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2015

# The Discipline of International Law in Republican China and Contemporary Taiwan

Pasha L. Hsieh



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# THE DISCIPLINE OF INTERNATIONAL LAW IN REPUBLICAN CHINA AND CONTEMPORARY TAIWAN

PASHA L. HSIEH\*

## ABSTRACT

*This Article examines the evolution of international law as a professional and intellectual discipline in the Republic of China (ROC), which has governed Mainland China (1912–1949) and post-1949 Taiwan. The ROC's centennial development fundamentally shaped modern China's course of foreign relations and postwar global governance. The Article argues that statism, pragmatism, and idealism define the major features of the ROC's approach to international law. These characteristics transformed the law of nations into universally valid normative claims and prompted modern China's intellectual focus on the civilized nation concept. First, the Article analyzes the professionalization of the discipline of international law. It offers insight into the cultivation of China's first-generation international lawyers in the Foreign Ministry, international law societies, and the Shanghai Mixed Court. Second, it explores the ROC's approach of assertive legalism in applying international law to advance diplomatic objectives. The nation's strategic engagement with unequal treaties, the League of Nations, and the United Nations contributed to its Grotian moment. The assertion of legal claims in judicial proceedings and Taiwan's international standing further reinforced the dynamic dimension of the discipline. Therefore, this Article provides a valuable case study of twentieth century international lawmaking in East Asia.*

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## I. INTRODUCTION

After ending more than two thousand years of imperial rule in China, the Republic of China (ROC) became Asia's first republic in 1912. Through two World Wars, the ROC ushered the fragile country into the global order and realized the revolutionists' aspiration of elevating China's status to a "civilized nation" under international law.<sup>1</sup> The ROC was the sole legitimate government of Mainland China before the founding of the People's Republic of China (PRC) in 1949. Following the loss of the civil war to its Communist rival, the Chinese Nationalist Party (KMT or Kuomintang) government of the ROC relocated to Taiwan and has continued to govern the island ever since. The ROC's centennial development, which shaped the course of modern China's foreign

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1. See Proclamation of President Sun Yat-sen on the Establishment of the Republic of China on January 1, 1912 [1912 Proclamation], [http://www.njmuseum.com/zh/book/cqgc\\_big5/zhmg.htm](http://www.njmuseum.com/zh/book/cqgc_big5/zhmg.htm) ("With the establishment of Provisional Government we will try our best to carry out the duties of a civilized nation so as to obtain the rights of a civilized state."). The preamble to the 1907 Hague Convention first mentioned the term, "civilized nations," which included China as a signatory country. Gustavo Gozzi, *History of International Law and Western Civilization*, 9 INT'L COMM. L. REV. 353, 365 (2007).

relations, provides a valuable case study of twentieth century international lawmaking in East Asia.

This Article enriches the existing international law literature for two reasons. First, among emerging scholarship on the historical foundation of international law, the universalization of the “public law of Europe” in post-Empire China is critical, yet largely ignored.<sup>2</sup> The discussion on the Qing Dynasty and the PRC fails to thoroughly explain modern China’s “Grotian moment” and its influence on the international legal order.<sup>3</sup> Thus, this research fills the gap with a two-year investigation based on first-hand declassified diplomatic archives, as well as interviews with scholars and government officials in China and Taiwan. Second, this Article provides the first systemic analysis of the cultivation of China’s first-generation international lawyers and their strategic engagement in international law. These prominent jurists, who served as diplomats and judges of international courts, played a crucial role in the ROC’s revision of treaties and in the creation of the League of Nations (LN) and the United Nations (UN).<sup>4</sup> Their intellectual legacy is further evidenced by their restoration of the capacity for international law in Taiwan and the post-Cultural Revolution PRC and by their legalist approach to tackle the recognition issue after the UN deprived the ROC of the “China seat” in 1971.<sup>5</sup>

The Article argues that the “Republican Chinese characteristics” of statism, pragmatism, and idealism define the major features of the ROC’s

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2. Recent literature on the historical aspects of international law, see THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fasssbender & Anne Peters eds., 2012); HATSUE SHINOHARA, US INTERNATIONAL LAWYERS IN THE INTERWAR YEARS: A FORGOTTEN CRUSADE (2012); Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. J. INT’L L.J. 475 (2010). For details on the “public law of Europe” as the foundation of international law, see Alexander Orakhelashvili, *The Idea of European International Law*, 17 EUR. J. INT’L L. 315, 336–38 (2006).

3. The prominent scholarship on China and International Law often focuses on the People’s Republic of China (PRC) and ignores the Republic of China (ROC) era. E.g., Bing Bing Jia, *A Synthesis of the Notion of Sovereignty and the Ideal of the Rule of Law: Reflections on the Contemporary Chinese Approach to International Law*, 53 GER. Y.B. INT’L L. 11 (2013) and XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW (2012).

4. Chinese judges, nominated by the ROC, sitting on international courts include Wang Chung-hui (1921–1939) and Cheng Tien-hsi (1939–1946) of the Permanent Court of International Justice (PCIJ), Hsu Mo (1946–1957) and Wellington Koo (1957–1967) of the International Court of Justice (ICJ), and Mei Ju-ao (1946–1948) of the International Military Tribunal for the Far East (Tokyo War Crimes Tribunal).

5. United Nations General Assembly Resolution 2758 (1971) transferred the China seat from the ROC to the PRC. Restoration of the Lawful Rights of the People’s Republic of China in the United Nations, G.A. Res. 2758 (XXVI), U.N. Doc. A/RES/2758 (Oct. 25, 1971).

international law approach.<sup>6</sup> It further contends that these characteristics transformed the law of nations into universally valid, normative claims and prompted modern China's intellectual shift to the civilized nation concept. These developments in international law are critical to current global governance. This Article is structured in four parts. Part II examines the ROC's professionalization of the discipline of international law, which was based on the Qing Court's legacy on the reception of the law of nations. It offers insight into the development of international law education and its impact on China's first-generation international lawyers. Moreover, it analyzes how these jurists emerged in tandem with the evolution of the Foreign Ministry, international law societies, and the Shanghai Mixed Court. Part III explores the utilization of international law in advancing the ROC's diplomatic objectives. The case studies, which demonstrate the ROC's assertive legalism, include the *rebus sic stantibus* argument in renegotiating unequal treaties and the nation's participation in the LN and the Permanent Court of International Justice (PCIJ). The ROC's idealist faith in international law further culminated in the creation of the UN and the International Court of Justice (ICJ). The international lawyers' intellectual legacy has also helped Taiwan advance its *sui generis* status. Part IV concludes by outlining the significance of international law as a professional and intellectual discipline in Republican China and contemporary Taiwan.

## II. THE PROFESSIONALIZATION OF INTERNATIONAL LAW IN THE ROC

Although Hugo Grotius' *De Jure Belli ac Pacis* (On the Law of War and Peace) was published in 1625, China's early encounters with the West did not reflect the influence of modern international law. The conventional understanding of China's first treaty was the 1689 Treaty of Nerchinsk concerning Sino-Russia border disputes.<sup>7</sup> In fact, the 1662 peace treaty concluded between Koxinga (Zheng Cheng-gong) of the defunct Ming Dynasty and the Dutch governor constituted the prelude to international agreements in Chinese history.<sup>8</sup> This treaty paved the way for the withdrawal of Dutch troops and contributed to the end of almost forty

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6. The Republican Chinese characteristics are distinct from commonly known "Chinese characteristics," which refer to the PRC's neo-Confucian approach that focuses on the Westphalian concept of absolute sovereignty and governmental control.

7. Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, RECUEIL DES COURS, vol. 221, at 227 (1990-II).

8. Hungdah Chiu, *The Reception of Modern International Law in China*, 9 CHENGCHI L. REV. 189, 192 (1973).

years of Dutch rule over Taiwan.<sup>9</sup> Because these treaties were largely reciprocal, they did not stimulate intellectual interest in international law in China. Understanding the law of nations only became a national necessity when the Qing Court encountered unequal treaties, beginning with the 1842 Treaty of Nanking<sup>10</sup> with the United Kingdom. Through the statist approach to education, the ROC expedited the professionalization of international law. The newly cultivated international lawyers gained experience from universities, the government and the Shanghai Mixed Court. Their positivist stance on international law galvanized the discipline's development and the ROC's legalist approach to diplomacy.

#### *A. The Evolution of International Law Education*

The statist approach to international law education developed during the Qing Dynasty. The discipline of international law was first systematically introduced into China when W. A. P. Martin, an American Presbyterian missionary, translated Henry Wheaton's *Elements of International Law* in 1864.<sup>11</sup> The Chinese translation, known as *Wanguo Gongfa* (Public Law of All Nations), had a profound impact on the discipline in East Asia.<sup>12</sup> In 1873, Martin began his teaching of "Law of Nations" at Tongwenguan (Interpreters College).<sup>13</sup> He became China's first professor of international law. Tongwenguan was also the first national institution that offered an international law course. Nonetheless, the fact that only nine of 102 students enrolled in the elective course suggests that international law was viewed as a fringe discipline.<sup>14</sup> The Imperial University of Peking (*Jing Shi Da Xue Tang*), the predecessor to today's Peking University, subsequently replaced Tongwenguan. Martin was appointed as the president of the new university. In the Department of

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9. Taiwan was under Dutch rule from 1624 to 1662. THE REPUBLIC OF CHINA YEARBOOK 2012, at 45. The peace treaty consists of Dutch and Chinese versions, which include 18 and 16 provisions respectively.

10. Immanuel C. Y. Hsu, *The Rise of Modern China* (2000), at 189–90.

11. LYDIA H. LIU, *THE CLASH OF EMPIRES: THE INVENTION OF CHINA IN MODERN WORLD MAKING* 113–15 (2004).

12. *Id.*; Han Sang-hee, *The Circulation of International Legal Terms in East Asia*, ASLI Working Paper, No. 014, July 2010, 3–25.

13. LIN XUEZHONG, *CONG WAN GUO GONG FA DAO GONG FA WAI JIAO: WAN QING GUO JI FA DE CHUAN RU, QUAN SHI YU YING YONG* [From Law of Nations to Public Law Diplomacy: The Introduction, Interpretation and Application of International Law in Late Qing] 126–27, 153 (2009). W. A. P. Martin's course was based on a more updated textbook of Theodore D. Woolsey's *Introduction to the Study of International Law*, known as *Gong Fa Bian Lan*. Shin Kawashima, *China*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW*, *supra* note 2, at 463.

14. LIN XUEZHONG, *supra* note 13, at 130.

Law, public international law and private international law were collectively taught as “Law of Negotiation” (*Jiao She Fa*).<sup>15</sup>

I offer the following observations for the Qing Court’s reception of international law. First, the Western notion of sovereignty came as an intellectual shock. *Wanguo Gongfa* explained that “[s]overeignty is the supreme power by which any State is governed” and that a state should function “independently of foreign powers.”<sup>16</sup> The book enabled Chinese officials to understand that the privilege of extraterritoriality and the right of foreign warships to navigate in internal waters actually encroached upon Chinese sovereignty. Second, the university course entitled “Law of Negotiation” illustrated that international law was commonly regarded as a tool of negotiation rather than as a universal value. For instance, before the First Opium War, Lin Zexu’s ban on the opium trade was based on passages from Emerich Vattel’s 1758 *Law of Nations* on embargos and blockades.<sup>17</sup> His letter to Queen Victoria challenged Britain’s dual standards on opium and urged the British to obey Chinese law in the same way that foreigners follow British law in the United Kingdom.<sup>18</sup> Instead of believing the normative truth of international law, Lin’s intention was simply to use “Western” arguments to persuade the British.<sup>19</sup> Therefore, with respect to the reception of international law, it is premature to conclude that nineteenth-century Chinese scholars were positivists.<sup>20</sup> Finally, the difference between Vattel’s universalism and Wheaton’s parochial understanding of international law, which was limited to Christian civilization, did not impede Chinese reception of international law.<sup>21</sup> The discipline of international law in the Chinese context rarely considered the diverse schools of thought on the application of international law. Also, as pragmatism dictated, the concept of natural law as the basis of international law was de-emphasized.

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15. *Id.* at 153; Sun Huei-min, *Cong Dong Jing, Beijing Dao Shanghai: Ri Xi Fa Xue Jiao Yu Yu Zhong Guo Lv Shi De Yang Cheng (1902–1914)* [From Tokyo, Beijing to Shanghai: Japanese Legal Education and the Development of Chinese Lawyers (1902–1914)], 3 *FA ZHI SHI YAN JIU* [J. of Legal History Studies] 157, 176 (2002).

16. See PETER ZARROW, *AFTER EMPIRE* 91 (2012) (discussing Wheaton’s explanation of sovereignty).

17. LIU, *supra* note 11, at 119; Chi-Hua Tang, *China-Europe*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW*, *supra* note 2, at 704–05.

18. See, e.g., Appendix: Lin Zexu’s Communication to Queen Victoria, *reprinted in* LIU, *supra* note 11, at 235–37.

19. See LIU, *supra* note 11, at 119 (“Lin treated international law not as the universal truth but as a mode of persuasion.”).

20. Cf. Lorca, *supra* note 2, 486–90, 534–35.

21. ODD ARNE WESTAD, *RESTLESS EMPIRE: CHINA AND THE WORLD SINCE 1750* 81–82 (2012).

During the first wave of the reception of international law, translations from Europe and the United States were critical to China's efforts to enter the family of nations. Important treatises that the international law literature often ignore include Charles de Martens' *Le Guide Diplomatique*.<sup>22</sup> This book helped early Chinese diplomats, starting from those posted to the London-based Chinese Legation in 1877, understand diplomatic customs and rules.<sup>23</sup> In addition, the translation of Robert Joseph Phillimore's *Commentaries upon International Law* became China's first book on private international law.<sup>24</sup> In the late nineteenth century, the second wave of international law learning shifted to Japan, a traditional tributary state of the Chinese Empire. Although Japan's exposure to the law of nations began with *Wanguo Gongfa*, the Meiji Restoration led to Japan outpacing China in legal reform and legal material translations. Japan's complete abolition of extraterritoriality in 1899 and its military victory over Russia in 1905 transformed the state into Asia's first "civilized nation."<sup>25</sup> Consequently, the Qing government "looked east" for international law instructors. From 1905 to 1908, Iwai Takafumi served as an invited international law professor at the Peking College of Law (*Jin Shi Fa Lu Xue Tang*).<sup>26</sup> These significant events, along with language proximity and lax immigration requirements, encouraged Chinese students to pursue legal studies in Japan. Chinese graduates from Japanese schools subsequently influenced the ROC's discipline of international law.

Until the 1920s, the majority of China's international textbooks were translated from Japanese either by Japanese professors in China or by Chinese students in Japan.<sup>27</sup> These translations solidified the Chinese

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22. Charles De Martens, *Le Guide diplomatique précis des droits et des fonctions des agents diplomatiques et consulaires, suivi d'un traité des actes et offices divers qui sont du ressort de la diplomatie, accompagné de pièces et documents proposés comme exemples* (M.F.H. Geffcken, Leipzig, and Paris eds., 5th ed. 1866). The Chinese translation, entitled *Xingyao Zhizhang*, is based on this book.

23. See IMMANUEL C. Y. HSU, *CHINA'S ENTRANCE INTO THE FAMILY OF NATIONS: THE DIPLOMATIC PHASE 1858–1880* 167–84 (1960) (discussing the posting of Qing envoys to European nations).

24. The Chinese translation, entitled *Geguo Jiaoshe Bianfalun*, is based on 4 Robert Phillimore, *COMMENTARIES UPON INTERNATIONAL LAW: PRIVATE INTERNATIONAL LAW OR COMITY* (1861).

25. In 1900, the US Supreme Court described Japan as "the last state admitted into the rank of civilized nations." *The Paquete Habana*, 175 US 677, 700 (1900).

26. YUAN-SHENG HUANG, *FA LV JI SHOU YU JIN DAI ZHONG GUO FA* [The Reception of Law and Modern Chinese Law] 64 (2007).

27. The list of Japanese translations, see RUNE SVARVERUD, *INTERNATIONAL LAW AS WORLD ORDER IN LATE IMPERIAL CHINA: TRANSLATION, RECEPTION AND DISCOURSE, 1847–1911* 269–302 (2007).



understanding of statehood and sovereignty under international law.<sup>28</sup> Another conspicuous influence was Japan's international law terminology. The most notable example is the term "international law," which Jeremy Bentham first coined in 1789.<sup>29</sup> Mitsukuri Rinsho's translation of *Guo Ji Fa* (international law) mostly replaced the Chinese indigenous translation, *Wanguo Gongfa* or *Gongfa* (public law), in the 1920s.<sup>30</sup> Also, as many Japanese-trained students joined the revolutionist camp and served as ROC bureaucrats, their international law understanding influenced the early Republic's foreign policy. Honoring the principle of *pacta sunt servanda* (treaties must be observed) by confirming the validity of Qing treaties that they deemed unfair indicated their commitment to international law. Given the failure of the Taiping Rebellion and the short-lived Republic of Taiwan, the ROC's founding fathers understood that only the "civilized" approach could gain the West's diplomatic recognition. In addition to the new government's legitimacy, the pragmatic need behind the search for recognition was to attain the legal capacity to get foreign loans to finance ammunition and infrastructure. Although Wheaton introduced the civilized nation concept to China, the concept only received attention when Qing officials participated in the two Hague Peace Conferences.<sup>31</sup> Foreign-trained ROC elites drove the civilized nation standard to be the nation's highest guiding principle. In Sun Yat-sen's own words, upholding this principle would help China "obtain the rights of a civilized state."<sup>32</sup>

Based on such a belief, the ROC strengthened the nature of statism in international law education and laid the foundation for the third wave of the reception of international law. The influence of the United States and the surfacing of China's international lawyers were the features of this era. International law became a mandatory subject in both judicial and diplomat examinations in the 1910s.<sup>33</sup> The government also made

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28. ZARROW, *supra* note 16, at 98–100.

29. Jeremy Bentham created the English term "international law" in his book, *Introduction to the Principles of Morals and Legislation*, and "international law" replaced the older term "law of nations." MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776–1939*, 12–13 (2010).

30. Hungdah Chiu, *The Development of Chinese International Law Terms and the Problem of Their Translation into English*, 27 J. ASIAN STUDIES 485, 490 (1968).

31. LIU, *supra* note 11, at 135; LIN, *supra* note 13, at 306–40 (2009).

32. 1912 Proclamation, *supra* note 1.

33. Li Qicheng, *Xuan Tong Er Nian De Fa Guan Kao Shi* [The 1910 Judicial Examination], 3 FA ZHI SHI YAN JIU [J. Legal History Studies] 197, 198–207 (2002); Li Zhaoxiang, *Zhong Hua Ming Guo Zao Qi Wai Jiao De Xin Bian Hua: Yi Wai Jiao Li Fa Wei Zhong Xin* [New Changes to Early Diplomacy of the ROC: Focusing on Diplomatic Legislation], in BEI YANG SHI QI DE ZHONG GUO WAI JIAO [Chinese Diplomacy in the Beiyang Era] 91, 107–08 (2006).

international law compulsory in the college curriculum. Beiyang University had the longest teaching hours of international and comparative law courses, including public international law (10 credit hours) and English law (12 credit hours).<sup>34</sup> Located in Shanghai, Soochow University Law School offered the first English-taught international law course.<sup>35</sup> Moreover, many graduates from Tsinghua School, which was founded with the US Boxer Indemnity, pursued college and legal education in America.<sup>36</sup> Starting in the 1920s, overseas-trained lawyers started returning to enhance China's academia in international law. Prominent examples were Zhou Gengsheng of Peking University and Wang Huacheng of Tsinghua University, who studied at Paris and Chicago universities, respectively.<sup>37</sup> Zhou's 1929 *Outline of International Law* (*Guo Ji Fa Da Gang*)<sup>38</sup> became the first international law textbook authored by a Chinese national.<sup>39</sup> During the Sino-Japanese war, international law professors fled to the temporary capital of Chongqing and continued teaching at the Central Political School and the National Southwestern Associated University.<sup>40</sup> Toward the end of the civil war,

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34. Beiyang University is the predecessor to Tianjing University. ZHONGGUO JINDAIJIAOYUSHI ZILIAOHUIBIAN [Compilation of Reference Materials related to China's History in Modern Education] 419 (2007). International law courses offered by Peking University's Department of Law were divided into "International Law in Peace Time" (Ping Shi Guo Ji Gong Fa) and "International Law of War" (Zhan Shi Guo Ji Gong Fa). *Id.* at 395. Shanxi University provided a one-year course on treaty law. *Id.* at 428.

35. As the 1930–1931 curricula demonstrate, a four-credit-hour international law course was offered in both English and Chinese at Soochow, also known as the Comparative Law School of China. Alison W. Conner, *Training China's Early Modern Lawyers: Soochow University Law School*, 8:1 J. CHINESE L. 1, 11 (1994).

36. Tsinghua Xuetang, which served as a preparatory school for Chinese students to pursue college education in the United States, was renamed Tsinghua School in 1912 and National Tsinghua University in 1928. *HISTORY OF TSINGHUA*, [http://www.tsinghua.edu.cn/publish/newthuen/newthuen\\_cnt/about-th/about-3.html](http://www.tsinghua.edu.cn/publish/newthuen/newthuen_cnt/about-th/about-3.html) (last visited Oct. 19, 2014).

37. Zhou Gengsheng joined the Department of Political Science at Peking University in 1922 and Wang Huacheng, a former student of Quincy Wright, joined the Department of Political Science at Tsinghua University in 1928. He Qinhua, *You Xue Ya Ou De Zhou Gengsheng: Zhong Guo Jin Dai Guo Ji Fa Zhi Fu*, Jan. 5, 2010, <http://www.intellectual.com.cn/Returnee/StudentAbroadElite/201001/377041.html>; Wang Hua Cheng *Qi Ren Qi Shi* [Introduction to Wang Hua Cheng], 99:3 ZHUAN JI WEN XUE [Biographical Literature] 69, 71–77 (2011).

38. *Guo Ji Fa Da Gang* [Outline of International Law], [http://fashi.ecupl.edu.cn/Article\\_Print.asp?ArticleID=217](http://fashi.ecupl.edu.cn/Article_Print.asp?ArticleID=217) (last visited Oct. 19, 2014). See also <http://sub.whu.edu.cn/dag/wdxsh/xld/zhougengsheng.htm> (in Chinese re Zhou).

39. Chen Tiqiang, *The People's Republic of China and Public International Law*, 8 DALHOUSIE L.J. 3, 11 (1984) (Can).

40. See generally JOHN ISRAEL, LIANDA: A CHINESE UNIVERSITY IN WAR AND REVOLUTION 178–83 (1998). The Central Political School was the predecessor to NCCU. The National Southwestern Associated University (Lianda), which merged with Peking University, Tsinghua University and Nankai University, was set up in 1938. *Id.* at 124. The international law professors

while most international law professors relocated to Taiwan, some remained in Mainland China. Their intellectual history mirrors the evolution of modern China's international law education.

### *B. The Reform of the Ministry of Foreign Affairs*

The ROC's top-down measures in education transformed international law from a fringe discipline to an official discipline and contributed to modern China's Grotian moment. The development of international law also served the government's pragmatic needs. The role of the Ministry of Foreign Affairs (MOFA) in promoting international law and cultivating first-generation international lawyers was critical. The MOFA of the ROC was built upon Zongli Yamen (Office of Foreign Affairs), the first centralized agency of international affairs that the Qing Court set up in 1861.<sup>41</sup> The Boxer Protocol mandated that the agency become "a Ministry of Foreign Affairs, *Wai Wu Pu*, which takes precedence over the six other Ministries of State."<sup>42</sup> The movement to reform the MOFA's bureaucratic status was carried out by meeting foreign expectations of an efficient "single window" channel for diplomatic communication.

Because none of the Qing officials selected from the imperial examination formally studied law, their successful execution of international law was confined to isolated incidents. For example, during the Prussian-Danish war, a Prussian battleship captured three Danish merchant ships in China's Bo Hai Gulf in 1864.<sup>43</sup> Based on *Wanguo Gonfa*, Zongli Yamen protested against this capture because of its violation of Chinese sovereignty over territorial seas.<sup>44</sup> Prussia's subsequent release and compensation for detaining the ships surprised the Qing government regarding the "usefulness" of international law. Yet, for most negotiations, strategic engagement in international law was beyond the Qing diplomats' capabilities. The often-criticized notion of

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included Tsui Shu-chin in the Department of Political Science and Yan Shutang in the Department of Law. *Id.* at 183. Tsui also taught at NCCU.

41. Imperial Decree to Establish the Tsung-li Ya-men (Office of Foreign Affairs), BAI NIAN CHUAN CHENG ZOU CHU HUO LU: ZHONG HUA MIN GUO WAI JIAO SHI LIAO TE ZHAN [A Century of Resilient Tradition: Exhibition of the Republic of China's Diplomatic Archives] 260 (2011).

42. Art. XII, Peace Agreement between the Great Powers and China (1901), *available at* <http://www.deutsche-schutzgebiete.de/boxerprotocol.htm> (last accessed June 14, 2015).

43. Chen, *supra* note 39, at 7; Tang, *supra* note 17, at 705. Li Zhaojie (James Li), *The Impact of International Law on the Transformation of China's Perception of the World: A Lesson from History*, 27 MD. J. INT'L L. 128, 134 (2012).

44. Li, *supra* note 43, at 135–38. The Qing government's assertion on the territorial sea was influenced by the Chinese translations of Henry Wheaton's *Elements of International Law*. *Id.* at 136, 137 n.44.

extraterritoriality exemplifies the problem. The consular jurisdiction granted to Western powers was “not [initially] construed as a derogation of sovereignty.”<sup>45</sup> Instead, it was provided under a convenient assumption that barbarians should settle their own disputes without disturbing Chinese courts.

The maturity of the ROC’s international law education propelled China’s first-generation international lawyers toward the world stage. These jurists have dominated in the diplomatic circle of various regimes, including the Provisional Government (Nanjing, 1912), the Beiyang Government (Beijing, 1912–28), the National Government (Nanjing and Chongqing, 1927–49) and the post-1949 Taipei Government.<sup>46</sup> China’s first-generation international lawyers shared common features. Their cosmopolitan education in leading law schools and practice experience transformed the MOFA into an elite ministry. Their positions as the heads of states or foreign ministers enabled them to apply international law to negotiations without bureaucratic interference.

The impact of international lawyers on Chinese diplomacy and international tribunals was significant. For instance, many “Yankeeified” ROC politicians, due to their substantial American education, fortified the ROC-US alliance over the course of more than a century.<sup>47</sup> Wu Tingfang, a Hong Kong lawyer trained in Lincoln’s Inn, was China’s first international lawyer. He was involved in the Treaty of Shimonoseki, which ceded Taiwan to Japan, and subsequently sided with the ROC government.<sup>48</sup> Chen Tien-hsi and Wang Chung-hui, graduates of University College London and Yale University respectively, served as PCIJ judges.<sup>49</sup> Wang was also the first international lawyer to serve as the

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45. Milton J. Helmick, *United States Court for China*, 14:18 FAR E. SURV. 252, 253 (1945).

46. See generally Hsu, *The Rise of Modern China*. The Guangzhou Military Government coexisted with the Beiyang Government from 1917 to 1927.

47. See STACEY BIELER, “PATRIOTS” OR “TRAITORS”? A HISTORY OF AMERICAN-EDUCATED CHINESE STUDENTS 167–68 (2004).

48. *Wu Tingfang de Waijiao Shengya* (Wu Tingfang’s Diplomatic Life), 56–76; 159–61. Wu Tingfang became acquainted with Guo Songtao, China’s first minister to the United Kingdom, and subsequently served as the legal advisor to Li Hongzhang, one of Qing’s most respected politicians.

49. Ole Spiermann, *Judge Wang Chung-hui at the Permanent Court of International Justice*, 5 CHINESE J. INT’L L. 115, 117 (2006). Among the ROC’s international lawyers, LL.B. graduates from Beiyang University (e.g., Wang Chung-hui and Yan Shutang) often pursued DCL or JSD degrees in the United States, while J.D. degrees in the US were common options for LL.B. graduates from Soochow University (e.g., John Wu and Ni Zhengyu) and graduates from Tsinghua School (e.g., Xiang Zhejun and Mei Ju-ao). Chen Tien-hsi graduated from UCL; see *List of University College London People* [http://www.bookslc.net/sw2.cfm?q=List\\_of\\_University\\_College\\_London\\_people](http://www.bookslc.net/sw2.cfm?q=List_of_University_College_London_people) (last visited Oct. 19, 2014). Wang Chung-hui graduated from Yale; see *Biographical Dictionary of Chinese Christianity*, <http://www.bdcconline.net/en/stories/w/wang-chonghui.php> (last visited Oct. 19, 2014).

Chief Justice of the ROC Supreme Court.<sup>50</sup> Hsu Mo and Wellington Koo, George Washington University and Columbia University-trained lawyers, became ICJ judges. Mei Ju-ao (J.D., Chicago) was appointed as the judge of the International Military Tribunal for the Far East (Tokyo War Crimes Tribunal).<sup>51</sup> John Wu (J.D., Michigan) was the principal drafter of the first ROC Constitution, in which a provision honoring “treaties and the Charter of the United Nations” was included in modern China’s constitution.<sup>52</sup>

The international lawyers propelled the MOFA reform and revamped the image of Chinese diplomats. The first legal document that delineated the MOFA’s authority was the 1911 Organizational Outline of the ROC Provisional Government.<sup>53</sup> Provisional President Sun Yat-sen appointed Wang Chung-hui as the first foreign minister of the new Republic. The Nanjing regime lasted only four months. The venue of foreign affairs power transferred to Beijing, the site of Yuan Shikai’s Beiyang Government. Interestingly, due to the Beiyang warlords’ disinterest and lack of ability in diplomacy, the MOFA became highly professionalized. Yuan’s promise not to intervene with the MOFA allowed the foreign minister, Lu Zhengxiang, to lay the groundwork for the ROC’s diplomatic system.

Based on the Qing legacy and Lu’s reform, the Beiyang MOFA became the top ministry, and the foreign minister ascended to a critical position in the political hierarchy.<sup>54</sup> In 1912, the Beijing Congress passed China’s first Organization Act of the Ministry of Foreign Affairs (*Wai Jiao Bu Guan Zhi*), which detailed its constitutional mandate.<sup>55</sup> Because managing treaty affairs was a priority for China, the ad hoc Treaty Study Commission (*Tiao Yue Yan Jiu Kuai*) was set up in 1912 and later evolved into the Department of Treaty (*Tiao Yue Si*).<sup>56</sup> The Department, which was in charge of the LN-related treaties, remained the Ministry’s most important division. Lu’s reform also expedited the professionalization of Chinese diplomats. To avoid the nepotism that had affected the Qing

50. *Id.* at 117.

51. Robin I. Mordfin, *Seeking the Past: Early Chinese Scholars at the Law School*, <http://www.law.uchicago.edu/alumni/magazine/fall12/chinesescholars> (last visited Oct. 19, 2014).

52. Li Xiuqing, translated by Nicholas Howson, *John C. H. Wu at the University of Michigan School of Law*, 58 J. LEGAL EDUC. 545, 545 (2008); ROC Constitution (1946), art. 141. The 1946 ROC Constitution is therefore commonly referred to as the Wu version.

53. Li, *supra* note 33, at 99–100 (2006).

54. The Foreign Minister, who was nominated by the Prime Minister and was appointed by the President, would be the acting Prime Minister should the incumbent Prime Minister resign.

55. Li, *supra* note 33, at 99–100.

56. *Id.* at 101. The Department of Treaty was later renamed as the Department of Treaty and Legal Affairs under Article 3 of the 1984 Organization Act of the Ministry of Foreign Affairs.

envoys' capacity in language skills and international law, Lu selected overseas Chinese students to join the government and introduced a diplomat examination.<sup>57</sup> Wellington Koo, who then studied under Professor John Bassett Moore of Columbia University, was invited to be Yuan's English language secretary.<sup>58</sup> Hsu Mo also joined the Beiyang Government after passing the diplomat examination in 1919.<sup>59</sup> These legal talents buttressed Lu's efforts to modernize the Ministry.

From 1928, Chiang Kai-shek's National Government unified China and continued to enlist university professors to serve in government positions. The 1935 official records show that 25.6% and 30% of 86 prominent diplomats were Ph.D. holders and lawyers, respectively.<sup>60</sup> During World War II, the ROC's highest decision-making power was vested in the Supreme National Defense Council. Both the Council and the MOFA were dominated by international lawyers, such as Wang Chung-hui and Wang Shijie. These international lawyer-governed agencies led to statism prevailing in the ROC's international law approach. Although a Chinese equivalent to the United States Office of the Legal Advisers never emerged in the ROC, the international lawyers serving as professional diplomats enhanced the legalist approach to diplomacy. The tradition of scholar-bureaucrats and the revolving door between academia and the government remains in today's Taiwan. International lawyers' close association with higher education also contributed to the development of international law as a professional and intellectual discipline in the ROC.

### *C. International Law Societies and Mixed Court Experiences*

International law education and the MOFA reform accelerated the modernization of the ROC's legal capacity. The formation of international law societies and the Shanghai Mixed Court further raised public

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57. LI YANGFAN, GUOHEN: MIN GUO WAI JIAO ER SHI REN [Laments for the Country: 20 People in ROC Diplomacy] 26–29 (2010). The ROC's diplomat examination was based on the 1912 Provisional Rules on the Diplomat and Consular Examination, 1915 Diplomat and Consular Examination Ordinance, and the 1919 Diplomat and Consular Examination Law. YUE QIANHOU, MIN GUO WAI JIAO GUAN REN SHI JI ZHI YAN JIU [Study on the Human Resources Development Mechanism of ROC Diplomats] 25 (2004).

58. JONATHAN CLEMENTS, WELLINGTON KOO: CHINA 31, 174 (2008). John Bassett Moore was Columbia's first full professor of international law. *Id.* at 31.

59. Wang Dingxian, *Guo Ji Fa Yuan Da Fa Guan Xu Mo Sheng Ping, Can Yu De Guo Ji Fa Yuan An Jian, Zhe Shu, Jian Ping* [ICJ Judge Hsu Mo's Life, ICJ Cases, Publications and Comments], 9 ZHONG GUO GUO JI SI FA YU BI JIAO FA NIAN KAN [Chinese Yearbook of Private International Law and Comparative Law] 504, 504–06 (2006). See also [http://www.tju.edu.cn/tjupaper/every\\_lib/20111110/104504/201111/t20111111\\_115542.htm](http://www.tju.edu.cn/tjupaper/every_lib/20111110/104504/201111/t20111111_115542.htm).

60. YUE, *supra* note 57, at 159–66.

awareness of international law's significance in Chinese diplomacy. While international law societies in the north of the country influenced political thinking, the Mixed Court in the South exposed Chinese judges and lawyers to cases with substantive foreign components. These experiences greatly advanced the legal sophistication of the ROC's international lawyers.

The participation of Qing officials in the London-based International Law Association (ILA) was China's first encounter with the Western concept of international law societies.<sup>61</sup> Founded as the Association for the Reform and Codification of the Law of Nations in 1873, the ILA remains one of the world's most esteemed international law societies.<sup>62</sup> Guo Songtao, the Qing's first minister appointed to the United Kingdom, and Japanese minister, Ueno Kagenori, were both invited to attend the ILA meeting in 1878.<sup>63</sup> Both Guo and his successor, Marquis Zeng Jize, were subsequently elected to be ILA honorary secretaries.<sup>64</sup> Their ILA experiences introduced them to the vast scope of international law and fortified their belief in "importing" additional international law knowledge to China. Later, in Changsha of Hunan Province, the Public Law Association (*Gong Fa Xue Hui*) and the Law Association (*Fa Lv Xue Hui*) emerged as China's first international law societies.<sup>65</sup> They were both established in 1898, with the primary goal of increasing the international law understanding necessary for revising treaties.<sup>66</sup> These societies preceded the American Society of International Law and the Netherlands Society of International Law that were founded in 1906 and 1910, respectively.<sup>67</sup> Nonetheless, the two Chinese societies soon ceased operation because of the failure of the Guangxu Emperor's short-lived reform.

Akin to education and the MOFA reform, the top-down approach influenced the formation of international law societies in the ROC. Lu

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61. HSU, CHINA'S ENTRANCE INTO THE FAMILY OF NATIONS, at 199–207.

62. Cecil J. Olmstead, *The International Law Association: A World-wide Organization for Development and Promotion of International Law*, 43 NORDIC J. INT'L L. 18, 18 (1973).

63. HSU, *supra* note 23, at 206–07.

64. *Id.* at 207.

65. LIN, *supra* note 13, at 70–71.

66. *Id.*

67. JANIS, *supra* note 29, at 149; Nico J. Schrijver, *A Missionary Burden or Enlightened Self-interest? International Law in Dutch Foreign Policy*, 57:2 NETH. INT'L L. REV. 209, 210 (2010); <http://www.asil.org/about/asil-history>. The Japanese Society of International Law, which continues to exist today, was founded in 1897. Yoshiro Matsui, *The Social Science of International Law: Its Evolution in Japan*, No. 45, 2002 JAPANESE ANNUL INT'L L. 1, 1. Nico J. Schrijver, *A Missionary Burden on Enlightened Self-Interest? International Law in Dutch Foreign Policy*, NILR 2010, vol 57:2, 209, 210, available at <http://www.asil.org/about/asil-history>.

Zhengxiang, the key Beiyang reformer of the MOFA, initiated the International Law Society (ILS) in 1913.<sup>68</sup> As a Qing envoy to the first two Hague Peace Conferences, Lu apprehended the strategic importance of implementing the treaties on the resolution of international disputes and the laws of war.<sup>69</sup> British and American proposals to exclude extraterritorial disputes from the jurisdiction of the Permanent Court of Arbitration (PCA) prompted him to urge the Qing Court to expedite legal reform.<sup>70</sup> To increase Chinese influence on the Court, the Qing government nominated several PCA members, including Wu Tingfang and former Belgium Minister of State, Jules Van den Heuvel.<sup>71</sup> With Wang Chung-hui's support, Lu founded the ILS, which aimed to prepare the ROC to actively take part in the Third Peace Conference and to strengthen the country's standing as a civilized nation.<sup>72</sup> Although the conference never took place due to WWI, the attempt to enter the family of nations as a civilized nation invigorated official support in building the international law capacity.<sup>73</sup>

Remarkably, based on a proposal by the US Minister to China, Paul S. Reinsch, Lu Zhengxiang and Wellington Koo established the Chinese Social and Political Science Association (CSPSA) in Beijing in 1915.<sup>74</sup> The CSPSA, modeled on the American Political Science Association, became China's first academic society of political science.<sup>75</sup> While the

68. The International Law Society lasted from 1913 to 1916. Chi-hua Tang, *Qing Mo Min Chu Zhong Guo Dui Hai Ya Bao He Hui Zhi Can Yu (1899–1917)* [A Study on China's Participation of the Hague Peace Conferences, 1899–1917], 23 GUO LI ZHENG ZHI DA XUE LI SHI XUE BAO [NCCU J. History] 45, 72–73 (2005); [http://nccur.lib.nccu.edu.tw/bitstream/140.119/16885/1/%E6%B8%85%E6%9C%AB%E6%B0%91%E5%88%9D%E4%B8%AD%E5%9C%8B%E5%B0%8D%E3%80%8C%E6%B5%B7%E7%89%99%E4%BF%9D%E5%92%8C%E6%9C%83%E3%80%8D%E4%B9%8B%E5%8F%83%E8%88%87\(1899-1917%E5%89%BC%E5%94%90%E5%95%9F%E8%8F%AF.pdf](http://nccur.lib.nccu.edu.tw/bitstream/140.119/16885/1/%E6%B8%85%E6%9C%AB%E6%B0%91%E5%88%9D%E4%B8%AD%E5%9C%8B%E5%B0%8D%E3%80%8C%E6%B5%B7%E7%89%99%E4%BF%9D%E5%92%8C%E6%9C%83%E3%80%8D%E4%B9%8B%E5%8F%83%E8%88%87(1899-1917%E5%89%BC%E5%94%90%E5%95%9F%E8%8F%AF.pdf).

69. Tang, *supra* note 68, at 47–65. These conventions, which represented China's first participation in multilateral treaties, include the Convention for the Pacific Settlement of International Disputes and the Convention with respect to the Laws and Customs of War on Land.

70. *Id.* at 62, 67. For the background of the Permanent Court of Arbitration (PCA), see David Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 15–17 (2000).

71. Tang, *supra* note 68, at 69, 70 n.151. Belgium was a neutral state and Jules Van den Heuvel was a prominent jurist. He was the only foreign national that the Chinese governments nominated as a member of the PCA.

72. *Id.* at 73. With President Yuan Shikai's support, Lu also organized the Preparatory Society for the Third Hague Conference (Bao He Hui Zhun Bei Hui), which convened in the Ministry of Foreign Affairs from 1912 to 1915. *Id.* at 73–74.

73. *Id.* at 81–83.

74. See *The Origin of the Association* [Editorial Note], 1 CHINESE SOC. & POL. SCI. REV. 1, 2 (1916) (describing that on December 5, 1915, 65 members attended the first meeting that took place at the residence of Lou Tseng-tsiang, then the Foreign Minister).

75. *Id.* at 1.



CSPSA was not an international law society *per se*, the majority of its work concerned “international law and diplomacy.”<sup>76</sup> The waning of the ILS and its overlapping membership with the CSPSA made the latter the most prominent academic society for promoting international law in China.<sup>77</sup> The direct involvement of Reinsch, together with Professor W. F. Willoughby of Princeton University and Professor Henry C. Adams of the University of Michigan, also enhanced American influence in the elite circle of Chinese diplomats.<sup>78</sup>

While Beijing-based academic institutions promoted international law research, the growth of the legal profession and the Mixed Court enabled ROC legal talents to familiarize themselves with Western adjudication mechanisms. Modeled after Japan’s Barristers Law, the 1912 Provisional Regulations on Lawyers governed the qualification and disciplinary procedures for the legal profession.<sup>79</sup> By the 1930s, the Shanghai Bar Association became the nation’s largest bar association.<sup>80</sup> Shanghai became a commercial and legal hub because of its flourishing legal market, galvanized by large foreign law firms and high-stakes commercial litigation.<sup>81</sup> The law schools of the English-speaking Soochow University and the French-speaking Aurora University also made the city an intellectual center of comparative law.<sup>82</sup>

The Mixed Court system that continued from the 1860s to 1927 made Shanghai’s legal landscape increasingly complex.<sup>83</sup> The *territorial and personal* jurisdiction under the multiplicity of courts was the most challenging legal experiment on Chinese soil.<sup>84</sup> The Shanghai International Settlement, which co-existed with the French Concession, constituted

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76. *Id.*; James Brown Scott, *The Chinese Social and Political Science Association*, 10:2 AM. J. INT’L L. 375, 376 (1916).

77. See Editorial Note, *supra* note 74, at 9.

78. See Scott, *supra* note 76, at 375, 377.

79. XIAOQUN XU, CHINESE PROFESSIONALS AND THE REPUBLICAN STATE: THE RISE OF PROFESSIONAL ASSOCIATIONS IN SHANGHAI 1912–1937 108 (2001).

80. See Alison W. Conner, *Lawyers and the Legal Profession during the Republican Period*, in CIVIL LAW IN QING AND REPUBLICAN CHINA 215, 229, 237 (Kathryn Bernhardt & Philip C. C. Huang eds., 1994) (“[B]y the end of 1916, 58 of the 122 lawyers registered [in the International Mixed Court] were Chinese.”).

81. Hou, Xinyi *Min Guo Shi Qi Lv Shi Shi Ru He Jing Zheng De*, <http://www.rmlt.com.cn/2013/1022/168521.shtml> (last visited Oct. 22, 2013).

82. Aurora University was known as Zhendan Daxue. Alison W. Conner, *The Comparative Law School of China*, in UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN (C. Stephen Hsu ed. 2003) 210, 222–25 (2003).

83. See XU, *supra* note 79, at 229; THOMAS B. STEPHENS, ORDER AND DISCIPLINE IN CHINA: THE SHANGHAI MIXED COURT 1911–27 vii–xi (1992).

84. Lee, Tahirih V. *Risky Business: Courts, Culture, and the Marketplace*, 47 U. MIAMI L. REV. 1335–414, 1362 (1993).

large exclaves of the extraterritorial zone.<sup>85</sup> The treaty right of consular jurisdiction granted to foreigners gave them immunity from Chinese jurisdiction. For example, the United States Court for China and the British Supreme Court for China and Japan were conferred jurisdiction over US and UK citizens, respectively.<sup>86</sup> Legally speaking, unlike with colonies, China did not lose its sovereignty over the Shanghai International Settlement. The Chinese government continued to exercise jurisdiction over Chinese and non-treaty foreigners (*i.e.* nationals of countries that were not accorded extraterritorial rights). Consequently, to deal with cases involving Chinese and non-treaty foreign defendants, the Mixed Court was set up.<sup>87</sup> The “mixed” nature of the Court meant that Chinese magistrates and foreign consular representatives, known as foreign assessors, jointly tried the cases.<sup>88</sup> The presence of foreign judges and lawyers with diverse nationalities in a single case became the norm.

Importantly, the Mixed Court’s establishment was based on convenience rather than on treaty rights. None of the treaties gave foreign consulates the power to appoint judges to the Court. As the British government acknowledged, the sole “legal” basis for the Court’s foundation was President Yuan Shikai’s 1913 declaration to permit the continuity of existing foreign “privileges and immunities” based on “established usages.”<sup>89</sup> Western-educated ROC judges opposed such an interpretation. The ROC Supreme Court eventually found that due to the absence of a legal foundation, the cases decided by the *de facto* Mixed Court lacked legal effect and, therefore, “a plea of *res judicata* [could not] be entertained” in Chinese courts.<sup>90</sup>

Notwithstanding the legal challenges to the Mixed Court and its non-recognition of *stare decisis*, its jurisprudence demonstrated the salient impact of legal cases on the nation.<sup>91</sup> In 1925, the Beiyang government was required to apply for an injunction against the Mixed Court’s order to

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85. See STEPHENS, *supra* note 83, at xi (“In 1925, the [population of the] settlement . . . numbered 30,000 foreigners and 810,000 Chinese.”); Manley O. Hudson, *The Rendition of the International Mixed Court at Shanghai*, 21:3 AM. J. INT’L L. 451, 451 (1927) (introducing the population of the Shanghai International Settlement and the bordering French Concession).

86. Hudson, *supra* note 85, at 454; see also Helmick, *supra* note 45, 252 (“A person accused of crime was tried in the court of his nationality.”).

87. The French Mixed Court was also established in the French Concession and had jurisdiction over French nationals. See also Wang, *supra* note 7, at 255–57 (explaining the origin of Shanghai-based foreign courts).

88. See Hudson, *supra* note 85, at 460.

89. STEPHENS, *supra* note 83, at 69–70.

90. Case Brought on Appeal from Kiangsi 16th Day 3rd Month, 6th Year of the Chinese Republic, cited in *id.* at 70–71.

91. *Id.* at 93–94.

destruct certain ammunition in Shanghai.<sup>92</sup> In the following year, the Mixed Court dealt with the Netherlands' request to extradite a German national who had committed crimes in Dutch Java.<sup>93</sup> The Court declined the request on the ground that the Netherlands-China treaties confined extradition to Dutch citizens.<sup>94</sup> These complex cases made Shanghai a training ground for China's first-generation international lawyers. Ni Zhengyu, a graduate of Soochow and Stanford Universities, was a prominent example. Before Ni was appointed as the Chief Advisor to the ROC Prosecutor Group in the Tokyo War Crimes Trial, he gained substantial experiences as a commercial lawyer and judge in Shanghai.<sup>95</sup>

### III. THE IMPACT OF INTERNATIONAL LAW ON THE ROC'S DIPLOMACY

This Article has explored the evolution of the international law discipline and the cultivation of international lawyers in the ROC. With the guiding civilized nation concept, the ROC's international lawyers took the positivist stance on international law and adopted the legalist approach to tackle diplomatic obstacles.<sup>96</sup> Other than the Republican Chinese characteristics of statism and pragmatism, idealism developed into a conspicuous feature of ROC diplomacy. The ROC's international lawyers contributed both to modern China's Grotian moment and to *twentieth century international lawmaking in East Asia*. The ROC's assertive legalism approach was evidenced in the revision of unequal treaties and in its participation in international organizations and courts. Based on these case studies, this Article challenges the view of the Chinese Communist Party (CCP) that the ROC succumbed to imperialism.<sup>97</sup> By demonstrating the ROC international lawyers' strategic engagement with international law, this Article will also demonstrate that their intellectual influence shaped the global order.

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92. Hudson, *supra* note 85, at 454.

93. Consul-General for the Netherlands v. Weidemann, Shanghai Mixed Court (1926). *Id.* at 96.

94. *Id.*

95. Ni Zhengyu was elected as the first PRC judge of the ICJ. Ling Yan, *In Memoriam: Ni Zhengyu*, 3 CHINESE J. INT'L L. 693, 693-95 (2004). Other international lawyers' experiences in Shanghai, see Conner, *supra* note 80, at 234.

96. The ROC's international law-based approach is distinct from the early PRC's political, radical position on diplomacy, which led to more than two-decade isolation of Mainland China. See William C. Kirby, *The Internalization of China: Foreign Relations at Home and Abroad in the Republican Era*, 150 CHINA Q. 433, 441 (1997) (discussing the ROC's legalist approach to diplomacy).

97. See, e.g., Report to the 2nd National Congress of Worker's and Peasant's Representatives (Jan. 23, 1934) (arguing that the Chinese Nationalist Party "surrenders completely to imperialism").

### A. *The Treaty Revision Campaign*

The revision of unequal treaties was a major impetus in the professionalization of international law in modern China. In fact, the strategy of the ROC's international lawyers to tackle the issue of unequal treaties represented a major landmark in the nation's legal capacity building. Importantly, the notion of unequal treaties did not originate from the West because none of the early translations of Western books alluded to such a concept.<sup>98</sup> The term "unequal treaties" seems to have first appeared in the 1923 KMT declaration that condemned the Qing Dynasty's conclusion of such treaties and pledged to "restore China's free and equal status."<sup>99</sup> Thereafter the term became popular and buttressed Chinese nationalism, enabling the CCP to use the "century of humiliation" slogan as a powerful weapon against the West and the KMT.<sup>100</sup>

#### 1. *The Concept of Unequal Treaties*

The peace treaties with the Netherlands and Russia, discussed previously, were not considered unequal. The concept of unequal treaties began with the 1842 Treaty of Nanjing with the United Kingdom. The common features of unequal treaties included the rights of extraterritoriality, leased territories, the stationing of troops, and navigation on inland waters.<sup>101</sup> These privileges were "unequal" because they encroached upon Chinese sovereignty. This Article, nonetheless, offer a different view. Certain rights that the Western powers requested were to remedy their unfair treatment in China. For example, the Treaty of Wanghia, the first unequal treaty with the United States, mandated the abolition of the Chinese practice banning foreigners from learning Chinese.<sup>102</sup> The Treaty of Tianjin prohibited Chinese official documents

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98. Hungdah Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 239, 241–46 (Jerome A. Cohen ed. 1972).

99. See *id.* at 245–46 (discussing various Chinese Nationalist Party declarations on the abrogation of unequal treaties).

100. Note that the abrogation of unequal treaties was also major feature of the National Government's political platform. See *How Humiliation Drove Modern Chinese History*, <http://www.theatlantic.com/china/archive/2013/10/how-humiliation-drove-modern-chinese-history/280878/> (last accessed June 1, 2015).

101. See Wang, *supra* note 7, at 252–53 (listing the rights and privileges under unequal treaties).

102. Treaty of Peace, Amity, and Commerce, Between the United States of America and the Chinese Empire, U.S.-China, art. XVIII, July 3, 1844.

from referring to the British as “barbarians.”<sup>103</sup> Arguably, the treaty right of extraterritoriality that Chinese intellectuals often condemned was not based on an imperialist intention,<sup>104</sup> rather, it protected foreigners from suffering the effects of Qing criminal proceedings that often forced confession by torture. On the “positive” side, foreign powers in the respective treaties promised to relinquish extraterritoriality should China revamp its legal system to be on par with Western standards.<sup>105</sup> This treaty obligation, along with the experiences in the two Hague Peace Conferences, prompted modern China to expedite its legal reform.

The attempt to end the unequal treaty system posed a complex legal challenge. The system, intertwined with the most-favored-nation (MFN) treatment, started China on a vicious cycle. Although the MFN clause was not conventionally understood as part of unequal treatment, this procedural requirement was more detrimental than other substantive treaty rights. Under Article 8 of the 1843 Treaty of the Bogue, the Chinese Emperor agreed that any “additional privileges or immunities” granted to other nations would be extended to British subjects.<sup>106</sup> It was the prelude to the unilateral, instead of reciprocal, MFN provision that subsequent treaties included.<sup>107</sup> The unequal treaties system became a locked-in regime. Based on the MFN claim, the United Kingdom enlarged its consular jurisdiction in accordance with a subsequent US treaty; moreover, Mexico and Switzerland could gain extraterritoriality despite the absence of such a treaty arrangement.<sup>108</sup> The legal effect of unequal

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103. Peace Treaty between the Queen of Great Britain and the Emperor of China. U.K.-China, June 26, 1858, art. LI; *see also* LIU, *supra* note 8, at 31–51 (analyzing “the birth of a super-sign” under Sino-British treaties). Page numbers do not match with source.

104. *See* Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC J. INT’L L. 335, 346 (2005).

105. *E.g.*, UK-China Commercial Treaty (1902), art. 12; Treaty Between the United States and China for the Extension of Commercial Relations Between Them, U.S.-China, art. XV, Oct. 8, 1903. The 1902 treaty is cited correctly. A minor problem: While the cited article mentioned the 1903 treaty, it does not provide the specific citation “art. 15” as the author does here. UK treaty, I don’t have the English version, Chinese version, *see* attached article (in Chinese) by Chen Yaping, p 1; US treaty, *see* <http://www.chinaforeignrelations.net/node/209>.

106. Supplementary Treaty of Hooman Chai (The Bogue), U.K.-China, art. XIII. The Treaty of the Bogue was the supplemental treaty to the 1842 Treaty of Nanjing.

107. In the modern trade regime, the most-favoured-nation (MFN) requirement accords reciprocal treatment. *See* General Agreement on Tariffs and Trade (1947), art. I; for an analysis of a modern MFN clause’s application in international disputes. *See generally* Locknie Hsu, *MFN and Dispute Settlement: When the Twain Meet*, 7 J. WORLD INVESTMENT & TRADE 25, 25–37 (2006).

108. For example, Article 25 of the Treaty of Wanghia extended consular jurisdiction from disputes between US and Chinese nationals to those between US and non-Chinese nationals. Hence, Chinese courts lost complete jurisdiction over cases involving Americans. On the MFN basis, UK nationals received the same treatment. There were 14 countries that received “direct” extraterritorial rights under their treaties with China, but other countries claimed the same treatment under the MFN

treaties has been controversial, as the unequal nature can be due to force or various types of coercion.<sup>109</sup> The positivist approach of the ROC's international lawyers was demonstrated by their non-denial of the unequal treaties' validity and by their seeking of the legal justification to revise or abrogate such treaties.<sup>110</sup> Distinct from ROC jurists, early PRC decision-makers simply considered unequal treaties *void ad initio* and failed to develop a consistent legal approach to the treaty regime.<sup>111</sup>

## 2. Three Legal Approaches

Upholding the civilized nation principle, the ROC did not directly challenge the normative value of the doctrine of *pacta sunt servanda*. To circumvent this doctrine, the ROC's international lawyers resorted to three approaches. The application of their legalist efforts, which ended the unequal treaties regime, not only elevated China's international status, but also demonstrated its statism and pragmatism. First, based on the suggestion of foreign legal counsel to the Beiyang Government, the ROC declared war against Germany and Austria-Hungary during WWI.<sup>112</sup> The goal underlying this opportunistic declaration of war was to invalidate Chinese treaties with these powers.<sup>113</sup> In addition to declaring the bilateral treaties invalid, the ROC revoked the extraterritorial privileges of Germany and Austria-Hungary and took over German concessions in Tianjin and Hankou.<sup>114</sup> The ROC also disarmed enemy troops and

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clause in their treaties. See Albert H. Putney & Raymond L. Buell, *The Termination of Unequal Treaties*, 21 PROC. AM. SOCIETY INT'L L. AT ITS ANNUAL MEETING 87, 96 (1927).

109. The current view under Article 52 of the Vienna Convention on the Law of Treaties (1969) is that a treaty is void if it was "procured by the threat or use of force in violation of international law." IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 619 (7th ed. 2008). Yet, this position does not render the previous unequal treaties void. Moreover, it does not govern the validity of treaties signed under other types of pressure. *Id.* See generally Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 73 NORD 3, 335–82 (2005).

110. Chiu, *supra* note 98, at 267.

111. *Id.* at 259, 267.

112. China declared war against Germany and Austria-Hungary in 1917. The Beiyang Government's foreign legal experts included Georges Padoux, Jean Escarra and Westel W. Willoughby. Lin-chun Wu, *1923 Nian Beijing Zheng Fu Fei Chu "Zhong Ri Min Si Tiao Yue" Zhi Fa Li Su Qiu* [Appealing to Legal Procedure: China's Endeavour to Abolish the Twenty-One Demands in 1923], 3 XIN SHI XUE [New History] 157, 175–76 (2008).

113. See generally Arnold Pronto, *The Effect of War on Law—What Happens to Their Treaties When States Go to War?* 2:2 CAM. J. INT'L & COMP. L. 227, 230 (2013) (explaining this traditional view no longer reflects current international law due to the 1928 Kellogg-Briand Pact).

114. Zhen-Feng Cai, *Zhong Guo Shou Guan De Ao Shi Guan Wei Dui Ji Jun Xie Zhi Yan Jiu (1917–1922)* [The Research of China's Takeover of German and Austro-Hungarian Embassy Guards and Weapons], in GUO JI FA ZAI ZHONG GUO DE QUAN SHI YU YIFUN YONG [The Interpretation and Application of International Law in China] 81, 97–101 (Hui Min Zhou ed., 2012).

accommodated them as prisoners of war in compliance with the 1899 Convention with respect to the Laws and Customs of War on Land.<sup>115</sup> The ROC's compliance with the Convention, which the Qing Court ratified following the First Hague Peace Conference, showed the nation's adherence to the civilized nation standard. These experiences constituted the ROC's first trial for abolishing foreign privileges and the first implementation of the laws of war in China.<sup>116</sup>

Second, the Chinese Senate claimed the absence of congressional ratification as a justification to invalidate the Sino-Japanese Treaties of 1915, which were commonly known as the "Twenty-One Demands."<sup>117</sup> Such demands compelled the Beiyang Government to confirm Japan's "succession" to German rights over Shandong at the end of WWI.<sup>118</sup> Since Japan insisted on the validity of the treaties, the ROC's attempt to abolish the 1915 treaties at the Paris Peace Conference was futile.<sup>119</sup> The Chinese delegation refused to sign the Treaty of Versailles because Article 156 of the Treaty mandated the transfer of German rights in Shandong to Japan.<sup>120</sup> In 1923, the ROC Senate passed a resolution invalidating the 1915 treaties.<sup>121</sup> In the Senate's view, such treaties should be *void ab initio* because they lacked congressional ratification.<sup>122</sup> The claim, based on President Yuan Shikai's incompetence to conclude the treaties alone, marked China's first challenge to the treaties' validity on a domestic constitutional procedure ground. Yet, this claim was problematic from the international and constitutional law perspective.

Article 35 of the 1912 ROC Provisional Constitution made congressional concurrence a condition for the conclusion of treaties. However, Yuan replaced the 1912 Provisional Constitution with the 1914 Provisional Constitution, which enlarged the president's treaty-making power.<sup>123</sup> The 1914 Provisional Constitution conferred to the president sole treaty power unless a treaty involved a "territorial change" or an

115. *Id.* at 86, 98.

116. Germany relinquished rights and privileges under the 1921 peace treaty with the ROC.

117. Madeleine Chi, *China Diplomacy, 1914–1918*, 88 (1970).

118. During WWI, Japan declared war against Germany and occupied the Shandong Peninsula. After the war, Japan requested that the German concessions in Shandong be transferred to Japan.

119. Tang, *supra* note 17, at 710; *see also* STEPHEN G. CRAFT, V.K. WELLINGTON KOO AND THE EMERGENCE OF MODERN CHINA 51 (2004) (explaining Wellington Koo's call for direct return of Qingdao on the ground of *rebus sic stantibus* because China's declaration of war ended the German leases).

120. Based on Washington's mediation, Japan agreed to return Shandong to China at the 1922 Washington Naval Conference.

121. Wu, *supra* note 112, at 170.

122. *Id.* at 171.

123. *Id.* at 179.

“increase of the burden of nationals.”<sup>124</sup> Neither condition applied to the 1915 treaties because concessions in Shandong were still deemed Chinese territory and the burden on nationals was not increased. It may be argued that the 1914 Provisional Constitution itself was invalid because Yuan’s decision to dissolve the original congress was unconstitutional. The weakness of such a claim lies in the fact that Yuan’s administration was considered China’s sole legitimate government and that the country’s internal political changes could not affect the validity of treaties. Albeit unsuccessful, the claim represented the congressional approach to treaty revision. During WWII, the National Government’s 1941 declaration of war terminated all treaties with Japan, including the Sino-Japanese Treaties of 1915.<sup>125</sup>

Finally, the most broad-ranging claim against unequal treaties was the reliance on *rebus sic stantibus* (a fundamental change of circumstances) that Zhou Gengsheng actively advocated.<sup>126</sup> He believed that incomplete congressional ratification did not constitute a sufficient basis for terminating the Sino-Japanese Treaties of 1915. Instead, *rebus sic stantibus* would have enabled China to assert a vital change of circumstances that warranted the denunciation of the treaties. As the threat of Germany and Russia to East Asia lessened substantially, the extension of the Japanese lease over Liushun and Dalian could not be justified. As a result of political changes it had undergone since the conclusion of the treaties in 1915, China could no longer permit foreign concessions in its territory. Furthermore, the *rebus sic stantibus* principle was enshrined in Article 19 of the Covenant of the League of Nations (League Covenant) and prompted the return of Weihaiwei, a British colony in Shandong, to China in 1930.<sup>127</sup>

Both the Beiyang Government and the National Government resorted to revision clauses in treaties and the principle of *rebus sic stantibus* as the basis for renegotiating the treaties. The ROC’s invalidation of the 1865 Sino-Belgium Treaty was a key case. After the ROC government unilaterally terminated the treaty, Belgium brought a complaint against

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124. *Id.* at 179.

125. Remarks by President Ma Ying-jeou at the Opening Ceremony of the Special Exhibition on the 60th Anniversary of the Coming into Force of the Treaty of Peace between the Republic of China and Japan, Taipei Representative Office in Greece, available at <http://www.roc-taiwan.org/GR/fp.asp?xItem=319723&ctNode=8128&mp=527> (last accessed June 15, 2014).

126. See Tang, *supra* note 17, at 707. See Chiu, *supra* note 98, at 255 n.64 (discussing that other ROC scholars held the same view).

127. The Avalon Project, Documents in Law, History and Diplomacy, *The Covenant of the League of Nations*, art. 19, [http://avalon.law.yale.edu/20th\\_century/leagcov.asp#art19](http://avalon.law.yale.edu/20th_century/leagcov.asp#art19) (last visited May 25, 2015).



China before the PCIJ.<sup>128</sup> Belgium argued that Article 46 of the treaty solely conferred onto Belgium the right to revise the treaty and that China had no right to denunciate it.<sup>129</sup> In anticipation of the PCIJ proceedings, China intended to rely on *rebus sic stantibus* as its major defense.<sup>130</sup> As UK-led Western powers attempted to improve ties with Chiang's National Government, Belgium reluctantly agreed to the ROC's request for treaty revision and withdrew its complaint from the PCIJ.<sup>131</sup> The renegotiated 1928 Treaty of Amity and Commerce with Belgium became the precedent for China's treaty revisions. In the middle of WWII, marked by new treaties with the United States and Britain that abolished extraterritoriality, all unequal treaties were abolished in 1943.<sup>132</sup> Correspondingly, foreign concessions and the Mixed Court ended. Since the 1842 Treaty of Nanjing, it took China's international lawyers a hundred years to achieve the goal of treaty revision. Their unyielding attempts to end the unequal treaty regime negated the PRC's pro-imperialist argument against the ROC.

### *B. Participation in International Institutions*

The ROC's legalist approach to unequal treaties demonstrated the international lawyers' positivist stance on international law. The strategy of assertive legalism escalated further with China's participation in the multilateral rule-making process. These experiences facilitated the transformation of the once Eurocentric law of nations to universally valid normative claims. Moreover, influenced by US President Woodrow Wilson's Fourteen Points, the idealism of the ROC's international law approach contributed to its Grotian moment that remains critical to current global governance.<sup>133</sup>

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128. See Craven, *supra* note 104, at 368–69 (discussing the argument and court proceedings).

129. Tang, *supra* note 17, at 708.

130. See *id.* Four foreign legal experts, Walther Schücking, Giuseppe Motta, Nicholas Politis and Robert Lansing, advised the Beiyang Government to defend the case on the basis of *rebus sic stantibus*. *Id.*

131. Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belg. v. China), 1929 P.C.I.J. (ser. A) No. 8 (Order of May 25).

132. Putney & Buell, *supra* note 108, at 97–98 (listing the countries that relinquished extraterritorial rights in China). See *supra* note 41, at 156.

133. Point I (open covenants of peace) and Point XIV (political independence and territorial integrity) were particularly pertinent to the Sino-Japanese Treaties of 1915. At the Paris Peace Conference, the Chinese delegation intended to rely on Wilsonianism to resolve the Shandong Problem. CRAFT, *supra* note 119, at 56–57.

### 1. *From the League of Nations to the United Nations*

The ROC was a founding member of the LN, which was established as a result of the Paris Peace Conference.<sup>134</sup> Wellington Koo served as the chairman of the League Council, in which China was a non-permanent member.<sup>135</sup> Unlike with unequal treaties, the Manchurian incident illustrated the ROC's initial efforts to turn the international treaties into a shield to protect the nation. To respond to Japanese aggression in Manchuria and to the creation of Manchukuo in the 1930s, Koo advised the government to appeal to the LN on the basis of Articles X, XI, and XV of the League Covenant.<sup>136</sup> To garner support from the United States, a non-member of the LN, the ROC asserted that the Japanese invasion violated the 1922 Nine-Power Treaty and the 1928 Kellogg-Briand Pact (Pact of Paris).<sup>137</sup> These two agreements, to which Japan, the United States and the ROC were signatories, respectively ensured China's territorial integrity and outlawed war as an instrument of foreign policy.<sup>138</sup> The League Covenant, along with the two treaties, constituted the ROC's legal basis for the complaint against Japan.

These well-devised claims prompted Washington to adopt the Stimson Doctrine, which confirmed the principle of *ex injuria jus non oritur* (law does not arise from injustice) by declining to recognize territorial changes by force.<sup>139</sup> Japan's British legal adviser, Thomas Baty, devised the justification of Japan's right of self-defense in Manchuria;<sup>140</sup> however, such a defense could not stand. It encountered fierce criticism from both foreign and Japanese scholars. A prominent scholar opposing the official argument was Kisaburo Yokota, who became Japan's first international

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134. Bart Gaens, Juha Jokela, and Eija Limnell, eds., *The Role of the European Union in Asia: China and India as Strategic Partners* 140 (2009).

135. Tang, *supra* note 17, at 719.

136. Chronology 1932, League of Nations Photo Archive, <http://www.indiana.edu/~league/1932.htm> (last visited Mar. 22, 2013); The Covenant of the League of Nations (1924), arts. X, XI, and XV.

137. SHINOHARA, *supra* note 2, at 121; Stephen G. Craft, *Saving the League: V.K. Wellington Koo, the League of Nations and Sino-Japanese Conflict, 1931–39*, 11:3 DIPLOMACY & STATECRAFT 91, 95 (2000).

138. See Milestones: 1921–1936, <http://history.state.gov/milestones/1921-1936/NavalConference> (last visited Aug. 1, 2013) ("The final multilateral agreement made at the Washington Naval Conference was the Nine-Power Treaty, which marked the internationalization of the U.S. Open Door Policy in China."). As this treaty only called for consultations in the event of violations, it had no enforcement mechanism. *Id.*

139. SHINOHARA, *supra* note 2, at 112–15.

140. Shinya Murase, *Thomas Baty in Japan: Seeing Through the Twilight*, 73 BRITISH YB. INT'L L. 327–32 (2002).

lawyer sitting on the postwar Supreme Court.<sup>141</sup> Some may argue that the Stimson Doctrine and the LN's adoption of the Lytton Report, which condemned Japanese military action, were futile.<sup>142</sup> This Article disagrees. It is true that these efforts neither deterred Japanese aggression nor prevented Japan's departure from the LN. Nonetheless, the ROC's legal strategy that effectively isolated Japan and gained moral support from the allies proved to be crucial for China's final victory.

In addition to the Manchuria issue, the Republican Chinese characteristics of statism, pragmatism and idealism dominated China's wartime policy. The ROC's declaration of war exemplified statism and pragmatism. At the inception of the Japanese invasion in 1937, the National Government only issued the Proclamation of *Self-Defense* and War of Resistance. It did not declare war against the Axis powers until the US Congress declared war on Japan after the Pearl Harbor attack in 1941. In the interim *de facto* war period, neither Japan nor the ROC declared war on each other or terminated diplomatic ties. Based on international lawyers' advice, Generalissimo Chiang made this heavily-criticized decision.<sup>143</sup> Their greatest concern was that the legal effect of the declaration of war would enable Japan to exercise the belligerent's right of visit and search on the high seas.<sup>144</sup> The exercise of this right would effectively cut off the supply of arms and ammunition to China by ships of neutral states through ports in Vietnam and Myanmar.<sup>145</sup> This was a matter of survival because most Chinese harbors were already occupied by Japan. Furthermore, due to the US Neutrality Acts, the Chinese military could not receive American arms should the ROC become a belligerent.<sup>146</sup> Given its

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141. *Id.* at 330; Takeso Shimoda, *In Memoriam: Dr. Kisaburo Yokota (1896–1993)*, 36 JAPANESE ANNUL INT'L L. 1, 2–3 (1993). See Edward McWhinney, ed., *Supreme Courts and Judicial Law-Making: Constitutional Tribunals* 80 (1986).

142. See China and the United Nations, Report of a Study Group Set up by the China Institute of International Affairs (Published for the Carnegie Endowment for International Peace) (1959) [China and the United Nations], at 8 (“The League’s failure in Manchuria demonstrated the failure of the collective security system.”); SHINOHARA, *supra* note 2, at 118 (articulating Thomas Baty’s position against the Lytton Report).

143. Zhang Zhong Fu Deng Guan Yu Ri Ben Dui Hua Xuan Zhan Wen Ti Deng Han Ling [Letter Orders of Zhang Zhong Fu and Others on Japan’s Declaration of War on China], in 5:2 ZHONG HUA MIN GUO SHI DANG AN ZI LIAO HUI BIAN [Compilations of ROC Historical Files] 76, 76–83 (No. 2 Historical Archives of China ed. 2010).

144. *Id.*; see also CARL JACOB KULSRUD, MARITIME NEUTRALITY TO 1780: A HISTORY OF THE MAIN PRINCIPLES GOVERNING NEUTRALITY AND BELLIGERENCY TO 1780, 256–57 (2000) (detailing the right of visit and search).

145. Letter Orders of Zhang Zhong Fu and Others on Japan’s Declaration of War on China, *supra* note 143.

146. Presumably also because of the US Neutrality Acts that would ban arms exports, Japan did not declare war against China. See generally for reference, Milestones 1921–1936, <http://history.state>.

fragile military power, the ROC's long-overdue declaration of war in tandem with Washington and London was a pragmatic approach to ensure multilateral support.

During WWII, the idealism of the ROC foreign policy quickly advanced. It was this characteristic that made China's first-generation international lawyers more Wilsonian than their Western counterparts and led to the ROC's "Grotian moment." The issuance of visas by the ROC Consulate in Vienna to Jewish persons illustrated this point.<sup>147</sup> Because of these "visas for life," more than 2,000 Jews escaped Nazi-controlled Austria and sought refuge in Shanghai.<sup>148</sup> The ROC's decision was unprecedented, particularly compared to the position of 32 countries in the 1938 Evian Conference.<sup>149</sup> Most Western nations were reluctant to accept Jewish refugees.<sup>150</sup>

The ROC's policy on Korea similarly evidenced idealism. During WWII, the ROC provided financial support to the Provisional Government of the Republic of Korea, which was based in Shanghai and subsequently relocated to Chongqing. Chinese diplomatic recognition of the Provisional Government also showed the ROC's support for Japanese-occupied Korea. In 1943, three heads of states, including Franklin D. Roosevelt, Chiang Kai-shek and Winston Churchill, convened at the Cairo Conference to discuss the common stance of the Allies against Japan.<sup>151</sup> At the Conference, Wang Chung-hui, the legal advisor to Chiang, fiercely opposed the British proposal.<sup>152</sup> In London's view, the joint declaration only needed to state that Korean and Chinese territories should be separate from Japanese rule without mentioning their final ownership.<sup>153</sup> At the ROC's insistence, the final version of the Cairo Declaration mandated that

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gov/milestones/1921-1936/Neutrality\_acts (last visited Aug. 2, 2013) ("[T]he Neutrality Acts became irrelevant once the United States joined the Allies in the fight against Nazi Germany and Japan in December 1941.").

147. ZHONG HUA MIN GUO YU GUO JI FA: MIN GUO BAI NIAN ZHONG YAO JI SHI [ROC and International Law: Important Issues of ROC Centenary] 41 (C.V. Chen et al. eds., 2011).

148. *Id.* The ROC consul general, Feng Shan He, was named *Righteous among the Nations by Israel for his humanitarian courage*. Chinese Visas in Vienna: Feng-Shan Ho, China, <http://www.yadvashem.org/yv/en/righteous/stories/ho.asp> (last visited Aug. 5, 2013).

149. The Evian Conference, <http://www.ushmm.org/outreach/en/article.php?ModuleId=10007698> (last visited Aug. 3, 2013).

150. *See id.* ("[D]elegate after delegate rose to express sympathy for the refugees. But most countries, including the United States and Britain, offered excuses for not letting in more refugees.").

151. For the positions of the United States, the United Kingdom and the ROC, *see* The Cairo Conference, 1943, <http://2001-2009.state.gov/r/pa/ho/time/wwii/107184.htm> (last visited Aug. 3, 2013).

152. LIANG CHING-CH'UN, KAI LUO HUI YI [Cairo Declaration] 143-45, 143 (1973).

153. *Id.* at 143.

“Korea shall be free and independent” and that Manchuria and Taiwan “shall be returned to the Republic of China.”<sup>154</sup> These provisions enabled the Cairo Declaration to be the foundation for Asia’s postwar order.

The ROC’s international lawyers also profoundly influenced postwar multilateral institutions. A preliminary, yet paramount, debate concerned China’s own status as one of the Big Four on par with the United States, the United Kingdom and Russia. While Wang Shijie opposed the position, Wang Chung-hui and Wellington Koo determined that *the Big Four status* would raise China’s international standing.<sup>155</sup> Among the Allies, Britain and Russia objected to the ROC’s Big Four status, since they deemed China a “secondary power and preferred to place priority on Europe.”<sup>156</sup> Yet, they reluctantly succumbed to Roosevelt’s insistence on China’s status. As Article 23 of the UN Charter enshrines, the ROC, a founding member of the UN, became one of the five permanent members of the Security Council.<sup>157</sup>

The ROC’s idealism culminated in the 1944 Dumbarton Oaks Conversations and the 1945 San Francisco Conference that created the UN and the ICJ. To a certain extent, even the US delegates claimed that the ROC “placed too much faith in international law.”<sup>158</sup> Other powers disagreed with the ROC’s proposals for creating a permanent international police force and conferring compulsory jurisdiction on the ICJ.<sup>159</sup> The ROC’s proposals made unique contributions to the UN Charter in certain regards. Article 13, which mandates the General Assembly to promote “the progressive development of international law and its codification,” was based on the Chinese delegation’s proposal.<sup>160</sup> Article 13 subsequently led to the creation of today’s International Law Commission, which is composed of prominent jurists committed to the statutory

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154. *Id.* at 146–47.

155. Tang, *supra* note 17, at 721.

156. Zi Zhongyun, *Big Power Assurance of Peace versus the Principle of Equality among All Nations*, in *THE DUMBARTON OAKS CONVERSATIONS AND THE UNITED NATIONS 1944–1994* 47, 55 (Ernest R. May & Angeliki E. Laiou eds. 1998).

157. U.N. Charter art. 23, para.5.

158. CRAFT, *supra* note 119, at 175.

159. *Id.* at 174–76; China and the United Nations, *supra* note 142, at 32–37.

160. China and the United Nations, *supra* note 142, at 46–47. Presumably for this reason, the ROC-recommended Yuan-li Liang served as the first director of the UN Division on the Development and Codification of International Law for 18 years. Liang was also the first Chinese scholar invited to lecture in the Hague Academy of International Law. See generally Yuen-Li Liang, *Le Développement et la Codification du Droit International*, RECUEIL DES COURS, vol. 73:2 (1948), at 407–33. Found link [http://nijhoffonline.nl/view\\_pdf?id=er073\\_er073\\_407-547-2](http://nijhoffonline.nl/view_pdf?id=er073_er073_407-547-2) but cannot access Liang’s work.

mandate.<sup>161</sup> Moreover, the ROC's main effort was reflected in the trusteeship system. The United States, the United Kingdom and France initially objected to the ROC's position that the trusteeship's basic objective should be independence rather than merely self-government.<sup>162</sup> With smaller states' support, Article 76 includes the "progressive development towards self-government or independence" as the primary goal of trust territories.

## 2. *International and Foreign Courts*

The ROC's wartime policy and postwar stance on the LN and the UN formed an integral part of its Grotian moment. The escalation of the ROC's legal capacity was demonstrated not only in the nation's participation in multilateral organizations, but also in its strategic engagement in court proceedings. Its assertive legalism in international tribunals was distinct from the hesitant approach of the Qing Dynasty and the PRC. Although the Qing government took part in the two Hague Peace Conferences that created the first multilateral judicial forum, the Permanent Court of Arbitration, Qing officials were suspicious about the impartiality of the West-dominated court.

For example, in 1909, the Qing government declined Portugal's proposal to resort to the processes of the PCA to adjudicate territorial disputes between China and Portugal-ruled Macao.<sup>163</sup> Likewise, in 1963, the PRC rejected India's suggestion to resolve border conflicts before the PCA.<sup>164</sup> The PRC's entrance into the UN did not change its sensitivity toward sovereignty and international courts. In 1972, the PRC even informed the UN of its refusal to recognize the ROC's acceptance of the ICJ's compulsory jurisdiction, registered under Article 36 of the Statute of the ICJ.<sup>165</sup> It was not until 2009 that the PRC's participation in the ICJ

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161. Yuen-Li Liang, *Roscoe Pound and the Science of International Law*, 22 TULANE L. REV. 369, 374 (1948).

162. Tang, *supra* note 17, at 721; China and the United Nations, *supra* note 142, at 58–60. For Tang, the page number is not correct. The book is on reserve at the law library. Ask author for correct page number.

163. JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 11 (1974).

164. ZHONG GUO GUO JI FA SHI JIAN YU AN LI [International Law in China: Cases and Practice] 371 (Duan Jielong ed., 2010).

165. Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009, at 29 n.1, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

advisory proceedings on Kosovo's declaration of independence marked the government's first appearance before the Court.<sup>166</sup>

The ROC's participation in international tribunals was based on an aspiration to act as a civilized nation. Its concern about sovereignty was no less than the Qing or PRC regimes; however, the positivist stance of the ROC's international lawyers enabled them to resort to international adjudication to resolve sovereign disputes. Their participation in judicial proceedings illustrated the Republican Chinese characteristics of statism, pragmatism and idealism. The ROC's first attempt to resort to the PCA related to the previously-discussed declaration of war against Germany as a means to revoke unequal treaties. During WWI, Germany sought the assistance of the Netherlands, a neutral state, to attend to German interests in China.<sup>167</sup> The Beiyang Government and the Netherlands disagreed as to whether German arms and ammunition should be taken over by China or the Dutch Embassy.<sup>168</sup> In 1917, the ROC requested that this issue be referred to the PCA on the basis of the 1915 Sino-Dutch treaty on dispute resolution.<sup>169</sup> Although this dispute never entered formal proceedings due to a delayed Dutch response and the end of the war, it highlighted the ROC's rising assertive legalism.<sup>170</sup>

The first instance in which the ROC defended a case before the PCA was in a 1935 case involving a US corporation, Radio Corporation of America (RCA).<sup>171</sup> The dispute arose from the ROC's conclusion of the Radio Traffic Agreement and a supplemental agreement with Mackay Radio and Telegraph Company.<sup>172</sup> RCA claimed that these agreements violated the Traffic Agreement that the ROC had concluded with RCA.<sup>173</sup>

166. Jia, *supra* note 3, at 46–47. For information on the PRC's participation in other international courts, see Julian Ku, *China and the Future of International Adjudication*, 27 MD. J. INT'L L. 154, 160–71 (2012). In comparison, the PRC has been more active in trade litigation in the World Trade Organization (WTO). See generally Bryan Mercurio & Mitali Tyagi, *China's Evolving Role in WTO Dispute Settlement: Acceptance, Consolidation and Activation*, 3 EUR. Y.B. INT'L ECON. L. 89, 89–123 (2012); Henry Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. Y.B. INT'L L. 41, 1–34 (2007). For the PRC's legal arguments with “Chinese characteristics,” see Mary E. Footer & Andrew R. Forbes, *Changing Ideologies in Trade, Technology and Development: The Challenge of China for International Trade Law*, in 2 THE LAW OF THE FUTURE AND THE FUTURE OF LAW 309, 309–22 (Sam Muller et al. eds., 2012).

167. Cai, *supra* note 114, at 81. With respect to German issues, Dutch Minister, Jonkheer Frans Beelaerts, became the key negotiators with the Chinese government. *Id.* at 82.

168. *Id.* at 97–110.

169. *Id.*

170. See Cai, *supra* note 114.

171. Radio Corporation of America v. The National Government of the Republic of China (1935).

172. Award of the Tribunal, Radio Corp. of Am. v. The Nat'l Gov't of the Rep. of China, 3 U.N. Reports of Int'l Arbitral Awards 1621, 1623 (1935).

173. See *supra* note 171, at 1–3.

According to the arbitrators, the texts of the Traffic Agreement were not “exclusive by nature,” and such an agreement did not constitute “a relation of partnership or a joint venture” that inhibited potential competition.<sup>174</sup> Furthermore, they accepted the ROC’s defense that a radio circuit was “a public service” and that it is “the Chinese Government’s duty” to enable nationals to use other facilities. The arbitrators, all of whom were Europeans, ruled in favor of the ROC.<sup>175</sup> As a result, the RCA case became China’s first successful case on the international stage.

The ROC’s assertive legalism grew in tandem with the emergence of Chinese jurists serving on international court benches. Wang Chung-hui, Sun Yat Sun’s first Foreign Minister and Chiang Kai-Shek’s legal advisor, was appointed as the first Chinese PCIJ judge.<sup>176</sup> Wang was subsequently succeeded by Chen Tien-hsi.<sup>177</sup> The three-year preliminary proceedings that involved Belgium’s challenge to the ROC’s renunciation of the 1865 Sino-Belgium Treaty ended with Belgium’s withdrawal of its complaint in 1929.<sup>178</sup> After WWII, Mei Ju-ao, a former law professor of the Central Political School, served as a judge on the Tokyo War Crimes Tribunal.<sup>179</sup> Eleven judges tried 28 high-profile Japanese leaders for war crime charges, including Japanese atrocities during the Nanking Massacre.<sup>180</sup> Mei’s firm position on imposing the death penalty on the defendants contrasted with the positions of many Western judges.<sup>181</sup> It diametrically opposed the view of the Indian judge, Radhabinod Pal, who found all of the accused not guilty.<sup>182</sup> The shared stance of Mei and other ROC

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174. *Id.* at 1626–29.

175. *See supra* note 171, at cover page.

176. *See* Spiermann, *supra* note 49, at 119 (“[Wang] was present for the first time at the third ordinary session in 1923, where the Permanent Court delivered its first judgment, in *The Wimbledon*, and also three advisory opinions . . .”).

177. League of Nations Photo Archive, Permanent Court of International Justice (PCIJ) Individual Judges in Alphabetical Order, <http://www.indiana.edu/~league/pcijindjudges.htm> (last visited July 3, 2015).

178. Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belg. v. China), *supra* note 131, at 6–7.

179. Mei Ju-ao was a judge of the Tribunal from 1946 to 1948. *Legal Robe Worn by Mei Ju-ao in the Tokyo War Crimes Tribunal*, NAT. MUSEUM OF CHINA, <http://en.chnmuseum.cn/tabid/549/Default.aspx?AntiqueLanguageID=4117> (last visited Aug. 9, 2013).

180. *See The Tokyo War Crimes Trials*, CND.ORG, <http://cnd.org/mirror/nanjing/NMTT.html> (last visited Aug. 9, 2013) (“Seven (7) were sentenced to death by hanging, sixteen (16) to life imprisonment, and two (2) to lesser terms.”).

181. He Qinhua, *Dao Du: Mei Ru-ao Yu “Yuan Dong Guo Ji Jun Shi Fa Ting”* [Introduction: Mei Ru-ao and the International Military Tribunal for the Far East], in MEI RU-AO, YUAN DONG GUO JI JUN SHI FA TING [International Military Tribunal for the Far East] 1, 6–7 (2005).

182. *See* Ushimura Kei, *Pal’s “Dissentient Judgment” Reconsidered: Some Notes on Postwar Japan’s Responses to the Opinion*, 19 JAPAN REV. 215, 217–18 (2007) (discussing Radhabinod Pal’s dissenting opinion).



international lawyers on the death penalty showed that the idealism the nation upheld was dissimilar to European ideology. After Mei, Hsu Mo and Wellington Koo became judges of the ICJ, the principal judicial organ of the UN.<sup>183</sup> Koo was the last judge nominated by the National Government.<sup>184</sup> The ROC participated in the ICJ's first two advisory proceedings in 1948 and 1949.<sup>185</sup> The written submissions demonstrated the nation's position on the conditions for a state's admission to UN membership, and detailed its views on reparation for injuries suffered in the service of the UN.

In addition to international courts, the ROC's strategic engagement in judicial proceedings was applied in foreign courts. The *Kwang Yuan* case, described as the Sino-Japanese war in San Francisco, was the most prominent case that was litigated in US courts during WWII.<sup>186</sup> *Kwang Yuan* was a steamship originally named Edna Christensen and was sold by its American owners to China's Yung Yuan Steamship Company.<sup>187</sup> The company entered into a charter party with a Japanese company for transporting 2,100 tons of scrap metal to Japan.<sup>188</sup> The scrap was to be used to produce military weapons against Chinese forces. To obstruct the voyage, the ROC expropriated the ship in 1938.<sup>189</sup> The Yokohama Specie Bank, the owner of the scrap, immediately requested that the court in San Francisco order the movement of the ship to discharge the cargo. Without challenging the ownership of the scrap, the ROC countered that the court lacked jurisdiction over the vessel following its expropriation.<sup>190</sup> The court, therefore, declined the Japanese side's request to direct the movement of the vessel and to use the gear due to comity and

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183. Robert Kolb, *The Elgar Companion to the International Court of Justice*, 105 (2014).

184. Koo's term ended in 1967 and the PRC replaced the ROC in the UN in 1971.

185. H. Hunghui Chang, Letter from the Chinese Ambassador at the Hague to the Registrar of the Court (19 Jan. 1948), in *Cour Internationale de Justice, Memoires, Plaidoiries et Documents*, 1948 Conditions de L'admission d'UN Etat Comme Membre des Nations Unies (Article 4 de la Charte) (1948), at 14; Henry Kunghui Chang, Letter from the Chinese Ambassador at the Hague to the Registrar of the International Court of Justice (26 Jan. 1949), in *Cour Internationale de Justice, Memoires, Plaidoiries et Documents*, 1949 Reparation des Dommages Subis au Service des Nations Unies (1949), at 13–14.

186. *Yokohama Specie Bank Ltd. v. Wang*, 113 F.2d 329 (9th Cir. 1940). The *Kwang Yuan* case included three court proceedings: (1) the dispute between the Japanese Officers and the Chinese seamen, (2) the libel for possession of the ship, and (3) the libel for possession of the cargo on board. *THE CASE OF THE S. S. KWANG YUAN* x to xvii (Chao Chin Huang ed., 1939) [The Case of the S. S. *Kwang Yuan*]. Chao Chin Huang, the ROC consul general in San Francisco, played an important role in legal arguments in this case.

187. *Wang*, 113 F.2d. at 330.

188. *THE CASE OF THE S. S. KWANG YUAN*, *supra* note 186, at 59–60.

189. *Wang*, 113 F.2d. at 330.

190. *Yokohama Specie Bank Ltd. v. Wang*, *supra* note 187, at 331–32.

jurisdictional immunity.<sup>191</sup> The court's ruling essentially rendered it impossible to ship the scrap to Japan. These cases demonstrated the impact of the ROC's assertive legalism on foreign policy and further buttressed the argument that the CCP's accusation of the National Government's pro-imperialist stance is unfounded.

### *C. The Intellectual Legacy of International Lawyers*

The civilized nation concept, which was introduced to China through Qing officials' participation in the two Hague Peace Conferences, evolved to be the ROC's guiding principle. During two World Wars, the ROC not only abrogated the unequal treaties regime, but also rose from a semi-colonial state to a global power. The evolution of the discipline of international law influenced the ROC's assertive legalism, evidenced in the nation's participation in the LN, the UN and judicial proceedings. Its loss in the Chinese civil war compelled the National Government to relocate to Taiwan in 1949. As most international lawyers sided with the National Government, they significantly contributed to restoring the international law capacity and tackling Taiwan's *sui generis* status.

#### *1. The Restoration of International Law Capacity*

After the Communist takeover, the PRC announced the abolition of the ROC's legal system that had matured through various legal reforms in an attempt to abrogate extraterritoriality.<sup>192</sup> Mao's *Marxist-Leninist* ideology became the guiding principle of the new "no-law" regime. Higher education collapsed during the ten-year Cultural Revolution. Many international lawyers, including Mei Ju-ao, failed to survive the political chaos. The dark age of international law in the PRC nonetheless still showed the legacy of legal talents trained in the era of Republican China.<sup>193</sup> Zhou Gengsheng, who argued *rebus sic stantibus for treaty revision*, published the two-volume *Guo Ji Fa* (International Law) in

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191. *Id.* at 331–32.

192. See JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 36–37 (1999) (discussing the PRC's abolition of the Kuomintang's Six Codes).

193. He Qinhua, *Dao Du: Mei Ru-ao Yu "Yuan Dong Guo Ji Jun Shi Fa Ting"* Introduction: Mei Ru-ao and the International Military Tribunal for the Far East], in MEI RU-AO, YUAN DONG GUO JI JUN SHI FA TING [International Military Tribunal for the Far East] 1, 3 (2005). See [http://www.21ccom.net/articles/rwcq/article\\_2013050982999\\_5.html](http://www.21ccom.net/articles/rwcq/article_2013050982999_5.html).

1976.<sup>194</sup> It became the leading textbook in the PRC.<sup>195</sup> During the Korean War, the PRC adopted the concept of the Chinese People's Volunteer Army.<sup>196</sup> The emphasis on the "volunteer" nature of this force was meant to obfuscate the PRC's official participation in the war and to support the claim that Chinese forces' involvement was based on "self-defense" against Washington's "aggression against Korea."<sup>197</sup>

Zhou's student, Wang Tieya, restored the PRC's international law research at Peking University in 1979.<sup>198</sup> In the early 1980s, Ni Zhengyu, the Tokyo War Crimes Tribunal veteran, participated in *the Huguang Railway Bond* case.<sup>199</sup> The Alabama court was asked to decide whether the PRC could assert sovereign immunity concerning unpaid principal and interest that arose from Qing government-issued bonds to finance railroad construction.<sup>200</sup> Beijing initially declined to appear before the US court but later decided to retain Baker & McKenzie, which persuaded the court to set aside the unfavorable default judgment.<sup>201</sup> With Ni's assistance, this case became the first instance in which the PRC took part in foreign proceedings.<sup>202</sup> Ni subsequently became the first PRC-nominated ICJ judge in 1985, nearly two decades after Wellington Koo's term ended.<sup>203</sup>

On the Taiwan side, international lawyers both contributed to the reintroduction of international law and transplanted Republican Chinese characteristics to the former Japanese colony. One of the prominent institutions was Taipei Imperial University, which was renamed National

194. Chen, *supra* note 39. Zhou was praised by PRC scholars as the father of modern international law in China. See <http://jpkc.whu.edu.cn/jpkc2010/gjgf/content.asp?m=4>) and <http://www.globalview.cn/ReadNews.asp?NewsID=32480>.

195. Liu Zhongmeng, *Guo Ji Fa Zhi Fu: Zhou Gengsheng Xian Sheng Shu Lue* [Father of International Law: Introduction to Mr. Zhou Gengsheng], available at <http://www.doc88.com/p-1186130820865.html> (last visited Oct. 19, 2014).

196. Zhou Gengshen: Qu Liu Zhi Jian [Zhou Gengshen: Between Leaving and Staying], <http://lawinnovation.com/html/xwzs/1071135.shtml> (last visited Sept. 2, 2013).

197. See Cohen & Chiu, *supra* note 163, at 1468–69 (explaining the PRC's position on the Korean War).

198. Wang Tieya, *Teaching and Research of International Law in Present Day China*, 22 COLUM. J. TRANSN'L L. 77, 78 (1983–84).

199. *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986).

200. The case occurred before the enactment of the US Foreign Sovereign Immunity Act, which contains the "commercial exception" to sovereign immunity claims. See Monroe Leigh, *Jackson v. People's Republic of China*, 794 F.2d 1490, 81 AM. J. INT'L L. 206, 214–16 (1987) (discussing the decisions of the District Court and Court of Appeals and the involvement of the Department of State).

201. William Scarbrough, *Practicing Law in China*, 6 PRACTICE INNOVATION, MANAGING IN A CHANGING LEGAL ENVIRONMENT, Mar. 2005, at 1, 9.

202. All Members, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited Sept. 2, 2013).

203. *Id.*

Taiwan University (NTU).<sup>204</sup> Although Tachi Sakutaro and Yasuo Yamashita served as the first two professors of international law, the Japanese legacy did not influence Taiwan as it did during the late Qing and early Republican China.<sup>205</sup> Peng Ming-ing, a Paris-educated lawyer, was NTU's first Taiwanese international law professor.<sup>206</sup> Despite his leading status, his academic influence waned following his arrest for advocating for Taiwan's independence. The re-establishment of National Chengchi University (NCCU) in Taiwan in 1954 was a milestone in international law research. NCCU, previously known as the Central Political School in the Mainland, was the cradle for ROC diplomats during WWII. Hsu Mo, the ROC's former ICJ judge, made international law a key subject when he founded NCCU's Department of Diplomacy.<sup>207</sup> Hungdah Chiu, a former student of Peng at NTU, joined NCCU after receiving his doctorate degree from Harvard Law School.<sup>208</sup> Chiu cultivated many prominent international lawyers, including Taiwan president Ma Ying-jeou.<sup>209</sup> *The Chinese (Taiwan) Yearbook of International Law and Affairs*, which Chiu edited for 22 years, remains as the most comprehensive English publication on the ROC's state practice.<sup>210</sup>

The critical mass of international lawyers who relocated to Taiwan also founded the Chinese (Taiwan) Society of International Law in 1958,

204. Joseph L. Pratt, *The Two Gates of National Taiwan University School of Law*, 19 UCLA PAC. BASIN L.J. 131, 134–35 (2001–02). For historical information on Taiwan's legal education under Japanese rule, see Tai-sheng Wang, *The Development of Legal Education in Taiwan: An Analysis of the History of Law and Society*, in LEGAL EDUCATION IN ASIA: GLOBALIZATION, CHANGE AND CONTEXTS 137, 137–38 (Stacey Steele & Kathryn Taylor eds., 2010).

205. Tachi Sakutaro, a prominent professor of the Tokyo Imperial University, taught at the Taipei Imperial University between 1933 and 1937 and Yasuo Yamashita taught at the University from 1940 to 1943. TAI-SHENG WANG, TAIWAN FA DE SHI JI BIAN GE [Taiwan's Legal Reform in the Past Century] 148, 178–79 (2005).

206. Peng taught at the Department of Political Science of National Taiwan University from 1954 to 1963. PENG MING-MIN, ZI YOU DE ZI WEI: PENG MING-MIN HUI YU LU [The Taste of Freedom: Memoir of Peng Ming-min] 92–95, 290–91, (Taiwan Pub. Co. 2009).

207. GUO LI ZHENG ZHI DA XUE WAI JIAO XUE XI CHUANG SHE BA SHI ZHOU NIAN JI NIAN WEN JI 1930–2010 [Collected Papers in Memory of the 80th Founding Anniversary of the NCCU Department of Diplomacy 1930–2010] 10–13 (2010).

208. For detailed information on Chiu, refer to Jerome A. Cohen, *Hungdah Chiu, China, and International Law: A Life Well Spent*, 27 MD J. INT'L L. 9, 10–16 (2012); Dongsheng Zang, *China's "Attitude" toward Human Rights: Reading Hungdah Chiu in the Era of the Iraq War*, 27 MD J. INT'L L. 263, 265–79 (2012).

209. David Bogen, *Memories of Professor Chiu*, 27 MD J. INT'L L. 3, 3–4 (2012). The editor-in-chief of the Yearbook changed to Ma Ying-jeou as of volume 23. Under Ma's support, international law was also added as a mandatory subject in Taiwan's judicial examination in 2011. *Id.* at 4.

210. *Id.* at 5. Chiu's *Xian Dai Guo Ji Fa* [Modern International Law] is still Taiwan's leading international law textbook. The first edition was published in 1995 and the third edition, revised by Chun Yi Chen, was published in 2012.

which joined the ILA in 1961.<sup>211</sup> The Society's accession to the ILA signified the first Chinese participation in the Association after the Qing Dynasty. Due to the ILA's attempts to accommodate a PRC branch, the Society's title underwent several changes.<sup>212</sup> Pursuant to Article 8.3 of the ILA Constitution, an ILA branch may represent "a single country or a geographical area within a country."<sup>213</sup> Hence, sovereign complexity never prevented Beijing from joining the ILA. In 1956, the PRC's Chinese Political Science and Law Association joined the ILA, but it subsequently withdrew.<sup>214</sup> The PRC's Chinese Society of International Law, which was founded in 1980, submitted its application to the ILA in 1988.<sup>215</sup> The application was withdrawn following the ILA's explanation that the name of the Chinese (Taiwan) Branch would not be amended.<sup>216</sup> Thus, Taiwan's membership to the exclusion of the PRC in the ILA is a unique case. The efforts of international lawyers to develop the discipline in higher education and in diplomatic circles galvanized the evolution of international law in Taiwan.

## 2. Taiwan's *Sui Generis* Status

UN Resolution 2758 that transferred the UN seat to the PRC in 1971 was a major setback in ROC diplomacy. The loss of UN membership and the severance of diplomatic ties with most states led to Taiwan's *sui generis* status. The political complexity went beyond the statehood definition under the Montevideo Convention, which Taiwan presumably

211. The Chinese (Taiwan) Society of International Law was originally named as the Chinese Society of International Law. Chun Yi Chen, *Zhong Hua Min Guo Guo Ji Fa Xue Hui—Yi Ge Ji Ju Tui Dong Guo Ji Fa Xue Yan Jiu Fa Zhan De Xue Shu Tuan Ti* [CSIL—An Academic Group that Actively Promotes International Law Research and Development], 17 *ZHONG GUO GUO JI FA YU GUO JI SHI WU NUAN BAO* [Chinese Yearbook of International Law and Affairs] 415, 423 (2003). As of 2013, there are 256 members of the Society. For members of the CSIL, see <http://csil.org.tw/home/about/%E6%9C%83%E5%93%A1%E5%90%8D%E5%96%AE/%E6%AD%A3%E6%9C%83%E5%93%A1%E5%90%8D%E5%96%AE/> (last visited Apr. 28, 2015).

212. The Society joined the International Law Association (ILA) in 1961 as the China (Taiwan) Branch and the name was changed to the Taiwan (China) Branch in 1974 and then to the present name, the Chinese (Taiwan) Branch, in 1976. *Id.*

213. Art. 83, International Law Association: Constitution of the Association (2014), available at [file:///C:/Users/pashahsieh/Downloads/constitution\\_english\\_adopted\\_washington\\_april\\_2014%20\(3\).pdf](file:///C:/Users/pashahsieh/Downloads/constitution_english_adopted_washington_april_2014%20(3).pdf).

214. Chen, *supra* note 39, at 9.

215. Huan Xiang, *Kai Mu Ci* [Opening Remarks], 1989 *ZHONGGUO GUO JI FA NIAN KAN* [Chinese Yearbook of International Law] 453, 455 (1989).

216. *Id.* Although the PRC's ILA branch membership remains a sensitive issue, PRC nationals have joined the ILA as members of ILA Headquarters or the Hong Kong Branch. Presumably, Beijing preferred the Chinese (Taiwan) Branch to change to the Chinese (Taipei) Branch.

met.<sup>217</sup> Consequently, the research focus of international law shifted from treaty law to recognition issues. The ROC's international lawyers devised legalist approaches to tackle the "one-China" problem. These approaches evidenced Taiwan's inheritance of the Republican Chinese characteristics of statism, pragmatism and idealism.

First, the international lawyers, many of whom were bureaucrat-scholars, crafted a pragmatic strategy for Taiwan's involvement in the international regime. Such pragmatism, which bypassed the sovereignty issue, enabled the ROC's access to fisheries agreements as a "fishing entity" and to the World Trade Organization (WTO) as a "separate customs territory."<sup>218</sup> Moreover, Taiwan applied UN conventions in bilateral treaties, such as the 1982 Taiwan-Korea agreement under which both countries agreed to comply with the International Convention on Tonnage Measurement of Ships.<sup>219</sup> Statism and idealism can best be exemplified in Taiwan's "internalization" of international human right treaties. The ROC signed the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1967 but did not ratify them before the ROC left the UN in 1971.<sup>220</sup> Taiwan's Congress transformed these two covenants into domestic law by enacting the Act to Implement the ICCPR and the ICESCR.<sup>221</sup> These efforts enabled Taiwan to uphold the civilized nation principle by unilaterally complying with international obligations.

Second, under the guidance of ROC's international lawyers, the assertive legalism approach has also been applied to foreign court proceedings to deal with the de-recognition plight. The pluralism of the jurisprudence on Taiwan is indicative of Taiwan's legal complexity. The utmost concern was Washington's switch of recognition to the PRC in 1979 and the potential legal consequences associated with government

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217. Article I of the Montevideo Convention on Rights and Duties of States stipulates that a state should possess four characteristics, including (1) a permanent population; (2) defined territory; (3) a government; and 4) capacity to enter into relations with other states.

218. See generally Andrew Serdy, *Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity*, 75:1 BRITISH YB INT'L L. 183, 183–221 (2004); Pasha L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39:6 J. WORLD TRADE 1195, 1195–1203.

219. Exchange of Notes Between the Republic of China and the Republic of Korea Concerning Mutual Implementation of the International Convention of Tonnage Measurement of Ships, 1969, at Art I (Sept. 4, 1982), [http://code.fabao365.com/law\\_63204.html](http://code.fabao365.com/law_63204.html).

220. Ying-jeou Ma, Forward, in Core Document Forming Part of the Reports, Republic of China (Taiwan) (2012), available at <http://www.taiwanembassy.org/public/Attachment/31127172371.pdf>. Note that as a non-member of the UN, Taiwan cannot deposit the instrument of the ratification with the UN and is therefore unable to be a party to UN conventions.

221. *Id.* at VII.

succession.<sup>222</sup> In response, the US Congress passed the Taiwan Relations Act (TRA) through a joint effort with the ROC's international lawyers, such as Hungdah Chiu. The TRA states that the severance of diplomatic ties with the ROC "shall not affect the application of the laws of the United States with respect to Taiwan."<sup>223</sup> Significantly, the so-called "Twin Oaks provision" has enabled Taiwan to keep possession of the ROC's embassy property without its being transferred to the PRC.<sup>224</sup> Taiwan's legal strategy did suffer setbacks in some instances. A key example was the *Kuang Hua Liao (Kokaryo)* case, which involved the ownership of a dormitory that Taiwan had purchased prior to Japan's recognition of the PRC in 1972.<sup>225</sup> The Osaka High Court found in favor of Taiwan because of "incomplete succession of government" in the case of China.<sup>226</sup> Notwithstanding the fact that the case was pending for 20 years, the Japanese Supreme Court quashed the decision. The Court held that Japan's recognition of Beijing in 1972 rendered the ROC's representation on behalf of "the State of China" invalid.<sup>227</sup> Notably, the Japanese decision carefully focused on a narrow ground. It did not foreclose the possibility of the ROC re-filing the case as a *de facto* state rather than as the state of China.<sup>228</sup>

Western courts, including those in countries that lack domestic legislation akin to the TRA, differed from the Japanese court. The *Tahiti Property* case concerned the ROC's ownership of a block of land that it had purchased for consulate use in the French Polynesian island of Tahiti.<sup>229</sup> The French Appellate Court found that the ROC exists as "a Chinese state" despite the lack of France's diplomatic recognition.<sup>230</sup> Confirming the decision, the French Supreme Court (Cour de Cassation)

222. The United States acknowledged that "there is but one China" and "Taiwan is part of China." US-PRC Shanghai Communiqué (1979).

223. 22 U.S.C. § 3303 (2000). Based on the Taiwan Relations Act, the US court recognized that Taiwan is deemed "as if derecognition has not occurred." *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 530 A.2d 1163, 1170 (D.C. 1987).

224. 22 U.S.C. § 3303(b)(3)(A) (2000). The ROC "sold" the embassy property to pro-Taiwan congressmen for a mere U.S.\$10 before derecognition and bought it back in 1982.

225. See generally Annex 5: Supreme Court of Japan Judgment (Mar. 27, 2007), reprinted in 25 CHINESE (TAIWAN) YB INT'L L. AFF. 139, 156–60 (2007).

226. Annex 4: Osaka High Court Judgment (Feb. 26, 1987), reprinted in 25 CHINESE (TAIWAN) YB INT'L L. AFF. 139, 155 (2007).

227. See *supra* note 225, at 158–59.

228. Tomofumi Kitamura, *Japanese Supreme Court Judgment in the so-called "Kokaryo Case,"* 7:3 CHINESE J. INT'L L. 713, 720 (2008).

229. See generally *République Française au Nom du Peuple Français*, Y 08-70.456, Cour de Cassation (2010).

230. Jenny W. Hsu, *French Court Rules for Taiwan in Land Dispute with China*, TAIPEI TIMES, A3, Oct. 24, 2008.

rejected the PRC's argument that the ROC had ceased to be a state and thus lacked standing in proceedings.<sup>231</sup> The Court, relying on procedural rules, decided that since the PRC opposed the ROC, it could not challenge the ROC's capacity as a defendant.<sup>232</sup> Courts in Switzerland and Canada went even further. They found that the ROC on Taiwan met the statehood criteria under the Montevideo Convention, hence recognizing the nation's capacity to sue and its sovereign immunity.<sup>233</sup> These cases reaffirmed the effectiveness of the ROC's assertive legalism in dealing with its *sui generis* status.

Finally, the versatility of the discipline of international law has been evidenced not only in state-to-state relations, but also in intra-China negotiations. Such quasi-application of international law traces back to Manchukuo-National Government interactions. Through the ROC's attempts, the LN's collective non-recognition policy prevented Manchukuo's accession to international treaties and organizations.<sup>234</sup> However, due to pragmatic needs, the ROC and Manchukuo concluded a memorandum of understanding (MoU) on postal services in 1934. The MoU thus functioned as a bilateral "treaty" without implying recognition under international law. Similarly, without recognizing each other as a "state," the ROC and the PRC concluded 22 cross-strait agreements, ranging from intellectual property protection to repatriation matters, from 1993 to 2011.<sup>235</sup>

A political premise for these agreements is the "1992 consensus," in which both governments agreed that there is one China and that the "one China" definition is subject to respective interpretation. Arguably, the 1992 consensus was based on an exchange of notes and should be construed as binding. Thus, legally speaking, the cross-strait agreements are distinct from the 1972 Basic Treaty, under which the two Germanys formally recognized each other. The Federal Constitutional Court of Germany also found that the Basic Treaty was a "treaty under international

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231. See generally *République Française au Nom du Peuple Français*, *supra* note 229.

232. *Id.*

233. *Republic de Chine (Taiwan) v. Organisation Internationale de Normalisation (ISO)*, 5A\_329/2009, Tribunal Federal (2010); *Parent v. Singapore Airlines Ltd.*, [2003] R.J.Q. 1330. See cf. *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570 (denying the Taiwan government's sovereign immunity); for detailed discussions, see C.L. Lim, *Non-recognition of Putative Foreign States (Taiwan) under Singapore's State Immunity Act*, 11 *ASIAN Y.B. INT'L L.* 3, 7–34 (2003–04).

234. See generally *Measures Consequent upon the Non-recognition of Manchukuo*, 15 *League of Nations O. J.* 429 (1934).

235. The list of cross-strait agreements, see Straits Exchange Foundation, <http://www.sef.org.tw/lp.asp?ctNode=4384&CtUnit=2569&BaseDSD=7&mp=300> (last accessed July 3, 2015).



law” and governed Germany’s “*inter se* relations.”<sup>236</sup> Nonetheless, from a pragmatic perspective, the cross-strait agreements are in fact comparable to the Basic Treaty because they regulate intra-Chinese ties in compliance with international law principles. A notable example is the Economic Cooperation Framework Agreement (ECFA), which the two governments concluded in 2010.<sup>237</sup> The ECFA, a free trade agreement under WTO law, normalizes bilateral economic ties.<sup>238</sup> Consequently, the application of international law in advancing Taiwan’s international standing and cross-strait relations signified the evolution of the discipline.

#### IV. CONCLUSION

This Article unveiled the critical development of the law of nations by examining the evolution of international law as a professional and intellectual discipline in the ROC. It argued that the Republican Chinese characteristics of statism, pragmatism and idealism define the ROC’s international law approach. These characteristics transformed the Eurocentric law of nations and galvanized modern China’s intellectual shift from Westphalian sovereignty to the civilized nation principle. By discussing the professionalization of international law in modern China, this Article offered insight into the development of international law education and Western influences. It further explored how the reform of the Foreign Ministry, as well as the international law society and the Shanghai Mixed Court experiences, cultivated China’s first-generation of international lawyers. Based on their positivist stance on international law, these prominent jurists resorted to the policy of assertive legalism to advance the fragile nation’s diplomatic objectives.

The ROC’s strategic engagement with international law was evidenced in the revision of the unequal treaties and its participation in international organizations and courts. The ROC’s wartime policy and its role in the founding of the UN best characterized the international lawyers’ idealism and led to the nation’s Grotian moment. Following the Chinese civil war, the international lawyers’ assertion of legal claims to tackle Taiwan’s *sui generis* status and to facilitate cross-strait negotiations

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236. Decision of the Federal Constitutional Court, Constitutionality of the Basic Treaty (1973).

237. See generally Explanation Concerning the Signing of the Cross-Strait Economic Cooperation Framework Agreement, <http://www.mac.gov.tw/lp.asp?ctNode=5921&CtUnit=4142&BaseDSD=7&mp=3> (last accessed Sept. 2, 2013).

238. Pasha Hsieh, *The China–Taiwan ECFA, Geopolitical Dimensions and WTO Law*, 14 J. INT’L ECON. L. 121–56, 121–25, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=pasha\\_hsieh](http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=pasha_hsieh).

further reinforced the dynamic dimension of international law. Therefore, the ROC's centennial development of international law, which shaped foreign relations of Republican China and contemporary Taiwan, provides a valuable case study of *twentieth* century international lawmaking in East Asia.

APPENDIX 1: SELECTED LIST OF ROC/NATIONALIST INTERNATIONAL  
LAWYERS

Name	Legal Education	Selected Positions	Note
Wu Ting-fang (NG Choy) 伍廷芳 (1842-1922)	University College London & Lincoln's Inn	Qing Minister to the United States (1897-1899); ROC Foreign Minister (1916-1917)	Born in Singapore
Eugene Chen (Chen Yu-jen) 陳友仁 (1878-1944)	Saint Mary's College, Trinidad	ROC Foreign Minister (1931-1932)	Born in Trinidad
Wang Chung-hui 王寵惠 (1881-1958)	LL.B., Beiyang University, Tianjin; DCL, Yale University	ROC Foreign Minister (1912; 1937-1941); Deputy Judge & Judge, PCIJ (1922-1936)	First ROC Foreign Minister; first Chinese judge at international courts
Chengting Thomas Wang (C.T. Wang) 王正廷 (1882-1961)	Beiyang University, Tianjin	ROC Foreign Minister (Beiyang Government 1922-1923, 1924; 1926); (Nationalist Government 1928-1931)	First Chinese member, Permanent Court of Arbitration; first Chinese member, International Olympic Committee
Cheng Tien-hsi (F.T. Cheng) 鄭天錫 (1884-1970)	LL.D., University College London	Judge, PCIJ (1936-1942)	
V.K. Wellington Koo 顧維鈞 (1888-1985)	Ph.D. (political science), Columbia University	ROC Foreign Minister (Beiyang Government 1922, 1926-1927; 1931); Judge, ICJ (1956-1967)	
Zhou Gengsheng 周鯁生 (1889-1971)	Ph.D. (law), University of Paris	President, National Wuhan University (1945-1949)	Stayed in Mainland China after 1949
Wang Shijie 王世杰 (1891-1981)	Ph.D. (law), University of Paris	Founding President, National Wuhan University (1929-1933); ROC Foreign Minister (1945-1948)	
Yan Shutang 燕樹棠 (1891-1984)	LL.B., Beiyang University, Tianjin; J.S.D., Yale University	Chair, Department of Law, National Peking University & National Southwestern University, Kunming (1935-1938)	Stayed in Mainland China after 1949
Hsiang Che-chun (Xiang Zhejun) 向哲浚 (1892-1987)	J.D., George Washington University	Prosecutor, International Military Tribunal for the Far East (1946-1948)	Stayed in Mainland China after 1949
Hsu Mo 徐謨 (1893-1956)	LL.B., Beiyang University, Tianjin; LL.M., George Washington University	Founding Chair, Department of Diplomacy, National Chengchi University (1930-1939); Judge, ICJ (1946-1956)	

Name	Legal Education	Selected Positions	Note
John C. H. Wu 吳經熊 (1899-1986)	LL.B, Soochow University; J.D., Michigan University	Judge, Shanghai Provisional Court (1927-1929); ROC Minister to the Vatican (1947-1948)	Principal drafter of the 1946 ROC Constitution
Yuen-li Liang 梁鑒立 (1903-1979)	LL.B, Soochow University; S.J.D., George Washington University	Director, UN Division on the Development and Codification of International Law (1946-1964)	
Mei Ju-ao 梅汝璈 (1904-1973)	J.D., Chicago University	Judge, International Military Tribunal for the Far East (1946-1948)	Stayed in Mainland China after 1949
Tsui Shu-chin 崔書琴 (1906-1957)	Ph.D. (political science), Harvard University	Professor, Department of Political Science, National Southwestern University, Kunming (1938-1946); Founding Director, Graduate Institute of International Law and Diplomacy, National Chengchi University (1954-1955)	
Ni Zhengyu 倪征燝 (1906-2003)	LL.B, Soochow University; J.D., Stanford University	Chief Adviser of the Chinese Procuratorial Group, International Military Tribunal for the Far East (1947-1948); Judge, ICJ (nominated by the PRC, 1985-1994)	Stayed in Mainland China after 1949
Peng Ming-min 彭明敏 (1923-present)	LL.M., McGill University; Ph.D. (law), University of Paris	Chair, Department of Political Science, National Taiwan University (1961-1962)	Democratic Progressive Party candidate for Taiwan's first presidential election (1995-1996)
Hungdah Chiu 丘宏達 (1936-2011)	LL.B., National Taiwan University; S.J.D., Harvard University	Professor, University of Maryland School of Law (1974-2011); President, Chinese (Taiwan) Society of International law (1993-1998); President, International Law Association (1998-2000)	