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The Development of International Law in Post-Mao China: Change and Continuity

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INTRODUCTION

International law as a behavioral guide in international relations seems to be in a precipitous decline in its traditional strongholds in the West, especially in the United States under the Reagan Administration. The constitutional mandate that "all Treaties . . . shall be the Supreme Law of the Land" seems to have fallen by the wayside, and the UN Charter, an international treaty of the highest order, has long since lost its normative potency and relevance in constitutional debates on U.S. foreign policy.[1]

However, to extrapolate about the future prospects of international legal order from the global unilateralism of one superpower[2] is to miss the context of a larger, evolving global reality. The perception of the role of international law in the context of international affairs has changed considerably in the hitherto forgotten two-thirds of humankind. Translating its numerical power into "normative

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1. U.S. CONST. art. VI. For the demise of international law in the conduct of Reagan's foreign policy, see F. BOYLE, WORLD POLITICS AND INTERNATIONAL LAW (1985), especially chs. 12-19, and L. BERES, AMERICA OUTSIDE THE WORLD: THE COLLAPSE OF U.S. FOREIGN POLICY 33-40, 55-59, 104-07, 111-15 (1987).

2. The global unilateralism of the United States during much of the Reagan Administration was shown by its disregard of international law, as in the funding of the Contra insurgency against the Sandinista government, the mining of the Nicaraguan waters, the invasion of Grenada, the bombing of Tripoli, the covert assistance for the National Union for the Total Independence of Angola (UNITA), and the withholding of assessed UN dues.

power,"[3] the Third World as a collective global actor has now turned the United Nations General Assembly into the central global forum for projecting its will as the *opinio juris communis* and for establishing itself as the shaper of the future international order.[4] The case of *Nicaragua v. United States* is the latest expression of a new willingness of a socialist David to challenge a capitalist Goliath in the principal judicial organ of the United Nations.[5] Yet another reminder of the changing nature of contemporary international law is the legal development that has taken place in post-Mao China.

This article is concerned with the legal dimension of Chinese international relations in the post-Mao era. Specifically, the article centers on the question of how and to what extent the changes in leadership and policy at home have affected Chinese attitudes toward, and principles and practices of, international law. While its focus is largely limited to the post-Mao period of 1977-1986, the article attempts to provide a diachronic analysis, drawing upon relevant findings about China's principles and practices during the Maoist period as a baseline for assessing the changes and continuities in the Chinese theory and practice of international law in the past decade.

The article contains five sections. The first section provides a brief synoptic overview of the domestic political context of the rejuvenation of international law in post-Mao China; the second discusses the elusive quest for a Chinese theory of international law; the third section attempts to decipher basic Chinese attitudes and concepts in terms of the traditional and contemporary sources of international law; the fourth section addresses the principle/practice fit within the framework of the Five Principles of Peaceful Coexistence; and the concluding section recapitulates the major lines of continuity and change in the Chinese attitude and practice of international law, and

3. By "normative power," I mean the ability to define, control, and transform the agenda of global politics and to legitimate a new dominant paradigm. *See* S. KIM, THE QUEST FOR A JUST WORLD ORDER 44 (1984).

4. For a more extensive analysis of this theme, see Kim, *The United Nations, Lawmaking and World Order*, 10 ALTERNATIVES: A JOURNAL OF WORLD POLICY 643 (1985).

5. The prodedural posture of the case is summarized as follows. On April 6, 1984, the United States withdrew unilaterally from the jurisdiction of the Court in defiance of the six-month withdrawal notice rule. A month after Nicaragua formally brought suit, the ICJ, by a unanimous decision of its fifteen judges (including the U.S. judge), issued a restraining order directing the United States to "cease and refrain" from the mining of Nicaraguan waters or from blocking access to Nicaraguan ports in any way. On November 26, 1984, the Court rejected (by a vote of 15 to 1) the U.S. contention that it had no jurisdiction and started its proceedings. On January 18, 1985, the United States walked out of the case in defiance of the court's rules, the first time since it joined the tribunal in 1946. On October 7, 1985, the United States withdrawal from the Court's compulsory jurisdiction became effective.

For a wide spectrum of legal opinions and commentaries on this case, see *Appraisals of the ICJ's Decisions: Nicaragua v. United States (merits)*, 81 AM. J. INT'L L. 77 (1987).

it explains the redefinition of contemporary international law in terms of the reformulation of the central challenge of post-Mao Chinese foreign policy.[6]

I. THE POST-MAO DEVELOPMENTAL LEAP

The legal profession in post-Mao China is now in a state of "hundred flower and hundred school" renaissance. In the 1950s, there were only 2,500 full-time and 300 part-time lawyers working in 800 legal advisory offices throughout the People's Republic of China. The practice of law was banned as a result of the 1957 anti-rightist campaign,[7] and not until 1979 was "socialist legality" restored and the legal profession revived. By July 1986, when the First National Congress of Lawyers was convened, the legal profession of China could claim 20,000 members;[8] by 1990, China is projected to have 50,000 legal workers.[9] Clearly, the legal profession has recovered and has taken its place in the accelerated march towards modernity.

The restoration and rejuvenation of international law was a natural outcome of the change of top leadership at the epochal Third Plenum of the Eleventh Central Committee of the Communist Party in December 1978.[10] The Plenum symbolized the ascendancy of Deng

6. For a more detailed analysis of Chinese foreign policy along this line, see Kim, *Foreign Relations*, in CHINA BRIEFING 1987 at 69 (J. Major & A. Kane eds. 1987) [hereinafter *Foreign Relations*].

7. *See* Wang Gangyi, *Economic Boom Spurs Big Leap in Legal Work*, China Daily, Oct. 8, 1985, at 1.

8. Renmin Ribao [hereinafter RMRB] (People's Daily), July 8, 1986, at 4.

9. RMRB, July 13, 1986, at 4 (overseas ed.).

10. The development of international law, especially during the Maoist era, did not always coincide with that of domestic law. In fact, the most vigorous debate on international law occurred during the period 1957-1960 when the domestic legal profession was already on the decline.

Tellingly enough, the entry into the United Nations in 1971 had no immediate visible effect in rejuvenating the international legal profession in China. Chinese legal practice during the period 1971-1978 was self-consciously limited in scope and subject. China's participation in the Sixth (Legal) Committee was more symbolic than substantive, focusing on a few highly political issues (*e.g.*, the definition of aggression, the Charter review question, and terrorism). Although the Chinese never used the term "new international legal order" (*xin guoji falü zhixu*), the Chinese legal practice during the 1970s clearly suggested an orientation in the direction of joining the Third World for the establishment of a new international legal order.

For the pre-entry period of 1949-1971, see J. COHEN & H. CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY, (1974) [hereinafter COHEN & CHIU]; Edwards, *The Attitude of the People's Republic of China Towards International Law and the United Nations*, in PAPERS ON CHINA 235 (1963); Chiu, *Communist China's Attitude Toward International Law*, 60 AM. J. INT'L L. 47 (1966); Chiu & Edwards, *Communist China's Attitude Toward the United Nations: A Legal Analysis*, 62 AM. J. INT'L L. 20 (1968); and J. HSIUNG, LAW AND POLICY IN CHINA'S FOREIGN RELATIONS (1972) [hereinafter HSIUNG].

For analyses of Chinese international legal behavior during the 1970s, see Chiu, *China and the Law of the Sea Conference*, in CHINA IN THE GLOBAL COMMUNITY 187 (J. Hsiung &

Xiaoping as the paramount leader of post-Mao China and marked the inauguration of the post-Mao modernization drive and opening to the outside world. Moreover, Deng's speech, "Emancipate the Mind, Seek Truth From Facts, and Unite As One in Looking to the Future," is frequently cited and regarded as the opening salvo in the post-Mao development of international law.[11]

In the speech, Deng authoritatively proclaimed that the Central Committee had finally advanced the redirection of all Party work to the four modernizations as "the fundamental guiding principle."[12] He then suggested that "democracy" could not be promoted or ensured without strengthening the legal system. The trouble with China's legal system, he said, was that it was incomplete, arbitrary, capricious, and constantly shifting with the changing views and opinions of leaders. Deng proposed a rapid and radical transformation from the rule of man to the rule of law as a more reliable instrument in the drive toward democratization and modernization, and urged that "we should also strengthen our study of international law."[13]

The response of Chinese scholars and bureaucrats to Deng's challenge was swift. Indeed, the year 1979 was a historical turning point in the development of international law in China. The list of "first-ever" inaugural events in 1979 includes a Planning Conference on the Study of Law, held in Beijing in March. The conference adopted an eight-year plan for the study of law, including international law, and the publication of a scholarly article entitled, "We Must Strengthen International Law Research," which was written by two leading international law scholars and published in the authoritative *Renmin Ribao* (People's Daily). The article echoed Deng's challenge and led off the post-Mao explosion of scholarly publications on

S. Kim eds. 1980); J. GREENFIELD, CHINA AND THE LAW OF THE SEA, AIR, AND ENVIRONMENT (1979); Kim, *The People's Republic of China and the Charter-Based International Legal Order*, 72 AM J. INT'L L. 317 (1978) [hereinafter *Charter-Based Legal Order*]; S. KIM, CHINA, THE UNITED NATIONS, AND WORLD ORDER (1979), especially ch. 8; Lichtenstein, *The People's Republic of China and Revision of the United Nations Charter*, 18 HARV. INT'L L.J. 629 (1977); Ogden, *Sovereignty and International Law: The Perspective of the People's Republic of China*, 7 N.Y.U.J. INT'L L. & POL. 1 (1974); Ogden, *China and International Law: Implications for Foreign Policy*, 49 PAC. AFF. 28 (1976); Ogden, *The Approach of the Chinese Communists to the Study of International Law, State Sovereignty and the International System*, 70 CHINA Q. 315 (1977); Ogden, *China's Position on U.N. Charter Review*, 52 PAC. AFF. 210 (1979); Tsien, *Conception et Pratique du Droit International Public en Republique Populaire de Chine*, 103 JOURNAL DU DROIT INTERNATIONAL 863 (1976): G. SCOTT, CHINESE TREATIES: THE POST-REVOLUTIONARY RESTORATION OF INTERNATIONAL LAW AND ORDER (1975).

11. For the text of the speech, see DENG XIAOPING, DENG XIAOPING WENXUAN (1975-1982) (Selected Works of Deng Xiaoping (1975-1982)) 130 (1983) [hereinafter DENG].

12. *Id.* at 130.

13. *Id.* at 136-37.

international law.[14] Also, seven basic laws were promulgated, including the Law of the PRC on Joint Ventures Using Chinese and Foreign Investment — the first act of what has come to be known as "Open Door Legislation." In September, Peking University, for the first time in its history, admitted thirty students as *undergraduate* majors in international law, and the same month, China sent three prominent international legal scholars (Chen Tiqiang, Huang Jiahua, and Sun Lin) to the Ninth World Jurist Congress in Madrid. Finally, the 34th Session of the UN General Assembly (1979) marked the debut of full-fledged Chinese participation in the legal domain of UN politics.

One measure of the post-Mao development of international law is the rapid growth of the legal profession in this field. For example, the founding conference of the Chinese Society of International Law in February 1980 was "attended by more than 200 delegates and guests" from various universities, research institutes and government agencies.[15] By the end of 1985, the membership of the Society reached nearly 500. During the same period, three major international law research centers were established at Peking University, Wuhan University, and the Foreign Affairs Institute.[16] Also, after a hiatus of a decade and a half, there has been a quantitative explosion of scholarly articles and monographs. The number of international law articles reached 13 in 1979, up from zero in the period 1965-1978, then rose to 23 in 1980 and 1981, 73 in 1982, 116 in 1983, and 110 in 1984.[17] In 1981, a two-volume treatise entitled *Guojifa* (International Law) by the late Zhou Gengsheng, the dean of Chinese international jurists in the 1950s and 1960s, was posthumously published.[18] Also in 1981, the first Chinese textbook on international law (hereinafter referred to as the "1981 textbook"), authored by twenty Chinese international

14. Wang Tieya & Wei Min, *We Must Strengthen International Law Research*, RMRB, Mar. 30, 1979, at 3.

15. Xu Hegao, *The Founding of the Chinese Society of International Law and Its Activities*, ZHONGGUO GUOJIFA NIANKAN 1982 (China Yearbook of International Law 1982) 305 (1982) [hereinafter CHINA YEARBOOK 1982].

16. Huan Xiang, *The Work of the Past Five Years in Chinese International Legal Research and its Future Direction*, ZHONGGUO GUOJIFA NIANKAN 1986 (China Yearbook of International Law 1986) 311-12 (1986) [hereinafter CHINA YEARBOOK 1986].

17. For a comprehensive bibliography of all international law articles published in China in the period 1979-1984, see CHINA YEARBOOK 1986, *id.* at 625-42.

18. This monumental work was completed in 1964, five years before the author passed away. Zhou was widely regarded the dean of Chinese international jurists during the first two decades of the PRC. The book was apparently "published" in limited numbers as *neibu* (internal classified) materials in 1976 but allowed to be published by Beijing's commercial publishing house (*Shangwu Yinshu Guan*) in 1981. ZHOU GENGSHENG, GUOJIFA (International Law) (1981). For a comprehensive review essay, *see* Chen Tiqiang, *Book Review: Zhou Gengsheng's International Law 1981*, in CHINA YEARBOOK 1982, *supra* note 15, at 375.

law scholars, was published.[19] Between 1982 and 1986, about two dozen scholarly books on general or specific issues of public international law were published.[20]

The burgeoning literature of international law in post-Mao China provides an important barometer of the general attitude and direction of official legal thinking and practice. In both traditional and new China, the notions of independent, critical scholarship and of an independent judiciary challenging the official orthodoxy are alien, as well as a dangerous, ideas to contemplate. When some scholars take this risky approach, they have done so (at least until recently) through the use of Aesopian language fraught with literary and historical allusions and metaphors, which posed an additional interpretational problem for the outside analyst. Judging by the rapid proliferation of international law literature, in contrast with the paucity of scholarly literature on foreign policy and international relations, it seems that Chinese international legal scholars have more freedom of expression than their counterparts in political science or foreign policy. This is largely due to the fact that foreign policy and international relations are seen as subjects with a higher level of sensitivity, whereas the study of international law, which is only an instrument of foreign policy, is viewed more as an academic exercise that allows more room for scholarship.

Still, for analytical purposes, one may accept as a working proposition that scholarly opinions are expressive of the "party line" at a given time. Scholarly opinions are especially revealing on those issues and questions where the official position remains unstated or where official documents are inaccessible. Moreover, Chinese international legal scholars have been exerting their influence through participation as members of Chinese delegations to law-making conferences (espe-

19. GUOJIFA (International Law) (Wang Tieya ed. 1981) [hereinafter GUOJIFA].

20. Only books of a general nature need be mentioned here: CHEN TIQIANG, GUOJIFA LUNWEN JI (Collected Essays on International Law) (1985); GUOJIFA JIANGYI (Teaching Materials on International Law) (Faxue Jiaocai Bianjibu (Editorial Department of Legal Teaching Materials) ed. 1983); GAO SHUYI, WU QI, & LI CHUNFU, GUOJIFA JIANGYI (Teaching Materials on International Law) (1981); GUOJIFA JIANGYI (SHIYONG BEN) (Teaching Materials on International Law (Trial edition)) (Shijiazhuang Falü Chubanshe ed. 1983); LIU FENGMING, XIANDAI GUOJIFA GANGYAO (Essentials of Modern International Law) (1982); XIANDAI GUOJIFA GANGYAO (Essentials of Modern International Law) (Liu Weimin ed. 1982); SHENG YU & WEI JIAJU, GUOJIFA XIN LINGYU JIANLUN (An Introduction to the New Frontiers of International Law) (1984); GUOJIFA, *supra* note 19; GUOJIFA ZILIAO XUANBIAN (Selected Materials on International Law) (Wang Tieya & Tien Ruxuan eds. 1982); GUOJIFA GAILUN (An Introduction to International Law) (Wei Min *et al* eds. 1986) [hereinafter GAILUN]; GUOJIFA LUNJI (Collection of Symposium Essays on International Law) (Zhao Lihai ed. 1981); ZHAO LIHAI, LIANHEGUO XIANZHANG DE XIUGAI WENTI (Problems with the Revision of the United Nations Charter) (1981); and ZHU LISUN, GUOJI GONGFA (Public International Law) (1985).

cially in the Third United Nations Conference on the Law of the Sea (UNCLOS-III)) as well as through participation in those international nongovernmental organizations (INGOs) concerned with the normative aspects of global problems.[21] Increasingly, Chinese legal scholars are called in for behind-the-scenes consultations on various perplexing legal issues confronting Chinese foreign policy makers.[22]

II. In Search of a Marxist Theory with Chinese Characteristics

Despite the quantitative explosion of scholarly articles and books in the past eight years, there is as yet no coherent or sanctioned Chinese theory of international law. The plethora of publications is matched by the poverty of theorizing. Chinese international legal scholars are self-consciously cautious in grand theorizing about international law. Wang Tieya, Professor of International Law at Peking University and the leading academic authority, is constantly urging his graduate students and younger scholars to concentrate on "practical" or policy related issues.[23]

It seems that in academe, the post-Mao maxim that "practice is the sole criterion of truth" has been reformulated as the *modus operandus* "practice is the sole criterion of theorizing." At the 1986 meeting of the China Law Society, for example, Chinese international legal scholars were prodded "to make an in-depth study of the important theoretical issues of international law and, on this basis, to gradually establish a theoretical system of international law for China. To do so, they should sum up developments in international law since World War II and bring to light the basic character of modern international law, its nature and its development trend."[24] In a similar vein, Vice-Premier Qiao Shi formulated the challenge to scholars as follows:

21. In the post-Mao period of 1977-1984, China's INGO membership increased fivefold from 71 to 355. Union of International Association, 2 Y.B. Int'l Orgs. 1481 (K.G. Saur ed. 1985). Examples of these organizations include the Asian-African Legal Consultative Committee, the International Standardization Organization, the World Federation of United Nations Associations and the International Council of Scientific Unions.

22. The Chinese scholars whom I interviewed in 1985-1986 were all in agreement on this point. They single out specifically UNCLOS-III and the Huguang Railway Bond Case as examples where the advice of Chinese legal scholars influenced government actions. *See* text accompanying notes 107-08, *infra*.

23. This observation is based on an interview with Professor Wang Tieya in Beijing, May 22, 1986, and is confirmed by interviews with younger Chinese scholars in China and in the United States.

24. Shao Tienren, *International Law Undergoing Change*, China Daily, June 19, 1986, at 4. Shao used to be Director of the Department of Treaties and Law of the Foreign Ministry and was, at the time of this speech, advisor to the Foreign Affairs Committee of the National People's Congress.

"Since there is no experience or model to copy, Chinese jurists must emancipate their minds, boldly explore and be good at summing up their experience under the guidance of the basic principles of Marxism so as to develop the Marxist science of law with Chinese characteristics."[25]

Chinese international legal scholars are currently preoccupied with trying to cover lost ground. This takes the form of textbook writing and revising or describing the "progressive development and codification of international law." Much of the Chinese literature is confined to descriptive analyses of the works of Western scholars on various international legal issues and problems. It seems that Chinese scholars still have some distance to go before they can feel intellectually ready to seek theory from practice.[26]

There is also a political reason for the absence of theoretical debate or work in the post-Mao scholarship on international law. The grand theoretical debates in the late 1950s on the class nature of international law and on how many international legal systems existed in the bipolar world were cut short by the anti-rightist political campaign. In its wake, the nascent development of an international legal community was stifled and many prominent international legal scholars were purged. There is no assurance that another round of theoretical debates now will not spill over into the political and ideological domain, opening a new Pandora's box. Thus, at the inaugural meeting of the Chinese Society of International Law in February 1980, Huan Xiang, President of the Society, formulated the challenge ahead in a politically safe but conceptually elusive way: as a progressive development of New China's own theory and system of international law guided by Marxism-Leninism and Mao Zedong Thought that

25. *See Vice Premier Qiao Shi Speaks on Law Research* (Foreign Broadcast Information Service — Daily Report: China [hereinafter FBIS] trans. May 27, 1986, at K28).

26. The "practice first" and "theory later" approach is also anchored in the epistemological premise that it is up to practice to provide a theory, not the other way around. Contrary to popular belief, the Dengist maxim of "seeking truth from facts" (*shishi qiushi*) is Maoist in origin. As a practical theorist, Mao was constantly striving toward a theory of praxis: "Marxism emphasizes the importance of theory precisely and only because it can guide action." 1 SELECTED WORKS OF MAO TSE-TUNG 304 (2d ed. 1967).

For a detailed analysis, see S. KIM, CHINA, THE UNITED NATIONS, AND WORLD ORDER (1979), especially ch. 2.

Hu Sheng, President of the Chinese Academy of Social Sciences, presents a dialectical view of the development of social science in post-Mao China. The current period since the Third Plenum (1979-1986) has witnessed the most rapid and remarkable development of social science since the founding of the PRC, yet this development is still far from meeting "the requirements of the new historical period." The new challenge and requirement of Chinese social scientists, Hu Sheng asserts, is "to give full play to the role of theory advancing ahead of practice and to its feedback role." *See* Cui Wenyu & Zhao Wei, *Hu Sheng on "Not" Seeking Answers from Marxism* (FBIS trans. Oct. 30, 1986, at K5).

integrates China's international practice.[27] In short, Chinese scholars are challenged to develop a Marxist theory of international law with Chinese characteristics. In view of the crisis of faith in post-Mao China which emanates from an ever-widening disjuncture between Marxist theory and non-Marxist practice, meeting this challenge seems to be a mission impossible for most Chinese scholars to undertake. Most Chinese international law scholars seem unable or unwilling to fully embrace or completely reject Marxism-Leninism-Mao Zedong Thought, and it is this dilemma that hinders international law theorizing in post-Mao China.[28]

To a certain extent, the absence of theoretical debate in Chinese international legal scholarship is evidence of a general agreement on the nature of contemporary international law. Chinese scholars apparently agree today that there is but one international law applicable to all international actors. This is reflected in the collaborative 1981 textbook, which defines international law as "mainly the law among the states" and "the sum total of principles, rules, regulations and systems which are binding and which mainly regulate interstate relations."[29] This definition is devoid of any reference to the Marxist theory that law is part of the superstructure reflecting the world view of the dominant class. The post-Mao literature of international law has largely kept the class struggle theory in limbo, in tune with the shift from an ideology-oriented to an interest-oriented pragmatic foreign policy.[30] "In international society there is no ruling class," stresses the 1981 textbook, "nor is it possible to have such a class."[31] Marxist ideology, while still bandied around in domestic politics, is

27. *See* CHINA YEARBOOK 1982, *supra* note 15, at 306.

28. Chen Tiqiang captured this sense of ideological malaise when he said: "We must not discard Marxism-Leninism because of our disagreement with Soviet international lawyers. We must not throw away the baby with the bath water." Chen Tiqiang, *The People's Republic of China and Public International Law*, 8 DALHOUSIE L.J. 16 (1984).

29. GUOJIFA, *supra* note 19, at 1. Chen Tiqiang, another prominent PRC international legal scholar, defines international law as embodying "all the principles, norms, rules and institutions governing the relations among states." *See* Chen, *supra* note 28, at 3.

30. The post-Mao development of Chinese foreign policy can be divided into three periods: (1) a continuity period from September 1976 to May 1978, when Hua Guofeng tightly embraced Mao's Three-Worlds Theory as the cardinal strategic principle; (2) a balance-of-power, quasi-alliance period from May 1978 to mid-1981, when China and the United States moved on a parallel anti-Soviet track; and (3) a readjustment period from mid-1981 (albeit officially proclaimed in September 1982) to the present during which an independent, non-aligned policy based on the Five Principles of Peaceful Coexistence has been proclaimed and pursued. In the domain of global political economy, however, the Chinese "open door" policy has remained fairly consistent since late 1978. For a more detailed elaboration, see Kim, *Chinese World Policy in Transition*, 1 WORLD POL'Y J. 603 (1984), and *Foreign Relations*, *supra* note 6.

31. GUOJIFA, *supra* note 19 at 9.

regarded as irrelevant in the context of contemporary international relations. The particular foreign policy action of any country in the world, declares Vice Foreign Minister Qian Qichen, "cannot simply be determined by judging which social system and ideology the responsible party adheres to, but by judging if the action helps to ease international tension, maintain world peace and promote common prosperity."[32]

This shift from a Marxist to a functional orientation becomes more evident when we examine the Chinese writings of the Maoist era. Zhou Gengsheng, whose two-volume treatise on international law may be accepted as expressive of the general attitude and thinking of the Maoist period, especially during the 1960s, asserts that international law, while different from domestic law, also shows the will of the ruling classes in different states. In fact, the class character is mentioned as one of the four characteristics of international law,[33] but this embodiment of the class character is a "reconciled will" (*xietiao de yizhi*), not a "common will" (*gongtong de yizhi*).[34] This reconciled will, Zhou further argues, constitutes what the Western bourgeois scholars call the "basis" of international law, and it is made manifest by way of conventions and treaties.[35] Beyond this Zhou refuses to go, neither explaining the meanings of "common will" and "reconciled will" nor the differences between the two. This ambiguity in the first and semi-official treatise suggests that Chinese international law thinking at that time was in transition from a class-oriented to a functional perspective.[36]

Chinese thinking on the nature of international law has fluctuated over the years. In the 1950s, much of the debate followed the Soviet model of mechanically transplanting Marxist theory of domestic law to international law — that the superstructure of the state, including its legal system, expresses the economic base of the state and serves the interests of its ruling class. International law was still regarded as necessarily possessing a class character, even if expressed in a compromise of the wills of the ruling classes of states having different social and political systems. Even among some scholars

32. *Qian Qichen Reviews China's Foreign Policy*, BEIJING REV. Jan. 6, 1986, at 14. An identical point was made by Premier Zhao Ziyang in his report on the Seventh Five-Year Plan. *See* Zhao Ziyang, *Report on the Seventh Five-Year Plan*, BEIJING REV. Apr. 21, 1986, at xvii.

33. ZHOU, *supra* note 18 at 3-8.

34. *Id.* at 8, 11.

35. *Id.* at 11. This is a restatement of the definition in a textbook. *See* COHEN & CHIU, *supra* note 10, at 47-48.

36. Chen Tiqiang points out that Zhou's treatment of the class character of international law is one of the most problematic features of the book, but asserts that the debate on this question is likely to continue. *See* Chen, *supra* note 18, at 380.

espousing the universalist view that there is only one international law applicable to all states, there was no easy escape from the class nature of international law. Zhou Ziya, for example, argued that continuity in the development of international law lies in the class structure of international society.[37] In the 1960s and much of the 1970s, there was no open debate on this question, but one may deduce from Zhou Gengsheng's monumental work, completed in 1964, that the issue was kept alive. In the 1980s, the issue is no longer of dominant concern in Chinese scholarship and statesmanship. The late Chen Tiqiang stands out as an exception with his insistence on the continued relevance of class analysis.[38]

In general, Chinese scholars today embrace a practical, interest-oriented view of international law. They do not view it as some abstract body of doctrines divorced from the changing political, economic and social processes at work in the world. Even among the minority of "hard liners," such as Chen Tiqiang, who insists on a class analysis of international law, the basic nature of contemporary international law is interpreted in a manner congenial to China's active and contributory participation in the existing international legal order. A more dominant and mainstream approach in the post-Mao era, as epitomized in the work of Wang Tieya, conceptualizes international law as an integral part of international relations.[39]

That Chinese thinking on the question of whether international law is really law has taken the functional approach can also be seen in its severe criticism of the traditional Austinian positivist school.[40] If

37. Zhou Ziya, *The Nature and Character of Modern International Law*, 7 XUESHU YUEKAN (Academic Monthly) 71 (1957).

38. In an article published in January 1984, several months after his death in Beijing, Chen forcefully argues that the consensual character of contemporary international law makes it impossible for any one ruling class to impose its will as the will of the international community. Chen, *supra* note 28, at 18. *See also* CHEN, *supra* note 20, for his thinking on a wide array of international legal issues.

39. At the founding conference of the Chinese Society of International Law in February 1980, Wang Tieya proposed the establishment of "a specialty of the science of international relations as a foundation for studying international law." This international relations/international law nexus is reflected in all of his published work. *See* CHINA YEARBOOK 1982, *supra* note 15, at 308 for Wang's proposal. *See also* Wang Tieya, *Present Trends of International Law*, 2 BEIJING DAXUE XUEBAO (Journal of Peking University) 17 (1980); Wang Tieya, *The Third World and International Law*, CHINA YEARBOOK 1982, *supra* note 15, at 9-36 [hereinafter *The Third World and International Law*]; Wang Tieya, *The Concept of a Common Heritage of Mankind*, ZHONGGUO GUOJIFA NIANKAN 1984, (China Yearbook of International Law 1984) [hereinafter CHINA YEARBOOK 1984] at 19-48; Wang Tieya, *The United Nations and International Law*, CHINA YEARBOOK 1986, *supra* note 16, at 3-22 [hereinafter *The UN and International Law*].

40. *See* Li Haopei, *Jus Cogens and International Law*, CHINA YEARBOOK 1982, *supra* note 15, at 37-63 and GUOJIFA, *supra* note 19, at 8-9.

one proceeds from the premise of the command conception of legal order that there must exist not only well-defined norms but also fully developed enforcing regimes, as did the nineteenth century English jurist John Austin, then international law cannot be considered "law proper." While Chinese international legal studies of the post-Mao era have yet to develop its own theory of international law — that is, a Marxist theory with Chinese characteristics — there is nevertheless a general movement toward the functional theory, which stresses the practical benefits of international cooperation on matters of mutual interest and concern.[41] As Francis Boyle, one of the leading contemporary advocates of the functional approach to international law, sees it, "international politics is and becomes international law, while international law is and becomes international politics."[42] The functionalists, in keeping with their pragmatic temperament, are skeptical of any grand schemes or legal-institutional blueprints as a guide for action. Likewise, most Chinese international legal scholars are reluctant to commit themselves to theorizing, not only because they adopt the functionalist view, but also because theorizing is tantamount to "premature specificity," a politically risky thing to do.

Despite the changes and shifts in the Chinese thinking on the nature of international law over three decades, an instrumental conception of international law remains the central underlying thread of continuity. As one publicist stated in the heyday of theoretical debates in 1958,

> [International law] is one of the instruments for resolving international problems. If this instrument is useful to our country, to the socialist cause or to the cause of the peoples of the world, we will use it. However, if this instrument is disadvantageous to these causes, we will not use it and should create a new instrument to replace it.[43]

This kind of self-serving instrumental conception of international law remains unchanged. As one Chinese writer puts it, "contemporary international law, as far as our country is concerned, is an indis-

41. *See* D. MITRANY, A WORKING PEACE SYSTEM (1966); E. HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964); FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS (A. Groom & P. Taylor eds. 1975); and BOYLE, *supra* note 1.

42. Francis A. Boyle, *New Directions for International Legal Studies* (Paper presented at the 28th Annual Convention of the International Studies Association, April 15-18, 1987, Washington, D.C.). In this paper, Boyle also presents a trenchant analysis and criticism of international relations lacunae in American international legal studies.

43. Zhu Liru, *Refuting Chen Tiqiang's Absurd Theory of International Law*, RMRB, Sept. 18, 1957, at 3.

pensable means to realize socialist modernization and construction."[44] What has changed is Chinese foreign policy and with it the Chinese definition of the international situation. In line with the "open" policy and its recurring theme of "global interdependence," international law too is reconceptualized as a positive, empowering instrument in the formulation and promotion of Chinese national interests.[45]

III. THE SOURCES OF INTERNATIONAL LAW

"As objects of study," writes Ian Brownlie, "the sources of international law and the law of treaties . . . must be regarded as fundamental: between them they provide the basic particles of the legal regime."[46]

Article 38(1) of the Statute of the International Court of Justice (ICJ), which is widely regarded as the most authoritative statement on the sources of international law,[47] provides that the Court, in deciding disputes in accordance with international law, should apply: (1) international conventions establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; (4) judicial decisions; and (5) the teachings of the most highly qualified publicists of the various nations.[48]

In keeping with the general practice of international legal scholarship, the first three sources will be referred to as the "primary sources" and the last two as "subsidiary sources" in the analysis that follows.

Chinese thinking on this question may be characterized as one of expanding, diversifying, and reordering the sources of international law, as can be seen in the inclusion of a sixth source in the following order: (1) international treaties; (2) international custom; (3) *decisions of international organizations*; (4) general principles of law; (5) judicial precedents; and (6) academic theories.[49]

What is noteworthy is not so much the specific inclusion of "decisions of international organizations" as a source, but its placement within the ranks of the "primary sources" in line with China's increasing participation in international organizations. The remainder

44. LIU FENGMING, *supra* note 20, at 5.

45. GAILUN, *supra* note 20, at 2.

46. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 1 (3rd ed. 1979).

47. M. SHAW, INTERNATIONAL LAW 58 (1986); BROWNLIE, *supra* note 46, at 3.

48. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1).

49. Wang Tieya, *The Sources of International Law* [hereinafter *Sources*], in ZHONGGUO DABAIKE QUANSHU: FAXUE (The Great Encyclopedia of China: Jurisprudence) [hereinafter ENCYCLOPEDIA] 195 (1984).

of this section is a detailed examination of each of the six sources with emphasis placed on the Chinese interpretation of their significance.

A. International Treaties

In principle, PRC publicists have always accepted international treaties as a primary source of international law, though not all international treaties have been treated as having the same significance.

During the Maoist period, China generally adhered to the positivist assumption that international legal obligations of the state are coterminous with the extent to which it has actually given its consent, which is "the willingness to be bound at the time an agreement is reached as the ultimate source of its binding force upon the parties, and to minimize any differences that might accrue from the modality in which an agreement is contracted."[50] Consistent with a redefinition of the changing international situation, however, Chinese participation in international conventions has made a quantum leap. The postwar period witnessed phenomenal growth in the role and importance of multilateral treaties at the expense of international customary law. In a world of increasing global interdependence, the utility of bilateral treaties is declining while multilateral treaties have become "the main device in the legal regulation of relations between States"[51] and have come to be treated as a direct source of international law.[52]

50. HSIUNG, *supra* note 10, at 27.

51. *Review of the Multilateral Treaty-Making Process*, [1979] 2 Y.B. INT'L LAW COMM. 191, U.N. Doc. A/CN.4/325/1979/Add.1 (Part 1).

52. Since bilateral treaties or those treaties involving a small number of states only bind the signatory state, they can only express the so-called particular international law (*teshu guojifa*) among the signatory states with no direct impact on the formation of sources of international law. *Sources*, *supra* note 49, at 195.

Another important qualification has been added in deciding the validity of international treaties in terms of the putatively higher authority of *jus cogens*. The concept of *jus cogens* was incorporated, albeit indirectly, into the 1969 Vienna Convention on the Law of Treaties. Article 53 of the Vienna Convention provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." It then defines *jus cogens* (a peremptory norm of general international law) as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/11/Add.2, U.N. Sales No. E.70.V.5 (1970).

During the Sino-British negotiations over the question of Hong Kong from 1982 to 1984, some Chinese international law scholars invoked *jus cogens* in support of the Chinese position denying the validity of "unequal treaties". *See* Jin Fu, *China's Recovery of the Hong Kong Area Conforms Entirely to International Law*, 4 GUOJI WENTI YANJIU (Journal of International Studies) 3 (1983); Zhao Lihai, *The Hong Kong Problem Viewed from an International Law Perspective*, FAXUE ZAZHI (Legal Journal) 9 (1984). For further analysis, see Kim, *Reviving International Law in China's Foreign Relations* (Paper presented at the Third International Congress of Professors World Peace Academy on China in a New Era: Continuity and

Table 1 shows a developmental synopsis of China's treaty practice over the years. The figures show that China now participates in 113 international conventions (multilateral treaties) distributed as follows: six in the pre-entry period of 1949-1970; 16 during the post-entry Maoist period of 1971-1976; and 91 during the post-Mao period of 1977-1985.[53] This activism in treaty-making not only shows one dimension of post-Mao China's increased openness to the outside world, but it also reveals a striking contrast between bilateral and multilateral treaty practice.

China's multilateral treaty practice has also shifted from a value-oriented to a functional, interest-oriented direction. During the 1970s, a concern for international egalitarianism was clearly shown in the prompt Chinese ratification of one type of multilateral treaty — the amendatory protocols to the conventions or the constitutions of the specialized agencies and the amendment to Article 61 of the UN Charter. These amendments were all designed to restructure the basis of representation in the limited-membership organs throughout the United Nations system to accommodate the demands of the Third World for participatory democracy in the management of world affairs.[54]

Nothing highlights post-Mao China's interest-oriented treaty practice as much as its grand entry into the cockpit of the capitalist world economic system — the World Bank, International Monetary Fund, the International Development Association and the International Finance Corporation.[55] Just as the laws and regulations are now popularized at home through the Five-Year Program for Spreading Basic Legal Knowledge Among All Citizens as "railroad tracks" ensuring that the train of reform advances on a correct course, multilateral treaties too are seen as instrumental in providing external link-

Change, Manila, the Philippines, August 24-29, 1987). *See also infra* note 76 and accompanying text.

53. This list should be accepted with a grain of salt. It seems somewhat selective and incomplete, especially for the pre-entry period of 1949-1970. Douglas Johnston and Hungdah Chiu list no less than 49 multilateral agreements (defined as those international agreements with four or more parties) for the period 1949-1967. *See* D. JOHNSTON & H. CHIU, AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 1949-1967: A CALENDAR 276 (1968). In an interview with two journalists of *Ban Yue Tan* in March 1986, Ling Qing, former Chinese Ambassador to the United Nations, states that China "has signed 132 world pacts of various descriptions." *See* FBIS, Apr. 18, 1986, at A4. A more comprehensive list of bilateral and multilateral treaties drawing from Chinese and non-Chinese sources, including the UN computer data bank, is included in my forthcoming book.

54. *See Charter-Based Legal Order, supra* note 10.

55. For a detailed analysis, see Feeney, *Chinese Policy in Multilateral Financial Institutions*, in CHINA AND THE WORLD: CHINESE FOREIGN POLICY IN THE POST-MAO ERA 266 (S. Kim ed. 1984).

TABLE 1. CHINA'S PARTICIPATION IN BILATERAL AND MULTILATERAL TREATIES, 1949-1985

Year	Bilateral Treaties	Multilateral Treaties	Total
1949-70	33	6	39
1971		2	2
1972		2	2
1973		5	5
1974		5	5
1975		2	2
1976			
1977		4	4
1978	1	4	5
1979		13	13
1980		12	12
1981		4	4
1982	2	12	14
1983		11	11
1984		22	22
1985	2	9	11
TOTAL	38	113	151

SOURCE: Adapted from Shijie Zhishi Nianjian 1985-1986 (World Knowledge Yearbook 1985-1986) 760-776 (Shijie Zhishi Chubanshe (World Knowledge Publishing House) 1986).

ages to ensure the smooth flow into China of the world's information, knowledge and technology to fuel the modernization drive.

The Chinese position on the relationship between the designation of an agreement and its international juridical effect has remained the same over the years. China has followed the widely accepted notions that the manner in which treaties are negotiated and brought into force is governed by the intention and consent of the parties concerned and that the validity of an international agreement does not depend on its modality or nomenclature.[56] From the inception of the People's Republic, many of the joint declarations or "joint communiques" (*lianhe gongbao*) that China signed with other governments

56. Article 2 of the Vienna Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, *supra* note 52, cited in SHAW, *supra* note 47, at 459.

were included in the official Chinese *Treaty Series*.[57] The post-Mao position is also that international law does not have a crystallized norm as to the adoption of any particular designation for an international agreement, and therefore "the legal effect of a treaty does not depend on its name."[58] This position has always been maintained in practice. For example, since the early 1970s, Chinese jurists have repeatedly invoked the legal authority of the Shanghai Communique I (1972) and Shanghai Communique II (1982) for various alleged infractions by the US government, such as the Taiwan Relations Act and the arms sales to Taiwan. The 1984 Sino-British Declaration on the Question of Hong Kong is a more recent case in which China accepted the international legal validity of a joint declaration as a binding international treaty.[59]

B. International Custom

International custom has always been mentioned as one of the two principal sources of international law.[60] Article 38 of the ICJ Statute defines the essence of international customs as "evidence of a general practice accepted as law" without indicating what constitutes such evidence.[61] Chinese scholars say that such evidence can be created or found in (1) diplomatic relations among states, as expressed in treaties, declarations and statements, and various diplomatic documents, (2) practices of international institutions, as expressed in resolutions and decisions; and (3) internal behavior of states, as expressed in domestic laws and regulations, court decisions, and administrative orders.[62]

There is a serious theoretical and policy question about the relevance of international custom as a source of international lawmaking. Traditionally, an international custom must satisfy the requirements of long duration, settled practice, and wide acceptance (*opinio juris sive necessitatis*), all of which may be difficult to reconcile with the

57. *See* JOHNSTON & CHIU, *supra* note 53, and Hsiao, *The Legal Status of Taiwan in the Normalization of Sino-American Relations*, in SINO-AMERICAN NORMALIZATION AND ITS POLICY IMPLICATIONS 50-51 (G. Hsiao & M. Witunski eds. 1983).

58. GUOJIFA, *supra* note 19, at 326.

59. Unlike the 1972 and 1982 Shanghai Communiques, the 1984 Joint Declaration makes the binding character explicit. Part 8 of the Declaration stipulates: "This Joint Declaration is subject to ratification and shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing before 30 June 1985. This Joint Declaration and its Annexes shall be equally binding." *See Sino-British Joint Declaration on the Question of Hong Kong*, BEIJING REV., Oct. 1, 1984, at v.

60. *See* ZHOU, *supra* note 18, at 14; GUOJIFA, *supra* note 19, at 28; *Sources*, *supra* note 49, at 195.

61. *See supra* note 48 and accompanying text.

62. GUOJIFA, *supra* note 19, at 30-31; *Sources*, *supra* note 49, at 195.

demands of today's rapidly changing, interdependent and complex world. Another factor in the decreasing importance of customary international law is the entry of the Third World into the international lawmaking process. The Third World countries refused to be bound by the customary rules of past state practice in which they had played no part and which they viewed as merely codifying the wills and practices of colonial and neocolonial actors.

The Chinese theoretical position on this question has shifted away from a skeptical view of the role of custom in meeting the needs of the changing international order. It used to be argued that, between treaties and customary law (both "primary" sources of international law), the former would become increasingly more important than the latter.[63] The post-Mao era saw the acceptance of a more dynamic definition of customary law which maintains that it is possible today to accelerate the slow tempo of the development of customary law. For example, it was observed that it took less than twenty years during the post-war period to develop customary laws on the continental shelf, exclusive economic zone, outer space and environmental protection.[64] This suggests that post-Mao Chinese thinking has embraced a collective consensual approach to international decision-making, which is reflected in the Chinese phrase "seeking common ground while preserving differences" (*qiutong cunyi*), whereby the Third World majority is able to create new "soft" norms in certain circumstances without undergoing a long period of gestation and crystallization.

In practice, China's use of customary international law closely followed its changing position in the international legal order. During the 1950s and 1960s, when it was excluded from most of global treaty regimes, China often found itself resorting to the protective shield (and sword) of customary international law. China asserted that many of the norms embodied in international conventions, including those from which it was excluded, emanated from customary law and found a new manifestation in treaty form.[65] From time to time, both Chinese officials and publicists invoked such norms as "the standards of international law and dignity and justice," "the elementary rules of international law," "international law and practice," and "an established pattern of conduct" — all of which can be subsumed under the nebulous umbrella concept of "international custom and convention" — in accusing the other party to a dispute of unreasonableness or of a

63. ZHOU, *supra* note 18, at 12.

64. GUOJIFA, *supra* note 19, at 29-30; *Sources*, *supra* note 49, at 195.

65. HSIUNG, *supra* note 10, at 229.

violation of international practice.[66] In the 1970s and 1980s, both the United States and Soviet Union received a large measure of Chinese accusations for having deviated from "international norms."[67] In the UN politics of collective legitimation and delegitimation, however, China has seldom invoked customary international law, resorting instead to certain General Assembly resolutions as the authoritative references for its multilateral diplomacy.[68]

C. *The General Principles of Law*

The acceptance of general principles of law as a source of international law can be used as a measure of the extent to which a given state rejects the nineteenth century doctrine of positivism that the only valid rules are created by means of explicit consent, as made manifest in a treaty or in customary practice. The exact meaning and status of general principles of law has been the subject of extensive discussion and controversy among Western international legal scholars. Nevertheless, most modern writers in the West are prepared to accept general principles as a separate source of law, albeit a source limited in scope and application to new situations not covered by international treaty and customary law.[69]

During the Maoist period, most Chinese scholars were silent about whether "general principles of law" should be treated as a source of international law. There were only a few instances in which they had been invoked in legal treatises and arguments.[70] Zhou Gengsheng's work was an exception in that he dealt with the general principles of law as part of the general discussion of the sources of international law, although he eventually dismissed them as a source, saying that "unless recognized in international convention and treaties, no general principle of law can be regarded as forming part of international law."[71]

The Chinese attitude toward the acceptance of general principles of law as a source of international law has become more flexible and

66. *See* COHEN & CHIU, *supra* note 10, at 77-79.

67. *See, e.g.*, Chen Tiqiang, *On U.S. Arms Sales to Taiwan in the Context of International Law*, RMRB, Feb. 2, 1982, at 6; Chen Tiqiang, *The Huguang Railway Bond Case and the Question of State Sovereign Immunity*, 6 SHIJIE ZHISHI (World Knowledge) 2 (1983) [hereinafter *Huguang Bond Case*]; Yang Hui & Zhan Xihuang, *Internationalism or Hegemonism?*, 3 HONGQI (Red Flag) 44 (1980); Zhao Lihai, *The Main Legal Problems in the Bilateral Relations Between China and the United States*, 16 N.Y.U. J. INT'L L. & POL. 543 (1984).

68. KIM, *supra* note 26, at 429-37.

69. *See*, G. VON GLAHN, LAW AMONG NATIONS, 23 (5th ed. 1986); M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 35 (4th ed. 1982).

70. HSIUNG, *supra* note 10, at 27.

71. ZHOU, *supra* note 18, at 14.

open in the post-Mao period. The issue, however, is still relatively new and controversial, and there seems to be three contending views. The first is the belief that general principles refer to international law principles or fundamental principles of international law. The second view is a contemporary variant on the "natural law" school. This view perceives general principles of law as emanating from the "general legal consciousness" and international society as having a "common legal consciousness." The third is that general principles of law refer to all of the common principles embodied and reflected in the legal systems of various states.[72] Also, in the context of Article 38(1)(c) of the ICJ statute, which limits authoritative "general principles of law" to those "recognized by civilized nations," there is a shift in the Chinese position from a negative emphasis on the offensive term "civilized nations"[73] to a positive emphasis on the word "recognized" as the key factor.

Although the 1981 textbook adopts the third view, it nevertheless concludes that general principles of law do not enjoy a very important status in international law, because they are not an "independent" source of international law.[74] However, such a cautious view is not shared by all Chinese international legal scholars. Lan Haichang takes the position that general principles of law constitute a principal source of international law.[75] Li Haopei, professor of international law at the Foreign Affairs Institute and a senior legal advisor in the Ministry of Foreign Affairs, takes an even bolder approach by linking *jus cogens* with the third source of international law. Li's article, "*Jus Cogens* and International Law," is perhaps the most positive interpretation of "the general principles of law" to be found in the growing body of international law literature in the post-Mao era.[76] It also contains a remarkable world order argument that transcends the contours and parameters of the sovereignty-centered image of international legal order in the Maoist era.

Only a few relevant points in Li's wide-ranging argument need be mentioned here. Li asserts that the international legal order cannot be established on the consent approach of positivists, for if international law is based on the consent of states alone, it would cease to

72. GUOJIFA, *supra* note 19, at 32.

73. *See* Ying Tao, *Recognize the True Face of Bourgeois International Law from a Few Basic Concepts*, 1 GUOJI WENTI YANJIU 42, 44 (1960).

74. GUOJIFA, *supra* note 19, at 32.

75. Lan Haichang, *Answers to Essential Questions of International Law*, 5 FAXUE PINGLUN (Legal Studies Review) 87 (1986).

76. Li Haopei, "*Jus Cogens* and International Law," CHINA YEARBOOK 1982, *supra* note 15, at 37.

exist if the states were to withdraw their consent. The inclusion of "general principles of law" as a source of international law is necessary, in part, because treaty and custom cannot fully cover or define all the rules of international law. More importantly, Li reasons, the international community requires such general principles of law to prevent the legitimation of wrongs by way of treaties.

Li concludes that, in the process of either ignoring "the general principles of law recognized by civilized nations" or belittling their value arbitrarily, the positivists have partially negated international law as well as the rule of law in the international community.[77]

The rise of such concepts as *jus cogens* and the common heritage of mankind suggests an ongoing attempt to integrate and synthesize the objective needs of the international community on the one hand, with the subjective goals and requirements of Chinese foreign policy on the other, in terms of some general principles of law recognized by all states.

D. Judicial Decisions and Precedents

The evolution of the Chinese attitude toward the ICJ or any judicial process must be viewed against special cultural and historical circumstances. It is difficult for the idea of judicial independence and judicial law-making to take root in the Chinese political culture: elements of both traditional Chinese and contemporary communist theory work against the development of a positive attitude toward judicial settlement of disputes. Part of the Confucian culture was hostile to publicly promulgated laws and adversarial litigation. China's modern communist rulers, like their Confucian ancestors, have until recently eschewed a written legal code and adversarial judicial proceedings. This tradition dies hard even in the midst of the great legal development of the post-Mao era. The Chinese reaction to the decision of the Kyoto District Court in the Guanghua (Kokario) Hostel Case in 1986 serves as a reminder: "As far as international relations are concerned, it is extremely abnormal for the judicial organ of a country to take a stand completely different from that taken by the administrative and legislative organs of the same country."[78]

Moreover, the development of the ICJ, until quite recently, was hardly congenial to any progressive softening of the Chinese attitude.

77. Also, instead of evading the problematic expression "civilized nations," Li directly grapples with the term — all states which have joined the United Nations can be regarded today as civilized nations. *Id.* at 52.

78. FBIS, Apr. 28, 1986, at D4. *See also* Zhao Lihai, *The Trial of Japanese Court on the Guanghua Hostel Case Is a Serious Violation of International Law*, RMRB, Mar. 6, 1987, at 7.

The Court not only suffers from physical and psychological remoteness from the changing currents of global politics, but also from a lack of institutional and procedural reform. Above all, the domination of the Court by Western or Western-trained international lawyers, coupled with the general lack of enthusiasm for judicial legislation in the non-Western world, have contributed to the progressive and general decline of the Court's role in the international lawmaking process.[79]

Even during the period of intense theoretical debate on international law in the late 1950s, Chinese scholars seldom made reference to the decisions or advisory opinions of the ICJ as a source or as evidence of international law. The single exception was the *Anglo-Norwegian Fisheries* case,[80] which was cited in support of the 1958 announcement that China would follow the straight baseline method to define the limits of its territorial sea.

More often, Chinese scholars denounced various judicial decisions of the Court, in particular the *Corfu Channel*[81] and *Anglo-Iranian Oil Co.*[82] cases, as examples of imperialist abuse and capitalist machination.[83] One writer categorically dismissed the notion that judicial decisions were a subsidiary source of international law.[84] In general, the Chinese were critical of any suggestions calling for expansion or even a liberal interpretation of the functions of the Court.[85]

The entry into the UN had little discernible effect upon the Chinese attitude toward the ICJ during the first decade of China's participation. China made it known in a letter to the ICJ dated September 5, 1972, that it "does not recognize the statement made by the defunct Chinese Government on 26 October 1946 . . . concerning the accept-

79. *See* Kim, *supra* note 4, at 649-51. Richard Falk argues cogently that the effectiveness of the ICJ depends on a shift from its traditional conservative legal mind-set to a more pluralistic (non-Western) jurisprudence that represents the diverse cultural and normative realities of the global system. *See* R. FALK, REVIVING THE WORLD COURT (1986).

80. Fisheries Cases (U.K. v. Nor.), 1951 I.C.J. 115 (Dec. 18, 1951).

81. Corfu Channel Case, 1947-48 I.C.J. 123 (Order of Dec. 17, 1948).

82. Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1951 I.C.J. 207 (Order of Dec. 20, 1951).

83. *See* HSIUNG, *supra* note 10, at 78, 310.

84. They say that judicial decisions are a subsidiary source. But who made the so-called judicial decisions? The majority of decisions they invoke are those decisions rendered by the municipal courts or arbitral organs of big capitalist powers and the international judicial or arbitral organs under their manipulation. In accordance with whose will and whose legal standards were these decisions made? Everyone knows that these decisions were made in accordance with the will and demands of big capitalist powers.

Ying Tao, *Recognize the True Face of Bourgeois International Law from a Few Basic Concepts, trans. in* COHEN & CHIU, *supra* note 10, at 71.

85. *See* ZHOU GENGSHENG, XIANDAI YINGMEI GUOJIFA DE SIXIANG DONGXIANG (Trends in Modern Anglo-American Thought on International Law) 52-54 (1963) [hereinafter SIXIANG DONGXIANG].

ance of the compulsory jurisdiction of the Court."[86] In the course of its participation in UNCLOS-III, China also opposed the inclusion of provisions concerning the compulsory jurisdiction of an international judicial organ in a draft treaty on the ground that this "would amount to placing [the judicial] organ above the sovereign State, which was contrary to the principle of State sovereignty."[87] China's indifference, if not open hostility, toward the Court is shown in its failure to advance a candidate in 1972, 1975, 1978, and 1981 for the ICJ, even though its nominated candidate would easily have been elected, given the well-established practice of electing nationals of the Big Five to the Court.

The shift in China's attitude in the direction of accepting the ICJ as part of the international legal order began in 1981, when Ni Zhengyu, one of the most prominent and senior Chinese international legal scholars, was nominated and elected to the International Law Commission (ILC).[88] This was followed in 1984 by his election to the ICJ.[89]

China's entry into the ICJ after a hiatus of almost four decades was a symbolic milestone, another triumph in the status drive of post-Mao China. However, this did not change China's position on compulsory jurisdiction. As late as 1982, it was argued by Wang Tieya that the problem is not so much with cultural tradition (as cultural relativists would have us believe)[90] as with the Court itself, which has always been dominated by Western legal institutions.[91]

This line of reasoning has been gradually modified. While criti-

86. *Report of the International Court of Justice, (1 August 1972-31 July 1973)*, 28 U.N. GAOR Supp. (No. 5) at 1, U.N. Doc. A/90005 (1973).

87. *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. V, at 24, U.N. Sales No. E.76.v.8 (1976).

88. Ni was easily elected on a single ballot on November 23, 1981 for a five-year term beginning January 1, 1982. G.A. Res. 36/316, 36 U.N. GAOR Supp. (No. 51) at 255, U.N. Doc. A/36/51 (1982). Ni was educated in the United States in the 1920s (Stanford Law School) and was 75 years old at the time he was elected to the ILC. He is the author of GUOJIFA ZHONG DE SIFA GUANXIA WENTI (The Question of Judicial Jurisdiction in International Law) (1964), and is one of a few international legal scholars whose service in the Chinese foreign policy field predated the Third Plenum. In the 1970s he participated in UNCLOS-III as a member of the Chinese delegation.

According to several international civil servants in the Office of Legal Affairs, UN Secretariat, whom I interviewed, Ni played a very active and positive role in the work of the ILC.

89. True to form, China followed a cautious and methodical step in using the ILC as a training ground or a springboard (possibly both) for its entry into the ICJ. On November 7, 1984, Ni was elected on a secret ballot as a member of the Court for a nine-year term beginning on February 6, 1985. G.A. Res. 39/307, 39 U.N. GAOR Supp. (No. 51) at 302, U.N. Doc. A/39/51 (1985).

90. *See* A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD (1971).

91. *The Third World and International Law, supra* note 39, at 34.

cizing some international lawyers in common law countries for overstating the role of international judicial decisions, the 1981 textbook nevertheless acknowledges that whenever the ICJ applies and interprets the principles and rules of international law, it confirms and validates them at the same time. Not only do the ICJ and other international tribunals consider themselves bound to follow these principles and rules, but they are also widely accepted in international practice. In short, international judicial decisions have come to be treated as a subsidiary means for the determination of rules of law.[92] Writing in the *1986 Chinese Yearbook of International Law*, three prominent scholar-diplomats argue that the practical demand of international society calls for the strengthening of the ICJ as a means of settling international disputes.[93] In the wake of the Court's final ruling in the *Nicaragua* case,[94] China urged the United States to comply with the ruling of the ICJ, the first instance when China publicly asked any state to respect a ruling of the Court.[95]

Such a change of attitude should not be explained solely in terms of China's entry into in the Court, but should be seen as part of the larger evolving global reality. The ICJ cannot remain immune from the changing international political realities and systemic pressures of the UN politics of collective legitimation and delegitimation. In the early 1980s, the effects of the changing international situation became apparent when Western countries, especially the United States, grew progressively more disenchanted with, and the Third World states more interested in, the Court. The politics of electing the ICJ judges in the General Assembly[96] and Nicaragua's victories in *Nicaragua v.*

92. GUOJIFA, *supra* note 19, at 33.

93. Huang Jiahua, Sun Lin, & Zhou Xiaolin, *The International Court of Justice: Its Retrospect and Prospect*, CHINA YEARBOOK 1986, *supra* note 16, at 23, 40. To the best of my knowledge, this is the first article devoted exclusively to the ICJ ever published in the PRC. Its authoritativeness is attested to by the fact that Huang Jiahua first came to New York in 1972 as a member of the Chinese delegation and has subsequently served as Director of the Department of Treaties and Law of the Ministry of Foreign Affairs, a member of the International Law Commission (completing the unfinished term of Ni Zhengyu) and is currently Ambassador Extraordinary and Plenipotentiary and Deputy Permanent Representative to the United Nations. Sun Lin was one of the four international law scholars sent to the World Congress of Jurists in 1979 and has been serving since 1984 at the Permanent Mission of the People's Republic of China to the United Nations in New York as legal counsel. Zhou Xiaolin served as division head in the Department of Treaties and Law of the Ministry of Foreign Affairs and is currently an S.J.D. candidate at Harvard Law School.

94. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27, 1986).

95. *PRC Urges U.S. to Respect Hague Ruling on Nicaragua* (FBIS trans. Aug. 1, 1986, at B1).

96. Most notably the surprise election of Mohammed Bedjaoui, the brilliant and radical Algerian candidate in 1982. Note also the surprise defeat of Sir Ian Sinclair, the British candi-

United States, demonstrate the Third World's new political awareness and sophistication with respect to its growing participation in the ICJ. China has also publicly acknowledged that the Court will play an increasingly important part in solving international disputes.[97]

E. The Writings of Publicists

The influence of individual scholars on the development of international law reached its peak during its early formative period between the sixteenth and eighteenth centuries, when such giants as Grotius, Gentilis, Pufendorf, Bynkershoek and Vattel made indelible contributions in defining the scope, form and content of international law.[98] With the rise of the positivist school in the nineteenth century, however, the influence of academic scholars and their writings diminished. At best, they became an indirect source of international law by showing what the law is on any one issue at a particular point in time. International legal scholars were not immune to the rising tides of nationalism and statism, and many came to reflect and reinforce national policy preferences disguised as the norms of international law.[99] Many prominent ones serve simultaneously as national officials and as agents of world order, according to Georges Scelle's theory of *dédoublement fonctionnel*;[100] others find their way to the ILC and even to the ICJ, or serve as counsel on behalf of various states

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date, in a single ballot election of members of the International Law Commission on November 14, 1986.

97. In his recent speech, Ambassador Huang Jiahua states that:

> . . . in recent years, the International Court of Justice has undergone some changes with the development of the international situation and changes within the United Nations. Its composition, applicable law and rules of procedure have all witnessed some positive progress. On the whole, the role and impact of the Court have been gradually increasing. This is reflected in the fact that the number of cases submitted to the Court for adjudication has increased, and that some important international treaties and agreements all contain provisions for submitting disputes to the Court for settlement. This shows that the international community is attaching greater importance to the Court.

Speech by Ambassador Huang Jiahua on International Law as it is Related to China, New York University Law School (March 11, 1987). A copy of this speech was given to me in the course of my interview with Ambassador Huang at the Permanent Mission of the People's Republic of China to the United Nations, on March 13, 1987.

98. A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS, (rev. ed. 1961).

99. Perhaps the most notable exception is the work of Raphael Lemkin who, through his one-man crusade and epochal work, AXIS RULE IN OCCUPIED EUROPE (1944), is widely regarded as having played the role of a founding father for the UN Convention on Genocide. *See* L. KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 22 (1981).

100. *See* Scelle, *Le Phénomène Juridique du Dédoublement Fonctionnel*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION: FESTSCHRIFT FÜR HANS WEHBERG 324 (W. Schätgel & H. Schlochauer eds. 1956).

engaged in legal battles at The Hague.[101] Still, academic scholars and their writings play an important role in stimulating debate on the outer limits and possibilities of international law in the changing world order.

During the Maoist period, there were virtually no Chinese formulations as to the significance of academic writings as a subsidiary source of international law. Yet Chinese jurists have never been shy in being selective either in citing certain prominent Western scholars in support of their policy preferences or in the condemning of bourgeois scholarship when necessary. Given the emphasis on sovereignty during this period, it is hardly surprising that Lassa Oppenheim's treatise on international law, which asserts that state sovereignty is the main ordering logic of the international system (in the tradition of twentieth century legal positivism), was translated into Chinese[102] and was the most extensively quoted — and at times misquoted — foreign source in Chinese writings.[103]

In the post-Mao era, Oppenheim's influence has declined.[104] Chinese scholars argue today that the role of international legal writers has been steadily diminishing due to the proliferation of more authoritative international legal materials. As private scholars, they certainly cannot play any direct role in determining the substance of international law; their writings can only serve as an indirect and subsidiary means for the determination of rules of international law.[105] In practice, however, the advisory role of international legal scholars,

101. To cite the most recent example, in the procedural phase of *Nicaragua v. United States*, the government of Nicaragua was represented as "agent and counsel" by Prof. Ian Brownlie (of Great Britain), Prof. Abram Chayes (of the United States), Prof. Alain Pellet (of France), and Mr. Paul S. Reichler (of the United States, Member of the Bar of the United States Supreme Court), while the United States was represented by such prominent scholars as Myres S. McDougal, John Norton Moore, Fred L. Morrison, and Stefan A. Riesenfeld, as well as by several legal advisers in the State Department.

102. L. OPPENHEIM, INTERNATIONAL LAW, (H. Lauterpacht ed. 7th ed. 1948). It was this seventh edition that was translated and published by the Chinese Foreign Affairs Publications, but I have not been able to find a copy of this Chinese translation. Most Chinese works published in the 1950s and the early 1960s refer to this Chinese translation. In another international law textbook published in 1986, however, the editors cite what appears to be a reprint of this early Chinese translation. It is identified in footnotes and bibliography as: AOBENHAI GUOJIFA (Oppenheim's International Law) (Shangwu Yinshuguan, 1981). *See* GAILUN, *supra* note 20, at 10 n.1, 380.

103. *See* COHEN & CHIU, *supra* note 10, at 29, 82, 176-177, 180, 280, 324-325, 327, 334, 366, 475, 532, 638, 684, 786-788, 848-849, 958-959, 982, 993, 1187, 1243, 1264, 1477. Incidentally, the structure of Zhou Gengsheng's two volume treatise on international law is largely based on the eighth edition of Oppenheim's volume, as pointed out by Hungdah Chiu in his review of Zhou Gengsheng's treatise. *See* Chiu, Book Review, 77 AM. J. INT'L L. 977, 978 (1983).

104. *See* GAILUN, *supra* note 20.

105. GUOJIFA, *supra* note 19, at 33-34; *Sources*, *supra* note 49, at 195.

both indigenous and foreign, has greatly increased in the post-Mao era.[106]

In the Huguang Railway Bond Case (*Jackson v. People's Republic of China*)[107] many Chinese international legal scholars advised their government that, rather than ignoring the claim, China should take an active part in the litigation and try to beat its opponents at their own game.[108] In August 1983, the Chinese government hired the international law firm of Baker & McKenzie to make a special appearance to present China's defense to the United States District Court in Alabama.[109] Two years later, in mid-1985, China announced that it would consult foreign lawyers and scholars in the drafting of future legislation so as to minimize the possible conflict of laws, another unprecedented decision that would have been inconceivable during the Maoist era.[110] In August 1986, the Chinese drafters of the "Law of the PRC on Enterprise Bankruptcy (For Trial Implementation)" invited foreign lawyers to discuss their experience with their own bankruptcy laws.[111]

F. Decisions of International Organizations

As mentioned earlier, Chinese international legal scholars recently added "decisions of international organizations" to the list of sources of international law found in Article 38(1) of the ICJ statute.[112] Practically all of the Chinese discussion on "decisions of international organizations" centers on certain resolutions of the UN General Assembly, which positivists (who consider state sovereignty

106. In 1985, a record number of foreign legal experts (more than 1,000) visited China in more than 50 legal delegations at the invitation of the Justice Ministry, the Supreme People's Court, Supreme People's Procuratorate and the China Council for the Promotion of International Trade. *China Tries to Cement International Legal Ties*, China Daily, Feb. 1, 1986, at 3.

107. For the facts of the case, see Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 J. CHINESE L. 23, 24 (1987) [hereinafter *Sovereign Immunity*].

108. This is my own paraphrasing of the essence of what many Chinese international law scholars told me in my field interviews in Beijing during 1985-1986.

109. For details, see Respondent's Brief in Opposition, *Russell Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986) (No. 86909), *cert. denied*, 107 S.Ct. 1371 (1987). This case ignited fireworks among Chinese international law scholars. *See also Huguang Bond Case*, *supra* note 67; Fu Zhu, *U.S. Court Trial Violates International Law*, 11 BEIJING REV., Mar. 14, 1983, at 24, 30; Liu Daqun, *The Odious Nature of the Huguang Railway Loans*, 4 GUOJI WENTI YANJIU 25 (1983); Sun Lin, *The Developmental Trend of the Principle of State Sovereign Immunity*, 1 GUOJI WENTI YANJIU 57 (1984); Zhu Qiwu, *Criticizing the Huguang Bond Case*, 11 MINZHU YU FAZHI (Democracy and Legal System) 12 (1984); a symposium debate involving three scholars in CHINA YEARBOOK 1986, *supra* note 16, at 249-305; and *Sovereign Immunity*, *supra* note 107.

110. Chen Hui, *China to Smooth Legal Trade Path*, China Daily, July 27, 1985, at 2.

111. Ta-kuang Chang, *The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislative Process*, 28 HARV. INT'L L.J. 335 (1987).

112. *See* text accompanying note 49.

to be of paramount importance) would dismiss as recommendatory at best.[113] The Chinese position on this question is of more than theoretical importance; it marks a significant shift from the preoccupation with sovereignty toward greater acceptance of the role of international organizations and international law in the shaping of world order.

In the 1950s, when China had high hopes of early admission into the United Nations, it adopted a highly selective, self-serving policy of accepting only certain General Assembly resolutions as having evidentiary value for certain unspecified norms of international relations. For example, the 1952 resolution dealing with permanent sovereignty over natural resources[114] was invoked in support of the argument that a state enjoys the right under international law to nationalize its natural resources without incurring a legal obligation to compensate foreign investors.[115] Moreover, several resolutions adopted by the General Assembly during the 1956 Suez Crisis were characterized as exerting a profound and positive influence on the maintenance of international peace and security.[116]

In the 1960s, as a result of the United Nations' continued nonrecognition of the legitimacy of the PRC government and the concommitant denial of a seat in the General Assembly, UN resolutions became less well received. China now viewed these resolutions as having only the nature of recommendations and, hence, not binding on the member states. This can be seen in Beijing's demands for the cancellation of the UN resolutions condemning China and North Korea during the Korean War.[117] China denied that the United Nations possessed any legislative power and insisted that all resolu-

113. This traditional and conservative position was expressed by Judge Ad Hoc van Wyk in the South West Africa cases, when he stated that "applicants' contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence whereby they could bind a dissenting minority . . . It is clear from the provisions of the Charter that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38(1)(b) of the Statute of this Court." South West Africa Cases (Ethiopia v. S. Afr., Liberia v. S. Afr.) Second Phase, 1966 I.C.J. 169-170 (Judgment of 18 July 1966) (van Wyk, J., separate opinion). For Judge Tanaka's dissenting opinion, *see id.* at 291-294.

Decisions of international organizations other than those of the General Assembly are not mentioned in the Chinese literature. One exception is the fleeting remark that the "standards" and "recommended practices" of some specialized agencies may have in effect the nature of normative rules. *The Third World and International Law, supra* note 39, at 22.

114. 7 U.N. GAOR Supp. (No. 20), U.N. Doc. A/2361.

115. Li Haopei, *Nationalization and International Law*, 2 ZHENGFA YANJIU (Research on Politics and Law) 14 (1958).

116. WAN JIAJUN, SHENME SHI LIANHEGUO (What is the United Nations?) 41 (1957).

117. These demands were spelled out by Foreign Minister Chen Yi in his press conference of September 29, 1965, in Beijing. *See* PEKING REV., Oct. 8, 1965, at 11-12.

tions had to go through the treaty-making process before they could acquire legally binding force.[118] Reflecting this hard-line approach, references to the UN Charter began to disappear from China's bilateral agreements in the 1960s.

After China's entry into the United Nations in 1971, and until 1979, the issues of disarmament, decolonization and development occupied a position of primary importance on China's global agenda.[119] Other functional issues, including legal ones, were consigned to a secondary role. China also quickly learned the art of selective legalism of invoking a resolution either as an authoritative source to legitimate its position or to attack the policy and practice of others in its conduct of multilateral diplomacy. This technique is best shown by China's constant invocation of the three New International Economic Order (NIEO) resolutions,[120] not only in the General Assembly but also throughout the entire United Nations system.[121] As a result, these resolutions have virtually replaced the UN Charter as the authoritative and legitimating source of China's position on North-South issues. In spite of this practice, none of the Chinese delegates had ever made a single legal exposition as to why the three NIEO resolutions should be binding on states or why the specialized agencies should implement them. There was no elaboration on General Assembly resolutions as a source of international law by Chinese legal scholars at this time since the international legal profession was still in a state of dormancy. However, one study predicted that the Chinese legal practice of invoking General Assembly resolutions "will have two legal consequences: first, it will make it increasingly difficult for China to defy Assembly resolutions without suffering a serious credibility problem in its multilateral diplomacy and, second, it will contribute to the process of broadening the scope of the Assembly's law-developing and law-legitimizing functions."[122]

With the restoration of international legal studies in 1979, Chinese scholars have finally been able to offer a coherent set of formula-

118. SIXIANG DONGXIANG, *supra* note 85, at 67.

119. *See* KIM, *supra* note 26, at 162-77.

120. *A Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, 6th Special Session, U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); *A Programme of Action on the Establishment of a New International Economic Order*, G.A. Res. 3202, *id.* at 5; and the *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975).

121. At one point, a Chinese representative went so far as to say that "the Programme of Action *should* be binding on States." 6th Special Session, General Committee and Ad Hoc Committee (13th mtg) at 68, U.N. Doc. A/AC.166/SR.13 (1975) (emphasis added).

122. *Charter-Based Legal Order*, *supra* note 10, at 349.

tions on the legal significance of General Assembly resolutions.[123] They start with the more dynamic and expansive Third World perspective[124] that the international system, due to the entry of newly independent states, has undergone a fundamental change and that there is no reason why the traditional sources of international law should remain frozen. This perspective recognizes not only the growth in the importance of the Third World in the international lawmaking and law-determining processes, but it also demonstrates the practical need of the international community to find a more economic and efficient means of codifying state practice and of progressively developing new principles and norms of international law.

Given the absence of a supranational legislature, many Chinese scholars regard the General Assembly as the most suitable and legitimate institution to respond to the challenge of global lawmaking. Not all resolutions, however, are regarded as having equal legal significance. A General Assembly resolution can enjoy the status of a source of international law only if it meets the following criteria: (1) the resolution reformulates the objective and the content of international law principles, norms and rules; (2) it enjoys unanimous or overwhelming support of the member states as evidence of *opinio juris sive necessitatis*; and/or (3) it reflects new principles and norms and acts as a harbinger of the emerging global judicial consciousness.[125]

123. The Chinese scholarly position summarized in this section is based on the following sources: *Sources, supra* note 49, at 195; He Qizhi, *Functions of the United Nations' International Legislation*, RMRB, Oct. 19, 1985, at 6; Qin Ya, *Legal Effects of the United Nations General Assembly Resolutions*, CHINA YEARBOOK 1984, *supra* note 39, at 164-191; GUOJIFA, *supra* note 19, at 34-35; *The Third World and International Law, supra* note 39, at 22-23; *The UN and International Law, supra* note 39, at 3; Wang Tieya, *The Concept of a Common Heritage of Mankind*, CHINA YEARBOOK 1984, *supra* note 39, at 43-44; Zhang Hongzeng, *The Development of International Law in the Forty Years Since the Establishment of the United Nations*, 3 GUOJI WENTI YANJIU 46 (1986); Zhou Xiaolin, *The United Nations and International Legislation*, 4 GUOJI WENTI YANJIU 27, 28 (1985).

124. For an eloquent exposition of this perspective, see Mohammed Bedjaoui, *A Third World View of International Organizations: Action Towards a New International Economic Order*, in THE CONCEPT OF INTERNATIONAL ORGANIZATION 207 (G. Abi-Saab ed. 1981). *See also* M. BEDJAOUI, POUR UN NOUVEL ORDRE ECONOMIQUE (1979).

125. The resolutions cited for having satisfied these conditions include the *Declaration on the Granting of Independence to Colonial Territories and Peoples*, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961); the *Declaration on Permanent Sovereignty Over Natural Resources*, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1963); the *Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space*, G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. Doc. A/5515 (1964); the *Declaration of Principles Governing the Seabed and the Ocean Floor and the Subsoil Thereof Beyond the Limits of National Jurisdiction*, G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1971); the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, *id.* at 21; the *Declaration on the*

While Chinese scholars generally accept the notion that a resolution capped by the term "declaration" plays a more significant law-making role,[126] they generally shy away from technical quibbles over whether General Assembly resolutions are "binding" or not, and concentrate instead on the legal effects of these resolutions in the law-clarifying or law-making process.[127] Practically all Chinese scholars who have written on the subject now accept certain General Assembly resolutions as a source of international law,[128] but there is no agreement on their importance. Some scholars merely accept those specially qualified resolutions as a subsidiary source,[129] although their status, given their universal character as the expression of the will of the international community, is considered higher than that of judicial decisions and writings of publicists.[130] Others would go a step further in accepting them as a primary source of international law.[131]

China's state practice of invoking certain General Assembly resolutions as legitimating the conduct of its multilateral diplomacy continues unabated into the post-Mao era.[132] Yet China's official statements and policy pronouncements have always stopped short of elucidating the legal status and effects of these resolutions. Despite

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Establishment of a New International Economic Order, supra note 120; and the *Charter of Economic Rights and Duties of States, supra* note 120.

126. According to a memorandum prepared by the UN Office of Legal Affairs, a "declaration" in UN practice "is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected." To the extent that the expectation of compliance is justified by state practice, the memorandum further notes that "a declaration may by custom become recognized as laying down rules binding upon States." 34 U.N. ESCOR Supp. (No. 8) at 15, U.N. Doc. E/3616/Rev.1 (1962).

127. More than two decades ago, Richard Falk pointed out that "the characterization of a norm as *formally binding* is not very significantly connected with its *functional operation* as law." Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 783 (1966). A more recent study has also shown that the behavioral (implementation) record of binding resolutions is only marginally better than that of nonbinding ones. *See* Bothe, *Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?*, 1981 NETH. Y.B. INT'L L. 65.

128. *See* Chiu, *Chinese Views on the Sources of International Law*, 28 HARV. INT'L L.J. 302 (1987).

129. *See Sources, supra* note 49, at 195; GUOJIFA, supra note 19, at 34-35; Zhang, *supra* note 123, at 51.

130. On this point, *see* GUOJIFA, *supra* note 19, at 35.

131. *See* LIU DING, GUOJI JINGJIFA (International Economic Law) 14-15 (1984), cited in Chiu, *supra* note 128, at 304; He, *supra* note 123, at 6; Qin, *supra* note 123, at 189; *The UN and International Law, supra* note 39, at 15; and Zhou, *supra* note 123, at 28-29.

132. For a more comprehensive analysis of Chinese policy in international organizations during the post-Mao era, see Samuel S. Kim, *China, International Organizations, and Multilateral Cooperation* (Paper presented to the Conference on Patterns of Cooperation in the Foreign Relations of Modern China, sponsored by the Joint Committee on Chinese Studies of the American Council of Learned Societies and the Social Science Research Council, Wintergreen, Va., August 9-15, 1987).

the deliberate vagueness, China still acts as if certain resolutions represent accepted international norms.

The foregoing analysis of China's position on the sources of international law suggests a subtle but significant shift in post-Mao China's attitude toward the international order; this shift is from the negative Manichaean vision of fighting against superpower hegemonism and of protecting its sovereignty to a more positive vision of multilateral cooperation. That China has moved some distance away from the minimalist conception of international organizations is shown in the acceptance of international organizations, in particular international intergovernmental organizations (IGOs) of universal membership, as a subject of international law.[133] The number of multilateral conventions China has signed, ratified or acceded to is another indicator of its increasing enmeshment with the international system. Post-Mao China's shift from national self-reliance to global interdependence is also evident in its acceptance of consensus, as opposed to consent, as a more practical means of global lawmaking in an increasingly complex and interdependent world.

IV. THE FIVE PRINCIPLES OF PEACEFUL COEXISTENCE

"Principles" rank the highest among the various components in the Chinese definition of international law,[134] and Chinese foreign policy is constantly explained and legitimated in terms of "basic principles."[135]

In the context of Chinese foreign policy, the relevant set of principles are the Five Principles of Peaceful Coexistence (FPPC). First conceived and initiated in the Sino-Indian Trade Agreement in Tibet in 1954, the FPPC (also known by its Indian name *panch shila)* initially served as a normative guide in creating an opening bridge to the Third World.[136] Thereafter they became official principles of Chinese foreign policy, as well as the core of the fundamental principles of international law in the years between 1954 and 1958 when "peaceful

133. The old position held in the 1950s and early 1960s is that only states are proper subjects of international law. While the individual is still denied the legal status as a subject of international law, some national liberation movements such as the Palestinian Liberation Organization and global IGOs are now accepted as qualified subjects of international law. *See* COHEN & CHIU, *supra* note 10, at 88-99; ZHOU, *supra* note 18, at 58; GUOJIFA, *supra* note 19, at 95-98; Wang Xuan, *Subjects of International Law*, ENCYCLOPEDIA, *supra* note 49, at 198.

134. *See* text accompanying note 29.

135. The number may go up or down — the latest one is up to "the ten basic principles of Chinese foreign policy" — but the principle-declaring habit persists. *See Action, Not Rhetoric, for World Peace*, China Daily, Mar. 26, 1986, at 4.

136. COHEN & CHIU, *supra* note 10, at 119-155; HSIUNG, *supra* note 10, at 31-47.

coexistence" was often touted in Chinese foreign policy pronouncements.

Since the five principles — (1) mutual respect for sovereignty and territorial integrity; (2) mutual nonaggression; (3) mutual noninterference of internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence — have recurred in Chinese foreign policy pronouncements as well as in Chinese international law literature, this section will address the principle/practice fit within the framework of the FPPC, centering on the following issues: (a) the role that "principles" play in the conduct of Chinese politics in general and Chinese international relations in particular; (b) the legal status of the FPPC; (c) the extent to which the FPPC have become an integral part of Chinese state practice; and (d) the practical and functional relevance that the FPPC enjoys in the post-Mao modernization drive.

A. The Role of Principles in Chinese Politics

The insistence on first achieving agreement on general or basic principles is one of the most distinctive behavioral characteristics of Chinese multilateral diplomacy.[137] It seems that all the changes of the post-Mao era have not seriously affected the deeply cultural and nationalistic notion that correct behavior is a manifestation of correct thought and correct principles — a line of continuity from the traditional to the Maoist images of world order.[138]

The quest for legitimacy through principles, for example, is an integral part of any polity, but it seems to have been accentuated and magnified in both traditional and contemporary Chinese politics because of the imperative of inculcating the popular habit of acceptance, compliance, and obedience in order to achieve effective govern-

137. *See* KIM, *supra* note 26, at 459; and CHINA IN THE GLOBAL COMMUNITY 228 (J. Hsiung & S. Kim eds. 1980). Even in commercial negotiations, the Chinese approach has been characterized as "almost the exact opposite of the American belief that progress in negotiations is usually best facilitated by adhering to concrete and specific details, avoiding debates about generalities, which can easily become entangled in political or philosophical differences." L. PYE, CHINESE COMMERCIAL NEGOTIATING STYLE 40 (1982).

138. The quest for a correct normative orientation, which has been internalized in the Chinese political culture, is the essence of Mao's "continuing revolution":

> Whether or not a line is ideologically and politically correct decides everything. If the Party's line is correct, then, we will get everything; if there are no men, we will get men; if there are no guns, we will get guns; if we do not hold power, we will get power. If our line is incorrect, even if we have these things, we can lose them. The line is the key link; once it is grasped, everything falls into place.

Summary of Chairman Mao's Talks to Responsible Local Comrades During His Tour of Inspection (mid-August to 12 September 1971), 5 CHINESE L. & GOV'T 33 (Fall/Winter 1972-73). For a more detailed analysis of the similarities and differences between the traditional and Maoist images of world order, see KIM, *supra* note 26, at 19-93.

ance with a minimum use of force. Moreover, because of the prominence of the issue of legitimacy in light of the PRC's long isolation from the post-war international system and the unsettled nature of the two-China question, principles have played an important role as a legitimating force in Chinese foreign policy.

When viewed against the background of such a strong tradition, what is surprising is not so much the continued emphasis on the deductive approach of insisting on agreement over basic principles, but the ease with which these principles, having been invoked, are flexibly and self-servingly revised in practice. The Chinese see no contradiction in this practice, asserting that they are only being faithful to the professed code of conduct in Chinese foreign policy — "firmness in principle and flexibility in tactics" (*yuanze de jiandingxing he celüe de linghuoxing*). This elasticity of approach makes it possible for the Chinese to stretch a given principle to accommodate new needs and requirements of its foreign policy. Thus, the characterization of China's international law as "a fighting international law rather than a thinking international law"[139] only captures the reality of the first phase of diplomacy Chinese-style and is not an accurate description of overall Chinese diplomatic practice.

B. The Legal Status

In the 1950s, the FPPC and the UN Charter together were seen by the Chinese to form a coherent body of peremptory norms and essential foundation principles of the international public order.[140] Thereafter, the demise of international law research in 1964-1979 left the legal status of the FPPC unelaborated. In the post-Mao era, with the restoration and rejuvenation of international legal research, there has been an attempt to treat the FPPC as an integral part of "the principles of international law." The five principles are now claimed to be (1) identical with the purposes expressed in the UN Charter, (2) the core of the fundamental principles of international law, and (3) a new development in the fundamental principles of international law.[141]

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139. Dicks, *Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong*, 95 CHINA Q. 429 (1983). In fairness to the author, two points need to be made. First, this article was published in 1983, based obviously on the author's careful observation of China's negotiating style in the opening round. Second, the author simply transplants to China the expression first used by Leon Lipson in describing the Soviet approach to international law. Lipson, *Peaceful Coexistence*, in SOVIET IMPACT ON INTERNATIONAL LAW (H. Boade ed. 1965).

140. Zhou Gengsheng, *The Principles of Peaceful Coexistence from the Viewpoint of International Law*, 6 ZHENGFA YANJIU (Research on Politics and Law) 38 (1955).

141. GUOJIFA, *supra* note 19, at 81-82.

There is support for the Chinese claim that the FPPC have already become basic principles of international law. In the context of the UN lawmaking process, the FPPC found their way into the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.[142] The legal significance of this resolution may be seen in the position taken by the United States government. Although the U.S. generally takes the traditional approach that the General Assembly is not and cannot be a lawmaking body, it has, nevertheless, singled out this resolution as an exception.[143]

Chinese scholars and statesmen generally evade the question of potency of principles in international life. The problem with "principles" is often their lack of clarity and coherence, or of situation-specific criteria.[144] The function of principles is only to guide the general attitudes of social actors and to provide a point of departure for formulating situation-specific rules of social behavior. For example, while there is no shortage of resolutions such as the 1970 Declaration restating the principles of international law,[145] the United Nations, in four decades of lawmaking, has yet to produce a single multilateral convention on the non-use of force. The near impossibility of achieving global consensus on legal norms and rules, as against general principles, concerning the maintenance of world peace and security is highlighted by the irreconcilable intersystemic disagreement on a global treaty on the non-use of force in the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. In short, the FPPC may well be a necessary,

142. Although the Soviet expression "peaceful coexistence" was euphemistically rephrased "friendly relations and cooperation" to meet Western objections. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1971). For an analysis of the process whereby the key principles of peaceful coexistence were incorporated into this law-declaring resolution, see E. MCWHINNEY, UNITED NATIONS LAW MAKING 16-19 (1984).

143. The resolution "may be an authoritative interpretation of international law, adopted as it was unanimously and stated as it was by many Members to be such." This is part of the November 11, 1977 statement made by Robert Rosenstock, U.S. Representative to the Sixth Committee of the General Assembly. *Cited in* J. BOYD, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977 54 (1979).

144. This lack of specificity is compounded in the UN Charter because of the presence of some competing principles, e.g., the principle of non-use of force (Article 2 (4)) versus the principle of the inherent right of individual or collective self-defense (Article 51), or the principle of unanimity (Article 27 (3)) versus the principle of the sovereign equality of all Member States (Article 2 (1)).

145. The latest of which is the *Manila Declaration on the Peaceful Settlement of International Disputes.* G.A. Res. 37/10, 37 U.N. GAOR Supp. (No. 51) at 261, U.N. Doc. A/37/51 (1983). The declaration appears as an annex to this resolution adopted by consensus (without a vote).

but certainly not a sufficient, condition for a peaceful world — the nations cannot live peacefully by principles alone.

C. State Practice

Although the FPPC seem to provide a line of continuity between the Maoist and post-Mao eras, this continuity seems to be more apparent than real.[146] Even as a set of "core" principles, the FPPC have followed, rather than guided, China's changing foreign policy needs and goals in that they have always been applied in a manner that mirrors the shifts in Chinese foreign policy. Consequently, the FPPC have never achieved the status of "customary law" through consistent, sustained, and settled practice.

During the 1950s, the FPPC were used mainly as a means of creating diplomatic openings to Third and Second World countries in response to the US-led attempt to isolate the PRC. In the 1960s, while the FPPC were having an effect on the UN's development of international law, China's foreign policy and the FPPC were neglected in the midst of the country's internal turmoil. Moreover, China's dual-adversary policy vis-à-vis the two superpowers in the 1960s could not be easily reconciled with the spirit of the FPPC. Even when China returned to the world scene in the early 1970s, the FPPC were not restored to their prior central position in Chinese foreign policy. Instead, from 1970 to mid-1982, anti-hegemonism (anti-Sovietism) served as the cardinal principle and operational guide of Chinese foreign policy.[147]

The claim of many Chinese international law scholars that the FPPC provide a line of continuity from the Maoist era to the post-Mao era is based partly on the fact that the FPPC were embodied in the preambles of the 1975, 1978, and 1982 Constitutions of the PRC. However, the contexts in which references to the FPPC are made in these constitutions need to be examined closely in assessing the way in which the FPPC fit into contemporary foreign policy objectives. In the 1975 Constitution, the reference to the FPPC was aligned with the objective to "oppose the imperialist and socialist-imperialist policies of aggression and war and oppose the hegemonism of the superpowers."[148] In the 1978 Constitution, a transitional constitution during the short-lived continuity period of the post-Mao era, the FPPC were used in such a way as to support Mao's three-worlds struggle

146. This observation is based on the author's field interviews with Chinese international law scholars in Beijing in 1985-86.

147. *See Foreign Relations*, *supra* note 6, and Kim, *supra* note 30.

148. PRC CONST. preamble (1975).

theory.[149]

In striking contrast, the current (1982) Constitution places the FPPC in a new context which emphasizes China's positive relationship with the rest of the world.[150] With the inauguration of an "independent and peaceful" foreign policy in 1982, the FPPC have once again returned to the status they enjoyed during the latter half of the 1950s, but with new twists and interpretations. The application of the FPPC has now become global, embracing all states of different social and political systems. In tune with a new and recurring theme of "interdependence," both the open-door policy and the FPPC were broadly applied. This is demonstrated by the peaceful resolution of a colonial/territorial/political dispute over Hong Kong through the application of the "one country, two systems" formula.

Although the past record of the FPPC has failed to establish its status as customary international law, China's practice since 1982 suggests that the FPPC may at least achieve more permanence in Chinese foreign policy.

D. Functional Relevance

As mentioned earlier, despite all the changes in Chinese foreign policy, a sustained conception of international law as an instrument is an underlying thread of continuity.[151] The radical changes of the post-Mao era have not weakened this instrumental conception of international law; rather, they have reinforced and strengthened it. Since the proclamation of the four modernizations as "the fundamental guiding principle" at the Third Plenum,[152] the challenge of the modernization drive has been formulated as follows: "The work of every district, every department and every unit, right down to every single individual, as well as the credit due to it, will be judged by its direct and indirect contribution to modernization."[153] The relevance of the FPPC too can be assessed in terms of their direct and indirect contribution to the modernization drive.

Strictly speaking, the first, second, third, and fifth principles (sovereignty, nonaggression, noninterference, and peaceful coexistence) in the FPPC make up a negative code of principles of mutual abstention more suited to an underdog state seeking protection in the

149. PRC CONST. preamble (1978).

150. "The future of China is closely linked with that of the whole world. China adheres to an independent foreign policy as well as to the five principles. . . ." PRC CONST. preamble (1982).

151. *See* text accompanying note 43.

152. DENG, *supra* note 11, at 130.

153. *Comrade Ye Jianying's Speech*, BEIJING REV., Oct. 5, 1979, at 7, 23, col. 2.

cocoon of sovereignty. Only the fourth principle of equality and mutual benefit has the character of a positive principle of mutual cooperation, or of what the late Wolfgang Friedmann called the "international law of co-operation."[154] With the shift from self-reliance to interdependence in the post-Mao era, it would seem, then, that the functional relevance of the FPPC as a unit is questionable.

However, China manages to minimize this discrepancy between principle and practice by shifting the main emphasis from the negative protective principles of sovereignty, nonaggression and noninterference to the positive reciprocity (fourth) principle of equality and mutual benefit.[155] Along these same lines, the discrepancy between China's moral and normative commitment to the NIEO and the Third World on the one hand, and the practical imperative of joining the established international economic regimes to fuel the modernization drive on the other, is "resolved" by shifting from one principle (individual and collective self-reliance) to another principle (interdependence) of the NIEO Declaration. As a collective consensual document, such a declaratory resolution always embodies many competing principles. A content analysis of the NIEO Declaration shows an uneasy coexistence of associative/linkage principles (cooperation, interdependence, etc.) and dissociative/withdrawal principles (sovereignty, self-determination, self-reliance, etc.).[156] During the NIEO inaugural process in 1974, China singled out two principles — "interdependence" and "international division of labor" — as being particularly objectionable.[157] In the post-Mao era, however, "interdependence" has become a central and recurring positive theme of Chinese policy pronouncements at global forums.

The minimization of the discrepancy between principle and practice is the art of the possible in Chinese diplomacy. In the post-Mao era, it means drastically reformulating, not repudiating, the basic

154. Friedmann, *The Changing Structure of International Law*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 144 (R. Falk, F. Kratochwil, & S. Mendlovitz eds. 1985).

155. In the 1982 annual "state of the world" report, for example, Chinese Foreign Minister Huang Hua, proclaimed that "[t]he economies of all countries are closely interrelated. The developed countries cannot achieve economic growth without the rich resources, vast markets and economic prosperity of the developing countries. All countries, whether rich or poor, north or south, must abide by the principle of equality and mutual benefit if they are to carry out fruitful economic exchanges and co-operation." *See* BEIJING REV., Oct. 11, 1982, at 18, col. 1.

156. The former occur seventy-nine times and the latter occur only nineteen times. Preiswerk, *Le Nouvel Ordre Economique International est-il Nouveau?* 8 ETUDES INTERNATIONALES (International Studies) 648 (1977).

157. 6th Special Session, U.N. GAOR General Committee and Ad Hoc Committee (10th mtg.) at 53, U.N. Doc. A/AC.166/SR.10 (1975).

principles of international law and relations so as to make room for modernization. This is illustrated by two recent real-world cases.[158]

From the start of Sino-British negotiations over Hong Kong, China assumed its usual approach. China categorically rejected the British proposal to deal first with substantive matters on the ground that such talk was meaningless unless two basic principles were first agreed to and recognized: first, sovereignty over the entire Hong Kong area, not just the leased New Territories, would revert to China in 1997; and second, because sovereignty is indivisible, there could be no separation between sovereignty and administrative power. Yet what finally emerged from the Joint Sino-British Declaration comes close to being a "divided sovereignty." The Hong Kong Special Administrative Region (HKSAR), according to the Joint Declaration, will enjoy a high degree of autonomy except in foreign and defense affairs. The Government of the HKSAR is permitted to exercise such powers of a sovereign state as independent judicial power, the status of a free port and separate customs territory, the right to issue travel documents for entry into and exit from Hong Kong, and the right to maintain and develop economic and cultural relations and to conclude relevant agreements with states, regions and relevant international organizations under the name of "Hong Kong, China."[159] The Declaration further provides that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force."[160] Thus, the resolution of the Hong Kong problem through the Joint Sino-British Declaration after two years of behind-the-scenes bilateral negotiations is a textbook model of creative and flexible application of the FPPC within the context of Sino-British relations.

In *Russell Jackson, et al. v. the People's Republic of China*, better known in China as the *Huguang Railway Bond Case*,[161] two clashing legal principles — the traditional principle of absolute sovereign immunity and the revised contemporary principle of restricted sover-

158. For a more detailed analysis, see Kim, *supra* note 52.

159. BEIJING REV., Oct. 1, 1984, at iv, col. 1. For a text of the Declaration and its annexes, see *id.* at i-xx.

160. *Id.* at xiii.

161. For a succinct summary of the facts of the case, see *Sovereign Immunity, supra* note 107. For Chinese legal views and interpretations, see *Huguang Bond Case, supra* note 67; Fu Zhu, *U.S. Court Violates International Law*, BEIJING REV., Mar. 14, 1983, at 24, 30; Liu Daqun, *The Odious Nature of the Huguang Railway Loans*, 1 GUOJI WENTI YANJIU 57 (1984); *Sovereign Immunity, supra* note 107; and Zhu Qiwu, *Criticizing the Huguang Bond Case*, 11 MINZHU YU FAZHI 12 (1984). For a most recent debate on this issue involving three Chinese international law scholars, see CHINA YEARBOOK 1986, *supra* note 16, at 249-305.

eign immunity — were brought to the fore. Despite much talk about a new international law, China in this case adhered to the traditional principle of absolute sovereign immunity. However, the final resolution of the case in March 1987 in the U.S. Supreme Court cannot be seen as an affirmation of the traditional principle by U.S. courts. Although the brief filed by China's American counsel[162] ritualistically reflects China's stand on the principle of absolute sovereign immunity as a fundamental aspect of its sovereignty, it rests its main argument on a different ground, that "retroactive application of changes in municipal laws affecting the jurisdictional immunity of foreign sovereign states would violate established norms of international law."[163] The bottom line, as in many other real-world legal issues and cases in post-Mao China, is not so much theoretical exercise in legal and technical gymnastics as the continuing quest to make legal principles serve the functional needs of the modernization drive: from the beginning of the case, the Chinese knew that they would not be able to enter the American capital markets without a successful and satisfactory resolution of this case.[164]

China's softening attitude on the principle of sovereign immunity is also shown in the context of UN lawmaking activities. Faced with the clash between two competing principles in the International Law Commission, China suggested that the Commission should seek "a reasonable and realistic balance" in order to accommodate both a principled and a flexible attitude towards the issue of state immunity in the draft articles.[165] The draft articles had to clarify and embody general principles first (firmness in principle) to be followed by exceptions to the rule (flexibility in tactics). Once again, China has taken

162. The brief was prepared and filed by Eugene Theroux of the law firm of Baker & McKenzie.

163. Respondent's Brief, *supra* note 109, at 12. And, lest its position in this case be misinterpreted, China reassured the U.S. Supreme Court via its American counsel:

> With respect to transactions with China generally, commercial transactions nowadays are concluded by the state enterprises of the People's Republic of China, not by the Government of China itself. China does not claim that its state commercial enterprises are entitled, as a matter of international law, to immunity from suit in respect of their commercial transactions. Therefore, this case has no bearing on any claims that may hereafter arise in respect of such transactions.

Id. at 14.

164. In May 1987, two months after the final resolution of the case by the United States Supreme Court, China announced it would borrow money in the American capital market. On June 7, 1987, China signed a claims settlement agreement with Great Britain, reversing its previous principled stand of refusal to honor debts of $37 million incurred by governments before the 1949 Communist Revolution, thus opening the way for China to issue bonds on the London capital market. N.Y. Times, June 8, 1987, at D9.

165. *See* Ambassador Huang Jiahua's statement, 41 U.N. GAOR C. 6 (39th mtg.) at 6, U.N. Doc. A/C.6/41/SR.39 (1986).

what it calls a "seeking common ground while reserving differences" (*qiutong cunyi*) approach on this question, as it has on so many other questions in the multilateral lawmaking process.

In the final analysis, the FPPC, no matter how flexibly reinterpreted, have limits. China's modernization cannot go too far by the proclamation or manipulation of principles alone: no principle can be stretched indefinitely without breaking it. Moreover, no multinational corporation would be willing to enter into any joint venture or direct investment on the assurance of principles alone. The dramatic increase in the number of multilateral treaties that China has acceded to or ratified[166] as well as the explosion in domestic economic legislation in recent years is a testimonial to the insufficiency of principles. A new practice in domestic legislation is to insert in the statute what may be called a qualified "supremacy clause." For example, Article 189 of the Civil Procedure Law of China (1982) provides that the provisions of an international treaty to which China is a party shall prevail even when in conflict with domestic laws, unless a reservation to the treaty has been made.[167] All this goes to show that China now recognizes that international law occupies a higher status than domestic law.

CONCLUSION

In post-Mao China, international law has become part of the effort to catch up with the rest of the world. The developments of the past seven years (1979-1986) go far beyond restoring international law to the status it enjoyed during its heyday in the late 1950s. Of course, quantitative change does not *ipso facto* lead to qualitative change. In domestic or international legislation, doing more does not necessarily mean achieving more, and, as the history of civil rights in the United States reminds us, there is also a wide discrepancy between having law and enjoying law. In a multi-cultural world, there will always be discrepancies between the authoritative (the "ought" of international law) and the actual (the "is" of international politics).

The foregoing analysis of the development of international law in post-Mao China provides a basis for depicting the lines of continuity and change. On the side of continuity, there still remains the shadow of the past — China's perennial concern with its status, security and sovereignty. China's classical deductive style of insisting on agreement over basic principles remains unchanged, at least in the initial

166. The latest one is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. FBIS, Dec. 5, 1986, at K8.

167. Zhao, *supra* note 67, at 555.

phase of the negotiating and lawmaking processes.[168] There persists the instrumental conception of international law as a means of enhancing foreign policy goals and objectives. Chinese statesmen and scholars do not believe in the feasibility and desirability of separating the domain of law from the domain of politics.

Despite frequent references in and out of China to "Chinese international law" (*Zhongguo Guojifa*), there is no such thing as "Chinese international law" any more than there is such a thing as "Chinese mathematics;" there can only be a Chinese theory and practice of international law. In other words, there is greater continuity and stability in any state's international legal behavior than in its foreign policy behavior. While China's international legal practice always dances to the tune of its foreign policy, this kind of behavior cannot exceed the permissible parameters of recognized international norms and rules. Hence, the changes and shifts in post-Mao China's general orientation toward international law should be seen as conceptual adjustments, redefinitions and reinterpretations.

Still, the development of international law in the post-Mao era is not merely one of quantitative motion without actual progress. To recapitulate some of the important qualitative changes in the post-Mao era: (1) the nature and basis of international law are now seen more in functional and practical terms with less emphasis on class nature or grand theorizing; (2) there has been a significant attempt to expand, diversify, and reorder the sources of international law with decisions of international organizations, especially certain General Assembly resolutions, playing an increasingly important lawmaking role; (3) the FPPC have been revived as the core principles of international law but with a more flexible interpretation and universal application; (4) the criticism of the theory of superiority of international law over domestic law in the late 1950s and early 1960s has been reversed with the focus of Chinese attack now being directed at the assumption of superiority of domestic law over international law; (5) while sovereignty is still central in Chinese international legal rhetoric, especially in the opening round of lawmaking or negotiating processes, its uncompromising attitude is being progressively modified to accommodate the functional requirements of China's deepening involvement with the capitalist world system; and (6) the rise of such concepts as *jus cogens* and the common heritage of mankind is an

168. It should be noted in this connection that the appeal to normative principles to legitimize and enhance its symbolic capability in global politics is not endemic to China; it is common state practice in the global politics of collective legitimation and delegitimation.

indication of growing recognition of the imperative of multilateral cooperation in the management of global commons.

In short, there has been a discernible legal turnabout, a shift from the Maoist system-transforming approach to Deng's system-maintaining approach in the Chinese vision of the international order. The general orientation of post-Mao China toward the international legal order may be said to have become progressively more positive and participatory.

How can we explain such a legal turnabout? The main answer, I submit, is to be found in the reformulation of the central challenge of Chinese foreign policy. During the post-Mao era, especially since the Third Plenum in December 1978, the primary challenge of Chinese foreign policy has stayed consistent — to make the world safe and predictable for China's march towards modernity. One of the main functions of international law is to provide a frame of normative reference to enhance international communication and to stabilize the expectations of international actors. International law thus becomes an important instrument in the Chinese quest for a stable and predictable external environment. The relevance of international law is also closely connected with the general foreign policy orientation and level of involvement of a state in the world system. The logic of self-reliance during the Maoist period in China called for the maximization of internal autocentric development, the minimization of external dependency and a minimal use of international law. The logic of interdependence in the new post-Mao era, on the other hand, calls for deep and extensive involvement in all kinds of international transactions — and a maximal use of international law.

With the center of normative gravity shifting from the negative, Manichaean vision of anti-hegemonism to a more positive and practical conception of "functionalism"[169] in the world outlook of the post-Mao leadership, "world peace and world development" are now identified as the twin objectives of Chinese foreign and domestic policies, as the twin problems of East-West and North-South relations, and the twin challenges of the United Nations and international law. The cumulative effect of increasing enmeshment with global networks of interdependence is that China has now become, for the first time, an integral part of the global political system. There is now a growing tendency toward conceptualizing Chinese and world interests and responsibilities in mutually complementary terms. "We are well aware," Premier Zhao Ziyang has publicly and officially acknowl-

169. *See* Kim, *supra* note 132.

edged, "of *our* obligations and responsibilities in the world."[170]

Only time will tell whether this reading of the development of international law in post-Mao China as generally positive and contributory to the international legal order is correct, and if so, whether the positive adjustments and shifts depicted in this article can be carried to completion after Deng Xiaoping is gone. Notwithstanding future developments, China's positive involvement with the international normative system provides a measure of hope and encouragement to those scholars and statesmen engaged in the challenging quest for a better international legal order.

170. Zhao Ziyang, *Report on the Seventh Five-Year Plan*, BEIJING REV., Apr. 21, 1986, at xviii (emphasis added). In response to the question, "What would you say is the most significant change in the development of international law in the post-Mao period?" one Chinese international scholar responded: "In the past, we used to think only in terms of our rights. But now we have to think in terms of our rights *and* responsibilities." The author's interview with Zhou Xiaolin, Division Chief, Department of Treaties and Law, Ministry of Foreign Affairs, in Beijing (Dec. 12, 1985).