The Post-War International Order with Chinese Characteristics and the "Enemy State" Clauses of the United Nations Charter

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The Post-War International Order with Chinese Characteristics and the “Enemy State” Clauses of the United Nations Charter

History shall not be altered with the passing of time, and facts not erased by crafty denial.

Xi Jinping

Eisuke Suzuki*

China’s recent propaganda against Japan is not so much directed at the rest of the world as at the Chinese audience at home. The leadership of the Chinese Communist Party (CCP) needs to maintain the myth that the CCP defeated the Japanese Imperial Army to perpetuate the monopoly of power by the CCP. The absence in China of freedoms of thought, expression, assembly and association, all prerequisite for democracy, allows the CCP leadership to train and mold Chinese people to the thought pattern designed by it.

The CCP leadership keeps denouncing Japan’s past acts that took place before the post-war international order was established by the United Nations. It is too preoccupied with the ghost of Japanese “militarism” to appreciate the fundamental change of Japanese society that has taken place since 1945. To correct its own story of the bogeyman of Japanese militarism would threaten the “legitimacy” and “authority” of the CCP leadership that it has so carefully crafted, and the “enemy state” clauses of the UN Charter is a great help.

In the name of “the realization of the Chinese dream of the great national renewal” as part of its efforts to maintain power, the CCP leadership has embarked on a fantastic campaign for territorial acquisition in the East China Sea and the South China Sea in complete disregard of the post-war international order. China is expected to conform to international law, an essential tool to mediate between different civilizations and cultures.

Key Words: Post-war International Order, the United Nations Charter, “Enemy State” Clauses, the UN Convention on the Law of the Sea, Territorial Acquisition

I. Introduction

China’s recent propaganda campaigns against Japan are extraordinary. They have been carried out systematically and deliberately in concerted efforts by government agencies around the world. Foreign Minister Yang Jiechi remarked in March 2013, “The current situation has been caused by the Japanese side single-handedly,” regarding the tension surrounding the Senkaku Islands, “the root cause” of which, he charges, “lies in Japan’s illegal seizure and occupation of China’s territory.” He calls it “a challenge to the outcome of the victory of the Second World War.”

The core issue of these campaigns is about “post-war international order”. President Xi Jinping often remarked on “the outcome of the victory of the Second World War and the post-war international order” in his numerous speeches in 2014. Ambassador Liu Jieyi to the United Nations also...
spoke of “the post war international order” created by the United Nations Charter in his speech at the Security Council on 29 January 2014.3

All anti-Japan propaganda is tirelessly repeating that Japan is attempting to “distort,” “deny,” “challenge,” or “reverse” the world order established after World War II, and so Chinese propaganda machinery appeals to the rest of the world that “the outcome of the Second World War” and “the victory of the anti-fascism war” must be protected and safeguarded. Such appeal seems to be intended to remind the United States that China and the United States were allies in their war against Japan and woo the United States to recognize China’s “major-country relationship with the United States.”4

These relentless Chinese attacks on Japan bewilder us. Defeated at the war, we lost our pride and spirit as a nation, and have been resigned to accept the U.S.-made Constitution that says “we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world.”5 Since then, being placed, in effect, under the protectorate status of the United States that won the war, we are accustomed to being subject to the authority and power of the United States. In the meantime, we have supported the United Nations by providing an enormous amount of financial contributions in safeguarding and promoting the post-war international order.

Given that, it seems what Chinese leadership refers to as the “post-war international order” in the propaganda and what Japanese understand it to be are two different things. What does China really mean by “post-war international order”? Let us consider it in some detail below.

II. The U.N. Charter and the “Enemy State” Clauses

The U.N. Charter came into the present form through two different stages: it was based, first, on “Proposals for the Establishment of A General International Organization” adopted at the 1944 Dumbarton Oaks Conference in which the representatives of the United States, the United Kingdom, the Soviet Union and the Republic of China participated;6 and subsequently, the Dumbarton Oaks Proposals went through rounds of discussions, negotiations, and revisions at the United Nations Conference on International Organization, which was held between 25 April and 26 June 1945 and in which 50 states participated.7 It should be remembered that both the Dumbarton Oaks Proposals and the United Nations Charter were drafted and finalized well before Japan surrendered. The United States, the United Kingdom and the Soviet Union decided on post-war world power relations and the basic structure of what was referred to as the “World Organization” at the Yalta Conference held from 4 to 11 February 1945. These three states also decided at Yalta who should be allowed to participate in the San Francisco conference that would prepare a “Charter of the United Nations,” which would, in turn, shape the structure of “the post-war international order.” Those states that were invited to take part in the Conference were “(a) the United Nations as they existed on 8 Feb., 1945; and (b) Such of the Associated Nations as have declared war on the common enemy by 1 March, 1945.”8 It is thus obvious that “the post-war international order” Ambassador Liu Jieyi referred to was the world order system designed by Four Big Powers. In fact, it was done, more precisely, by the United States,
the United Kingdom, and the Soviet Union since the participation of the Republic of China was marginal and perfunctory without any effective contribution to the Proposals. Moreover, the Republic of China was absent from the Yalta Conference in February 1945, which was the most important conference of all. The Charter of the United Nations was thus finalized and signed on 6 June 1945 by all those states that declared war on the Axis powers.10

Article 4(1) of the U.N. Charter is illustrative. It stipulates that “Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter . . . [emphasis added].” It is presumed that those states which participated in the San Francisco Conference and signed the U.N. Charter were peace-loving states because they declared war against the Axis Powers.11 The concept of “peace-loving states” was first introduced in the Dumbarton Oaks Proposals. Chapter II, paragraph 1 provided: “The Organization is based on the principle of the sovereign equality of all peace-loving states.”12 The U.N. Charter also derived in part from the Atlantic Charter issued by President Roosevelt and Prime Minister Churchill on 14 August 1941, which set forth eight “common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.” The first three principles were as follows:

1. Their countries seek no aggrandizement, territorial or other.
2. They desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.
3. They respect the right of all peoples to choose the form of Government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.

With respect to the third principle, a certain change was introduced at the Yalta Conference. The Protocol of Proceedings of Crimea Conference provides: “This is a principle of the Atlantic Charter— the right of all peoples to choose the form of government under which they live— the restoration of sovereign rights and self-government to those peoples who have been forcibly deprived of them by the aggressor nations.”14 By inserting the new phrase, “by the aggressor nations,” to the Atlantic Charter’s original phrase, “the restoration of sovereign rights and self-government to those peoples who have been forcibly deprived of them,” the Yalta conference limited the range of “peoples who have been forcibly deprived of” sovereign rights and self-government only to those peoples whose sovereignty and self-government were deprived of by “the aggressor nations.” In short, the Yalta conference in effect agreed that sovereign rights and self-government would not be restored to those peoples who were deprived of them by “peace-loving states,” i.e., any member of the “United Nations.”15 Accordingly, they acquiesced in the French and the Dutch attempts to re-colonize Indochina and Indonesia, respectively, after Japan lost the war, and in the Soviet Union’s incorporation, and iron-fist rule, of Eastern European nations. As President Roosevelt candidly remarked in his address to Congress on 1 March 1945, “The final decisions in these areas are going to be made jointly; and therefore they will often be a result of give-and-take compromise.”16 In other words, there are two different sets of rationales and criteria applicable separately to the victors and the vanquished of World War II.

When these historical developments are taken into account, we understand clearly the reason for the “enemy state” clauses in the Charter of the United Nations. Articles 53 and 107 read as follows:

III. China’s Conduct and the Post-War International Order

It is hard to appreciate exactly what the leadership of the Communist Party of the People’s Republic of China understands by the phrase “the post-war international order” as the officials merely harp on the same slogan-like phrases, and not giving us any specific examples. What I suggest to do is to examine Japan’s post-war conduct on the basis of principles flowing from the Atlantic Charter, through the Dumbarton Oaks Proposals and the Yalta Agreement to the Charter of the United Nations, which all constituted “the post-war international order.” Of these principles, the following are noteworthy: sovereign equality, the prohibition of the threat or use of force, territorial integrity, political independence, non-interference in domestic affairs, equal rights and self-determination of peoples, human rights and fundamental freedoms for all, the settlement of international disputes by peaceful means, the Security Council’s primary responsibility for the maintenance of international peace and security, the unanimity of major powers, regionalism, etc... Some of these principles are newly developed principles added to the traditional corpus of international law, which has governed the traditional international order, which includes freedom of the high seas, and freedom of navigation. As the post-war international order continues to regulate today’s international relations, we should also add the entirely new regime of the continental shelf and the Exclusive Economic Zone of the United Nations Convention on the Law of the Sea.18

Sovereign Equality: Japan became a member of the United Nations Organization in 1956, four years after the entering into force of the San Francisco Peace Treaty on 28 April 1952. Yet, the “enemy state” clauses have remained in the Charter of the United Nations in denial of sovereign equality. Nonetheless, Japan has been paying the second largest financial contribution to the U.N. Organization in accordance with the principle of capacity to pay. Japan’s share assessed at 10.833% for 2013-15 is next to the United States contribution assessed at 22%.19 (Japan used to pay 19.468% for 2004-06).20

In the case of the People’s Republic of China (PRC), the Communist government in Beijing of the PRC replaced the Nationalist government in Taipei of the Republic of China (ROC) in 1971 which had been representing “China” in the United Nations since 1945.21 The Nationalist government remained a member of the United Nations until 25 October 1971 even after Chairman Mao Tse-tung’s successful revolution against the Chang Kai-shek government in 1949. By automatic transfer of entitlement by change of representation, PRC became a permanent member of the Security Council and thus with veto power, the epitome of inequality of U.N. membership. These historical facts attest that there was little actual contribution by the Chinese Communist Party (CCP) to what President Xi Jinping calls “the outcome of

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17 In addition, there is Article 77 (1)(b), which relates to the disposition of “territories which may be detached from enemy states as a result of the Second World War” in connection with the trusteeship.
the victory of the Second World War and the post-war international order.”

When the ROC participated in some of these international conferences where the future structure of post-war world order was discussed, its participation was perfunctory or non-existent. And the CCP was busy fighting against the Nationalist government and being pursued by the Nationalist army. The Japanese Imperial Army was actually defeated by the Nationalist army which was aided by the United States and the United Kingdom as well as the Soviet Union, and not by the People’s Liberation Army of the CCP. Jung Chan and Jon Halliday’s Mao: The Unknown Story thus narrates:

Since then, history has been completely rewritten, and the world has come to believe that the CCP was more patriotic and keener to fight Japan than the Nationalists were – and that the CCP, not the Nationalists, was the party that proposed the United Front. All this is untrue.

President Roosevelt invited Generalissimo Chiang Kai-shek to Cairo in November and December 1943 over the objection of Prime Minister Winston Churchill because he grew increasingly concerned about the status of the ongoing conflict in China, and he not only became worried that China could give up its fight against Japan, but he also needed Chiang Kai-shek’s China to counter the presence of the United Kingdom and the Soviet Union after the war in Asia. That was the extent of China’s participation. Chiang Kai-shek was not invited either to Yalta or Potsdam.

The prohibition of the threat or use of force against the territorial integrity of political independence of any state: Thanks to its constitutional constraints as a pretext, the Japanese government had shirked away even from a call for participation by the Self-Defense Forces (SDF) in U.N. Peace-Keeping Operations until recently. Japan has not used a military fire power against any state since the end of World War II in 1945. The use of weapons by SDF personnel is significantly restricted as evidenced by the absence of a set of proper “rules of engagement” that is common among all armed forces of any country as part of global standards. Thus, the legal basis of the “use of weapons” for the SDF is essentially reduced to the rights of the individual, as incorporated in Article 36 (self-defense) and Article 37 (emergency evacuation) of the Japanese Penal Code. It concerns with the preservation of life and body of individual SDF personnel, and it is nothing to do with their authority and duties. The action taken under Article 36 or Article 37 of the Penal Code must, like any civilian citizen’s action, be subject to review and judgment of civilian judges as to whether the requirements of legitimate defense and emergency evacuation are properly fulfilled or not. Besides, paragraph 1 of Article 24 of the International Peace-Keeping Operations Cooperation Law provides that a person who is engaged in international peace cooperation work in a host country “may use small arms if it is deemed necessary and unavoidable to defend the life and body of oneself, his other co-workers at the work site, or any other persons who are under his supervision as part of his duty, and it is deemed reasonable and necessary to deal with the situation.” It means that the use of weapons under paragraph 1 of Article 24 has nothing to do with the duty entrusted to the SDF personnel. Also, paragraph 4 of Article 24 says that “the provisions of two preceding paragraphs shall be subject to the order of commanding officers present at the site, except when threat or harm to life and body is imminent, leaving no time for such an order.” With respect to the use of weapons, however, paragraph 6 of Article 24 essentially denies the raison d’être of the weapon by stipulating that except under the provisions of Article 36 or Article 37 of the Penal Code, “it shall not harm people.”

The use of weapons is thus extremely restricted as the conduct of the SDF is regulated by the Police Duties Execution Law as the SDF does not have

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22 President Xi’s speech, supra note 2.
28 Police Duties Execution Law (Law No. 136, 12 July 1948, as amended), Article 7 provides:

“A police officer may use his weapon in case there is reasonable ground to deem it necessary for the apprehension of a criminal or the prevention of his or her escape, self-protection or protection of others or suppression of resistance against the execution of his official duty within the limits judged reasonably necessary in the situation. However, he shall not inflict any injury upon any person except the case falling under the category of the provisions of Article 36 (Legal Defence) of the Criminal Law (Law No. 45, 1907) or of Article 37 (Emergency Refuge) of the same law, . . .”

Article 76 of the Constitution of Japan stipulates in part that “No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power. All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.” The Constitution of Japan, supra note 5.

Legally, therefore, the enormity of fire power at its disposal notwithstanding, the SDF is the same as the police force; every aspect of its competence is prescribed by domestic law, according to what is commonly referred to as “a positive list” and nothing can be done unless it is so empowered explicitly in a piece of legislation. The SDF is a make-believe military force!

Let us take a look at China’s case, i.e., the conduct relating to the People’s Republic of China since its establishment in 1949. The first breach of “the post-war international order” was the invasion of Tibet in 1950, and then, the outbreak of the Korean War in June 1950. The PRC’s role in the Korean War was significant, in that it sent combat troops ostensibly explicitly in a piece of legislation. The SDF is a make-believe military force!

The list can go on, without counting the invasions by proxy, i.e., these so-called home grown communist insurgencies that were said to be instigated and funded by China, of Malaya, Indonesia, the Philippines, Laos, and Cambodia. Never in the history of post-war international relations has any state been direct party to more conflicts in such a short span of time with its neighboring states than China. It is the People’s Republic of China that breached such basic international principles as the prohibition of the use or threat of force against the territorial integrity of states; and the principle of peaceful resolution of international disputes. These are the most fundamental principles of the post-war international order China speaks of. China’s unabashed claim that the South China Sea belongs to China by unilaterally drawing the Nine-dash Line has stunned the world. Such egregious claim is, as analyzed below in some detail, not only a total denial of basic principles relating to “territorial sea,” “maritime boundary delimitation,” and “high seas;” but also the violation of relevant provisions relating to “archipelagic States” (Article 46), “straight archipelagic baselines” (Article 47), “traditional fishing rights” (Article 51), to name a few, of the U.N. Convention on the Law of the Sea.

Moreover, the Chinese forcible control of Tibet and Xinjiang Uyghur denies equal rights and the right of self-determination of peoples. China that is a permanent member of the Security Council which has primary responsibility for the maintenance of international peace, is acting to the contrary and undermining the function of the Security Council from within.

President Xi Jinping recently claimed that “[i]t is not in the genes of the Chinese nation to invade other countries or seek world hegemony.” Yes, of course, Genghis Khan’s 100-year long Yuan Dynasty was Mongolian. The 270-year long Qing Dynasty was Manchurian. There is no wonder. Tibet, Xinjiang Uyghur, and Inner Mongolia do not belong to China.
But these past and present records as briefly enumerated above do not indicate that the same claim can be made of the leadership of the CCP. As a contemporary observer of The New York Times noted:

In the six decades since coming to power, China's Communist Party has devoted enormous resources to composing historical narratives that seek to legitimize its rule and obfuscate its failures... When it comes to China's ethnic minorities, the party-run history machine is especially single-minded in its effort to promote story lines that portray Uighurs, Mongolians, Tibetans and other groups as contended members of an extended family whose traditional homelands have long been part of the Chinese nation.36

Denial by China of “the post-war international order” is not confined to the conduct of international relations, but extends to the ruthless and forcible suppression by the military of ’89 Democracy Movement at Tiananmen Square on 4 June 1989. It epitomizes China’s denial of “human rights and fundamental freedoms” that touch on the nerve of the Communist Party leadership and squarely demonstrates China's disregard of international concern in favour of “domestic jurisdiction” under the pretext of the principle of “non-interference in domestic affairs.”37 As Mr. Liu Jieyi, Chinese Ambassador to the UN, said nonchalantly recently, “China is not a forum designed for involvement in human rights issues, and still less should human rights issues be politicized.”39 To him or the CCP leadership, for that matter, large-scale and gross violations of human rights in Tibet, Xinjiang Uyghur or Inner Mongolia, let alone Tiananmen Square, are not “issues that really concern international peace and security.”40

These events are current and present affairs, not like the atrocities committed by a brief aberration of Japan of 70-odd years ago. It is high time that the leadership of the CCP reflected on President Xi Jinping's statement: “[H]istory shall not be altered with the passing of time, and facts not erased by crafty denial.”41

How did Japan conduct itself in the pre-World War II era, in which Japan was a new player in the world arena? Here is an observation by Eliza Ruhamah Scidmore (1856-1928), an American writer, photographer and geographer, who became the first female board member of the National Geographic Society:

The manner in which the Japanese government cared for the 79,367 Russian prisoners of war, detained at twenty-seven military posts, during the long campaign in Manchuria was so strikingly in contrast to the way in which European nations had dealt with the same problem within the same half century, that it is a question for Peace Congress yet to debate whether the Japanese or the European way is right or best. Since the Russo-Japanese war, the Italian campaign in Tripoli, the war of the Balkan allies against Turkey, and the war between the allies themselves have presented the extremest contrast to the Japanese way. Christian Europe has proved itself, in these instances at least, still mediaeval if
not barbaric in the treatment of prisoners of war, despite the Geneva and Hague conventions.\textsuperscript{42}

Such honorable record of conduct that had continued through World War I to the 1920s was tarnished by atrocities committed by some elements of the same military in the course of its war against the Allied Forces. Even under such an aberrant period of oppressive fascism the Japanese diplomat Chiune Sugihara disobeyed his government’s orders and continued issuing visas in 1940 to allow 6000 Jews to escape from Nazis to Japan.

Recent remarks by Australian Prime Minister Tony Abbott on Japan attest to the conduct of its international relations in the post-World War II.\textsuperscript{43} “Japan should be judged on its actions today, not on its actions 70-odd years ago and Japan has been an exemplary international citizen in the post-war era,” said Abbott. Rather than focusing on the conduct of 70-odd year old past, he suggested, “These are the standards by which Japan should be judged … because Japan today is a radically different country than it was 70 years ago.” And he acknowledged, “At every step of the way since 1945 Japan has been a country which has acted in accordance with the rule of law.”\textsuperscript{44}

IV. The United States’ Betrayal of Japan’s Sovereignty of the Senkaku Islands

Why, then, is China relentlessly broadcasting anti-Japanese propaganda while concealing its own historical and present records of numerous breaches of principles of the post-war international order? On 27 September 2012 Chinese Foreign Minister Yang Jiechi made an outlandish statement on the status of the Senkaku Islands, which he referred to as “the Diaoyu Islands, as part of his speech at the U.N. General Assembly.\textsuperscript{45} As set out below, Mr. Yang’s obstinate factual presentation distorts the status of the Senkaku Islands, which form part of the Ryukyu (Okinawa) Islands. The Ryukyu or Okinawa Islands have never been part of mainland China nor Taiwan, and they were not discussed in connection with the conclusion of the Sino-Japanese War of 1895. Foreign Minister Yang said,

Japan seized these islands in 1895 at the end of the Sino-Japanese War and forced the then Chinese government to sign an unequal treaty to cede these islands and other Chinese territories to Japan. After the Second World War, the Diaoyu Dao islands and other Chinese territories occupied by Japan were returned to China in accordance with the Cairo Declaration, the Potsdam Proclamation and other international documents. By taking such unilateral actions as the so-called “island purchase”, the Japanese government has grossly violated China’s sovereignty. This is an outright denial of the outcomes of the victory of the world anti-fascist war and poses a grave challenge to the post-war international order and the purposes and principles of the Charter of the United Nations. The moves taken by Japan are totally illegal and invalid. They can in no way change the historical fact that Japan stole Diaoyu Dao and its affiliated islands from China and the fact that China has territorial sovereignty over them [emphasis added].\textsuperscript{46}

Mr. Yang’s use of the term “stole” must have come from the Cairo Communique which said that “all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China.” But none of the participants at the Cairo meeting signed the Communique, and the U.S. State Department’s official view is simple and unequivocal: “The Cairo


\textsuperscript{44} Ibid.


\textsuperscript{46} Ibid.
The declaration manifested our intention. It did not itself constitute a cession of territory.\(^47\) And Prime Minister Churchill, direct party to the Communique himself, testified that Formosa would not be returned to the People's Republic of China at one of sessions on 1 February 1955 of the Parliament and said that “The declaration contains merely a statement of common purpose.”\(^48\) Given these outright negation of the Communique, it is understandable that the Chinese government cannot help becoming concerned about the real effect of the Communique.\(^49\)

The Republic of China, then, was a member of the Security Council, and must have enjoyed countless opportunities in which it could have asserted its position on the status of the Senkaku Islands. Generally speaking, Chang Kai-shek himself took part in the Cairo meeting. There was no mention of the Ryukyu Islands, of which the Senkaku Islands are part. The following is the translation done by the U.S. State Department of the notes of the meeting between Roosevelt and Chang Kai-shek prepared by the Chinese counterpart:

The President then referred to the question of the Ryuku [sic] Islands and enquired more than once whether China would want the Ryukus. The Generalissimo replied that China would be agreeable to joint occupation of the Ryukus by China and the United States and, eventually, joint administration by the two countries under the trusteeship of an international organization.\(^50\)

The Ryukyu Islands were offered to Chang Kai-shek on a plate by Roosevelt, but the Generalissimo declined the offer by counteroffering the “joint occupation” of the Ryukyu Islands. Reluctance on the Generalissimo’s part was understandable because he knew that the Ryukyu Islands did not belong to China. Since then, the United States had been the sole and exclusive administrator of the Ryukyu Islands until the Ryukyu Islands were returned to Japan in 1972. It must be remembered that the United States acknowledged all along that Japan had residual sovereignty over the Ryukyu Islands.\(^51\)

The Nixon Administration deliberately created the problem of the Senkaku Islands by leaving the sovereignty of the Senkaku Islands out of the Ryukyu (Okinawa) Islands. The Nixon Administration did so by treating the sovereignty of the Senkaku Islands as being undetermined in order to appease the then-Republic of China’s government on Taiwan whose large textile exports to the U.S. were creating a serious problem for President Nixon’s southern strategy campaign for re-election in 1971.\(^52\) Also, at that time, the U.S. was secretly negotiating with the Communist government in Beijing for rapprochement and possible Nixon’s visit to Beijing.

The Nixon Administration’s utmost desire for the successful re-election campaign and historic United States rapprochement with Beijing necessitated it not to displease either the Communist government in Beijing which started claiming the Senkaku Islands for the first time in 1971 since the U.N. study indicated the probable presence of substantial energy deposits in the area around the Senkaku Islands or

\(^{47}\) U.S. Department of State./FRUS, 1951, Korea and China, The China area, at 1481; available at [http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=goto&id=FRUS.FRUS1951v07p2&page=1481&isize=text]


\(^{49}\) Chen Jia, “Major world powers urged to stick to Cairo Declaration terms,” 2 Dec. 2013, China Daily, USA; available at [http://usa.chinadaily.com.cn/world/2013-12/02/content_17143857.htm]

\(^{50}\) Roosevelt-Chiang Dinner Meeting, 23 Nov. 1943, 8 p.m., 5. Proceedings of the Conference, at 324; available at [http://images.library.wisc.edu/FRUS/EFacs/1943CairoTehran/reference/FRUS.frus1943cairotehran.0001.pdf]

\(^{51}\) Statement by President Kennedy Upon Signing Order Relating to the Administration of the Ryukyu Islands, 19 Mar. 1962: “I recognize the Ryukyus to be a part of the Japanese homeland and look forward to the day when the security interests of the free World will permit their restoration to full Japanese sovereignty;” available at [http://www.presidency.ucsb.edu/ws/?pid=9114]

\(^{52}\) See John Foster Dulles: “In the face of this division of allied opinion, the United States felt that the best formula would be to permit Japan to retain residual sovereignty, while making it possible for these islands to be brought into the United Nations trusteeship system, with the United States as administering authority.” John Foster Dulles’ Speech at the San Francisco Peace Conference, 5 Sept. 1951; available at [http://www.ioc.u-tokyo.ac.jp/~worldgeo/documents/texts/JPUS/19510905.S1E.html]


Doc. 133. Memorandum From the President’s Assistant for International Economic Affairs (Peterson) to President Nixon, 7 June 1971, para. 3(c); Foreign Relations of the United States, 1969-1976, Volume XXVII, China, 1969—1972, Document 133; available at [http://history.state.gov/historicaldocuments/frus1969-76v17/d133] The U.S. Government takes the same strange, self-serving position on the Philippines sovereignty of Scarborough Shoal which was ceded to the United States by Spain by the Treaty of Washington in 1900.
the Nationalist government in Taipei which claimed them likewise. Thus, the United States betrayed Japan by changing its long-standing recognition of Japan’s “residual sovereignty” over the Ryukyu (Okinawa) Islands which include the Senkaku Islands to the strictly neutral position that the Okinawa reversion treaty did not prejudice anyone’s claims to the “disputed” islands. That was a non-historical political concoction to serve the self-convenience of the time at the expense of Japan’s sovereignty.53

That is the origin of the Senkaku Islands problem. It does not make sense for the United States to perpetuate this fictitious election gimmick of 1971. Any question about the status of the Senkaku Islands must be answered in the context of Article 3 of the San Francisco Peace Treaty, which placed “Nansei Shoto, south of 29° North latitude (including the Ryukyu and the Daito Islands)” under the United States’ trust as “sole administrating authority.”54 It is obvious that the area includes the Ryukyu Islands, which in turn include the Senkaku Islands. That has been the consistent position of the U.S. government from Dean Acheson through John Foster Dulles to John F. Kennedy and Lyndon B. Johnson.

The Cairo Communique was, as the principal parties professed, nothing but the expression of common purpose, and as such, it bears no legal effect.

V. Ramifications of the “Enemy State” Clauses

As discussed above, it was the victors who called themselves “United Nations” of “peace-loving states” that established “the post-war international order.” And China is now acting as such with the “enemy state” clauses, referred to above, which allow any state responsible for action taken as a result of the war, to take enforcement action against any enemy state without the Security Council’s authorization. China’s reaction to Prime Minister Yoshihiko Noda’s remarks in 2012 at the U.N. General Assembly that “the Senkaku Islands are an inherent territory of Japan in light of historical facts and based upon international law,”55 attests to it. Chinese Foreign Ministry Spokesperson Qin Gang thus responded: “It is outrageous that a defeated country is now trying to occupy the territory of a victor.”56

For Japan that was party to the war as an “enemy state,” it is comforting and self-serving as well to talk about the death of the “enemy state” clauses and the absence of real legal effect of the “enemy state” clauses. As all former enemy states became members of the United Nations as “peace-loving states,” the term “enemy state” has lost its practical meaning.57 Nonetheless, only Article 107 is under Chapter XVII: Transitional Security Arrangements, and the designation of “enemy state” is not subject to any stipulations as to the conditions precedent to the expiration of the status of “enemy state” such as a time frame for conditions to be fulfilled or events to take place. In short, there is no condition that tells you when you will no longer be an enemy state.

The General Assembly’s resolution adopted on 11 December 1995 at the 50th session deals, in part, with the question of the deletion of the “enemy state” clauses.58 It recognizes “that, having regard to the substantial changes that have taken place in the world, the ‘enemy State’ clauses in Articles 53, 77 and 107 of the Charter of the United Nations have become obsolete,”59 but the resolution merely expresses “its intention to initiate” the amendment procedure set out in Article 108 of the U.N. Charter “by the deletion of the ‘enemy State’ clauses from Articles 53, 77 and 107 at its earliest appropriate future session.”60 Likewise, General Assembly resolution A/RES/60/1 of 16 September 2005 on “2005 World Summit Outcome” merely states that “we resolve to delete references to ‘enemy States’ in Articles 53, 77, and 107 of the Charter.”61 There is no binding effect in this provision, and the “enemy state” clauses remain there, and there are always

59 Ibid.
60 Ibid.
some people who will invoke them as China does surreptitiously today.62

Germany, another “enemy state,” entered into a treaty on the final settlement with respect to Germany with the United States, the United Kingdom, the Soviet Union, and France at the time of collapse of the “Berlin Wall” in 1990 and when the unification of East and West Germany was under way.61 Article 7 of the Treaty is significant, as set out below:

ARTICLE 7
(1) The French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadrilateral agreements, decisions and practices are terminated and all related Four Power institutions are dissolved.
(2) The United Germany shall have accordingly full sovereignty over its internal and external affairs.

With this Treaty, the effect of the “enemy state” clauses is understood to have expired with respect to Germany. Likewise, it is generally understood that a peace treaty between any of the United Nations, i.e., the victors, and the vanquished, will terminate the former’s right to take military measures against any “enemy state” without the Security Council’s authorization under Articles 53 and 107 of the U.N. Charter. Normally, peace treaties stipulate the prohibition of the use of force between the contracting parties to the treaties, and which directly bind them under the Treaty on Renunciation of War (the Kellogg-Brien Treaty) and international customary law.

Given the situation where the deletion of the “enemy state” clauses of the U.N. Charter is unrealistic, it would be more useful to seek to conclude bi-lateral treaties with major United Nations members with a view to terminating the rights and responsibilities relating to the “enemy state” clauses. The Japan and Soviet Union Joint Communique of 18 April 1991 provides that two parties confirm that the “enemy state” clauses have lost meaning.64 As for China, although the China-Japan Peace Treaty does not refer to the “enemy state” clauses, its Article 1 stipulates as follows:65

1. The Contracting Parties shall develop relations of perpetual peace and friendship between the two countries on the basis of the principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other’s internal affairs, equality and mutual benefit and peaceful co-existence.

2. The Contracting Parties confirm that, in conformity with the foregoing principles and the principles of the Charter of the United Nations, they shall in their mutual relations settle all disputes by peaceful means and shall refrain from the use or threat of force.

I believe nobody would object to the provisions of Article 1 of the Peace Treaty above. But, as mentioned earlier, the People’s Republic of China’s records abound in breaches of the basic principles of the post-war international order. It is pertinent to recall now what Hegel said: “The relationship between states is a relationship of independent units which make mutual stipulations but at the same time stand above these stipulations.”66 Whether or not these states’ treaties are observed, that is, whether or not “their rights are actualized” depends on “their own particular wills.” “Consequently,” concludes Hegel, “the universal determination of international law remains only an obligation, and the [normal] condition will be for relations governed by treaties to alternate with the suspension [Aufhebung] of such relations.”

So the ultimate question is what is “renewal of aggressive policy on the part of” an enemy state under Article 53 of the U.N. Charter. And who is

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62 “If Japan continues to blatantly violate the obligations of its unconditional surrender and the terms of the Potsdam Declaration, and attempts to revive its war machinery, it will forever be bound by the ‘enemy state’ clauses of the UN Charter and will never be accepted by people in China, Asia and the world. And its dream of acquiring a permanent seat in the UN Security Council will never be realized.” Pang Guoping, “Japan’s game will not succeed,” China Daily, 20 Aug. 2012; available at <http://www.china.org.cn/opinion/2012-08/20/content_26283167.htm>

63 Treaty on the Final Settlement with Respect to Germany, 12 Sept. 1990; available at <http://usa.usembassy.de/etexts/2plusfour8994e.htm>


67 Id. at §333, at 368 [emphasis added]
going to determine that such “renewal of aggressive policy” is undertaken by an “enemy state” to allow “measures against [such] enemy state” to be taken? Is it limited to “regional arrangements” or “regional agencies”? Is any member state of the United Nations not related to either such regional arrangements or regional agencies authorized to invoke the provisions of Article 53? There is, however, no specific provision dealing with any of these questions.

The second set of more serious questions relates to the duration of such measures being taken against the enemy state even though Article 53 stipulates “until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.” In the absence of the Government’s request, is the Security Council allowed to act on its own initiative to exercise “responsibility for preventing further aggression” by such enemy state? The United Nations’ practice would indicate that the Security Council has its own authority to act in taking charge of its primary responsibility for the maintenance of international peace and security by “preventing further aggression” by such an “enemy state.”

Yet, it is, after all, any member state of the United Nations that may determine, according to what Hegel referred to as its own “particular will,” when and how to act in taking measures against such “enemy state.”

Whether in the face of “armed attack” under Article 51 or “renewal of aggressive policy” under Article 53, a member state’s initial freedom of action does not require the Security Council’s authorization, and that freedom of action may continue until the Security Council acts on the matter in question. As the conflict continues on the battle ground, another battle for a Security Council decision begins inside the Security Council. There is one critical question regarding the provisions of Article 23, paragraph 3 which stipulates that “a party to a dispute shall abstain from voting.” Since no “action . . . taken or authorized . . . by the Governments having responsibility for such action” is precluded by the U.N. Charter under Article 107, would such measures taken by the Government concerned be subject to the Security Council’s deliberation and vote? There are many areas of controversy that need to be clarified as the past drags on into the 21st century.

VI. China’s Fantastic Claims for Territorial and Maritime Acquisition in the East China and the South China Seas

China abruptly incorporated the Senkaku Islands (which it calls Diaoyu Islands) within its Law on the Territorial Sea and the Contiguous Zone of 25 February 1992. Article 2 of the Law stipulates as follows:

The territorial sea of the People’s Republic of China is the sea belt adjacent to the land territory and the internal waters of the People’s Republic of China.

The land territory of the People’s Republic of China includes the mainland of the People’s Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People’s Republic of China [emphasis added].

The waters on the landward side of the baselines of the territorial sea of the People’s Republic of China constitute the internal waters of the People’s Republic of China.71

That provision is designed to characterize Japan’s effective control of the Senkaku Islands and its reinvigorated policy to reinforce its effective control in the Senkaku Islands as “renewal of aggressive policy” of Japan, an “enemy state”. It could be used as a pretext to capture the Senkaku Islands forcibly in accordance with Articles 53 and 107 of the U.N. Charter.

Aside from Japan’s Senkaku Islands, and the Penghu Islands and the Dongsha Islands clearly belonging to, and claimed by, Taiwan, all other islands named in the Law, i.e., Xisha (Paracel) Islands, the Zhongsha (Scarborough) Islands and Nansha (Spratly) Islands, are all subject to multiple territorial claims by any of neighboring states like Taiwan, Vietnam, the Philippines, Brunei, Malaysia or Indonesia. Furthermore, in May 2009 China sent two Notes Verbales to the UN Secretary General requesting that they be circulated to all UN Member

68  Ibid.
69  U.N. Charter, art. 27, para.3.
71  Id. at art. 2.

States. The 2009 Note Verbales included China’s unilateral declaration of the Nine-dashed Line that engulfed the entire South China Sea as China’s territorial sea. The 2009 Note Verbales stated the following:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.

But China’s claim that “China has indisputable sovereignty over the islands in the South China Sea” sounds like an oxymoron in the face of such claim being disputed by China’s neighboring States having equally competing claims over these islands.

In 2011 China sent out a third Note Verbale relating to the same subject matter, asserting that “China’s sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.” There have been a few different versions of the dashed line map produced by both the Republic of China and the People’s Republic of China, none of which was accompanied by any of geographic coordinates specifying the location of any of the dashes. China has not published that critical information to date.

Under international law, maritime boundaries are established by agreement between neighboring States, and Article 15 of the United Nations Convention on the Law of the Sea (LOS Convention), governing delimitation of the territorial sea between States with opposite or adjacent coasts, stipulates:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.

“The above provision,” continues Article 15, “does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.” Given the breadth of the territorial sea of a State is set “up to a limit not exceeding 12 nautical miles, measured from baselines,” any of the nine-dashes unilaterally proclaimed by China are all closer to the surrounding coasts of neighboring States than they are to the closest islands within the South China Sea. Such unilaterally proclaimed nine-dashed line is contrary to the provisions of the LOS Convention and customary international law. China understood it perfectly well. The 1958 Declaration on China’s Territorial Sea states:

This [12-nautical mile territorial sea] provision applies to all territories of the People’s Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas [emphasis added].

According to the 1958 Convention on the High Seas, the term “high seas” means “all parts of the sea that are not included in the territorial sea or in


74 The map referred to in China’s Notes Verbales is attached at page 2 of each of the Notes Verbales referred to in supra note 72


77 Id. at Article 15.

78 Ibid.

79 Id. at Article 2.

the internal waters of a state.”

The LOS Convention further refined the scope of the high seas to mean:

“all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.”

Thus, the reference in the 1958 Declaration on China’s Territorial Sea to “the high seas” separating China’s mainland and coastal islands from “all other islands belonging to China” underscores that “in 1958,” as Kevin Baumert and Brian Melchior concluded, “China made no claim to the entirety of the ocean space within the dashed line.”

Accordingly, China’s third Note Verbale claims, albeit unsurely, “abundant historical and legal evidence [emphasis added]” to justify its unilateral assertion of sovereignty over the vast area of the South China Sea. Nonetheless, evidence for such historic rights is nil. Besides, the LOS Convention recognizes only two places for historic claims: “historic bays” under Article 10 and “historic title” in connection with the delimitation of territorial sea boundary under Article 15. Nor do the LOS Convention’s provisions relating to the EEZ, the continental shelf, and the high seas contain exceptions for historic claims. Rather, the LOS Convention provides specific provisions governing activities in the sea. Except “traditional fishing rights” referred to in the context of archipelagic waters, the LOS Convention does not recognize a “traditional” or “historical” basis for sovereignty, sovereign rights or jurisdiction. As the judgment of the ICJ in the Gulf of Maine case stated, “[the Chamber] can only confirm its decision not to ascribe any decisive weight . . . to the antiquity or continuity of fishing activities carried on in the past” in these expanses that were part of the high seas.

Thus, the ICJ concluded that the LOS Convention prevails over whatever enjoyment other States had before the coastal States had set up exclusive 200-mile fishery zones. The ICJ thus observed, “Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones and of any position of advantage they might have been able to achieve within them.”

Given these circumstances, China’s foreign policy of late has been anything but contrary to China’s professed principles of its foreign policy. In the words of President Xi Jinping,

Disputes and differences between countries should be resolved through dialogue, consultation and peaceful means. We should increase mutual trust, and settle disputes and promote security through dialogue. Flexing military muscles only reveals the lack of moral grounds or vision rather than reflecting one’s strength.

But when it comes to implementing these principles, China has engaged in volatile confrontations with several neighbors over claims in the South China Sea, not to mention air and maritime incursions around the Senkaku Islands: confrontations with Vietnam over an oil rig constructed in disputed waters of the Paracel Islands; a naval stand-off with the Philippines over the Scarborough Shoal; escalation of disputes with all Southeast Asian countries over the Spratly Islands. China’s assertion sounds hollow:

We should urge upon all parties to abide by international law and well-recognized basic principles governing international relations and use widely applicable rules to tell right from wrong and pursue peace and development.

Accordingly, the Philippines filed its complaint


82 LOS Convention, supra note 76, at Art. 86.

83 Limits in the Seas, No. 143, Kevin Baumert and Brian Melchior, “China: Maritime Claims in the South China Sea,” at 12, (U.S. Dep’t of State, 5 Dec. 2014) [hereinafter “Limits in the Seas”].

84 Third Note Verbale, supra note 75.

85 LOS Convention, supra note 76, art. 47(b) and 51.


87 Id. at para. 235.

88 Ibid.

89 President Xi Jinping’s speech at “Five Principles of Peaceful Coexistence” Anniversary, 8 June 2014; available at <https://www.google.co.uk/?gfe_rd=cr&ei=nX68U63gFyR9geiz4HoBQ&gws_rd=ssl&q=xijinping’s+remarks+on+Five+Principles+for+Peaceful+COEXISTENCE&spell=1>.

90 Ibid.
against China over the legality of the Nine-dash Line for resolution by the Permanent Court of Arbitration. China reacted negatively accusing the Philippines of dragging China into arbitration proceedings. Asked about “a deadline” set by the Permanent Court of Arbitration to respond to the Philippines submission, China’s Foreign Ministry Spokesperson Hong Lei gave a cryptic reply: “China does not accept nor participate in the arbitration case filed by the Philippines. This position remains unchanged.” Subsequently, China issued its position paper on the case. China has always insisted that disputes should be “peacefully resolved through negotiations between the countries directly concerned.” The point here is patently obvious. It is China that is in a far stronger position, economically and militarily, and in a more advantageous position geographically, having more leverage than any other negotiating parties. Whether negotiations are bilateral or otherwise is irrelevant in this respect. And so China invokes the Declaration on the Conduct of Parties in the South China Sea, on which China places so much reliance, that stipulates at paragraph 4 as follows:

The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.

China insists that “with respect to all the disputes between China and the Philippines in the South China Sea, including the Philippines’ claims in this arbitration, the only means of settlement as agreed by the two sides is negotiations, to the exclusion of any other means.” That, I must say, is an overstatement by resorting to the question-begging Latinism *inclusio unius est exclusio alterius* [The inclusion of one is the exclusion of another]. Nowhere does any agreement to which the Philippines is party, be it bilateral or multilateral, state that it agrees to have peaceful settlement by only negotiations to the exclusion of any other means of peaceful settlement.

Moreover, China insists that the Philippines, or for that matter, ASEAN member States by implication, and China have agreed “to settle their relevant disputes by negotiations, without setting any time limit for the negotiations!” The absence of the specified time limit only means that such negotiations should be completed within a reasonable period of time. The settlement of disputes by negotiations does not require the parties to negotiate indefinitely while denying a party the option of concluding no settlement would be reached and to seek some other peaceful means of its own choice. Besides, the parties are under an obligation to negotiate in good faith.

President Xi insists that “there should be just one law that applies to all. There is no such law that applies to others but not oneself, or vice versa.” In this connection, I support the following statement of


95 Id. at 30.


97 Id. at para. 40.


99 See the Southern Bluefin Tuna case (Australia and New Zealand v. Japan), XXIII Reports of International Arbitral Awards, 4 Aug. 2000, at 43, para. 55.


101 President X’s statement, supra note 89
his policy:
Security should be universal. All countries have the right to participate in international and regional security affairs on an equal footing and shoulder the shared responsibility to maintain security both internationally and in various regions. We should champion common, comprehensive, cooperative, and sustainable security, and respect and ensure every country’s security. It is unacceptable to have security just for one country or some countries while leaving the rest insecure, and less should one be allowed to seek the so-called “absolute security” of itself at the expense of others’ security.102

Japan is coming out of a long post-war period of indulgence in minding its own business. Japan is coming of age as a normal country to “shoulder the shared responsibility,” to use President Xi’s phrase, in international and regional security affairs. As Prime Minister Shinzo Abe said,

Japan is now working to change its legal basis for security so that we can act jointly with other countries in as many ways as possible. . . . We want to make Japan a country that will work to build an international order that upholds the rule of law. Our desire is to make Japan a country that is all the more willing to contribute to peace in the region and beyond. It is for this reason that Japan has raised the banner of “Proactive Contribution to Peace.”103

Mr. Abe’s remarks befittingly echo President Xi’s statement:

As China develops, it will better play its role as a major responsible country. We will be more active in working to uphold world peace, advocate common, comprehensive, cooperative and sustainable security and commit ourselves to peacefully resolving disputes through consultation and negotiation. We will firmly uphold the UN-centered post-war international order and actively participate in UN peacekeeping missions and regional security dialogue and cooperation.104

China is, in the words of President Xi Jinping, “actively working towards building a new model of major-country relationship with the United States.”105 Ultimately, it seems China aspires to control the western half of the Pacific Ocean. At the present, China is in the process of establishing effective control within the First Island Chain, which stretches from southern Kyushu, through the Ryukyu archipelago, Taiwan, the Philippines, Borneo, Malaysia, and to the Strait of Malacca. It will encompass the Yellow Sea, the East China Sea, and the South China Sea. To that end, the control of the Senkaku Islands is indispensable. The recent declaration of an Air Defense Identification Zone (ADIZ) over a large portion of the East China Sea, which includes the Senkaku Islands, is a clear indication of this ultimate goal.106

China recently unveiled a new map showing the Ten-dash Line,107 which would potentially threaten freedom of navigation through the most important three straits in the south: the Strait of Malacca between Malay Peninsula and Sumatra, connecting the South China Sea and the Indian Ocean; the Sunda Straight between Sumatra and Java; and the Lombok Strait between the islands of Bali and Lombok, both connecting the Java Sea and the Indian Ocean. These three straits are strategically the most important controlling points of sea lanes connecting the Indian Ocean and the South China Sea. Also in the north, there are two important straits: the Bashi Channel in the Strait of Luzon between Taiwan and the Philippines; and the Miyako Strait between the Okinawa Island and the Miyako Island. These two straits in the north are for the Chinese People’s Liberation Army Navy to access the Pacific Ocean. For the first time in 2010 the PLA Navy transited through the Miyako Strait.108 Since then, the passage of the PLA Navy through the Miyako Strait has become an annual event for the Chinese naval

102 Ibid.
104 President X’s statement, supra note 35.
105 President X’s statement, supra note 89.
exercise in the Pacific Ocean, which is necessary for it to develop into a “blue-water” navy. Alarmed by these developments, Japan moved to take necessary measures.\textsuperscript{109} With the transit of the PLA Navy fleet through the Miyako Strait established as a routine manoeuvre, China is now positing itself to deal with the next hurdle, i.e., the Second Island Chain that runs from the Izu Islands through the Bonins Islands, Guam, the Marianas Islands, and the Caroline Islands to Papua New Guinea. The Bashi Channel in the Luzon Strait between Taiwan and the Philippines allows the PLA Navy fleet to return to the South China Sea without going back to the Miyako Strait, which is subject to Japanese surveillance.

It seems that all anti-Japan propaganda is designed to create a favorable environment for China’s eventual action against Japan to capture the Senkaku Islands in order to deny U.S. and Japan’s naval forces access to the East China Sea and to secure the PLA Navy’s access to the Pacific Ocean.\textsuperscript{110} The “enemy state” clauses are the ready-made provisions that China could invoke in the use of force against Japan as if such action would be in accordance with the U.N. Charter, But why is China expanding by force the acquisition of islands and territorial waters in such a vast area of the South China Sea in the name of “the realization of the Chinese dream of the great national renewal”?\textsuperscript{111} Hegel suggests an answer to the question: “nations [\textit{Nationen}] troubled by civil dissension gain internal peace as a result of wars with their external enemies.”\textsuperscript{112}

More fundamentally, however, with the Tiananmen Square Massacre of 1989 still fresh in its memory, I suspect that China is concerned with the implications of the dramatic territorial changes that took place in Europe and the Soviet Union 1989 and 1990. These changes have in effect “demolished part of the basis of the postwar settlement and the cold war.”\textsuperscript{113} Even though these changes themselves have not directly impacted East Asia yet, they will sooner or later, because the postwar territorial settlement about China, Russia, Japan and Koreas, not to mention the South China Sea, is equally “a regional expression of war settlement that can be compared across the globe.”\textsuperscript{114} China knows, for the first time in 70 years, that we are in a period when any of these States may redefine its position in the postwar international order. That is China’s major concern that must have prompted President Xi Jinping to pursue “the realization of the Chinese dream of the great national renewal.”\textsuperscript{115}

The brutal campaigns of the “Islamic State of Iraq and the Levant” (ISIL), the non-state-organization, for territorial expansion across state boundaries in the middle east indicates the same attempt to redefine the territorial boundaries drawn by the victors as a result of the postwar settlement, i.e., the Sykes-Picot Agreement between France and the United Kingdom (the Asia Minor Agreement of 1916).\textsuperscript{116}

\textbf{VI. International Law as an Essential Tool of Mediation}

China’s claims for acquisition of islands in the South China Sea are based on distorted facts and the self-serving interpretation of “archipelagic State,” “historic title,” “traditional fishing rights” for archipelagic States, the “straight archipelagic base line,” and other relevant provisions of the U.N. Convention on the Law of the Sea in such a manner as to suit the realization of “the Chinese dream of the great national renewal.” Such claims are contrary to “the Five Principles of Peaceful Coexistence” which President Xi himself considers “open and inclusive principles of international law.”\textsuperscript{117} Such open and


\textsuperscript{112} Hegel, supra note 66, at §324, 362.


\textsuperscript{114} Idid.

\textsuperscript{115} President Xi’s remarks, supra note 111.

\textsuperscript{116} \texttt{http://wwi.lib.byu.edu/index.php/Sykes-Picot_Agreement}

\textsuperscript{117} President Xi’s statement, supra note 89.
inclusive principles of international law will not support China’s unilaterally declared “core interests” at the expense of other people’s interests.\textsuperscript{118} China’s unilateral claims for territorial acquisition in the East China Sea and the South China Sea have curious correlations with mounting evidence of Chinese voracious appetite that is threatening the world’s species: shark fin\textsuperscript{119} and ivory.\textsuperscript{120} Most of their operations are undertaken in violation of international law. Moreover, recent massive poaching operations by over 200 fishing boats of red coral around the Bonin Islands, located 1000 kilometers directly south of Tokyo, seem to indicate that their activities were state-directed.\textsuperscript{121} Given these extraordinary China-centric behavior, it is no strange coincidence that China’s close allies in the past sixty years have all fell out with her and even waged war against her. The Soviet Union, Vietnam and Albania left long ago, and now Myanmar and North Korea are on the verge of their decision to leave the Chinese orbit.

Of course, today’s world is not the same as the world Hegel depicted two hundred years ago. Nor did international law remain static as described by him. Throughout history international law has developed to be an instrument to provide a common standard against which the conduct of international actors can be judged. Such common standard is the outcome of the process of inter-determination in an interacting, and interdependent world. As Myres S. McDougal and Harold D. Lasswell taught us long ago,\textsuperscript{122}

\begin{equation}
[A] \text{a legal order of inclusive scope can only exist into existence in a process of interaction in which every particular legal advance both strengthens a world public order and is in turn itself supported and strengthened by that order. The processes of law have as their proper office the synthesizing and stabilizing of creative efforts toward a new order by the procedures and structures of authority, thereby consolidating gains and providing guidance for the next steps along the path toward a universal system.}\textsuperscript{123}
\end{equation}

The post-war international order as reflected in the U.N. Charter itself is built, in part, on the principle of regionalism.\textsuperscript{123} Peoples of different regions characterized by their respective civilizations, cultures, religions, mores, etc. are interacting to maximize their preferred values. The process of inter-determination on a global scale has produced the Universal Declaration of Human Rights adopted by the U.N. General Assembly in 1948 as the universal “standard of achievement.”\textsuperscript{124} International law that has historically been used as a tool to mediate between different civilizations, religions and cultures now incorporates these human rights principles as part of the common standard of conduct.\textsuperscript{125} Respect for each other’s dignity and freedom of choice, commitment to dispute resolution by peaceful means, and minimization of coercion must underpin President Xi’s statement, “Hegemony or militarism is simply not in the genes of the Chinese.” It is neither befitting for, nor worthy of, China as the guardian and custodian of the rich tradition and profound heritage of a great civilization to invoke the “enemy state” clauses that are now commonly considered obsolete and inapplicable. ♥♥♥