[714] It also reflects the relative importance of human rights treaties in Chinese diplomacy, which changed significantly after 1989.[715]

Since the CEDAW, the ICERD, the CRC and the ICESCR have in common that they are,

Both the US and the UK argued, *inter alia*, that the Committee had granted itself powers not provided for by the ICCPR and could not do so without state consent. See Observations by the United States of America on General Comment No. 24 (52), UN Doc A/50/40 and Observations by the United Kingdom on General Comment No. 24, UN Doc A/50/40, paras. 11-12. The issue has subsequently been taken up by the ILC, leading to the Guide to Practice on Reservations to Treaties (2011) (UN Doc A/66/10, para. 75), section 3.2. See also Ineke Boerefijn, 'Impact on the Law of Treaty Reservations' in: Menno T. Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press 2009) 63-97, at 84-92. For an example in practice, see the reply of the United States to the CCPR about extraordinary renditions in relation to the principle of *non-refoulement*, which the CCPR considers part of Article 7 ICCPR but the United States does not: CCPR, Reply to List of Issues to be taken up in connection with the consideration of the second and third periodic reports of the United States of America, 15-21, para. 10. <http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf> [19.5.2013]

714 See generally Anne F. Bayefsky (ed), *The UN Human Rights System in the 21st Century* (The Hague: Kluwer, 2000); Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence or Convergence?* (Antwerp and Oxford: Intersentia, 2004).

715 See also Sophia Woodman, 'Human rights as "foreign affairs": China's reporting under human rights treaties', *Hong Kong Law Journal* 35 (2005) 179-203, at 181. Woodman points out that ratification of human rights treaties was much smoother in China before 1989.

by and large, aspirational treaties, the obligations they contain are usually obligations of conduct or due diligence and to that extent difficult to measure directly. This has raised issues with regard to the justiciability and direct enforceability of these rights, even if the distinction between supposed directly enforceable civil and political rights and the supposed 'programmatic' nature[716] of economic and social rights is often overstated.[717] Although civil and political rights focus more on obligations of states to refrain from certain conduct, these rights also entail 'positive' obligations. Economic and social rights, on the other hand, also have a 'minimum core' which does involve direct obligations of states.[718] For the current discussion, the relevant point is however the empirical component of the assessment of compliance: once states have undertaken steps to realise the rights laid down

716 See e.g. CESCR, Concluding Observations (United Kingdom), UN Doc CESCR/2003/22, para. 214, where the Committee expresses regret on the UK's position that the ICESCR's provisions "constitute principles and programmatic objectives rather than legal obligations that are justiciable". See also Ivan Shearer and Naomi Hart, 'The engagement of Asia-Pacific states with the UN Human Rights Committee: reporting and individual petitions' in: Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 17-36, at 17.

717 CESCR, General Comment 3: The nature of States parties obligations, 14 December 1990, para. 1. The Committee notes, however, that although the ICESCR provides for progressive realisation, some of its obligations have immediate effect, in particular to undertake to guarantee the exercise of the rights without discrimination and that "deliberate, concrete and targeted" steps must be taken "within a reasonably short time after the Covenant's entry into force for the States concerned.", paras 1-2. CRC, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc CRC/GC/2003/5, 27 November 2003, in particular paras. 5-6, referring to the CCPR and ICESCR general comments and stating the position of the CRC Committee that "economic, social and cultural rights, as well as civil and political rights, should be regarded as justiciable." See also CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/G/GC/28, 16 December 2010, in particular para. 29. The CERD has made a number of general recommendations involving direct obligations of states under ICERD, including General Recommendation No. 01: States parties' obligations (art. 4), UN Doc CERD/Gen/Rec/No.01, 25 February 1972; General Recommendation II, States parties obligations, 26 February 1972, UN Doc A/8718; General Recommendation VII: Legislation to eradicate racial discrimination (Art. 4), 23 August 1985, UN Doc A/40/18; General Recommendation XV: Organized violence based on ethnic origin (Art. 4), 23 March 1993, UN Doc A/48/18; General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination [*sic*], UN Doc CERD/G/GC/32, 24 September 2009.

718 See inter alia Matthew C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) 106-152; Manisula Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Oxford: Hart Publishing, 2009) 344-346. See, for more discussion, Martin Scheinin, 'Direct Applicability of Economic, Social and Cultural Rights: A Critique of the Doctrine of Self-Executing Treaties' in: Krzystof Drzewicki, Catarina Krause and Allan Rosas (eds.), *Social Rights as Human Rights: A European Challenge* (Turku: Institute for Human Rights, Åbo Akademi University, 1994) 73-87, in particular 76-78 and Martin Scheinin, 'Economic and Social Rights as Legal Rights' in: Asbjørn Eide, Catarina Krause and Allan Rosas, (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edition; Dordrecht: Martinus Nijhoff Publishers, 2001) 29-54; Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003).

in these treaties, as China has, the exchanges with treaty bodies will necessarily entail discussion about the relative effect of policies which have been implemented and the allocation of resources, but deal less with immediate obligations.

The extent to which compliance can be assessed based solely on the sources of information described above, has resulted in their reporting histories being remarkably similar where China is concerned. Its initial encounters with the CEDAW[719] and the CERD in the 1980s where characterised by relatively short reports which only enumerated legislation, and polite exchanges between the treaty bodies and the Chinese delegations. The CERD did express the wish for China to provide information 'in a more amplified manner' in response to its first report,[720] after which China's subsequent report was in compliance with the committee's guidelines and on time.[721]

During the consideration of its combined third and fourth CEDAW report in 1999, China was chided for not fully following the Committee's guidelines for the preparation of periodic reports, particularly by insufficiently providing statistical data aggregated by sex, comparing the current situation to that at the time of the previous report.[722] This is a complaint echoed by other treaty bodies at the same time. At the same time, the Chinese government sent a high-level and large delegation containing many specialists from different government departments, indicating that it took its reporting duties and obligations under the Convention quite seriously.[723] The lack of statistical data remained a problem when China last appeared before the Committee in 2006.[724] Since this kind of data is essential for the assessment of compliance with aspirational obligations, this remains a significant problem for the treaty bodies.

In the 1990s, when China had also started reporting to the Committee Against

719 In general about CEDAW reporting, see Carmel Shalev, 'State Reporting and the Convention on the Elimination of All Forms of Discrimination Against Women' in Anne F. Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (The Hague: Kluwer, 2000) 23-34.

720 Report of the Committee on the Elimination of Discrimination, UN GAOR, 38th sess, Supp No 18, UN Doc A/38/18 (1983), para 466.

721 Report of the Committee on the Elimination of Discrimination, UN GAOR, 42nd sess, Supp No 18, UN Doc A/42/18 (1987), para 331.

722 UN Doc CEDAW/A/54/38/Rev.1 (1999), para. 267.

723 *Ibid*., para 269.

724 Concluding comments of the Committee on the Elimination of Discrimination against Women: China, UN Doc CEDAW/C/CHN/CO/6 (2006), para 2.

Torture and began reporting to the Committee on the Rights of the Child, encounters between Chinese delegations and the treaty bodies became more confrontational, although the quality of Chinese reports as well as its delegations to Geneva and New York improved significantly. During this time China was under fire in the Commission on Human Rights, mainly due to the fallout from the 'Tiananmen' events.[725] Although the early focus on enumerations of legislative and administrative measures remained, such information was increasingly supplemented with statistical data. China ensured a large degree of procedural compliance, adhering to the guidelines of the treaty bodies and taking its appearances before them seriously by sending high-level, large delegations such as mentioned above with regard to CEDAW. China's attitude during this time is reflected in the words of Ambassador Wu Jianmin, who headed numerous delegations in front of different treaty bodies. In 1996, he told the CRC in his closing remarks that although the Cold War was over, "the world had not forgotten its prejudices, and lies continued to be told about China"; China and the world needed to understand each other through "an objective dialogue devoid of accusation".[726] He was responding to intense questioning by treaty bodies on politically sensitive issues, relying on NGO sources which China claimed were biased against it.[727]

In the first decades of the 21st century, it seems that members of treaty bodies have concluded that an overly critical approach is neither helpful nor effective and have turned to milder questioning of Chinese delegations, although prodding on politically sensitive issues remains. China has continued to improve its procedural compliance and, in many respects, takes both its obligations and its reporting very seriously, at both the diplomatic[728], but also substantive level. The latter, however, depends on the topic, and the Chinese government ensures that it has the final word and control over the assessment of its compliance, to the frustration of committee members. While the exchanges between the other treaty bodies, including the first encounter between China and the Committee on

725 See *infra*, 2.3.5 and 5.2.1.1.

726 *Ibid*., paras 65-66.

727 See *infra*, 5.3.4.4.

728 For example, in its concluding observations of 2005, the CRC complimented China on its "comprehensive and informative periodic report" and the "large high-level, multisectoral delegation". Concluding observations: China (including Hong Kong and Macau Special Administrative Regions), UN Doc CRC/C/CHN/CO/2 (2005), para. 2.

Economic, Social and Cultural Rights, have become more mild, this is not the case with the Committee Against Torture. The most likely explanation is that the obligations in CAT are more immediate, measurable, and in principle require less state effort to achieve than the more aspirational obligations in the other treaties.[729] For this reason, after the other treaty bodies are discussed together, the CAT will receive some separate attention.

The reporting on the SARs of Hong Kong and Macau is conducted by their regional governments and has shown a considerable amount of continuity with the reporting under the under the previous sovereigns, the United Kingdom and Portugal, respectively.[730] Although representatives of the SAR governments are now incorporated into the Chinese delegations in their appearances before treaty bodies, the administrative divisions effectively mean that three different governments are reporting simultaneously. The discussion below will solely be concerned with the mainland, although in the next section one important aspect of the continued application of human rights treaties to the SARs is discussed. The reporting of the SARs and the involvement of the central government is a topic for further research, although there does not seem to have been much interference.

5.3.3 Hong Kong and Macau: practice in support of automatic succession?

As described before, before the transfer of sovereignty over Hong Kong from the United Kingdom to China, the Human Rights Committee had made it known that it would not accept if a population, once it enjoys the protection of the ICCPR, would no longer be covered.[731] It reiterated this position through its Chairman following the consideration of one of the United Kingdom's last reports regarding Hong Kong:

> The Human Rights Committee – dealing with cases of dismemberment of States parties to the International Covenant on Civil and Political Rights – has taken the view that human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered by the predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State. [...]

729 See also the observation by CAT committee member Felice Gaer in Compte rendu analytique de la 846e séance, UN Doc CAT/C/SR.846 (2009), para 36.

730 Dinusha Panditaratne, 'Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse Since 1997?', *Human Rights Law Review* 8 (2008) 295-322, at 321-322.

731 See *infra*, 2.3.3.1 and 5.2.1.2.

> However, the existence and contents of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong make it unnecessary for the Committee to rely solely on the foregoing jurisprudence as far as Hong Kong is concerned. In this regard, the Committee points out that the parties to the Joint Declaration have agreed that all provisions of the Covenant as applied to Hong Kong shall remain in force after 1 July 1997. These provisions include reporting procedures under article 40. As the reporting requirements under article 40 of the International Covenant on Civil and Political Rights will continue to apply, the Human Rights Committee considers that it is competent to receive and review reports that must be submitted in relation to Hong Kong.[732]

Although China thus provided for a 'traditional' legal basis for the continuity of the obligations under the ICCPR by making statements expressing its consent and performing acts which can be seen as treaty actions, it thus took part in a practice which can be taken as support for a wider understanding of legal subjectivity under international law, with the consequence that once human rights have been granted within a territory, they cannot be taken away by the state. This could be construed as implicit recognition that human rights treaties do grant rights directly to these individuals, despite China's contractual approach to treaties, its position on the issue of sovereignty and the primacy of the state in international law.

The practice with regard to Macau seemed more ambiguous due to a delay in its initial report under China's sovereignty. The Chinese government sent a note on 3 December 1999 to the Secretary-General as depositary of the ICCPR stating that "[t]he provisions of the Covenant which are applicable to the Macao Special Administrative Region shall be implemented in Macao through legislation of the Macao Special Administrative Region [...] Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international rights and obligations that place on a Party to the Covenant." When it resumed the exercise of sovereignty over Macau, China notified the Secretary-General "that the Covenant with the statement made by China will also apply to the Macao Special Administrative Region."[733] The Committee also expressed its expectation that it would continue to receive reports in its last report on Macao under Portuguese

732 CCPR, Concluding Observations United Kingdom of Great Britain and Northern Ireland (Hong Kong), 9 November 1995, UN Doc. CCPR/C/79/Add.57, statement of the Chairman.

733 See <treaties.un.org>.

sovereignty.[734] It took until 2011 for this expectation to be met.[735]

With regard to all human rights treaties (and other treaties of which he was depositary), China sent notes to the Secretary-General of the UN in his capacity as depositary on 20 June 1997 (Hong Kong) and 13 December 1999 (Macau).[736] These notes clarified that treaties (not just human rights treaties) to which China already was a party and which already applied in Hong Kong and Macau, respectively, would continue to apply, as well as treaties to which the PRC was not a party but which would continue to apply in the SARs. The notes seemed designed to clarify rather than to create this situation under treaty law, and were carefully phrased as such. Regarding human rights treaties, some reservations applicable to all of China were extended to the SARs as well, such as the reservations to dispute settlement by the ICJ. However, article 20 of CAT, which provides for the committee's right to investigation has continued to apply, a situation encouraged by the CAT committee.[737]

Although the exact basis and method is open for discussion, it is important to note that on substance the provisions of all human rights treaties have continued to apply and the record is more ambiguous on procedure.

5.3.4 Common aspects of China's reporting

5.3.4.1 Normative acceptance

In its reports to all treaty bodies, China has consistently repeated its acceptance of international human rights norms, usually in the introduction, asserting its compliance and referring approvingly to international standards, both from treaties as well as non-binding instruments such as the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action, and even the ICCPR although China is yet to become a party.[738]

734 Concluding observations of the Human Rights Committee: Portugal (Macao), UN Doc CCPR/C/79/Add.115 (4 November 1999), paras. 3 and 17.

735 CCPR, Initial report of States parties: Macao, China, UN Doc CCPR/C/CHN-MAC/1 (Macao) (2011), 30 May 2011.

736 See <treaties.un.org>, under "Historical information", "China", n 2 and 3.

737 Summary record of the 423rd meeting, UN Doc CAT/C/SR.423/Add.1 (2000), para. 3.

738 See, e.g., Second periodic report of States parties due in 1997: China, UN Doc CRC/C/83/Add.9 (2005), para. 73.

China also draws attention to its role in the drafting of human rights instruments. It opened its supplementary report under CAT in 1992 with the claim that it had "participated actively in the drafting" of the Convention[739] and later emphasised how it had "participated acively in the drafting and elaboration of international human rights instruments within the framework of the United Nations system".[740] In its first CRC report in 1995, China styled itself as a "consistent respecter and defender of children's rights", and claimed to have taken "a positive part" in drafting the CRC, being a co-sponsor of the draft UNGA resolution calling for adoption.[741]

5.3.4.2 Domestic application of the treaty

A recurring question before various treaty bodies is the issue of applicability of the norms laid down in human rights treaties in China's domestic legal order. As described in the previous chapter, China's practice in this regard evolved from an assumption in the early 1990s that international treaties were binding in Chinese domestic law to a somewhat opaque practice in which provisions from human rights treaties are not directly applicable in the Chinese domestic order and the hierarchy between treaty provisions and those of domestic statutes is unclear. The positions taken in front of the treaty bodies have reflected this. Sovereignty-related concerns have prevented the Chinese government from allowing provisions of human rights treaties to have more effect in domestic law.[742]

5.3.4.3 Reservations, declarations and sovereignty

Reservations to human rights treaties are generally seen as undesirable, from a substantive point as well as a formal one, even if they are preferable over non-compliance.[743] China has

739 Supplementary report submitted to the United Nations on the implementation of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, para 1, UN Doc CAT/C/7/Add.14 (1993). China is mentioned once in the drafting history described by two of the main drafters CAT: J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht and Boston: Martinus Nijhoff, 1988) 93-95.

740 Supplementary report submitted to the United Nations on the implementation of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, UN Doc CAT/C/7/Add.14 (1993), para. 60.

741 Initial reports of States parties due in 1994: China, UN Doc CRC/C/11/Add.7 (1995), para. 1.

742 See *infra*, 4.5.6.

743 Vienna Declaration and Programme of Action, *supra* note 640, para I.26; para II.5. See generally Lijnzaad, *Reservations*, *supra* note 680; See also Boerefijn, *supra* note 713, and the discussion of General Comment 24 and its responses in that note. See also, in particular on the issue of severability of reservations, Ryan

made reservations and declarations to every human rights treaty under which it reports. Two of these are of a substantive nature. The first is a reservation to article 6 CRC, providing for the right to life of the child, which needs to be in conformity to Chinese constitutional provisions and legislation on family planning.[744] In response to inquiries by the CRC, China explained that the reservation was due to the "current situation of the country's economic and social development" and that it would "modify" this "at an appropriate time"'[745] Although it considers this a "declaration, rather than a reservation in the strict sense of the word", the Committee calls it a reservation, which seems appropriate also based on treaty law.[746]

The second substantive declaration concerns article 8(1)(a) ICESCR to the effect that China's laws on trade unions remain in effect. China has defended this rather strongly by appealing to its peculiar history which, in its view, renders China different than most other countries: 'the All-China Federation of Trade Unions, the unified national union organization, is the historical choice made by China's labor movement in its long years of development.' When questioned further, the government stated that '[n]o foreign country should try to make unwarranted accusations or interferences in this regard.'[747] Nonetheless, the CESCR urged China to amend its Trade Union Act to allow workers to form independent trade unions and to consider withdrawing its declaration.[748]

China's other reservations are all of a procedural nature. It has made reservations to dispute settlement clauses which provide for jurisdiction of the International Court of Justice: article 29(1) CEDAW, article 22 ICERD and article 30(1) CAT. CEDAW allows this explicitly, even though reservations to dispute settlement clauses would likely be acceptable

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Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent', *AJIL* 96 (2002) 531-560.

744 Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1, UN Doc A/HRC/WG.6/CHN/2 (2008). See also United Nations Treaty Collection <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> [30.3.2010].

745 List of issues to be taken up in connection with the consideration of the initial report of China, UN Doc CRC/C.12/WP.5 (1996); Written replies by the government of China concerning the list of issues, UN Doc [no number] (1996), para 1.

746 Summary record of the 298th meeting: China, paras. 30, 39, 46, UN Doc CRC/C/SR.298 (1996).

747 Replies by the government of the People's Republic of China, UN Doc CESCR/NONE/2004/10 (2004), paras. 2, 20.

748 *Ibid.*, para. 55. Contrary to the CRC, the CESCR has respected China's qualification of this reservation as a "declaration".

anyway. China has also made reservations to the inquiry procedure provided for by article 20 CAT (explicitly allowed by article 28), which enables the CAT to initiate an investigation when presented with credible evidence of a systematic practice of torture within a state party. Since China has not accepted the optional rights to petition, independent verification of facts asserted by China, but also of allegations by NGOs, is not possible, although at times China has invited members of treaty bodies to come to China.[749]

Treaty bodies usually recommend that China withdraw its reservations and accept the optional procedures provided by the treaties and optional protocols, and also call upon the government to accede to human rights treaties related to their mandate. The response to this has been consistent throughout: a non-committal, polite assurance that the Chinese government is taking this in consideration.

For example, in 1996 the CERD invited China to make the declaration accepting its right to receive individual petitions, which would be "passed on" to the government.[750] In 2001, the Chinese representative explicitly pointed out that China's reservation to article 22 "reflected his Government's practice with respect to provisions on settlement of disputes" and observed that the declaration under article 14 was optional.[751] The CERD repeated the recommendation in its most recent concluding observations.[752] The CRC also encouraged China to withdraw its reservation in 1998.[753] During its subsequent appearance before this committee in 2005, China also discussed its initial report under the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography[754] and various committee members encouraged China to establish a truly independent system for monitoring the CRC. They again recommended China to withdraw its reservation, on which

749 See, e.g., Summary record of the 300th meeting: China, UN Doc CRC/C/SR.300 (1996), paras. 65-66; Summary record of the 423rd meeting, UN Doc CAT/C/SR.423/Add.1 (2000), para. 4.

750 Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 51st sess, Supp No 18, UN Doc A/51/18 (1996), para 393; Summary record of the 1164th meeting: China, UN Doc CERD/C/SR.1164 (1996), para. 45.

751 Summary record of the 1469th meeting: China, UN Doc CERD/C/SR.1469, para. 2. See also *infra*, 4.5.4.

752 Concluding observations of the Committee on the Elimination of Racial Discrimination: China (including Hong Kong and Macau Special Administrative Regions), UN Doc CERD/C/CHN/CO/10-13 (2009), para. 37.

753 Report of the Committee on the Rights of the Child, UN GAOR, 53rd sess, Supp No 41, UN Doc A/53/41 (1998), para .117.

754 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, 2171 UNTS 247 (entered into force 18 January 2002); Initial reports of States parties due in 2005, UN Doc CRC/C/OPSA/CHN/1 (2005).

the Chinese delegation held off as usual.[755]

During the consideration of China's supplementary report to its initial CAT report in 1993, the Chinese representative claimed that "reconsideration" of its reservation to the dispute settlement clause in article 30 was "under way", and the committee's views regarding the reservation to its right to inquiry in article 20 "would be duly taken into account."[756] Committee members had stated that they would have been better able to assess the situation if China had accepted these competences.[757] Three years later, when China returned for its second report, committee members pushed harder for answers on a number of serious allegations and inquired after the conclusion of China's "reconsideration".[758] They expressed concern about the lack of independent international supervision since no independent body, not even the Red Cross, was permitted to visit prisons.[759] The Chinese representative declared that the reservations to the Convention were still undergoing a "comprehensive review", with "particular attention to the views of the other States parties concerning reservations and the impact of reservations on the Committee's work". He dismissed allegations as based on "anti-China bias" and the claim that the ICRC had been refused access to prisons as "entirely groundless".[760] The committee again recommended China to withdraw its reservation make declarations.[761] These events more or less repeated themselves during the consideration of China's third report.[762]

Following China's fourth periodic CAT report in 2008, when the committee again asked if China was considering making the declarations and withdrawing its reservations, the Chinese government explicitly invoked China's sovereignty.

755 Summary record of the 1062nd meeting, UN Doc CRC/C/SR.1062 (2005), paras. 16, 20, 27.

756 Report of the Committee Against Torture, UN GAOR, 48th sess, Supp No 44, UN Doc A/48/44 (1993), para. 421.

757 Summary Record of the Third Part (Public) of the 143rd meeting, UN Doc CAT/C/SR.143/Add.2 (1993), para. 37.

758 Summary record of the 251st meeting: China, UN Doc CAT/C/SR.251 (1996), paras. 9, 17.

759 *Ibid*., para. 25.

760 Summary record of the public part of the 252nd meeting: China, UN Doc CAT/C/SR.252/Add.1 (1996), paras. 12, 17, 19.

761 Summary record of the public part of the 254th meeting: China, Croatia, UN Doc CAT/C/SR.254 (1996), para. 2. See also Report of the Committee Against Torture, UN GAOR, 51st sess, Supp No 44, para 150(h), UN Doc A/51/44 (1996), para. 148.

762 Summary record of the 416th meeting, UN Doc CAT/C/SR.416 (2000), para. 42; Summary record of the 419th meeting, UN Doc CAT/C/SR.419 (2000); Summary record of the 423rd meeting, UN Doc CAT/C/SR.423/Add.1 (2000), para. 3.

> Making the declaration under Articles 21 and 22 is an optional provision and the right to make reservations to the Convention is also a part of the sovereignty of States parties. The Chinese government faithfully fulfils its obligation under the Convention and respects the Committee's recommendations, and at the same time, China's national conditions should also be taken into full account. At present, this issue is under careful study by the Chinese government.[763]

During China's appearance, the country rapporteur reiterated that without such a declaration, the committee could not but raise the fundamental questions that remained in the context of state reports.[764] In reply, the Chinese delegation again held off on the committee's optional competences, stating that although China had "not yet" recognised them, this in no way impacted how it acquitted itself of its obligations. It then repeated the standard position that governments are primarily responsible for the promotion and protection of human rights, and that states should promote dialogue in this domain while being mindful of national sovereignty.[765] In its concluding observations, the committee again encouraged China to consider making the declarations and also encouraged it to ratify UN human rights treaties to which it was not yet a party, including the ICCPR, and to ratify the Statute of the International Criminal Court.[766]

Most recently, in its concluding observations following China's first report under the CRPD, the Committee on the Rights of Persons with Disabilities also expressed regret about its failure to ratify the Optional Protocol to the CRPD and invited China to sign it.[767]

In the UNGA Sixth Committee, the Chinese government has been resisting the competence of treaty bodies to rule on the validity of reservations, invoking the VCLT and state practice. Commenting on the draft guidelines on reservations to treaties adopted by the ILC, the Chinese representative stated that "[t]reaty monitoring bodies should not have competence to rule on the validity of reservations."[768] More recently, China has also tried to hold back any movement in the direction of acceptance of greater powers of treaty bodies in

763 Written replies by the Government of the People's Republic of China to the list of issues (CAT/C/CHN/4) to be taken up in connection with the consideration of the fourth periodic report of CHINA (CAT/C/CHN/4), UN Doc CAT/C/CHN/Q/4/Add.1 (2008), para. 40.

764 Compte rendu analytique de la 844e séance, UN Doc CAT/C/SR.844 (2009), paras. 28-29.

765 *Ibid.*, para. 34.

766 *Ibid*., para. 41.

767 CRPD, Concluding observations on the initial report of China, UN Doc CRPD/C/CHN/CO/1, para. 4.

768 Zhu Lijiang, 'Chinese Practice in Public International Law: 2006 (I)', *CJIL* 6 (2007) 475-506, at 477, para. 5. See discussion above, *supra* note 713.

ruling on the validity of treaties, stating that the ILC guidelines on treaty reservations should make clear that when a reservation was found impermissible, the state that made it should be given the option of withdrawing it or denouncing the treaty. The assessment of the permissibility of reservations by contracting parties should be prioritised over that by dispute settlement bodies and treaty bodies.[769] These attempts did not prevent the ILC from including the competence of treaty monitoring bodies to assess the permissibility of reservations in its Guide to Practice on Reservations to Treaties, although it does specify that the "assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it."[770]

5.3.4.4 China and NGOs in alternate realities: Tibet, Xinjiang and the Falun Gong

The greatest tensions between members of the treaty monitoring bodies and Chinese delegations arose when committee members inquired about the human rights issues with which China is usually associated: the Tiananmen incident, rights of minorities, in particular in Tibet and Xinjiang, and of practitioners of Falun Gong. Usually, the term 'constructive dialogue' is more than diplomatic nicety when the topics discussed are not politically charged and Chinese delegations are open to criticism. However, when confronted with these issues, information about which committee members derive from reports of NGOs such as Amnesty International, Human Rights Watch and Human Rights in China, Chinese delegates respond in accordance with pre-defined official discourses, dismiss allegations without further argumentation as "totally groundless" and inevitably reject the sources as "one-sided", "not objective" and "biased". The Chinese government claims that it is "a victim of lies and disinformation" and that "the true situation" is rarely reported.[771] The fact that the Chinese government has not allowed for any kind of international monitoring beyond the reporting procedure and the occasional visit of a special mechanism of the Human Rights Council, makes both the official Chinese narrative and the NGO narratives unverifiable.[772] Of course, this is the central shortcoming of the reporting procedure and the reason other procedures exist in the first place.

769 Zhu Lijiang, 'Chinese Practice in Public International Law: 2009', *CJIL* 9 (2010) 607-662, at 610, para. 4.
770 Guide to Practice on Reservations of Treaties (2011), *supra* note 713, para. 3.2.1(2).
771 Summary record of the 299th meeting: China, UN Doc CRC/C/SR.299 (1996), paras. 8-10.
772 See also Peerenboom, *China Modernizes*, *supra* note 637, 164-165.

Tensions have manifested themselves, to a greater or lesser extent, with every treaty body. The CERD started asking more specific and critical questions about minority policies from the discussion of China's third and fourth report in 1990 onwards, shortly after the Tiananmen events and a preceding period of unrest in Tibet. Committee members expressed "great concern" about the situation of the people of Tibet and questioned the Chinese government's account of riots in the Tibetan capital Lhasa, while the Chinese government provided an alternative narrative, claiming that after the central government had been "obliged to impose martial law" for more than a year, the situation "had been stable since."[773]

In subsequent sessions and also before other treaty bodies, the records of the exchanges between the committees and the Chinese government give the impression that the two are living in alternate realities. China's communications describe in glowing terms all kinds of modernisation, education and development programmes undertaken in minority areas, as well as extensive minority participation in government.[774] This emphasis on modernisation, development and harmony also dominates China's general human rights discourse, but is even more pronounced when combined with the official Chinese line that Tibet was "liberated" from feudal oppression in 1951,[775] has enjoyed full autonomy from 1956 and any immigration of Han Chinese is not aimed at upsetting the demographic balance but to provide temporary "technical assistance". Riots and separatist activities are the work of a handful of law-breakers, illegal and by implication illegitimate. On the other hand, members of the treaty bodies, based on NGO information, ask questions about unrest, rioting, separatism and, more structurally, allegations of systematic violations of the freedom of religion, self-determination, widespread torture and destruction of traditional culture. One member of CERD even alleged that China used "every imaginable stratagem to wipe out Tibet's culture and identity."[776]

773 Report of the Committee for the Elimination of Racial Discrimination, UN GAOR, 45th sess, Supp No 18, UN Doc A/45/18 (1990), paras. 118, 121, 124.

774 Seventh periodic reports of States parties due in 1995: The People's Republic of China, UN Doc CERD/C/275/Add.2 (1996). Ironically, this kind of discourse echoes the colonial discourse of Western countries bringing 'progress' to their colonial subjects in the age of modern imperialism at the turn of the 19th and 20th centuries.

775 Summary record of the 1942nd meeting, UN Doc CERD/C/SR.1942 (2009), para. 39; Compte rendu analytique de la 1943e séance, UN Doc CERD/C/SR.1943 (2009), para. 8.

776 Summary record of the 1163rd meeting: China, India, UN Doc CERD/C/SR.1163 (1996), paras 17, 60.

Three treaty bodies have taken a specific interest in the question of the Panchen Lama, the second highest figure in Tibetan Buddhism. The exchanges on this topic are illustrative of the existence of two parallel mutually incompatible narratives. Before the CERD, China presented its handling of this issue in support of the assertion that it "protects the religious beliefs of minorities and respects their traditional faiths and rituals." Following the death of the previous Panchen Lama, a search for his reincarnation was started. The Chinese government involved itself in this until in its view in 1995 the Dalai Lama "abruptly jumped the gun by announcing from abroad his own 'reincarnated child' in disregard of established rules", while a government-backed group, observing all religious and traditional rules, found its own reincarnated Panchen Lama.[777] A member of the CERD expressed surprise at the level of Chinese government involvement in religious matters,[778] although according to the government its participation in the ritual was a historical convention.[779]

The fate of Gedhun Choekyi Nyima, the Dalai Lama-recognised Panchen Lama, remains unknown, as he disappeared from public view shortly after being named. Both the CRC and the CAT considered the issue within their mandate. Before the CRC in 1996, China repeated its position on the issue and added that since "separatists were seeking to kidnap the boy, the parents had become fearful for his safety and requested Government protection, which had been provided." The boy was living with his parents in good conditions.[780] China ignored suggestions for an independent fact-finding mission consisting of outsiders to visit Tibet, or for a UN representative to verify its account.[781] When the CRC raised the issue again in 2005, again requesting to allow an independent visit to verify the child's living conditions, China stated that this was not possible "at the instruction of the child and his family, who did not wish to have their privacy invaded."[782] The CAT inquired about the child's fate during China's most recent appearance as a possible case of enforced disappearance.[783] The government again said that the child and his family "indicated clearly

777 Seventh periodic reports of States parties due in 1995: The People's Republic of China, UN Doc CERD/C/275/Add.2 (1996), para. 69.
778 Summary record of the 1163rd meeting: China, India, UN Doc CERD/C/SR.1163 (1996), para. 56.
779 Summary record of the 1164th meeting: China, UN Doc CERD/C/SR.1164 (1996), para. 48.
780 Summary record of the 299th meeting: China, UN Doc CRC/C/SR.299 (1996), para 39.
781 Summary record of the 300th meeting: China, UN Doc CRC/C/SR.300 (1996), para. 13.
782 Summary record of the 1064th meeting, UN Doc CRC/C/SR. 1064 (2005), paras. 11, 13-14.
783 Compte rendu analytique de la 844e séance, UN Doc CAT/C/SR.844 (2009), para. 63.

that in order to keep their normal life from being disturbed, they do not wish to meet with any organization or outsiders."[784]

Although exchanges on minority issues were rather confrontational during the 1990s, this has diminished in recent exchanges between the CERD and China. Considering China's combined eighth and ninth report, submitted in 2000, committee members again inquired about serious human rights violations reported by various NGOs against the Uighur population in Xinjiang, religious freedom in Tibet, and the contrast between China's report, which focused on legislation, and the more pragmatic and specific approaches of NGOs, which pointed at the discrepancy between the law and the actual situation, although one CERD member stated that "China was certainly not pursuing an obvious policy of repression" in Tibet.[785] China's response again questioned the credibility of NGO information, presenting its own information as more reliable and provided by the ethnic minorities themselves.[786]

In 2004, China reported for the first time under the ICESCR. The CESCR asked to what extent "non-violent advocacy for self-determination by the officially recognized ethnic minorities – such as Tibetans, Mongols, and Uygurs" was lawful. The government responded that the Chinese constitution guarantees a variety of democratic political rights, including freedom of speech. It stressed that all the "areas where ethnic self-rule is practiced are inalienable parts of the People's Republic of China" and that to "maintain China's territorial integrity [...] those who organize, plot, instigate or carry out the scheme of splitting the state or undermine the unity of the country have committed a crime and should be punished accordingly."[787] The committee asked further questions about Tibet based on information provided by the Special Rapporteurs on racism, racial discrimination, xenophobia and related intolerance, and on adequate housing. The Chinese government denied all charges as "entirely untrue" and again emphasised all the developmental gains in Tibet.[788]

784 Written replies CAT 2008, *supra* note 763, para. 2.
785 Summary record of the 1468th meeting, UN Doc CERD/C/SR.1468 (2003), paras. 47, 49, 60.
786 Summary record of the 1469th meeting, UN Doc CERD/C/SR.1469 (2001), para. 2.
787 Replies by the government of the People's Republic of China, UN Doc CESCR/NONE/2004/10, para. 4.
788 *Ibid*., paras. 8, 30.

The unrest in Tibet in 2008 and in Xinjiang in 2009 was discussed in recent appearances before the CAT and the CERD. CAT members asked detailed questions, requesting lists and details of all persons detained in Tibet, inquiring about secrecy regulations, allegations that lawyers had been warned against defending Tibetan protesters, and whether some quick convictions were based on confessions. The government disputed their reading of the facts, denied that there were hundreds of arrests, and claimed that "some law-breakers" had resorted to premeditated violence. It provided precise numbers, but not names, about detainees and convicts and claimed that all procedures were in strict accordance with China's criminal procedural laws. There was 'no need to separately set up the so-called independent review or supervision committee for certain cases.'[789]

During the consideration of its combined tenth through thirteenth report under CERD,[790] which emphasised China's "splendid achievements" in legislative and other efforts in the area of development, the Chinese delegation gave a consolidated official account of the events.

> Violent crimes involving beating, smashing, looting and arson had taken place in Lhasa and neighbouring areas of the Tibet Autonomous Region on 14 March 2008 and in Urumqi in the Xinjiang Uighur Autonomous Region on 5 July 2009, resulting in the loss of many innocent lives and damage to property. There was evidence that the two incidents had been premeditated and masterminded by separatists abroad and carried out by separatists within China with a view to promoting ethnic hatred, disrupting harmonious development in ethnic minority areas and undermining national unity and territorial integrity. The violent crimes perpetrated were also serious breaches of the purposes and principles of the Convention and had been widely condemned by Chinese people of all ethnic groups. The Government had taken prompt action to halt those criminal activities and to protect citizens' right to life and property. Public order had been quickly restored and unity among ethnic groups preserved.[791]

Some mild questions by Committee members on a possible ethnic dimension and whether members of certain ethnicities may have a legitimate fear of persecution[792] were answered by the delegation in the usual terms. There was no ethnic or religious dimension to the unrest in Xinjiang; the unrest there was to be blamed on terrorists, whereas the unrest in Lhasa was to be blamed on separatists. Both areas had been part of China since time immemorial, but their autonomy and peoples were constitutionally protected and guarded

789 Written replies CAT 2008, *supra* note 763, para. 2.

790 Thirteenth periodic reports of States parties due in 2007: China, UN Doc CERD/C/CHN/10-13 (2009).

791 Summary record of the 1942nd meeting, UN Doc CERD/C/SR.1942 (2009), para. 15.

792 See, e.g., *ibid.*, para. 58.

by the central government.[793] The Chinese delegation ignored suggestions by committee members for truth commissions in response to the events in Xinjiang and Tibet. In response to a question about the potential discriminatory effects of China's bedrock principle of 'one country, two systems', China defended it as the best way to deal peacefully with historical divisions, maintain national unity and safeguard its territorial integrity.[794]

Finally, two entrenched opposing positions also exist with regard to the spiritual movement known as the Falun Gong.[795] The CAT was the first to ask questions about allegations of torture against practitioners.[796] The Chinese representative stated that China's Public Security Organs had investigated "the illegal organization known as Falun Gong" and had "amassed a huge amount of evidence against it". The government alleged that "Falun Gong was a a cult that met secretly [...] practised mind control [...] and endangered society". It had allegedly caused the death of over 1,500 persons and led certain members to murder their parents. In short, the organisation was presented as an evil cult. Allegations that numerous arrests related to the cult had been made and torture extensively applied, were denied and specific cases referred to were discussed and dismissed.[797]

In 2004 the CESCR inquired about the enjoyment of the the right to freedom of religion as a dimension of cultural rights was answered by detailed answers with historical background on the five major religions in China – Buddhism, Taoism, Islam, Catholicism and Protestantism. Falun Gong, although mentioned by the committee, was in the Chinese view not a religion.[798] Around the same time, the Chinese delegation to the CRC also said Falun Gong was "not a religion but rather an evil cult that was contrary to the interests of

793 Compte rendu analytique de la 1943e séance, UN Doc CERD/C/SR.1943 (2009), paras 2-7.

794 *Ibid*., paras. 57-59, 64.

795 Chinese: 法轮功. The movement was started in 1992 and bases itself on Chinese Daoist traditions, and came at the end of a rise in popularity of *qigong* movements, which focus on aligning breath, movement and awareness for exercise, healing and meditation. After tensions between the movement and the PRC government had mounted in previous years, the authorities started to crack down on the movement in 1999. If the movement was not en enemy of the CCP before this crackdown, it certainly has been since. It is well-organised outside of China and its activities range from involvement in human rights litigation and activism, providing information to NGOs and UN mechanisms, as well as litigation, and it is liaised with anti-CCP media organisations such as the *Epoch Times*. See e.g. *Nine Commentaries on the Communist Party* (Gillette, NJ: Epoch Times, 2004) and Human Rights Law Foundation <www.hrlf.net>, which filed the Spanish cases against Jiang Zemin and others. See *infra*, 6.3.6. See David Ownby, *Falun Gong and the Future of China* (Oxford: Oxford University Press, 2008).

796 Summary record of the 416th meeting, UN Doc CAT/C/SR.416 (2000), para. 12.

797 Summary record of the 419th meeting, UN Doc CAT/C/SR.419 (2000).

798 Replies by the government of the People's Republic of China, UN Doc CESCR/NONE/2004/10, para. 46.

humanity and society" and alleged that Falun Gong preachers had "encouraged death in the name of enlightenment".[799] This position has remained the same since, although Falun Gong is not prohibited in Hong Kong and one CAT member recently went as far as telling the Chinese delegation that if it wanted to combat a movement deemed an "evil sect" like the Falun Gong, it should do so through legal means and not torture.[800]

5.3.4.5 Disaggregated statistical data

Although, as described above, the quality of China's reporting has increased significantly throughout the years, as evidenced by its most recent (and first) report to the Committee on Economic, Social and Cultural Rights as well as its most recent reports to the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, a continuing point of criticism is the insufficiency of statistical data, disaggregated by gender, age and ethnicity. The record now is mixed. While previously sometimes the reply of the Chinese government when criticised for the unavailability of disaggregated statistical data was that this was simply not available,[801] China seems to be on its way to collecting increasingly more of these, and to build the capacity to deal with this. For example, China's second periodic report to the CRC Committee described measures to build this capacity, and was also rich in statistical data.[802] The rest of the report was rich in legislative and policy information, as well as statistical data. In response to the committee's list of issues, China provided disaggregated statistical data in its replies.[803] However, in its first concluding observations regarding China, the Committee on Economic, Social and Cultural Rights still regretted that it was unable to give a proper assessment due to the lack of availability of statistical data.[804] China's recent report to CEDAW[805] and its initial report

799 Summary record of the 1064th meeting, UN Doc CRC/C/SR. 1064 (2005), para. 11.

800 Compte rendu analytique de la 846e séance, UN Doc CAT/C/SR.846 (2009), para. 40.

801 See e.g. CERD, UN Doc A/51/18 (1996), para. 392.

802 Second periodic report of States parties due in 1997: China, CRC, UN Doc CRC/C/83/Add.9 (2005), p ara. 11.

803 Written replies by the government of China concerning the list of issues (CRC/C/Q/CHN/2) received by the Committee on the Rights of the Child relating to the consideration of the second periodic report of China (CRC/C/83/Add.9), CRC, UN Doc CRC/C/RESP/89 (2005).

804 Concluding observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao), CESCR, UN Doc E/C.12/1/Add.107 (2005), para 2.

805 UN Doc CEDAW/C/CHN/7-8 (2012); see CEDAW/C/CHN-HKG/7-8 (2012) and CEDAW/C/CHN-MAC/7-8 (2012) for Hong Kong and Macao.

under the CRPD[806] are again richer in statistical data. The CRPD Committee did not criticise any absence of statistics in its concluding observations.[807]

As more and more work is done within the Office of the High Commissioner of Human Rights in cooperation with the human rights treaty bodies towards methodological improvements to improve the framework for assessing states' compliance with their human rights obligations, the reliability of Chinese statistics can be expected to remain an important issue.[808]

5.3.5 China and the Committee Against Torture

China's encounter with the CAT reflects many of the points made before, but confrontation has remained. In its initial CAT report in 1989, China still felt free to make a sweeping conclusion.

> The whole series of legislative, judicial and administrative measures adopted by the People's Republic of China for the implementation of the Convention are wholly in compliance with the relevant stipulations of the Convention and have yielded marked results. China will continue to work hard to fulfil earnestly its assumed obligation, formulate and strictly implement relevant laws and regulations, and adopt resolute measures to prevent and stamp out torture and other cruel, inhuman or degrading treatment so as to make due contribution to the total elimination of such phenomena and fulfilment of the purposes of the Convention.[809]

In general, the report was high on recitation of Chinese legislation and low on other information. The government claimed there was no need to adopt any legislation because the Convention took precedence anyway and torture was already prohibited.[810] Responding to questions, it denied the existence of political prisoners in China and presented the "rehabilitation through labour" programme, which would prove a continuing concern to the committee, as an "administrative measure comprising reform through compulsory education aimed at preventing and reducing offences" which was "mainly imposed on

806 CRPD, Initial reports submitted by States Parties under article 35 of the Convention: China, UN Doc CRPD/C/CHN/1, 8 February 2011; Hong Kong, China, UN Doc CRPD/C/CHN-HKG/1, 11 February 2011; Macao, China, UN Doc CRPD/C/CHN-MAC/1, 8 February 2011.

807 CRPD, Concluding observations on the initial report of China, UN Doc CRPD/C/CHN/CO/1.

808 See OHCHR, Human Rights Indicators: A Guide to Measurement and Implementation, UN Doc HR/PUB/12/5 (2012), in which the use of both qualitative and quantitative indicators for the implementation of human rights is set out.

809 Initial report of States parties due in 1988: China, UN Doc CAT/C/7/Add.5 (1989), para. 55.

810 Summary record of the 51st meeting, UN Doc CAT/C/SR.51 (1990), para. 2.

persons who had refused to repent of repeatedly upsetting the social order or had committed minor offences for which punishment was thought inappropriate."[811]

The 'sensitive' issues received only one paragraph in the summary record. Speaking shortly after the "anti-governmental disturbances in 1989", the government stated "there had been no summary arrests or detentions of peaceful demonstrators, summary executions or widespread torture" and blamed "anti-governmental rioting and criminal activities" on "a handful of persons". In Tibet, crimes committed again by "a small minority" had been tried "in full conformity with the law", without torture.[812] The committee, finding China's report and explanations insufficient, requested an additional report as it did in those years with Afghanistan, Belize, Cameroon, Chile, Ecuador, Libya, and Nepal.[813] The cautious language of this request probably reflected a far deeper gap between the committee and the Chinese delegation, which seems to have expected a more diplomatic setting and not the detailed scrutiny, informed also by NGO reports, which caught the members of the Chinese delegation by surprise.[814]

However, the Chinese government responded well with a much more detailed supplementary report, albeit two years after it was due, enabling closer scrutiny.[815] Although it still answered most questions by reference to its legislation, the Chinese delegation also reserved a special remark for NGO material, calling it "questionable" and biased.[816] Since the Special Rapporteur on Torture relied on similar sources, his reports had to be treated with equal caution. Violations of CAT were, in any case, "merely isolated cases" and "not representative of the policy" of the PRC.[817]

One observer describes China's presentation of its supplementary report as the "first

811 Report of the Committee Against Torture, UN GAOR, 45th sess, Supp No 44, UN Doc A/45/44 (1990), para 494. The 'rehabilitation through labour' programme is also known as 'reeducation through labour' (*láodòng jiàoyǎng* 劳动教养 or *láojiào* 劳教).

812 *Ibid*., para. 497.

813 *Ibid*., para. 500; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008) 626, 639-640.

814 For detailed discussion of this first encounter see Kent, *China, the UN*, *supra* note 626, 93-97.

815 Supplementary report submitted to the United Nations on the implementation of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, UN Doc CAT/C/7/Add.14 (1993).

816 Summary Record of the Third Part (Public) of the 143rd meeting, UN Doc CAT/C/SR.143/Add.2 (1993), para. 12.

817 *Ibid*., para. 422.

time the Chinese authorities had recognized that the Committee had the right to question them and that they had the obligation to respond."[818] In general, during this second encounter China showed the importance it attached to a good relationship with the committee by sending a high-level delegation and showing a large degree of procedural compliance, even if substantive compliance was more problematic.[819] Reporting thus became less of a purely diplomatic exercise, and China had to account more for the way it acquitted itself its obligations than initially expected.

China's second report in 1995 supplemented the earlier reports and focused mainly on legislative measures. It contained a single paragraph responding to questions by the committee on investigations of NGO allegations of torture, especially in Tibet. Its explanation was limited to an account of how China responded and which domestic institutions were involved, claiming that "relevant United Nations organizations" would be informed at "the appropriate time". Without specifying, China stated that some of these communications had "helped to clear up cases of violations of law and discipline by State functionaries."[820] Unsatisfied committee members pushed harder for answers than three years before and wondered, both in light of China's report and other information, if China could really claim to be respecting its obligations under CAT, describing its response as "hardly enlightening".[821] One pointed out that as a permanent member of the Security Council "China had special responsibilities in regard to respect for international instruments."[822]

China was on the defensive from the beginning. Ambassador Wu deplored deploring "misconceptions" about China which were "both widespread and deep-rooted". He blamed them on "communication failures, partly to the media's preference for bad news and partly to bias", and singled out one major source of the committee, Amnesty International, as "that body was known to be politically motivated." He blamed allegations of widespread torture in Tibet to the "Tibetan separatist movement" and biased NGOs which "drew their information from so-called 'dissidents' who made their living out of accusing and blaming

818 Kent, *China, the UN*, *supra* note 626, 97.
819 *Ibid*., 97-100.
820 Second periodic reports of States parties due in 1993: China, UN Doc CAT/C/20/Add.5 (1995), para. 69.
821 Summary record of the 251st meeting: China, UN Doc CAT/C/SR.251 (1996), paras. 9, 17.
822 *Ibid*., para. 28.

China". When the committee showed little sensitivity to this position in its concluding observations, ambassador Wu replied that if the conclusions of CAT "were based on misinformation, they could not be considered objective."[823]

Neither side gave in to the other and this was also the case in the consideration of China's third report, submitted in 2000. The section on the mainland systematically described new implementation measures, referring to earlier reports and providing new information and more statistical data.[824] Again, it was left to committee members to bring up China's record as described by NGOs, notably allegations of torture against Falun Gong practitioners,[825] forced labour in "re-education" camps in Xinjiang,[826] and allegations of ill-treatment, particularly of Uighurs and Tibetans.[827] This was the first time China presented its official line on Falun Gong as an "evil cult". Allegations of massive arrests and torture of practitioners were denied and some specific allegations were discussed and dismissed. Denials of allegations of ill-treatment of members of ethnic minorities were less specific, and some serious ones dismissed as "not worth refuting"' However, other not politically sensitive questions, such as regarding the coerced extraction of confessions by law enforcement officials, were answered in detail, acknowledging the problems.[828]

In its concluding remarks, the Committee again ignored the general refutations of the Chinese delegation and, while complimenting the Chinese authorities on their efforts, continued to express concern about "allegations of serious incidents of torture, especially involving Tibetans and other national minorities",[829] leaving it to the delegation to again deplore the reliance of CAT on NGO information. The best way for the Committee to "make an independent and objective judgment" was to visit China and meet "law-enforcement officers and scholars."[830]

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823 Summary record of the public part of the 252nd meeting: China, UN Doc CAT/C/SR.252/Add.1 (1996), paras. 2, 4, 17; Summary record of the public part of the 254th meeting: China, Croatia, UN Doc CAT/C/SR.254 (1996), paras 2, 3.

824 Consideration of reports submitted by states parties under article 19 of the Convention: Third periodic reports of States parties due in 1997, UN Doc CAT/C/39/Add.2 (2000).

825 Summary record of the 416th meeting, UN Doc CAT/C/SR.416 (2000), para. 12.

826 *Ibid*., para. 24.

827 *Ibid*., paras. 31, 35.

828 Summary record of the 419th meeting, UN Doc CAT/C/SR.419 (2000).

829 Summary record of the 423rd meeting, UN Doc CAT/C/SR.423/Add.1 (2000), para. 3.

830 *Ibid.*, para. 4.

China's fourth periodic report to CAT was submitted in three components, for the mainland[831], for Macao[832] and for Hong Kong.[833] The mainland report provided both legislative measures and statistics, although not completely disaggregated as requested by the Committee.[834] The committee's list of issues[835] made clear that China was about to face a tough session; China's response made clear that its willingness to cooperate only went so far. Responding to the committee's assertion that despite the measures China had taken, "an array of mutually reinforcing conditions contribute to [torture and ill-treatment's] continued pervasiveness in the criminal justice system", the Chinese pointed out "[w]ith regret" that this allegation was only based on "unproven so-called 'information'", which ran "counter to the principle of impartiality and objectivity" and was therefore "not acceptable to the Chinese side". In response to specific questions about Tibet, the government disputed the committee's reading of the facts, denying there were hundreds of arrests, and again blaming "some law-breakers" for premeditated violence. It provided precise numbers, but not names, about detained and convicted people, claiming that all procedures were in strict accordance with criminal procedural laws and discounting any need for a "so-called independent review or supervision committee for certain cases."[836]

Maybe more surprisingly, the Chinese government also rejected as "groundless" criticism of the overreliance of China's criminal justice system on confessions and "re-education". "The extremely few cases of torture found in detention facilities are personal law-breaking acts towards detainees by a few keepers who failed to perform their duties properly."[837] These problems had in the past few years been acknowledged both inside and outside of China, including publicly by officials.[838]

831 Fourth periodic reports of States parties due in 2004: China, CAT, UN Doc CAT/C/CHN/4 (2007).

832 Fourth periodic reports of States parties due in 2001: Macao Special Administrative Region, UN Doc CAT/C/MAC/4 (2006).

833 Fourth periodic reports of States parties due in 2001: Hong Kong Special Administrative Region, UN Doc CAT/C/HKG/4 (2006).

834 Reply to list of issues, UN Doc CAT/C/CHN/Q/4/Add.1, paras 16, 31.

835 This report was the first under the new working methods of CAT. Nowak and Arthur, *supra* note 813, 644.

836 Written replies CAT 2008, *supra* note 763, para. 2.

837 *Ibid*.

838 See, e.g., Morten Kjaerum, Hatla Thelle, Xia Yong and Bi Xiaoqing (eds.), *How to Eradicate Torture: a Sino-Danish Joint Research on the Prevention of Torture* (Beijing: Social Sciences Documentation Publishing House, 2003); see also Concluding Observations of the Committee Against Torture, UN Doc CAT/C/CHN/CO/4 (2008), paras. 9, 11; Yuwen Li, 'The Influence of International Organisations on the

Other allegations denied outright were the application of administrative detention to persons exercising their freedom of expression, assembly or religion; that re-education through labour caused severe physical and mental pain and suffering; that China had detained persons because they belonged to a specific group or ethnicity; and that petitioners to the government were intimidated or detained in unofficial facilities. The committee inquired about specific cases. About the fate of four named petitioners, the government claimed to have found nothing upon investigation due to incomplete information. Specific information was also requested about four possible cases of enforced disappearance, to which the government did reply.[839]

However, to the surprise of the committee president during the subsequent discussion, China did not consider enforced disappearance to be within the realm of torture.[840] Similarly, it rejected the notion that human trafficking and sexual exploitation belonged "to the realm of 'torture' as defined by the Convention".[841] Responding to questions about domestic violence, the government also wrote that this was "obviously outside the scope of the convention", but answered nonetheless.[842] The same applied to work conditions in factories.[843] A number of other disagreements on the scope of CAT also showed that China does not automatically accept the authority of the committee to interpret the convention.

The Chinese government responded in a similar way to questions on specific cases originally raised by the Special Rapporteur on Torture. It objected that the special rapporteur "is not a mechanism established by the Convention and questions thereunder fall outside the scope of the terms of reference of the Committee", emphasising procedure over substance.[844] However, China, "in the spirit of cooperation", did present its "principled

Protection of Human Rights in the Chinese Legal System' in: Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Antwerp: Intersentia, 2008) 179-197, at 189-196.

839 Written replies CAT 2008, *supra* note 763, para. 2.

840 Compte rendu analytique de la 844e séance, CAT, UN Doc CAT/C/SR.844 (2009), 63.

841 Written replies CAT 2008, *supra* note 763, para. 35.

842 *Ibid*., para. 7.

843 *Ibid*., para. 38.

844 This position also discounts a reality in which mandateholders of the special procedures and members of treaty bodies obviously do coordinate their activities and exchange information. See Sir Nigel Rodley, 'The United Nations Human Rights Council, Its Special Procedures, and Its Relationship with the Treaty Bodies: Complementarity or Competition?' in: Kevin Boyle (ed), *New Institutions for Human Rights*

position", consisting in part of its usual point of being a developing country with a huge population and vast territory with drastically uneven regional development, which made investigation of vague information difficult. It also referred to its replies provided to the Human Rights Council.[845]

An even more sensitive question concerned suggestions for new investigations into the Tiananmen Incident of 1989, to which the government merely responded that it "has already drawn its conclusions" and that "practice over the past almost 20 years has proved that the timely and resolute measures taken by the Chinese government at that time was absolutely necessary and right." It also took exception to the use by the committee of the words "exile of the Dalai Lama" as "out of tune with historical facts" and rejected allegations of dispersing peaceful demonstrations by monks as "sheer fabrication", qualifying them instead as "organized law-breaking".[846] Regarding Xinjiang, it expressed "deep regret for raising the issue by the Committee on the basis of totally groundless rumours."[847]

The exchange between the Committee and the Chinese delegation followed a familiar pattern, in which the Chinese side emphasised achievements and measures taken and focused on the cooperation between the Chinese government and the treaty bodies and Office of the High Commissioner for Human Rights, and how the eradication of torture was a continuing effort. As has been noted about positions taken by China elsewhere, this once again suggests that the Chinese government considers that even the prohibition of torture is subject to progressive realisation and not an immediate obligation. This prompted Committee member Felice Gaer to point out to the Chinese delegation the difference between aspirational obligations as laid down in treaties like the ICESCR and the direct obligations contained in CAT.[848]

The members of the Committee were apparently losing their patience, stating that China was appearing for the fourth time and the questions on the list of issues were to a

Protection (Oxford: Oxford University Press, 2009) 49-73, at 65-71.

845 Written replies CAT 2008, *supra* note 763, para. 21.

846 *Ibid*., para 34.

847 *Ibid*., para 36.

848 Compte rendu analytique de la 846e séance, UN Doc CAT/C/SR.846 (2009), para. 36.

large extent the same before. A lot of information requested was nowhere to be found in its communications, fundamental questions remained unanswered, and certain problems raised by the committee were just swept aside as groundless or outside the Committee's mandate.[849]

The Chinese delegation as usual invoked the importance of awareness of differences between cultures, traditions, level of development and legal system of a country, and China making major achievements but still being limited in resources, again conjuring up the model of progressive realisation. It professed cooperation with NGOs, although a small number of NGOs, under the cover of human rights, in its eyes distorted facts and disseminated wrongful information for political purposes. This kind of manipulation surely would not hamper the members of the Committee in their objectivity and impartiality.[850] The responses on the usual issues did not differ from the answers China usually provides. The standoff between the Committee and the Chinese government thus remained intact, with China holding firm to its sovereignty.[851] The committee was left to express regret that the Chinese government mainly spoke in generalities and did not enter into detail on specific cases, and that statistics remained absent, even though China had been a party to the Convention for almost twenty years.[852] Although it acknowledged China's increasing awareness of its torture problem, the committee did not mince words in its concluding observations.

> [T]he Committee remains deeply concerned about the continued allegations, corroborated by numerous Chinese legal sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings.[853]

Its first recommendation was that China, "as a matter of urgency", should take "immediate steps" to prevent torture "throughout the country"[854] and that it should "immediately abolish all forms of administrative detention, including 're-education through labour'".[855] Its other recommendations did not seem to indicate much doubt on the credibility of serious

849 Compte rendu analytique de la 844e séance, UN Doc CAT/C/SR.844 (2009), paras 28-29.
850 Compte rendu analytique de la 846e séance, UN Doc CAT/C/SR.846 (2009), paras 2-4.
851 *Ibid*., para. 34.
852 *Ibid*., paras. 36, 40.
853 Concluding Observations of the Committee Against Torture, UN Doc CAT/C/CHN/CO/4 (2008), para 11.
854 *Ibid*.
855 *Ibid.*, para. 13.

allegations levelled by NGOs.[856]

The public response of the Chinese government would be disappointing if it were not fairly predictable by now. In response to these Concluding Observations, a Foreign Ministry spokesman said:

> To our regret, some biased committee members, in drafting the observations, chose to ignore the substantial materials provided by the Chinese Government, quote and even fabricated some unverified information. Running counter to the ethics of justice and objectiveness, they attempted to politicize the review by squeezing some unreal and stigmatized comments into the concluding observations, which China firmly opposes.[857]

In its comments on the Concluding Observations, the Chinese government went even further. Claiming that "[m]ost Committee members positively assessed China's efforts to combat torture and its achievements in this regard", it singled out the country rapporteurs and regretted their alleged "strong bias against China", adding that they

> paid no heed to the facts and disregarded the detailed and accurate information and thorough explanations provided by the Chinese Government. Instead, they cited an extremely small number of "reports" and "sources" fabricated by groups whose goal is the overthrow of the Chinese Government, thereby deliberately politicizing the review process. When the Chinese report was under consideration they made unwarranted criticisms of the Chinese Government, and they introduced many inaccuracies in the concluding observations: for example, they claim that China "suppressed" the so-called "1989 Democracy Movement" and "peaceful demonstrations" in Lhasa and neighbouring areas; they vilify China's "practice of torture" vis-à-vis ethnic minorities and "other vulnerable groups"; they irresponsibly spread the rumour fabricated by the Falun Gong cult that its members have been "subjected to torture" and "used for organ transplants"; they groundlessly accuse China of attacking "human rights defenders" and maintain that torture is "widespread" in detention centres. The Chinese Government strongly rejects all of these slanderous and untrue allegations.[858]

The government went on to describe its understanding of the correct framework for the work of the Committee.

> It must be pointed out that the Committee against Torture was established under the Convention and should conduct its work within the framework of that instrument, in accordance with the principle of objectivity and fairness; the Committee should also promote the implementation of the Convention through *cooperation with States parties based on equality and mutual respect*. Abuse of the rapporteur's role by individual

856 *Ibid.*, para. 41.

857 Qin Gang, quoted in Zhu Lijiang, 'Chinese Practice in Public International Law: 2008', *CJIL* 8 (2009), 493-551, at 520, para 49.

858 Comments by the Government of the People's Republic of China to the concluding observations and recommendations of the Committee against Torture (CAT/C/CHN/CO/4), UN Doc CAT/C/CHN/CO/4/Add.1, 17 December 2008.

> Committee members and using the consideration of a State party's report as an opportunity to maliciously attack the State party severely compromises the fairness and objectivity of the exercise, and seriously undermines its integrity. Such acts are contrary to the objectives of the Convention and violate its authority; they not only undermine the basis for cooperation between China and the Committee, but also damage the Committee's image and credibility. The Chinese Government is deeply disturbed by this.[859]

This language indicates a very horizontal understanding of the relationship between the government and the treaty body and flow easily from China's general sovereigntist position. However, the emphasis on the assumption of truthfulness that members of treaty bodies should extend to factual statements made by governments is troubling, as it is clear that rather than engaging with the substance of these allegations on 'sensitive' issues, for example by presenting convincing evidence for its own position, the Chinese government prefers to attack the authority of the body raising the issues instead. Its personal attacks directed at specific members of the committee is of even greater concern. However, it remains important to note that while China disowns the committee or at least its alleged "biased members", the government asserted its continuing adherence to the treaty norms.

Despite its harsh language on the CAT Committee and its members, China did comply with the Committee's requests for additional information, submitting it even ahead of the specified deadline. The Committee then requested further clarifications. China's fifth report was due in November 2012.[860]

5.3.6 China's position in the discussion on reform of treaty body mechanisms

Since China has started reporting to human rights treaty bodies, the system has undergone significant changes. The account above has referred to developments such as the increased requests of treaty bodies for statistical data and the consolidation of certain reporting obligations due to the fact that states often do not file their reports on time, and the streamlining of the involvement of NGOs, an issue about which the Chinese government has been ambivalent. Within the UN and the OHCHR, the issue of reform of the treaty bodies and their procedures has been on the agenda for a considerable time.[861] As much as China's

859 *Ibid*. (emphasis added).

860 Report of the Committee against Torture, 45th and 46th sessions, UN Doc A/66/44 (2011), at 146.

861 For some more recent publications and reports on the matter, see: Measures to improve further the effectiveness, harmonization and reform of the treaty body system, Report of the Secretary-General, UN Doc A/66/344, 7 September 2011; Consultation for states on treaty body strengthening, Geneva, 7

treaty reporting has improved over the decades, many of the topics discussed in this literature still seem alien to China's general practice, especially when there is discussion of improvement of the individual complaint procedures, but also about the involvement of NGOs and domestic civil society in the state reporting process, even in developing countries.[862] Despite the involvement of many relevant state organs and organisations in current Chinese reporting, all these organisations remain linked to the Chinese state.

China's contribution to the discussion consists essentially of a call for conservatism. When discussing China's position on the reform of the reporting system before the Third Committee of the General Assembly, ambassador Liu Zhenmin stated, *inter alia*:

> We also believe that various treaty bodies should strictly observe their treaty mandates and the rules of procedure; the requirement for the content of the reports and the scope of consideration should not exceed the provisions of the relevant treaties.[863]

He also made a point of again calling for adherence to "the principles of fairness, objectivity and neutrality and [the] use [of] caution when it comes to unverified information from unreliable sources." This again illustrates China's continuing adherence to a sovereigntist stance in the middle of an international society which is more directed at international institution building.

5.4 Assessment and concluding remarks

In 1999, Ann Kent asked whether "the United Nations is more effectively incorporating China into the human rights regime, or merely facilitating the undermining of UN norms and procedures by China."[864] Her later assessments of China appear milder than the one implied in this question, possibly under the influence of the more negative attitude and

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and 8 February 2012, available at <www2.ohchr.org/english/bodies/.../Consultation7-8Feb12_Report.docx> [3.3.2013]; Vandenhole, *Procedures*, *supra* note 714; John Morijn, 'Reforming United Nations Human Rights Treaty Monitoring Reform', *Netherlands International Law Review* 58 (2011) 295-333; Tiemo D.J. Oostenbrink, 'The Reform of the Thematic Treaty Mechanisms of the United Nation' in: Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Antwerp: Intersentia, 2008) 161-178.

862 See e.g. Heli Niemi and Martin Scheinin, 'Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective', Institute for Human Rights, Åbo Akademi University, June 2002. China's treaty reporting practice seems most properly compared to that of Iran, with very limited civil society input but careful reporting. In addition, Iran's reports are described as "not entirely frank" (at 10-11).

863 Liu Zhenmin, quoted in in Zhu, 'Chinese Practice: 2008', *supra* note 857, 522, para 54.

864 Kent, *China, the UN, supra* note 626, 82.

practice of the United States in the first decade of the 21st century, in particular after the events of 11 September 2001, and the accompanying shift to a more security-oriented paradigm in the UN.[865] The answer suggested by this chapter is that while the former is true, there is an element of the latter as well.

The quality of China's reports to treaty bodies has improved in the course of the last two decades. China shows a high degree of procedural compliance, adhering to the guidelines set out by the relevant treaty bodies and supplying increasingly more statistical data, although not always to the satisfaction of the treaty body in question.[866] China has come a long way from merely reciting all the legislative measures taken in the period under discussion and stating that this legislation "fully complies" with the terms of the Convention in question. It sends comprehensive answers in reply to questions asked by the treaty bodies in response to its reports. It sends high-level delegations to the treaty body sessions, and there is plenty of reason to believe that the reciprocal praise of the 'dialogue' which has taken place after every session is not a mere expression of diplomatic politeness.

Unfortunately, the more problematic sides of China's engagement with UN treaty bodies is fairly predictable, and there are red lines which cannot be crossed. Although most treaty bodies now avoid crossing these lines when questioning the Chinese delegation, this is clearly not the case, and indeed impossible, with the CAT, and the last encounter between this committee and the Chinese government remained highly adversarial, up to the point where the Chinese government felt the need to publicly question the integrity of the body and some of its individual members. The defensive and authoritarian responses of China stand out because when discussing less politicised issues, China tends to be far more forthcoming and open to criticism. Although China's lack of openness on the more sensitive issues may eventually lead to more conflict, as can be seen with the CAT, for the time being, antagonism and confrontation in the CERD and CRC has diminished and it seems that the

865 See Kent, *Beyond Compliance*, *supra* note 626;

866 See, eg, Report of the Committee for the Elimination of Racial Discrimination, UN GAOR, 51st sess, Supp No 18, UN Doc A/51/18 (1996), para. 392; Second periodic report of States parties due in 1997: China, UN Doc CRC/C/83/Add.9 (2005), para. 11; Written replies by the government of China concerning the list of issues (CRC/C/Q/CHN/2) received by the Committee on the Rights of the Child relating to the consideration of the second periodic report of China (CRC/C/83/Add.9), UN Doc CRC/C/RESP/89 (2005); Concluding observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao), UN Doc E/C.12/1/Add.107 (2005), para. 2.

CESCR has learned from the experience of those bodies by being relatively mild in its questioning during China's first appearance before it, even though its concluding observations identified many areas of deep or grave concern.

To China, the most important reason not to accept more intrusive forms of treaty monitoring and supervision is the wish to retain sovereign control over any information that comes out, the ability to deny allegations of violations completely without offering any chance of independent verification, and, ultimately, to remain the final arbiter of its own human rights record, especially when judging its compliance with its obligations under human rights treaties, with the treaty bodies in an advisory rather than quasi-judicial role. However, acceptance of visits by the special procedures of the Human Rights Council, most notably the Special Rapporteur on Torture and the Working Group on Arbitrary Detention, indicates a willingness to give more intrusive measures a try. Since this requires the consent of the state for each visit, it can be seen as a relatively safe way for the Chinese government to experiment.

China's state reporting practice indicates slow but steady progress towards better understanding and implementation of the norms in the human rights treaties. However, its narrow reading of its obligations under those treaties and the way in which it places all of these within the paradigm of progressive realisation is a cause for concern. There is no indication that the Chinese government is going to change its position in this respect; the remarks of its ambassador in the discussion on treaty reform on the need for treaty bodies to observe and not exceed their mandates indicates the contrary.

The question remains whether the high importance the Chinese Government obviously attaches to its reputation as a member of the international community, may still lead it one day to accept more institutionalised limitations to its sovereignty. It may however take considerable time before it considers itself ready and is prepared to let go of the defensive discourse that still dominates its official position, as is evidenced by its response to the latest Concluding Observations of the CAT. It seems unlikely that any change in China's position would happen first in the area of human rights; indeed, the only area where it has given up sovereignty is in that of WTO law, and even there it is attempting to

restrict its reach.[867]

Although politically influential, China's human rights practice so far seems to have made a limited normative impact at the international level on other states. Its main influence will be in its use of the paradigm of progressive realisation (or 'progressive development'). This paradigm and China's formulation of the related "principle of practicality" in its most recent National Human Rights Action Plan may serve other states which wish to limit the reach of international human rights law, acting as as a brake. Taken together with China's emphasis on sovereignty, this could have a restrictive effect on the more expansive understanding of human rights norms proclaimed by other actors such as human rights bodies and NGOs, but also more 'progressive' states.[868] This *Lotus* approach to human rights treaties and state-to-state contractual understanding of the obligations undertaken under those treaties sits uneasily with what was known even when the earliest universal human rights instruments were drawn up: even though they took the form of a treaty, these treaties are treaties which are drawn up to benefit a third party – individuals.[869]

Since China's human rights discourse remains in essence defensive, it does not seem likely that its political influence will have a strong normative or legal impact. The rhetoric of development, non-interference, and respect for cultural and historical differences mostly helps other states which also prefer not to have too much discussion of their own human rights records, but it lacks a positive paradigm to follow, especially because when it comes down to the one issue on which China has the greatest appeal and made the most impressive achievements, development, it rejects 'one-size-fits-all models' and emphasises each nation's sovereign right to determine its own development agenda. For example, during the "interactive dialogue" following China's UPR in the Human Rights Council, many states commented on China's report. Criticism of its record on civil and political rights, the rights of minorities and the death penalty was only voiced by Western states, which were

867 See *infra*, 4.5.5 and 4.5.6.

868 A similar conclusion is reached by Katrin Kinzelbach, 'Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000-2010)', *Netherlands Quarterly of Human Rights* 30 (2012) 299-332. Kinzelbach is more pessimistic about the normative repercussions. See also Sceats and Breslin, *supra* note 635.

869 For the Refugee Convention, see a similar statement in UN Doc A/CONF.2/SR.19 (1951). See also *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide* , Advisory Opinion, ICJ Reports 1951, 23.

obviously the ones China had in mind when deploring the "politicised" statements by certain countries. Non-western and developing countries mainly complimented China on its development record and meeting the Millennium Development Goals ahead of time. Some used the opportunity to take their own swipe at the critical countries. However, few countries seemed to take China as a model, although some suggested that it could share more of its developmental practices so other countries could learn from them.[870]

These responses also show that sovereignty-oriented concerns are not unique to China. Both at the regional level and at the universal level, many states had similar objections to monitoring and supervisory mechanisms, but starting with the acceptance of the norms laid down in human rights treaties, they were able to gradually accept international monitoring and supervision and grew willing to comply with views and judgments laid down by international bodies. This was, for example, the case in Europe, where the European Commission and Court of Human Rights took decades to become reasonably active, and also with regard to the UN Human Rights Committee. Alternatively, China might go the way of the United States, which has been a major normative force in international human rights law but has consistently refused to accept any form of international monitoring except through reporting to treaty bodies.

The findings of this chapter therefore confirm the point made in the previous chapter that the principle of sovereignty is used by China as an instrument to delineate the reach it wishes to give to international law. Moreover, China's practice under human rights treaties does indicate that it takes its legal obligations seriously within the limited understanding that it attaches to them. China also takes its commitment to 'dialogue' and 'mutual cooperation' seriously, as evidenced by the multitude of human rights dialogues and projects which exist and in which actors in different societies are enabled, supported by the state, to engage with international human rights, even if many of these projects come with their own challenges.[871]

870 Report of the Working Group on the Universal Periodic Review: China, 5 October 2009, UN Doc A/HRC/11/25, para. 26.

871 See Birgit Lindsnæs, Hans-Otto Sano and Hatla Thelle, 'Human Rights in Action: Supporting Human Rights Work in Authoritarian Countries' in: Daniel A. Bell and Jean-Marc Coicaud, *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations* (Cambridge: Cambridge University Press, 2007) 117-131; Sophia, Woodman, 'Driving Without a Map: Implementing Legal Projects in China Aimed at Improving Human Rights' in: Daniel A. Bell and Jean-Marc Coicaud, *Ethics in*

This also means that the true impact of human rights on China is more properly seen in terms of the normative impact that they have within China and the development of civil society in the country itself. The appeal of norms laid down in human rights treaties disseminated in China and promoted by (parts of) the government, and an increasing willingness on the part of Chinese citizens to invoke them in court or elsewhere, may contribute more to compliance than even the strongest international institutions.[872] This can be done, for example, also by connecting international legal norms to similar norms present in the Chinese tradition.[873] These kinds of processes are no substitute for international law, but can be complementary. For example, treaty body practice can contribute to greater awareness of government departments and officials of the content of the treaties that China has joined.

Given that China has placed itself in a anti-imperialist discourse, seeing itself almost as much as a victim of colonialism as countries which fully lost their independence and generally aligned itself with the developing world in international, it should be noted that as much as developing states have in the past few decades presented alternative discourses as a reaction against a perceived Western bias in human rights, their struggle for independence had previously been defined exactly in terms of human rights, most importantly the right to self-determination, which is laid down in the first articles of both the ICCPR as well as ICESCR. In the words of Reus-Smit:

> That many developing states have since sought to separate their right to independence

Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations (Cambridge: Cambridge University Press, 2007) 132-150; Sun Zhe, 'Normative Compliance and Hard Bargaining: INGOs and China's Response to Intenrnational Human Rights Criticism' in: Daniel A. Bell and Jean-Marc Coicaud, *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations* (Cambridge: Cambridge University Press, 2007) 151-167; Li, 'Influence", supra note 838. See also Katrin Kinzelbach and Hatla Thelle, 'Talking Human Rights to China: An Assessment of the EU's approach', *CQ* 205 (2011) 60-79, describing the way in which the EU dialogue on human rights does and does not contribute to improvement of the human rights situation in China.

872 Along similar lines, although not about China but other Asian countries: Catherine Renshaw, 'The role of networks in the implementation of human rights in the Asia Pacific region' in: Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building (Routledge, 2011*) 185-208. There is a wide body of literature on the impact of international human rights on China's domestic legal system. This includes Ming Wan, 'Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics', *Human Rights Quarterly* 29 (2007) 727-753; see also the articles in the previous footnote.

873 Mimi Zou and Tom Zwart, 'Rethinking human rights in China: towards a receptor framework' in: Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 249-263, at 263.

> from the observance of human rights, or to invoke non-Western values to deny the universality of liberal civil and political rights, does not alter the fact that the campaign against colonialism championed such rights and used them to justify the right to self-determination.[874]

It is therefore not surprising that China has placed itself in an alternative human rights discourse rather than rejecting a notion of human rights altogether.

An important underlying aspiration both among western human rights scholars and activists, as well as many human rights activists (or 'defenders') within China and in Taiwan, is that the appeal of human rights norms will operate in such a way that the interplay of international institutions and NGOs, domestic actors and pressure from liberal democracies may result in China in a kind of 'Helsinki effect'. This describes the developments after the Conference for Security and Cooperation in Europe which resulted in the Helsinki Final Act of 1975, in which human rights played a major role. The communist regimes in Eastern Europe were held to their own human rights commitments not only by western states, but also by actors in their own society, leading to an erosion of their own popular legitimacy, ultimately contributing to the collapse of the regimes.[875] The same hope has been held out with regard to the popular uprisings in the Arab world of the last few years which have been described as the 'Arab Spring' and helped overthrow authoritarian regimes in Tunisia and Egypt. China's sovereigntist stance is seen as an effort to counter an effect like this, and the response of the Chinese leadership to the protests of 1989 and certain episodes of increased repression which have taken place in China over the last few years are often described in that context. Yet maintaining only this perspective discounts some of the legitimacy in China's substantive arguments. Although the emphasis on subsistence rights and the promotion of the right to development, as well as the accompanying rhetoric, bears the imprint of some of the hypotheses on a 'trade-off' between development and human rights which was developed in development literature of the 1960s, in international discourse development and human rights have now become integrated.[876] This does not mean that there are no cultural differences and that international human rights norms should not

874 Christian Reus-Smit, 'Human rights and the social construction of sovereignty', *Review of International Studies* 27 (2001) 519-538, at 536.

875 Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton, NJ: Princeton University Press, 2001).

876 Rajagopal, *International Law from Below*, 219.

accommodate this. However, cultural diversity is served less by abstract and generalised discussions on universal standards and multiculturalism, but rather by reference to specific contexts and circumstances in which these tensions arise.[877]

877 Nisuke Ando, 'Human rights monitoring institutions and multiculturalism' in: Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 37-48, at 46-48.

6 Humanitarian law and international criminal law

6.1 Introduction

International human rights law is not the only field of international law involved with the protection of individuals. Humanitarian concerns have been at the heart of international law which has a separate history: the law dealing with the conduct of armed conflict. International humanitarian law (IHL), also known as the law of armed conflict, was developed from the mid-nineteenth century until the present to protect participants in armed conflict as well as civilians in areas where this armed conflict is taking place. Two main branches of international humanitarian law exist: law which regulates the conduct of armed hostilities, notably which weapons may and may not be used (Hague law), and law which protects prisoners of war and civilians (Geneva law). The current rules of international humanitarian law are primarily laid down in the four Geneva Conventions of 1949 and their additional protocols of 1977. Many rules are also considered customary international law. In recent years the guardian of IHL, the International Committee of the Red Cross (ICRC), has made a major effort to codify the rules of customary international humanitarian law, a project which has not been without controversy and in which many states and academics have criticised the ICRC's methodology and challenged its findings.[878] In this chapter, China's position, to the extent that it is documented, is analysed and compared with the findings on sovereignty and human rights made in previous chapters.

The discussion of China's practice in international humanitarian law includes China's participation in various regimes on arms control and prevention of weapons of mass destruction, which may or may not, strictly speaking, be part of international humanitarian law, as they are less based on notions of humanity than on bilateral and multilateral agreements between governments and also lack penal provisions.[879] They are included in

878 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* Volumes I: Rules and II: Practice (ICRC; Cambridge: Cambridge University Press, 2005). For one discussion of the controversy about the methodology used to ascertain custom, see Jan Wouters and Cedric Ryngaert, 'Impact on the Process of the Formation of Customary International Law' in: Menno T. Kamminga & Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009) 111-131.

879 See M. Cherif Bassiouni, *A Manual on International Humanitarian Law and Arms Control Agreements* (Ardsley, NY: Transnational Publishers, 2000) 36-37.

this chapter because of their substantive overlap with international humanitarian law, and because the focus here is on two features which have to do with the protection of individuals: substantive restrictions on the types of weapons which can be used in armed conflict, and international mechanisms to ensure compliance.

International efforts to punish violations of international humanitarian law and large-scale violations of human rights gave birth to another field of international law which puts individuals at the centre: international criminal law. Under international criminal law, individuals have become duty-bearers under international law for the first time. After failed attempts before the Second World War, the foundations for international criminal law were laid after World War II in the Nuremberg Charter and through the trials of war criminals before international tribunals in Nuremberg and Tokyo. Several decades went by before the next major step, when the ad hoc tribunals for the former Yugoslavia and Rwanda were established in 1993 and 1994, although some normative efforts had been made before, notably in the various drafts of crimes against the peace and security of mankind.[880] The establishment of the permanent International Criminal Court (ICC) in 1998 (with its Statute entering into force in 2002) was the culmination of this effort. China's attitude to the ICC again demonstrates its policy of normative support and contribution, but limited engagement with international institutions.

China's practice in these fields shows clear similarities to its practice in international human rights law. It has shown support for, and at times contributed to, normative development, demonstrated a fairly high degree of compliance with its own international obligations, but been reluctant to accept any institutionalised limitations on its sovereignty. In terms of engagement with international bodies, it has evolved from a revolutionary state with a deep hostility and scepticism towards any international supervisory body to a state which attempts to be a good international citizen without jeopardising its sovereignty.

880 GA Res 36/10, 10 December 1981; Draft Code of Crimes Against the Peace and Security of Mankind (1991), Report of the International Law Commission, 43rd Session, UNGAOR, 46th Session, Supp. No .10, UN Doc A/46/10 (1991); Draft Code of Crimes Against the Peace and Security of Mankind, Yearbook of the International Law Commission 1996, Volume II, UN Doc A/CN.4/SER.A/1996/Add. 1 (Part 2).

6.2 International humanitarian law

Textbooks on international humanitarian law usually point out that treaties which codify humanitarian principles to regulate the conduct of armed conflict have a long history in different civilisations, which is an argument in favour of the substantive universality of these principles.[881] Bassiouni enumerates a number of examples from history, starting with the well-known ancient Chinese scholar and general Sun Tzu,[882] and citing examples from ancient Greece and Rome, the Old Testament, Hindu, Egyptian, Assyrian-Babylonian, Islamic and western civilisation.[883] In particular, he quotes Sun Tzu as asserting that it is important to treat captives well and a general should attack enemy armies and not cities; there are also antecedents for the prohibition of infliction of unnecessary or excessive suffering.[884]

In view of the above, agreeing to norms in the field of international humanitarian law seems to raise less problems with regard to a perceived western bias than exists (albeit to a large extent unjustified) in the area of human rights law. China still calls for the "evolution and development" of humanitarian law and objects to a supposed "one-size-fits-all" approach,[885] which in human rights law is Chinese code language for cultural relativistic arguments.

6.2.1 Imperial and Nationalist China

Imperial China already acceded to a number of humanitarian law treaties, starting in 1904 with the 1864 Geneva Convention.[886] Under the Nationalist government, the Republic of China joined a number of other treaties, as a result of which China was a party to many treaties concerning arms regulation and the conduct of hostilities when the People's Republic was established. The Nationalist government participated in the 1949 Geneva

881 For example Bassiouni, *Manual*, *supra* note 879, 1-2, 45.

882 simplified Chinese: 孙子; traditional Chinese: 孫子; pinyin: *Sūnzǐ*, known for *The Art of War* (孫子兵法; simplified 孙子兵法 (*Sūnzǐ Bīngfǎ).*

883 Bassiouni, *Manual*, *supra* note 879, 5-15.

884 Sun Tzu, *The Art of War* 76, 78, cited by Bassiouni, *Manual*, *supra* note 879, 5.

885 Statement by H. E. Ambassador Li Baodong, Permanent Representative of China to the United Nations, at the Security Council Open Debate on the Protection of Civilians in Armed Conflict, 10 May 2011. <http://www.china-un.org/eng/chinaandun/securitycouncil/thematicissues/civilians_ac/t823976.htm>

886 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864. For text and ratification dates, see the ICRC's database of IHL treaties at <http://www.icrc.org/ihl.nsf> [last consulted 29 August 2011].

Diplomatic Conference that concluded the Geneva Conventions and signed them in December 1949.[887]

The ROC was one of the opponents of the original formulation of Common Article 3, reflecting the conflict between state sovereignty and humanitarianism for which its successor the PRC is more known. The original draft of Common Article 3 would have obliged state parties to respect the entire Convention in a non-international armed conflict. Opponents feared, however, that "it was too wide in application and failed to protect the rights of States adequately in favour of individual rights." This led to the current formulation, which only consists of a number of minimum obligations.[888]

6.2.2 The PRC: applicable law

The PRC recognised the ROC's signature to the Geneva Conventions in 1952 and ratified them in 1956. Earlier, it had reserved its position to various treaties regarding humanitarian law,[889] and had accepted some explicitly, although many of their provisions had passed into customary law in any case. Upon recognition of the Geneva Conventions, the PRC did make a number of reservations, which mostly concerned the role of the International Committee of the Red Cross (ICRC) in the absence of a Protecting Power, since China considered the ICRC to be a tool of Western imperialism.[890] Each of the reservations therefore requires the explicit consent of the government of which the protected persons are nationals for a humanitarian organisation to perform the functions which should normally be performed by the protecting power.[891] The PRC's attitude towards the ICRC started to soften after the end of the Cultural Revolution, and had reversed to such an extent by the 1990s that it adopted a Law on the Red Cross Society in 1993, which provided for government funding and official support, and provided that the Chinese Red Cross would do its work in according with the Geneva Conventions and Additional Protocols.[892] The reservations to the

887 Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (Princeton, NJ: Princeton University Press, 1974) 1415-1417; ICRC database.

888 Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002) 23-24.

889 See *infra*, 2.3.3.1.

890 Jamieson L. Greer, 'China and the Laws of War: Patterns of Compliance and Disregard', *Virginia Journal of International Law* 46 (2005-2006) 717-743, at 722-723. See also Cohen and Chiu, *People's China*, *supra* note 887, 1515, 1541.

891 UNTS 260, 1957, 438-444, as reproduced in the ICRC treaty database.

892 Cohen and Chiu, *People's China*, *supra* note 887, 1582. Greer, 'China and the Laws of War', *supra* note 887,

Geneva Conventions may thus be obsolete, unless the Chinese government would try to promote the Chinese Red Cross against the ICRC, which seems unlikely.

In the 1980s, the PRC joined the treaty on Certain Conventional Weapons, the Genocide Convention and Additional Protocols I and II to the Geneva Conventions, only part of which reflect customary international law, thus providing more protection in theory than other countries which did not ratify the Additional Protocols. As a result, China has explicitly consented to most of the rules regarding conduct in armed conflict which are also considered customary international law (to which it would be bound in any case bar persistent objections), and some more which are not generally considered customary.[893] Of the treaties considered by the ICRC to be the most important ones, China is a party to the four Geneva Conventions with the reservation described above; Additional Protocols I and II (where it should be noted that Additional Protocol III of 2005, which only deals with the issue of the Red Cross emblem, still has a relatively low ratification rate in any case), as well as the Optional Protocol to the CRC concerning the involvement of children in armed conflict (see also the previous chapter). Article 90 of Additional Protocol I provides for an International Fact-Finding Commission to investigate breaches of the conventions and the protocol. A state can accept the competence of this commission by making a declaration, analogously to the optional clause on recognition of the compulsory jurisdiction of the ICJ. This arrangement is the result of a compromise between states which were in favour of a compulsory enquiry and those who found this an unacceptable encroachment on state sovereignty.[894] The declaration has currently been made by 72 states. China is not among them, which is not surprising in light of its reluctance to accept the competence of independent international institutions.[895]

740.

893 Greer, 'China and the Laws of War', *supra* note 887, 723.

894 ICRC, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 25 August 2011, obtained from ICRC treaty database. See also Yves Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC; Geneva: Martinus Nijhoff, 1987) 1044. See <www.ihffc.org>.

895 ICRC, State Parties to the Following International Humanitarian Law and Other Related Treaties, <http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf>

6.2.2.1 Arms control agreements

In the area of arms control, China is a party to almost all treaties on conventional, biological and chemical weapons considered most important by the ICRC.[896] Twelve years passed between the opening of the Biological Weapons Convention of 1972 and China's accession.[897] In part, this demonstrates a gradual abandoning on the part of the Chinese government of a sceptical attitude to the international legal order which it took after developing an independent position from the Soviet Union in the 1960s.[898] This was followed by its 'learning period' in the UN of the 1970s, as described in previous chapters. China did speak out against the use of biological and chemical weapons from the outset, including during the conflicts in Korea, where it accused the United States of waging "germ warfare", and in Vietnam.[899] Its strong opposition to biological weapons is in part the result of the widespread use of biological warfare by Japan in China during the Second World War.[900] The initial reluctance to sign up to multilateral arms control treaties is an indication of distrust in the international order rather than normative disagreement.

The only key treaties which China has not ratified are the Convention on Anti-Personnel Mines[901] and the Convention on Cluster Munitions[902]. Greer points out that although China is a major mine-exporting country, it has prohibited the production of

896 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Warfare (Geneva, 17 June 1925); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Moscow and Washington, 10 April 1972); Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW, Geneva, 10 October 1980); Protocol I on non-detectable fragments; Protocol II on prohibitions or restrictions on the use of mines, booby-traps and other devices; Protocol III on prohibitions or restrictions on the use of incendiary weapons (1980); Protocol IV (1985) on Blinding Laser Weapons, 13 October 1995; Protocol IIA on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996; Amendment to the CCW, Geneva, 21 December 2001; Protocol V on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 28 November 2003); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.

897 See also Cohen and Chiu, *People's China*, *supra* note 887, 1643.

898 *Ibid*., 1618.

899 *Ibid.*, 1508.

900 See, *inter alia*, Adam Cathcart and Patricia Nash, '"To Serve Revenge for the Dead": Chinese Communist Responses to Japanese War Crimes in the PRC Foreign Ministry Archive, 1949–1956', *CQ* 200 (2009) 1053-1069, at 1056-1063.

901 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997.

902 30 May 2008.

mines for export, which is a more substantial commitment than that by the United States and Russia, who also have not signed the Convention on Anti-Personnel mines.[903] China has expressed public support for the Convention.[904] China supported, albeit passively, the creation of a general Arms Trade Treaty (ATT), but was one of the 22 states to abstain when the text of the treaty was adopted.[905] Its representative regretted the lack of consensus and stated that the treaty did not address China's concerns.[906]

6.2.2.2 Nuclear weapons

China has taken a strong position against nuclear weapons from the founding of the People's Republic. Before it became a nuclear power, and in line with the Soviet position, China considered any use of nuclear weapons illegal under international law from the 1950s. An official government statement in 1963 stated: "The people of the world demand general disarmament and a complete ban on nuclear weapons." It denounced a partial testing ban concluded by the United States, the UK and the USSR as a "dirty fraud". It called on all countries to "prohibit and destroy nuclear weapons completely, thoroughly, totally, and resolutely."[907]

Following its own successful first nuclear test, China claimed that its position remained the same, and that it had only developed nuclear weapons to defend itself, as it was "forced to" by the nuclear threat posed by the United States. "In developing nuclear weapons, China's aim is to break the nuclear monopoly of the nuclear powers and to eliminate nuclear weapons." China called for a world summit "to discuss the question of the complete prohibition and thorough destruction of nuclear weapons." Most importantly, the Chinese government declared for the first time "that China will never at any time and under any circumstances be the first to use nuclear weapons."[908] It has maintained this position

903 Greer, 'China and the Laws of War', *supra* note 887, 739.

904 Zhu Lijiang, 'Chinese Practice in Public International Law: 2008', *CJIL* 8 (2009) 493-551, at paras 56-57.

905 See <http://www.un.org/disarmament/ATT/docs/ATT_Country_Table.pdf> [22.5.2013] 156 states voted in favour, 3 voted against.

906 'China: UN arms trade treaty should be reached through consensus', Xinhua, 3 April 2013. See <http://news.xinhuanet.com/english/video/2013-04/03/c_132281188.htm> [22.5.2013]

907 Statement of the Chinese Government, 31 July 1963, reproduced in Cohen and Chiu, *People's China*, *supra* note 887, 47-3, 1622-1625.

908 Statement of the Government of the People's Republic of China, 16 October 1964, reproduced in Cohen and Chiu, *People's China*, *supra* note 887, 47-4. 1627-1631. See also Xue Hanqin, 'Chinese Contemporary Perspectives on International Law — History, Culture and International Law', *Recueil des Cours* 355 (2012)

ever since.[909]

Although China called for multilateral efforts to eliminate nuclear weapons, there were a few diplomatic windows for bilateral agreement with the USA about disarmament which closed with the escalation of the Vietnam War. During the late 1960s, China opposed the efforts by the US and the USSR to reach a non-proliferation agreement and dismissed these as a "swindle". From late in 1970 and its entry into the UN in 1971, it started calling for a worldwide conference on nuclear disarmament again. It also started to warm to the establishment of nuclear-free zones in certain parts of the world, such as Latin America.[910] After its 'decade of learning' in the UN, China started to take part in the international arms control regimes from the 1980s, and also changed its stance on non-proliferation.

China acceded to the Nuclear Non-Proliferation Treaty (NPT) in March 1992. The NPT by now has near universal ratification.[911] Its instrument of ratification was accompanied with a declaration which summarises China's stance on nuclear weapons.

> 1. Pursuing an independent foreign policy of peace, China has all along stood for the complete prohibition and thorough destruction of nuclear weapons. [...]
>
> 2. China pursues a policy of not advocating, encouraging or engaging in the proliferation of nuclear weapons, nor helping other countries to develop nuclear weapons. China supports the objectives set forth in the Treaty, namely, prevention of the proliferation of nuclear weapons, acceleration of nuclear disarmament and promotion of international cooperation in the peaceful use of nuclear energy, and believes that these three objectives are interrelated.
>
> 3. China maintains that the prevention of proliferation of nuclear weapons is not an end in itself, but a measure and step in the process towards the complete prohibition and thorough destruction of nuclear weapons. Non-proliferation of nuclear weapons and nuclear disarmament should be mutually complementary. Only when substantial progress is made in the field of nuclear disarmament can the proliferation of nuclear weapons be checked most effectively and the authority of the nuclear non-proliferation regime truly enhanced. At the same time, an effective nuclear non-proliferation regime

41-233, at 189-190, 198.

909 The pledge is, unusually, not made explicitly in China's most recent white paper on defence. There has been speculation about whether this signals a change in policy. However, the few references to the use of nuclear weapons in the White Paper are still all in reference to counterattacks against nuclear strikes by other states. Information Office, State Council, The Diversified Employment of China's Armed Forces, April 2013, <http://news.xinhuanet.com/english/china/2013-04/16/c_132312681.htm> [22.5.2013] See James M. Action, 'Is China Changing Its Position on Nuclear Weapons?', *New York Times*, 18 April 2013. <http://www.nytimes.com/2013/04/19/opinion/is-china-changing-its-position-on-nuclear-weapons.html?pagewanted=all> [22.5.2013]

910 Cohen and Chiu, *People's China*, *supra* note 887, 1630-1644.

911 See <http://disarmament.un.org/treaties/t/npt> [2.1.2013].

> is conducive to the goal of total elimination of nuclear weapons. To attain the lofty goal of complete prohibition and thorough destruction of nuclear weapons, countries with the largest nuclear arsenals should earnestly fulfill their special obligations by taking the lead in halting the testing, production and deployment of nuclear weapons and drastically reducing those weapons of all kinds they have deployed inside and outside their countries. Tangible progress they make in all these aspects will create conditions for the convening of a widely representative international conference on nuclear disarmament with the participation of all nuclear-weapon states.
>
> 4. China maintains that in order to improve and strengthen the nuclear non-proliferation regime and help attain the goal of complete prohibition and thorough destruction of nuclear weapons, the following specific measures should also be taken:
>
> (1) All nuclear-weapon states undertake not to be the first to use nuclear weapons at any time and under any circumstances, and an international agreement on the non-first-use of nuclear weapons should be concluded.
>
> (2) All nuclear-weapon states undertake not to use or threaten to use nuclear weapons against non-nuclear-weapon countries or nuclear-free zones, and an international legal instrument on the non-use or non-threat of nuclear weapons against non-nuclear-weapon countries and nuclear-free zones should be concluded.
>
> (3) All nuclear-weapon states undertake to support the proposition of establishing nuclear weapon-free zones, respect the status of such zones and undertake corresponding obligations.
>
> (4) All states that have nuclear weapons deployed outside their boundaries withdraw all those weapons back to their own territories.
>
> (5) The major space powers halt their arms race in outer space and cease the development of space weapons, the nuclear-related in particular.
>
> 5. The signing and ratification of the Treaty by the Taiwan authorities in the name of China on 1 July 1968 and 27 January 1970 respectively are illegal and null and void.[912]

Although China still carried out a nuclear test as late as 1995, it actively took part in the negotiations for the Comprehensive Nuclear Test Ban Treaty (CTBT) of 1996 and signed it when it was concluded, although it has yet to ratify the treaty.[913]

In light of its previously stated strong opinions on nuclear weapons, it may be considered surprising that China did not submit any written observations or appear before the ICJ in the proceedings for the Advisory Opinion on the *Legality of the Threat or Use of*

912 <http://disarmament.un.org/treaties/a/npt/china/acc/washington> [2.1.2013]

913 Miguel Marin Bosch, 'The Non-Proliferation Treaty and its future', in: Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 375-389, at 379. The website of the preparatory commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), established under the treaty, notes that most monitoring facilities in China have already been installed. See <www.ctbto.org>.

Nuclear Weapons.[914] However, the eventual opinion seemed to affirm China's position that first use of nuclear weapons would be illegal, as this could not be in accordance with Article 2(4) and 51 of the UN Charter.[915] China's inaction can probably be explained by the fact that the proceedings took place at a time when it was still very cautious in engaging with any international body. It is telling in this respect that China was the only nuclear power not to object to the competence of the WHO to request an advisory opinion in its earlier, failed attempt to obtain an advisory opinion on the legality of nuclear weapons, and voted in favour of all eight resolutions which had been concluded in the General Assembly from 1994 to 1996 on rethinking nuclear weapons doctrines after the Cold War.[916]

In recent years, China has continued to advocate the complete prohibition and destruction of weapons of mass destruction (WMD), including nuclear weapons. Its government noted that it was the first nuclear armed state to complete the procedures mandated by the International Atomic Energy Agency (IAEA) requiring the establishment of safeguards regarding the accounting and control of nuclear material and the physical protection of such material, for which it concluded a Protocol Additional to the Agreement Between China and IAEA for the Application of Safeguards in China.[917] More generally, China has used multilateral fora to call for a rethinking of the structures currently in place to protect global security and its calls for nuclear and other forms of disarmament are part of this more general call, which apparently takes a more holistic approach which includes development issues, as discussed elsewhere in this thesis.[918]

6.2.2.3 Verification mechanisms in arms control treaties

While China has been reluctant to join international mechanisms for monitoring and

914 *ICJ Reports* 1996, 226.

915 See in particular the *dispositif* under C. Cf Bassiouni, *Manual*, *supra* note 879, 40. For a view that sees more problems, see Martti Koskenniemi, 'The Silence of Law/the Voice of Justice' in: Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 488-510.

916 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, 66. See also Virginia Leary, 'The WHO Case: Implications for Specialised Agencies' in: Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 112-127, at 124; Marin Bosch, 'The NPT', *supra* note 913, 385.

917 Hu Qin, 'Chinese Practice in Public International Law: 2002', *CJIL* 2 (2003) 667-715, at 671-676. The legal procedures entered into force on 28 March 2002.

918 Xue, 'Chinese Contemporary Perspectives', *supra* note 908, 196-198. See also, *infra*, chapter 7.

supervising its human rights compliance and, as shall be discussed in the next section, has been cautious about the International Criminal Court, it has in recent years been a proponent of stronger international verification and inspection mechanisms in the field of arms control. For example, upon ratification of the Biological Weapons Convention (BWC) in 1984, it made a declaration in which it deplored the BWC's failure "to provide in explicit terms for the 'prohibition of the use of' biological weapons and the concrete and effective measures for supervision and verification; and it lacks forceful measures of sanctions in the procedure of complaint against instances of violation of the Convention."[919] Upon signing the Chemical Weapons Convention (CWC), it did declare explicitly that its inspection mechanisms should not be abused respectively "to the detriment of the security interests of States Parties unrelated to chemical weapons", and elaborated upon ratification that "the national security interests of States parties not related to chemical weapons shall not be compromised. China is firmly opposed to any act of abusing the verification provisions which endangers its sovereignty and security."[920] That the Chinese government does not seem to think this has been the case can be seen in a recent statement in which it prides itself on having "received more than 270 inspections from the Organization for the Prohibition of Chemical Weapons" (OPCW).[921]

In similar language, the Chinese government declared upon ratification of the Comprehensive Test Ban Treaty (CTBT) that it "endorses the application of verification measures consistent with the provisions of the CTBT to ensure its faithful implementation and at the same time it firmly opposes the abuse of verification rights by any country, including the use of espionage or human intelligence, to infringe upon the sovereignty of China and impair its legitimate security interests in violation of universally recognized principles of international law."[922]

In its official position regarding the negotiation of a general Arms Trade Treaty (ATT), the Chinese government emphasised, as expected, the balance between humanitarian

919 United Nations, Status of Multilateral Arms Regulation and Disarmament Agreements, <http://unhq-appspub-01.un.org/UNODA/TreatyStatus.nsf>, under "BWC".

920 *Ibid*., under "CWC".

921 On the 40th Anniversary of the Restoration of the Lawful Seat of the People's Republic of China in the United Nations, keynote Address by Assistant Foreign Minister Wu Hailong at the Fourth Lanting Forum, 2 September 2011. <http://www.mfa.gov.cn/eng/zxxx/t854706.htm>

922 UN, Status of Arms Regulation and Disarmament Agreements, under "CTBT".

concerns and the legitimate interests of states, and that such a treaty should not be misused "for political purposes to interfere with the normal arms trade and internal affairs of any state." It stressed an implementation mechanism that did not interfere with "states' sovereign decisions", emphasising an "effective national regulatory mechanism and build[ing] related capabilities." China was "not against proper transparent measures such as establishing international register on conventional arms and sharing information on arms trade", although an appropriate balance between transparency and national security should be struck. "Clean-cut transparency measures may not suit all."[923] The final text of the ATT is primarily aimed at national measures, with limited provisions for international cooperation as well as a reporting procedure. The Secretariat established under the treaty primarily serves a facilitating role rather than enforcement.[924] As noted above, China abstained from the vote on the final treaty text.

6.2.3 Chinese practice in international humanitarian law

Because China does not have a good reputation with regard to respect for human rights, there has been an assumption among Western commentators, politicians and military officials that China would also violate the law of war. A recent article by Greer challenges this assumption and dismisses it as dangerously incorrect. It describes China's policy and practice in more nuanced terms, and claims that China selectively adheres to certain principles. Violations of *ius in bello* have been exceptions rather than the rule, and the bigger problems are in the field of the *ius ad bellum*. This conclusion seems to fit with China's general approach to international law as described in this thesis: it chooses carefully which norms to adhere to, but tends to comply when it has accepted a norm, although its interpretation may be informed by considerations which overly protect its sovereignty.

The most serious violations, according to Greer, took place during the Korean War, but China improved its behaviour significantly in the subsequent armed conflicts it was involved in – the Sino-Indian border war of 1962 and the armed conflict with Vietnam in

923 Statement by the Chinese Delegation at the General Debate of the United Nations Conference on the Arms Trade Treaty, 6 July 2012, <http://www.un.org/disarmament/ATT/statements/docs/20120709/20120706_China_E.pdf> [2.4.2013]

924 See UN Doc A/CONF.217/2013/L.3, 27 March 2013, notably Articles 13 (Reporting), 15-17 (cooperation and review), 18 (Secretariat) and 19 (Dispute Settlement, emphasising methods reached by mutual consent).

1979. It should be noted that his article was primarily focused on Chinese behaviour in international armed conflicts. Considering its rigid stance on internal conflicts, during any action taken internally which may or may not constitute internal armed conflict, China would probably pay less attention to rules of humanitarian law, if only because it does not accept their applicability in those situations.[925] It does of course have the residual obligations deriving from Common Article 3 to the Geneva Conventions, but, just as is the case of verifying compliance with its obligations under human rights treaties, it is difficult to get a clear picture of its compliance with those obligations.

China's relative lack of compliance during the Korean War coincides with the immediate post-revolutionary period. Its rhetoric in the official sources which indicate its legal positions remains revolutionary into the next two decades.

It is clear that in its conduct of international armed conflict, China places a lot of importance on adherence to the rules of armed conflict, as is borne out by both its legislation and its practice. Only during the Korean War, when the PRC was still a revolutionary regime and challenged the international order in more than one respect, did it also engage in serious violations of the laws of war, which it only ratified three years after the ceasefire that ended the conflict in any case (although it did recognise the conventions, with reservations which remained upon ratification, during the conflict on 13 July 1952)[926]. Greer observes that during the conflict, China's international reputation probably mattered a lot less to the Chinese leadership – China was branded as an aggressor by the UN General Assembly in any case (see chapter 2) – whereas the UN forces fighting on the Korean peninsula could be perceived as an existential threat. In the later international armed conflicts in which China has engaged, the Sino-Indian War of 1962 and the Sino-Vietnamese war of 1979, China adhered in word and deed to the relevant rules of international humanitarian law, and violations were an exception. Since then, China has not been involved in any international armed conflicts, so its more recent practice is mostly represented by adoption of legislation, as documented by the ICRC, and statements in international fora with regard to armed conflicts in other places.

China's practice with regard to non-international armed conflicts is more

925 Greer, 'China and the Laws of War' *supra* note 890, 741.

926 Cohen and Chiu, *People's China*, *supra* note 887, 1522.

problematic and more opaque. As explained elsewhere in this thesis, politically sensitive issues are redefined by the Chinese government as purely internal issues and shielded from international scrutiny by reference to China's sovereignty. With regard to the *ius ad bellum*, this would affect China's view of any armed conflict with Taiwan, making such a conflict a purely domestic issue in China's view, even if other countries may view it as an international armed conflict. It already affects the way China deals with separatist threats in Xinjiang and Tibet, which are, from the perspective of the Chinese government, internal issues, more law enforcement-related than military, while in the views of others these may well be potential internal, or even international, armed conflicts. As will be seen in the next section, China has resisted the drive to apply the same rules of international humanitarian law applicable in international armed conflicts in non-international conflicts, *inter alia* by objecting to what it perceives as an undue extension of customary international law in the Rome Statute of the International Criminal Court. The question then becomes which rules of IHL China still finds applicable in internal conflicts and how it sees the criteria for determining the existence of an international armed conflict.

A recent statement by the Chinese government representative to the Security Council during discussions on the issue of protection of civilians in armed conflict confirms the importance China attaches to the division between international and non-international armed conflicts, linking the issue to non-interventionism in the process.

> The responsibility to protect civilians lies first and foremost with the Government of the country concerned. The international community and external organizations can provide constructive assistance, but they must observe the principles of objectivity and neutrality and fully respect the independence, sovereignty, unity and territorial integrity of the country concerned. There must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians.[927]

The Chinese representative also stressed the importance of conflict resolution - "promoting a political solution by peaceful means through dialogue and negotiation" - and "the development and evolution of the norms of international humanitarian law", since conflict situation varied and there should not be a "one-size-fits-all approach".[928]

927 Statement by H. E. Ambassador Li Baodong, Permanent Representative of China to the United Nations, at the Security Council Open Debate on the Protection of Civilians in Armed Conflict, 10 May 2011. <http://www.china-un.org/eng/chinaandun/securitycouncil/thematicissues/civilians_ac/t823976.htm>

928 *Ibid*.

China has often publicly called for adherence to rules of international humanitarian law, including during the US and UK invasion of Iraq in 2004.[929] In a general public statement on respect for humanitarian law in 2009, a Chinese representative stated that "all parties to the conflict, whether the government of a State or the rebellion organization", were obliged to "respect and observe international humanitarian law in accordance with general international law." However, he also stressed that states could urge each other to implement humanitarian law, but should not infringe on the sovereignty and territorial integrity of the state concerned.[930] This echoed the oft-repeated statement (seen again in the quote in the previous paragraph), familiar from the discussion above on human rights law, that the primary responsibility to protect civilians lies with the government concerned.[931]

6.2.4 Concluding remarks

China's limited practice in IHL substantially confirms its approach to human rights law: support for normative development, reluctance to allow international institutions to impinge on its sovereignty and emphasis on the primacy of the state in safeguarding its norms. It has resisted the extension of customary norms to non-international armed conflicts which, as will be seen in the next section, also raises issues in the field of international criminal law.

6.3 International criminal law

The notion of individual criminal responsibility under international law first arose in the field of international humanitarian law. The birth of modern international criminal law is generally considered to have taken place after the Second World War, most significantly with the establishment of the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo, which were the first international institutions to both formulate the principle of individual criminal responsibility for 'war crimes' and to actually prosecute individuals for these crimes.[932]

929 Cohen and Chiu, *People's China*, *supra* note 887, 1522.

930 Zhu Lijiang, 'Chinese Practice in Public International Law: 2009', *CJIL* 9 (2010) 607-662, para 57.

931 Zhu Lijiang, 'Chinese Practice in Public International Law: 2006 (I)', *CJIL* 6 (2007) 475-506, para 90.

932 Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2011) 230, 274. See also E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser Press,

6.3.1 International criminal law after the Second World War

Under the Nationalist government, China supported and took part in the international trials of Nazi and Japanese war criminals after the end of the Second World War as one of the Allied states. Following the Japanese surrender, one of the nine signatories to which was China (still the ROC), all state power in Japan fell to the Supreme Commander of the Allied Powers in the Far East, US General Douglas MacArthur. In his 1946 Proclamation calling for the establishment of the International Military Tribunal for the Far East (IMTFE), he specifically noted the "concurrence of China" with his action; in accordance with Article 2 of the IMTFE Charter, China submitted the name of one of its nationals to be appointed judge to this Tribunal, Mei Ju-ao.[933] The IMTFE also had a Chinese prosecutor.[934]

The PRC's initial stance towards Japanese prisoners of war suspected of being war criminals and held in Japan in the early 1950s, was to call for harsh punishment as well. This position changed, however, when it decided to attempt to gain diplomatic recognition by the Japanese government. From then on, it publicised "its new policy of magnanimity" and contrasted this with the alleged harsh treatment of Japanese war criminals by the United States and Nationalist China. It also accused the United States of committing war crimes in the Korean War.[935] In 1956, the PRC held trials of alleged Japanese war criminals (either transferred by the Soviet Union from Siberia, or soldiers who stayed behind to fight with the Nationalists against the Communists) in the northern city of Shenyang and in Taiyuan. During those trials, it adopted a "policy of leniency" instigated by Prime Minister Zhou Enlai for diplomatic reasons. Many prisoners never even entered the courtroom, and

2003) 2-3. Van Sliedregt also identifies earlier antecedents for individual criminal responsibility; Zhu Lijiang, 'Some Asian states' opposition to the concept of war crimes in non-international armed conflicts and its legal implications', *Asian Yearbook of International Law* 14 (2008) 71-99, at 72-73, who describes the pre-World War II history in which it is noted that many peace treaties before the First World War provided for amnesties for violations of international humanitarian law, and also identifies the IMT and IMTFE as the beginning of international criminal law.

933 Chinese: 梅汝璈; pinyin: Méi Rǔáo, 1904-1973. Proclamation by the Supreme Commander for the Allied Powers, 19 January 1946; Charter of the International Military Tribunal for the Far East (19 January 1946, amended 26 April 1946), reproduced in: John C. Watkins, Jr. and John Paul Weber, *War crimes and war crime trials: from Leipzig to the ICC and beyond* (Durham, NC: Carolina Academic Press, 2006) 316-323. Mei is described by his Dutch colleague B.V.A. Röling as relatively young and in favour of severe punishment. See B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press, 1993) 29. See also Ju-ao Mei, 'China and the Rule of Law', *Pacific Affairs* 5 (1932) 863-872.

934 Xiang Zhejun (Hsiang Che-chun, 向哲浚, 1892—1987).

935 Cohen and Chiu, *People's China*, *supra* note 887, 1583.

sentences were much lighter than those meted out by the Nationalists, which were still lenient compared to punishments in the West.[936] The Supreme People's Court referred to "international law standards and humanitarian principles" in sentencing Japanese war criminals.[937] The policy was adopted by the National People's Congress and summarised as follows:

> A decision taken in 1956 by the Chinese National People's Congress adopted as policy for the prosecution of Japanese war criminals that those Japanese whose criminal acts were of secondary importance or who showed good signs of repentance would be dealt with leniently and spared prosecution. Those Japanese war criminals who had committed serious crimes would be sentenced on an individual basis according to the crimes they had committed and their behaviour during detention.

This policy is cited by the ICRC as practice relevant to a customary rule which calls upon authorities in power at the end of hostilities to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, except for alleged war criminals.[938] It should be noted that prior to the adoption of this policy, the alleged war criminals had been held without trial for many years, and that China's policy towards German war criminals did not change and remained as harsh as its original policy.[939] Reflecting the political divisions of the Cold War, the Chinese government called for punishment of Nazi war criminals as late as 1965, stating that "[u]nder international law and the international agreements relative to the punishment of war criminals, severe sanctions must be applied against these hangmen of the people of many countries and makers of aggressive war."[940]

The picture that emerges from this limited practice at least shows clear support for the punishment of war crimes and war criminals. However, it provides less insight into specific aspects of the punishment of international crimes, such as the definition of war crimes and the primacy of national states or international institutions in prosecuting the perpetrators. The practice cited by the ICRC in its Customary International Humanitarian

936 See Cathcart and Nash, 'To Serve Revenge', *supra* note 900; Justin Jacobs, 'Preparing the People for Mass Clemency: The 1956 Japanese War Crimes Trials in Shenyang and Taiyuan', *CQ* 205 (2011) 152-172.

937 Hungdah Chiu, *The People's Republic of China and the Law of Treaties* (Cambridge, MA: Harvard University Press, 1972) 6.

938 See ICRC database, rule 159. <http://www.icrc.org/customary-ihl/eng/docs/v2_cou_cn_rule159> [29 August 2011].

939 Cohen and Chiu, *People's China*, *supra* note 887, 1596-1597.

940 Chinese Government Statement, 24 March 1965, reproduced in Cohen and Chiu, *People's China*, *supra* note 887, 45-6, at 1598.

Law database reflects in part PRC legislation, but it also refers to Nationalist regulations from before 1949. Since China has not been very militarily active outside its own borders, we are therefore left with some expressions of *opinio iuris* and very little state practice.

6.3.2 The ad hoc *tribunals: support, acquiescence, and rediscovery*

In any case, China has expressed clear support for the notion of international war crimes, crimes against humanity and genocide, and their punishment. Although it was Nationalist China which participated in conducting the Tokyo trials, it seems that its prosecution of war criminals was endorsed by the PRC, also after 1949.[941] It may have been relevant in this regard that Mei Ju-ao remained in the PRC.[942] It is noteworthy that the Chinese nationals who served as prosecutor and judge in the IMTFE remained in mainland China after the Communist revolution, and Judge Mei lent his authoritative voice to campaigns to draw attention to biological warfare by the Japanese during the Second World War.[943]

China's support for the prosecution of war crimes and scepticism about international institutions are reflected in its measured support for the establishment of the ICTY,[944] and are made explicit by the statement of the Chinese representative to the UN Security Council after the adoption of the resolution which established the International Criminal Tribunal for former Yugoslavia (ICTY).[945] He emphasised that the establishment by the Security Council of an international criminal tribunal should in no way serve as a precedent and could "only be an ad hoc arrangement". He warned in particular of the risk of "abuse of Chapter VII [of the UN Charter]" and expressed China's political support for the establishment of the ICTY, reiterating that China had "consistently opposed" international

941 For example, Shen Chün-ju, 'On the Indictiment and Punishment of War Criminals', 16 September 1951, reproduced in Cohen and Chiu, *People's China*, *supra* note 887, 1584-1587, criticises the United States for freeing war criminals to prepare for a new war, and notes the USSR's attempts to prosecute Japanese emperor Hirohito. It notes the conviction of Japanese war criminals and treats them as fact.

942 See 'Jurist on Disposition of Japanese Who Committed Crimes During War', 4 July 1956, reproduced in Cohen and Chiu, *People's China*, *supra* note 887, 1595-1596. This article quotes Mei ju-ao as endorsing the policy of "magnanimity" which reflects "Chinese people's traditional spirit".

943 Cathcart and Nash, 'To Serve Revenge', *supra* note 900, 1062-1063.

944 See William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2007) 17 and 20. China watered down the original resolution calling for a commission of inquiry, together with the UK and France, but voted in favour of the Tribunal in the end. See also discussion by Mireille Delmas-Marty, 'Present-day China and the Rule of Law: Progress and Resistance', *CJIL* 2 (2003) 11-28, at 26.

945 UN SC resolution 827 (1993) of 25 May 1993.

crimes and advocated bringing perpetrators of those crimes to justice. However, China disagreed with the legal approach of the Security Council; the exclusive jurisdiction of the ICTY was not in line with "state judicial sovereignty". An international criminal tribunal should be established by treaty, and the creation of the ICTY by the Security Council would "bring many problems and difficulties both in theory and in practice."[946]

The stated reservations of China again reflect its emphasis on state sovereignty and the consent of states to be bound by legal rules. It also explains in part why the next year, when the Security Council voted to establish another *ad hoc* International Criminal Tribunal for Rwanda (ICTR), China abstained from voting. All other members of the Council voted in favour with one notable vote against, that of the Government of Rwanda itself.[947] In explaining China's vote, the Chinese representative restated China's strong opposition to "all crimes in violation of international humanitarian law, including acts of genocide" and it being in favour "of bringing to justice those responsible". However, he also stated that the establishment of a special tribunal could be "only a supplement to domestic criminal jurisdiction and the current exercise of universal jurisdiction over certain international crimes". Although China had originally been prepared "to give positive consideration" to the Draft Statute, it noted that the government of Rwanda still had objections to the statute in its current form and had asked for further consultations. Therefore, the Chinese government found it "an incautious act to vote in a hurry on a draft resolution and statute that the Rwanda Government still finds difficult to accept".[948] Although China thus deferred to an extent to Rwanda's sovereignty and voiced a principled objection to the Security Council's action, it should be noted that it did not choose to block the establishment of the ICTR at that moment, even though it had the power to do so.

In the following years, Chinese nationals served at the ICTY, including as prosecutors and judges. These included Wang Tieya and Li Haopei.[949] Some other former Chinese ICTY

946 Provisional Verbatim Record of the 3217th meeting of the Security Council, 25 May 1993, UN Doc S/PV.3217, 33-34.

947 UN SC Resolution 955 (1994) of 8 November 1994.

948 Provisional verbatim record of the 3453rd meeting of the UN Security Council, 8 November 1994, UN Doc S/PV. 3453, 11. See Schabas, *International Criminal Tribunals*, *supra* note 944, 28-29.

949 See e.g. Wang Tieya and Bing Bing Jia, 'Is Defective Composition a Matter of Lack of Jurisdiction within the Meaning of Rule 72?" in Richard May et al (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague etc; Kluwer Law International, 2001) 45-53.

employees are now among the more prominent public international lawyers in China.[950] At the same time, the Chinese government remained critical about the work of the ICTY. For example, in 2000 the Chinese representative on the Security Council offered criticism which he himself described as "constructive". He stated that the ICTY had become "a political tool", without specifying why. He also called for caution with regard to a number of procedural improvements suggested by the ICTY president, emphasising the importance of proper geographical distribution in selecting *ad litem* judges and pleading for a role for the General Assembly.[951]

In general, the Chinese criticism of various aspects of the establishment of the ad hoc tribunals is not without merit. Others have criticised the establishment of a criminal tribunal by the Security Council under Chapter VII, an issue which had to be resolved by the ICTY Appeals Chamber itself in the decision in the *Tadić* case in which it examined the legality of its own establishment.[952] The Chinese judge in the Appeals Chamber of the ICTY, Li Haopei, appended a separate opinion to this decision in which he argued that the Chamber had exceeded the space provided by the doctrine of *Kompetenz-Kompetenz* and "should have dismissed the appeal on this question without examining the legality of the establishment of this Tribunal."[953] He also took issue with the Appeals Chambers' finding that customary international law had developed to such an extent that the war crimes listed in the ICTY Statute were also liable for prosecution even if there was no international armed conflict, finding that there was no support for this conclusion in state practice. On a related note, he stated that the Tribunal's decision that it could exercise jurisdiction over other offences under conditions decided upon by the ICTY itself was "an unwarranted assumption of legislative power which has never been given to this Tribunal by any authority."[954]

950 This includes Zhu Wenqi (Renmin University), a former prosecutor, Sienho Yee (Wuhan University and editor-in-chief of the *CJIL*), and Bing Bing Jia (Tsinghua University).

951 Statement by H.E. Ambassador Shen Guofang, Deputy Permanent Representative of China to the United Nations, On the Work of the International Tribunal for the Former Yugoslavia at the 4161th Meeting of the Security Council on 20 June 2000, reproduced on the Chinese MFA website. <http://www.china-un.org/eng/lhghyywj/smhwj/wangnian/fy00/t29017.htm> [31.08.2011]

952 ICTY, *Prosecutor v Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995.

953 ICTY, *Prosecutor v Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1, Appeals Chamber, Separate Opinion of Judge Li on the Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, paras 2-4.

954 *Ibid*., paras 5-13.

Although Judge Li's opinion is not necessarily the same as that of the Chinese government,[955] it shows a certain level of restraint, or even conservatism, which runs counter to what has been described by more human rights-oriented lawyers as new methods of formation of customary international law. One characteristic of this approach is that it places more emphasis on *opinio iuris* rather than state practice, and is described by Wouters and Ryngaert as 'modern positivism'.[956] It is safe to say that this 'modern positivist' approach will not find favour with the Chinese government, as many states, not just China, but also the United States and France, are unlikely to support it; the question remains whether Chinese international lawyers such as Judge Li will be more sympathetic to this approach.[957] It should be noted, however, that the case-law of the ICTY does give reasons for concern when it comes to finding customary international law and that the ICTY's assessment of its own establishment was, in the opinion of the present writer, a case of judicial overstretch which could have been resolved in a more satisfying manner, even if it by now it has been vindicated by subsequent Security Council practice. The issues raised in light of the legality principle with regard to international criminal law might also, in the long run, damage the objectives of international criminal justice, rather than strengthen it and thus contribute to the protection of individuals. In other words, the 'Chinese approach' may well have been the more prudent one.

China was an opponent of the establishment of an international court for Cambodia, although this was established eventually as the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic

955 Although China's positions in the ILC and other UN fora with regard to the application of international humanitarian law in non-armed conflict seem to indicate that its official position is similar. See *infra*.

956 Wouters and Ryngaert, 'Impact on Custom', *supra* note 878, 118.

957 The current Chinese national serving as a judge in the ICTY has dissented cases on findings related to customary international law. He disagreed with the majority that there was a basis for a "crime of terror" under customary international law in ICTY, *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1, Appeals Chamber, Judgment, 12 November 2009, Partly dissenting opinion of Judge Liu Daqun. He pointed, *inter alia*, at a number of countries declined to criminalise the act, although he acknowledged that "negative practice" had not been fully explored (para 8 and n 24). In ICTY, *Prosecutor v Naser Orić*, Case No. IT-03-68, Appeals Chamber, Judgment of 3 July 2008, Partially dissenting opinion and declaration of Judge Liu, he took the opportunity to voice his disagreement with the Appeals Chamber finding in *Hadžihasanović* Decision on Jurisdiction on the existence of a customary international law basis for a finding of responsibility of commanders for crimes committed before they assumed command, referring to Article 87 of Additional Protocol I. Neither opinion is evidence of a significantly different approach or methodology on Judge Liu's side to other ICTY judges. Even more than in the case of Li Haopei, Judge Liu's findings seem wholly independent from any official Chinese positions.

Kampuchea (ECCC). This may have been in part due to the interests of China itself, which was connected with the Khmer Rouge regime, members of which are now on trial.[958]

6.3.3 China and the International Criminal Court

The existence of the International Criminal Court and the way in which its Statute came into existence provides an interesting case study to test realist assumptions about the international order and to analyse the way in which diverse actors, notably the NGOs that make up what is called international civil society, can shape the discourse and counter the interests of larger, powerful states.[959]

6.3.3.1 Drafting of the Rome Statute

A lot of attention in academic and activist circles has been aimed at the opposition to the International Criminal Court by the United States. What has been neglected, is to what extent the history of China's involvement in the establishment of the ICC runs parallel to the American story. China was an active participant in the negotiations for the Rome Statute, supplying a vice-president for the conference and members for the drafting and credentials committees.[960] China supported establishment of an international criminal court, although eventually it voted against the Rome Statute, along with the United States and five other states.

In the early 1990s, different ways of establishing an international criminal court were discussed within the United Nations, and convening a diplomatic conference to establish an independent treaty organisation separate from the UN was only one of the options, although this was the one eventually taken. One factor of note concerning China's role is that when the states represented on the Sixth Committee decided to take this route, a decision which was taken by consensus, China came on board, in the opinion of one of the diplomats most involved, reluctantly because it did not want to be the only state blocking

958 Schabas, *International Criminal Tribunals*, *supra* note 944, 32.

959 Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse and Agency* (New York, NY and Houndmills, Basingstoke: Palgrave Macmillan, 2008).

960 Bing Bing Jia, 'China and the International Criminal Court: the current situation', *Singapore Year Book of International Law* 10 (2006) 87-97, at 88. There were 31 vice-presidents in total. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. I, UN Doc A/CONF.183/13 (Vol. I), Final Act, at 68, para. 18.

the formation of a consensus.[961] Looking back on China's role in the entire process of negotiation of the ICC Statute, one Chinese diplomat has stated that China "saw itself in the position of the defendant" throughout the process.[962]

When work started in the UNGA Sixth Committee on the convening of a diplomatic conference to draft the ICC statute, China's priorities were already clear as expressed by its representative to the committee in 1995. Indicating its continuing reluctance to go ahead, China called for restraint in moving ahead considering the major differences of opinion which still existed. The Chinese delegation emphasised "the great divergence in national criminal law systems" and called for a "prudent, hard-nosed and step-by-step approach to the whole undertaking." It called for a number of principles to be expressed in the statute. First, the principle of complementarity, as called for in the draft Statute drawn up by the ILC. Second, the principle of state consent; the court should be established by multilateral treaty, its jurisdiction based on consent and voluntary agreement of states parties. Third, the principle of limited jurisdiction, covering "the most serious crimes of concern to the entire international community", the criteria of which were "universal concern" and that it must be a "serious crime", which basically meant "genocide, serious violations of the rules of war and crimes against humanity", whilst "inclusion of aggression [...] should be handled with the utmost circumspection", given the problems in defining the crime and the role of the Security Council in determining whether aggression has occurred. In the Chinese view, some "treaty crimes" such as torture under CAT were considered not to meet the seriousness required while others, such as endangering the safety and security of UN peacekeepers, were not of universal concern to the entire international community. As a fourth principle, the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) as adopted in national criminal justice systems must be included; in this, China also called for clearly defined crimes.[963] Most of these principles are in fact reflected in the Rome Statute as adopted, although more crimes were included in the ICC's jurisdiction than China

961 Struett, *Politics of Constructing*, *supra* note 959, 76 and 188 fn 33. The diplomat in question was Adriaan Bos, the Dutch diplomat in charge of the ad hoc committee on establishing the ICC.

962 Quoted in Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (London: Chatham House 2012) 52.

963 Statement by H.E. Ambassador Chen Shiqui, Representative of China to the Sixth Committee on the Establishment of An International Criminal Court, 30 October 1995, Coalition for the International Criminal Court (CICC), <http://www.iccnow.org/documents/China1PrepCmt30Oct95.pdf> [21.2.2013]

preferred.[964]

In one account of the negotiations for the Rome Statute at the eventual conference, China is usually mentioned in opposition to proposals which potentially erode state sovereignty, in particular consent, or develops existing international law too far beyond current practice. For example, China was one of a minority of states which objected to the inclusion of war crimes committed in internal armed conflicts in the Statute, fearing that this might not sit easily with the principle of complementarity and lead to interference with domestic affairs.[965] In the plenary meeting, the Chinese representative stated that the definition of war crimes and crimes against humanity had "already exceeded commonly understood and accepted customary law."[966] China was also among the states which insisted on an opt-in regime for the jurisdiction of the Court, at the very least for war crimes. It found itself in the company of Arab states and France in this respect.[967] China was also an opponent of extending superior responsibility (or command responsibility) to civilian superiors in addition to military superiors (Article 28), but, in the words of the chairman of the relevant working group, "graciously allowed work to go forward".[968] Together with Japan, China was also in a small minority which spoke against the principle that the crimes

964 China raised this specific issue again in the Sixth Committee in 1997: Statement by Mr. Duan Jielong, Deputy Representative of the Chinese Delegation before the Sixth Committee of the 52nd General Assembly, regarding agenda item 150: establishment of an international criminal court, 21 October 1997, CICC, <http://www.iccnow.org/documents/China6thComm21Oct97.pdf> [21.2.2013] See also Struett, *Politics of Constructing*, *supra* note 959, 96-97, who notes that in 1995 more states shared China's concern that the ICC would supplant national courts or become a supranational court, although many of these ultimately went on to support the ICC.

965 Herman von Hebel and Darryl Robinson, 'Crimes within the jurisdiction of the Court' in: Roy S. Lee (ed), *The International Criminal Court: The Making Of the Rome Statute. Issues -Negotiations – Results* (The Hague: Kluwer Law International, 1999) 79-126, at 105 and 121.

966 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II, UN Doc A/CONF.183/13 (Vol. II), Summary records of the plenary meetings, at 124, para. 38. This point was voiced by Liu Daqun, who subsequently became judge in the ICTY.

967 Elizabeth Wilmshurst, 'Jurisdiction of the Court' in Roy S. Lee (ed), *The International Criminal Court: The Making Of the Rome Statute. Issues -Negotiations – Results* (The Hague: Kluwer Law International, 1999) 127-141, at 135-136.

968 Per Saland, 'International Criminal Law Principles' in: Roy S. Lee (ed), *The International Criminal Court: The Making Of the Rome Statute. Issues -Negotiations – Results* (The Hague: Kluwer Law International, 1999) 189-216, at 203. See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II, UN Doc A/CONF.183/13 (Vol. II), Summary records of the meetings of the Committee of the Whole, 137, para. 77. The customary international law basis of superior responsibility of civilians is indeed thinner than that of military command responsibility.

within the ICC's jurisdiction should not be subject to any statutory limitations.[969] It favoured the direct applicability of national law (Article 21) rather than national law as an indirect source, an issue on which a compromise was reached during the negotiations.[970] Together with Japan and to an extent the United States, China opposed the obligation for states to ensure that procedures were available under their national laws for cooperation with the ICC (Article 88).

China opposed the granting of ex officio powers of investigation to the ICC Prosecutor.[971] However, it spoke strongly in favour of granting the Security Council the power to refer cases to the court, "since otherwise it might have to establish a succession of ad hoc tribunals in order to discharge its mandate under the Charter."[972] This is a somewhat surprising statement in light of China's later reluctance to refer situations to the ICC, but also in opposing what it considered "highly subjective" criteria for determining the unwillingness of a state to carry out an investigation in the context of the principle of complementarity, where China worried that the Court would receive "unduly wide powers". Here, China stated that Rwanda and Yugoslavia were exceptions and most countries had judicial systems capable of functioning properly.[973]

Although these are examples of China metaphorically hitting the brakes in the negotiating procedure, not all its proposals were negative or should be seen negatively. Other positions reflect China's other concerns, such as the universality of the ICC. It strongly favoured specifically mentioning representation of the main forms of civilisation in the Statute.[974] It has also been mentioned that China's "cautious approach" was aimed at

969 Saland, *supra* note 968, 204. The limit should only apply to war crimes; China was in agreement that for genocide and crimes against humanity there should be no statute of limitations. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II, UN Doc A/CONF.183/13 (Vol. II) Summary records of the meetings of the Committee of the Whole, 143, para. 71.

970 Saland, *supra* note 968, 214-215.

971 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II, UN Doc A/CONF.183/13 (Vol. II) Summary records of the meetings of the Committee of the Whole, 204, para. 9.

972 *Ibid.*, 209, para. 85.

973 *Ibid.*, 218, para. 9.

974 Medard R. Rwelamira, 'Composition and Administration of the Court', in: Roy S. Lee (ed), *The International Criminal Court: The Making Of the Rome Statute. Issues -Negotiations – Results* (The Hague: Kluwer Law International, 1999) 153-173, at 165.

achieving "universal participation".[975]

Despite this support, in the end China was one of the two permanent members of the Security Council, together with the United States, to vote against the Rome Statute. Its representative in the UN General Assembly provided a long explanation of China's vote in a subsequent meeting.[976] In this speech, he reiterated that establishing an international criminal court "had been a goal of the international community for nearly a century." He complained that some of the provisions in the Rome Statute did not take "the legitimate rights and interests of countries" into account, and that many states had been excluded from key parts of the negotiations in Rome.[977]

The Chinese government had reservations in particular to the universal jurisdiction of the ICC as expressed in Article 12 of its Statute, which "directly infringed on the judicial sovereignty of States." First, because it interfered with the jurisdictional sovereignty of states which had a different basis for jurisdiction than those mentioned in the article. Secondly, the ICC Statute's provisions on jurisdiction had the potential to impose more obligations on non-parties than parties, and in the view of the Chinese delegation there were contradictions between various articles to do with the jurisdiction of the Court.[978] Some of these objections seem fairly far-fetched, highly theoretical, or only possible based on a bad faith interpretation of the Rome Statute. They seem to be more reflective of the lingering distrust which China has also shown elsewhere.

A more substantive objection of the Chinese government concerns the way in which the Statute included domestic armed conflicts into the ICC's jurisdiction, since, in the view of the delegation, "the provisions of international law concerning war crimes committed during such conflicts were still incomplete."

> The provisions of Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 were very weak in comparison with those of Additional Protocol I and the question

975 Jia, 'China and the ICC', *supra* note 960, 88. The records do indeed reflect that this formulation was used often by Chinese representatives.

976 Sixth Committee, Summary Record of the 9th meeting, 21 October 1998, UN Doc A/C.6/53/SR.9, 4 November 1998.

977 *Ibid*., paras 30-31.

978 *Ibid*., paras 33-34. This seems to be a more developed version of earlier criticism that the Rome Statute did not abide by the "principle of supplementarity" which in the Chinese view placed the jurisdiction of the ICC ahead of that of national courts. See Hu, 'Chinese Practice: 2002', *supra* note 917, 669.

> of whether some of those provisions had acquired the status of customary international law was still in debate. The definition of war crimes committed during domestic armed conflicts in the Statute had far exceeded not only customary international law but also the provisions of Additional Protocol II.[979]

This point of criticism echoes Judge Li Haopei's criticism of the ICTY Appeals Chambers' findings in the *Tadić* decision on jurisdiction. Even if the point has a certain merit, however, it is unclear how the drafters of a treaty should be precluded from extending the substantive reach of the ICC beyond that which is allowed by customary international law – after all, a high ratification rate for the ICC Statute could be taken as development of new custom, or establish a treaty regime which provides more protection than customary international law, even if it is not particularly desirable that both regimes would exist in parallel. Another consideration of the Chinese government could be the earlier mentioned aim of universal acceptance of the ICC, which may be more difficult to achieve if it departs from existing custom; states would however have to cite this specific point as a consideration not to join the ICC.

One Chinese observer explicitly identifies the Taiwan issue as the reason why the Chinese government is opposed to the concept of internal or domestic armed conflicts both in customary law and in the ICC Statute, pointing out that the PRC has made clear repeatedly that it does not rule out the use of force in case the government on Taiwan would seek independence and thus formal secession from China, and the threat was made explicit in the Anti-Secession Law adopted on 14 March 2005. This author also mentions secessionist activity in Xinjiang, although (writing in 2006) he feels the situation there is far from a non-international armed conflict. "Should the use of armed force against Taiwan and Xinjiang secessionists occur, it is almost unavoidable that acts which might constitute internal war crimes by both sides would probably be committed."[980] Somewhat surprisingly, the author does not mention Tibet.

The same article surveys the position and practice of various Asian states with regard to individual criminal responsibility for war crimes in non-international armed conflicts, and concludes that the concept of internal war crimes is relatively recent and,

979 Sixth Committee, Summary Record of the 9th meeting, 21 October 1998, UN Doc A/C.6/53/SR.9, 4 November 1998, para 36.

980 Zhu, 'Asian states' opposition', *supra* note 932, 83.

although confirmed by the ICTY and ICTR, implemented in the domestic criminal law of quite a few states and endorsed by the majority of scholars on the subject, still lacks state practice. In particular, China, India and Pakistan could be seen as persistent objectors to what in the view of the author is at most an emerging rule in customary international law.[981] Although acceptance of the notion has certainly increased since the *Tadić* decision, it has not become generally accepted and China finds itself in the company of an influential minority when it comes to opposing it. Apart from China and India, Russia and Mexico also opposed this even when the negotiations in Rome were nearing their end.[982]

In its statement in the Sixth Committee after the adoption of the Rome Statute, China voiced a similar objection to the inclusion of domestic armed conflict in the Statute about the way crimes against humanity had been included, in particular the disconnect from the nexus with an international armed conflict.

> The Statute [...] failed to link those crimes to armed conflicts and thereby changed the major attributes of the crimes. In listing specific acts constituting crimes against humanity, the Statute added a heavy dose of human rights law. Hence, crimes against humanity as defined in the Statute represented "new wine in old bottles". His delegation believed that what the international community needed at the current stage was not a human rights court but a criminal court that punished international crimes of exceptional gravity. The injection of human rights elements would lead to a proliferation of human rights cases, weaken the mandate of the Court to punish the most serious crimes and thus defeat the purpose of establishing such a court.[983]

It was also a problem for the Chinese delegation that the crime of aggression had been included in the ICC Statute despite the inability of the Conference to arrive at a definition. Should there have been a definition, China would have been in favour of including it.[984] China had also called for a link to the Security Council.[985]

China also regretted that an opt-in clause had not been included in the Statute to allow states to decide which crimes they would like to be in the jurisdiction of the Court.[986] This issue has been discussed above. It may be relevant to note that in 1995, China had

981 *Ibid*., 98-99.

982 Struett, 160.

983 Sixth Committee, Summary Record of the 9th meeting, 21 October 1998, UN Doc A/C.6/53/SR.9, 4 November 1998, para 37.

984 Ibid., para 38.

985 Jia, 'China and the ICC', *supra* note 960, 89. See also Hu, 'Chinese Practice: 2002', *supra* note 917, 669-670.

986 Sixth Committee, Summary Record of the 9th meeting, 21 October 1998, UN Doc A/C.6/53/SR.9, 4 November 1998, para 39.

expressed reservations over inclusion of the crimes of enslavement, forced sterilisation and enforced disappearances, which all eventually made their way into the Statute.[987]

A further objection concerned the *proprio motu* powers of the ICC Prosecutor. First, China regretted the absence of a qualifier regarding the kind of "information" the Prosecutor could use to initiate an investigation. Possibly due to its experience with NGOs providing reports to human rights bodies, the Chinese government stated that

> article 15 empowered individuals, non-governmental organizations and other bodies to bring cases before the Court and gave them virtually the same right as States parties and the Security Council to trigger the Court's jurisdiction mechanism. As a result, the Court would be faced with a huge number of complaints from individuals and non-governmental organizations, and therefore would not be able to concentrate its limited resources on dealing with the most serious international crimes.[988]

Furthermore, if the prosecutor could initiate an investigation based on that kind of information, he or she could "influence or directly interfere with with the judicial sovereignty of a state." The Chinese government believed that the Statute's built-in mechanism for prevention of abuse of authority in the form of a Pre-Trial Chamber would only work if "the members of the Pre-Trial Chamber, or the members of the Chamber and the Prosecutor, should be the product of different legal systems and different political and cultural backgrounds."[989]

What stands out here, is that the Chinese objections to the powers of the ICC Prosecutor, which show some similarity to those of the United States, are expressed in the language of cultural relativism and hostility to global civil society, with the implicit accusation that these are western-dominated.

China's last objection also had to do with the risk of political manipulation. It feared that the principle of complementarity and primacy of national judicial systems could be undermined.

> As stipulated in article 17, the Court could judge ongoing legal proceedings in any State, including a non-party, in order to determine whether the intention existed to shield the criminal or whether the trial was fair, and could exercise its jurisdiction on the basis of that decision. In other words, the Statute authorized the Court to judge the judicial

987 Hu, 'Chinese Practice: 2002', *supra* note 917, 670.

988 Sixth Committee, Summary Record of the 9th meeting, 21 October 1998, UN Doc A/C.6/53/SR.9, 4 November 1998, para 40.

989 *Ibid.*, para 41.

> system and legal proceedings of a State and negate the decision of the national court. What was worse, the criteria for determining whether a trial was fair or whether a State had the intention to shield a criminal were very subjective and ambiguous.[990]

This objection is again consistent with the stance China has taken towards human rights treaty bodies and other international mechanisms: protection of national sovereignty and primacy of national institutions.

If the problems as described by China would not be solved, this "would inevitably obstruct the process of ratification and accession to the Statute, thereby affecting the authority and universality of the Statute."[991] It is probably safe to say that China's worst fears have not been realised, as the ICC has quiet a high ratification rate despite the non-ratification of a number of major states,[992] and the states parties were recently able to agree on a definition of the crime of aggression.

6.3.3.2 Subsequent developments

China's involvement with the ICC did not end after its negative vote. Both internationally and domestically, government representatives expressed their support for the establishment of an international criminal court that was truly "independent, impartial, effective and universal" and stated that it would treat all issues arising from the Rome Conference "in a cautious manner to prevent the Court from becoming a political tool for intervention in the internal affairs of States." China continued to observe and participate in the Preparatory Committee of the Court and also participated in the drafting of important documents.[993]

Following the 90th ratification of the Rome Statute and the election of its first Prosecutor, the Chinese government released a statement in 2003 explaining its attitude to the court, which was slowly becoming active. It continued to express its support for the Court, noting the misgivings which made it unable to vote for the Statute or join the treaty, and called on the ICC to "strictly follow relevant principles", most importantly that of

990 *Ibid.*, para 42.

991 *Ibid.*, para 43.

992 As of 1 May 2013, 122 countries are states parties to the Rome Statute, 34 African, 18 Asian-Pacific states, 18 Eastern European states, 27 Latin American and Caribbean states and 25 from the 'Western European and other' group. See <http://icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> [22.5.2013].

993 Jia, 'China and the ICC', *supra* note 960, 92.

complementarity. "The most important role of the International Criminal Court is expressed in that it promotes all countries to improve their domestic judicial systems and guarantees that all countries exercise jurisdiction over perpetrators of grave crimes according to their domestic judicial systems." It also stated that the crimes under the jurisdiction of the ICC should be limited to "the gravest international crimes as provided for in the Statute." The Court should not act counter to the UN Charter (especially with regard to aggression), and "execute its duties objectively and impartially, make best efforts to avoid political bias and prevent the Court from becoming a place for political misuse of litigation." The Chinese Government adopted "an open attitude" to acceding to the ICC Statute, in which the "actual performance of the Court" was an important factor.[994]

Chinese scholarship in international law has dealt with the government's objections to the Rome Statute from various angles, and provided some suggestions for paving the way for an eventual accession. A lack of familiarity with developments in international criminal law, as well as an undue emphasis on comparisons with Chinese criminal law seem to hamper some of Chinese scholarship, although there is also a fear of being left out as a refusenik nation.[995] Chinese commentators have also criticised the Chinese government position, calling on the Chinese government to join the Court and not to follow the example of the United States, since that country is staying out for reasons which do not apply to China. They also point out that, for example with regard to the issue of crimes under customary international law, the positions which China criticised have become more mainstream in the case-law of the ad hoc tribunals.[996] However, they did write before a more recent backlash in scholarship according to which international criminal law may have gone a bit too far along the way to progressive development.[997] In the meantime, however, the Chinese government has inched slightly towards support of the Court, but has not moved much. It has acted in ways that support the ICC, for example by threatening to veto a

994 Ministry of Foreign Affairs, China and the International Criminal Court, 28 October 2003. <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2627/t15473.htm> [01.09.2011]

995 For an overview, see Jia, 'China and the ICC', *supra* note 960, 93-97. See also Lijun Yang, 'Some Critical Remarks on the Rome Statute of the International Criminal Court', *CJIL* 2 (2003) 599-622, which elaborates on what are mostly the official objections of the Chinese government.

996 Lu Jianping and Wang Zhixiang, 'China's attitude towards the ICC', *JICJ* 3 (2005) 608-620.

997 See, for example, Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008); Darryl Robinson, 'The Identity Crisis of International Criminal Law', *LJIL* 21 (2008) 925-963.

proposed UN Security Council resolution to shield US peacekeepers from the jurisdiction of the Court.[998]

China participated as an observer to the ICC Review Conference in Kampala in 2010.[999] Following the conference's adoption of a definition of the crime of aggression,[1000] it criticised the result for failing to reflect that it was "necessary for the Security Council to make a determination of its existence first before the International Criminal Court could exercise jurisdiction over the crime of aggression." Both the UN Charter, as well as the Rome Statute itself (Article 5(2)) required this.[1001] This concern, which is unsurprising considering China's earlier stance, was shared by other states, including the United States and Russia, but also members of the ICC (and the Security Council) France and the United Kingdom.[1002]

6.3.3.3 Sovereignty and Security Council referrals

The concerns of China with regard to the ICC all have to do with issues of sovereignty and consent, and display the same unwillingness to allow international institutions to "interfere in domestic affairs" as China has shown with regard to human rights institutions. The principled stance of China with regard to the ICC Statute is consistent with positions China has taken elsewhere, and it has shaped China's attitude towards the Court so far, although there may have been some shifts in recent years. China abstained from the vote in the Security Council to refer the situation in Darfur to the ICC prosecutor in 2005, reiterating its "major reservations" to some of the provisions of the Rome Statute.[1003] China's Security Council representative even argued that Sudanese courts would be able to try violations of international humanitarian law themselves.[1004] China expressed "grave misgivings" to the arrest warrant issued against the Sudanese president Bashir, and aligned itself with the African Union states which opposed it. It stated that "[t]he relevant actions of the ICC

998 Jia, 'China and the ICC', *supra* note 960, 93.

999 It participated as a full member in the Drafting Committee for the purpose of linguistic accuracy. See Review Conference of the Rome Statute of the International Criminal Court, Official Records, Kampala, 31 May-11 June 2010, ICC Doc RC/11, 28.

1000 ICC Review Conference, Resolution RC/Res.6, 11 June 2010.

1001 Review Conference of the Rome Statute of the International Criminal Court, Official Records, Kampala, 31 May-11 June 2010, ICC Doc RC/11, Annex IX, 125. See also *infra*, 6.3.5.

1002 Ibid, 124 and 126-127.

1003 Press Release SC/8351 on adoption of Resolution 1593 (2005), 31 March 2005. <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> . See also *infra*, 7.2.2.1.

1004 Jia, 'China and the ICC', *supra* note 960, 97.

should be conducive to the stability in Sudan and proper settlement of the Darfur issue, not the opposite" and called on parties involved not to disturb the "cooperative atmosphere".[1005]

Surprisingly, China did vote in favour of the referral of the situation in Libya to the ICC. It has been reported that China was the last holdout, but when a consensus emerged, it did not abstain from voting, but actually joined the yes vote to make the referral unanimous.[1006] A short while later, China did abstain when the Security Council authorised the use of force, thus declining to use its veto power to block military action. This situation may have been exceptional due to the fairly strong international consensus, both in the region and beyond, in favour of action in Libya, but China's apparent change in attitude may also be explained by a reappraisal of its own interests due to its expanding role around the world.[1007] For the time being, both explanations are speculative, and not mutually exclusive in any case. The Chinese attitude towards the ICC can therefore be described as sceptical but not unsupportive.

6.3.3.4 Concluding remarks

Since China's objections to the ICC are for the most part related to the protection of state sovereignty and China itself is a member of the UN Security Council, its objections to the ICC have shown similarities to those of the United States, even if members of its own military are at far less risk of being subjected to the ICC's jurisdiction without Chinese consent.[1008] At the moment, it seems that China's 'cautious approach' is allowing it to inch towards support for the International Criminal Court, and it has repeatedly stated that it may well join the Rome Statute one day, although that day still seems far away.

A bit more unclear is what the Chinese government had in mind when, in a recent speech on the occasion of the 40th anniversary of the 'restoration of the lawful seat' of the PRC in the United Nations. The Chinese Assistant Foreign Minister stated, inter alia, that the

1005 Zhu, 'Chinese Practice: 2008', *supra* note 904, 542, para 74; Zhu, 'Chinese Practice: 2009', *supra* note 930, 646-647.

1006 'Libya: UN Security Council votes sanctions on Gaddafi', *BBC News*, 27 February 2011, <http://www.bbc.co.uk/news/world-africa-12589434>

1007 Brian Spegele, 'China takes new tack in Libya vote', *Wall Street Journal*, 20 March 2011, <http://online.wsj.com/article/SB10001424052748703292304576212431833887422.html>. See *infra*, 7.2.2.

1008 For discussion of the key role of the Security Council in US concerns, see William A. Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council', *EJIL* 15 (2004), 701-720. See also Lu and Wang, 'China's attitude towards the ICC', *supra* note 996, 610-611.

UN "should continue to set up ad hoc international criminal tribunals, among other things, to try the most heinous international crimes and prosecute individuals for their criminal liabilities to realize judicial justice."[1009] At the very least, the issue of the power of the Security Council to establish such tribunals does not seem problematic anymore, and can probably be construed as an accepted practice. However, this statement does raise issues with regard to the question of referrals to the ICC, as it seems to open the possibility that China would in the future prefer to establish an ad hoc tribunal rather than refer a situation to the ICC.

Due to the wide participation in the ICC as well as China's role in Security Council referrals, ICC practice will in any case have an impact on China even if it stays out, and conversely China will have an impact on the work of the ICC even if it stays out, apart from its continuing active involvement as an outsider in the workings of the Court.[1010]

6.3.4 Right to redress of victims of war crimes

China has expressed moderate support for compensation claims by Chinese forced labourers against Japan during the Second World War, in urging the Japanese government to take these claims seriously.[1011] However, it seems that these statements are mostly within the realm of diplomacy and do not express support for a legal principle.

6.3.5 China and the crime of aggression

At the Review Conference of the ICC in Kampala, the states participating in the ICC adopted a definition of the crime of aggression and amended the ICC Statute accordingly. The definition is clearly a compromise and will not be entering into force until 2017.

The crime of aggression has had a long history since the end of World War II, when the nazi and Japanese leadership were also tried for crimes against peace. Aggressive war

1009 On the 40th Anniversary of the Restoration of the Lawful Seat of the People's Republic of China in the United Nations, keynote Address by Assistant Foreign Minister Wu Hailong at the Fourth Lanting Forum, 2 September 2011. <http://www.mfa.gov.cn/eng/zxxx/t854706.htm>

1010 Wenqi Zhu and Binxin Zhang, 'Expectation of Prosecuting the Crimes of Genocide in China' in: René Provost and Payam Akhavan (eds), *Confronting Genocide* (Dordrecht etc: Springer, 2011) 173-191, at 183-184, also pointing out that Chinese citizens or those responsible for crimes committed within China's own territory may still be tried at the ICC at some point.

1011 Zhu, 'Chinese Practice: 2008', *supra* note 904, para 63.

has been considered outlawed since, even if the precise definition of what constitutes the crime of aggression has been a matter of debate. As noted before, the PRC was condemned as an aggressor by the UNGA in 1951.[1012] The UNGA adopted a resolution on aggression in the 1970s.[1013] The preparatory work for this resolution was initiated in 1967, and had therefore already been in progress when the PRC joined the UN. China did not show much interest in the matter in any case.[1014] Although the resolution was adopted without a vote, the Chinese delegation made it clear at the time that it would not have taken part in a vote, as the text "still has some serious loopholes and defects on some key issues, which might be used by the super-Powers to justify their acts of aggression."[1015] China did have an alternative definition couched in anti-imperialism and directed at both the US and the USSR, and also more preoccupied with "economic aggression", but this position will most likely have softened since the 1970s.[1016]

During the negotiations in Rome on the ICC Statute, China insisted that the Security Council should have the power to determine whether acts of aggression had been committed.[1017] As noted above, it held the same position in Kampala and criticed its outcome, as it was not the n response to the adoption of the resolution containing the definition of the crime, the Chinese representative made a statement in which he deplored the fact that it is not the UN Security Council which determines the existence of an act of aggression.[1018]

Although arguably a former victim of aggression, China has therefore essentially played a passive role in the development of the crime of aggression.

1012 GA Res 498 (V), 1 February 1951. See *infra*, 2.2.3.

1013 GA Res. 3314 (XXIX), 14 December 1974, adopted without a vote.

1014 Samuel S. Kim, *China, the United Nations, and World Order* (Princeton, NJ: Princeton University Press 1979) 458.

1015 Stefan Barriga and Claus Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge: Cambridge University Press, 2012) 166.

1016 Detailed discussion in Kim, *China, the UN*, *supra* note 1014, 459-462.

1017 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II, UN Doc A/CONF.183/13 (Vol. II) Summary records of the meetings of the Committee of the Whole, 209, para. 85.

1018 ICC Resolution RC/Res.6. See also *infra*, 6.3.3.2. See also Zhu Lijiang, 'Chinese Practice in Public International Law: 2010 (II)', *CJIL* 10 (2011) 883-895, at 894.

6.3.6 Universal jurisdiction and state immunity

In addition to the creation of international tribunals, another recent trend in attempts to end impunity for the most serious international crimes has been the promotion of universal jurisdiction, in the sense that certain crimes should be punishable in every state regardless of the nationality of the perpetrator or victim and regardless of whether the act was perpetrated in that state's territory on the basis of the principle that states have a duty to extradite or to prosecute (*aut dedere aut iudicare*). The most commonly cited example from classical international law concern piracy and slave-trading.[1019] In recent years, the principle has been promoted in varying degrees in scholarship and practice against serious international crimes and violations of human rights, such as the Convention Against Torture (Articles 5(2) and 7) and the Convention on Enforced Disappearance (Article 9(2) and 10).[1020] For other crimes, there appears to be a basis for universal jurisdiction in customary international law.[1021] On this basis, some states have adopted legislation to provide for implementation of the principle of universal jurisdiction in their national criminal laws, the most notorious of which is the Belgian law which led to the 2002 *Arrest Warrant* case before the ICJ, in which the Democratic Republic of the Congo complained that the Belgian authorities had issued an international arrest warrant against its Minister for Foreign Affairs, Abdulaye Yerodia Ndombasi, for alleged serious violations of international humanitarian law. The Court found that Belgium had violated its legal obligation to reject the immunity from criminal jurisdiction of the incumbent Minister for Foreign Affairs when issuing the warrant.[1022] These events demonstrate that the application of universal jurisdiction in practice may give rise to difficulties in interstate relations, especially when they also involve issues of state immunity. Another similar experience has befallen Spain, which also adopted a 'genocide law' based on the principle of universal jurisdiction, including a more expansive definition of genocide than the one found in the Genocide

1019 See among others Zahar and Sluiter, *International Criminal Law*, *supra* note 997, 496-503.

1020 Both the CAT and CED provisions do require the presence of the alleged perpetrator in the territory of the state, which means that states which initiate prosecutions against persons not on the territory of the state are going beyond the wording of these conventions. There has been debate in scholarship on the question how far these efforts need to go to achieve 'true' universal jurisdiction.

1021 Zahar and Sluiter identify universal jurisdiction as implied in the Geneva Conventions and absent in the Genocide Convention, although there is a strong case for universal jurisdiction for genocide in customary international law: *International Criminal Law*, *supra* note 997, 498.

1022 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002, *ICJ Reports* 2002, 3.

Convention. In Spain, in addition, criminal complaints were filed against former Chinese president Jiang Zemin and other high-ranking officials, alleging genocide against Tibetans and against Falun Gong practitioners. The Spanish experiment has however also come to an end.[1023]

It has been a fixture of Chinese public statements that "stability" is more important than the exercise of jurisdiction in cases of allegations of serious international crimes. Elsewhere, the government has also warned against "abuse" of the principle of universal jurisdiction. China takes the position that universal jurisdiction is "currently only an academic concept" and does "not yet constitute an international legal norm", and its criteria need to be defined further. It accepts that states can exercise jurisdiction over piracy on the high seas, but the obligation to extradite or prosecute as laid down in treaties does not equal universal jurisdiction – a view which has been taken in doctrine as well.[1024] Just like in human rights law, China takes the orthodox position that all these obligations are only contractual obligations between states. China has referred to *Arrest Warrant* judgment as reflecting the correct legal position.[1025] This judgment has been criticised for not striking a proper balance between the interests of international justice and state sovereignty.[1026]

The exercise of jurisdiction by Belgium in the *Arrest Warrant* case clashed with the immunity that the foreign minister of the Democratic Republic of the Congo enjoyed as a state official. Since the end of the 1990s, a number of cases have appeared in which the question arose whether state immunity, which is derived from the principle of sovereign equality of states, should be set aside in cases in which large-scale human rights violations, sometimes violations of norms of *ius cogens*, are at stake.[1027] The approach of the ICJ in the

1023 Ignacio de la Rasilla del Moral, 'The Swan Song of Universal Jurisdiction in Spain', *International Criminal Law Review* 9 (2009) 777-808, at 781 and 784.

1024 Zhu, 'Chinese Practice: 2009', *supra* note 930, 647, para 75.

1025 See Zhu, 'Chinese Practice: 2008', *supra* note 904, 542, para 73.

1026 Antonio Cassese, 'When May Senior State Officials Be Tried For International Crimes? Some Comments on the *Congo v. Belgium* Case', *EJIL* 13 (2002) 853-875.

1027 Most famously, the cases concerning former Chilean head of state Augusto Pinochet before the UK House of Lords: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1)* 3 WLR 1456 (1998) and *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* 2 WLR 827 (1999); ECHR, *Al-Adsani v. United Kingdom* (App No 35763/97), 21 November 2001. For one general overview, see Thilo Rensmann, 'Impact on the Immunity of States and their Officials' in: Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford

Arrest Warrant case was to distinguish between the procedural nature of the rules governing immunities and the question whether a violation of a substantive norm was at issue, as summarised in the phrase immunity does not mean impunity.[1028] Immunity merely bars a specific forum state from exercising its jurisdiction over foreign states and their officials.[1029] As such, there is no conflict between state immunity and impunity because the state involved in the alleged violations of *ius cogens* should provide for domestic remedies or prosecute the state officials involved. Because this does not always happen in practice, it can be argued that there is a clash in reality between the rules on state immunity and the aim of impunity for violations of *ius cogens* norms. This is why different legal avenues have been pursued across different jurisdictions in attempts to circumvent state immunity in states which are less keen on enforcing it, involving both civil and criminal jurisdiction.

As a result of this litigation, the ICJ revisited the issue of state immunity in a recent case between Germany and Italy concerning various different cases in which Germany claimed that Italian courts had failed to respect its sovereign immunity.[1030] In this judgment, the Court again emphasised the difference between the procedural nature of the rules on on immunity and the substantive nature of the allegations of *ius cogens* claims. In its analysis of state practice regarding the relevance of the distinction between immunity for sovereign acts (*acta iure imperii*) and private acts of states (*acta iure gestionis*) to the "territorial tort exception" which limits the immunity of states before the national courts of other states, the ICJ included a reference to a statement by China in finding that in this respect, Article 12 of the UN Convention on Immunities, which made no such distinction, did not reflect customary international law.[1031]

China's position on the importance of immunity is unsurprising considering its

University Press, 2009) 151-170. Immunity of state officials derived from state sovereignty should be distinguished from the immunity of diplomats, which is functional rather than derived from the principle of sovereign equality. See also Zahar and Sluiter, *International Criminal Law*, *supra* note 997, 503-508.

1028 *Arrest Warrant*, *supra* note 1022, para 60.

1029 See also Rensmann, 'Impact on Immunity', *supra* note 1027, 164. Obviously, in case-law and scholarship distinctions are made between the immunity of the state itself and that of state officials and former state officials, as well as criminal and civil jurisdiction; for the purpose of the analysis here, this level of detail is not necessary.

1030 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, *ICJ Reports* 2012.

1031 *Ibid*, para 64.

heavy emphasis on sovereignty and related principles. Legal and political considerations also explain its lack of enthusiasm regarding universal jurisdiction, where its position on the customary international law on the matter is on the more conservative side of the mainstream, although by signing up to CAT China has acted in support of the principle.[1032] When taken together with its emphasis on complementarity and respect for the jurisdictional sovereignty of states in the context of the ICC, it is safe to say that China is not contributing to the increase in remedies against large-scale human rights violations.

6.3.7 International criminal law in Chinese domestic law

Article 9 of the Chinese Criminal Code provides for the possibility of criminal jurisdiction for crimes stipulated in international treaties to which the PRC is a party. However, since some of the specific crimes have not actually been included in the Chinese criminal code, including the crime of genocide, it is unclear whether China would be able to comply with its obligation under the Genocide Convention to prosecute acts of genocide, and for this reason Chinese scholars have identified the need to legislate on the crime of genocide. Some Chinese scholars believe that Article 9 provides a basis for Chinese courts to assert universal jurisdiction.[1033] These developments all seem to remain at an early stage inside China, although indications are that they are going in a hopeful direction for exercise of criminal jurisdiction over international crimes and possible universal jurisdiction. Whichever way this turns, it can be expected that in case of conflict between such an exercise of jurisdiction and the immunity of a foreign state or its official, China will respect the principle of state immunity.[1034]

1032 The dissenting opinion of judge Xue Hanqin in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, *ICJ Reports* 2012 may be indicative in this regard. Judge Xue criticises the majority for, in her view, stretching the notion of the *erga omnes* obligations to cover also rules in CAT which are not of *ius cogens*, as well as using the notion as a basis for Belgium's standing instead of interpreting the treaty. She also states that Belgium has turned its requests for extradition into a means to monitor Senegal's compliance with its obligation to prosecute (para. 39). Both Judge Xue's criticisms reflect a more limited understanding both of the obligations in CAT and of the notions of *erga omnes* obligations.

1033 Zhu and Zhang, 'Expectation of Prosecuting', *supra* note 1010, 179-180, 186-189.

1034 See the previous section. Chinese judicial practice is consistent with China's support for the doctrine of state immunity, also with regard to civil jurisdiction, although this has not been legislated in China's legal system. In the field of immunity of foreign central banks, the Hong Kong SAR requested legislation after the British State Immunity Act ceased to apply there following the transfer of sovereignty in 1997. As a result, China did adopt a Law of the People's Republic of China on the Immunity of Judicial Compulsory Measures against the Properties of Foreign Central Banks (adopted at the 18th session of the Standing Committee of the 10th NPC, 25 October 2005, Order of the President, No. 41 (2005). See

6.4 Conclusion

As is the case in international human rights law, China has a long record of normative support for the aims and development of international humanitarian law and international criminal law. However, it has shown the same reluctance to accept international institutions which may erode state sovereignty and is also reluctant to support norms which may have such effects. In both fields, it holds strongly to a state-centric framework which keeps both the ultimate responsibility for upholding international legal norms as well as verification of their compliance within the state.

'State practice of Asian countries in the field of international law', *AYBIL* 12 (2005-2006) 129-231, at 139-140.

7 Peace and security, and counterterrorism

7.1 Introduction

In chapter 3, it was noted that a lot of discussion in IR literature on Chinese foreign policy is focused on security related issues.[1035] As noted, in response to the geopolitical changes following the end of the Cold War, the PRC started developing what it calls a "new security concept" which was first articulated in 1997. This runs parallel to the emergence of a more security-oriented discourse at the global level, which accelerated after the events of 11 September 2001. While China continues to emphasise sovereignty and non-interference, its 'new security concept' includes the challenge of what China itself (along with the dominant discourse) calls "non-traditional security areas" such as terrorism and organised crime, which can be seen as among the shadow sides of 'globalisation', or the "complex and profound changes" that China often refers to when speaking of the "international situation", and involve non-state actors operating across borders and jurisdictions.[1036] Another mantra which is a staple of the PRC's foreign policy rhetoric is that of "China's foreign policy of peace".[1037]

The focus of this chapter is on how these features of Chinese foreign policy affect the international law in the areas related to peace and security. As one of the five permanent members ('P5') of the UN Security Council, China occupies a key position in the collective security framework of the United Nations.[1038] Its agreement or acquiescence is crucial for the Council to take any measures which may override the sovereignty of UN member states and legitimise interference in their domestic affairs under Chapter VII of the Charter, which means that its commitment to sovereignty and non-interference is put to the test regularly.[1039] As noted in chapter 4, the debate on sovereignty has never been more heated than when it comes to the question of military intervention for humanitarian purposes, or

1035 See *infra*, 3.3.3 and 3.3.4.

1036 "*xin anquan guan*" (新安全观). See FMPRC, 'China's Position Paper on the New Security Concept', <http://www.fmprc.gov.cn/ce/ceun/eng/xw/t27742.htm> [1.4.2013]

1037 See *infra*, 3.3.3 and 4.5.4.

1038 Article 23(1) Charter of the United Nations.

1039 Article 27 of the UN Charter provides that non-procedural decisions of the Security Council require an "affirmative vote" of nine members including "concurring votes" of the permanent members. An abstention is considered a concurring vote .

humanitarian intervention, as it is commonly known. Recently, this debate has become intertwined with that on the 'responsibility to protect' ('R2P'), of which humanitarian intervention may be an element.

As discussed in this chapter, China has been a consistent opponent of humanitarian intervention, being cautious about authorising sanctions and the use of force in the Security Council and vehemently opposed to intervention without Security Council authorisation. In the related areas of peacekeeping and peace enforcement, it has gone from opposition to participation, although not always with equal enthusiasm. In recent years, its attitude to military intervention with Security Council authorisation has shifted between different situations, as exemplified most recently by its responses to humanitarian crises in Libya and Syria, and this has become intertwined with its support or acquiescence in SC referrals to the ICC, as described in the previous chapter.[1040]

In the wake of the events of 11 September 2001, the Security Council has been taking a leading role in counterterrorism. As one of the P5, China's role in the Security Council's actions has been crucial. At the same time, China has been increasing its regional counterterrorism efforts, claiming to adhere to the path set out by the UN (including its counterterrorism strategy of 2006) in the Shanghai Cooperation Organisation (SCO)[1041], an intergovernmental organisation founded in 2001 by China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan and successor of the Shanghai Five, which had been established in 1996 by the same countries minus Uzbekistan. In line with UN policy, China is a proponent of regional cooperation and emphasises its importance in public statements.

Peace and security occupies a double position in the current international legal order when it comes to the rights of the individuals, and their protection. The doctrine(s) of humanitarian intervention are ostensibly aimed at the protection of human rights, but interventions are often counterproductive for that purpose given the involvement of military force, the complexity of the situations in which intervention is contemplated and the presence of ulterior motives on the part of would-be intervenors. In the area of counterterrorism, many measures taken by states may and have run afoul of their human

1040 See section 6.3.3.3.

1041 Chinese: 上海合作组织 (*Shànghǎi Hézuò Zǔzhī*); also Russian: Шанхайская организация сотрудничества (ШОС).

rights obligations, and the very labelling of certain groups of individuals as terrorist in the absence of a clear international definition may entail a violation of some of their human rights.

Counterterrorism has overtaken certain more human-rights friendly paradigms as a dominant theme in 21st century international law. Thematically, counterterrorism is not one subsection of public international law, but rather an area where other areas of law come together. It involves, *inter alia*, human rights law, humanitarian law, the *ius ad bellum*, refugee law, and other strongly sovereignty-oriented policy areas such as mutual cooperation in criminal matters, transnational crime, and extradition. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (henceforth Special Rapporteur on Counterterrorism) has, from a very early stage of his mandate, pointed at the difficulties in these areas, which are to a large extent the result of a lack of a clear definition of what constitutes terrorism. This legal unclarity has allowed China to group politically unwelcome and potentially violent persons among terrorists, in particular in the context of the SCO.

This chapter takes China's Security Council practice as the point of departure to explore these interrelated themes. The first part deals with questions of peacekeeping and intervention. The second discusses the UN's efforts in the area of counterterrorism and describes China's UN and regional practice, followed by an assessment of the normative and practical impact of China's behaviour in these fields.

7.2 Non-interference, peace and intervention

As a country that was, for a while, "gradually reduced to a semi-colonial and semi-feudal country as a result of invasions by foreign Powers",[1042] China holds the principle of non-interference in domestic affairs, one of the corrolaries of sovereignty, in particularly high regard. This principle is laid down in Article 2(7) of the UN Charter and is connected to the the prohibition of the use of force in Article 2(4), as both reflect the rule of non-intervention.

1042 HRC, Working Group on the Universal Periodic Review, National Report submitted in accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: China, UN Doc A/HRC/WG.6/4/CHN/1, 10 November 2008, para. 3. See *infra*, 2.2.1 and 4.3.

The Security Council has primary responsibility for the maintenance of international peace and security in accordance with Article 24(1) of the UN Charter. The legal framework for the collective security system of the United Nations is laid down in Chapter VI and VII of the UN Charter, providing for the obligation to seek peaceful means of dispute settlement (Article 33). If the Security Council deems that there exists a "threat to the peace, breach of the peace, or act of aggression" (Article 39) it can take measures under Article 41 or 42, the latter of which allows for the use of force. Under Article 25 of the UN Charter, member states "agree to accept and carry out the decisions of the Security Council". There has been disagreement on whether this means that all measures taken by the Security Council are binding, although it is generally agreed that all measures taken under chapter VII are usually binding.[1043] The view of the ICJ seems to be that binding measures can be taken under both Chapter VI and VII, but that the language of an UNSC resolution needs to be analysed carefully before reaching a conclusion on its binding effect.[1044]

As discussed in chapter 2,[1045] initial Chinese human rights diplomacy following the PRC's entry into the UN focused on promoting the interests it shared with other 'Third World' states, stressing the importance of the struggle against imperialism and colonialism, national independence and sovereignty.[1046] China emphasised the principle of sovereign equality by calling for 'democracy in international relations' and continues to do so.[1047] It was one of the states promoting the right to development.[1048]

Although it is generally expected that China will respond to any situation in which human rights violations are reported in other countries by invoking the principle of non-interference in domestic affairs, in the same way it responds to allegations on sensitive issues within its own borders, China's insistence on sovereignty has not been absolute. There is space for common action together with other states, as long as this happens in the

1043 Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* (4th revised edition; Boston and Leiden: Martinus Nijhoff, 2003) 825-826, §1323.

1044 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, 16, paras. 113-114.

1045 See *infra*, 2.3.3.

1046 Andrew J. Nathan, 'Human Rights in Chinese Foreign Policy', *CQ* 139 (1994) 622-643, at 626-627.

1047 See e.g. 'China Stands for Democracy in International Relations, Envoy Says', *People's Daily*, 27 April 2001.

1048 Adopted by the General Assembly in resolution 41/128 of 4 December 1986, UN Doc A/RES/41/128.

context of the UN. It is also often said that China favours 'silent diplomacy' or 'quiet diplomacy', away from the public eye, but this is by definition unverifiable.[1049] In recent years, its diplomacy has become more public, or at least it has made sure that it was seen to be doing something.

China's insistence on sovereignty did not prevent it, in the 1980s, from voting in favour of investigations into human rights violations in Afghanistan and Chile or having its UN representatives denounce countries such as Israel, South Africa, Vietnam and Afghanistan.[1050] Politics, taking into account factors such as relationships between states with Taiwan and regional and global rivalries, will probably have played a role. For a while, choosing whether to denounce human rights violations may also have been informed more by ideological considerations than by other criteria.[1051] Even so, this does not make China immune to the allegation of applying double standards in much the same way as its detractors, as it likes to point out in its calls for 'objectivity' and 'non-selectivity'. In recent years, China has stated that various issues are "internal affairs" of the states concerned, including in Myanmar (Burma),[1052] before its recent turn to reform, and Zimbabwe, where the "situation has not deteriorated to go beyond its scope of internal affairs".[1053]

The issue of intervention and sovereignty has come up in the context of UN action or possible action, from stabilising conflict areas to getting involved in wholesale armed conflict. The deployment of forces to stabilise a situation either before a conflict has erupted or after it has come to an end is generally referred to as peacekeeping, although as it evolved, terms like 'peace enforcement' have been used in case of deployment of forces with a broader mandate to use force. Intervention in an ongoing conflict is usually discussed under the notion of 'humanitarian intervention'. The next subsection focuses the first, followed by discussion of the latter. Respect for state sovereignty is a crucial issue in both.

1049 See for example Zhu Ziqun, *China's New Diplomacy: Rationale, Strategies and Significance* (Surrey: Ashgate 2010) 212.

1050 Nathan, 'Human Rights', *supra* note 1046, 627. See also *infra*, 5.2.1.1.

1051 *Ibid.*, 629-630.

1052 Zhu Lijiang, 'Chinese Practice in Public International Law: 2007 (I)', *CJIL* 7 (2008) 485–507, para 5.

1053 Zhu Lijiang, 'Chinese Practice in Public International Law: 2008', *CJIL* 8 (2009) 493-551, para 12.

7.2.1 UN Peacekeeping: from opposition to participation

After the PRC joined the United Nations in 1971, it first retained its anti-imperialist foreign policy stance and its scepticism about the UN organisation.[1054] Its attitude to peacekeeping has run parallel to its attitude to the UN organisation as a whole. Before it became a member of the UN, China opposed UN peacekeeping politically as a tool of the imperialists and US hegemony, having found itself confronting a UN army during the Korean War, an attitude which remained during the first decade of its membership in the UN.[1055] This period of opposition and nonparticipation lasted until 1981, when China started to support UN peacekeeping under the guideline of "active and gradual involvement". China started taking part in peacekeeping missions and has become increasingly involved since the late 1980s.[1056] In 1988, China became a member of the UN Special Committee on Peacekeeping Operations, and it started to participate in missions in the following years.[1057] Following 'Tiananmen', participation in UN peacekeeping was also a way in which China could restore its image.[1058]

Major steps in China's involvement in peacekeeping were its participation in the UNTAC mission in Cambodia, where it sent 800 engineering troops and 97 military observers from 1992 to 1993,[1059] and East Timor (UNTAET, 1999-2002).[1060] Its participation in UNTAC helped China overcome a negative perception that existed of it in Cambodia due to the PRC's earlier support of the Khmer Rouge regime.[1061] The East Timor mission helped China

1054 See *infra*, 2.3.3. See also Samuel S. Kim, *China, the United Nations, and World Order* (Princeton, NJ: Princeton University Press 1979).

1055 Liu Tiewa, 'Marching for a More Open, Confident and Responsible Great Power: Explaining China's Involvement in UN Peacekeeping Operations', *Journal of International Peacekeeping* 13 (2009) 101-130, at 105.

1056 *Ibid*., 107. Samuel S. Kim, 'Sovereignty in the Chinese Image of World Order' in: Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 425-445, at 433. Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007) 83-84.

1057 Chin-Hao Huang, 'Principles and Praxis of China's Peacekeeping', *International Peacekeeping* 18 (2011) 257-270, at 258. Liu, 'Marching', *supra* note 1055, 108.

1058 Zhao Lei, 'Two Pillars of China's Global Peace Engagement Strategy: UN Peacekeeping and International Peacebuilding', *International Peacekeeping* 18 (2011) 344-362, at 345. Kim , 'Sovereignty', *supra* note 1056, 433, refers to a period of retreat following the events of 1989, but this seems to have been very temporary.

1059 UNSC Res 745 (1992). Liu, 'Marching', *supra* note 1055, 110-111.

1060 Marc Lanteigne, 'A Change in Perspective: China's Engagement in the East Timor UN Peacekeeping Operations', *International Peacekeeping* 18 (2011) 313-327.

1061 Miwa Hirono, 'China's Charm Offensive and Peacekeeping: The Lessons of Cambodia – What Now for Sudan?', *International Peacekeeping* 18 (2011) 328-343.

in the development of its 'new security concept' and shift its policy towards a greater acceptance of multilateral peacekeeping as well as more acceptance of peacebuilding initiatives.[1062]

The Chinese government reports that as of December 2012, 1,842 PLA officers and servicemembers were implementing peacekeeping in nine UN mission areas (notably the DRC, Liberia, Lebanon, South Sudan and Darfur) and that in total, it had dispatched 22,000 military personnel to 23 peacekeeping missions. It prides itself on being the largest contributor among the P5, the largest supplier of engineering, transportation and medical troops, and contributing the largest share to the peacekeeping budget of all developing countries.[1063] In September 2007, a Chinese officer was appointed for the first time as a force commander of a UN peacekeeping mission. This happened again in January 2011.[1064]

The Chinese government sees UN peacekeeping operations as "an important and effective means for maintaining international peace and security" and describes itself as "a strong supporter of and active participant in UN peacekeeping operations."

> China maintains that in conducting peacekeeping operations, it is important to strictly abide by and carry out the mandate of relevant Security Council resolutions, adhere to the three principles of "consent of the parties, impartiality and non-use of force except in self-defense" put forward by former UN Secretary-General Dag Hammarskjold, respect the will and choice of the host country, strengthen operation planning, set out clear priorities, and coordinate actions to form synergy.

In addition, China has called for "better coordination between peacekeeping, peacemaking and peacebuilding", "greater emphasis on enhancing cooperation with regional and sub-regional organizations" and "more attention to the needs of African countries".[1065]

This statement is indicative of both China's political priorities in participating in UN

1062 Lanteigne, 'Perspective', *supra* note 1060.

1063 Information Office, State Council, The Diversified Employment of China's Armed Forces, April 2013, <http://news.xinhuanet.com/english/china/2013-04/16/c_132312681_4.htm> [22.5.2013] This is a slight decrease compared to 2009, when China deployed 2,157 personnel. See Information Office, State Council, China's National Defense in 2008, 20 January 2009, <www.china-un.org/eng/zt/wh/t534321.htm> [last visited 20 April 2009].

1064 In 2007, Major General Zhao Jingmin was appointed in Western Sahara (MINURSO), in January 2011 Major General Chao Liu was appointed force commander in Cyprus (UNFICYP). Courtney J. Richardson, 'A Responsible Power? China and the UN Peacekeeping Regime', *International Peacekeeping* 18 (2011) 286-297, at 290.

1065 Position Paper of the People's Republic of China at the 67th Session of the United Nations General Assembly, FMPRC, 19 September 2012. <http://www.fmprc.gov.cn/eng/zxxx/t970926.htm> [14.4.2013]

peacekeeping as well as its normative contribution, which is in line with what has been found elsewhere in this thesis. Especially significant in light of China's sovereigntist approach to international law and international relations is that in the 2000s, China has gone beyond 'traditional' peacekeeping and become more supportive of 'non-traditional' or 'robust' peacekeeping, where UN forces are authorised to use "all necessary means" under Chapter VII of the UN Charter.[1066] This is mainly visible through China's authorisation of and participation in such operations rather than in normative statements, thus creating a dichotomy between rhetoric and practice.[1067]

It has been noted by various observers that the extent of Chinese support and participation for certain peacebuilding operations, which seek to promote notions of good governance and the rule of law as found in liberal democratic and Western societies, sits uneasily with its own positions and political system. A number of explanations have been provided for China's involvement with UN peacekeeping. The first one is that China wanted to improve its general international image and seen as a 'responsible power' and counter perceptions of the 'China threat'. In fact, the notion of 'responsibility' has been very present in its discourse on peace and security, as it has the advantage of having both positive connotations and being sufficiently vague to allow for many interpretations, or being "evocative without being restrictive."[1068]

Chinese participation in peacekeeping is both a way to improve its relationship with the west, by collaborating in multinational operations with western powers, as to counterbalance western power. It also helps present China as an alternative which does not have imperialist designs in the countries where it participates in peacekeeping.[1069] At the same time, participating in peacekeeping has helped China protect its interests abroad, especially given its expanding activities in Africa. However, the links between Chinese interests and peacekeeping have been indirect, and are seen by observers as being complementary rather than part of the same intentions.[1070] In general, Chinese

1066 Miwa Hirono and Marc Lanteigne, 'Introduction: China and UN Peacekeeping', *International Peacekeeping* 18 (2011) 243-256, at 243-244. See also *infra*, 7.2.2.

1067 Richardson, 'Responsible Power', *supra* note 1064, 292 and 295.

1068 Zhao, 'Pillars', *supra* note 1058, 353. Richardson, 'Responsible Power', *supra* note 1064, 288.

1069 Hirono and Lanteigne, 'Introduction', *supra* note 1066, 252. Zhao, 'Pillars', *supra* note 1058, 347 and 352. Richardson, 'Responsible Power', *supra* note 1064, 289 and 292.

1070 Richardson, 'Responsible Power', *supra* note 1064, 291 notes that the FMPRC is more inclined to

peacekeepers have been mindful of the risk of alienating local populations. Observers have noted that the Chinese interpretation of their rules of engagement and tactics tend to be on the restrictive side.[1071]

China has started to present its own discourse compared to western powers and in differentiation from the liberal agenda. However, it still manifests itself primarily as a more restrictive or cautious approach rather than an alternative approach, and harkens back to its insistence on sovereignty. It opposes the conflation of peacebuilding with military action, humanitarian intervention or regime change, and asserts that the political dimensions of state-building may not be conducive to peace-building, and due to its political nature spark further conflict instead. China therefore emphasises the right of the country concerned to make its own decisions in post-conflict peacebuilding and that the primary task in this regard is to restore the administrative functions of state organs, and take into full consideration the development priorities independently identified by the country concerned.[1072] All these points are in line with China's general international discourse, emphasising development and the independence associated with sovereignty.

At the same time, China and the PLA are exposed, through their participation in peacekeeping, to its principles and operation. In this regard, the underlying normative framework which emphasises state obligations towards their citizens and protecting local populations are also feeding back into China's institutions. In addition, the PLA and other Chinese security forces gain from the exposure to international practices in peacekeeping, anti-piracy missions, rescue operations, and post-conflict reconstruction.[1073]

From China's discourse in previous chapters, in particular on human rights, it has become apparent that the notion of a paternalist state which takes care of its citizens is present in China's official thinking about development. It has been present in western notions of development from colonial times, including in the nineteenth-century imperialist notion of the 'civilising mission' and in the League of Nations' mandate system. After decolonisation, to many newly independent states development played a key role in

participate in peacekeeping than the PLA. Zhao, 'Pillars' *supra* note 1058, 348.

1071 Richardson, 'Responsible Power', *supra* note 1064, 293.

1072 *Ibid.*, 351-252.

1073 Huang, 'Principles and Praxis', *supra* note 1057, 259, 261. Richardson, 'Responsible Power', *supra* note 1064, 291.

establishing their legitimacy and defining their sovereignty.[1074] One observer has noted that by participating in more intrusive peacekeeping operations, China is trying to reconcile both the roles of a 'responsible great power' but still to maintain its role as a leading member of the developing world. However, there is an implicit assumption of paternalism on the Chinese side as well, as the UN as well as China apply a top-down approach to peacekeeping operations, in which outsiders profess to know better what is good for the state in which the operation is executed than the host state itself. In this regard, increasing China's involvement in peacekeeping sits uneasily with its rhetorical emphasis on the unsuitability of a 'one-size-fits-all' approach and the right of each state to choose its own development path. Although there are no concrete indications of a deliberate Chinese version of a 'civilising' or rather 'developing mission', there are currents of Chinese superiority thinking present in China's policy circles and its discourse is strongly influenced by hierarchical thinking and an envisaged universal trajectory of development.[1075]

7.2.2 Humanitarian intervention and the Responsibility to Protect

Events in the 1990s have transformed the way in which UN peacekeeping is conducted in developments which are intertwines with the evolution of thinking on humanitarian intervention. Humanitarian intervention, in the meaning of the use of force to protect civilians in situations where gross human rights violations may be or are taking place, without the approval of the UN Security Council, is the notion at the heart of the sovereignty debate.[1076] As noted above, the UN can act under Chapter VII to restore peace and security, and strictly speaking an authorised intervention like that for the purpose of halting human rights violations is also a human rights violation. Following the genocide in Rwanda and the wars in former Yugoslavia, it became accepted that large-scale violations of human rights could constitute a threat to international peace for the purpose of article 39 UN Charter, and thus be a basis in principle for the use of force. In the collective security system of the UN, only the Security Council can authorise such a humanitarian

1074 Shogo Suzuki, 'Why Does China Participate in Intrusive Peacekeeping? Understanding Paternalistic Chinese Discourses on Development and Intervention', *International Peacekeeping* 18 (2011) 271-285, at 273. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) 57-58; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) 208.

1075 Suzuki, 'Intrusive Peacekeeping', *supra* note 1074.

1076 See *infra*, 4.2.

intervention, although the position has been defended that humanitarian interventions without the approval of the Security Council are or should be in accordance with international law. The reason for this is that in view of the political makeup of the Security Council and the veto power of its permanent five members, the current framework will not always work. As a result, the debate has been raging in literature for a long time, usually informed by contemporary events in which the UN failed to act.[1077] It is inevitable that any form of intervention will sooner or later be used for ulterior motives and states will not always be honest about their motives.[1078]

In recent decades, debates on intervention focused on intervention in former Yugoslavia, culminating in the NATO airstrikes on Serbia during the Kosovo crisis of 1999; the UN's failure to act to stop the genocide in Rwanda; the failed UN mission in Somalia; intervention by regional African organisations in the wars in the Great Lakes region in Africa; the invasion of Iraq by the United States and the United Kingdom in 2004, where humanitarian concerns were cited along with the official justification of enforcing UN resolutions on disarmament; large-scale human rights violations in Darfur, Sudan; and most recently, NATO's military campaign to uphold a UN-imposed no-fly zone and protect civilians in the civil war in Libya. Since the last decade, humanitarian intervention has become part of a wider debate on a supposedly emerging 'responsibility to protect', which emphasises the duty of care a state has for its citizens but has an uncertain conceptual makeup, and the scope of which is as yet unclear.

Until recently, the position of China on humanitarian intervention did not receive much attention, in the view of one author (writing in 2004) either because it was perceived to be irrelevant, or an insurmountable obstacle.[1079] Its domestic concerns regarding its

1077 Among the abundant literature on the subject, see Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', *AJIL* 67 (1973) 275-305; Christine Gray, 'The legality of NATO's military action in Kosovo: is there a right of humanitarian intervention?' in: Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London: Routledge, 2001) 240-253; Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford: Oxford University Press, 2008); Başak Calı, 'From Bangladesh to Responsibility to Protect: the legality and implementation criteria for humanitarian intervention' in: Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (London and New York: Routledge, 2011) 228-244.

1078 Louis Henkin, 'The Mythology of Sovereignty' in: Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht etc.; Martinus Nijhoff, 1994) 351-358, at 358.

1079 Michael C. Davis, 'The Reluctant Intervenor: The UN Security Council, China's Worldview, and Humanitarian Intervention' in: Michael C. Davis, Wolfgang Dietrich, Bettina Scholdan and Dieter Sepp,

territorial integrity with Tibet and Taiwan clearly shape its external outlook, treating humanitarian crises either as an internal, domestic affair or, if they are international, insisting on UN Security Council approval. Although China expresses strong views against potential interventions, it has been careful in using its veto power to stop them, often abstaining from voting.[1080] In the wake of the 'Arab spring', attention to China's Security Council positions has increased and its most recent practice may indicate a shift in its position.

As stated, and just as has been described in the previous section with regard to UN peacekeeping, China's approach to sovereignty in practice has been more flexible than its rhetoric, and conforms to the position of many other states.[1081] Its statements and votes in post-Cold War Security Council debates on intervention has been consistent in terms of adhering to a cautious attitude and emphasising the principles of sovereignty and non-interference, but it has applied this approach in a very nuanced way, depending on the political circumstances. It has emphasised the importance of Security Council authorisation and state consent where possible and where the latter was lacking but intervention was authorised, tended to state that its acquiescence in or even agreement with the decision did not constitute a precedent but was due to the special circumstances obtaining at the time, thus taking care to contribute as little to development of accepted exceptions to sovereignty as possible. It has also consistently opposed unilateral humanitarian intervention.

7.2.2.1 Security Council practice

A number of examples from China's Security Council practice illustrate this. During the Gulf crisis of 1990, China voted in favour of Resolution 660, which demanded Iraq's immediate and unconditional withdrawal from Kuwait, which it had occupied.[1082] China abstained from voting on Resolution 678,[1083] which authorised military action as well as Resolution 688, which was not adopted under Chapter VII and called on Iraq's leadership to end the

International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics (Armon, NY: M.E. Sharpe, 2004) 241-253, at 243-244.

1080 *Ibid*., 244.

1081 Jonathan E. Davis, 'From Ideology to Pragmatism: Chinas Position on Humanitarian Intervention in the Post-Cold War Era', *Vanderbilt Journal of Transnational Law* 44 (2011) 217-283, at 220.

1082 UNSC Res 660, 2 August 1990.

1083 UNSC Res 678, 29 November 1990.

"repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas", which it did qualify as an threat to international peace and security.[1084] This was the first time the SC declared a humanitarian crisis as such a threat. China initially did not object to the establishment of no-fly zones in Northern Iraq and only occasionally voiced concern for Iraq's sovereignty and territorial integrity.[1085] Considering China's own concerns with Taiwan and Tibet, it cannot have been very eager to develop law or practice in this regard.

China supported the humanitarian intervention in Somalia in 1992, which authorised the use of force for humanitarian purposes without host state consent, in the absence of a functioning Somali government. Here, China expressed reservations about the novelty of invoking Chapter VII in a peacekeeping context and stated that it should be seen as an exception.[1086] Due in part to the failure of that intervention, China abstained from voting in favour of Resolution 929 authorising "all necessary means" to achieve humanitarian objectives following the genocide in Rwanda, where it expressed a preference for the expansion of the existing peacekeeping force and argued that resorting to force would only worsen the situation.[1087]

The conflict in Bosnia and Herzegovina from 1992 to 1995 was the first to feature 'mission creep' in what started as a UN peacekeeping operation, but gradually turned into 'peace enforcement', where the Security Council expanded the mandate of UNPROFOR, the UN mission there, several times in the face of mass civilian casualties, ethnic cleansing and refugee flows.[1088] China voted in favour of Resolution 743, which established UNPROFOR.[1089] After voting in favour of several resolutions which expanded UNPROFOR's mandate, it abstained on the vote on Resolution 770, taken under Chapter VII and authorising "all measures necessary" to facilitate the delivery of "humanitarian assistance to Sarajevo and

1084 UNSC Res 688, 5 April 1991.

1085 Davis, 'Reluctant Intervenor', *supra* note 1079, 230.

1086 Ibid., 231-232. UN Doc S/RES/794 (1992), 3 December 1992. The resolution was adopted unanimously. UNSC Provisional verbatim record of the 3145th meeting, S/PV.3145, 3 December 1992.

1087 UN Doc S/RES/929 (1994), 22 June 1994. Brazil, New Zealand and Nigeria also abstained. UN Doc S/PV.3392, 22 June 1994. Davis, 'Reluctant Intervenor', *supra* note 1079, 237.

1088 *Ibid*., 238-245.

1089 SC Res 743, 21 February 1992.

wherever needed in other parts of Bosnia and Herzegovina".[1090] In abstaining from this resolution and the connected Resolution 776, China emphasised the lack of consent from the parties concerned in Bosnia and Herzegovina for enlarging UNPROFOR's mandate, and worried that the use of force "in any form" would only "complicate the situation, sharpen differences, intensify hatreds and make it more difficult to solve the problem". It expressed worry that UNPROFOR would be turned into a non-mandatory operation and would "run the risk of plunging into armed conflict."[1091] When violence escalated in 1993, China took a softer stance on the enlargement of UNPROFOR's mandate, including Chapter VII measures to establish "safe areas".[1092] When it supported resolutions authorising the expanded use of force, including air power in 1994, China called the situation in Bosnia an "exceptional case" which did not "constitute a precedent for future United Nations peace-keeping operations".[1093] It stressed the humanitarian considerations which motivated its votes in support and reiterated its reservations on invoking Chapter VII.[1094]

China was a major opponent of the NATO intervention in Kosovo in 1999, which signified its most vocal opposition to the doctrine of humanitarian intervention. The fact that its embassy was allegedly accidentally bombed during the campaign was not helpful. At the time, an article in the *People's Daily* argued that humanitarian intervention is based on the incorrect assumption that human rights are more important than sovereignty.[1095] Then Chinese president Jiang Zemin framed the issue in terms of power politics and argued for the continuing relevance of the UN Charter.[1096] In the Security Council, China insisted on seeing the Kosovo issue as an internal affair. It abstained from voting for Resolution 1160,

1090 UN Doc S/RES/770, 13 August 1992, para. 1. India and Zimbabwe also abstained. Previously, China had voted in favour of S/RES/761, 29 June 1992; S/RES/762, 30 June 1992; S/RES/769, 7 August 1992. All of these were adopted unanimously.

1091 UN Doc S/PV.3114, 14 September 1992, 11-12. UN Doc S/RES/776 (1992), 14 September 1992. Again, India and Zimbabwe also abstained.

1092 UN Doc S/RES/819, 16 April 1993. UN Doc S/RES/824, 6 May 1993. Both were adopted unanimously.

1093 S/RES/807, 19 February 1993 (adopted unanimously). UN Doc S/PV.3174, 19 February 1993. S/RES/836, 4 June 1993 (although China voted in favour, Venezuela and Pakistan abstained). S/RES/958, 19 November 1994 (unanimous).

1094 UN Doc S/PV.3228, 4 June 1992. UN Doc S/PV.3461, 19 November 1994, 7.

1095 Ming Wan, *Human Rights in Chinese Foreign Relations: Defining and Defending National Interests* (Philadelphia, PA: University of Pennsylvania Press 2001) 21.

1096 Gao Feng, 'China and the principle of sovereign equality in the 21st century' in: Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London and New York: Routledge, 2001) 224-239, at 225.

the first to determine that the conflict constituted a threat to international peace and security, a rare case in which China was the only country not to vote in favour.[1097] Its representative stated that the question of Kosovo was "in its essence, an internal matter of the Federal Republic [of Yugoslavia]" and should be resolved "through negotiations between both parties concerned on the basis of respect for the sovereignty and territorial integrity" of the FRY. It warned the Council against getting involved in a dispute "without a request from the country concerned".[1098] In 1998, when NATO had started taking some military steps, China deplored the decision to "interfere in [the FRY's] internal affairs", and even more that this was done "unilaterally, without consulting the Security Council or seeking its authorization." It claimed that this "violated the purposes, principles and relevant provisions of the United Nations Charter, as well as international law and widely acknowledged norms governing relations between States", creating "an extremely dangerous precedent in international relations".[1099]

After the NATO bombing campaign started, China stated in the Security Council that this act amounted to "a blatant violation of the United Nations Charter and of the accepted norms of international law", reiterated that the Kosovo question was an internal matter, and voiced China's opposition to "use or threat of use of force in international affairs and to power politics whereby the strong bully the weak." China called for "immediate cessation".[1100] In a subsequent meeting, a draft resolution condemning NATO's actions was voted down and only received support from China, Russia and Namibia.[1101] Following the bombing of the PRC embassy in Belgrade on 7 May 1999, China called an emergency meeting of the Security Council in which it condemned the act a "gross violation of China's sovereignty and a flagrant flouting of the Vienna Convention on Diplomatic Relations and the basic norms of international relations", and reserved the right to take further measures. It also took the opportunity to condemn the "enormous casualties involving innocent civilians" already caused during the previous 45 days of bombing.[1102] On 14 May, the Chinese

1097 UN Doc S/RES/1160, 31 March 1998.
1098 UN Doc S/PV.3868, 31 March 1998, 11-12.
1099 UN Doc S/PV.3937, 24 October 1998, 14.
1100 UN Doc S/PV.3988, 23 March 1999, 12-13.
1101 UN Doc S/PV.3989, 26 March 1999, 6. Several Council members, including three of the P5, were NATO members.
1102 UN Doc S/PV.4000, 8 May 1999, 2-3.

representative referred to a Chinese saying that "[n]othing on Earth is more precious than human life and no benevolence is greater than that which treasures life" when speaking of the massive displacement of Kosovar refugees. He then went on to condemn the NATO strikes again, claiming that "this war, conducted in the name of humanitarianism, has created the largest humanitarian disaster since the Second World War." He mentioned the releases of poisonous substances, environmental destruction and hardships and victims among the civilian population. The embassy bombing was referred to as a "criminal act" and used as an additional argument to call upon NATO to cease its bombing.[1103]

Following these events, it is not surprising that China did not vote in favour of Resolution 1244, which ended the hostilities. China abstained from voting, the only member not to vote in favour.[1104] In explaining its vote, China reiterated its condemnation of the strikes and the civilian casualties and damage to civilian facilities which it had caused. In addition, it stated that although in multiethnic countries there should be "equality, unity, harmony and common prosperity among the various ethnic groups" and there should be no discrimination, it was "also opposed to any act that would create division between different ethnic groups and undermine national unity."

> Fundamentally speaking, ethnic problems within a State should be settled in a proper manner by its own Government and people, through the adoption of sound policies. They must not be used as an excuse for external intervention, much less used by foreign States as an excuse for the use of force. [...]
>
> History has proved that only by upholding the purposes and principles of the United Nations Charter and by seeking peaceful solutions to regional and international conflicts and disputes through talks and negotiations, without resorting to force, can all States live in harmony and achieve common development; only thus can world peace be maintained and promoted; and only thus can the United Nations play a role in international affairs. Any deviation from or violation of these purposes and principles will lead to rampant power politics, will make it impossible to effectively safeguard regional and international peace, and will damage the sovereignty and independence of countries, especially the small and weak ones, weakening the role of the United Nations and leaving the world with no peace.
>
> Respect for sovereignty and non-interference in each other's internal affairs are basic principles of the United Nations Charter. Since the end of the cold war, the international situation has undergone major changes, but those principles are by no means outdated. On the contrary, they have acquired even greater relevance. At the

1103 UN Doc S/PV.4003, 14 May 1999, 7.

1104 S/RES/1244, 10 June 1999. Russia had been included in the arrangements and therefore had reason to vote in favour.

> threshold of the new century, it is even more imperative for us to reaffirm those principles. In essence, the "human rights over sovereignty" theory serves to infringe upon the sovereignty of other States and to promote hegemonism under the pretext of human rights. This totally runs counter to the purposes and principles of the United Nations Charter. The international community should maintain vigilance against it.[1105]

A few months after the events in Kosovo, China supported the establishment of the UN mission in East Timor, which was to assist the organisation of a referendum, which voted from East Timorese independence from Indonesia, which had occupied it shortly after its independence from Portugal in 1975. When violence broke out after the referendum, the Security Council responded, eventually, by sending a peacekeeping force acting under Chapter VII with China's support, which had been conditioned on the consent of the Indonesian government and endorsement by the Security Council.[1106] As noted above, China also deployed peacekeepers in East Timor's transitional administration (UNTAET).[1107] This signalled that China had retained its flexibility on intervention, although in this case the consent of the Indonesian government made acceptance easier.

The NATO intervention in Kosovo fed a new debate on humanitarian intervention in international law which led, *inter alia*, to the reconceptualisation known as 'responsibility to protect'. The next subsection discusses China's attitude towards this concept in particular. In terms of law and Security Council practice, China continued along the same lines in the 2000s as in the 1990s, with still more indications of its doctrinal rigidity but practical flexibility.

On 30 July 2004, the Security Council adopted Resolution 1556 under Chapter VII, in which it declared the situation in Darfur in western Sudan, in which government-allied Janjaweed militia were accused of committing atrocities against civilians, a threat to international peace and security.[1108] China abstained. It emphasised the leading role the African Union was playing in resolving the situation and that the Sudanese government retained primary responsibility. China abstained because the resolution included "mandatory measures", which it feared might complicate a resolution.[1109] China continued

1105 UN Doc S/PV.4011, 10 June 1999, 8-9.

1106 Davis, 'Reluctant Intervenor', *supra* note 1079, 251-254. UN Doc S/RES/1264, 14 September 1999, adopted unanimously.

1107 UN Doc S/RES/1272, 25 October 1999.

1108 UN Doc S/RES/1556, 30 July 2004.

1109 UN Doc S/PV.5015, 30 July 2004, 2-3. Pakistan also abstained.

to reiterate this position and emphasised the importance of the consent of the Sudanese government for deploying any UN operation.[1110] China did not support referral of the situation to the ICC and emphasised dialogue and consultation whilst opposing "wilfully imposing pressure and sanctions or resorting to the threat of force".[1111] In the Security Council debate, it emphasised that "any negative impact on the political negotiations in Darfur" should be avoided and that apart from "punishing the perpetrators", it was "also necessary to promote national reconciliation." Out of "respect for national judicial sovereignty", China preferred to see perpetrators stand trial in Sudan and it opposed the ICC referral due to lack of consent by the Sudanese government.[1112] It has also been reported that in negotiating the text of resolutions on Darfur, China always emphasised language requiring the consent of the Sudanese government for UN deployment.[1113] In late 2006 and early 2007, China reportedly played a major diplomatic role in pressuring Sudan into accepting a hybrid United Nations-African Union force in Darfur, including a contingent of Chinese engineers. In response to public pressure and a campaign to designate the Beijing Olympics as the "Genocide Olympics", China also appointed a special envoy.[1114] On 31 July 2007, the Security Council unanimously adopted Resolution 1769, which authorised the deployment of this force.[1115] China emphasised the importance of Sudanese consent to its positive vote.[1116]

Recent developments seemed to indicate that China was moving towards a more flexible approach to sovereignty, but this has been set back again. First, China has been participating in the international efforts against piracy off the Somalian coast, the furthest its military has ventured outside. Secondly, although in 2007 China resisted UN sanctions against Myanmar (Burma) and even used its veto, for the first time since 1973 in a matter not related to Taiwan, it subsequently took a tougher line against its government, acquiescing in a Human Rights Council condemnation, supporting a Security Council

1110 UN Doc S/PV.5434, 9 May 2006, 7. See also Davis, 'Reluctant Intervenor', *supra* note 1079, 267.

1111 UN Doc S/RES/1593, 31 March 2005. Algeria, Brazil and the United States also abstained. Zhu, 'Chinese practice: 2008', *supra* note 1053, para 13. See *infra*, 6.3.3.3.

1112 UN Doc S/PV.5158, 31 March 2005, 5.

1113 Davis, 'Reluctant Intervenor', *supra* note 1079, 268.

1114 *Ibid*., 269-270. Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (London: Chatham House 2012) 47.

1115 UN Doc S/RES/1769 (2007).

1116 UN Doc S/PV.5727, 31 July 2007, 10.

statement condemning violence against peaceful demonstrators and pressing for its government to receive the UN special envoy. China also called for meaningful efforts at national reconciliation with opposition groups and ethnic minorities.[1117] This may well have contributed to the more recent developments in this respect.

Third, China abstained from voting and thus allowed a NATO intervention in Libya to happen.[1118] Even so, its Ministry of Foreign Affairs spokesperson emphasised the importance of Libya's sovereignty and territorial integrity and said that China had reservations about UNSC Resolution 1973, but decided to allow it to be adopted due to "the concerns and stances of Arab countries and the Africa Union as well as the current special situation in Libya".[1119] In the debate after adoption of the resolution, China had also stated its difficulty with the lack of answers to some "specific questions" which it and other Council members had asked, but that it attached "great importance" to the positions of the Arab League and the African Union. It also referred to the "special circumstances" in Libya.[1120] Soon after, China started expressing concern about states exceeding the authorisation given in that resolution.[1121]

During the ongoing current crisis in Syria, China seems to have regretted its previous acquiescence in the Libya intervention, where the authorisation to protect civilians and impose a no-fly zone led to the overthrow of the existing government. Following these events, its language hardened. It expressed concern over civilian casualties and criticised the interpretation of the mandate provided by the resolution (together with other BRIC states).[1122] Together with Russia (in itself a rather unprecedented action), it

1117 Rosemary Foot, 'The Responsibility to Protect (R2P) and its Evolution: Beijing's Influence on Norm Creation in Humanitarian Areas', *St Antony's International Review* 6 (2011) 47-66, 56-57.

1118 UN Doc S/RES/1973, 17 March 2011. Brazil, India, Russia and Germany also abstained. See also Brian Spegele, 'China takes new tack in Libya vote', *Wall Street Journal*, 20 March 2010, <http://online.wsj.com/article/SB10001424052748703292304576212431833887422.html>.

1119 Foreign Ministry Spokesperson Jiang Yu's Remarks on the Adoption of UNSC Resolution 1973 on the Libya Issue, 21 March 2011, Ministry of Foreign Affairs of the People's Republic of China website <http://www.mfa.gov.cn/eng/xwfw/s2510/2535/t808091.htm>.

1120 UN Doc S/PV.6498, 17 March 2011, 10. See also Andrew Garwood-Gowers, 'China and the "Responsibility to Protect": The Implications of the Libyan Intervention', *AsJIL* 2 (2012) 375–393. Gadaffi's diplomatic isolation, the defection of key persons within the regime and the immediacy of the threat to the civilian population influenced China's vote, as well as the danger to Chinese workers in Libya.

1121 See e.g. Foreign Ministry Spokesperson Jiang Yu's Remarks on the Death of Gaddafi's Son and Others in NATO's Air Strikes, 2 May 2011, MFA website <http://www.mfa.gov.cn/eng/xwfw/s2510/2535/t819910.htm>.

1122 Garwood-Govers, 'Libyan intervention', *supra* note 1120, 387.

vetoed a proposed resolution sponsored by western states and the Arab League, still under Chapter VI of the UN Charter, which would have called for the Syrian regime to immediately cease all hostilities and specified a 21-day deadline.[1123] The rejection of the proposed draft resolution produced strong rhetorical responses on the part of the United States and European countries, as well as in the international press.[1124] Possibly in response to this, the Chinese government made a stronger effort than usual to explain its vote, some of which tellingly claimed that the proposed draft resolution called for "regime change".[1125] In the weeks after, China sent envoys to Syria in an unusually visible diplomatic effort.[1126]

In sum, China's legal position on humanitarian intervention as well as its practice indicate acceptance of the notion, but only on a multilateral basis within the consent of the UN system, and barring exceptional circumstances requiring the consent of the target state. Although its rhetoric is still often absolute and, at the height of the Kosovo crisis, even ideologically coloured, China tends to behave pragmatically and cautiously, within a fairly traditional understanding of international law and sovereignty.

7.2.2.2 The Responsibility to Protect

The NATO intervention in Kosovo served as a catalyst for renewed debate on humanitarian intervention and led to an attempt to reconceptualise it within a larger context. Following calls by the UN General Assembly and Secretary-General to find a new consensus, the government of Canada took the initiative to establish an International Commission on Intervention and State Sovereignty (ICISS), which released a report in December 2001 on

1123 UN Department of Public Information, 'Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan', UNSC, 6711th meeting, 4 February 2012, UN Doc SC/10536. <http://www.un.org/News/Press/docs/2012/sc10536.doc.htm> [03.04.2012]. For the draft resolution, see UN Doc S/2012/77, 4 February 2012.

1124 UN Doc S/PV.6711, 4 February 2012.

1125 Chinese Mission to the United Nations, Explanation of Vote by Ambassador Li Baodong after Vote on Security Council Draft Resolution on Syria, 4 February 2012, <http://www.china-un.org/eng/hyyfy/t901712.htm> [03.04.2012]; Chinese Mission the the United Nations, Explanation of Vote by Ambassador Li Baodong after Vote on Security Council Draft Resolution on Syria, 5 February 2012, <http://www.fmprc.gov.cn/eng/zxxx/t901714.htm> [03.04.2012]; Xinhua, 'China explains Syrian resolution veto', *China Daily*, 6 February 2012, <http://europe.chinadaily.com.cn/china/2012-02/06/content_14547296.htm> [03.04.2012]; Zhong Sheng, 'Why China vetoes UN draft resolution for Syria issue', *People's Daily*, 8 February 2012 <http://english.peopledaily.com.cn/90780/7723539.html> [03.04.2012].

1126 See also Sceats and Breslin, *supra* note 1114,46-50.

The Responsibility to Protect (R2P).[1127] The Commission did not have a Chinese member but did hold a consultation in Beijing.[1128] During this consultation, Chinese interlocutors emphasised rejected humanitarian intervention without Security Council approval, the notion of human rights "transcending" sovereignty and drew attention to alleged double standards employed by the west, and argued against humanitarian intervention on a more pragmatic level. They did embrace an alternative notion of "humanitarian assistance" which respected state sovereignty.[1129] They paid less attention to the non-military actions which were also stressed in the ICISS report, which only saw military action as a last resort.[1130]

Although the notion of R2P as contained in the ICISS report was aspirational, it did receive endorsement by the UNSG's High-Level Panel (with former PRC Foreign Minister Qian Qichen as a member) as an "emerging norm", but requiring Security Council authorisation.[1131] It then gained official recognition in the 2005 World Summit Outcome Document, which was adopted by consensus by all (then) 191 UN members.

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [...] The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. [...] The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means [...] to help to protect populations [...] In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[1132]

This official formulation of R2P emphasises a notion of common humanity but also acknowledges pluralism by leaving the state as the primary actor. It is an attempt to bridge the concepts of state and human security by placing the threshold of intervention at those

1127 ICISS, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

1128 *Ibid.*, 83.

1129 Davis, 'Reluctant Intervenor', *supra* note 1079, 257-258.

1130 Foot, 'R2P and its Evolution', *supra* note 1117, 51.

1131 Report of the High-Level Panel on Threats, Challenges and Changes, A More Secure World: Our Shared Responsibility, UN Doc A/59/565, 2 December 2004, para. 203.

1132 GA Res 60/1, UN Doc A/RES/60/1, 16 September 2005, paras. 138-140.

instances where a state is "manifestly failing" in its duty to protect,.[1133] Given the broad support for the Outcome Document, this definition can be seen as authoritative when interpreting the criteria for Security Council-sanctioned interventions. It stays closer to international law by referring to four specific crimes rather than broader references to large-scale human rights violations.

In 2009, the UN Secretary-General presented a report to the General Assembly on 'Implementing the Responsibility to Protect'.[1134] The report proposed a three-pillar approach to R2P: protection of the responsibilities of the state (embracing the notion of "sovereignty as responsibility"), international assistance and capacity-building to prevent atrocities, and a "timely and decisive response" should these occur. In the General Assembly, there was unanimity on the importance of the first two pillars as well as the obligation to prevent mass atrocity crimes.[1135]

China's representative to UNGA described R2P as "a new concept that emerged at the beginning of this century" and endorsed the description of the concept in the 2005 World Summit Outcome Document, stressing that it limited the scope of application of R2P to four serious crimes. Noting that there was still controvery over the meaning and application of R2P, he presented China's "preliminary view". First he restated China's position that governments bear the primary responsibility for protecting their sovereignty and implementation of R2P should not "contravene the principle of state sovereignty and the principle of non-interference of internal affairs." This phrase was actually used twice. Acknowledging that sovereignty was changing, he said

> Although the world has undergone complex and profound changes, the basic status of the purposes and principles of the UN Charter remains unchanged. There must not be any wavering over the principles of respecting state sovereignty and non-interference of internal affairs.

Second, "[n]o state should expand the concept or make arbitrary interpretations" and "abuse of the concept should be avoided". He explicitly stated that "it is necessary to prevent 'R2P' from becoming another version of 'humanitarian intervention'." Thirdly, he emphasised the importance that any action "strictly abide by the provisions of the UN

1133 Foot, 'R2P and its Evolution', *supra* note 1117, 48.
1134 UN Doc A/63/677, 12 January 2009.
1135 Foot, 'R2P and its Evolution', *supra* note 1117, 54.

Charter, and respects the views of the government and regional organizations concerned." The UN framework was essential to addressing the crisis and unilateral implementation of R2P had to be prevented. Fourth, the Security Council should judge and decide in light of "specific circumstances" and "consider 'R2P' in the broader context of maintaining international peace and security", guarding against abuse. Finally, China held off on the establishment of an 'early warning and assessment' mechanism as proposed in the Secretary-General's report, saying further study was needed, and that in any case if such a mechanism were established "double standards or politicization" should be avoided. The Chinese representative also emphasised that R2P "does not constitute a rule of international law" and remained "a concept" for the time being.[1136]

In the backlash against NATO's intervention in Libya, in addition to its other points of criticism China also questioned the applicability of R2P in that situation, and it has been suggested that it may have renewed Chinese efforts to "contain R2P's normative development". The willingness of China and Russia to block Security Council action on Syria even though all other members were in favour, as well as the focus of their criticism on NATO taking sides in the conflict, suggests a backlash against the risk of R2P being used as a pretext for regime change.[1137]

All these developments fit in China's sovereignty-oriented, cautious approach, and the response to the Libyan intervention to an extent mirrors China's response to the Kosovo intervention of 1999, although with less intensity. This suggests that in the international environment, states will continue to push for R2P and expansion of the notion, while China will be pushing back, but not to the extent that it tries to block its development, rather than slowing it down. From a legal perspective, it is noteworthy that at all times, China refers to the Charter of the United Nations and supports the humanitarian aims of contemplated Security Council action. A statement by its representative from November 2011 gives a good summary of the current Chinese positions on protection of civilians.

> [O]ver the past few years, the Council's open debates on civilian protection had generated both consensus and differing views. The Security Council should first take into consideration the views of non-members of the Council in order to better represent the world. Proposing a series of suggestions, he said national Governments,

1136 Zhu Lijiang, 'Chinese Practice in Public International Law: 2009', *CJIL* 9 (2010) 607-662, para 76.

1137 Garwood-Govers, 'Libyan intervention', *supra* note 1120, 387-390.

> which were primarily responsible for protecting their civilians, must abide by international law and apply the United Nations Charter, particularly with regard to respecting a State's sovereignty and the right of non-interference in a State's affairs. An early achievement of a declared ceasefire should first be attempted, and protecting civilians through the use of force should only be authorized with extreme caution [...]Given the possible imprecision of attacks and the advanced nature of weapons today, civilian deaths were inevitable [...].
>
> Many questions needed to be clarified, and the Security Council should never take "hasty" action [...]. Security Council resolutions should be fully implemented, and no party should wilfully misinterpret a resolution in a way that tolerated attacks on infrastructure and residential areas, or civilian casualties. Those legitimate concerns demanded answers. It was also imperative to abandon selectivity and double standards. All issues should be treated equally, [...] using Gaza, Somalia, Afghanistan and Iraq as examples.[1138]

China's stance on R2P thus incorporates its views on humanitarian intervention, prioritising sovereignty as the paramount principle of international law, and challenging any assertion that a rule of international law has crystallised. China has also tried to divert its emphasis more towards the notion of protection of civilians and to limit its impact, not only regarding military action without host state consent, but also with regard to 'robust' peacekeeping.[1139] In the words of Rosemary Foot, "this is not solely about China's adaptation to a global norm. Beijing has also shaped the discursive and behavioural environment in such a way as to make it more compatible with its preferences."[1140]

7.2.3 Other principles as expressed in Security Council statements

In statements on security related matters, Chinese representatives tend to recall the same themes over and over again. These statements consistently reflect China's position on sovereignty, stressing the importance of dialogue and diplomacy to enable the peaceful settlement of disputes, non-interference and consent to UN peacekeeping in areas of conflict, and restraint in the application of stronger measures like sanctions. At the same time, the Chinese government acknowledges the existence of transnational problems and the importance of multilateral solutions. It has also repeatedly called for strengthening the conflict prevention mechanisms of the Council.

1138 UNSC, 6650th meeting, 22 November 2011, UN Doc SC/10442, <http://www.un.org/News/Press/docs/2011/sc10442.doc.htm> [03.04.2012]

1139 See Sarah Teitt, 'The Responsibility to Protect and China's Peacekeeping Policy', *International Peacekeeping* 18 (2011) 298-312.

1140 Foot, 'R2P and its Evolution', *supra* note 1117, 57.

In a 2010 high-level meeting, for example, Premier Wen Jiabao stated that

> while the international security situation was stable on the whole, threats to stability were increasing due to the global economic and financial crises. Terrorism, transnational crime, cybersecurity, proliferation of weapons of mass destruction and other non-traditional security issues were becoming more pronounced [...] in the face of those threats, multinational cooperation must be intensified and stronger collective action taken.
>
> As the core of the collective security mechanism, the Council must enhance its authority and play a greater role in maintaining international peace and security, [...] proposing in that regard that it improve the peaceful settlement of disputes. Dialogue, negotiations and diplomacy were the only effective way to do that. The Council should therefore strengthen its good offices and mediation role in order to prevent outbreaks of conflict.
>
> Noting that peacekeeping was the major means by which the Council addressed conflicts, he said it was therefore important to improve the effectiveness of such operations. However, the Council must adhere to the Hammarskjöld principles [...]. While the Council might decide to impose sanctions, it must exercise caution since such measures often did not help to solve the situation. An integrated strategy was necessary in order to remove the root causes of conflicts, such as poverty [...].
>
> The Council must, as a matter of priority, resolve problems in Africa, since most issues on the Council's agenda related to that region. In the quest for world peace, hot spots in Africa must be addressed, he said, stressing that the international community must accommodate the concerns of African countries and respect their choices. China appreciated the value of peace and, as a permanent Council member, had worked vigorously for the peaceful settlement of disputes. It had played an active part in United Nations peacekeeping operations, he said, noting that his country was the biggest contributor of peacekeeping personnel among the Council's permanent members.[1141]

This speech consolidates much of what has been discussed before and summarises China's main preferences: an emphasis on multilateral cooperation, and prevention, based on consent, and restraint when applying forceful measures such as sanctions, and it also restates China's wish to be seen as a champion of the interest of the developing world by calling for elimination of the root causes of conflict.

This last theme was more pronounced in a Security Council speech by Yang Jiechi, China's Minister for Foreign Affairs, who also echoed the other themes from Wen's speech. He called for "a keener appreciation of preventive diplomacy and adding to the United Nations efforts in that regard" through "increased use of early warning systems, conflict prevention and mediation". Echoing the language of the UN Charter preamble, he suggested

1141 UNSC, 6389th Meeting, 23 September 2010, SC/10036 (high-level meeting) <http://www.un.org/News/Press/docs/2010/sc10036.doc.htm> [26.03.2012]

this would "help save resources, improve efficiency and protect people from the scourge of war." More attention towards "development and eliminating the socio-economic causes of conflict, particularly in Africa", was necessary. In the same speech, Yang also called for a strengthening of UN partnerships with regional and subregional organisations to "fully utilize their unique political, geographic and moral advantages".[1142]

The next day, Ambassador Li Baodong discussed peace and security in the Council and promoted a holistic notion of security, which not only included terrorism and the proliferation of weapons of mass destruction, but also transnational organised crime, which was "often intertwined with terrorism, thus affecting the stability and economic development of affected countries", prevention and treatment of HIV/AIDS and other communicable diseases in cooperation with the World Health Organisation (WHO), and climate change (where UN bodies should "maintain coordination while avoiding duplication of efforts").[1143]

Aspects of sovereignty are, unsurprisingly, a regular occurrence in statements by Chinese representatives in the Council. For example, Ambassador Li has stated that "international efforts in security sector reform should focus on assistance and advice to countries that endeavoured to pursue such reform and respect their national will."[1144]

Another issue which is mentioned regularly, is the importance of cooperation and consultation with regional organisations. For example, in a recent meeting on improving the working methods of the Security Council, the Chinese representative, apart from calling for informal dialogue, suggested that the "Council could benefit from consultations with regional organizations when considering and drafting measures in the area of preventive diplomacy and conflict prevention."[1145] In another meeting concerning Eritrea, China "supported the settlement of African issues by African ways and by Africans, and hoped the African Union played a positive role in this issue." In the same meeting, China also called for

1142 UNSC, 6621st Meeting (PM), 22 November 2011, UN Doc SC/10392 (peace and security) <http://www.un.org/News/Press/docs//2011/sc10392.doc.htm> [26.03.2012]

1143 UNSC, 6668th Meeting, 23 November 2011, UN Doc SC/10457 (peace and security), <http://www.un.org/News/Press/docs//2011/sc10457.doc.htm> [03.04.2012]

1144 UNSC, 6630th meeting, 12 October 2011, UN Doc SC/10409.

1145 UNSC, 6672nd meeting, 30 November 2011, UN Doc SC/10466, <http://www.un.org/News/Press/docs//2011/sc10466.doc.htm> [03.04.2012]

"a prudent view of sanctions" as "such restrictions could affect people's livelihoods."[1146] After a briefing by the Organisation for Security and Cooperation in Europe (OSCE), the Chinese representative expressed appreciation for the "OSCE's work in regional security, counter-terrorism and other areas" and "encouraged the organization's efforts in resolving problems through dialogue and peaceful negotiation". He stressed the importance of cooperation between regional organisations and that this was done "in a complementary manner".[1147]

Finally, blending the discourse of governance and that of security, the Chinese representative stated that "the rule of law in international relations should be strengthened" and that the "essence" of promoting the international rule of law was "[a]dherence to the Charter and respect for the principles of international law, including of national sovereignty and non-interference". Probably implicitly alluding to NATO's actions in Libya, he stated that this respect "[s]trict implementation" of SC resolutions without "distortion or expansive interpretations of their content" was necessary. Repeating one staple of Chinese diplomatic statements, he said that conflicts were "inevitable in countries with different cultural backgrounds and levels of development". In order to address the development of the rule of law in countries in or post-conflict "holistically", "it was necessary to coordinate efforts for economic development and national reconciliation, and to respect each country's unique situation." He then went on to condemn human rights violations, express support for the penalisation of war crimes, genocide and crimes against humanity, and stated that peace and justice had to facilitate and complement each other, and the "pursuit of justice should promote, rather than interfere with peace processes." Caution should be employed in imposing sanctions and double standards avoided.[1148]

7.2.4 Activities in Africa

A recent development which has little to do with intervention but a lot with non-

1146 UNSC, 6674th Meeting, 5 December 2011, UN Doc SC/10471, <http://www.un.org/News/Press/docs//2011/sc10471.doc.htm> [03.04.2012] Earlier, China has expressed some support for 'targeted sanctions'. Zhu Lijiang, 'Chinese Practice in Public International Law: 2010', *CJIL* 10 (2011) 427-468, at 465, para. 69.

1147 Briefing by OSCE, Security Council 6715th Meeting, 9 February 2012.

1148 UNSC, 6705th Meeting, 19 January 2012 (international peace and security), UN Doc SC/10524, <http://www.un.org/News/Press/docs//2012/sc10524.doc.htm> [03.04.2012].

interference, is China's expansion into Africa and South America in its quest for commodities. Western governments and aid organisations have criticised these activities for jeopardising what they see as the gains of decades of lessons learned in development aid, as China does not pose any conditions for its support and does not accompany aid with rhetoric or demands on human rights, a practice which has been described as "separating politics and business."[1149] True to China's adherence to the principle of non-interference, following criticism by the President of the World Bank in 2006 that China neglected human rights standards when granting loans to African countries, a Foreign Ministry spokesperson stated:

> China can not accept the accusation that China has undermined human rights status in Africa when providing financial and economic assistance. These accusations are groundless. China has adopted the principle of non-interference of other nations' internal affairs in its foreign relations. China does not accept any country imposing its values, social systems and ideology upon China. Neither will China allow itself to do so to others. China has trade and cooperation with African nations on the basis of equality and mutual benefit, which is conducive to the improvement of people's livelihood and the development of various social and economic and social undertakings of Africa.[1150]

The normative underpinnings of China's evolving policy with regard to Africa can to an extent be derived from the previous sections: an emphasis on sovereignty and non-interference, developmental rights, and China presenting itself as different from the external powers which previously were active in Africa, itself previously a victim of imperialism and still a developing country, thus presenting a framework informed by history. Rhetorically, the aspects of the Five Principles of Peaceful Coexistence emphasised by China are mutual benefit, often referred to as 'win-win' and referring back to the Bandung Conference. More contemporary is China's pluralist claim to be accepting political diversity and not dictating to others.[1151] This is in essence also China's stated policy in its White Paper on Africa.[1152] This position could count on support among various African countries, which was also visible as diplomatic support when China was under fire in the UN after the Tiananmen events of 1989.[1153]

1149 Zhu Ziqun, *China's New Diplomacy*, *supra* note 1049, 38-41.

1150 Zhu Lijiang, 'Chinese Practice in Public International Law: 2006 (I)', *CJIL* 6 (2007) 475-506, para 15.

1151 See also Chris Alden and Daniel Large, 'China's Exceptionalism and the Challenges of Delivering Difference in Africa', *Journal of Contemporary China* 20(68) (2011) 21-38, especially 27-28, and *infra*, 2.3.2.

1152 'White Paper on China's African Policy, January 2006', *China Report* 43 (2007) 275-391.

1153 Ruchita Beri, 'China's Rising Profile in Africa', *China Report* 43 (2007) 297-308.

China's experiences have already been different than the principles it proclaims. Commentators have referred to its involvement in Sudan and Zambia as evidence of a shift,[1154] but just like its positions on humanitarian intervention, this should be taken on a case-by-case basis and premature conclusions should not be drawn. A more significant problem is already the unequal power relationship between China and the African states with which it cooperates, which shows the dichotomy between China's twin aspirations of being a 'great power' but also one of the developing nations. In the third place, in actual reality the nature of China's trade relations with African countries is very similar to that of other countries, in which raw materials are exported by Africa and China exports manufactured products, thus placing Africa's nascent manufacturing in direct competition with that of China. In addition, Chinese companies operating in Africa are already starting to operate with a large measure of autonomy, and are therefore difficult for Beijing to control or even keep track of. One difference with Europe is that there is a steady stream of migration of Chinese to Africa, while this no longer happens with Europeans.[1155]

While western development discourse has become more complex, China's seems relatively straightforward. It has been described as "a form of African development with Chinese characteristics, one which folds together classic assertions of modernisation theory, mercantilist self-interest and actual development experience within the open-ended rhetoric of 'South-South co-operation'." This classic modernisation discourse echoes the 1960s rather than the more problematic modern development discourse.[1156]

Other than the principles underpinning this cooperation, the role of international law is relatively limited in this context. China's sovereigntist stance means that extraterritorial application of human rights norms is not much of a concern. However, the realities of deeper involvement will most likely require more regulation, which sooner or later may bring these kinds of norms into play.

1154 See previous section for discussion on Sudan. For Zambia, see Dan Haglund, 'Regulating FDI in weak African states: a case study of Chinese copper mining in Zambia', *Journal of Modern African Studies* 46 (2008) 547-575.

1155 Alden and Large, *supra* note 1151, 29-31 and 34.

1156 *Ibid.*, 35-36. Compare also with Suzuki, *supra* note 1074.

7.3 International counterterrorism

7.3.1 At the UN level

In particular in the last decade, counterterrorism has risen to the top of the international agenda, resulting in a string of Security Council resolutions as well as the development of the UN Global Counter-Terrorism Strategy.[1157] This section sets out the general legal framework of international counterterrorism efforts as well as China's position in this regard, to be followed by China's regional efforts in the context of the SCO.

Despite many attempts, a definition of terrorism is still lacking.[1158] The lack of a definition causes difficulties in assessing the compliance of states with international obligations regarding protection of human rights in counterterrorism, as already noted in the very first report of the Special Rapporteur on this topic, in which he also warned that the term was easily abused by states for other purposes.[1159]

According to the UN, there are 14 universal legal instruments and four amendments to prevent terrorist acts. In addition, there are seven regional treaties, and a range of UNSC and UNGA resolutions which oblige states to prevent and repress terrorism.[1160] The table below lists the conventions China is a party to, along with reservations. By and large, it reflects China's increased participation in the international system from the 1970s as described in previous chapters, as well as its consistent reluctance to consent to the jurisdiction of any international dispute settlement mechanism. All reservations concern the standard dispute settlement clauses providing for arbitration and ICJ jurisdiction. This reflects China's standard practice, as has also been discussed in previous chapters.[1161]

1157 UNGA, Resolution 60/288, UN Doc A/RES/60/288, 20 September 2006.

1158 Elizabeth Stubbins Bates, *Terrorism and International Law: Accountability, Remedies, and Reform. A Report of the IBA Task Force on Terrorism* (Oxford: Oxford University Press, 2011) 1-12. See also Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006); Gerhard Hafner, 'The Definition of the Crime of Terrorism' in: Giuseppe Nesi (ed.), *International Cooperation in Counterterrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Aldershot: Ashgate, 2006) 33-43.

1159 UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2005, UN Doc E/CN.4/2006/98, paras. 26-27.

1160 See <http://www.un.org/terrorism/instruments.shtml> [26.5.2013] Stubbins Bates, *Report of the IBA Task Force*, *supra* note 1158, 1-2.

1161 See *infra*, 4.5.4.

PRC and treaties on terrorism[1162]				
Treaty	*Signature*	*Ratification/accession*	*Reservations*	*Parties*
Convention on Offences and Certain Other Acts Committed On Board Aircraft, Tokyo, 14 September 1963[1163]	14 Nov 1978	12 Feb 1979	Art. 24(1)	185
Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970[1164]		10 Sep 1980	Art 12(1)	185
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971[1165]		10 Sep 1980	Art 14(1)	188
Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 24 February 1988[1166]	24 Feb 1988	5 March 1999		171
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, UNTS 1035, 167[1167]		5 August 1987	Art 13(1)	176
International Convention Against the Taking of Hostages, New York, 17 December 1979, UNTS 1316, 205[1168]		26 Jan 1993		170
Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980,[1169] as amended in 2005[1170]		10 Jan 1989, 14 Sep 2009	Art 17(2)[1171]	145
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome on 10 March 1988[1172]	10 March 1988	20 Aug 1991	Art 16(1)[1173]	158
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988[1174]	10 March 1988	20 August 1991	Art 16(1) of Convention	146
International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UNTS 2149, 256[1175]		13 Nov 2001	Art 20(1)	165
International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999[1176]	13 Nov 2001	19 Apr 2006	Art 24(1)	182

1162 China is not a party to the Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991, although it has continued to apply in the HKSAR after its return to Chinese sovereignty. <http://www.icao.int/secretariat/legal/List%20of%20Parties/MEX_EN.pdf> [27.03.2012]

1163 <http://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf> [26.03.2012]

1164 <http://legacy.icao.int/icao/en/leb/Hague.pdf> [27.03.2012]

1165 <http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf> [27.03.2012]

1166 <http://www.icao.int/secretariat/legal/List%20of%20Parties/VIA_EN.pdf> [27.03.2012]

1167 <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-7&chapter=18&lang=en> [27.03.2012]

1168 <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-5&chapter=18&lang=en> [26.03.2012]

International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005[1177]	14 Sep 2005	8 Nov 2010	Art 23(1)	115

Since the end of the 1990s and especially after the terrorist attacks of 11 September 2001, the Security Council has become a lot more active in adopting resolutions to counter terrorism, stating repeatedly that acts of terrorism can never be justified, but it has been difficult to provide a comprehensive definition.[1178] A working definition was adopted in Resolution 1566 of 2004, although it is not explicitly phrased as a definition. Paragraph 3 of that resolution states:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature [...][1179]

Negotiations for a comprehensive convention on counterterrorism, containing a definition, have stalled, with continuing disagreement on the proper approach to counterterrorism – armed conflict or law enforcement; whether it should include 'state terrorism' and acts by armed forces of states; and whether armed resistance to a colonial or occupying regime should be excluded.[1180] By virtue of being a permanent member of the

1169 <http://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf> [27.03.2012]

1170 <http://www.iaea.org/Publications/Documents/Conventions/cppnm_amend_status.pdf> [27.03.2012]

1171 <http://www.iaea.org/Publications/Documents/Conventions/cppnm_reserv.pdf> [27.03.2012]

1172 <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf> [27.03.2012] China is not a party to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, London, 14 October 2005.

1173 <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf> [27.03.2012]

1174 Ibid.

1175 <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&lang=en> [26.03.2012]

1176 <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en> [26.03.2012]

1177 <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=IND&mtdsg_no=XVIII-15&chapter=18&Temp=mtdsg3&lang=en> [27.03.2012]

1178 UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2005, UN Doc E/CN.4/2006/98, para 28.

1179 UN Doc S/RES/1566 (2004), para. 3. Discussion in Saul, *Defining Terrorism*, *supra* note 290, 247-248.

1180 Stubbins Bates, *Report of the IBA Task Force*, *supra* note 1158, 2.

Security Council, the very least which can be said about China is that it voted in favour of each resolution related to counterterrorism adopted by the Council, even those with far-reaching consequences such as adoption of 'legislative' powers by the Council or with a problematic human rights dimension. However, this cannot be considered very significant since all resolutions were adopted unanimously with 15 votes in favour.[1181]

In the General Assembly, while many resolutions on terrorism have been adopted without vote, a number of resolutions stand out in which western nations consistently vote against human rights-oriented resolutions, while developing nations, including China, vote in favour. Some of these resolutions date from before 2001.[1182] The political lines within the General Assembly are familiar from earlier resolutions in the 1970s and 1980s denouncing state-sponsored terrorism.[1183] Most of these resolutions affirm the UN Charter and the Universal Declaration of Human Rights in their preambles, and the ones from the 1990s and the last decade all reiterate the importance of human rights protection, although the focus is on alleged human rights violations committed by terrorists. Although subtle political shifts can be discerned from the language of the resolutions and the voting patterns, they are too small to draw conclusions when it comes to normative development or expressions on customary international law, as they affirm the existing normative framework but may only give rise to discussion on the proper interpretation of existing norms. China predictably votes with its traditional allies in the developing world. It does not seem to have a leading role in the General Assembly on this issue.

It can therefore be concluded that China does not aim at normative change in the area of counterterrorism and international cooperation on the matter, but rather takes its traditional position. However, as explored in the next section, China does use its position and the lack of an international definition of terrorism, to its advantage.

In general, China is supportive of the Security Council's leading role in combating

1181 Verified at the UN website: <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&menu=search&submenu=power#focus> [27.03.2012]

1182 UNGA Resolution 59/195, UN Doc A/RES/59/195; UNGA Resolution 58/174, UN Doc A/RES/58/174. The west voted against these two resolutions, while the developing world was in favour. Two previous resolutions on 'Human Rights and terrorism' were adopted with the developing world voting in favour and the west abstaining: UNGA Resolution 56/160, UN Doc A/RES/56/160; UNGA Resolution 54/164, UN Doc A/RES/54/164; UNGA Resolution 52/133, UN Doc A/RES/52/133.

1183 E.g. UNGA Resolution 39/159, UN Doc A/RES/39/159, denouncing 'state terrorism'. Also UN Doc A/RES/34/145, UN Doc A/RES/32/147 and UN DOC A/RES/3034(XXVII).

terrorism, although in 2002 it opposed "arbitrarily widening the scope of strikes in the name of fighting terrorism"[1184], presumably referring to the risk of expansion of the US use of force. While arguing for a limitation of the reach of counterterrorism at the international level, it can be said that China argued in favour of an expansionary view at the domestic level by defining terrorism as "any action taken by any illegal armed forces against a sovereign country".[1185]

7.3.2 The 2001 SCO Convention

One of the first acts of the Shanghai Cooperation Organisation after it was established in 2001, was, on the same day, the adoption of the Shanghai Convention on Combating Terrorism, Separatism and Extremism.[1186] As is clear from the name, but also the preamble of the Convention, it blurs the distinction between terrorism, separatism and extremism, even though, as observers have pointed out, separatist or extremist movements do not necessarily use terrorist methods.[1187] The preamble accepts as a fact that "terrorism, separatism and extremism constitute a threat to international peace and security, the promotion of friendly relations among States as well as to the enjoyment of fundamental human rights and freedoms". The three terms are defined in Article 1:

> 1. For the purposes of this Convention, the terms used in it shall have the following meaning:
>
> 1) "terrorism" means:
>
> a) any act recognized as an offence in one of the treaties listed in the Annex to this Convention (hereinafter referred to as "the Annex") and as defined in this Treaty;
>
> b) any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict or to cause major damage to any material facility, as well as to organize, plan, aid and abet such act, when the purpose of such act, by its nature or context, is to intimidate a population, violate public security or to compel public authorities or an international organization to do or to abstain from doing any act, and prosecuted in accordance with

1184 Hu Qian, 'Chinese Practice in Public International Law: 2002', *CJIL* 2 (2003) 667-715, 680.

1185 In an ad hoc meeting of Foreign Ministers of the SCO on 7 January 2002. *Ibid.*, 680.

1186 Adopted 15 June 2001, entered into force 29 March 2003. The state parties are Kazakhstan, China, Kyrgyzstan, Russia, Tadjikistan and Uzbekistan. See Saul, *Defining Terrorism*, *supra* note 1158, 160; available at <http://www.sectsco.org/EN/show.asp?id=68> [29.03.2012] and <http://www.ecrats.com/en/normative_documents/2005> [01.04.2012]

1187 Saul, *Defining Terrorism*, *supra* note 1158, 160. For a more detailed critique of the SCO definition, see Human Rights in China (中国人权), *Counter-Terrorism and Human Rights: the Impact of the Shanghai Cooperation Organization*, Whitepaper, New York, NY and Hong Kong, 2011, 42-48.

> the national laws of the Parties;
>
> 2) "separatism" means any act intended to violate territorial integrity of a State including by annexation of any part of its territory or to disintegrate a State, committed in a violent manner, as well as planning and preparing, and abetting such act, and subject to criminal prosecuting in accordance with the national laws of the Parties;
>
> 3) "extremism" is an act aimed at seizing or keeping power through the use of violence or changing violently the constitutional regime of a State, as well as a violent encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the Parties.
>
> 2. This Article shall not affect any international treaty or any national law of the Parties, provides or may provide for a broader application of the terms used in this Article.

Saul notes that the Convention shares elements in common with the 1999 Terrorist Financing Convention and the 2002 EU Framework Decision on combating terrorism, but goes further than both in adding violations of "public security", a vague and potentially far-reaching alternative element. In addition, acts not covered by the definition of terrorism can still constitute separatism or extremism, which are defined as to cover both secession and more limited domestic rebellions, such as violent unrest by Uighurs in Xinjiang.[1188] It should be noted that separatists in Xinjiang are already characterised by China as terrorists in any case.[1189]

The Charter of the SCO itself reflects China's (and Russia's) preference for a sovereignty-based regional order, as reflected in the first two articles of its Charter. Article 1 states states the main goals and tasks of SCO, some of which are vague and others quite concrete. First, its aim is "to strengthen mutual trust, friendship and goodneighborliness" between its members, and to cooperate in "strengthening peace, security and stability in the region" by using "multidisciplinary cooperation". Third, the SCO members also aim to "jointly counteract terrorism, separatism and extremism in all their manifestations", thus grouping these three phenomena together in its charter as well, and linking it to the fight against illegal drug and arms trade and illegal migration. More vague and broadly formulated tasks include encouraging "efficient regional coordination" in a broad and open array of fields - "politics, trade and economy, defense, law enforcement, environment

1188 Saul, *Defining Terrorism*, *supra* note 1158, 161-162.

1189 *Ibid*., 50. See also *infra*, section 5.3.4.4.

protection, culture, science and technology, education, energy, transport, credit and finance, and also other spheres of common interest"; facilitating "comprehensive and balanced economic growth, social and cultural development in the region through joint action on the basis of equal partnership"; and " to coordinate approaches to integration into the global economy". The SCO Charter also mentions human rights and explicitly aims to "to promote human rights and fundamental freedoms in accordance with the international obligations of the member States and their national legislation", a formulation which suggests that the latter would prevail over the former. The last three aims are also open: maintaining and developing relations with other states and international organisations, cooperating in preventing and settling international conflicts and, finally, "to jointly search for solutions to the problems that would arise in the 21st century."[1190]

The language of all these aims has a clear intergovernmental character, an impression strengthened by the principles the SCO sets out for itself in Article 2.

> The member States of SCO shall adhere to the following principles:
>
> mutual respect of sovereignty, independence, territorial integrity of States and inviolability of State borders, non-aggression, non-interference in internal affairs, non-use of force or threat of its use in international relations, seeking no unilateral military superiority in adjacent areas;
>
> equality of all member States, search of common positions on the basis of mutual understanding and respect for opinions of each of them;
>
> gradual implementation of joint activities in the spheres of mutual interest;
>
> peaceful settlement of disputes between the member States;
>
> SCO being not directed against other States and international organizations;
>
> prevention of any illegitimate acts directed against the SCO interests;
>
> implementation of obligations arising out of the present Charter and other documents adopted within the framework of SCO, in good faith.[1191]

These principles are very much in line with China's general foreign policy. They are similar to the Five Principles of Peaceful Coexistence, and also echo China's emphasis on independence, dialogue, and non-interference. The explicit statement that the SCO is not meant as a counterweight to other states or organisations serves to counteract notions such

1190 Charter of the Shanghai Cooperation Organisation, <http://www.sectsco.org/EN/show.asp?id=69> [30.03.2012].

1191 *Ibid*.

as the 'China threat', as well as concerns about Russian designs on other states. The reference to "gradual implementation" may be taken as representative of China's approach to its international obligations in which it aims at slowly realising common goals, or in other words, in the framework of cooperation, and certainly not community.

Within the SCO, a separate standing body has been set up to "combat terrorism, separatism and extremism", known as the Regional Anti-Terrorist Structure (RATS). Article 10 of the SCO Charter provides for this body, but its organisation is provided for in a separate treaty[1192] It is based in Tashkent, Uzbekistan.[1193]

Apart from the Convention and the SCO Charter, there are a few more documents which reflect the SCO's stance against terrorism. A Joint Statement by the SCO's foreign ministers on 7 January 2002 linked SCO policy to recent developments in Afghanistan and reiterated the need to preserve regional stability and crack down on the "three forces" of terrorism, separatism and extremism. It also stressed the point that terrorism should not be confused with a certain religion, freedom of belief, country or ethnic group and there was no "specific" ethnic or religious characteristic in terrorism. It also called for a comprehensive convention on international terrorism and a convention on preventing nuclear terrorism.[1194]

7.3.3 SCO practice

The normative content of SCO agreements is located within China's normal international legal vocabulary, emphasising the sovereignty of its member states and leaving a lot of room for flexibility on the part of their governments. As the organisation is composed mainly of states which are not liberal democracies, and whose historical relationships have not always been smooth, its practice is of particular interest when analysed against multilateral organisations in the West. For the purpose of this section, the most important question is to

1192 *Ibid*., referring to it as the "Regional Counter-Terrorist Structure" and locating it in Bishkek, Kyrgyzstan. See also Article 10 of the Shanghai Convention on Combating Terrorism, Separatism and Extremism. The treaty establishing RATS is only available in Russian at <http://www.ecrats.com/ru/normative_documents/1557> [01.04.2012]; I rely on the unofficial translation provided by HRIC, *Impact of the SCO*, *supra* note 1187, 12, and Annex A.

1193 HRIC, *Impact of the SCO*, *supra* note 1187, 10.

1194 Quoted in Hu, 'Chinese practice: 2002', *supra* note 1184, 677. The translation 'three forces' differs from 'three evils' as used in the HRIC report.

what extent the human rights safeguards laid down in some SCO texts but also in the treaty obligations of its member states are adhered to in practice.

A report by the US-based NGO Human Rights in China from 2011 has raised a number of concerns in this respect.[1195] Among the issues it has identified, are the SCO practice of blacklisting, which in the context of the UN system under Resolution 1267 had problems in terms of lacking access to judicial review; the regional version of the SCO suffers from the same deficiency, but in addition has due process issues in that SCO member states uncritically accept the designation of individuals and entities by other members as terrorists.[1196] One aim was, *inter alia*, to make subjects identified as terrorists in one state ineligible for asylum in another.[1197] A similar lack of oversight is present with regard to a surveillance database set up by RATS, which also lacks accountability mechanisms.[1198] Overall, the report details many instances in which the states cooperate and share information on possible threats, but do not implement human rights safeguards despite their international obligations. There have been examples in practice where state officials allowed the extradition requirements of the SCO to prevail over the prohibitions of UNCAT.[1199]

7.3.4 The SCO and the UN

It has been noted above that China emphasises the importance of cooperation with regional organisations in its statements in the UN.[1200] In that respect, it should be noted that the Security Council has been promoting the contributions that regional organisations can make to maintaining international peace and security even before the adoption of its Global Counter-Terrorism Strategy in 2006.[1201] This referred to positive experience with the regional frameworks on the African continent, while elsewhere regional organisations have also played a positive role. In 2004, China requested that the SCO be granted observer status

1195 Human Rights in China, 'Impact', *supra* note 1187.
1196 *Ibid.*, 83.
1197 *Ibid.*, 86.
1198 *Ibid.*, 88 and 95.
1199 *Ibid.*, 104-105.
1200 See *infra*, 7.2.3.
1201 See SC Res 1631, UN Doc S/RES/1631 (2005).

to the General Assembly.[1202] This was accepted upon recommendation by the Sixth Committee in 2005.[1203] It appears that this has happened without much debate, and the SCO is taken at face value as an organisation that promotes economic and security cooperation, much along the lines of organisations such as the OSCE. Given the increasingly prominent role of regional organisations in the UN system, the SCO can be expected to have a normative impact in the future. Although the previous discussion suggests that its practice represents the worst flaws of the post-9/11 counterterrorism paradigm, engagement with the SCO by other states and organisations, and more attention to transparency and accountability issues within the UN, could also make it a useful platform for the promotion rather than the erosion of human rights norms.

7.3.5 Other regional mechanisms

Apart from the SCO, China also took initiatives with regard to counterterrorism measures in other regional fora. In 2002, it submitted two Documents to the various ASEAN fora regarding its "New Security Concept", in which it emphasised the need to cultivate this concept, and engage in dialogue to enhance trust and cooperation to promote security.[1204] Echoing the Five Principles of Peaceful Coexistence, China held that this concept should include mutual trust, mutual benefit, equality and coordination, coordination which should be "flexible and diversified in form and model", which apparently reflects various more or less binding multilateral measures, either mechanisms or dialogues.[1205]

The document provides a specification of what mutual trust and benefit actually mean in the given context.

1202 UN Doc A/59/141 (2004).

1203 GA Res 59/48, UN Doc A/RES/59/48 (2004).

1204 The documents are called Document Concerning China's Stand in Strengthening Cooperation in Non-Traditional Security Fields, submitted to the ASEAN Regional Forum (ARF) Senior Officials' Conference, and Document Concerning China's Stand in Regard to the New Security Concept, submitted to the Ninth ARF Foreign Ministers' Conference held in July 2002. Hu, 'Chinese Practice: 2002', *supra* note 1184, 678.

1205 *Ibid*. Hu provides a link to the original document which no longer works, but the document seems to be available at <http://www.fmprc.gov.cn/ce/ceun/eng/xw/t27742.htm> [3.1.2013]. The relevant passage reads: "China maintains that cooperation under the new security concept should be flexible and diversified in form and model. It could be a multi-lateral security mechanism of relatively strong binding force or a forum-like multi-lateral security dialogue. It could also be a confidence-building bilateral security dialogue or a non-governmental dialogue of an academic nature. The promotion of greater interaction of economic interests is another effective means of safeguarding security."

> Mutual trust means that all countries should transcend differences in ideology and social system, discard the mentality of cold war and power politics and refrain from mutual suspicion and hostility. They should maintain frequent dialogue and mutual briefings on each other's security and defense policies and major operations.
>
> Mutual benefit means that all countries should meet the objective needs of social development in the era of globalization, respect each other's security interests and create conditions for others' security while ensuring their own security interests with a view to achieving common security.
>
> Equality means that all countries, big or small, are equal members of the international community and should respect each other, treat each other as equals, refrain from interfering in other countries' internal affairs and promote the democratization of the international relations.
>
> Coordination means that all countries should seek peaceful settlement of their disputes through negotiation and carry out wide ranging and deep-going cooperation on security issues of mutual concern so as to remove any potential dangers and prevent the outbreak of wars and conflicts.[1206]

7.3.6 Extradition of terrorism suspects

Among the terrorism suspects held by the United States in its military detention centre in Guantánamo Bay, Cuba, have been a number of Uighurs suspected of being members of a separatist movement. On 12 January 2010, it was reported that Switzerland may receive two of these suspects, in response to which the Chinese FMPRC spokesman stated that China was "firmly against" releasing these suspects to a third country. "No country should accept them in whatever name, neither. These suspects are members of the terrorist group 'East Turkistan Islamic Movement', thus should be handed over to China under legal proceedings." China invoked UNSC Resolution 1373, specifically its provision that states should "deny safe haven to those who finance, plan support or commit terrorist acts, or provide safe havens."[1207] The statement shows a strange conflation of the fact that these Uighurs are *suspected* terrorists and the assertion that they are members of this movement. The United States did not want to hand them over to China under the principle of *non-refoulement*, while Switzerland had granted them asylum on humanitarian grounds.[1208] The case is mentioned here because of China's invocation of the Security Council resolution, which in this case appears to be opportunistic rather than the reflection of a policy.

1206 *Ibid*.

1207 Zhu, 'Chinese practice: 2010', *supra* note 1146, 442, para. 30.

1208 See also 'China attacks Guantanamo Uighurs' asylum in Switzerland', *BBC News*, 4 February 2010. <http://news.bbc.co.uk/2/hi/8497532.stm> [26.5.2013]

7.4 Concluding remarks

China's legal position and record with regard to peace and security issues is mixed is consistent with its sovereigntist approach to international law described in earlier chapters. Overall, it is characterised by acceptance of the main norms of international law and adaptation with regard to their implementation and interpretation dominated by sovereignty-related concerns. While its practice on humanitarian intervention and R2P can be seen as a 'prudent' attitude which is not only the result of self-interest but also acts as a brake on the overzealousness of states which are more inclined to intervene, and may be motivated by self-interest themselves, its counterterrorism practice appears at odds with its rhetorical concern for humanitarian matters. Overall, it seems unlikely that China's position will change radically in the near future.

8 Conclusions

8.1 A tale of two crises

This thesis departed on the question of the extent of the normative impact of China's 'rise' on the development of international law, set against the background of international law as a discipline in a permanent existential crisis, or maybe just an identity crisis. Because there is no doubt that international law exists, and the real question then becomes what it is for. There may be as many answers to this question as there are actors and practitioners, as well as many ordinary people are affected by its rules every day. In this system of international law the focus was on one important actor, about whose identity there is as much confusion, both when observed from the outside world as from within. The conclusions reached here range from analysis to informed speculation on the future, but it may be prudent to draw attention to the obvious, which is that this future is unknown. What is known, however, is that the question of Chinese identity is at the heart of the answer. In a way, this has therefore been a discussion of a meeting of two identity crises.

The importance of the question of identity becomes clear by looking at the vocabulary used at different normative levels in the previous chapters, from discourse, as a way of speaking about the world, via the norms of 'international society', to legal rules and their use and interpretation. At the discursive level, the question about China's identity concerns its role in the world both seen from within and without, and comes to the fore in expressions like 'socialism with Chinese characteristics', as what China aspires to be, and 'responsible power', as how it wants to be seen. It can be seen in China's emphasis on being a 'newcomer' on the international stage and in the way it uses its sovereignty discourse in a defensive way; it can be seen in the preoccupation with 'soft power' in its IR thinking; and it can be seen in the way China makes pluralist arguments and refers to differences in culture and history.

The question of identity is not presented here as an attempt to anthropomorphise a state with many different organs, institutions and a population of 1.35 billion. It has to be seen in the context of the Legal Orientalism which was identified in the introduction as informing both the perceptions of China and its position in international law in the West as

well as its self-perception.[1209] It is an undercurrent which informs public discourse and perceptions.

At a more concrete level, China has consistently presented an alternative discourse of international law compared to the western mainstream. From China's own point of view, it has been adapting to an international order in which it was an outsider. From a western point of view, China has been 'socialised' into an international order, initially as a 'norm-taker', but increasingly as a 'norm-maker'. So far, this has mostly had an effect at the international political level, but less at the legal level, where China has not done much to shape new the making of new law or rules, but rather been acting as a brake on developments which it finds undesirable. It has also become increasingly adept at reshaping existing norms to fit its preferences. This development has been identified across the different fields of legal practice, and also in the realm of political and diplomatic norms.

Xue Hanqin has observed that "China's opening process [...] is not just about China's 'reintegration', but a process of mutual engagement and interaction."[1210] This concluding chapter starts with a summary of China's approach to international law at the various normative levels described in the previous chapters, identifying the themes, principles and methods which determine China's current approach to international law. It then identifies the challenges and opportunities this presents to the current legal order and for the developments within this order which have been the focus of this thesis. Finally, it uses the conclusions drawn to make some observations about the wider role of international law.

8.2 Continuity and change

8.2.1 Conceptual approach

> This distrust of the West led the Ch'ing to prefer, as modes of conflict resolution, either direct negotiation or mediation, conciliation, or other forms of third-party settlement that did not require China to surrender control of the outcome of the dispute to a third party from a world community in which it lacked confidence.[1211]

1209 See *infra*, 1.3.3.

1210 Xue Hanqin, 'Chinese Contemporary Perspectives on International Law — History, Culture and International Law', *Recueil des Cours* 355 (2012) 41-233, at 87.

1211 Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (Princeton, NJ: Princeton University Press, 1974) 11.

This description of the attitude of China's late nineteenth-century rulers to international law can be transposed to present-day China. Despite the vast transformation in China's position in the international order, it still maintains a sovereigntist discourse to international law informed by its historical experience and refers to history and culture as the factors which outsiders need to take into account in trying to understand China's position.

This thesis agrees with China that contemporary public international law can only be understood properly with a good understanding of its history, all the more so when looking at China, although not entirely for the same reasons. The role of law in international relations is historically contingent. World orders have been fluid, characterised by continuity and change, and the current framework of independent sovereign states has transformed throughout the centuries, especially when these political entities started rebuilding their identities based on the notion of the nation-state and this concept was exported from Europe to the rest of the world in the age of imperialism.

The current international legal framework still carries the imprint of imperialism, most notably in the rhetoric of 'civilised nations' and the dominance of progressive developmental discourses within the UN. At the same time, its actors have become more diverse. The United Nations membership consists of a majority of non-western states, which have started using the framework to their advantage since the 1970s, although not always with equal success.

Simultaneously, the nature of the project of international law has changed from the early twentieth century onwards. The abolition of war and the achievement of world peace, along with social progress, became an aspiration of international law – the Hague Peace conferences, the establishment of the Permanent Court of Arbitration and the Permanent Court of International Justice, the League of Nations, and the Treaty of Locarno are all illustrations of this. The same aspiration sustained the ideals of the United Nations and the development of international human rights law after the Second World War. During the Cold War, there was a division between Soviet and western approaches to international law, although the ideology differred more at how to achieve the aims of international law rather the aims themselves, as is illustrated by the PRC's continued support for the UN Charter

even when it denounced the organisation. The 'international community' became more universal following decolonisation.

The integration of the People's Republic of China, comprising at times one quarter or one fifth of the world population, into the burgeoning universal world community was fraught with difficulty. The Chinese Empire had its own world order, which did not survive its encounter with that western order, whose laws were used against it in securing humiliating concessions. The Republic of China tried to participate in an order that failed to protect it from foreign invasion (and still does, even if Taiwan is excluded from a large part of it due to not being official 'China'). The PRC aligned with the Soviet bloc in the Cold War, only to fall out with the Soviet Union and align with the fledgling 'Third World' instead. After it started engaging with the outside world again, the next backlash followed in 1989, followed by China's economic integration into the world. All this time, China has remained reluctant to sign on to a 'post-sovereign' world order, insisting on state sovereignty as the fundamental principle of international law.

Along with these elements, China's approach to international law has evolved from orthodox Soviet-style sovereigntism to a pragmatic adherence to the principle of sovereignty, denouncing a notion of 'absolute' sovereignty. This sovereigntism works well when it fits in an essentially reactive foreign policy with narrowly defined national interests. Especially in the last decade, China has arrived at a point where it is bound to undergo major changes, and based on the research undertaken here a few tentative indications can be given regarding the approach and direction which China is going to take in international law based on its statements and recent practice.

In light of China's own experience, Chinese international lawyers have from the beginning been aware of the limitations of international law, notwithstanding its universal aspirations and the lofty ideals often present in its rhetoric. China has adopted this rhetoric as well, including strong rhetorical support for international law. This can be taken as support for its ideals with a realistic understanding of its limitations, but it can also be seen as a cynical attempt to be seen as a good member of the 'club', while China bides it time until it is powerful enough to become far more equal than other states and secure for itself an exceptionalist position. The latter interpretation is present in public discourse about the

'China threat', for which there appears to be little basis in fact. At the very least, China is currently already able to carve out an exceptionalist position for itself.

Diminishing the perception of a 'China threat' is one important foreign policy priority for China. However, it also promotes its own worldview as an alternative to the dominant liberal discourses generally subscribed to in the west. China presents a pluralist discourse in which the reach of international law is less ambitious and more limited. It is expressed in the Five Principles of Peaceful Coexistence: mutual respect for each other's territorial integrity and sovereignty; mutual non-aggression; mutual non-interference in each other's internal affairs; equality and mutual benefit; and peaceful coexistence. However, in an era of globalisation, in which China has been opening itself up and become integrated into the world economy, Chinese citizens are connected to the rest of the world through the internet (even if behind the Great Firewall), and Chinese nationals venture out for business and tourism, the role of international law extends far beyond coexistence. It also does not suffice in China's international ambition to be seen as a 'responsible great power' and protector of the interests of the developing world, two roles which can be at odds with each other. The Chinese leadership is aware of this and allows its normative positions in the international order to adapt gradually to this reality. However, the conceptual view it has maintained in the current form since 1978 remains the point of departure.

A central theme therefore has been the way in which China's adherence to sovereignty has a firm basis in the traditional understanding of international law, which safeguards the pluralism and diversity of this order, but limits the reach of international legal norms and institutions. China's approach to international law acts as a brake on developments which challenge international law's underlying framework, in particular those aimed at verticalisation and constitutionalisation. However, it is also clear that China has no intention of rolling these developments back, as long as it does not get bound to them against its consent. Moreover, in some cases, particularly international economic law but also to an extent in international human rights law, China (or rather, different actors within China, including state officials) has actually used its adherence to international norms to stimulate domestic reform. The Chinese state is not a monolith domestically, and

there are constituencies for international norms in China just like in other countries.

Conceptually, China is clinging to an updated version of the classical early 20th century conception of international law, reinforced by elements of Soviet doctrine and the Third World Approaches to International Law. It uses the concept of sovereignty flexibly to maneuver between the legal and the political, supporting international law's utopian dimensions in rhetoric (adopting the mainstream vocabulary of progress and development), while acting conservatively and with a priority towards its self-interest – one may say apologetically – by consistently placing limits on the interpretation of norms, notably in the area of rights of individuals, and restraining any expansion of international institutional power in which it does not have a say. A Chinese observer has called this "China's realistic utilitarianism".[1212] With this approach, it seems to have fallen 'behind' a more sophisticated, constitutionalist European outlook, but withstands the more hegemonic sovereigntism of the United States at the same time.

8.2.2 Normative impact

Although the 'big picture' of China's approach to international law and international relations – which to it are in the same continuum – is clear and consistent, its language in public statements has a tendency to remain general, repeating principles and other mantra's *ad infinitum*, and avoid specifics. This has the advantage for the Chinese government that it can come across as principled, that it will automatically receive attention when it speaks out because of its relative silence, and that it retains maneuvering space to be flexible and pragmatic, and that consensus is easier to achieve because it is easier to agree on generalities than on specifics. However, this mode of communication fits better in an order of coexistence than one of cooperation. It also diminishes China's normative contribution.

When the PRC started to reintegrate itself in the international system from the 1970s, it was faced with many norms which it did not have any role in making. China took its time both to learn the framework of the international legal system and to shake off its initial more ideological foreign policy stance, and made considered decisions to join the

1212 Guo Ran, 'Study on the History of International Law, YANG Zewei', *Journal of the History of International Law* 14 (2012) 147-156, at 156.

international human rights regime, to change its stance on UN peacekeeping from an opponent to a participant, to join the UNCLOS regime on the law of the sea, the WTO, and to get involved from the sidelines in international criminal law. Sovereignty and consent remained the principle of departure, but China's approach has been pragmatic. Although China took care to draw attention to its contributions in international legislative fora, its role has been relatively modest, characterised by caution and conservatism. In recent years, China has gradually changed its foreign policy and let go of Deng Xiaoping's admonition to keep a low profile, and China has become more assertive, although the newness and extent of its assertiveness has been overstated. This trend will most likely continue, not least because, as is seen most prominently in the Libyan and Syrian crises, other states and actors are having more expectations of China as a 'responsible great power'. One Chinese observer has aptly noted that China has to navigate between marginalisation and demonisation, as it will be criticised for not participating but will also be criticised for what it does when it participates.[1213]

Both in international relations and in international law, the picture that has emerged of China is that it is no longer merely a 'norm-taker', but still not as much of a 'norm-maker' as would be expected from a great power. This conclusion can be drawn consistently based on the various areas of practice which have been analysed in this thesis, each of which involves China subscribing and supporting the norms of the respective fields, while resisting international monitoring institutions and third-party dispute settlement, thus maintaining control over the interpretation, application and implementation of these norms through its sovereignty. The WTO is a major exception in this regard, and some acceptance of international monitoring exists in the fields of human rights, albeit limited to the most basic mechanism of state reporting, and in arms control treaties. But even in those fields, the unresolved question of the application of international law in the Chinese domestic order limits the reach of international law.

Because China has not accepted the interpretative authority of many international institutions, one result of its sovereigntism is that the proper understanding of positive law remains to a large extent within its control. Its approach to the the international legal order

1213 Zhao Lei, 'Two Pillars of China's Global Peace Engagement Strategy: UN Peacekeeping and International Peacebuilding', *International Peacekeeping* 18 (2011) 344-362, 354.

as a system of sovereign equal states with equal authority on the 'correct' understanding of positive law, taken together with the kind of language it uses in official statements, give the impression that to China, diplomacy and international legal practice or in the same continuum and sometimes difficult to distinguish from one another. One illustration of this is the similarity between the language used in its human rights diplomacy and its human rights treaty practice, where the latter is mainly an extension of the former. This approach will inevitably often lead to deliberate unclarity, as studied vagueness and the use of imprecise language are common tools in diplomacy and international politics. However, it does not make it easier to determine what positive law is or ought to be in the view of the Chinese government.

One result of this is that in areas of international law where the norms are very developed and there is a lot of jurisprudence, the Chinese stance serves to erode these norms.[1214] This risk is very visible in the area of human rights, but also in the other fields of international law analysed in this thesis and has also been noted by other observers, who have referred to it as deliberate "conceptual dilution"[1215] through endorsement of norms but undermining them through rhetoric or, more generously, "selective adaptation", a mode of analysis which combines institutional and contextual perspectives and looks at "the ways that interpretation of international rule regimes is mediated by local norms."[1216] Selective adaptation is an accurate description of the process, while normative erosion and conceptual dilution are rather descriptions of its outcome. In this way, China does manifest itself as a normative actor, but one which shapes and reshapes existing norms rather than creating new ones.[1217] In terms of the theme of progress and regression in international law which was presented in the introduction, this normative impact of China's stance presents the greatest risk of regression in international law, depending on the area.

1214 The present author referred to "normative erosion" in Wim Muller, 'Chinese practice in UN treaty monitoring bodies: principled sovereignty and slow appreciation' in: Hitoshi Nasu and Ben Saul (eds), Human Rights in the Asia-Pacific Region: Towards Institution Building (Routledge, 2011) 87-104, at 88; this was an earlier version of chapter 5 of this thesis.

1215 "Conceptual dilution" was used by Eva Pils, quoted in Katrin Kinzelbach, 'Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000-2010)', *Netherlands Quarterly of Human Rights* 30 (2012) 299-332, at 332.

1216 Pitman B. Potter, 'China and the International Legal System: Challenges of Participation', *CQ* 191 (2007) 699-715, at 700.

1217 See also Rosemary Foot, 'The Responsibility to Protect (R2P) and its Evolution: Beijing's Influence on Norm Creation in Humanitarian Areas', *St Antony's International Review* 6 (2011) 47-66.

8.2.3 Impact on the international legal system

The specific impact which China has had on the developments which are transforming contemporary international law are mixed. The 'humanisation' process has been described as involving substantive and conceptual developments: at the substantive level, the development of human rights, humanitarian law and international criminal law, and at the conceptual level the development of normative hierarchy, the institutionalisation of community interests through the notions of *ius cogens* and obligations *erga omnes*, and the redefinition of international legal sovereignty.

Based on the findings of the previous chapters a conclusion can be reached that China is lagging behind in this process of humanisation, and that it is uncertain if it wants to reach the same destination as the one which has been taken so far. The same can be said with regard to the constitutionalisation of the international legal order, which is in direct contradiction with the *Lotus* approach which China adheres to, unless any move in the direction of constitutionalisation would be made through explicit consent of all states involved, a development which it is unlikely to support.

China's main objection to the processes of 'humanisation' and 'constitutionalisation' as they come forward in this thesis are political at a very general level and have to do with the perception that they are representative of western discourses which do not take sufficient accounts of the needs of developing countries. Although developing states are represented in the UN and have formal sovereign equality, they have less resources and expertise to enable them to make their voice heard at the international stage, even compared also to NGOs and other organisations which are active there.[1218] If this argument is not seen as one made out of self-interest, it rather represents a fundamental issue of legitimacy within the international order and is as such a valuable contribution. Although the importance of the developing world has been part of international legal scholarship since at least the 1970s, institutions and expertise remain concentrated predominantly in the western world and having a great power promote viewpoints from the perspective of the developing world contributes to the legitimacy and universality of international law.

1218 See also Xue Hanqin, 'Fragmented Law or Fragmented Order?', *Finnish Yearbook of International Law* XVII (2006), 55-61, at 60-61.

However, as noted there will be inevitable conflicts between China's aim of being a 'responsible power', of being a champion of the developing world, and of safeguarding its own interests. Its discourse is already subject to criticism, both from the west but also the developing world itself, and this should continue. One deficiency is its state-centric perspective, which has for example been associated in its peacekeeping with insufficient attention to civil society actors. In general, taking the interests of the developing world into account in international law should not only take into account the viewpoints by states, but also other actors and social movements.[1219]

The issues identified in this thesis all revolve around a number of contradictions in the fabric of international law. The first of these is the tension between the two purposes – descriptive and prescriptive (or in the language of the ILC statute, codification and progressive development) – of international law. In both regards, public international law is an imperfect instrument to describe and shape a more complex reality. The 'humanisation' and constitutionalisation discourses act as powerful currents in this process. Adherents sometimes confuse – be it deliberately and consciously political or because of a lack of intellectual rigour – these two dimensions to further their aims. However, these aims differ within the adherents to these discourses as well, and might clash with other values which are arguably equally important. In the case of China, this would be pluralism and universality, manifested in the wider aim to bring a government representing one fifth of the world population into the mainstream of international law, and also, crucially, to allow its voice to be heard.

A second internal contradiction of international law is its dual function as facilitating international relations (in the sense of the relationships between states) and as a system guaranteeing the international rule of law. The former, as the language of diplomacy, sometimes depends on deliberate vagueness, while a prerequisite for the latter is the clearest and least ambiguous language possible. As discussed before, this is very visible in Chinese practice. A related question concerns the difference between law and rhetoric. The Chinese government is very vocal about its adherence to international law, which masks a

1219 See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003). See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

mixed record when it comes to compliance, as well as China's unwillingness to resolve some of its issues in accordance with international law. For example, China couches its territorial claims in the language of international law and asserts the strength of its legal position, while refusing to submit these claims to international arbitration or adjudication. While the constant invocations of international law serve to legitimise the international legal system, at the same time it is not actually used.

The major themes of early twenty-first century international law are strongly embedded in China's official rhetoric: sustainable development (linked to the right to development which of which China itself has been a major proponent), good governance and the rule of law are clearly goals that the Chinese government adheres to, even if these notions are sometimes defined in ambiguous ways to gloss over political differences. This also applies to the Responsibility to Protect, although the clear red line there remains in the area of humanitarian intervention. Within the UN, all these themes are giving rise to increasingly integrated discourses. For each of these notions, their indeterminacy explains their political appeal but is also a weakness, allowing actors to pay lip service to their importance whilst violating or diluting the underlying norms which originally gave them meaning, in a way similar to that described for legal norms above.

8.3 Challenges and opportunities

China's sovereigntist approach thus presents challenges to constitutionalist and other human rights-oriented approaches to international law at both the conceptual and substantive levels, and to the achievement of an international rule of law (in its true sense) in general as it depends on precision rather than vague language. Given China's acceptance of the international legal order, its basic principles and its aims, it is submitted here that these challenges can be met to a large extent by accommodating the concerns underlying them. It should not be assumed too lightly that China's sovereign reflexes merely reflect a lack of political will or cynical and hypocritical acceptance of the international legal order to suit China's interests.

China has accepted the notion of *ius cogens* and obligations *erga omnes*, although it takes a conservative approach to the way in which states can invoke these kinds of norms.

China's position is however not out of line with the mainstream in international law, which is slowly coming to terms with these concepts – the ICJ has only started using the term '*ius cogens*' explicitly in the last decade, and even then its practical effect has been limited.[1220] Other states than China also tend to be more conservative and sovereignty-oriented in this respect than human rights-oriented international lawyers and NGOs. The same is true with regard to the question of legal personality for individuals under international law, about which there is no reason to believe that China has departed from its stance that this is incompatible with the principle of state sovereignty.

It is unclear which norms China considers to be norms of *ius cogens*.[1221] However, in its practice in human rights as well as counterterrorism and in consular relations in the *Rio Tinto* case, sovereignty has been treated as the all-important principle. It can therefore be safely concluded that China will not contribute to more verticalisation and normative hierarchy in international law and it remains to be seen if it will acknowledge the *opinio iuris* and practice of other states and international institutions such as courts and treaty bodies in this respect. Its approach to all human rights obligations as in a paradigm of progressive realisation does not bode well in this respect either, and can even be said to be at odds with the object and purpose of many human rights treaties in light of the overwhelming consensus in both western and non-western states, and the accepted practice of human rights treaty bodies, that these treaties bestow rights directly on individuals.

In addition to this conceptual challenge, China's international legal practice also presents substantive challenges to human rights law: first, its reluctance to accept potentially sovereignty-impinging powers of international mechanisms and second, its restrictive interpretation of the scope of human rights. One way to accommodate China's concerns lies in the principle of subsidiarity – accepting that states are indeed the primary guarantors of human rights, supervised by international bodies. Developing practice in this regard would however require China's accession to more intrusive treaty monitoring procedures such as the right of individual petition. However, China's practice before the Committee Against Torture and its continuing postponement of the ratification of the

1220 Resistance was strong from French international lawyers, for example Prosper Weil, 'Towards Relative Normativity in International Law?', *AJIL* 77(3) (1983) 413-442.

1221 In an essay written in her personal capacity, Xue Hanqin writes that the "fundamental principles of international law as embodied in the UN Charter" are regarded as peremptory. *Supra* note 1218, 60.

ICCPR indicate that it is unlikely to accept these kinds of competences of treaty bodies in the near future and will limit itself to state reporting. It will therefore need to be the practice of other non-western states before UN treaty bodies which may help China to become more open to this.[1222]

Another factor which may influence the attitude of the Chinese government to international institutions is the role of international norms, notably human rights norms but also WTO law, in China's domestic legal reform. As international rules continue to play a role in China's efforts to strengthen its domestic rule of law and find application in practice. This has the additional benefit that domestic actors will be pushing for these norms, thus bestowing more legitimacy on them.

8.3.1 Culture, trust and suspicion

A theme which has been explored explicitly and implicitly throughout this thesis is the question of trust in the international order.[1223] China's history with international law and the international order has been referred to many times as a reason why the PRC has found it hard to trust international institutions, and suspicions remain until today. Deeper cultural differences between China and the rest of the world are also explained through differences in history and deep-seated aspects of its mentality which are an intangible presence in the thinking of Chinese leaders.[1224] This distrust is to an extent reciprocated in the Legal Orientalism on the part of the west which has been identified in the introduction. The reality of this continuing suspicion means that all the trust-building measures which have been developed in the previous decades in the form of dialogues, exchanges, and collaborative projects should continue in order to genuinely promote mutual understanding. It also means that it should be kept in mind that what is obvious to one side,

1222 See for the current situation Ivan Shearer and Naomi Hart, 'The engagement of Asia-Pacific states with the UN Human Rights Committee: reporting and individual petitions' in: Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 17-36; Nisuke Ando, 'Human rights monitoring institutions and multiculturalism' in: Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 37-48

1223 See also Richard A. Falk, *The Status of Law in International Society* (Princeton, NJ: Princeton University Press, 1970).

1224 See also, *inter alia*, Wang Hongying, 'Understanding the intangible in international relations: The cultural dimension of China's integration with the international community' in: Zheng Yongnian (ed), *China and International Relations: The Chinese view and the contribution of Wang Gungwu* (Abingdon, Oxon and New York, NY: Routledge, 2010) 203-220.

may be a revelation to the other, and vice versa.

Suspicion also explains why it has been easier for China to engage with international norms and accept many of them, including in the realm of human rights (and despite the risk of normative erosion or dilution identified before). Its willingness to engage with these institutions nonetheless, regardless of its motivation, means that an additional method of trust-building would be just for these institutions to function properly and be seen to be even-handed and sensitive to concerns of the developing world. In this regard, it can be expected that in the immediate future, the jurisprudence of the WTO Dispute Settlement Body will have the most significant impact on China's attitude to international dispute settlement. China has already shown there that it can let go of supposed cultural inhibitions against adversarial proceedings and go into fullblown litigation. Although it is regrettable that China did not even choose to take part in the arbitration proceedings initiated against it under UNCLOS by the Philippines, a well-reasoned outcome there may also be helpful; in any case, these proceedings will be a significant test case to see if China's response can evolve beyond defensive sovereigntist rhetoric. Finally, a well-functioning International Criminal Court could also serve to strengthen belief in China that international institutions can take a truly global perspective, as many Chinese international lawyers are involved in international criminal law.

8.4 Interests, values, pluralism and universality

Another aspect of China's integration into the mainstream of international law concerns the perceived difference in values between a non-liberal China and an international order which is still predominantly based on liberal universalist values which originated in Western Europe. Rhetorical clashes between the west and China have had ideological and cultural connotations, but nowadays there appears to be a lot of common ground, as both sides subscribe to the principles of the UN Charter, human rights – both civil and political as well as economic, social and cultural – and notions such as the responsibility to protect. The proclaimed differences are in interpretation and implementation, with China emphasising the issue of priorities and progressive realisation and rejecting the liberal model not as such, but the notion that it is the *only* model. In one respect, this reflects the indeterminacy

and generality of the rhetoric of the 'international community' described above. However, it also raises the question of the nature of the international community. In some liberal views, all roads lead to liberal democracy along more or less western models. However, a truly pluralist international society which accommodates cultural diversity and accepts the principle of self-determination, would accept that countries can also take a different development path, as emphasised by China. Whether China will really develop its own development path or head towards liberal democracy remains unknown.[1225]

Equally important as the content of this outcome is the process by which the 'international community' gets there. International law aspires to be universal. Separately, human rights are also considered to be universal, and have been proclaimed as such by the Vienna Declaration and Programme of Action of 1993 with almost universal participation. The exact nature of this universality can and is however still debated. It is submitted here that in both cases, universality should be seen as an aspiration – a modest or humble[1226] approach to claims of universality – rather than an ontological truth, and that the aim of achieving universality continually influences the process in which international law changes and evolves. From this perspective, China's participation in the international legal order, even if disruptive at times, has strengthened its universality.

It is somewhat ironic that China promotes pluralism at the international level, but encourages it less in practice domestically, while liberal states have promoted more pluralism domestically while promoting a less pluralist model at the international level. Regardless of China's own deficiencies, its calls for pluralism and "democracy in international relations" reflect a legitimate point of criticism which should be taken into account in order to enhance the legitimacy and universality of the international order.[1227]

1225 See, *inter alia*, Randall Peerenboom, *China Modernizes: threat to the west or model for the rest?* (Oxford: Oxford University Press 2007).

1226 See also Falk, *supra* note 1223.

1227 For the question of universality, see also Onuma Yasuaki, 'A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century', *Recueil des Cours* 342 (2009) 77-418; C.G. Weeramantry, *Universalising International Law* (Leiden and Boston: Martinus Nijhoff, 2004); Jonathan I. Charney, 'Universal International Law', *AJIL* 87 (1993) 529-551; Pahuja, *supra* note 1219.

8.5 An 'East Asian' approach to international law?

The search for an 'Asian' approach to international law continues to this day. It is evidenced by the recent establishment of the Asian Society of International Law (AsianSIL), which already has cousins in the American and European Societies of International Law. The AsianSIL also gave birth to the *Asian Journal of International Law*.

It is difficult to speak of an 'Asian approach' to international which encompasses the entire continent, the largest of all the continents in the world and home to several civilisations. It includes a large part of the Arab world, Iran, Russia, Pakistan, India, and the regions of Southeast Asia and East Asia, which have all had their own identities for a long time. India, China, and Iran can be called 'civilisational nation-states' (the contradictions of which will be discussed). Therefore, a monolithic 'Asian approach' to international law does not exist. It may however be possible to identify regional approaches: the Southeast Asian states have been cooperating in ASEAN for a considerable time already, despite major differences between the political systems of its member countries, which have been allowed to survive thanks to the sovereignty-related principle of non-interference in internal affairs. An 'East Asian' approach has also been identified, although it is unclear if Japan and China can be grouped together.[1228]

To an extent, TWAIL scholarship can be seen as an 'Asian' contribution to international law, although TWAIL scholars have also originated elsewhere in the developing world, notably in Africa. In his description of TWAIL rhetoric, B.S. Chimni repeats many phrases which will by now be familiar from China's international law discourse. "The essence of TWAIL scholarship is anti-imperialism, the need for the democratization of international relations, and the imperative of peaceful dialogue based on the principle of equality between all civilizations in the world."[1229] Inter-civilisational dialogue has in particular been emphasised by Asian scholars, including Xue Hanqin, Onuma Yasuaki, and C.G. Weeramantry.[1230] Many Asian accounts are counched in history, like

1228 Rather unconvincingly, Samuel P. Huntington considered the two as separate civilisations in his vastly overrated *The Clash of Civilizations and the Remaking of World Order* (New York, NY: Simon & Schuster 1996).

1229 B.S. Chimni, 'Asian Civilizations and International Law: Some Reflections', *Asian Journal of International Law* 1 (2011) 39-42, at 42.

1230 Xue Hanqin, 'Meaningful Dialogue Through a Common Discourse: Law and Values in a Multi-Polar

the Chinese.[1231]

Asian states have contributed to the law of decolonisation, and one author cites the weight of their combined vote in various General Assembly resolutions, such as the Declaration of a New International Economic Order, the Declaration of Permanent Sovereignty over National Resources, the Convention on the Law of the Sea and the Declaration on Friendly Relations and Cooperation.[1232] Writing in 1993, one observer noted that

> Asia, with over 50 per cent of the world's population concentrated in about 15 per cent of the earth's land surface, is yet to make her real contribution to international law. Although it is true that certain areas of international law by reason of wealth and resources are more appropriate for the great powers such as the law of space, the initiation of concepts and their wholehearted advocacy by Asian States in respect of matters relevant to Asia, has not been marked.[1233]

Allowing for the importance of balancing the historical narrative of international law to include non-Western perspectives, the question remains whether the approaches and principles promoted by TWAIL and other non-Western scholars leads to an altogether different understanding of the principles cited most often: peaceful dialogue, peaceful coexistence, and respect for sovereignty have after all been fundamental principles of international law for a long time already. What remains is then the 'democratisation' of international relations, which is primarily a political aim but does not reveal a distinctive methodology or philosophy of international law.

In the analysis of d'Aspremont, one significant difference between western liberal and constitutionalist scholars of international law on the one hand and Asian scholars on the other, is that western scholars tend to analyse the legal order through the lens of values, but Asians rather through that of interests, encompassing both individual and common interests.[1234] It can be said that Asian scholars may align more with realist thinking in international relations which is also more geared towards interests, and can be explained

World', *Asian Journal of International Law* 1 (2001) 13-19. See also Onuma; Weeramantry, *supra* note 1227.

1231 See e.g. R.P. Anand, 'Changing Dimensions of International Law: An Asian Perspective', *Collected Courses of the Xiamen Academy of International Law* 1 (2006) 17-158 and Onuma, *supra* note 1227.

1232 See *infra*, 2.3.3.

1233 Jeremy A. Thomas, 'History and International Law in Asia: A Time For Review?' in: R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (The Hague: Kluwer, 1993) 813-857, at 856.

1234 Jean d'Aspremont, 'International law in Asia: the limits to Western constitutionalist and liberal doctrines', *Asian Yearbook of International Law* 13 (2008) 89-111.

through historical factors such as those that apply in China. It seems that in order to promote universality, defining common interests may help prevent the kind of civilisational and cultural controversies which would be associated with discussion about values.[1235]

This brief discussion of international law in Asia does not suggest that there is a distinct Asian approach to international law, but that there seem to be commonalities between Asian countries. China's sovereigntist approach seems less exceptional when seen through a regional perspective.

8.6 Dinner in Meseberg

On 26 May 2013, PRC Premier Li Keqiang attended a state dinner with the German Chancellor Angela Merkel. On his first foreign trip as prime minister, Germany was the only EU member state Li visited, and among the topics discussed was a trade row between China and the EU on solar panels, which may or may not end up before the WTO DSB.[1236] Earlier that day, Li had made a tour of the site of the Potsdam Conference in the state of Brandenburg in Germany, accompanied by its Governor.[1237] He reviewed copies of the Potsdam Declaration and the Cairo Declaration, which were issued on 26 July 1945 and 27 November 1943, respectively, by US Presidents Harry S. Truman and Franklin D. Roosevelt, UK Prime Minister Winston Churchill and ROC government chairman Chiang Kai-shek, and set the terms for the Japanese surrender in World War II. Li recalled that according to its terms, "all the territories that Japan had stolen from China, such as Northeast China, Taiwan and related islands, shall be restored to China." He described the Allied victory as one "secured at the price of tens of thousands of lives and an important underpinning of the world order established after WWII", which should be upheld by "[a]ll peace-loving people". Premier Li then pointed out "that history is an objective existence and a mirror and cited the ancient Chinese 'By looking into a mirror, one can make sure that he is dressed properly'. Only by facing history squarely, can one have a future." China stood ready "to

1235 However, taking a sufficiently longterm view, values and interests may well converge.

1236 See <www.epa.eu>, image no. 50848210, for a photograph of Li and Merkel during the dinner. See also 'Duitsland wil ruzie EU en China voorkomen', *de Volkskrant*, 26 May 2013. <http://www.volkskrant.nl/vk/nl/2680/Economie/article/detail/3447530/2013/05/26/Duitsland-wil-ruzie-EU-en-China-voorkomen.dhtml> [26.5.2013]

1237 FMPRC, 'Only by Facing History Squarely Can One Embrace the Future, Premier Li Keqiang Stresses', 26 May 2013. <http://www.fmprc.gov.cn/eng/zxxx/t1043950.shtml> [26.5.2013]

work with Germany and Europe to further maintain world peace and promote common development."

The purpose of the study of history is usually to understand the present better. Often, it also allows one to take more distance from events in the past. The strong wording of Premier Li regarding territories "stolen" from China suggests that in the official rhetoric of the PRC, this is not yet the case. At the same time, it is remarkable for a PRC leader to refer to a declaration made by the ROC, even if it was the legitimate representative of China at the time. As important as history is to China, and its sovereignty because of its collective memory of humiliations past, the present affords both China and the international legal order enough opportunity to move beyond both and face the challenges of the future. The international legal order has always been characterised by continuity and change, as is inherent in any legal system. As a country which has seen its share of revolutionary change, China has been trying to allow the system to accommodate its increased prominence as smoothly as possible, even if there have been setbacks. This has resulted in a 'win-win' situation, to use Chinese terminology, for most participants involved. There is no reason for undue pessimism that this will continue in the foreseeable future.

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Note

Traditionally, Chinese names are written in the order [Family name][Given name]. To accommodate western audiences, Chinese authors frequently reverse the order of their names in publications. To avoid confusion, the family name is depicted in SMALL CAPITALS.

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