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## Unequal Treaties: revisiting China's approaches toward colonial injustice

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## 1. Introduction

Chinese approach toward international law was heavily influenced and shaped by the Qing Empire's encounter with the Western Powers in the 19th century. Notwithstanding the lack of recognition, the Chinese 'unequal treaties' doctrine served as a historical and political narrative that facilitated the nation-building of China and shaped its approach toward international law.[2] While most of the 'unequal treaties' were considered by-gone with the return of Hong Kong and Macau in the 20th century, the contemporary relevance of the 'unequal treaties' doctrine is evidenced in many of the leftover problems of 19th century 'unequal treaties', as could be seen from the dispute over Taiwan[3] and the Sino-Indian border dispute[4] over Arunachal Pradesh.[5]

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[2] Jean d'Aspremont and Binxin Zhang, 'China and International Law: Two Tales of an Encounter' (2021) 34 Leiden Journal of International Law 899, 911–917.
[3] James Crawford, *The Creation of States in International Law* (2. ed.; repr, Clarendon Press 2011) 199; Dr Ming-Sung Kuo, 'Democracy and the (Non)Statehood of Taiwan' (*EJIL: Talk!*, 3 November 2022) <https://www.ejiltalk.org/democracy-and-the-nonstatehood-of-taiwan/> accessed 20 June 2023.
[4] Biswanath Singh, 'LEGALITY OF THE McMAHON LINE' (1967) 28 The Indian Journal of Political Science 163, 163.
[5] Bérénice Guyot-Réchard, *Shadow States: India, China and the Himalayas, 1910-1962* (First paperback edition, Cambridge University Press 2018) 232–264.

At the same time, the increasing economic dominance of China also allows it to acquire extensive commercial rights and benefits in the Global South. The most famous example that has attracted press' attention is the 99-year lease of Hambantota Port in Sri Lanka.[6] To protect Chinese interests overseas, the People's Republic of China (PRC) also stepped up its capacity in projecting military power abroad, including the active acquiring of leased military bases from developing countries. In addition to the military support base built in Djibouti in 2017,[7] there are indications that the PRC are currently constructing naval bases in Cambodia[8] and Pakistan.[9] With China's modern status in international affairs completely reserved to that of the Qing Empire in the 19th century, this paper revisits the historical origin of modern Chinese 'unequal treaties' doctrine in light of its contemporary relevance.

The main claim of this paper is that China has an unequal approach to the unequal treaties' doctrine in two ways: First, different Chinese governments have had different approaches towards treaties they considered 'unequal'; Second, past and present Chinese approaches towards the 'unequal treaties' doctrine differ. More specifically, the 'unequal treaties' doctrine invoked the PRC is only referred to in relation to historical treaties in which 'China' perceived itself as the weaker party, for example, the three treaties that defined Hong Kong's territorial status. It is argued that the PRC's 'unequal treaty' doctrine is a legitimacy discourse and set of historical narratives that supports its contemporary sovereign claims in territorial disputes. Therefore, with the absence of any consistent application of 'unequal treaties' beyond the Handover of Hong Kong, this paper doubts whether a recognition of 'unequal treaties' doctrine would be the best way to address colonial injustice. This is especially considering the existing norm of self-determination that might potentially overlap and even conflict with the Chinese 'unequal treaties' doctrine.

## 2. China's encounter with international law and the 'unequal treaties'

It is impossible to fully understand the Chinese 'unequal treaties' doctrine without understanding the historical background of the encounter between the Qing Empire and the European 'Law of Nations'. This encounter started with the Treaty of Nerchinsk in 1689, a

[6] 'The Hambantota Port Deal: Myths and Realities' <https://thediplomat.com/2020/01/the-hambantota-port-deal-myths-and-realities/> accessed 21 August 2023.
[7] 'Fears of a Chinese Naval Base in West Africa Are Overblown' <https://foreignpolicy.com/2022/03/03/china-pla-navy-base-west-africa-atlantic-equatorial-guinea/> accessed 21 August 2023.
[8] 'Is China Building a Military Base in Cambodia? | Chatham House – International Affairs Think Tank' (28 July 2023) <https://www.chathamhouse.org/publications/the-world-today/2023-08/china-building-military-base-cambodia> accessed 21 August 2023.
[9] 'China's New High-Security Compound In Pakistan May Indicate Naval Plans' <https://www.forbes.com/sites/hisutton/2020/06/02/chinas-new-high-security-compound-in-pakistan-may-indicate-naval-plans/> accessed 21 August 2023.

treaty signed between the Qing Empire and the Russian Empire which delineated the boundary in the Amur Region,[10] which was generally seen as concluded on an 'equal basis'.[11] However, the Treaty of Nanking of 1842, a peace treaty that concluded the First Opium War between the UK and the Qing Empire,[12] was widely seen as the first 'unequal treaty' that marked the beginning of China's Century of Humiliation.[13] The climax of the Century of Humiliation was marked by the Conventions of Pekin in 1860,[14] a capitulation treaty signed at a time when Peking was occupied by the Anglo-French Expedition Forces. Qing Empire was further defeated by its former tributary, Japan, in the First Sino-Japanese War. The resulting Treaty of Shimonoseki of 1895 not only forced the cession of Formosa (Taiwan) and Pescadores (Penghu) to Japan, but it also terminated Qing's suzerainty over its last tributary, Korea.[15] The inability of the Qing Empire to fence off foreign incursion further encouraged European powers to seek concessions from the Qing Empire through territorial leasing:[16] In 1897, Kiaochow was leased to Germany for 99 years;[17] in March 1898, Port Arthur was leased for 25 years to Russia;[18] In response, Britain also secured a lease for Weihaiwei from Qing for as long as 'Russia occupied Lushun';[19] Similarly, France also obtained a 99 years lease for Kuang-chou Wan'[20] As a counter-reaction, Britain and the Qing Empire signed the Second Convention of Peking,[21] in which 1104 square kilometers of land, known as the New Territories, were held on lease by Britain for a period of 99 years.[22] The international intervention to suppress the anti-foreign Boxer Rebellion resulted in the Boxer

[10] Treaty of Nerchinsk, China–Russia (7 September 1689) 18 CTS 503.
[11] Minshu Liao, *Qing dai Zhongguo dui wai guan xi xin lun* (2nd edn, NCCU Press 2017) 82–91.
[12] Treaty between China and Great Britain Signed at Nanking (adopted 29 August 1842) 93 CTS 467.
[13] Tieya Wang, 'International law in China : historical and contemporary perspectives' in Académie de droit international de La Haye (ed), *Recueil des cours* (M Nijhoff 1990) 251; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) 72–73.
[14] Convention of Friendship between China and Great Britain (adopted 24 October, 1860) 123 CTS 73.
[15] This treaty also compelled the Qing Empire to recognize sovereignty as the only meaningful legal status to describe territorial administration, see Ryan Martínez Mitchell, *Recentering the World: China and the Transformation of International Law* (Cambridge University Press 2022) 81.
[16] Michael J Strauss, *Territorial Leasing in Diplomacy and International Law* (Brill Nijhoff 2015) 74; However, in 1899, the Qing Empire successfully rejected the demand from Italy to lease the Sanmen Bay in Zhejiang, see Renata Vinci, 'Chinese Public Sentiments about Italy during the Sanmen Bay Affair in the Pages of the Shenbao' (2016) 3 International Communication of Chinese Culture 117.
[17] Treaty between China and Germany respecting the Lease of Kiao-Chau to Germany (Qing-Germany)(6 March 1898), 1 Hertslet's China Treaties (H.M. Stationery Office, 3rd ed, 1908) 350 ('Kiaochow Lease').
[18] Convention between Russia and China for the Lease to Russia and China for the Lease to Russia for Port Arthur, Tailenwan and the Adjacent Waters (Qing-Russia) (27 March 1898) 4 AJIL Supp. 289. ('Port Arthur Lease').
[19] Convention between Great Britain and China respecting Weihaiwei (UK-Qing) (1 July 1898), 1 Hertslet's China Treaties (H.M. Stationery Office, 3rd ed, 1908) 122, 14 GBTS 1898. ('Weihaiwei Lease').
[20] Convention for the Lease of Kuang-chou Wan, (France-Qing)(27 May 1898) 4 AJIL Supp. 293. ('Kuang-chou Wan Lease').
[21] Convention between China and Great Britain respecting an Extension of Hong Kong Territory (adopted 9 June 1898) 186 CTS 310.
[22] Peter Wesley-Smith, *Unequal Treaty, 1898-1997: China, Great Britain, and Hong Kong's New Territories* (Oxford University Press 1998) 88–89, 182–183; Anthony Dicks, 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong' (1983) 95 The China Quarterly 427, 449.

Protocol of 1901, in which eight foreign powers collectively imposed crippling financial indemnities on the Qing Empire and gained further rights to militarily occupy strategic points around Qing's capital city.[23] While there was no exhaustive list of all the treaties which China deemed 'unequal',[24] 'unequal treaties' as conventionally understood in the Chinese discourse, included all the treaties mentioned above that involved a significant imbalance of reciprocal obligations between the foreign powers and the Qing Empire..

The arrival of translated Western legal text and the rise of Chinese national consciousness amongst young and western educated Chinese intelligentsia led to an upsurge of intellectual curiosity about international law. Attentions were drawn to the nomenclature of 'unequal treaties' by classical legal writers, including Hugo Grotius, Samuel Pufendorf, and Emer de Vattel.[25] In the beginning of the 20th century, the need for the revision of 'unequal treaties' was interlinked with the claim of equal admission of China into the 'community of nations.'[26] In 1910, Swiss Jurist Max Huber proposed that China, Siam, and many Muslim states should be counted as true members of the global legal community under the principle of equality (*Gleichheitsprinzip*), which was unfortunately hindered by the existence of extraterritorial jurisdiction in non-Western states.[27] The inherent idea of 'equality' as 'justice' in international law inspired the Chinese intelligentsia, who saw international law as a tool to deliver China's 'national salvation'.[28] This belief was enhanced with the comparison drawn with the successful admission of Japan, a non-Western state, into the 'community of nations' following its diplomatic revision of 'unequal treaties' that granted extraterritorialities to foreign powers.[29] First generation of Chinese international lawyers, such as Wellington Koo (顧維鈞) and Wang Chonghui (王寵惠),[30] saw the 19th century treaties as the main culprit[31]

[23] Mitchell (n 15) 91.

[24] Dong Wang, *China's Unequal Treaties: Narrating National History* (Lexington Books 2005) 418–419 ('the number of 'unequal treaties' could range from 500 to 1356.'); Fang Gao, '近现代中国不平等条约的来龙去脉' (1999) 2 Social Science of Nanjing 18 (Gao estimated that there were there were altogether 745 unequal treaties.); For some authoritative list of the said unequal treaties, see Wang, 'International law in China : historical and contemporary perspectives' (n 13) 237–262; Anne Peters, 'Treaties, Unequal', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2018) para 10 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1495> accessed 22 July 2022.

[25] Wang, *China's Unequal Treaties* (n 24) 410–420.

[26] See Derun Ma, 'Der Eintritt Des Chinesischen Reiches in Den Völkerrechtlichen Verband' (University of Berlin 1907); Tschun Tschou Tso, *Die Reformen Des Chinesischen Reiches in Verfassung, Verwaltung Und Rechtsprechung Mit Ruecksicht Auf Die Entsprechenden Einrichtungen Europas* (Druck von Emil Ebering 1909).

[27] Max Huber, 'Beiträge Zur Kenntnis Der Soziologischen Grundlagen Des Völkerrechts Und Der Staatengesellschaft', *Jahrbuch des öffentlichen Rechts der Gegenwart* (J C B Mohr 1910) 7.

[28] Mitchell (n 15) 82–84.

[29] Masaharu Yanagihara, 'Japan' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 494.

[30] For a summary of the background and positions of the first generation of Chinese international lawyers, see Mitchell (n 15) 97–101.

[31] See, eg, the treatment of the Qing Empire in the Second Hague Conference at ibid 98–113.

that effectively casted 'China' out of the realm of public law.[32] At the same time, the internalization of the western idea of 'sovereignty' resulted in an important paradigm shift. Compared to the previous Sinocentric view that equated 'concessions' with 'benevolence' granted by the Son of Heaven to preserve the essential character of the Sinocentric World Order from being altered by barbarians,[33] these ''benevolence' granted by the Manchurian rulers began to be seen as sold-outs of China's inherent sovereign rights, and became the very shackles that denied 'China' its rightful place in the Euro-American dominated 'community of nations'.

## 3. The approaches of successive Chinese governments toward 'unequal treaties'

### 3.1 'Diplomacy of Treaty Revision' at the Paris and Washington Conferences

Following the successful example of Japan, the newly established Republic of China (ROC) deemed the claiming of equal voice and position in the 'community of nations' as its diplomatic aim.[34] Similar to the majority of successor states in the 20th century,[35] the ROC government in Pekin initially vowed to respect all the existing treaties and privileges of the foreign powers.[36] However, despite substantial political and legal reforms, the western powers remained unwilling to enter into any substantial negotiation with the ROC for the revision of the 19th century treaties.[37] At the end, the strategy of the ROC's diplomats was to negotiation the revision of 'unequal treaties' with the foreign powers based on the fundamental change of circumstances after the republican revolution, which formed the basis of Pekin government's 'diplomacy of treaty revision' (修約外交)[38] in the late 1910s to the early 1920s.[39]

The Chinese cause for 'treaty revision' was further inspired by ROC's entry into the First World War and the Wilsonian discourse of self-determination in the First World War's settlement. Particularly, Woodrow Wilson's call for '[a] free, open-minded, and absolutely

[32] ibid 99.
[33] ibid 14, 27, 33.
[34] Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford University Press 2012) 175; see also, Mitchell (n 15) 114 in which Mitchell traced the position back to the aftermath of the Second Hague Conference of 1908, together with the consistent positions held by Latin American states.
[35] Roda Mushkat, 'Hong Kong and Succession of Treaties' (1997) 46 International and Comparative Law Quarterly 181, 182 at fn 5; Peters (n 24) para 59.
[36] Sun Yat-sen, 'the Early Manifesto of the Republic of China to All Friendly Nations' (1912) cited in Maria Adele Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840* (1st edn, Cambridge University Press 2019) 111.
[37] ibid 82–108.
[38] Tang Qihua (唐启华), 'The origin of the treaty revision diplomacy of the Beijing government at the beginning of the republican period, 1912–1918' (民国初年北京政府"修约外交"之萌芽 1912-1918) (1998) 28 Wenshixue bao 文史学报 118–143, cited by ibid 111 at fn 7.
[39] ibid 113–119.

impartial adjustment of all colonial claims',[40] attracted the widespread attention of Chinese intelligentsia. For example, Chen Duxiu, who later became the first General Secretary of the Chinese Communist Party (CCP), hailed Wilson as the 'number one good man in the world' as the Fourteen Points installed hope into the minds of the Chinese to end extraterritoriality and warlord government.[41] Matten argued that Wilson's popularity in China and the Chinese enthusiasm toward Fourteen Points were resulted from the overexaggerating wartime propaganda organized by the US Far Eastern representative of the Committee on Public Information (CPI).[42] Wilson's original intention to apply self-determination restrictively to those living under the rule of the vanquished Central Powers[43] was conveniently omitted.

At the Paris Peace Conference, the Chinese delegation presented two major demands: (1) the complete abolition of consular jurisdiction; and (2) the restitution of German possessions in Kiaochew (occupied by Japan, another victorious power, at that time). [44] The Chinese emphasis on 'national' unity resembled the 19th century's 'nationality principle', as expressed in irredentist movements of Italy, Germany, Romania, and Greece.[45] It was worth noticing that, during the Paris Peace Conference, the success or failure of applying 'nationality principle' depended on strategic considerations of each individual cases instead of the specific legitimacy of each national cause.[46] In this regard, Chinese delegate Wellington Koo, defended the Chinese claim by stating that China could no more relinquish Shandong, which was the birthplace of Confucius, than could Christians concede Jerusalem. In its Abolition of Consular Jurisdiction Memorandum, the ROC also argued that the lack of reciprocity in a treaty could justify a treaty's unilateral abrogation under the rule of fundamental change of circumstances (*rebus sic stantibus*).[47]

However, both the Chinese territorial demand over Kiaochew and the demand to abolish consular jurisdiction were unanimously rejected by all victorious powers.[48] Adding insult to injury, article 156 of the Treaty of Versailles unilaterally transferred all the German rights,

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[40] Woodrow Wilson, 'Address to a Joint Session of Congress on the Conditions of Peace ('The Fourteen Points')' (a joint session of the two Houses of Congress, a joint session of the two Houses of Congress, 8 January 1918) <https://www.presidency.ucsb.edu/node/206651>.
[41] Marc Andre Matten, *Imagining a Postnational World: Hegemony and Space in Modern China* (Brill 2016) 215.
[42] ibid 216–217.
[43] Erez Manela, 'Imagining Woodrow Wilson in Asia: Dreams of East-West Harmony and the Revolt against Empire in 1919' (2006) 111 The American Historical Review 1327, 1327.
[44] See Wellington Koo, 'Memorandum on the Abolition of Consular Jurisdiction' cited in Carrai (n 36) 118.
[45] James Summers, *Peoples and International Law: Second Revised Edition.* (Martinus Nijhoff Publishers 2014) 470.
[46] Glenda Sluga, 'The Principle of Nationality, 1914–1919' [2006] The Nation, Psychology, and International Politics, 1870–1919 37, 37.
[47] Carrai (n 36) 119.
[48] Wên-ssŭ Chin and Wensi Jin, *Woodrow Wilson, Wellington Koo, and the China Question at the Paris Peace Conference* (A W Sythoff 1959) 16.

privileges, and titles in Kiaochow to Japan.[49] From the eyes of the Chinese nationalists, the Treaty of Versailles was seen as another 'unequal treaty', as the sovereignty of China over Kiaochew was blatantly infringed by the Western powers and Japan. The resulting sense of betrayal and disappointment resulted in the May Fourth Movement in Pekin, which eventually dissuaded the Chinese diplomats from signing the peace treaty with Germany.[50] Influenced by the May Fourth Movement,[51] China's second generation of international lawyers, such as Zhou Gengsheng (周鲠生),[52] were more critical about the roles and hypocrisies of the West. Compared to the first generation of Chinese international lawyers who favored the revision of 'unequal treaties' through diplomacy, the second generation actively called for a fundamental change in the international legal order.[53] In this regard, contemporary Chinese scholar Zhang Yongle (章永樂) argued that the Paris Peace Conference was the turning point, as it convinced the new generation of Chinese nationalists to abandon the path of seeking recognition from the West but to establish a new international order which rejects the hierarchy of civilizations.[54]

The 'Shandong Question' was eventually resolved when Japan transferred the territory of Kiaochew to the ROC, in exchange for the pledges of China to recognize Japanese economic and security interests there.[55] During the Washington Conference of 1921, although the ROC delegation was included in the nine parties' negotiations, the foreign powers only agreed to appoint a commission of inquiry to determine if Chinese progress of judicial reform was 'satisfactory' enough to justify the abolishment of extraterritorial jurisdiction.[56] The repeated postponement of abolition of the extraterritoriality was seen by the Chinese intelligentsia as another example of the Western betrayal and the failure of Pekin government's 'diplomacy of treaty revision'.

### 3.2 'Revolutionary diplomacy' of the KMT during the Interwar Period

When Kiaochew eventually returned to China in 1921, the early enthusiasm toward

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[49] Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany (signed at Versailles, 28 June 1919), 225 CTS 188 ('Treaty of Versailles') art 156.

[50] Carrai (n 36) 120.

[51] Mao, for example, criticized the selective application of national self-determination for ignoring the interests of the Chinese people, the Korean, and the Central Asians, in Mitchell (n 15) 132–133.

[52] Wang Tieya was, for example, one of Zhou Gengsheng's students of international law at Beijing, see ibid 170–171.

[53] ibid 133–134.

[54] 章永乐, '从萨义德到中国——《法律东方主义》的一种读法' (2016) 4 中国法律评论 176.

[55] See Noel H Pugach, 'American Friendship for China and the Shantung Question at the Washington Conference' (1977) 64 Journal of American History 67, 67.

[56] Mitchell (n 15) 138.

Wilsonism had long been shattered. The attention of the new generation of Chinese nationalists was drawn toward the ideology of Leninism,[57] including Lenin's conception of self-determination as a right of the colonized peoples against the imperialist powers.[58] Contrary to Wilson's idea, whose emphasis was on the right to 'self-government',[59] Lenin's idea of self-determination focused on the right of independence,[60] which was more closely related with the ultimate aim of the Chinese nationalists. Zhou Gengsheng, was one of the most important Chinese jurists who helped to pioneer a new approach toward revising the 'unequal treaties', known as the 'revolutionary diplomacy' (革命外交).[61] This approach was supported by the Kuomintang (KMT) and the Chinese Communist Party (CCP), who both advocated for a unilateral change of territorial *status quo* through popular action.[62] This willingness to depart from the principle of *pacta sunt servanda* could be distinguished from the conservative 'diplomacy of treaty revision' adopted by the Pekin government.[63] This paper argues that a distinctive Chinese doctrine of 'unequal treaties' only began to emerge in the 1920s, when a willingness to depart from existing international legal doctrines created and sustained by the European states was clearly signified by the KMT led National Government in Canton (廣州國民政府) in its pursuit of revolutionary diplomacy.

The development of the Chinese 'unequal treaty' doctrine was not only ideologically but also practically influenced by the example of the Soviet Union. Following the October Revolution of 1917, the Soviet government declared to repudiate all the wartime loans contracted by Tsar Nicholas II on the ground that these loans were obtained merely for the benefit of the imperialists powers instead of the Russian people.[64] While the Soviet repudiation of wartime loans is often characterized as opportunistic, the Soviet Union similarly renounced the benefits and privileges unjustly obtained by the Tsarist government through the treaties with Persia and China:[65] In the 1919 Karakhan Manifesto, the Bolsheviks renounced all the extraterritorialities, concessions and Boxer indemnities obtained by Imperial Russia in China as a demonstration of solidarity with the oppressed Oriental peoples.[66] Theses promises were

[57] Victor H Mair and Carlos Yu-Kai Lin (eds), *Remembering May Fourth: The Movement and Its Centennial Legacy* (Brill 2020) 58, 114.
[58] See Vladimir Lenin, 'A Caricature of Marxism and Imperialist Economism' (August–October 1916) cited in Jörg Fisch and Anita Mage, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (Cambridge University Press 2015) 121 at fn 69.
[59] Linzhu Wang, *Self-Determination and Minority Rights in China* (Brill 2019) 46.
[60] ibid 53.
[61] Mitchell (n 15) 134.
[62] En-han Lee, *Bei Fa Qian Hou Di 'Ge Ming Wai Jiao', 1925-1931* (Zhong yang yan jiu yuan jin dai shi yan jiu suo 82) 6–7; see also Peters (n 24) paras 35–37.
[63] Carrai (n 36) 113.
[64] Jeff King, *The Doctrine of Odious Debt in International Law: A Restatement* (Cambridge University Press 2016) 83–84.
[65] ibid 84.
[66] See Allen S Whiting, 'The Soviet Offer to China of 1919' (1951) 10 The Far Eastern Quarterly 355, 355–364, see also Agreement on the General Principles for the Settlement of the Questions between the Republic of China

eventually materialized in the 1924 Sino-Soviet Treaty,[67] except for the return of the Chinese Eastern Railway in Manchuria.[68] At the same time, the Soviet Union continuously called upon other great powers to follow the Soviet lead and renounce the privileges and concessions obtained through 'unequal treaties'.[69] Despite the selective and opportunistic denunciation by the Soviet Union, its unilateral abolishment of 'unequal treaties' was unprecedented compared to the continued insistence of 'treaties rights' by the western powers at the Washington Conference. This left a favorable impression on Chinese nationalists, who began to see the Soviet Union as the champion of Chinese national liberation.

The formation of the United Front between KMT and the CCP in the 1920s led to the beginning of the 'unequal treaty' discourse in Chinese politics.[70] Inspired by Leninism, KMT revised the Three Principles of the People to embrace the right of the oppressed nations to self-determination in its First National Congress,[71] in which the KMT also called for the 'abolishment of all unequal treaties' (廢除不平等條約) as its ultimate goal.[72] Similarly, the Manifesto of the Second National Congress of the Chinese Communist Party in 1922 envisaged the 'removal of oppression by international imperialism and the complete independence of the Chinese nation' as one of its objectives.[73] Thus, Lenin's version of anti-colonial self-determination was heavily imprinted in the ideologies of the KMT and the CCP, the two most important Chinese political parties in the 20th century. In 1924, the Kuomintang government deemed the following treaties as 'unequal': '(a) foreign leased territories; (b) consular jurisdiction (extraterritoriality); (c) administration of customs by foreigners; and (d) political rights that infringe upon the sovereignty of China.'[74] On the other hand, the CCP offered a broader definition of 'unequal treaties', which did not seek to determine their 'unequalness' by classification of the treaties obligations but rather according to their circumstances of conclusion: international treaties were considered as unequal when they were 'concluded by the coercion of one party through unjust methods to impose unequal obligations on the other party.'[75]

The KMT government in Canton heavily criticized the failure of Pekin government's

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and the Union of Soviet Socialist Republics, Signed at Peking, May 31 1924' (1925) XXXVII LNTS 176.
[67] Carrai (n 36) 121.
[68] Bruce A Elleman, 'The Soviet Union's Secret Diplomacy Concerning the Chinese Eastern Railway, 1924-1925' (1994) 53 The Journal of Asian Studies 459, 459.
[69] ibid.
[70] Wang, *China's Unequal Treaties* (n 24) 412.
[71] Wang, *Self-Determination and Minority Rights in China* (n 59) 55.
[72] Wang, *China's Unequal Treaties* (n 24) 69–70.
[73] Wang, *Self-Determination and Minority Rights in China* (n 59) 58.
[74] Yash P Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd ed, Hong Kong University Press 1999) 10.
[75] ibid 11.

conservative approach toward the abolishment of 'unequal treaties'.[76] Rather than engaging in diplomatic negotiation, the KMT government prioritized the unilateral termination of all 'unequal treaties' through the mobilization of the mass.[77] For example, the Canton-Hong Kong General Strike (1925-1926), organized and supported by the KMT government in Canton, [78] was a response of KMT's 'revolutionary diplomacy' against the crackdown of labor protest by the Sikh policemen in Shanghai.[79] The 'revolution' quickly escalated when protestors forcefully marched into the Anglo-French Shamian settlement in June 1925. Afterward, the KMT organized a general strike in Hong Kong followed by a complete blockade of the British colony from Canton.[80]

As a result of the challenge posed by KMT's Northern Expedition, even the moderate Pekin government was put under increasing pressure to demonstrate the success of the 'diplomacy of treaty revision'. This was for example, expressed by Wang Chonghui, during the Special Tariff Conference with the foreign powers that 'China was no longer willing to be led by the hand and was no longer interested in treaty technicalities.'[81] In 1926, the Pekin government unilaterally abrogated the 1865 Sino-Belgian Treaty based on the fundamental change of circumstances (*rebus sic stantibus*).[82] This was reportedly a result of the advice sought by the Pekin government from prominent international scholars, including German scholar and PCIJ judge Walther Schücking.[83] In response, Belgium applied to the Permanent Court of International Justice (PCIJ) and secured favoring interim measures against China for the 'preservation' of Belgium interests on 8 January 1927.[84] However, both parties later settled the disputes through bilateral negotiation, which resulted in a new Sino-Belgium Treaty. As a result of the success of the ROC in revising its treaty relations with Belgium, the PCIJ never had the chance to properly address the legality of 'unequal treaties' in international law.

Following the success of Chiang Kai-shek's Northern Expedition, the ROC reclaimed tariff autonomy from the great powers in 1928.[85] In December 1929, the KMT government in Nanking unilaterally declared to abolish all extraterritoriality in China.[86] As a result of the increasing pressure from KMT's actions, including its forceful takeover of British

[76] Dong Wang, 'The Discourse of Unequal Treaties in Modern China' (2003) 76 Pacific Affairs 399, 413.
[77] Carrai (n 36) 122.
[78] Steve Tsang, *A Modern History of Hong Kong* (IBTauris 2007) 92.
[79] ibid; John M Carroll, *A Concise History of Hong Kong* (Rowman & Littlefield Publishers 2007) 163.
[80] Carroll (n 79) 166.
[81] Mitchell (n 15) 151.
[82] Peters (n 24) para 56.
[83] Mitchell (n 15) 154–155.
[84] See *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belg v China)* (1929) 18 PCIJ (ser A) 257 (PCIJ).
[85] Carrai (n 36) 121.
[86] Ingrid Detter, 'The Problem of Unequal Treaties' (1966) 15 The International and Comparative Law Quarterly 1069, 1080.

concessions in Hankou, other British concessions in Jiujiang, Zhenjiang, Xiamen, and Weihaiwei, were surrendered to KMT's Nanking government from 1927 to 1931.[87] In particular, the former British leased territory of Weihaiwei was granted the status of Special Administrative District by the ROC (特別行政區). [88] Weihaiwei's surrender was regulated by the Convention for the Rendition of Weihaiwei, negotiated and signed by the ROC and the UK[89] and the Convention was often compared to the Sino-British Joint Declaration of 1984.[90] However, the handover of Weihaiwei was relatively simple compared to the handover of Hong Kong: 'it involved no more than hand over of the keys of key government offices to the incoming Chinese commissioner, attend the formal celebrations, and depart on the next ship to the UK'.[91] While the subsequent autonomous arrangement provided by the ROC to Weihaiwei might have some precedential values in terms of territorial autonomy in the Chinese context, it is argued that the status of former British concessions was more comparable to the treatment of leased territory who has no identity of its own, such as the Panama Canal Zone or Guantanamo.

Following the Northern Expedition, the presence of European powers was gradually limited to the isolated outposts on the southeastern Chinese coast. Following a full-scaled purge of communists in 1927, the KMT government in Nanking, who desired international recognition of its status as the legitimate government of China, gradually returned to the 'diplomacy of treaty revision.'[92] The change of KMT's attitude was consistent with the opinions of Zhou Gengsheng at that time, who argued in favor of resuming bilateral negotiations based on the unique circumstances of relations with each counterpart state:[93] In 1926, the KMT reportedly reached an understanding with the British Foreign Office to cooperate with the foreign powers in collecting collect 'inland tax' and ended the blockade against Hong Kong.[94] From 1933 to 1937, ROC asserted jurisdiction in the Kowloon Walled City of Hong Kong based on the New Territories Lease signed between the Qing Empire and the UK in 1898.[95] Until the 1930s, the combination of popular sentiment and the invocation of new doctrine by the KMT

[87] Kurt Bloch, 'The Basic Conflict over Foreign Concessions in China' (1939) 8 Far Eastern Survey 111, 114.
[88] See Robert A Bickers, 'The Colony's Shifting Position in the British Informal Empire in China' in Judith M Brown and Rosemary Foot (eds), *Hong Kong's Transitions, 1842–1997* (Palgrave Macmillan UK 1997) 51; 陳弘毅 and 鄒平學, 香港基本法面面觀 (三聯書店(香港)有限公司 2015) 46.
[89] Convention between His Majesty and the President of the National Government of the Republic of China for the Rendition of Weihaiwei and Agreement regarding certain Facilities for His Majesty's Navy after Rendition (adopted 1 Octoer 1930) CTS 50. 1930.
[90] Marcel Hooijmaijers, 'HONG KONG AND THE RIGHT OF SELF-DETERMINATION' (1997) 6 Tilburg Law Review 197, 205–206 citing Dick Wilson, 'New thoughts on the future of Hong Kong' (1977) Pacific Community, 597.
[91] ibid 205.
[92] Bickers (n 88) 51.
[93] Mitchell (n 15) 163.
[94] ibid 154.
[95] NJ Miners, 'A Tale of Two Walled Cities: Kowloon and Weihaiwei' [1982] Hong Kong Law Journal 179, 179.

and the CCP led to a provisional success in the decolonization of China. As a result, most foreign concessions along the Yangtze River were successfully terminated, with the remaining enclaves concentrated on China's prosperous eastern coast, including Macau, Hong Kong, Kuang-chou Wan, and the International Settlement of Shanghai.

3.3 The wartime negotiations on the abolition of extraterritoriality in China

Following the attack on Pearl Harbor, Japan abolished the International Settlement in Shanghai and conquered Hong Kong by force in December 1941. Branding itself as the liberator of the East Asian people, Japan deliberately accelerated Chinese decolonization to further divide Chiang Kai-shek from his Western allies with the abolition of all foreign concessions except for Hong Kong[96] and Macau (as Portugal remained neutral) in favor of Wang Jingwei's Nanking government. As the result of Japan's 'divide and conquer' tactics, the US and the UK were prompted to re-negotiate existing treaties with Chiang Kai-shek's wartime government in Chongqing. During the re-negotiation of the new Anglo-Chinese equal treaty, the return of the New Territories was raised by Chiang.[97] Chiang's book written in 1943, *China's Destiny* (中國之命運), made it clear that his government did not merely intend to recover the leased New Territories but also the ceded territories of Kowloon and Hong Kong Island after the war.[98] The Chinese cause received much sympathy from US President Roosevelt, who shared similar anti-imperialist feeling.[99] During the Cairo Conference of 1943, Roosevelt proposed that the UK should unilaterally surrender Hong Kong and the New Territories to China after the war, in return for the promise from China to establish a free port for the benefit of all states.[100] While the ROC agreed to Roosevelt's proposal without accepting the creation of free port as a condition, Churchill rejected the proposal in entirety.[101]

To counter the accusation of being imperialistic on the Hong Kong Question, there were some local attempts by British colonial officers to reaffirm the UK's position as the 'trustee' of the Hong Kong people and invoke a civic understanding of self-determination to strengthen the UK's position in Hong Kong. At a meeting held by the Institute of Pacific

[96] Tsang (n 78) 126; Chi Man Kwong, 重光之路 ── 日據香港與太平洋戰爭 (天地圖書有限公司 2015) 64–66 (in September 1944, the Japanese war cabinet proposed to offer Hong Kong to Chiang Kai Shek's Chongqing regime as one of the conditions of a peace offer. However, such offer was rejected by the Emperor himself).
[97] Frank Welsh, *A History of Hong Kong* (2nd edition, Harpercollins Pub Ltd 1997) 423; Kwong (n 96) 365, 369–371.
[98] Chiang Kai-shek, China's Destiny, cited in Dicks (n 22) 453 at fn 105.
[99] Welsh (n 97) 423–425; Carroll (n 79) 208; Kwong (n 96) 362–363.
[100] Hungdah Chiu, 'Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties' in Jerome Alan Cohen (ed), *China's Practice of International Law: Some Case Studies* (Harvard University Press 2013) 252–254.
[101] ibid 253-254 at fn 60.

Relations in 1942, the Chinese representatives demanded the return of Hong Kong 'without any string'.[102] The Chinese claim was based on the geographical continuity between Hong Kong and China and the common Chinese ethnicity of over 90% of Hong Kong's inhabitants.[103] In response, David M. MacDougall, the Colonial Secretary of Hong Kong and the British delegate at the conference, asked the Chairman 'whether the wishes of the citizens of Hong Kong might not have something to do with the fate of the Colony'[104] and if '[China] intended to deny to Hong Kong the spirit of the Atlantic Charter.'[105] When the Chinese representatives stated that 'this question didn't arise', MacDougall 'asked them if they intended to deny to Hong Kong the spirit of the Atlantic Charter.'[106] The Chinese responded by saying Hong Kong was 'different; which is exactly what the Americans say when you try to extend the Charter to Honolulu.'[107] Although the Chinese reply seemed to reflect their long-held beliefs that Hong Kong is as much a part of China as Hawaii to the US, Hawaii was later listed as a Non-Self-Governing Territory and joined the US only following a referendum in 1959.[108] MacDougall's remark represented the first historical instance in which the Hong Kong people's right to self-determination was being raised in the discussion of Hong Kong's territorial status. Nonetheless, MacDougall himself also held reservations regarding the use of popular consultation: 'if it comes to a referendum, the Chinese have ways of ensuring that the correct answer is given.'[109] As a result, when the Chinese delegates later requested MacDougall's remarks to be struck off the record, MacDougall stated that he 'attached no importance' to the inclusion of his remarks in the minutes.[110] Thus, the invocation of self-determination was arguably MacDougall's personal impromptu rather than a result of official strategy. Nonetheless, as the director of the Hong Kong Planning Unit and Colonial Secretary reporting directly to Governor Young, MacDougall's idea of self-determination hugely influenced the postwar planning of Hong Kong in the late 1940s.[111]

As a result of a continuing deadlock, the ROC eventually agreed to separate the question of Hong Kong's New Territories from the abolition of extraterritoriality under the Sino-British New Equal Treaty of 1943.[112] Nonetheless, the Chinese Foreign Minister informed the British 'that the Chinese government reserves its right' to raise the issue of the New

[102] 'MacDougal to Sabine, 30/1211942 ,TNA, FO 371/35824' 2; cited in Kwong (n 96) 379-380 at fn 69.
[103] 'MacDougal to Sabine, 30/1211942 ,TNA, FO 371/35824' (n 102) 2.
[104] ibid.
[105] ibid.
[106] ibid.
[107] ibid.
[108] See sections 4.5, 6.2.
[109] 'MacDougal to Sabine, 30/1211942 ,TNA, FO 371/35824' (n 102) 2.
[110] ibid.
[111] MacDougall's ideas led to the introduction of Young Plan in 1947, in which the UK attempted to a financially independent and fully representative Municipal Council to handle Hong Kong's internal affairs, see Tsang (n 78) 143–147.
[112] ibid 125–126; Kwong (n 96) 370.

Territories lease again 'for discussion at a later date', a position which was acknowledged by the British.[113] In 1944, when the US Ambassador to the UK repeated Roosevelt's suggestion, Winston Churchill famously stated that such retrocession could only happen 'over my dead body.'[114] Churchill also added that 'Britain is not bound by the principles of the Atlantic Charter at all',[115] a position arguably contradicted MacDougall. As the ROC was unable to launch an effective counter-offensive against Japan,[116] the US was increasingly eager to invite the Soviet Union to declare war against Japan. In the Yalta Conference of February 1945, Roosevelt secretly promised Stalin that the Soviet Union could 'lease' Port Arthur from China after the war without consulting Chiang Kai-shek. When being asked if this would render the US commitment to support the Chinese claim over Hong Kong inconsistent, Roosevelt explicitly stated that: 'let it drop'.[117] Following the death of Roosevelt, Chiang's poor relationship with Roosevelt's successor Harry Truman led to a further disinterest of the US toward supporting the ROC on the Hong Kong Question.[118]

The withdrawal of US support from the Chinese cause and the unilateral action taken by the UK in August 1945 to accept the surrender of Japanese forces in Hong Kong ultimately preserved the colonial *status quo* in Hong Kong.[119] Hong Kong's treatment could be contrasted with that of the French leased territory of Kouang-Tchéou-Wan, which was surrendered by Japan directly to the ROC on 18 August 1945.[120] After 1945, Hong Kong and Macau became the last two European enclaves in the Chinese coast, which served as a vivid reminder to the Chinese nationalists that the 'Century of Humiliation' was yet to be completely vindicated in 1945.

### 3.4 PRC's legal and practical approaches toward 'unequal treaties'

Compared to the KMT, who acknowledged the conditional termination of 'unequal treaties', the CCP insisted that all 'unequal treaties' must be unconditionally terminated.[121] Following the CCP's victory in the Chinese Civil War, Mao Zedong announced that the CCP's policy was to unilaterally abolish all foreign privileges and unequal treaties.[122] When the CCP established the People's Republic of China (PRC) in 1949,[123] Article 55 of the Provisional

[113] Tsang (n 78) 125–126.
[114] ibid 131.
[115] Mitchell (n 15) 178.
[116] Kwong (n 96) 384–386.
[117] ibid 386–387.
[118] Tsang (n 78) 136; Kwong (n 96) 396.
[119] Kwong (n 96) 386–387 (Roosevelt still insisted in 1945 that UK should 'restore' Hong Kong to China).
[120] Bertrand Matot, *Fort Bayard: Quand La France Vendait Son Opium* (Éditions François Bourin 2013) 214–217.
[121] See Chiu (n 100).
[122] W Jianlang, *Unequal Treaties and China (Volume 1)* (Enrich Professional Publishing (S) Private, Limited 2015) 106–108.
[123] ibid 106.

Constitution of the PRC provided a basis for the Central People's Government to 'examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall recognize, abrogate, revise, or re-negotiate them according to their respective contents.[124] While the distinction between the leased New Territories and the ceded territories of Hong Kong was still recognized by the ROC,[125] the PRC rejected this distinction because neither the lease nor the cession of territories was legally valid and the entire British colony of Hong Kong was considered as 'Chinese territories unlawfully occupied by the British' since 1842.[126] On this basis, the PRC deemed both Hong Kong and Macau as falling under Chinese sovereignty and reserved the ultimate right to unilaterally recover both territories as a matter of China's 'internal affairs'.

While the PRC was steadfast in maintaining the non-recognition of territorial situations arising out of 'unequal treaties', the value of Hong Kong for the cause of the World Revolution inhibited its nationalists' irredentist impulse. As early as 1946, CCP Chairman Mao Zedong told a British journalist that the CCP was not interested in Hong Kong and would certainly not allow it to become a bone of contention between the UK and China.[127] Instead, the colonial status of Hong Kong was used as a bargaining trip by the PRC to break the diplomatic blockade launched by the US. This strategy was clearly successful when the UK became the very first Western state to recognize the PRC as the sole legitimate government of China in 1950[128] in light of the 'British interests in China and in Hong Kong.'[129] This was in contrast to the US policies that called for the continued recognition of the ROC as the sole legitimate government of China.[130] To reconcile the apparent contradiction between PRC's actual practice and ideological doctrine, Mao later clarified that the PRC's policy was 'to utilize [Hong Kong] comprehensively and to plan for the long-term (長期利用，充分打算)'.[131] The fact that keeping Hong Kong in British hands served rather than undermined the PRC's interests eventually formed the basis of a tacit understanding between Beijing and London:[132] So long as the UK did not lead Hong Kong to colonial

[124] Albert P Blaustein (ed), *Fundamental Legal Documents of Communist China* (Fred B Rothman & Co 1962) 53.
[125] 陸委會網站管理員, '中華民國政府對「九七」香港情勢的立場與政策說帖' (12 June 2009) <https://ws.mac.gov.tw/001/upload/oldweb/www.mac.gov.tw/ctb257.html?ctNode=6076&CtUnit=4247&BaseDSD=7&mp=1> accessed 19 June 2023.
[126] Tsang (n 78) 154.
[127] FO371/63318, Boyce (Peking) to Chancery (Nanking), 30 December 1946, cited in ibid 153; Priscilla Mary Roberts and John Mark Carroll, *Hong Kong in the Cold War* (Hong Kong University Press 2016) 21.
[128] Roberts and Carroll (n 127) 93.
[129] FO 371/75824, F17901/1023/10, 4 November 1949, Commissioner-General in Southeast Asia, Singapore to FO, cited in David C Wolf, '"To Secure a Convenience": Britain Recognizes China - 1950' (1983) 18 Journal of Contemporary History 299, 316 at fn 69.
[130] Tsang (n 78) 159.
[131] See 齊鵬飛, '新中國成立后中共"暫時不動香港"戰略始末--中國共產黨新聞--中國共產黨新聞網' <http://cpc.people.com.cn/BIG5/85037/8292161.html> accessed 26 July 2022.
[132] Chi-Kwan Mark, *Hong Kong and the Cold War: Anglo-American Relations 1949-1957* (Clarendon ; Oxford

independence[133] or let Hong Kong become a 'subversive base' against the PRC,[134] the PRC would not seek to forcefully 'liberate' Hong Kong.[135] This pragmatic policy was even upheld by the PRC during the Cultural Revolution when Portugal effectively conceded it's right to administer Macau in 1966,[136] and when the UK was considering the total evacuation of Hong Kong during the Riots of 1967.[137]

3.5 Differences between the Chinese and the Soviet 'unequal treaties' doctrines

PRC's pragmatic policy deviated from the ideologically driven policy line dictated by the Soviet Union,[138] who consistently urged the PRC to forcefully annex the colonial enclaves of Hong Kong and Macau.[139] As early as in 1946, the official newspaper of the Soviet Union, *Pravda,* argued that the continued British possession of Hong Kong as 'a Chinese territory' violated 'the Atlantic Charter and the right of all peoples to self-determination.'[140] Apart from its adherence to the ideological struggle against western imperialism, Moscow's position could also be explained by its fear and envy that the western presence in Hong Kong allowed secret unofficial contacts between the PRC and the West during the Sino-Soviet split.[141] For example, in response to Mao's accusation of Soviet capitulation during the Cuban Missile Crisis, Khruschev attacked Mao's pragmatic policies toward Hong Kong and Macau as hypocritic.[142]

Notwithstanding the subsequent fall out between the PRC and the Soviet Union, Moscow maintained its stance on 'unequal treaties' and vehemently argued for the exclusion of Hong Kong and Macau from colonial independence.[143] For instance, during a UNGA debate over the issue of Chinese refugees in Hong Kong, the Soviet Union objected to the panel discussion without the participation of the PRC on the ground that Hong Kong belonged to

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University Press 2004) 29–30.
133 'FCO 40/327, Constitutional Development of Hong Kong'.
134 ibid.
135 ibid.
136 Carmen Amado Mendes, *Portugal, China and the Macau Negotiations, 1986-1999* (Hong Kong University Press 2013) 34.
137 Ray Yep, 'The 1967 Riots in Hong Kong: The Diplomatic and Domestic Fronts of the Colonial Governor' [2008] The China Quarterly 122, 129.
138 Michael Share, *Where Empires Collided: Russian and Soviet Relations with Hong Kong, Taiwan and Macao* (Chinese university press 2007) 141 at fns 7 & 8.
139 ibid 242.
140 Pravda, 15 May 1946, cited in Michael Share, 'The Soviet Union, Hong Kong and the Cold War, 1945-1970 | Wilson Center' (2003) 4 at fn 8 <https://www.wilsoncenter.org/publication/the-soviet-union-hong-kong-and-the-cold-war-1945-1970> accessed 26 July 2022.
141 ibid 24.
142 John W Garver, *China's Quest: The History of the Foreign Relations of the People's Republic of China* (Oxford University Press 2016) 183.
143 Share (n 138) 141–142.

China.[144] In particular, the Soviet delegate highlighted in his speech the difference between colonial territories and various small colonial territories 'which are part of another independent state. Hong Kong and Macao are examples.'[145] This position was reproduced by the Far East Department of the Ministry of Foreign Affairs of the Soviet Union in its "Broad Survey of Hong Kong and Macao", in which Hong Kong, Macao, and Goa were listed in the category of colonies that should not exercise self-determination.[146] In the absence of PRC's representation before the UN, the Soviet Union and its allies were keen on arguing for Hong Kong's automatic return to China and blocked any attempt to apply UNGA's decolonization rules in Hong Kong.

Nonetheless, contrary to the irredentist positions held by the PRC, Soviet Union refused to consider 'unequal treaties' as *void ab initio* when they established international boundaries.[147] This was consistent with the fact that any renunciation of 'unequal treaties' by the Soviet Union had never extended to the 19th centuries boundary treaties in which the Qing Empire ceded a large part of its territories to the former Russian Empire.[148] When it came to leased foreign military base, Soviet Union supported the cause of Cuba, who considered the lease agreement for Guantánamo Bay void *ab initio* as it was imposed by force and duress.[149] This was notwithstanding the fact that neither the PRC nor the Soviet Union had ever considered the application of 'unequal treaties' with regards to the status of Port Arthur (旅順), the naval port secretly promised by Roosevelt to Stalin, which was subsequently 'leased' from China to the Soviet Union from 1945 to 1955.[150] In contrast with the PRC, Soviet Union had been unwilling to support an automatic claim of territorial revision. The different approaches of the two states toward 'unequal treaties' were best illustrated by the different positions adopted by the parties in the boundary disputes from 1960.[151]

During the negotiation of the 1969 Vienna Convention on the Law of Treaties (VCLT), when the PRC was not yet admitted to the UN, the Soviet Union argued in favor of including its version of the 'unequal treaties' doctrine in the draft treaty on the law of treaties. In the Sixth

144 ibid 140.
145 ibid.
146 ibid 23.
147 Peters (n 24) paras 36–37.
148 Zubeida Mustafa, 'THE SINO-SOVIET BORDER PROBLEM' (1969) 22 Pakistan Horizon 321, 326–328.
149 Alfred de Zayas, 'Guantánamo Naval Base', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2016) para 14 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e301> accessed 22 July 2022..
150 For the Sino-Soviet negotiation over Port Arthur, see Zhihua Shen, '中苏条约谈判中的利益冲突及其解决' (2001) 2 历史研究 39.
151 See Jesse Finkelstein, 'An Examination of the Treaties Governing the Far-Eastern Sino-Soviet Border in Light of the Unequal Treaties Doctrine' (1979) 2 Boston College International and Comparative Law Review 445, 468–470.

Committee of the UN General Assembly, the doctrine of 'unequal treaties' was raised by the delegations of Ukraine SSR during the negotiation. According to the Ukrainian SSR's proposal, three kinds of 'unequal treaties' were considered invalid by the Soviet Union: (1) agreements normally denominated "treaties of assistance" but that in reality only had the purpose to secure certain "colonial rights" in a less developed State; (2) agreements concerning military assistance and military bases in which the stationing states often enjoy almost unlimited privileges and full immunity from the host states;[152] and (3) agreements 'forced' upon newly independent States at the price of their freedom.[153]

Here, it was important to notice that the proposed 'unequal treaties' only reflected the Soviet doctrine which was much narrower in scope than that of the Chinese: While the second type of unequal treaty might cover the Cuban claim for Guantánamo Bay, none of the three categories of treaty included territorial treaties procured by war or duress, being the predominant type of 'unequal treaties' which the PRC sought to abolish. This could be understood from a policy standpoint that the Chinese doctrine would only put the Sino-Soviet border and the territorial boundaries in Eastern Europe drawn by the Soviet Union after the Second World War into uncertainty. Nonetheless, at the end of the negotiation, not even the much narrower defined Soviet doctrine was included in the VCLT, neither as a ground of invalidity nor as ground justifying termination of treaties.[154] Although part of the spirit of the 'unequal treaties' doctrine was taken into account by the VCLT through the inclusion of coercion as invalidating grounds under Articles 51 and 52, a mere assertion of inequality in the negotiating power or the obligations of the parties supports neither a claim to renegotiation under Articles 39 to 41 nor a ground of voidability under Articles 48 to 50 of the VCLT.[155] More importantly, even though the VCLT was held to reflect pre-existing customary international law,[156] it did not provide any retroactive application.[157] It demonstrated *a contrario* that the Soviet doctrine of 'unequal treaty', proposed by Ukraine SSR, was not accepted by the international society as a ground of invalidation in 1969.

Rather, from the text of the VCLT itself and the subsequent jurisprudence of the ICJ, it is clear that international law separates the validity of a treaty and the territorial regime established by such treaty into two water-tight compartments. Article 70(1)(b) of the VCLT

[152] Detter (n 86) 1082–1083.
[153] ibid (noted that the PRC was not represented at the diplomatic conferences which adopted the treaty and does not appear to have acceded to it formally).
[154] Peters (n 24) para 32.
[155] ibid 55.
[156] See *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal), Judgment* [1991] ICJ Rep 53 (ICJ) [48]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility* ICJ Reports 6 (ICJ) [33]; *Oil Platforms (Preliminary Objections) (Islamic Republic of Iran v United States of America), Judgment* [1996] ICJ Rep 803 (ICJ) [23].
[157] Peters (n 24) para 51.

provides that the termination of a treaty 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.' Article 71(2)(b) similarly provides that if a treaty becomes void due to its conflict with subsequently emerging peremptory norm, any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination would not be affected. The ICJ in its jurisprudence has also treated the continuing validity of the territorial regime as independent from the validity of the boundary treaty.[158] Considering the number of imposed peace treaties in history that could also be categorized as 'unequal' such as the Treaty of Versailles of 1919,[159] or the number of boundary treaties signed by the colonial powers without the consent of the colonized peoples,[160] any invalidation of established territorial régime pursuant to 'unequal treaties' would arguably open a 'pandora box' to all kinds of irredentist claims based on historical grievances, which would only undermine instead of promoting international peace and security, being the central purpose of international law in the UN era. The consideration of separating the finality of international borders from the question of 'unequal treaties' was implicitly recognized by the Soviet Union, which not only inherited a series of Russo-Qing boundary treaties in the 19th century but was also responsible for creating new international boundaries in Central and Eastern Europe after 1945.

## 4. The practice of the PRC toward 'unequal treaties' in the case of Hong Kong

As aforementioned, the PRC approach toward 'unequal treaties' was a combination of both the idealistic and pragmatic visions of 'revolutionary diplomacy' and the 'diplomacy of treaty revision'. On one hand, regardless of the lack of state practices in support, the PRC insisted that no 'unequal treaty' or the result of such treaty should be recognized as legally valid. In 1972, the PRC successfully requested the UN Decolonization Committee to remove Hong Kong and Macau from the ambit of decolonization based on the Chinese 'unequal treaty' doctrine. The delisting decision was seen as the only piece of state practice that arguably supported the existence of the Chinese 'unequal treaties' doctrine. On the other hand, the PRC did not seek to forcefully revise the 'unequal treaties' despite it being so legally entitled under its own 'unequal treaties' doctrine. In the case of Hong Kong, the PRC emphasized that it reserved the ultimate right to liberate Hong Kong by force and successfully forced the UK to concede its sovereignty and its right to administer Hong Kong after 1997. As a result, the UK and the PRC managed to come to an understanding, embodied by the Sino-British Joint Declaration of 1984, which preserved the legal positions of both parties: In exchange for the return of the sovereignty and administration of Hong Kong by the UK, the PRC allowed the UK to administer Hong Kong until 1 July 1997, when the original lease would expire, which

[158] *Territorial Dispute (Libyun Aruh Jamuhiriyu/Chad), Judgment* [1994] ICJ Rep 6 (ICJ) [72]-[73].
[159] Detter (n 86) 1085.
[160] See *Bissau/Senegal Maritime Delimitation Award* (1989) 83 ILR 1 (Arbitral Tribunal).

implicitly recognized the validity of the 'unequal' Lease of the New Territories in 1898.

4.1 The delisting of Hong Kong and Macau in 1972

On 25 October 1971, the UN General Assembly (UNGA) passed Resolution 2758 (XXVI), in which the PRC was recognized as the only legitimate government of China in the UN.[161] Following the PRC's entry into the UN, it began to request the delisting of Hong Kong and Macau from the Chapter XI List of Non-Self-Governing Territories, being the synonym for the UN list of 'colonial territories' in the decolonization context. In this regard, Hong Kong had been consistently placed in the Chapter XI List of Non-Self-Governing-Territory since 1947.[162] In 1963, the UN Decolonization Committee (C-24) approved the preliminary list of Non-Self-Governing-Territory, including Hong Kong, with reservations expressed by the Soviet Union, Bulgaria, and Cambodia.[163]

On 8 March 1972, the new Chinese Permanent Representative to the UN, Huang Hua, submitted a letter of request to the Chairman of the C-24:

"As is known to all, the questions of Hong Kong and Macau belong to the category of questions resulting from the *series of unequal treaties* left over by bigotry, treaties which the imperialists imposed on China. Hong Kong and Macau are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macau is entirely within China's sovereign right and does not at all fall under the ordinary category of "colonial Territories". Consequently, they should not be included in the list of colonial Territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples. With regard to the questions of Hong Kong and Macau, the Chinese Government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions. For the above reasons, the Chinese delegation is opposed to including Hong Kong and Macau in the list of colonial Territories covered by the Declaration and requests that the erroneous wording that Hong Kong and Macau fall under the category of so-called "colonial territories" be immediately removed from the documents of the Special Committee and all other United Nations documents." [164]

[161] UNGA Resolution 2758 (XXVI), Restoration of the lawful rights of the People's Republic of China in the United Nations, UN Doc A/RES/2758. 1971.
[162] Roda Mushkat, 'Hong Kong as an International Legal Person' (1992) 6 Emory International Law Review 105, 112; cf Wang, *Self-Determination and Minority Rights in China* (n 59) 100 (ROC challenged the inclusion of Macau on the Chapter XI list in 1960 and 1963).
[163] Letter from FCO dated 5 Dec 1982 in 'PREM19/1053, Hong Kong (Future of Hong Kong) (Part 4)' 269 <https://www.margaretthatcher.org/source/prem19/prem19-1053>.
[164] Hua Huang, 'Letter from the Permanent Representative of China to the United Nations to the Chairman of the Special Committee, U.N. Doc. A/8723/Rev.1, Annex 1' ('The PRC's Letter').

Upon receiving the letter from the PRC's representative, the Working Group of the C-24 in its 66th Report nonetheless agreed, with reservation expressed by Sweden, to recommend that the 'Special Committee should recommend the UNGA that Hong Kong and Macau should be excluded from the List of Non-Self-Governing-Territory.'[165] At the 873rd meeting of the C-24, Venezuela, Fiji, and Sweden expressed their reservations against the recommendation to delist Hong Kong and Macau without a plenary debate at the UNGA. The delegate from Venezuela argued that the matters of Hong Kong and Macau should be referred to the UNGA for a substantive decision without there being any need for us to formulate the recommendation.[166] Further, the delegate from Fiji also stated that 'there is an important matter of principle involving legal and juridical implications in the Working Group's recommendation which requires the most careful consideration.'[167] Fiji delegation 'is also mindful of the fact that as the situations exist today in Hong Kong and Macau those two Territories are in fact non-self-governing.'[168] The delegate of Sweden again reaffirmed that Sweden dissociated itself with the Working Group's recommendation and required the reservation to be once again noted in the official record.[169]

At the same time, there were three states explicitly or implicitly supported the Working Group's recommendation, with two of them explicitly upholding the validity of the 'unequal treaties' doctrine. First, the Soviet Union's delegate reaffirmed his government's position on 'unequal treaties' outlined in the statements of the USSR dated 29 May and 13 June 1969.[170] Similarly, the delegate of Afghanistan stated that his government supported the recommendation and the position of the PRC about the question of Hong Kong and Macau.[171] Mali was the only state that supported the recommendation to delist without resorting to the 'unequal treaty' doctrine. Rather, Mali argued that the request from the PRC indirectly reflected the intention of the administering power on this matter.[172] However, at that time, most western states including the UK had voluntarily resigned from the C-24,[173] as they believed that the committee was 'hijacked' by the Soviet Bloc and the

[165] 'List of the Territories to Which the Declaration Is Applicable: 66th Report of the Working Group, U.N.Doc. A/AC.109/L. 795 and Corr.1, 2' para 4.
[166] 'Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Verbatim Record of the 873rd Meeting, U.N.Doc. A/AC.109/PV.873, RG/6' 16 <https://digitallibrary.un.org/record/3803303/files/A_AC-109_PV-873-EN.pdf>.
[167] ibid 17.
[168] ibid.
[169] ibid.
[170] ibid 18.
[171] ibid.
[172] ibid.
[173] Steven Hillebrink, 'Political Decolonization and Self-Determination: The Case of the Netherlands Antilles and Aruba' (Leiden University 2007) 35 <https://hdl.handle.net/1887/11003>.

Third World for their own agendas.[174] Relying on the lack of action by the UK, the Malian delegate stated that 'we should not be more royalist than the king' and 'we should not be more English than the English'. [175]

In the absence of any objection, the Ethiopian Chairperson of the Special Committee, who was described by one commentator as 'fiercely pro-China',[176] decided to approve the recommendation relating to the delisting of Hong Kong and Macau subjected to the reservations expressed.[177] This was in stark contrast to the recommendations made in the same session to refer the reinstatement of Puerto Rico to the plenary session of the Special Committee and to defer the issue of Comoros Archipelago until a study of the views of the population had been carried out.[178] Ironically, the 873rd meeting of the Special Committee was the only occasion in which the legal treatment of Hong Kong and Macau was officially discussed between UN member states. As a result of the lack of deliberation at the UNGA, in the Special Committee's 198 pages of report to the UNGA, only paragraph 183 on page 64 of volume I recommended the de-listing of Hong Kong and Macau:[179]

'183. The Special Committee also continued its review of the list of Territories to which the Declaration is applicable. In the light of the close examination of related matters, *the Committee agreed that it should recommend to the General Assembly the exclusion of Hong Kong and Macau and dependencies from the list* and the inclusion of the Comoro Archipelago in the list of the Territories to which the Declaration applies. As regards the question of the applicability of the Declaration to Puerto Rico, the Committee decided to instruct its Working Group to submit to it at an early date in 1973 a report relating specifically to the procedure to be followed by the Special Committee for the implementation of resolution 1514 (XV) with respect thereto.'

On 2 November 1972, the UNGA adopted Resolution 2908 (XXVII), titled 'Implementation of the Declaration on the Granting of Independence to Colonial Countries

[174] See Thomas M Franck, *Nation against Nation: What Happened to the U.N. Dream and What the U.S. Can Do about It* (Oxford University Press 1985); cited in Hillebrink (n 173) 35 at fn 152.
[175] 'Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Verbatim Record of the 873rd Meeting, U.N.Doc. A/AC.109/PV.873, RG/6' (n 166) 18.
[176] See Nihal Jayawickrama, 'The Right of Self-Determination - A Time for Reinvention and Renewal"' (1993) 57 Saskatchewan Law Review 1, 16; Carole J Petersen, 'Not an Internal Affair Hong Kong's Right to Autonomy and Self-Determination under International Law.Pdf' (2019) 49 Hong Kong Law Journal 883, 893.
[177] 'Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Verbatim Record of the 873rd Meeting, U.N.Doc. A/AC.109/PV.873, RG/6' (n 166) 18.
[178] 'Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Supp. No. 23, U.N.Doc. A/8723/Rev.1' 64 at para 183.
[179] ibid.

and Peoples'.[180] The text of the Resolution criticized Portugal and South Africa for their colonial dominations in Africa and urged colonial powers to withdraw their military installations and bases immediately. However, neither Hong Kong nor Macau was mentioned in the text. Rather, Hong Kong and Macau were removed from the Chapter XI List of Non-Self-Governing-Territory pursuant to one paragraph of the UNGA's resolution, which urged 'all states and UN organs to give effect to the recommendations in the 1972 Report',[181]

According to the voting record of the 2078th plenary meeting of the 27th session of the UN General Assembly, UNGA Resolution 2908(XXVII) was adopted with 99 votes to 5, with 23 abstentions.[182] Here, another East-West divide was observable. Nearly all states who voted in favor of the resolution belonged to the Communist Bloc and the Third World.[183] The only five votes against were from Portugal, France, South Africa, the UK, and the US, whereas other western or pro-western states, such as Japan and Western Europe, were amongst those who abstained.[184] However, the delegates who voted in favor mainly expressed their supports for the cause of decolonization without mentioning either Hong Kong nor Macau in the entire verbatim record.[185] Although the UNGA was widely recognized as possessing 'a measure of discretion with respect to the forms and procedures by which [self-determination] is to be realized',[186] in the absence of a plenary debate, it would be misleading to treat the vote of Resolution 2908 (XXVII) as a piece of evidence of the UNGA upholding the Chinese 'unequal treaties' doctrine.[187] In the words of Franck, the adoption of the report of the Decolonization Committee is 'a sacred annual ritual', and it is 'virtually impossible for any country – particularly a Western country – to amend it from the floor.'[188]

As the administrating power of Hong Kong, the UK voted against UNGA Resolution 2908(XXVII) and provided a letter to the UN Secretary-General explaining its reason. The UK stated that 'the action of the General Assembly in no way affects the legal status of Hong Kong' as '[t]he views of my Government about this status are well known. They are unable to accept any differing views which have been expressed or may hereafter be

[180] UNGA Resolution 2908, Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN.Doc. A/RES/2908(XXVII) 1972.
[181] ibid 3, 4.
[182] See 'UNGA, 27th Session : 2078th Plenary Meeting, A/PV.2078'.
[183] ibid.
[184] ibid.
[185] ibid.
[186] *Western Sahara, Advisory Opinion* [1975] ICJ Rep 12 (ICJ) [71].
[187] Cf CL Lim, *Treaty for a Lost City: The Sino-British Joint Declaration* (Cambridge University Press 2022) 63.
[188] Franck (n 174) 199.

expressed by other Governments.' However, the UK declared that it would discontinue transmitting Hong Kong's information to the UN as 'no useful practical purpose would be served by continuing to transmit information on Hong Kong under Article 73(e) of the UN Charter.'[189] However, when compared to the other situations, such as Gibraltar and Falkland Islands, where the UK fiercely defended the inhabitants' right to self-determination before the UNGA, the UK could be said to effectively acquiesce to the delisting of Hong Kong.[190] Portugal, the administrating power of Macau, also voted against the aforementioned resolution without providing any written reason.

In a declassified confidential letter in 1982, the Foreign and Commonwealth Office (FCO) explained the reasons for the UK's cessation to transmit information to the UN. It is argued by the FCO that if the UK continued to transmit information to the UN, it would lead to an annual confrontation over Hong Kong in the C-24 and perhaps also in the UNGA.[191] The PRC could mobilize the Third World lobby and the UK would be 'strongly outnumbered'.[192] At the same time, the Legal Advisers of the FCO believed that if the UK ceased to transmit information, it could be 'assumed that the UNGA also considered article 73(e) no longer applicable to Hong Kong.'[193] In the case of Hong Kong, the UK did not intend to concede on the colonial status of Hong Kong when it agreed to cease the transmission of information under article 73(e) of the UN Charter. In these circumstances, the FCO deemed it necessary 'to safeguard our legal position', which explained its earlier letter to the UNSG.[194]

The arguments that UNGA Resolution 2908(XXVII) had the effect of foreclosing Hong Kong people's right to self-determination rested on the assumption that the Chapter XI List is the complete and exhaustive list of all the Non-Self-Governing-Territories.[195] This premise however stood in contrary to the practice of decolonization. In the most recent ICJ's Advisory Opinion on *Chagos Archipelago,* the ICJ thought that the process of decolonization of Mauritius has not been completed in light of the separation of the Chagos Archipelago from Mauritius by the United Kingdom in 1965.[196] This is notwithstanding the

[189] 'Letter from the Permanent Representative of the United Kingdom of Great Britain to the Secretary General of the United Nations, U.N. Doc. No A/8989'.
[190] Petersen (n 176) 895–896.
[191] Letter from FCO dated 5 Dec 1982 in 'PREM19/1053, Hong Kong (Future of Hong Kong) (Part 4)' (n 163) 269.
[192] ibid.
[193] ibid.
[194] Letter from FCO dated 5 Dec 1982 in ibid.
[195] Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1996) 66 British Yearbook of International Law 283, 291–292.
[196] Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge University Press 2018) para 174.

removal of Mauritius from the Chapter XI List of Non-Self-Governing-Territory in 1968.[197] This advisory opinion further confirmed that the Chapter XI List of was not an exhaustive list of all Non-Self-Governing-Territories entitling to the right to self-determination.[198] Instead of the Chapter XI List, the ICJ also determined the colonial status of Mauritius according to the criteria laid down in Resolution 1541(XXVII).[199] The facts that Hong Kong remained geographically, culturally, and ethnically separated from the UK, satisfied the jurisdictional criteria of a Non-Self-Governing Territory,[200] which was unaltered by the passage of UNGA Resolution 2908(XXVII).

Finally, even if the delisting decision coupled with the fact that the final settlement of the Hong Kong Question did not follow the UN practice of decolonization, the PRC's position that Hong Kong had been 'illegally occupied' by the UK under 'unequal treaties' since 1842, is at least consistent with the right to self-determination based on 'alien domination and foreign occupation'. To treat the delisting of Hong Kong as a successful application of the 'unequal treaties' doctrine presupposes a much narrower application of self-determination as a right exclusively applies to cases of 'salt-water' colonization, in accordance with the definition of Non-Self-Governing Territories under Resolution 1541(XXVII). This presumption was at least inconsistent with PRC's traditional support for the self-determination of Palestine,[201] a situation which was more adequately described as 'alien domination and foreign occupation'.[202] Therefore, it was difficult to see how UNGA Resolution 2908(XXVII) could be an example supporting the Chinese 'unequal treaties' doctrine in the absence of any material alteration of Hong Kong's colonial status in 1972 or deprivation of Hong Kong people's right to self-determination explicitly recognized by the UNGA.

4.2 The Sino-British Joint Declaration of 1984 and the Handover of Hong Kong

In 1982, the UK and the PRC began to negotiate Hong Kong's future. UK's Prime Minister Margaret Thatcher offered to recognize Chinese sovereignty over the ceded parts of Hong Kong Island and Kowloon Peninsula, in exchange for a right to continuously administer

[197] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion* [2019] ICJ Rep 95 (ICJ) [75].
[198] McCorquodale (n 195) 293.
[199] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion* (n 197) para 156.
[200] UNGA Resolution 1541, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, UN. Doc. A/1541 1960 Principle IV.
[201] See Brian Yeh, 'Self-Determination for Some: The Palestinians and the Uyghurs in China's Foreign Policy' (2020) 41 University of Pennsylvania Journal of International Law 1137.
[202] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 94.

Hong Kong beyond the expiry of the New Territories Lease in 1997. However, consistent with PRC's position on 'unequal treaties', Deng Xiaoping considered the entire territory of Hong Kong, including the ceded parts, as an inalienable part of China. Thus, Deng saw the sovereignty over the entire Hong Kong as 'unnegotiable'.[203] Deng's position was consistent with the Chinese long-held opposition against foreign extraterritoriality pursuant to 'unequal treaties'.[204] It was precisely on this basis that the PRC could not separate Chinese titular sovereignty from its right to administer Hong Kong. Otherwise, the PRC would be seen as acknowledging the creation of 'extraterritoriality' in Hong Kong after 1997 through another 'unequal treaty' with the UK, which betrayed PRC's own historical image as the vanguard of the 'Chinese Nation'.

Concerning Deng's claim of sovereignty over Hong Kong Island and Kowloon, Thatcher defended her position by invoking the principle of *pacta sunt servanda*.[205] Thatcher emphasized that the international treaties which ceded Hong Kong Island and the Kowloon Peninsula to the UK remained valid until the two governments came to another arrangement.[206] From Thatcher's perspective, the question was only 'whether we should retain the New Territories'. British sovereignty over the ceded Hong Kong Island and Kowloon Peninsula was on the contrary considered firmly established in international law.[207] While Thatcher recognized that the PRC would never recognize any unequal treaty signed by its predecessor, she simply dismissed the Chinese positions by stating that 'communist governments could not be relied upon to respect agreements.'[208] In this regard, Thatcher warned Deng that '[i]f a country will not stand by one treaty, it will not stand by another.'[209]

During the first round of negotiation, Margaret Thatcher further explained to Deng Xiaoping that the cessation of transmitting information to the UN did not in any way affect the status of Hong Kong as a British colony. She stated that the cessation of the report was because the UK 'understood' China's position.'[210] Here, Thatcher arguably saw the ceasing

[203] Mark Roberti, *The Fall of Hong Kong: China's Triumph and Britain's Betrayal* (J Wiley 1994) 49.
[204] See Tieya Wang, 'Criticism of Bourgeois International Law on the Question of State Territory' in Jerome Alan Cohen and Hungdah Chiu (eds), *People's China and International Law: A Documentary Study*, vol 1 (Princeton: Princeton University Press 1974) 333; TC Chen, 'Book Review: Zhou Gengsheng's International Law' in Chinese Society and of International Law (eds), *Selected Articles from Chinese Yearbook of International Law* (China Translation & Publishing Corporation 1983) 251.
[205] Ghai (n 74) 12.
[206] Roberti (n 203) 49.
[207] 'Future of Hong Kong [record of a ministerial meeting]', 13 September 1982 in 'PREM19/790, Hong Kong (Future of Hong Kong) (Part 2)' f183 <https://www.margaretthatcher.org/source/prem19/prem19-0790>.
[208] 'Call on the Prime Minister by Lord MacLehose [record of a conversation]', 23 July 1982 in 'PREM19/789, Hong Kong (Future of Hong Kong) (Part 1)' f125 <https://www.margaretthatcher.org/source/prem19/prem19-0789>.
[209] Roberti (n 203) 51; Michael Sheridan, *The Gate to China: A New History of the People's Republic and Hong Kong* (Oxford University Press 2021) 99.
[210] RECORD OF A MEETING BETWEEN THE PRIME MINISTER AND VICE CHAIRMAN DENG XIAOPING AT THE GREAT HALL OF THE PEOPLE ON FRIDAY 24 SEPTEMBER AT 1030 A.M. in

of reporting after 1972 as an 'acknowledgment' instead of a 'recognition' of China's position on Hong Kong. Instead of UNGA Resolution 2908(XXVII), Thatcher said that it was the policy consideration, being the 'complication of the lease from China', that lead to a deviation from the UK's normal policy of guiding the colonies toward independence. Notably, Deng did not challenge any of her points.[211] From Thatcher's explanation and her insistence on the need for continued British administration in Hong Kong beyond 1997, it would also appear that the UK saw the ceasing of the report as consistent to the Sino-British tacit understanding in not guiding Hong Kong toward independence. This also coincided with the long-held position by the UK up until the recent *Chagos* Advisory Opinion that the UNGA Resolutions relating to self-determination were non-binding in character.[212]

Thatcher's positivist and legalistic approach largely overlooked Deng's nationalistic sensitivities.[213] Deng was reportedly disappointed by Thatcher's insistence on the validity of treaties that the Chinese had deemed 'unequal'.[214] Referring to the 'Century of Humiliation' that began from the Treaty of Nanking, Deng stated that if China did not take back Hong Kong in 1997, its leaders and its government 'would not be able to account for it to the Chinese people or the people of the world.'[215] Deng stated that he would not let himself go down in history as another Li Hongzhang,[216] the late Qing negotiator who was responsible for signing the New Territories Lease and many other 'unequal treaties'.[217] Deng added forcefully: 'if China failed to recover Hong Kong in 1997, the people would have every reason no longer to put their faith in their leaders and the Chinese government ought to retire voluntarily from the political arena. Thus, the PRC could wait for 1 or 2 years but nothing more.'[218] A FCO analysis argued that any implicit recognition of the 'unequal treaties' would stain the Chinese leader's 'desired image in the annals of Chinese national history and deny them the only form of an afterlife that true Marxist can entertain.'[219]

Owing to its controversial image so intertwined with the history of subjugation and humiliation of the 'Chinese Nation' by Western colonial powers, international law did little to further the first round of talks between the UK and the PRC.[220] Rather, the legal dispute over

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'PREM19/790, Hong Kong (Future of Hong Kong) (Part 2)' (n 207) 7.

[211] ibid 5.

[212] Petersen (n 176) 894.

[213] Steve Tsang, *Hong Kong: An Appointment with China* (IB Tauris 1997) 94–95.

[214] Welsh (n 97) 509.

[215] 'PREM19/790, Hong Kong (Future of Hong Kong) (Part 2)' (n 207) 132.

[216] ibid 133.

[217] See Chapter II.

[218] 'PREM19/790, Hong Kong (Future of Hong Kong) (Part 2)' (n 207) 133.

[219] The Future of Hong Kong in 'PREM19/1059, Hong Kong (Future of Hong Kong) (Part 10)' f240 <https://www.margaretthatcher.org/source/prem19/prem19-1055>.

[220] This paper followed the division of negotiations into three phrases by Cradock, see Percy Cradock, *Experiences of China* (John Murray 1999) 183, 188 <https://books.google.com.hk/books?id=z9DHQgAACAAJ>.

the validity of the three 'unequal treaties' became a point of contention between Deng and Thatcher which almost led to an immediate breakdown of the negotiation.[221] Since both sides refused to make any compromise, no meaningful negotiation was conducted from October 1982 to April 1983.[222] To force the UK to concede, Deng set a deadline for the negotiation. He stated that the PRC would come up with a plan to recover Hong Kong 'within one or two years' and the role of the negotiation was to merely formulate a plan of transition to 'avoid major disturbances'[223] The Chinese negotiation position was accompanied by a direct threat of use of force if the negotiation failed to meet the deadline. There, Deng further stated: 'If there were very large and serious disturbances in the next fifteen years, the Chinese government *would be forced to consider the time and formula relating to its recovery of its sovereignty over Hong Kong*.'[224] Ironically, while the PRC repeatedly stressed that the UK coerced the Qing Empire to cede Hong Kong to the UK in the 19th century, the revision of such treaties through the threat of the use of force potentially also make the resulting Sino-British Joint Declaration challengeable under Article 52 of the VCLT.[225]

Here, it is important to notice that the PRC consistently identified armed resistance by people rightfully exercising their rights of self-determination as an customary exception to the UNSC authorization for the use of force.[226] Since 'colonial wars', such as the two Opium Wars, were traditionally seen as unjust by China, the forceful recovery of Hong Kong, if it happened in the 1980s as another Goa-styled operation, would likely be justified by the PRC as a just war 'to resist aggression and colonization',[227] similar to India's argument of 'continued self-defence' against the Portuguese enclave of Goa.[228] Even if no force was actually employed by the PRC, the PRC could well rely on the Chinese 'unequal treaties' doctrine to negate the illegality of the threat of use of force in recovering illegally occupied territory. The combination of the threat of use of force and PRC's stringent legal claim based on 'unequal treaties' played a significant role in swaying the opinions of the chief British diplomat, to eventually adopt the path of conciliation when they were approaching the two years deadline.[229] At the same time, the possibility of Chinese armed intervention was also used by the UK to justify the denial of any referendum or plebiscite in Hong Kong, unlike in

[221] Matthew Hurst, 'Britain's Approach to the Negotiations over the Future of Hong Kong, 1979–1982' [2022] The International History Review 1, 9.
[222] Roberti (n 203) 49; Welsh (n 97) 509.
[223] 'PREM19/790, Hong Kong (Future of Hong Kong) (Part 2)' (n 207) 139.
[224] ibid 138.
[225] Wesley-Smith (n 22) 317, 319 at fn 8; Trinidad (n 196) 115.
[226] Julian Ku, 'How China's Views on the Law of Jus Ad Bellum Will Shape Its Legal Approach to Cyberwarfare' [2017] Stanford University 6 at fn 24 <https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1178>.
[227] See ibid 6 at fn 27.
[228] Quincy Wright, 'The Goa Incident' (1962) 56 The American Journal of International Law 617, 619.
[229] Sir Percy Cradock, quoted in Michael B Yahuda, *Hong Kong: China's Challenge* (Routledge 1996) 21.

Gibraltar and Falkland/Malvinas.[230] It was stated by UK Foreign Minister Francis Pym that 'there would be real dangers in developing new mechanisms to test Hong Kong opinion, whether by referenda or otherwise […] the Chinese government have made clear that they will not allow themselves to be outvoted by their 'compatriots' in the colony.'[231]

In April 1983, Margaret Thatcher eventually agreed to concede British sovereignty over the ceded parts of Hong Kong, with the condition that the arrangement would be acceptable to the British Parliament and to the people of Hong Kong.[232] Part of the reasons for Thatcher's eventual concession could be found in an opinion brief written by Anthony Parsons, former British permanent representative to the UN and then Thatcher's personal advisor on international affairs. There, Parsons argued that 'the world opinion in general would not be inclined to support the UK over the retention of a territory acquired by force.' Also, he highlighted that even if the UK retained the legal titles over the ceded territories in international law, 'there is no chance of our taking to any international legal forum where we should be able to take advantage of our title in international law.'[233] This important concession eventually led to the 1984 Sino-British Joint Declaration, in which the UK agreed to 'handover' Hong Kong to the PRC on 1 July 1997, in exchange for the PRC's promise of offering a 'high degree of autonomy'(高度自治) in Hong Kong under the framework of 'One Country Two Systems' (一國兩制), and letting Hong Kong run by the Hong Kong people (港人治港).

From the PRC's perspective, the Hong Kong Handover was seen as an example of the successful application of the 'unequal treaty' doctrine. In the words of former ICJ Judge Shi Jiuyong, the Joint Declaration 'is an unprecedented treatment of invalidity of unequal treaties imposed by big powers in history. This practice can be counted as China's contribution to the process of the progressive development of contemporary international law.'[234] However, the text of the Joint Declaration actually involved a clever attempt to 'reconcile' the contradictory positions of the PRC and the UK regarding the legality of the 'unequal treaties'. Thus, it is perhaps more accurate to describe the Joint Declaration as embodying two parallel statements, resembling 'agreement to disagree' on the validity of three 'unequal treaties': Article 1 of the Joint Declaration provided that 'China has decided to resume the exercise of sovereignty over the whole of Hong Kong'. The use of the word

[230] 'PREM19/1053, Hong Kong (Future of Hong Kong) (Part 4)' (n 163) 6.
[231] ibid.
[232] Margaret Thatcher letter to Zhao Ziyang on 10 March 1982 in 'PREM19/1054, Hong Kong (Future of Hong Kong) (Part 5)' <https://www.margaretthatcher.org/source/prem19/prem19-1054>..
[233] PO/84/6 in 'PREM19/1262, Hong Kong (Future of Hong Kong) (Part 11)' f289 <https://www.margaretthatcher.org/source/prem19/prem19-1262>.
[234] 'Department of Justice - Community Engagement - SJ's Blog - 20210130 Blog' <https://www.doj.gov.hk/en/community_engagement/sj_blog/20210130_blog1.html> accessed 4 April 2023.

'resume' reflected the traditional CCP's view on 'unequal treaties', in which the sovereignty of Hong Kong had never been lost and thus, there was no transfer of Hong Kong sovereignty under the Joint Declaration.[235] Article 2 provided a contradicting declaration from the UK that it will 'restore Hong Kong' to China on 1 July 1997. The use of the word 'restore' suggested retrocession of Hong Kong from the UK to China on 1 July 1997, which was contrary to the PRC's claim earlier.[236] Regardless of the different views on the legal qualification of the Handover, it was agreed in article 4 of the Joint Declaration that, before 1 July 1997, 'the Government of the [UK] will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the [PRC] will give its co-operation in this connection.' Contrary to the PRC's legal position on the non-recognition of 'unequal treaties', the Joint Declaration provided a legal basis for British colonial rules from 1984 to 1997 for another 13 years, upon the expiry of the original New Territories Lease, and mandated a reciprocal duty from the PRC to co-operate with the UK to preserve prosperity and stability in Hong Kong.

From this angle, although the Joint Declaration successfully revised the permanent cession of Hong Kong Island and the Kowloon Peninsula under the Treaty of Nanking in 1842 and the Convention of Pekin in 1860, it had tacitly confirmed the validity of the New Territories Lease in 1898. Therefore, the Joint Declaration of 1984 cannot be seen as a successful example in the application of the Chinese 'unequal treaties' doctrine. Rather, the underlying illegitimacy of the 'unequal treaties' was utilized by the PRC to (1) isolate the UK if it decided to openly defend the validity of the three unequal treaties before the UN; (2) highlight the PRC's resolve to restore its legitimate rights, with military actions as a last resort, if the UK refused to reach an agreement with the PRC within the 2 years as imposed by Deng Xiaoping; and (3) legitimize the denial of self-determination in Hong Kong. The use of 'unequal treaties' by the PRC not as a legal but as a legitimacy discourse, supported by the PRC's threat of 'unilateral solution' within 2 years, eventually forced the UK into accepting a political solution that recognized its colonial rules for another 13 years in exchange for a peaceful 'handover' on 1 July 1997.

## 5. Self-determination as an exception to intertemporal law?

In recent years, there have also been increasing calls amongst international legal scholars to

[235] Jacques Delisle, 'China's Conception of Law for Hong Kong, and Its Implications for the SAR and US-PRC Relations' [1998] Harvard Asia Quarterly 8, 22.

[236] 'OD(K): Strategy in Negotiation', Secret, B.06733, A. D. S. Goodall to Prime Minister, c. Sir Robert Armstrong, 2 May 1984 in 'PREM19/1265, Hong Kong (Future of Hong Kong) (Part 14)' <https://www.margaretthatcher.org/source/prem19/prem19-1265?w=PREM191265&page=2&startDate=&endDate=&sort_by=field_date&sort_order=ASC&&&&order=field_title_value&sort=desc>.

confront the colonial past of international law and to consider what remedy could the 'post-colonial international law' offer.[237] One suggestion was the recognition of certain limits to the application of the intertemporal rule.[238] According to the doctrine of intertemporal law, the legality of the act must be judged by the rule at the time it occurred.[239] In this regard, there was an attempt to reconcile the PRC approach to 'unequal treaty' by viewing the legality of the 'unequal treaties' in present light. For example, instead of arguing that the three 'unequal treaties' were *void ab initio*, Lim suggested that it was the application of an exception to intertemporal law which affected the continuing enjoyment of rights in Hong Kong by the UK. In this regard, Lim argued that 'the continued enjoyment of international rights should conform to the subsequent post-colonial evolution of international law. It is that which explains the removal of Hong Kong from the list of non-self-governing territories; namely, the emergence of a principle of self-determination against colonial rule. Hong Kong was removed not because it had become self-governed but because China is.'[240]

Lim's argument essentially involves the modification of the rule as laid down in the famous *Island of Palmas* arbitration, which required that 'a juridical fact must be appreciated in the light of the law contemporary with it.'[241] Admittedly, the exception to intertemporal law is not a recent invention. Lauterpacht suggested in 1933 that '[i]n certain cases rights may cease to be effective as the result of the development of new rules of law attaching conditions of the continued validity of these rights.'[242] Relying on Lauterpacht's idea, Wheatley argued that during the transition between old and new custom, the new rule must be applied from the moment of its crystallization, as identified from the benefit of hindsight:[243] 'Following the crystallisation of the right of peoples to self-determination, valid title could only be maintained where the population agreed to the continuing exercise of sovereign power, and any change in the administrative boundaries of the colonised territory was only valid with the free and genuine consent of the people concerned.'[244] The possibility of newly evolved peremptory norms as a limit to the *Palmas*' intertemporal rule was similarly confirmed by Judge Ranjeva in the ICJ case of *Cameroon v Nigeria*.[245] Relying on this opinion, Stahn

[237] Carsten Stahn, 'Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?' (2020) 33 Leiden Journal of International Law 823.
[238] ibid 833.
[239] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion* (n 197) para 140.
[240] Lim (n 187) 263.
[241] *Island of Palmas (Netherlands v USA)* [1928] 2 RIAA 829, 845.
[242] Hersch Lauterpacht, *The Function of Law in the International Community* (1st pbk. ed, Oxford University Press 2011) 291.
[243] Steven Wheatley, 'Revisiting the Doctrine of Intertemporal Law' (2021) 41 Oxford Journal of Legal Studies 484, 25.
[244] ibid.
[245] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002* ICJ Rep 2002 303 (ICJ) Separate Opinion of Judge Ranjeva, at para. 3.

argued that certain exceptions to the intertemporal rule could be recognized to avoid international law from further perpetuating colonial injustice. Stahn's suggestion arguably seeks to extend the *Radbruch* formula in the German domestic system to international law.[246]

Applying the evolving custom of self-determination as recognized by the *Chagos* Advisory Opinion,[247] it is clear that the UNGA rules on self-determination were binding and must be applied in Hong Kong since 1960. As a result, British territorial rights in Hong Kong during the 1980s must also be interpreted according to the norm of self-determination. The suggestion that the continued enjoyment of colonial rights may be subjected or limited by subsequently emerging peremptory norms was foreseen by the drafting of the VCLT.[248] Article 64, for example, stipulates that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.' However, compared to Article 53, the operation of Article 64 'does not void ab initio treaties conflicting with jus cogens, but only prohibits their future existence or performance.'[249] This reading was further supported by Article 71(2)(b), which stipulated that the termination of a treaty under Article 64 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.' Applying Article 71(2)(b) of the VCLT to the situation of Hong Kong, it would mean that, while the cession of Hong Kong Island and the Kowloon Peninsula would be unaffected as territorial right *created* prior to 1960, the exercise of the right of administration over the New Territories, being a continuous right under the lease of the New Territories signed in 1898, would only be maintained to the extent that it was not in conflict with self-determination. This position was in contrast to the strict application of the intertemporal rule as argued by UK's chief legal advisor Sir Ian Sinclair in 1983: 'the fruits of conquest before 1928 were entirely legitimate', 'there was no peremptory norm against

[246] Stahn (n 237) 833.

[247] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion* (n 197) para 140.

[248] 'The Right to Self-Determination - Implementation of United Nations Resolutions, UN Doc.E/CN.4/Sub.2/405/Rev.1 (1980)' 72; 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10' 112; International Law Commission, 'Conclusions of the Work of the Study Group on Fragmentation of International Law, UN Doc. A/61/10, Para. 251' para 33 <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf>; The ILC has consistently identified self-determination as one of jus cogens, despite the absence of its explicit recognition by the ICJ, see Dire D Tladi, 'Fourth Report on Preemptory Norms of General International Law (Jus Cogens) 2019, UN Doc. A/CN.4/727' paras 108–115 <https://digitallibrary.un.org/record/3798216/files/A_CN.4_727-EN.pdf?ln=en>.

[249] T O. Elias, 'Problems Concerning the Validity of Treaties (Volume 134)', *Collected Courses of the Hague Academy of International Law* (Brill) 393 <http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/problems-concerning-the-validity-of-treaties-volume-134-A9789028603523_05>.

colonial rule.'[250]

However, the problem is precisely how we understand what the right to self-determination entails and who is the subject of self-determination. Lim's argument was partly based on the interpretation of self-determination as a right to result, which is in his own words, 'a right against colonial rule.' Lim's view was consistent with the PRC's understanding of self-determination as a right to a result, namely independent statehood directed solely against European and Japanese colonialism.[251] The other part was based on the denial of the 'peoplehood' of Hong Kong based on the delisting of Hong Kong from the Chapter XI List of Non-Self-Governing-Territory.[252] Lim's first view on self-determination was inconsistent with the practices of the UNGA since the late 1960s, which began to emphasize the right as a 'freedom of choice' rather than merely a right to independence. Wheatley, who argued in favor of a progressive interpretation of the continued enjoyment of colonial rights, interpreted the application of intertemporal customary law by the ICJ in *Chagos* as meaning that 'valid title could only be maintained *where the population agreed* to the continuing exercise of sovereign power.' [253] In other words, even if self-determination was recognized as an exception to the application of the intertemporal rule, it did not give any right to the pre-colonial state to recover colonial territory without at least seeking valid popular consent to the territorial cession. With regards to the entitlement to self-determination, it is highly doubtful if the application of intertemporal law would also apply to the extent which negates the fact that a distinct population had emerged under colonial rule. In fact, the ACHPR, a court that has consistently emphasized the right of self-determination as an anti-colonial right, acknowledged the separate peoplehood of the South Cameroonians resulted from British colonization.[254] In other words, even if past colonial conquest was seen as a mistake and must be rectified, the emergence of a separate collective identity, even as a result of such colonial wrongdoing, must be preserved and respected by international law.

Lastly, it is important to emphasize that, while China has been subjected to a series of unfair imposition of extraterritorialities, it has remained an independent state even at the apex of 'the Century of Humiliation'. There is no doubt that China has consistently been self-governing although one could challenge its degree of independence from the Great Powers. Lim's proposition that a colonial territory could be decolonized not based on the achievement of self-government within such territory, but the fact that it was achieved

[250] Telegram number 539 of 21 September in 'PREM19/1057, Hong Kong (Future of Hong Kong) (Part 8)' f178 <https://www.margaretthatcher.org/source/prem19/prem19-1057>.
[251] Anonymous, 'China and the Principle of Self-Determination of Peoples' (2010) 6 St Antony's International Review 79, 84.
[252] Lim (n 187) 262 at fn 73.
[253] Wheatley (n 243) 25.
[254] *Mgwanga Gunme v Cameroon* [2009] Comm 266/2003, 26th ACHPR AAR Annex (ACPHR) [178, 179].

elsewhere, defeats the essence of self-determination as a right exclusively held by the people of the colonies. While one could of course point out the specific nature of Hong Kong, in which over 90% of the territories were held by the UK on leasehold only, UNGA Resolution 1541(XV) did not distinguish Non-Self-Governing Territories based on the nature of legal titles held by the administrating power. Rather, focusing on the nature of 'arbitrary subordination', cogent arguments could be made that self-determination also applied to leasehold territories such as the Panama Canal Zone,[255] provided that a 'people' existed in such leased territory, as it did in the case of Hong Kong.[256] The focus on the consent of the colonized people is especially relevant considering the inherent danger of treating territorial dispute solely as a problem of the validity of the underlying 'unequal treaties', an approach which risked completely overlooking the genuine will and wish of the inhabitants in those territories concerned.[257] One could question whether any revision of 'unequal treaty', without taking into account the consent of the most affected party, could be regarded as a just outcome of rectifying a moral wrong in the past.

## 6. Conclusion

In Chinese, legality and legitimacy are both translated as 合法性. Similar to the denotation of law as *Recht* in German, *droit* in French, or *diritto* in Italian, the interchangeability of legality and legitimacy in the Chinese language reflects a quasi-naturalist understanding amongst the Chinese speakers that law in and of itself carries inherent moral appeals. In this regard, the Chinese ambiance toward international law could be traced back to the Sino-West encounter in the 19th century, in which treaties were used to justify the plunders and exploitation of Western powers against the Chinese people.[258] The doctrine of 'unequal treaties' arose precisely from this background of injustice and humiliation, in which international law was seen by the Chinese audience as not only failing to deliver the promise of justice and fairness but also acting as the tools of imperialist powers to subjugate the Chinese civilization as inferior to its western counterpart. China's historical experiences in the 19th century still contribute to many of its contemporary suspicious toward the Eurocentric character of international law, given its historical contribution to the injustice suffered by the Chinese Nation.[259]

[255] John Major, '"Pro Mundi Beneficio"? The Panama Canal as an International Issue, 1943-8' (1983) 9 Review of International Studies 17, 27.
[256] This view is supported by both the International Commission of Jurists, 'Countdown to 1997: Report of a Mission to Hong Kong' (International Commission of Jurists 1992); Nihal Jayawickrama, 'Hong Kong: The Gathering Storm' (1991) 22 Bulletin of Peace Proposals 157, 159; McCorquodale (n 195) 293; Petersen (n 176) 891–893.
[257] See International Commission of Jurists (n 256) 2.
[258] d'Aspremont and Zhang (n 2) 911–912.
[259] ibid 917.

Despite its strong moral appeal, neither the Chinese nor the Soviet doctrine of 'unequal treaties' was accepted in state practices. Compared to the invocation of inequality as a ground for treaty revision by the Pekin government and the KMT, the CCP considered 'unequal treaties' as void *ab initio*. Although the connection between the validity of treaties and the existing territorial regimes was explicitly rejected by Article 70(1)(b) of the VCLT, the example of Hong Kong was sometimes invoked by the PRC as a limited example supporting the claim of territorial revision based on 'unequal treaties'. As this paper shows, the delisting decision of Hong Kong and Macau at the UNGA and the Sino-British Joint Declaration did not demonstrate sufficient acceptance of the Chinese 'unequal treaties' by states other than the PRC and the Soviet bloc. It remains highly doubtful whether any subsequent evolving norm of international law supported the PRC's position either. Unlike the ICJ in the *Chagos Archipelago*, which enjoyed the benefit of hindsight over the crystallization of self-determination from 1960 to 1970, there was no sign of emerging custom that will invalidate the 19th century 'unequal treaties'.[260] Antony Anghie, who was sympathetic to the doctrine, equally doubted whether the doctrine was supported by sufficiently widespread and consistent state practices.[261] Thus, it is unlikely that developing states will be able to utilize the 'unequal treaties' doctrine, even as against the PRC, when such doctrine has failed not gained sufficient recognition in international law.

Arguably, the Chinese allegation of 'unequal treaties' doctrine was not so much about whether the treaties themselves were unequal, but rather the overall circumstances leading to the signing of the treaties, namely the Century of Humiliation, were unjust. The invocation of fairness, justice, and equity, by the Chinese scholars, thus resembled a progressive 'Utopia', in which *principles* of international law were invoked to challenge the colonial *status quo*.[262] This was contrasted with the British reliant on the doctrines of intertemporal law and *pacta sunt servanda* as 'Apology'. The same 'Apology' and 'Utopia' dichotomy is seen in the Sino-British negotiation. However, the presence of the binary and opposing linguistic structure did not mean the solution has to be at the end of either spectrum. The indeterminate nature of the legal problem simply meant that a political solution, justified by extra-judicial factors, had to be taken to resolve the issue. [263] Instead of applying the Chinese 'unequal treaty' doctrine, the ultimate solution to the Hong Kong Question was essentially political, with the conclusion of a treaty encapsulated a disagreement on the validity of the 'unequal treaties' by both parties.

[260] Cf Wheatley (n 243) 506–507.
[261] Anghie (n 13) 73 at fn 121.
[262] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 58–62.
[263] ibid 8, 12.

However, the danger of recognizing this 'legitimacy discourse' as a legal doctrine lies precisely in its presumption that only states were treated as relevant in redressing colonial injustice. For example, in the case of Hong Kong, the PRC's success in overturning the 'unequal treaties' could even be seen as an imposition of another 'unequal treaty' to the Hong Kong people, who were denied a right to determine the future of their territory. The crux of colonial injustice, being the outright denial of marginalized peoples of their right to be treated as equal subjects in diplomatic negotiations, could still be re-perpetuated. Therefore, instead of upholding automatically a claim of a pre-colonial state to reclaim colonial territories as an imposed solution, it is argued that any continuation of colonial status or enjoyment of colonial rights should be decided with the involvement of the peoples concerned. In this regard, it is argued that the best cure for the deep disappointment and resentment that resulted from the unfulfilled promise of Wilson's Fourteen Points in 1919 is precisely to recognize again the right to self-determination in territorial settlements: With the support of repeating ICJ advisory opinions and important UNGA Resolutions, self-determination in the UN era not only provided the principles but also the practices of UN-supervised referenda in which any continued enjoyment of colonial rights could be determined on an open, informed, and democratic basis. This paper argues that the appropriate way to address colonial injustice in the 21st century is to take into account not only the interests and historical grievances of 'empires' and 'states', but also to treat the needs, wishes, and rights of the 'peoples' as paramount.