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Chinese Attitudes to International Law.

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Mr. Richard H. Nolte,
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Dear Mr. Nolte,

In the fifteen years that have elapsed since the foundation of the Chinese People's Republic, the international lawyers and publicists of the West have devoted a lot of attention to the important question of the proper legal position in the world community of the two rival regimes which claim to represent China in her international relations, and thus to the problem of the attitude which from a legal point of view ought to be adopted by the world towards the People's Republic. Very little attention has been given to the corresponding question of China's attitude to the law of the community of nations which is still so hesitant about admitting her. While critics of this or that action of the Chinese government are not hard to find, little thought seems to have been given to Chinese policy from a specifically legal point of view. The attached paper represents a tentative first step towards filling that gap.

An ultimate object of an enquiry into Chinese attitudes to international law should be to throw light on the role of law in the making of policy in all aspects of China's external affairs - an important aspect of the whole problem of including China, on terms which both she and the rest of the world can recognise and accept, in some kind of system of world order. It would be impossible, I think, to make a study of this kind outside Peking. However, some of the preliminary questions can be usefully studied, and in this paper I shall be concerned with two: how far has China embraced a Marxist, or more specifically Soviet, view of international law? how far does she accept and make practical use of rules of international law which are recognisable to us in her conduct of her foreign relations? In a further Newsletter I shall deal with the significance for international law of the concept of peaceful co-existence as advocated by the Chinese government.

To ask these questions is to remember that China is not only an avowedly Marxist state; it is, in the words of Premier Chou En-lai, an ancient country and yet a very young state. Like many young states, China questions many of the basic assumptions of traditional international law. To the extent that they are nonetheless prepared to use its terms and concepts we should, perhaps, be grateful.

Yours sincerely,

Anthony Ricketts

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ARD-5.

CHINESE ATTITUDES TO INTERNATIONAL LAW (1)

by

Anthony R. Dicks.

This paper seeks to examine in outline the attitudes to international law which have been adopted by the Chinese government since the establishment of the Chinese People's Republic in 1949. Its principal object is to discover how far China has embraced a specifically Marxist or Soviet theory and practice of international law, and how far she has continued to conduct her foreign affairs in accordance with recognised rules and doctrines which form part of generally accepted international law. In this connexion it touches on a question that has become all too familiar to international lawyers in the West: how far does the international law principle of universality, the universal applicability of the rules of international law to all states, still reflect the will of the states (particularly the new states) which make up the world community? In the case of China, with its vast population and potential power and influence, the problem is acute. China's political isolation has led to her exclusion from many of the normal institutions of international life, and as the rest of the world, however haltingly, is drawn together institutionally, so China is in danger of becoming more isolated.

This is strictly an exploratory study, and it has been necessary to limit it in scope as well as in length in several ways. It is by no means an exhaustive examination of the material available, and is in no sense a compendium of the state practice of the People's Republic in international law. Again, while the hypothesis which would relate international positions to Chinese internal politics has its attraction, no such relation could be sought here without undue elaboration. Finally, the conformity of Chinese state practice to generally accepted doctrine is measured in terms of rationalisations rather than acts; no attempt is made here to judge whether the People's Republic in fact conforms to the rules of international law or not. With all these limitations, no answer can be given to the major question how far international law plays a role in the making of foreign policy decisions in Peking.

The line between law and politics is often hard to draw, especially where international law is concerned. I have tried to confine myself to legal questions, with the result that important political matters may seem to have been overlooked.

The questions considered are principally within the realm of public international law, that is the law applicable to states and international organisations in their mutual dealings. But legal relationships of a non-'public' nature, such as those between the Chinese government and foreign private individuals and groups, are touched on when they seem to exhibit characteristic Chinese attitude to internat-

The Reception of International Law in China before 1949.

The relationships of European rulers and states have been visualised in legal terms at least since the revival of legal studies in eleventh century Italy. In 1800, however, the government of China still knew virtually nothing of Western notions either of law and jurisprudence in general, or of international law in particular. The external relations of the Empire were visualised and conducted on the basis of an entirely different system of order, the 'tribute system'. Unlike Western international law, this system was not based on an explicit analogy with the internal legal system; and, while its incidence and effectiveness varied with the political and military fortunes of the Empire so as to give some appearance of a balance of power, its rigid theory had nothing in common with the egalitarian 'family of nations' doctrine which had developed in the West. Even those institutions of the two systems which bore some superficial resemblance - diplomatic missions, for example, or the extraterritorial jurisdiction of groups of foreign residents - were based on assumptions so widely different that they turned out to be the source of more misunderstanding than harmony.

During the late nineteenth century, with the conclusion of numerous treaties with Western states and the establishment of regular diplomatic missions, China came to be regarded as a member of the family of nations, though, unlike Turkey, she was never formally admitted. Western books on international law were translated into Chinese, Western lawyers began to teach in Chinese law schools, and Chinese officials learned to make skilful use of the system as a weapon in the fight against Western encroachment. At the same time it seems clear that the Chinese officials of the late nineteenth century, while they realised that international law was a system to which the Western powers felt bound to conform, themselves only used it as an occasional device, refusing to accept it as a set of rules binding on China as well.

As the character of the Western system and the nature of the obligations imposed by it on China (to which Chinese consent was deemed to have been given) became clear, so there developed an important strain of criticism of international law. The unpopularity of the capitulations treaties, with their direct interference in the administrative and legal systems of the country as a whole, and later the complete failure of the international rule of law as personified by the League of Nations to protect Chinese interests against Japan were the principal foci of this discontent. China was in this sense the first of the 'new states' to question the validity of traditional international law.

It should also be remembered that, in common with other 'new states', China had nothing resembling the Western jurisprudential tradition on which to build analogous theories of international law. Traditional China might fairly be described as an 'a-legal' society;

the complete lack of explicit rules of private law (on which international law, if it is to govern the relations of formally equal states, must be based) in the imperial system of law, the absence of a legal profession, the paucity of legal technique and the popular dislike and official discouragement of recourse to law as a means of solving disputes and of legal argument as a means of promoting social objectives were all inimical to the easy assimilation of Western legalism into Chinese habits of political behaviour.

It is true that in the period before 1949 China, as represented by her governing elite, felt herself to be a full member of the international community; she was, after all, recognised permanently as a great power by the provisions of the United Nations Charter. She had also the will and the means, in the shape of a reasonable number of competent (and in some cases distinguished) international lawyers, to conduct her relations with the rest of the world in accordance with international law. Lawyers and diplomats trained in the Western tradition, however, tended to belong to a class whose political influence was at least neutralised, if not entirely destroyed, by the coming to power of the Chinese Communist Party. With the adoption in 1949 of dialectical materialism as the official philosophy of the Chinese state, China was committed to a Marxist view of the international scene and of international law.

The Marxist-Leninist Theory of International Law.

Communist writers on the theory of law and state have always laboured under great difficulties in arriving at a satisfactory definition of international law. The difficulty begins with the typical statement of Marx and Engels that law is essentially connected with the state and is by its very nature the law of the state. From the nature of the state, it is thus by definition always an instrument of class domination. It is essentially a coercive order - in Lenin's words 'Law is nothing without a mechanism capable of compelling the observance of legal norms.' At the outset, then, if socialist states were to form part of the world community at all, a definition of international law had to be found which would present it as (a) coercive (a difficulty well known to bourgeois lawyers who have tried to align definitions of international law to definitions of law in general) (b) the law of the state (c) an instrument of class domination, and which also permitted an interpretation of the actual rules of the law which would accord with the changing foreign policy needs of the socialist states.

The tortuous efforts of Soviet jurists to repair the gap left by Marx's failure to deal with the problem of international law cannot be traced here, but some more or less permanent theories can be isolated. These are: (a) the class character of all international law; (b) the newness and uniqueness of 'socialist' international rules, as against the rules of bourgeois, imperialist or capitalist international law; (c) the impossibility of general international law existing except as a 'form of temporary compromise between two antagonistic class systems; (d) an insistance on the primacy of national over international law; (e) the theory that a socialist state is an entirely different

legal entity from the state which it replaces (with the result that it is entirely exempt from liability for the previous government's actions and obligations); (f) the candid admission that international law is a part of the armoury with which the class struggle is to be carried out on the international plane; (g) the view that the validity of each rule of international law depends on the recognition or consent of each sovereign state, and a positivist emphasis on sovereignty as the leading norm of international law; (h)finally, for the Khruschev era, a heightened emphasis on the principles of peaceful co-existence as being applicable to the relations of ideologically opposed states, for '....naturally international law cannot remain aloof from the triumphant march of this idea which is so vitally essential to the nations.'

International Legal Theory in Modern China.

How closely does Chinese official thinking adhere to these Soviet principles of international legal theory? Which does it accept, and which reject? These questions would be easier to answer if there existed an authoritative book on either international law or on legal theory generally in China. I have been unable to find either. Since 1960 at least, there have been plans for the writing of a book to be called 'The Theory of State and Law', and reports of discussions of the project in various law schools, as well as articles on the outlines of the book, have appeared in the journal Cheng-fa Yen-chiu (Political and Legal Research). In fact the subject of international law is so far absent from these discussions, and it is probable that the problem of defining it has not yet been seriously tackled. The very fact that 'The Theory of State and Law' is taking so long to write, and is in effect a joint enterprise of all the law faculties in China, suggests that a once-for-all authoritative definition is being sought. It also strongly suggests that Soviet theory will not necessarily be accepted.

It should not be thought that there is no discussion of either the theoretical or practical aspects of international law in China. In the first place, Soviet views on the definition and character of international law have been made available in a collection of translated papers - Basic Principles and Problems of Contemporary International Law, published in 1956, at a time when there was apparently little academic legal work being dome in China. A number of Western texts are also available in Chinese, as will be shown later. More important, since 1958 a modest but significant number of articles have appeared in various newspapers and journals covering a number of problems of international law. In general the style of writing is very much in the Soviet mould, and much of the content could have come straight from a Soviet textbook. Most of the theoretical principles listed above are cited in one or other of these articles; thus the class character of international law, the special nature of socialist international law and the use of international law as a weapon in the class war are all adopted in an article called Recognise the True Face of Capitalist International Law from a Few Basic Concepts; A Criticism of Capitalist International Law in Regard to Theories of State Sovereignty discloses the normal Marxist-Leninist positivist emphasis on the inalienable character of state sovereignty; and other examples could be given.

Perhaps the most significant of these articles are three which appeared in the journal Chiao-hsüeh yü Yen-chiu (Teaching and Research) in 1958 - a time when rightist and bourgeois tendencies, particularly amongst lawyers, were being rigourously suppressed as part of the 'Rectification Campaign' which followed hard on the heels of the criticisms levelled at the government during the 'Hundred Flowers' period. In the first two articles, Lin Hsin and Chou Fu-lun espoused radically opposing theories of international law. The former took a firmly leftist view, in particular developing the old Marxist view that since international law is stamped with an indelible class character, there can be no single, general system of law acceptable to states of different class character. Since international law is a tool of foreign policy, how can the same law serve opposing foreign policies? Chou Fu-lun, on the other hand, took up a position that would have certainly been condemned as thoroughly rightist in the Soviet Union, at any rate in pre-Khruschev times. Abandoning the analogy between international law and national law, he only admits the existence of a single general system, binding on socialist and capitalist states alike. Pointing out that the content of international law changes in time, he regards it as reflecting the transition from capitalism to socialism. The third of the articles, which is unsigned and may be taken to reflect an official view via the editor, does not specifically settle this dispute. It deplores instead rightist tendencies in international law teaching, emphasising the importance of class confict in development, and condemning the uncritical use of such bourgeois texts as Oppenheim's International Law.

The importance of this controversy, which has not been continued, is that it strongly suggests that importance is attached to a full debate on the difficult subject of defining international law before an official line is taken on it. It was said in 1959 by a visiting Japanese lawyer that while in general duplicated or printed courses of lectures were in use in law schools as textbooks, those on public and private international law were not yet ready for printing. Discussions were still taking place. A report on the state of legal research at Peking University in 1962, while describing the preparation of general courses on law and state, merely says that 'advanced discussions' on the nature of international law had taken place.

It seems, then, that an official position is still being hammered out. It can hardly be doubted that, at a time when the Chinese Communist Party is determined to act as the champion of Marxist-Leninist orthodoxy, any official theory which emerges will be carefully aligned to established general theories of law and state. But it will also probably not be any slavish copy of Soviet theory, and it will no doubt include some purely Chinese contributions, such as, for example, some statement of the significance for international law of the Maoist theory of contradictions, which has not so far been forthcoming.

Such a theory would also have to bear some relation to China's actual practice in foreign affairs. As I hope to show below, most of the principles listed as running through Soviet international legal theory have been found serviceable by the Chinese, and they will no doubt find a place in an official theoretical system.

Up to now, China's rather tenuous links with most of the non-Communist world have lent some reality to the classical Marxist distinction between different systems of international law serving the different ideological camps. As political and economic necessities induce China to give effect to her own version of peaceful co-existence, and she enters into legal relations more and more with the non-Communist world, such an analysis of international law will become less and less realistic. While they may evolve a more subtle definition of international law than the Russians have yet found, it is doubtful whether the Chinese jurists can escape altogether the difficulties which Marxist jurisprudence imposes on international lawyers.

Traditional International Law and Marxist-Leninist Theory in the State Practice of the Chinese People's Republic.

In common with most states, particularly socialist ones, China does not in fact conduct her foreign relations in a legalistic way. The policy statements of her leaders, while they often denounce the 'illegality' of the actions of her opponents, rarely contain legal arguments or touch on legal questions. Indeed, perhaps in keeping with her own 'a-legal' tradition, she goes further than most states in the direction of a political rather than a legal approach to foreign affairs. There are few of the carefully prepared legal analyses which appear in the statements of the British Foreign Office or the U.S. State Department. China's absence from the United Nations has isolated her from the discipline which obliges other states, including those of the Soviet bloc, more and more often to take a legal stand on a wide range of legal problems. Even given the present 'transitional' phase of Chinese domestic law, her statute book shows a striking absence of legislation on international matters.

Maybe it is not too fanciful to see in this reluctance to take up firm legal positions not only a traditional Communist aptitude for keeping law strictly in its place as the servant of politics, but also a traditional Chinese dislike of argument and action based on legal rather than moral or political norms. In the rebuttals of Indian arguments over the disputed frontier, or of American arguments on Taiwan, the denunciation of 'juggling' or 'toying' with legal arguments and precedents could have come from the pens of any Communist jurists, but there is also a strong whiff of the age-old disapproval of 'sung-kun', or pettifoggers, and other users of legal argument. In a more positive sense, the same emphasis on moral rather than legal rules is suggested by the characterisation of the principles of peaceful co-existence as policies rather than rules of law.

All this is in no way meant to imply that international law in the Western sense is not understood in Peking; on the contrary, certain aspects of Chinese practice, for example the conduct of the diplomatic correspondence on the Sino-Indian border dispute, suggest that the Chinese government is legally well advised when necessary.

(1) The Sovereignty and Identity of the State.

Among the first acts of the Chinese Communists after they attained power in 1949 were certain legislative acts of a character

which clearly reflects a change in their self-ascribed role on becoming the government of a sovereign state. Among these may be noticed the abolition of all existing laws and codes, the adoption of a new name, flag, armorial device and anthem for the state, and the adoption of the Gregorian calendar. Although as Communists they regarded themselves as bound to 'lean to one side' in foreign policy (i.e. to stand with the U.S.S.R.), the People's Government fully appreciated the nature of the sovereignty in both the domestic and international spheres which they now wielded. Chinese practice has consistently adhered to a firmly positivist view of its sovereignty. Thus in the Common Programme of the Chinese People's Consultative Conference, adopted 29th September 1949, article 54 provides that

> 'The principle of the foreign policy of the Chinese People's Republic is the protection of the independence, freedom, integrity of territory and sovereignty of the country...'

while article 3 provides that

> 'The People's Republic of China must abolish all the prerogatives of imperialist countries in China...'

Article 56, which restricts negotiations with foreign countries to the basis of 'equality, mutual benefit and mutual respect for territory and sovereignty' was no doubt intended to make this sovereignty inalienable. Nothing is said in this pre-constitutional document of the relationship of the state to international law in general, though other foreign policy objectives are stated to be 'upholding of lasting peace and friendly cooperation between peoples of all countries and opposition to the imperialist policy of aggression and war.'

The 1954 Constitution of the Chinese People's Republic is quite silent on the question of international law and its relation to the state and domestic law. We can easily infer from this, however, the operation of the typical Soviet principle of the complete primacy of national law over international law and the complete dualism of the two systems - quite at variance with the position under the Kuomintang. While the Constitution confers powers to conclude treaties and perform other international legal acts on various organs of the state, there is no provision as to the relationship of such acts to the law of the land, and it is apparently not thought necessary to place any limitation on the way in which these powers are to be exercised.

Chinese treaty practice also suggests that care is taken to reserve the primacy of national over international law. Thus in the Chinese declaration of adherence to the Convention Relative to the Treatment of Prisoners of War, 1949, (with the other Geneva Conventions one of the only major international conventions opened to China's signature) it was provided that

> '.... the People's Republic of China shall not be bound (by article 85) in respect of the treatment of prisoners convicted under the laws of the Detaining Power in accordance with the trials of war crimes and crimes against humanity laid down by the Nuremburg and Tokyo International and Military Tribunals.'

Similarly, the primacy of the state legal system is expressly reserved in the provisions of an Exchange of Memoranda with Nepal relating to

the grazing of cattle and to other rights of peoples living on the common boundary of the two countries, and the provision has been repeated in other agreements between the two states.

Again, the privileges and immunities of diplomats resident in the Chinese People's Republic are said to be defined by state legislation. According to the standard textbook on civil law

> 'The diplomatic immunity of foreign diplomats is based on international usage and the principle of equality and mutual benefit Our diplomats in foreign countries enjoy the same immunity..... Diplomatic immunity is a matter of protocol in international relations. It does not affect the uniformity and independence of our legal sovereignty.'

There is no mention of international legal obligation in this context at all.

In at least one important theoretical matter, China did not follow the post-revolutionary practice of the Soviet Union. China has always claimed that for purposes of international law it is the same state as was represented by the Ch'ing Empire and by the former Republic. It is true that by article 55 of the Common Programme

> 'The Central People's Government shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall recognise, abrogate, revise or re-negotiate them according to the contents.'

- a provision which seems to reject any contention that the new government should be bound in any way to honour the obligations of the old against its will. It was apparently not the intention of the Chinese that other states should have the same freedom of action, which would have been conferred on them had the Soviet principle that states which undergo fundamental social revolutions are not the same legal persons as those which they replace. China was fully alive to the importance of obtaining not only recognition but also the benefits that she hoped would go with it, such as succession to the great power membership of the United Nations and the benefit of the alleged transfer of Taiwan under the Cairo Declaration of 1943. As time passed, the claim to state succession has not been abandoned, and its importance has not diminished. Apart from the United Nations and Taiwan questions, it has proved useful in framing the Chinese territorial claims against India and the Soviet Union. It could be used either to make a claim for the return of Hong Kong and Macao to China or to rationalise their retention by Britain and Portugal.

The claim was not related solely to territorial status; for exaple China regarded herself as being in a state of war with Germany until she terminated it by unilateral act in 1958.

(2) Territory.

In line with her attitude to sovereignty, Chinese practice with regard to her territory has been strictly conservative. In

accordance with her view of state succession she lays claim or has laid claim to virtually the whole territory of the Ch'ing Empire, with the exception of Outer Mongolia, whose independence she has expressly recognised. Such claims partly depend for their validity on doctrines which can only form part of a new 'socialist international law', such as 'not taking advantage of the fruits of the imperialist policy of former rulers' of other countries, but they also call in aid some quite subtle applications of the rules governing the acquisition and loss of territory in general international law.

In some instances, as with Pakistan , these claims have been used as negotiating points, rather than being pressed to success. Others remain to be settled. All are of obvious political importance.

China was quick to follow the lead of other states in enlarging her territorial claims to the sea after the failure to reach agreement on the width of territorial waters at the United Nations Conference on the Law of the Sea at Geneva in 1958. (It is interesting to speculate whether China, as a non-participant, would have accepted the general rule had it been agreed. Her delay in making the claim until after the conference ended suggests that perhaps she might have accepted it.) By a declaration of 4th September 1958 the People's Republic laid claim to a belt of territorial sea 12 miles wide, measured from base lines which include all the off-shore islands and are more generously drawn than those of most other states. Foreign warships were forbidden to enter these waters, and foreign aircraft to overfly them.

(3) War, Aggression and Neutrality.

This is, of course, the most sensitive area of international law from a political point of view. It is clear from Chinese practice that Peking regards war and aggression falling short of war as illegal, by virtue not only of the Kellogg-Briand Pact and the United Nations Charter, but also of the Five Principles of Peaceful Co-existence. The Five Principles are regarded in China as largely a Chinese contribution to international affairs, while the United Nations Charter, the basic principles of which are endorsed by the Chinese government, is regarded as an example of the beneficial impact of socialism in the realm of international law, the credit for the drafting of it being given to the Russians.

There is little to add of special legal significance. The absence of the People's Republic from the United Nations has prevented China from building up a corpus of state practice on the questions of world peace and security. It would be rather rash to try to deduce a firm legal position on these questions from the statements of Chinese spokesmen; quite apart from the fact that it is by deeds rather than words that the legal position of a state must in the last analysis be judged, Chinese statements tend to be rather loosely framed when charges of aggression are levelled.

It does seem clear, however, that China would define the concept of aggression, as it appears in the Charter, in terms of the class struggle on the international plane. Thus, wars of colonial liberation are regarded as legal and justifiable, sanctioned by the principle of safeguarding the sovereignty of the people. Any use or threat of force which is characterised as running counter to this principle is aggressive. The characterisation is made, it appears, on Marxist principles; while the process appears to be a highly 'political' one to Western international lawyers, it is regarded by Chinese official policy as highly 'scientific'.

In common with the other states involved in the cold war, China has evolved various legal categories of hostilities falling short of war. Leaving aside her highly technical attitude in terminating the war with Germany, mentioned above, she has not defined these categories with great precision, except with regard to the Taiwan question, which of course she regards as strictly an internal one. The term 'war' is used rather loosely, as, for example, in the Korean case, where she did not regard herself as being at war at all, using instead the device of allowing volunteers from her army to go to the assistance of the North Koreans - a device seemingly adopted from the practice of the Spanish Civil War.

China appears also to recognise the legal character of neutrality. Indeed, as her policy in South-East Asia suggests, she is apparently trying to broaden the concept in order to give it an effective legal significance in peacetime. The Geneva Accords on Laos do in effect call for the recognition of a kind of ideological neutrality which is unknown to international law. While it is not suggested that such a concept is thereby introduced to international law, it does seem that China would attach legal importance to political neutrality.

Similarly, China's acceptance of the traditional legal concept of neutrality in wartime is apparently qualified by the principle of political partiality; in her acceptance of the four Geneva Conventions of 1949, the Chinese People's Republic reserved the right to refuse to recognise the nomination of a neutral power for the purposes of the Conventions without her consent.

(4) Treaties.

Obligations imposed by treaties have always been the least obnoxious obligations to socialist states, for they are fully under the control of the parties and thus impinge least on the autonomy and sovereignty of the state. The number of treaties and other instruments concluded by the the Chinese People's Republic since 1949 must by now be numbered in hundreds. The great majority of these have been with other Communist countries. These form the principal content of the expression 'socialist international law', though there is no noticeable difference in form between these and the other treaties concluded by China.

With the important exception of treaties defining or adjusting her territorial status, the majority of China's treaties are very limited in point of time. China's economic and financial agreements with the other socialist states have all been short term arrangements, and the same can be said of her agreements for cultural and technical exchanges.

Even where international organisations are set up among the socialist states, their activities are generally subject to the unanimous approval of their members at the annual meeting. It is difficult to say how far this policy has been China's alone, for short term treaties have been usual in the Soviet bloc for many years.

Whether because she wishes to secure her relationships with her immediate neighbours or as a result of a change in her treaty policy as a whole, China recently concluded more comprehensive and durable treaties of commerce and navigation with North Korea and North Vietnam. Her recent unofficial fisheries agreement with Japan is probably a long term one, though I have been unable to see the text. Long term loan agreements are also used in Chinese economic relations with the new African states.

An important result of China's effective exclusion from the United Nations is that the People's Republic is not represented at the conferences which negotiate important law-making treaties under United Nations auspices, for example, the three Conventions on the Law of the Sea, the Conventions on Diplomatic and Consular Immunities, &c. Among the few multipartite conventions to which China has been allowed to accede are the Geneva Conventions of 1949 and the Convention on Nuclear Testing. (She rejected the latter.) China has not yet clarified her position on those instruments to which the Republican government, as the representative of the Chinese state in the United Nations, has adhered. It is also unclear whether, after her admission to the seat in the United Nations, the People's Republic would regard itself as bound by the practice in the organs of the organisation of the delegation from Taiwan.

In common with other socialist states, China tends to put great emphasis on the purely consensual character of treaties. Moreover, the importance attached to the mere fact of agreement is often out of all proportion to the apparent legal significance of the legal contents of a treaty. The legal obligations are treated as though they were incidental to the friendly conduct of foreign affairs, and the tendency is to emphasise the consensual rather than legal basis of all foreign relations that are not hostile. There is thus great variety in the types of treaty listed in the Chinese official treaty series. Some of these instruments show considerable legal sophistication, while others are no more than agreed policy statements which cannot be looked on as intended to create legal obligations at all. Some of the agreements so published originate with official organs of the Chinese government, while others are made by unofficial bodies of various kinds.

Many of China's most important international arrangements are contained in these unofficial or semi-official agreements - for example all her 'treaties' with Japan. They are thus agreements of a kind which Western jurists would regard as falling outside the sphere of public international law, though it is clear that their legal effectiveness is not intended to be in any doubt by the parties. I have not yet found any attempt to analyse the exact legal status of these agreements in Chinese legal literature, but it seems clear that the Chinese regard them as apt to create inter-state obligations. They are necessitated

by the failure of the People's Republic to secure general recognition by the international community, and if the present trend towards more normal relations with other states continues they are likely to become less important.

Perhaps because China has tended to make short term agreements up to now, she has not yet had to rationalise her way out of any treaty obligations contracted since 1949. However, Chinese practice clearly regards 'unequal' treaties as null and void, and her outstanding territorial claims depend for their validity on this doctrine, a creation of socialist international law, as the Chinese, like the Soviet Russians, would readily acknowledge. (It is not certain whether the claim in respect of territory now forming part of the U.S.S.R. has yet been formally presented at the diplomatic level, but it has been made clear in Chinese statements that it will be based on the doctrine of unequal treaties.) China has also sought in her claim against India to present an unusually wide interpretation of the rule invalidating treaties signed under duress, the object apparently being to make it coincide with the unequal treaties doctrine.

(5) Nationality.

I have been unable to find any legislation dealing with the incidence of Chinese nationality or citizenship. The Constitution does make provision for the diplomatic protection of 'the proper rights and interests of Chinese resident abroad.' (Article 98; the earlier Common Programme contained a similar provision.) In this sense, the most important for international law, these people are claimed as Chinese nationals, but it appears that no definition of the term 'Chinese resident abroad' has been given. Nor is it clear whether the Chinese People's Republic claims to legislate for these people, or accepts the liability to receive them back into Chinese territory if they are deported from other countries.

If the Chinese government does regard the overseas Chinese as nationals (except in the cases mentioned below, where Chinese nationality has been explicitly renounced) it would seem that a distinction is made between nationality and citizenship, for while electoral privileges are conferred on overseas Chinese by the Constitution and the Electoral Law, they are not referred to as citizens. Moreover, overseas Chinese have certain investment privileges, and also privileges with regard to customs and foreign exchange, which are applied, according to the Regulations of 1st July 1958, regardless of whether the overseas Chinese concerned is travelling on a Chinese or foreign passport. This of itself suggests either that the status of 'Chinese resident abroad' is a creation purely of Chinese internal law without international effect, or that it involves a claim of Chinese nationality, sometimes of dual nationality.

In the case of both Indonesia and Nepal, China has accepted limitations on her claims of nationality in respect of overseas Chinese, in both cases with provision for individual freedom of choice within a certain period. It is not clear how far people who choose non-Chinese

nationality are eligible for the privileges of overseas Chinese status.

The whole question of Chinese nationality in the international sense is complicated by the existence of many 'nationalities', that is ethnic minority groups, for purposes of domestic legislation and administration. Traditionally the communities of overseas Chinese have been formed of people of Han descent only. It is not known how far the government of the Chinese People's Republic would regard descendants of other groups who may reside outside China as either Chinese by nationality or as overseas Chinese. Many of the ethnic groups living in the Soviet and Outer Mongolian parts of Central Asia, descended from subjects or tributaries of the former Ch'ing Empire, might be regarded by the Chinese government as being of Chinese nationality in this sense, whatever territory they may live in.

(6) The Treatment of Aliens.

Article 59 of the Common Programme provides that 'The People's Government of the Chinese People's Republic protects law-abiding foreign nationals in China.'

The nature of this provision, and the meaning of the term 'law-abiding', became clear to foreign residents in China in the years following 1949. Wholesale arrests, imprisonments and deportations were the lot of many of these people, and virtually all their property was transferred in various ways to the Chinese government or its agents. No diplomatic claims have ever been entertained in respect of the treatment of either the persons or property of aliens at that time. As we have seen, the Chinese have consistently upheld in their practice the absolute primacy of national over international law, and as a result any acceptance of the customary international rules on the minimum standards for the treatment of aliens under national law is unthinkable. The Chinese have not felt the need to justify their treatment of aliens on any ground of international law. For the same reasons, international legislation on human rights can be expected to be unacceptable to Chinese in so far as it is intended to bring about changes in Chinese domestic law. (Many other states, including the United Kingdom , for example, take the same position.) The reservations to the Geneva Convention on Prisoners of War noted above seems to reflect the same reasoning.

As regards the property of aliens in the period following 1949, Chinese practice did not follow that of the Soviet Union in wholesale confiscation of foreign property and renunciation of liability to make compensation through the denial of state succession. Though article 17 of the Common Programme abolished all existing laws in their entirety, property was treated as existing factually, and legal transfers were required before it changed hands. However, punitive claims of various kinds were made against the owners of foreign firms; these might take the form of retroactive tax claims, civil claims of various kinds - in particular claims for wrongful dismissal by employees whom the firms could no longer afford to pay - or fines for breaches of various regulations. The Chinese government had little difficulty in securing a transfer of property and a release from all claims for compensation against a waiver of these demands. Although such a release is generally

regarded as ineffective in international law (on the ground that the international right to compensation belongs to the state whose national is injured, and not to the national, and cannot be waived by his act alone) they might be thought to have some moral value, and the Chinese government doubtless took this course in order to avoid the stigma which has been and continues to be the experience of the Soviet Union.

The 1954 Constitution contains no provisions on the rights of aliens except for one granting asylum in China to aliens persecuted for 'supporting a just cause, for taking part in the peace movement or for engaging in scientific activity'. Aliens resident in China, however, appear to enjoy the full protection of the laws, including the right to own immovable property, though they are also subject to certain restrictions.

Chinese internal law makes some specific provision for the proper consideration of the interests of aliens. Leaving aside the special property interests of overseas Chinese (who are often nationals of other states) the laws which provide for the protection of trade-marks, patents and copyrights, and which provide for rewards to inventors, all provide specifically for the interests of aliens in some cases only for resident aliens. Foreign residents employed in state or collective enterprises are able to benefit from their insuranc schemes. Aliens may hold interests in legally permitted forms of property, and a system of private international law exists to provide for questions arising out of such property rights. The position with regard to other conflicts of law affecting foreigners is rather obscure. The following passage from a textbbok of civil law emphasises the difference betwsen conflict rules and the old exterritoriality:

> 'Aliens in our country are all subject to the rules of our civil law. The Party and the State frequently send educational materials to our people living in other countries, asking them to observe the laws of their countries of residence. In the concrete handling of civil suits involving foreigners, the legal rules of the foreign parties' countries should sometimes be taken into consideration. This however does not mean that foreign law comes into force in the territory of our country. It means the application of foreign law according to the norms of our country. It is a question of private international law, and is outside the scope of this book.'

The only book so far published on the subject is not generally obtainable.

(7) Settlement of Disputes.

On the level both of public international law and of private law the Chinese are extremely reluctant to submit their disputes of any kind to any means of settlement which involves the decisive participation of third parties - whether in courts, arbitral tribunals or elsewhere. The only form of settlement on the international plane to which they adhere is conciliation. They have never yet concluded a treaty with a clause submitting disputes to a court or to arbitration

and it is unlikely that they would do so unless to secure some special advantage (analogous to such international services on the private plane as banking and re-insurance, which they can only secure on terms acceptable to the rest of the market.) The treaties which they sign do sometimes contain disputes clauses, but they are in vague terms; for example, by clause 4 of the Sino-Afghan Boundary Treaty it is provided that:

> 'The Contracting Parties agree that any dispute concerning the boundary which may arise after the formal delimitation of the boundary between the two countries shall be settled by the two Parties through friendly consultation.'

Such a provision is almost entirely without function, since it is not in sufficiently explicit terms even to exclude attempts to use other forms of settlement, e.g. an appeal to the Security Council.

Since the jurisdiction of international tribunals is based at present almost entirely on consent, there is no risk to China of being hauled before one against her will, unless she undertakes to submit by the terms of some treaty. Should the Chinese People's Republic gain access to the Chinese seat in the United Nations it would no doubt like the other great powers provide a judge for the International Court of Justice, but it is doubtful whether even in these circumstances China would prove any friendlier towards the Court than the Soviet countries have done.

Chinese trading corporations have from time to time brought actions in the courts of foreign countries, including those of Hong Kong, where, for example, such a corporation sought unsuccessfully to recover possession of aircraft hastily transferred to the ownership of private nominees of the Nationalist Government in 1949. In general, however, they avoid foreign courts just as they avoid foreign or international commercial arbitration. In many states they are themselves protected from action by the application of a wide rule of sovereign immunity.

As has been pointed out in an earlier Newsletter, these corporations habitually insist in their contracts with foreign traders on an arbitration clause providing for the arbitration in Peking of all disputes by a tribunal all of whose members are drawn from either the Foreign Trade Arbitration Commission or the Maritime Arbitration Commission. Apart from the rules which provide for their all-Chinese composition, these tribunals, which are established by governmental decree as organs of the semi-official China Council for the Promotion of Foreign Trade, function under rules similar to those of commercial arbitrators elsewhere.

The most important characteristic of these two tribunals is that they virtually never function at all, and it is likely that they are not intended to do so. As far as I have been able to discover, only one case has been settled by either of them, a salvage claim in which liability was admitted by the foreign shipowner, the dispute being only as to the amount of salvage payable. Even in this case, the role of the Maritime Arbitration Commission was confined to conciliation rather than arbitration proper. It may be that the unpalatable feature

of these tribunals in the eyes of foreign businessmen - their all-Chinese composition - is designed specifically to keep them from being used. In negotiations with Chinese corporations the emphasis is usually on avoiding the appearance of there being a dispute at all. In the last analysis a Chinese corporation which is on unfirm legal ground generally prefers an expensive settlement to continuing dispute.

The Chinese attitude towards disputes is very close to the Soviet one, though in recent years, with the participation of the United Nations European secretariat, acceptable forms of commercial arbitration have been worked out for use between traders of the Eastern and Western blocs. The Soviet attitude to public international arbitration has been consistently hostile. Arbitration machinery does not operate even among the socialist states themselves. It seems unlikely that the Chinese will depart from this position.

Conclusion.

It has been suggested that in general Chinese foreign policy objectives are pursued as far as possible without raising legal questions at all. Where it becomes necessary to raise legal questions, the Chinese government sometimes makes skilful use of traditionally accepted international rules, suiting them to its own characterisation of the facts of the situation. At other times, the generally accepted rules are sidestepped by a varying combination of orthodox and Marxist argument. Like the Soviet Union, the Chinese People's Republic has chosen an extremely nationalist and conservative formulation of state sovereignty as the most effective legal safeguard of her freedom of action, with the result that many legal outlines tend to soften and blur.

What is perhaps most significant is that in the majority of situations where legal questions arise, China has defined her position in terms which are at least recognisable to Western international lawyers. We should perhaps be relieved that there is at least a starting point for the discussion of the role of international law in this sense.

Nonetheless, the Chinese emphasis on state sovereignty, the emphasis on intentions rather than obligations, and the softening of legal rules with political generalisations are part of a conscious assault on international law as we know it. In a subsequent paper on tha Chinese formulation of the Marxist Leninist concept of peaceful co-existence I hope to give some further perspective to this attack.

9th October 1964.