

THIRD SESSION

Friday, April 28, 1967, at 9:15 a.m.

PANEL: THE PEOPLE'S REPUBLIC OF CHINA AND INTERNATIONAL LAW—OBSERVATIONS

The session convened at 9:15 a.m. in the Congressional Room of the Statler-Hilton Hotel, Professor Leon Lipson of Yale Law School presiding.

Chairman LIPSON introduced the panel and commented that some political scientists look at the relationship of Communist parties to the non-Communist states in which they function as that of "an anti-system party," one which takes advantage of the organization of political activity into many different parties in order to promote a policy, which, if successful, would lead to the overthrow of the system that harbors the "anti-system party." The People's Republic of China (PRC) can be said from the legal standpoint of international law to function as "an anti-system regime" in the same sense. Professor LIPSON emphasized, however, that such a statement, although a helpful beginning of analysis, is only a beginning. He then put three questions to the panel: (1) Is it true in practice that the People's Republic of China has behaved as an anti-system regime in international law? (2) What is the system to which the PRC supposedly is anti, and are others faithful to it? (3) Does it make sense to look at the PRC in the international polity as if it were a determinate quantity, an immutable force not likely to be affected by the way in which the outside world regarded it and reacted to it?

The CHAIRMAN then called upon the first panelist, Professor JEROME ALAN COHEN.

CHINESE ATTITUDES TOWARD INTERNATIONAL LAW—AND OUR OWN

BY JEROME ALAN COHEN

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A century ago Peking was in crisis. A series of wars had humiliated China and shattered its millennial isolation. Western force had rudely awakened the "Central Realm" to the fact that, beyond the tributary peoples of East Asia, lay powerful nation-states with a vastly different view of society, government and international relations. Moreover, the Western "barbarians" seemed bent on further opening up China and compelling it to participate in the Western state system. How should China meet this challenge? A small group of modernizers, who wanted

to use barbarian techniques to check the barbarians, advocated engrafting the new Western learning upon traditional Confucian ideology and institutions.

Western demands were often couched in terms of the Westerners' system of international law. Having witnessed China's need for knowledge of this subject, an American missionary named Martin had just translated Wheaton's *Elements of International Law* into Chinese. The mandarins at first suspected this book "as the Trojans did the gift of the Greeks," but, after successfully invoking its principles in a dispute with Prussia, certain Chinese officials recognized that international law could be a useful defensive weapon. Yet, should the Chinese Emperor, the Son of Heaven, abandon the pretensions of his universal overlordship of the hierarchically-organized Sinocentric world in favor of a system premised on the sovereign equality of many states? Should he concede that the Western powers had been right in seeking to have their representatives reside in Peking? Should he agree to station Chinese diplomats in foreign capitals? Should Chinese students be sent abroad to study international law and should that subject be injected into the Confucian curriculum at home? Such actions were scarcely conceivable to Chinese traditionalists, and, amid the anti-foreign atmosphere of the era, die-hard obscurantists waged a bitter struggle against the modernizers whom they called "sinners against the Confucian heritage."

Opinion among Westerners concerned with China policy was in an equal state of ferment. Although all wanted to end China's isolation, they varied greatly in both motives and preferred methods. Some diplomats condemned missionary Martin's attempt to introduce international law, arguing that it would lead the Chinese to recognize how greatly the recently imposed "unequal treaties" had taken advantage of them. As the French chargé d'affaires put it: "Who is this man who is going to give the Chinese an insight into our European international law? Kill him—choke him off; he will make us endless trouble." The Western trading community also was apprehensive about supplying an instrument that might curb newly acquired commercial privileges and prevent the exaction of further concessions. Missionary Martin, on the other hand, saw international law as a vehicle for bringing the heathen to Christ. And many diplomats, including Americans and Englishmen, approved of Martin's effort in the belief that it would show the Chinese that force was not the West's only law and would help them understand and deal with the outside world, to the mutual benefit of China and the West.¹

Today Peking is again in crisis, its elite badly divided over whether and how to bring China out of isolation. Again, spokesmen for "rationality" claim that the prevailing Chinese ideology—no longer Confucianism but Maoism—must be adapted to meet the demands of modernization. And the outcome of the current struggle for power will inevitably affect

¹ For the above quotations and details of this fascinating story, see Hsu, *China's Entry into the Family of Nations*, Chs. 8, 9 (1960).

the degree to which China accepts the rules and institutions of the world community.

Western opinion also remains in ferment over China policy. Some voices call for the continuing isolation of the Communist regime and emphasize evidence of its open hostility to the international status quo. Others argue for an end to China's isolation and take comfort from those words and deeds that indicate the Communists' willingness to accept aspects of the existing international system. It is inevitable and proper that scholars of international law contribute to this debate. Indeed, it is surprising that there have thus far been so few studies of the eighteen-year record of the People's Republic (PRC) in international law.

A perusal of those studies that have appeared leads me, as an area specialist, to make a few suggestions for consideration by international lawyers who come fresh to the China field.

1. I would, first of all, urge scholars to take account of the extent to which Chinese Communist attitudes toward international law are related to the breakdown of China's imperial tradition. I do not insist upon an acquaintance with China's pre-imperial history, despite the fact that during that period (from the eighth to the third centuries B.C.) a number of contending Chinese states developed recognizable rules to govern their interrelations. Although that ancient experience may in the nineteenth century have helped a historically conscious elite to understand the multi-state system of the West, its relevance to contemporary Chinese attitudes is marginal. Nor do I maintain that contemporary attitudes are substantially the product of the hierarchically organized East Asian tribute system over which Chinese emperors ruled throughout most of the period from 221 B. C. until the Revolution of 1911. Some observers note traces of the tribute tradition in the style of Communist diplomacy: the special emphasis on exchange of visits and gifts; the inaccessibility and glorification of the supreme ruler; and the sense of uniqueness, righteousness and superiority that appears to inhibit friendly relations on the basis of equality. But these are resonances the existence and significance of which are the subject of academic dispute.²

What is beyond dispute and what is of overriding importance is not the impact of the imperial tradition but the impact of its destruction. By the early years of the twentieth century the succession of humiliations that began with the Opium War (1839-1842), and that was symbolized by the stigma of extraterritoriality, had created Chinese nationalism out of Confucian culturalism. It had instilled in a proud and once powerful people the determination to end their country's status as a semi-colony and to achieve its recognition as a sovereign equal. The Chinese Communists drove to power by capturing this nationalist sentiment. Upon gaining control of mainland China in 1949 they promptly abolished the vestiges of imperialist exploitation and sought international acceptance

² See, *e.g.*, Fairbank, China: The People's Middle Kingdom and The USA (1967); and Schwartz, "The Maoist Image of World Order," 21 Journal of International Affairs 92 (1967).

of their sovereign status. Yet, almost two decades later, they are still outsiders in a world community that is willing to admit them only on terms they deem incompatible with national self-respect. Moreover, because of renewed American intervention in the Chinese civil war in 1950, they have been prevented from attempting to establish their authority over China's island province of Taiwan. And they have not been very successful in preventing other humiliations, such as American violations of China's airspace.

Is it any wonder that Chinese leaders maintain a "vivid sense of outrage"³ and manifest an almost obsessive concern with vindicating and preserving national sovereignty? To condemn them, as some writers have done, for retaining the nineteenth-century notions of sovereignty that they were taught by the West is like condemning American Negroes for being obsessed with achieving the equality that they have been promised—and that we have enjoyed—for a century. In both cases, the average white observer is almost totally unable to conceive of what long-imposed second-class citizenship means.

2. Historical perspective is useful in other respects. What makes the China problem especially complex is the continuing existence on Taiwan of the pre-Communist regime, the Republic of China (ROC), with which the U. S. is allied. In these circumstances, appraisal of the Communist record has often involved, at least implicitly, comparison with that of the ROC. If such comparisons are to be made, they should be comprehensive and should take into account the history of Chinese nationalism rather than focus exclusively on recent legal and political positions.

For example, it is true, at least from the American viewpoint, that the ROC has "an enviable record in the United Nations and in the international community."⁴ Yet it is helpful to remember that when in 1928 Chiang Kai-shek's Kuomintang Party (KMT) seized control of the ROC it was, as the Communist regime is now, a vigorous challenger of the international *status quo*. Much of its political support rested upon its promise to restore Chinese dignity by recovering China's lost rights and ending foreign domination. Although in 1943 the ROC formally succeeded in abolishing extraterritoriality, its deteriorating political condition after World War II led it to abandon anti-imperialism and become more closely allied to the West, thereby forfeiting to Communism much of the political legitimacy that derives from Chinese nationalism. History suggests that the ROC's "enviable record" may in part be the product of weakness rather than virtue, and that any government strong enough to rule the China mainland will be ardently nationalistic for some time to come and unwilling to promote world order on other people's terms.

Similarly, critics who seek to establish the wickedness of the Peking government frequently seize upon Mao Tse-tung's famous aphorism—an

³ See Mancall, "The Persistence of Tradition in Chinese Foreign Policy," *The Annals*, Sept. 1963, pp. 14, 23.

⁴ McDougal and Goodman, "Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution," 60 *A.J.I.L.* 671, 698 (1966).

incomplete statement of his political philosophy—that “political power grows out of the barrel of a gun.” But Mao is not the only Chinese patriot to have learned this lesson from the West; he simply has been more candid than others in articulating it. Chiang Kai-shek, after a four-month visit to the Soviet Union during the KMT’s romance with the Comintern, returned to China in 1925 to forge a strong party-army that proceeded to use force to bring a semblance of unity to the country. Indeed, Chiang’s subsequent defeat by the Communists has been attributed to his excessive reliance on militarism and failure to appreciate the explosive potential of peasant nationalism and the social and economic needs of Chinese society.

Knowledge of modern Chinese history also brings into focus the image of “Free China” that is often presented to justify exclusion of the Communists from the world community. We ought to recall that, during the era of Soviet influence, the KMT became a Leninist-style dictatorship; that political repression was a prominent feature of its tenure on the mainland; that, in re-establishing Chinese control over Taiwan after Japan’s defeat, this dictatorship destroyed the flower of Taiwanese leadership in a blood bath that took thousands of lives; and that during the past two decades it has quietly violated the “rule of law” by using secret police and secret military tribunals to imprison large numbers of persons, both Mainlanders and Taiwanese, who have actively sought democratic self-government. I do not mean to imply that other governments, including our own, have had spotless records in dealing with self-determination or other aspects of political freedom, but I simply want to emphasize the value of giving an historical dimension to any comparisons of the rival Chinese regimes.

3. We must not only take account of the nineteenth and twentieth-century background of Chinese Communist attitudes toward international law, but we must also recognize that those attitudes themselves are already part of history. This is true not only of the Communists’ record during their decades of struggle to achieve nation-wide power prior to 1949, but also of the post-’49 era. Although some scholars underemphasize the fact, Peking’s views on many aspects of international law have been far from static. To be sure, there have been certain constants, such as the enduring emphasis upon sovereignty that has consistently led Communist writers to denounce all schemes for “world law” as neo-colonialist subterfuges designed to subject China to the rule of an adverse majority. But on so important a matter as its relation to the United Nations, for example, the attitude of the People’s Republic has gone through a number of distinct stages that began with hopeful expectation of participation and evolved into frustrated antagonism that in turn led to the recent noisy search for a substitute.⁵ Scholars are superfluous if their only task is to do a scissors and paste job on current Chinese statements, for

⁵ See Weng, “Communist China’s Changing Attitudes toward the United Nations,” 20 *International Organization* 677 (1966).

clipping services and propaganda organizations bombard us with reminders of Peking's recent hostility. Scholarship, after all, should tell us how the past became the present and why. Otherwise we may mistake the PRC's present attitudes as eternally fixed and be deterred from attempting to encourage moderation of those attitudes.

4. In examining the evolution of Chinese Communist attitudes toward international law we must be alert to the large extent to which they represent reactions rather than initiatives. For example, contrary to the view of some observers, a major reason why "Communist China has either ignored or challenged virtually every activity of the United Nations"⁶ in recent years may well be that it bitterly resents being excluded from participation. One should also note that many of the PRC's severely censured actions appear to have been acts of retaliation against felt injustice. Was it a coincidence that the PRC seized United States compounds in Peking in 1950 the day after the U. S. defeated a Soviet effort to unseat the ROC representative in the Security Council? And was there no connection between the Red Guards' abuse of a French diplomat this winter and the arrest of Chinese students who had been demonstrating in Paris the day before?

Moreover, if, as it appears, the Chinese Communists regard international law as an instrument of policy to be used when useful, to be adapted when desirable, and to be ignored when necessary, we should not overlook the extent to which this attitude reflects their perception of how others play the game. The topic deserves detailed treatment, but brief reference to a few of the PRC's legal experiences with the so-called leader of the imperialist camp should illustrate the point.

Until the outbreak of the Korean War the U. S. position was that Taiwan had been restored to China under the 1943 Cairo Declaration, that the Allied Powers had accepted the exercise of Chinese authority over the island since V-J Day, that the widely anticipated Communist invasion of Taiwan would thus constitute continuation of a civil war, and that the United States would not become involved in that civil conflict. The North Korean attack on June 25, 1950, reversed all this. The United States promptly dispatched the Seventh Fleet to "neutralize" the Taiwan Strait and, what was even more upsetting to the Communists, it reopened the question of the legal status of the island by declaring that "the determination of the future status of Formosa must await the restoration of security in the Pacific, a peaceful settlement with Japan or consideration by the United Nations."⁷

In the fall of 1950, in an effort to frustrate the consequences of Soviet vetoes in the Security Council, the United States persuaded the General Assembly to adopt the Uniting for Peace Resolution, a significant departure

⁶ The quotation is from McDougal and Goodman, *loc. cit.* note 4, at 711. On p. 713 they attribute Peking's refusal to co-operate in U.N. disarmament efforts not to its exclusion from the U.N. but to its perception that the U. S. manipulates the U.N. and has no intention of disarming.

⁷ Statement of President Truman, June 27, 1950, 23 Dept. of State Bulletin 5 (1950).

from the original understanding of the Charter and one which could not square with the PRC's fundamentalist principles of constitutional interpretation.

What had been distrust of Western legalism became cynicism in February, 1951, when the General Assembly found that the PRC had engaged in aggression by aiding North Korea after the U.N. Command had ignored repeated Chinese warnings against implementing its plan to bring down the North Korean regime by driving to the Chinese border. To the Chinese Communists, who had yet to consolidate their power at home and who were cognizant of Western intervention in the Soviet Union in 1918, American actions in Korea appeared to be a repetition of Japan's design to conquer China via Korea and Manchuria. Thus it constituted a grave threat to China's security and created a sense of immediate danger that impelled China to send "volunteers" to meet what was perceived to be aggression by the United States.⁸

Secretary Dulles proved even more willing than Secretary Acheson to suit international law to American convenience. For example, in 1950, when the United States was confident of its voting strength in the Security Council, it had maintained that the question of Chinese representation was procedural; by 1954, however, the United States' view was that this had become a substantive matter subject to a veto.

What must have been especially infuriating to the Chinese was Dulles' sanctimonious posturing about international law. In 1954, for example, the PRC announced that two Americans, John Downey and Richard Fecteau, had been convicted of espionage and sentenced to life imprisonment and twenty years, respectively. According to the opinion of the Supreme People's Court and the evidence subsequently displayed, the Americans had been CIA agents whose plane had been shot down in northeastern China in late 1952 while they had been making contact with Chinese anti-Communists whom they had previously organized and dropped into China. The United States responded to the Chinese announcement with a strong note of protest, and, in the Dulles tradition, an even harsher press release that branded the convictions "a most flagrant violation of justice" based upon "trumped-up charges." These men, it was claimed, were civilian personnel, employed by the Department of the Army in Japan, who had been lost on a flight from Korea to Japan. Their "continued wrongful detention," the release said, "furnishes further proof of the Chinese Communist regime's disregard for accepted practices of international conduct."⁹

Apparently on the assumption that the best defense is a good offense, even though the United States had never announced that these "civilian personnel" were missing, the note accused the PRC of practicing deception by having failed to include their names on a list of Americans remaining in China. And, incredible though it may seem a decade later, in Feb-

⁸ For authoritative interpretation of these events, see Tsou, *America's Failure in China, 1941-1950*, Ch. 13 (1963), and Whiting, *China Crosses the Yalu*, Ch. 8 (1960).

⁹ 31 Dept. of State Bulletin 856, 857 (1954).

ruary, 1957, Mr. Dulles delivered the *coup de grâce* to the affair by telling a press conference that, although the PRC had indicated that it would release the prisoners if the United States would allow American newsmen to visit China, he would not approve such an arrangement because it would constitute yielding to Chinese "blackmail."¹⁰ The United States has never admitted the truth of the PRC's assertions, even though it has been an open secret that Downey and Feeteau were actually CIA agents,¹¹ and even though such an admission, coupled with an expression of regret, would give them what would seem to be their only chance of immediate release.

Space precludes discussion of our sponsorship of U-2 over-flights by the ROC, our Viet-Nam intervention, and other recent American actions toward China that have done little to moderate the PRC's jaundiced view of international law. Nor can I do more here than emphasize the PRC's sensitivity to the dexterity with which the United States applies international law elsewhere in the world, especially in its own bailiwick, as exemplified by overthrow of the Arbenz regime in Guatemala, organization of the Bay of Pigs fiasco, and intervention in the Dominican Republic in 1965.

5. Plainly, if we are ever to complete the process of integrating China into the family of nations, students of international law will have to empathize rather than moralize, and give the PRC's words and deeds a fair hearing. It is not enough merely to quote Chinese Communist statements, such as those asserting that the United States dominates the United Nations, or that the United States has no intention of disarming, as though these assertions carry their own refutation; we should inquire in each instance to what extent there is evidence to support the Chinese belief. If we trace the Communists' contemporary attitudes back to their scorn of the League of Nations, we might ask whether the League's abject failure to come to China's assistance provided a reasonable basis for disillusion. If we condemn the Communists for refusing to accept a "two China" policy and to renounce the use of force in the Taiwan Strait, what should we say about the Chiang Kai-shek regime for sharing this position? Similarly, Communist claims to Tibet and to territory on the Indian border may take on a different hue if we know that the ROC position is fundamentally the same.

If we castigate the PRC for preferring to settle the Indian boundary dispute by negotiations rather than adjudication, we should inquire how many issues the United States has submitted to the ICJ of late. If we sermonize about the PRC's rejection of a U.N. rôle in Viet-Nam, should we not point out that the 1954 and 1962 Geneva Conferences demonstrate that the PRC has not been unwilling to participate in international conferences in which it enjoys equal status with other Powers? If we criticize

¹⁰ New York Times, Feb. 6, 1957, p. 1, col. 6.

¹¹ See, e.g., Wise and Ross, *The Invisible Government* 106-108 (1964); New York Times, Sept. 9, 1957, p. 7, cols. 5-6.

the PRC for insisting on the unanimity principle at international conferences, should we not ask what Great Power has been willing to do without a veto over important matters? If we censure the PRC for pronouncing its readiness to transfer nuclear weapons information to other countries, should we not acknowledge that it has never made such a transfer? If we recognize, as many political observers do, that China's behavior has been cautious, though its rhetoric has been hostile, is it fair to characterize that behavior as "guerrilla-type caution"?¹²

At times American international lawyers appear to teeter on the brink of self-deception. Recently, for example, in an effort to demonstrate the proposition that the PRC's performance at past multinational conferences "belies the possibility that it will act constructively at the United Nations," two writers soberly noted that "Communist China has sought to manipulate the membership and timing of international conferences to insure that the conferences produced preferred results."¹³ Is there a foreign office in the world that is not guilty of such a charge?

What I have said is intended not as an apologia but as a plea for understanding. According to the Chinese classics, when the superior man is treated in an unreasonable manner, he is supposed to attribute the difficulty to his own personal failings and to examine his own behavior to find the source of the problem. Although hardly a panacea, were we to adopt such an attitude toward the Chinese, we might make a modest contribution to ameliorating present international tension. Of course, no amount of empathy can erase the fact that the Chinese Communists devoutly preach their own version of the Marxist-Leninist challenge to the bourgeois state system and, within the limits of China's capabilities, seek to translate this revolutionary ideology into action. Yet, as Benjamin Schwartz has pointed out,¹⁴ there is more than one level to China's international relations. Even in the throes of the cultural revolution, the PRC has by and large continued to carry on conventional diplomatic and commercial relations within the bourgeois nation-state framework, and, as the Sino-Soviet dispute has deepened, it has increasingly invoked principles of international law in its relations within the Communist orbit. The strands of Chinese theory and practice are many. China is Communist, to be sure, but it is also an aspiring Great Power, a chauvinistic "new nation" and the heir to a distinctive history and cultural style. Our task is to assess these complex strands as objectively and comprehensively as possible in order to facilitate what must inevitably be the slow and painful process by which China and the world adjust their demands upon each other. We should not caricature the Chinese demands. It will be difficult enough to deal with reality.

The CHAIRMAN thanked Professor Cohen, and called on the second panelist, Dr. HUNGDAH CHIU.

¹² See McDougal and Goodman, *loc. cit.* note 4, at 708.

¹³ *Ibid.* at 717 (text and note 233).

¹⁴ See Schwartz, *loc. cit.* note 2, at 101.