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Hong Kong's Future: Can the People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty?

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Abstract

This Note analyzes the PRC's claim that, according to accepted principles of international law, it is justified in abrogating the Treaty of Nanking. The basis for the PRC's position is that the treaty is not reciprocal in its terms and is the product of coercion. Therefore, according to the PRC, the Treaty is unequal and nonbinding. The first part of this Note provides the historical background surrounding the conclusion of the Treaty of Nanking. Part II briefly defines the principle of *pacta sunt servanda* and examines problems that arise when the rule is applied to unequal treaties. Part III presents a two-part analysis of whether exceptions to *pacta sunt servanda* exist, and, if so, whether the Treaty of Nanking falls within the exceptions.

HONG KONG'S FUTURE: CAN THE PEOPLE'S
REPUBLIC OF CHINA INVALIDATE
THE TREATY OF NANKING
AS AN UNEQUAL TREATY?

INTRODUCTION

In 1898, Great Britain and Imperial China concluded a treaty¹ that leased to Great Britain an area constituting over two-thirds of Hong Kong.² The other third of Hong Kong³ had previously been ceded to Great Britain as a term of the Treaty of Nanking⁴ in the aftermath of the Opium War. The People's Republic of China (PRC) contends that when the lease terminates in 1997,⁵ the ceded area should also revert to the PRC's control.⁶ Private negotiations between the two countries are currently being conducted to determine the fate of Hong Kong and its inhabitants.⁷ The PRC has announced that an agreement must be reached with Great Britain by September 1984.⁸

This Note analyzes the PRC's claim that, according to accepted principles of international law, it is justified in abrogating the Treaty of Nanking.⁹ The basis for the PRC's position is that the

1. Convention Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Great Britain, 90 Brit. For. 17, 32 Martens Nouveau Recueil 89 [hereinafter cited as Lease].

2. N.Y. Times, May 16, 1983, at A2, col. 3. Hong Kong is composed of two separate areas: Kowloon, a peninsula attached to mainland China, and Victoria Island. *Id.* The island was ceded to Great Britain in the Treaty of Nanking, Aug. 29, 1842, China-Great Britain, 30 Brit. For. 389, 93 Parry's T.S. 465. Fifty years later, the lease was concluded to increase the area under British control, because the British believed "that an extension of Hong Kong . . . [was] necessary for the proper defence and protection of the Colony." Lease, *supra* note 1.

3. The other third of Hong Kong is Victoria Island. *See supra* note 2.

4. Treaty of Nanking, *supra* note 2.

5. *See* Lease, *supra* note 1.

6. Fuhman, *Hong Kong is Adjusting to the "1997 Jitters,"* Nat'l L.J., July 11, 1983, at 26, col. 1; *see Hong Kong is Chinese Territory*, Jen-min Jih-pao [JMJP], Aug. 20, 1967, in 1 PEOPLE'S CHINA AND INTERNATIONAL LAW 382 (J. Cohen & H. Chiu eds. 1974) [hereinafter cited as 1 PEOPLE'S CHINA]. The views expressed in JMJP may be taken to reflect the official policy of the People's Republic of China (PRC). *See Treaty Relations of the People's Republic of China: A Study in Compliance*, 116 U. PA. L. REV. 244, 249 (1967).

For a discussion of the PRC legislature indicating the PRC's intention to reclaim Hong Kong, *see* Dicks, *Position of Hong Kong & Macao in Recent Chinese Legislature*, 4 H. K. L.J. 151, 159-60 (1974).

7. N.Y. Times, Nov. 10, 1983, at A3, col. 4.

8. *Id.*

9. *See* L. CHEN, STATE SUCCESSION TO UNEQUAL TREATIES 29 (1974).

treaty is not reciprocal in its terms and is the product of coercion.¹⁰ Therefore, according to the PRC, the Treaty is unequal¹¹ and non-binding.¹²

The first part of this Note provides the historical background surrounding the conclusion of the Treaty of Nanking.¹³ Part II briefly defines the principle of *pacta sunt servanda*¹⁴ and examines problems that arise when the rule is applied to unequal treaties.¹⁵ Part III presents a two-part analysis of whether exceptions to *pacta sunt servanda* exist,¹⁶ and, if so, whether the Treaty of Nanking falls within the exceptions.¹⁷

I. HISTORICAL BACKGROUND

A. The Opium War

In the middle of the nineteenth century, Chinese silk and tea were commodities greatly desired by Westerners.¹⁸ British merchants, however, were unable to find a market in China for European commodities.¹⁹ This resulted in a large trade deficit for Great Britain.²⁰ To overcome this problem, British traders exploited the large Chinese market for opium.²¹ Their efforts, however, were thwarted by Emperor Chia-ch'ing's prohibition against opium

10. See Varma, *Unequal Treaties in Modern International Law*, 7 E. J. INT'L L. 56 (1975).

11. Summary Records of the 684th Meeting, [1963] 1 Y.B. INT'L L. COMM'N 67, 69, U.N. Doc. A/CN.4/156/Add.1/1963 (Statement by Mr. G. Tunkin, member of the Commission from the Soviet Union). The International Law Commission adopted the language used by the Afro-Asian Jurist's Conference in defining unequal treaties as "treaties establishing gross inequality between the obligations of the parties." *Id.*

12. See Varma, *supra* note 10, at 57.

13. See *infra* text accompanying notes 18-34.

14. See *infra* text accompanying notes 35-38.

15. See *infra* text accompanying notes 39-48.

16. See *infra* text accompanying notes 49-116.

17. See *infra* text accompanying notes 117-207.

18. J. POPE-HENNESSEY, *HALF-CROWN COLONY* 24 (1969).

19. *Id.* at 24-25.

20. I. HSU, *THE RISE OF MODERN CHINA* 220 (2d ed. 1975). From 1781 to 1790, 16.4 million taels of silver were brought into China; then from 1800 to 1810, the British paid 26 million taels as trade increased. *Id.*

21. *Id.* Before British merchants began importing Indian opium into China, the British paid for Chinese goods with silver. Thus, they were trading at a loss and currency was flowing into China. When British traders began importing opium, the trade deficit was eliminated, and the following year China suffered its first deficit. *Id.*

trading.²² British opium was confiscated and burned by the Imperial Chinese government.²³ The British became extremely frustrated by the unprofitable trading situation and their inability to obtain any concessions through diplomatic channels.²⁴ Consequently, Great Britain refused to recognize Chinese jurisdiction or financial domination.²⁵ The Opium War resulted. It began in 1839, and the more modern British force easily overcame the ill-equipped Chinese army.²⁶ In 1842, China and Great Britain ended the war and signed the Treaty of Nanking.²⁷

B. *Treaty of Nanking*

In effect, the Treaty of Nanking began the colonization of Imperial China.²⁸ The treaty was described as being "imposed on China at the mouth of the British fleet, and under the threat of an assault on the City of Nanking by British troops."²⁹ The treaty required China to open five ports for trade with Britain³⁰ and pay a large indemnity.³¹ It also imposed a fixed tariff³² and transferred Hong Kong "to be possessed by her Britannick Majesty, her Heirs,

22. W. TUNG, *CHINA AND THE FOREIGN POWERS* 19 (1970).

23. *Id.*

24. *Id.* at 21. For example, an Imperial Edict of 1757 restricted all trade to Canton. E. HOLT, *THE OPIUM WARS IN CHINA* 31 (1964).

25. E. HOLT, *supra* note 24, at 102; see W. TUNG, *supra* note 22, at 7.

26. See G. SCOTT, *CHINESE TREATIES 18-19* (1975); see also E. HOLT, *supra* note 24, at 21 (an analysis of the reasons behind China's lack of modernization).

27. W. TUNG, *supra* note 22, at 7. An in depth analysis of the factors surrounding the Opium war and Anglo-Chinese relations during this period is provided in G. GRAHAM, *THE CHINA STATION WAR AND DIPLOMACY 1830-60* (1978).

28. See G. SCOTT, *supra* note 26, at 19-21. A number of treaties subsequently concluded further eroded Chinese sovereignty. For an extensive analysis of the subsequent unequal treaties following the Treaty of Nanking, see W. TUNG, *supra* note 22, at 21-67.

29. G. SCOTT, *supra* note 26, at 19 (quoting H. MORSE, 1 *THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE* 49 (1910)).

30. Treaty of Nanking, *supra* note 2, art. II. The ports were Canton, Amoy, Foochow-foo, Ningpo, and Shanghai. *Id.*

31. *Id.* arts. IV, V, VI. The indemnity demanded of China consisted of Mex.\$6 million for confiscated opium. In addition, the British demanded Mex.\$12 million for expenses incurred during the war, and Mex.\$3 million for debts due to British subjects from Hong Kong merchants. *Id.* See generally J. CHESNEAX, M. BASTID, M. BERGERE, *CHINA FROM THE OPIUM WARS TO THE 1911 REVOLUTION* 65 (A. Destenay trans. 1976).

32. Treaty of Nanking, *supra* note 2, art. X.

and Successors.”³³ In exchange, Great Britain agreed that there would be peaceful relations between the two nations.³⁴

II. THE RULE OF PACTA SUNT SERVANDA

When states conclude a treaty they apply “a norm of customary international law, the rule *pacta sunt servanda*.”³⁵ This rule provides that treaties must be observed, or in other words, that they have binding force.³⁶ Without this rule, treaty-making would be a futile process because parties to treaties could evade their obligations without legal consequences.³⁷ Different views exist on whether *pacta sunt servanda* requires parties to strictly observe unequal treaties.³⁸

A. Traditional Policy

Nineteenth century writers believed that “[t]reaties were always to be observed under *pacta sunt servanda*.”³⁹ The policy reasons for validating all treaties, even those procured through military coercion, were twofold:

33. *Id.* art. III.

34. *Id.* art. I.

35. H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 456 (2d ed. 1962). The principle of *pacta sunt servanda* has been codified in article 26 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 8 I.L.M. 679 (1969), reprinted in U.N. Doc. A/Conf. 39/27 (1969) [hereinafter cited as Vienna Convention]. Article 26 states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention, *supra*, art. 26. For further discussion on the Vienna Convention, see *infra* notes 62-91 and accompanying text.

36. H. Kelsen, *supra* note 35, at 456.

37. See Keenton, *Extraterritoriality in International Law and Comparative Law*, 72 *RECUEIL DES COURS* 287, 352 (1948).

38. Compare H. Kelsen, *supra* note 35, at 179 (strict observance of treaties is required because the rule *pacta sunt servanda* is a norm of general international law that has permanent validity and is thus “beyond the scope of . . . limitation”) with S. Malawer, *IMPOSED TREATIES AND INTERNATIONAL LAW* 5 (1977) (rule against imposed treaties “functions as an exception to *pacta sunt servanda*”).

39. S. Malawer, *supra* note 38, at 18. The only qualification that has traditionally been accepted is when coercion is used against the representative of a state. *Id.* at 5 n.1. Nineteenth century writers emphasized the difference between procuring an agreement through coercion of an individual negotiating a treaty, and concluding a treaty through the coercion of a state. *Id.* at 16-17. The former was illegal while the latter was valid. See M. Bernard, *FOUR LECTURES ON SUBJECTS CONNECTED WITH DIPLOMACY* 184-85 (London 1868); T. Woolsey, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 162 (6th rev. ed. 1899).

First, the essential consideration was the need for a state to be able to ensure its survival by consenting to an agreement to prevent that state and its people from further destruction. Second, there was the need to ensure the observation of treaties by all states in the international community.⁴⁰

Although one of the fundamental principles of the national law of civilized people is that the conclusion of a contract must be voluntary on both sides, at least one scholar has noted that traditional international law fails to recognize this principle as applicable to peace treaties.⁴¹ In this regard, principles of national and international law are egregiously inconsistent.⁴² Historically, this inconsistency has been tolerated by the international legal community for the sake of fostering stable relations between nations.⁴³

B. *New Policy Considerations*

Recent evolution of international law has reflected state recognition that aggressive war-making leads toward the destruction of all nations' interest rather than the beneficial attainment of any single state's ends.⁴⁴ In 1945, article 51 of the Charter of the United Nations outlawed the use of military force in circumstances other than self defense.⁴⁵ Immediately, a logical inconsistency arose in international law. While aggressive military force was universally acknowledged as being illegal, treaties procured through the use of such force were not.⁴⁶ International legal scholars and states began to recognize that because war was illegal, treaties procured through

40. S. MALAWER, *supra* note 38, at 18-19.

41. H. KELSEN, *supra* note 35, at 464. Kelsen examines the significance of voluntary consent not being required to conclude peace treaties which "are among the most important treaties." He characterizes this facet of international law as primitive. *Id.*

42. *See id.*

43. *See* S. MALAWER, *supra* note 38, at 19; *cf.* U.N. Conference on the Law of Treaties, 2d Sess. (18th plen. mtg.) at 91, U.N. Doc. A/Conf. 39/11/Add.1 (statement by Mr. R. Binschelder, Delegate from Switzerland) [hereinafter cited as U.N. Conference].

44. *See* Tunkin, *The Principal Developments in International Law During the Course of the Last Half Century*, 24 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 1, 2 (1968). Tunkin traces the development of a rule against war-making from the Kellogg-Briand Pact, General Pact for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57, which was "the first multilateral treaty to prohibit aggressive war," to the Charter of the United Nations. *Id.*

45. U.N. CHARTER art. 51.

46. S. MALAWER, *supra* note 38, at 7-8.

military coercion should lack binding force.⁴⁷ The development of a rule which allows states to abrogate treaties in some circumstances involves the creation of an exception to *pacta sunt servanda*.⁴⁸

III. THE DEVELOPMENT OF AN UNEQUAL TREATY EXCEPTION

A. Does An Exception Exist?

1. Traditional Western Approach

When the principle of equality of states⁴⁹ emerged during the sixteenth century, the categorization of treaties as either equal or unequal also began.⁵⁰ The issue of unequal treaties was framed in moral rather than legal terms.⁵¹ Grotius defined unequal treaties as lacking reciprocity and imposing permanent or temporary burdens on one of the parties.⁵² Unequal treaties were characterized by Vattel as "those in which the allies do not reciprocally promise to each other the same things, or things equivalent."⁵³ Seventeenth and eighteenth century writers also recognized that treaties imposed upon nations defeated in a war were unequal.⁵⁴ All of these scholars acknowledged that unequal treaties were inequitable, but none suggested that such treaties lacked binding force.⁵⁵

47. See *infra* notes 68, 75-84 and accompanying text.

48. See S. MALAWER, *supra* note 38, at 5. For example, the rule against imposed treaties is an exception to *pacta sunt servanda*. *Id.*

49. See J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 122-26 (1977). According to Starke: "The doctrine of equality of States was espoused early in the modern history of international law by those writers who attached importance to a relationship between the law of nations and the law of nature." *Id.* at 122-23. Today the doctrine of equality of states has become increasingly important as a principle guiding the relations between states, as evidenced by the incorporation of the principle into the Charter of the United Nations. See U.N. CHARTER arts. 1, 2.

50. Varma, *supra* note 10, at 56.

51. See L. CHEN, *supra* note 9, at 28-29 (examining various classical approaches to the concept of unequal treaties, all of which posit the issue of unequal treaties in moral terms and do not question their legal validity); *but see* I. BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 495-96 (1966) (unequal treaties are a legal problem which warrant the invalidation of a treaty).

52. 2 H. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 394-97 (F. Kelsey trans. 1925).

53. E. DE VATTEL, *THE LAW OF NATIONS* 199 (J. Chitty trans. 1958).

54. See S. MALAWER, *supra* note 38, at 17-18.

55. See *supra* note 51 and accompanying text.

Nineteenth and early twentieth century writers rarely mentioned the issue of unequal treaties, although the conclusion of these treaties was a frequent practice.⁵⁶ Lawrence Oppenheim, while not employing the term "unequal treaty" directly, addressed the question of whether a treaty procured through military force is legally binding.⁵⁷ Although Oppenheim recognized the principle that a treaty without true consent lacked binding force,⁵⁸ he also maintained that "circumstances of urgent distress, such as . . . defeat in war . . . would not invalidate the consent of a state to the terms of a treaty."⁵⁹ He concluded, as did most Western scholars,⁶⁰ that the repudiation of any treaty, even one brought about by the threat or use of force, was to be viewed as an unlawful repudiation under international law.⁶¹ Thus, under the traditional Western approach there existed no ambiguities in the law on this point. Unequal treaties were absolutely binding.

2. The Vienna Convention and Article 52

a. The Convention

The Vienna Convention on the Law of Treaties⁶² (Convention) was the product of over fifteen years of work by the International Law Commission, and two sessions of a 110 nation conference.⁶³ The purpose of the Convention was to codify international law according to article 13 of the United Nations Charter.⁶⁴ A great deal of controversy arose at the Convention because the members differed as to which laws constituted existing rules of international law, rather than developing rules. The conflicting views of the

56. See 1 L. OPPENHEIM, *INTERNATIONAL LAW* 547 (1912). Oppenheim's discussion of a state's right to repudiate a treaty procured by force does not make reference to unequal treaties. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See *supra* notes 51-55 and accompanying text.

61. L. OPPENHEIM, *supra* note 56, at 547.

62. Vienna Convention, *supra* note 35.

63. Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

64. *Id.* Article 13 provides: "The General Assembly shall initiate studies and make recommendations for the purpose of: a) promoting international cooperation in the political field and, b) encouraging the progressive development of international law and its codification." U.N. CHARTER art. 13, para. 1(a).

delegates caused a simple codification of accepted rules of law to become an arduous task.⁶⁵ This confusion has been aptly noted:

[I]t is reasonable to expect that, of all the areas of international law, the law of treaties would have become the most thoroughly developed However, as late as 1935, the introductory comment to the Harvard Draft Commission on the Law of Treaties remarked that "at the threshold of this subject one encounters the fact that there is no clear and well-defined law of treaties."⁶⁶

It was this appraisal of treaty law that the Vienna Convention sought to rectify.

b. Unequal Treaties Under the Vienna Convention

The following four elements have been identified by twentieth century scholars as rendering a treaty unequal:⁶⁷ 1) coercion of a state by the threat or use of force;⁶⁸ 2) personal intimidation;⁶⁹ 3) changed circumstances;⁷⁰ and, 4) economic or political pressure.⁷¹

65. Kearney & Dalton, *supra* note 63, at 496.

66. *Id.*; see also *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Law of Treaties*, 29 AM. J. INT'L L. 653, 666 (Supp. 1935).

67. Varma, *supra* note 10, at 57. These elements have been codified under separate articles of the Vienna Convention because each has a distinct legal effect on the binding force of treaties. See *infra* notes 68-71 and accompanying text.

68. See Report of the International Law Commission to the General Assembly, 21 U.N. GAOR Supp. (No. 9) at 74-75, U.N. Doc. A/6309/Rev.1 (1966), reprinted in 61 AM. J. INT'L L. 253, 408 (1967) [hereinafter cited as I.L.C. Report]. Article 52 of the Vienna Convention renders treaties procured through the threat or use of force void *ab initio*. I.L.C. Report, *supra*, at 74-75; see *infra* notes 75-76 and accompanying text.

69. A state's consent, procured by the coercion of its representative through intimidation directed against him personally, has long been recognized as invalid. See I.L.C. Report, *supra* note 68, at 409. This rule has been codified in article 51 of the Vienna Convention. Vienna Convention, *supra* note 35, art. 51.

70. Article 62 of the Vienna Convention deals with a fundamental change of circumstances "which has occurred with regard to those existing at the time of the conclusion of a treaty." Vienna Convention, *supra* note 35, art. 62. It is a rule of limited application which may not be invoked unless the existence of the changed circumstances was essential, and the change radically effects the obligations under the treaty. *Id.* Even if these circumstances are present, the doctrine still may not be applied if the treaty establishes a border, or the change is a result of a breach by the party invoking the rule. *Id.*

Article 62 is subject to these restrictions because jurists are concerned with protecting the security of treaties against the invocation of article 62 (also known as the doctrine of *rebus sic stantibus*). I.L.C. Report, *supra* note 68, at 428. Thus, alleging a fundamental change of circumstances does not necessarily result in the termination of a treaty. See generally A.

These elements are codified separately under the Vienna Convention because each has a different impact on the binding effect of a treaty.⁷² Any of the above elements taken separately renders a treaty unequal, but under current⁷³ international law only the first two circumstances result in the automatic invalidity of an unequal treaty.⁷⁴

c. Article 52

Article 52 of the Convention creates an exception to the *pacta sunt servanda* rule.⁷⁵ It states that “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”⁷⁶ The exception, however, is more narrow than it appears.

The scope of article 52 hinges on the interpretation of the word “force.”⁷⁷ This term was the subject of a substantial controversy

DAVID, *THE STRATEGY OF TREATY TERMINATION* 3-55 (1975) (analysis of *rebus sic stantibus*); Lissitzyn, *Treaties and Changed Circumstances*, 61 *AM. J. INT'L L.* 895-902 (1967).

71. Economic and political coercion used in concluding a treaty are not made illegal under any article of the Vienna Convention, but they are prohibited by a Declaration in the Final Act. Vienna Convention, *supra* note 35, Final Act. For an explanation of the difference between the articles of the Convention and the Final Act, see *infra* note 77. Western states adamantly refused to include these types of coercion in the definition of the word “force” in article 52. See Malawer, *A New Concept of Consent and World Public Order: “Coerced Treaties” and the Convention on the Law of Treaties*, 4 *VAND. INT'L L.* 19-20 (1970). The fear of instability in treaty relations was the primary reason for the refusal of European and industrialized states. *Id.* at 21. Also, there was the suggestion that applying economic and political pressure is normal procedure between states and, therefore, these types of coercion are not recognized as being illegal. See Waldock, *Second Report on the Law of Treaties*, [1963] 2 *Y.B. INT'L L. COMM'N* 36, 52, U.N. Doc. A/CN.4/156/Add.1-3.

As to the effect of the Declaration against economic and political coercion, Stuart Malawer states that it is a matter of interpretation: “If [the] restrictive definition of ‘force’ . . . is accepted ‘force’ will be limited to military force . . . [I]f a broad interpretation . . . is adopted, then defining ‘force’ as economic and political . . . would be justifiable.” Malawer, *supra*, at 24-25. Thus, the effect of these types of coercion may depend on the voting distribution of the “old” and “new” states in the United Nations. *Id.*

72. See *supra* notes 68-71.

73. The term current refers to the rule of law as recognized by the Vienna Convention. See *supra* notes 69-70.

74. See *supra* notes 68-70 and accompanying text.

75. S. MALAWER, *supra* note 38, at 5.

76. See Vienna Convention, *supra* note 35, art. 52.

77. See Kearney & Dalton, *supra* note 63, at 532-33. The International Law Commission's original version of article 52 failed to specifically prohibit economic and political

among the participants in the conference.⁷⁸ The European and industrialized countries were concerned that the creation of a broad exception to *pacta sunt servanda* would encourage states to evade treaty obligations they found onerous.⁷⁹ Consequently, many Western nations advocated restricting the word "force" to the threat or use of military force.⁸⁰ On the other hand, various Asian and third world states wanted the term "force" to encompass economic and political coercion.⁸¹ A compromise solution was reached by including a Declaration in the Final Act of the Convention⁸² that prohibits "military, political or economic coercion in the conclusion of treaties."⁸³ Article 52, however, is restricted to those unequal treaties involving military force.⁸⁴

The International Court of Justice provided insight into the conditions that activate article 52 in the *Fisheries Jurisdiction* case.⁸⁵ The case was brought by Great Britain to challenge Iceland's

coercion. I.L.C. Report, *supra* note 68, at 407, para. 3. In response to this version, an amendment to change the text to include "economic and political pressure" was proposed but not adopted. Kearney & Dalton, *supra* note 63, at 533. Instead, the Convention agreed to prohibit these forms of coercion in a separate declaration in the Final Act. *See supra* note 35.

The PRC was not yet a member of the United Nations and so did not participate in the Convention. It became a member of the United Nations in 1971. 4 CHINA READER: PEOPLE'S CHINA 1966 THROUGH 1972 (D. Milton, N. Milton & F. Schurmann eds. 1974) [hereinafter cited as CHINA READER]. The PRC's status as a nonmember, however, does not affect the applicability of article 52. The Drafters purposely phrased the principles regarding the threat or use of force in terms of general international law. I.L.C. Report, *supra* note 68, at 408. The phrase "violation of the principles of the Charter," rather than "violation of the Charter," was chosen "in order that the article should not appear to be confined in its application to [the] Members of the United Nations." *Id.*

78. *See supra* notes 71, 77 and accompanying text.

79. *See supra* note 71.

80. *See id.*

81. *See supra* notes 71, 77.

82. Article 52 was interpreted by the members of the Convention as solely prohibiting the threat or use of military force. *See supra* note 71. The Final Act includes a prohibition of political or economic coercion used to impose treaties. Vienna Convention, *supra* note 35, Final Act. For a discussion of the legal effects of the Declaration, *see supra* note 71.

83. Vienna Convention, *supra* note 35, Final Act; *see* Kearney & Dalton, *supra* note 63, at 535.

84. *See* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 96-97 (1973) (describing the gradual development of the rule prohibiting the threat or use of force in concluding treaties, and the International Law Commissions' recognition of this rule). The Commission has stated that it "considers . . . that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today." I.L.C. Report, *supra* note 68, at 407 para. 1.

85. *Fisheries Jurisdiction (U.K. v. Ice)*, 1973 I.C.J. (Jurisdiction of the Court, Judgment of Feb. 2, 1973).

proposed extension of its fisheries jurisdiction from 12 to 50 miles around its shores.⁸⁶ Iceland claimed that Notes exchanged between the governments that purported to delineate the jurisdiction were invalid.⁸⁷ Iceland's Minister of Foreign Affairs contended that "[t]he 1961 Exchange of Notes took place . . . when the British Royal Navy had been using force."⁸⁸ The Court discussed the application of article 52, stating: "There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention . . . that under contemporary international law an agreement concluded under the threat or use of force is void."⁸⁹

The decision recognized the limited exception to *pacta sunt servanda* stated in article 52. In this particular case, however, the court did not hold that the agreement lacked binding force, because it found that there was insufficient evidence of the threat or use of military force.⁹⁰ Thus, although an exception to *pacta sunt servanda* has evolved in cases involving unequal treaties imposed through military force, it is an extremely narrow exception limited to situations in which the threat or use of military force was indisputably employed.⁹¹

3. The PRC's Concept of Unequal Treaties

a. Background

The twentieth century concept of unequal treaties was developed by the Soviet Union following the Russian Revolution,⁹² and

86. *Id.* at 8.

87. *Id.* at 39.

88. *Id.* at 14.

89. *Id.*

90. The court analyzed the circumstances surrounding the conclusion of the Notes and found the Notes to have been "freely negotiated by the interested parties on the basis of perfect equality and freedom of decision." *Id.*; see Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51, 66 (1974) (discussing the Court's analysis).

91. See Briggs, *supra* note 90, at 56. For an interesting critique of article 52, discussing the misguided idealism of the drafters and the basic impracticality of the rule, see Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 357 (1968). Stone states: "The writer . . . while finding it morally outrageous that such a treaty should be legally binding even if imposed . . . by a victorious 'aggressor,' on the victim of 'aggression,' [has] seen no way of rescuing mankind *by legal precept* from this particular kind of outrage." *Id.*

92. See Chiu, *Certain Legal Aspects of Communist China's Treaty Practice*, 1967 PROC. AM. SOC'Y INT'L L. 117, 119-20.

was later used by Asian countries attempting to sever colonial relationships with Western states.⁹³ After World War I, the term "unequal" treaties was frequently used by these states and began specifically to denote those nineteenth century treaties in which "Western Powers forced Asian States to accept, *inter alia*, extra-territorial jurisdiction, . . . territorial cessions and liability to pay tributes, etc."⁹⁴

As Asian and third world colonies obtained independence from Western powers, they became concerned with achieving the status of equal states in the international community.⁹⁵ If unequal treaties were to remain binding, these states doubted that they could function effectively as sovereign equals.⁹⁶ Thus, the concept of unequal treaties was employed toward the practical goal of defeating obligations that would undermine the independence of new states or serve as a perpetual reminder of their former colonial status.⁹⁷ Therefore, unequal treaties can no longer be analyzed merely as a theoretical problem involving moral violations of international law.⁹⁸ The practice of these states requires that the issue of unequal treaties be framed in legal rather than moral terms.⁹⁹ This broad view, however, is not a customary rule of international law.¹⁰⁰

93. See Varma, *supra* note 10, at 56.

94. *Id.*

95. L. CHEN, *supra* note 9, at 20-21.

96. *See id.*

97. See O. UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 60 (1972). A speech by the observer for the Asian-African Legal Consultative Committee stated: "The progressive development of international law was of particular interest to Asian and African countries. . . . They were anxious to eradicate all vestiges of colonialism and foreign domination." Summary Records of the 745th Meeting, [1964] 1 Y.B. INT'L L. COMM'N 139, 140, U.N. Doc. A/CN.4/SER.A/1964.

98. See Detter, *The Problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069 (1966). "For as new States have been born, States that feel entitled to the same treatment and to the same rights as the Great Powers, the problem has ceased to be of primarily doctrinal interest; it has an immediate bearing on the practice of States." *Id.*

99. *See id.*; *supra* note 51.

100. H. KELSEN, *supra* note 35, at 440 (citing *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 (Judgment of Nov. 20)). The Court formulated elements of custom as follows: "The Party which relies on custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party. [The Party] must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question" 1950 I.C.J. at 276.

The rule prohibiting economic and political coercion in procuring treaties is not a customary rule of law. *See* I.L.C. Report, *supra* note 68, at 407, para. 3. It was not included

Article 52 recognizes only unequal treaties imposed by the threat or use of military force as void.¹⁰¹

b. The PRC's Position

The PRC's concept of unequal treaties has not wavered or been subject to reinterpretation, despite the fact that its position on various political issues has often shifted.¹⁰² The PRC has consistently emphasized the illegality and invalidity of such treaties.¹⁰³ Although the PRC has not specifically articulated criteria that would serve as a definition of an unequal treaty, a 1958 article stated:

Treaties can be classified into equal and unequal treaties and the latter undermine the most fundamental principles of international law—such as the principle of sovereignty; therefore they are illegal and void, and states have the right to abrogate this type of treaty at any time.¹⁰⁴

The right to abrogate unequal treaties is the essence of the Chinese concept.¹⁰⁵ This concept directly conflicts with the traditional Western approach because the notion that unequal treaties fall within an exception to the rule *pacta sunt servanda* is inherent

in article 52 because a majority of states at the Convention believed that the rule was merely developing. See *supra* notes 68-71 and accompanying text.

101. S. MALAWER, *supra* note 38, at 9. "Unequal," by itself, means that the terms of the treaty are not reciprocal. See *id.* However, the term "unequal" also refers to the means by which a treaty is concluded. See *id.* The term "unequal imposed treaties" then refers specifically to treaties with unreciprocal terms that have been procured through the threat or use of force. *Id.*

102. See CHINA READER, *supra* note 77 (discussing changes occurring in recent Chinese culture because of the ongoing spirit of revolution). An example of the PRC's consistency in its interpretation of unequal treaties is found in 1 PEOPLE'S CHINA AND INTERNATIONAL LAW, *supra* note 6, at 385 (quoting the Letter from the Chinese Ambassador Huang Hua to the Chairman of the U.N. General Assembly's Special Committee on Colonialism). The Chinese Ambassador wrote: "With regard to the questions of Hong Kong and Macao, the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe." *Id.*

103. See Chiu, *supra* note 92, at 120.

104. *Id.*

105. *Id.* The discussion of unequal treaties was framed in terms of abrogation in both the Nationalist Government's proclamation to abolish unequal treaties in 1928 and various PRC statements on the subject. *Id.*

in the PRC's approach.¹⁰⁶ A Chinese text on international treaty law further elucidates the PRC's position:

The classical writers of Marxism-Leninism opposed the undermining of international treaties at will; they regarded the performance of equal international obligations as a fundamental principle of the whole body of international law. They, however, considered the international law principle of *pacta sunt servanda* . . . not to be applicable to treaties involving aggression and slavery.¹⁰⁷

Although the PRC's position directly conflicts with the West's emphasis on the binding force of treaties, there is nothing in the PRC's concept that theoretically conflicts with Western principles of international law.¹⁰⁸ For example, it has been observed that the PRC's reasons for invalidating unequal treaties can be justified by principles set forth in the Charter of the United Nations.¹⁰⁹ One scholar stated that the Chinese rationale for abrogating unequal treaties:

can be justified by legal principles acceptable to the West. For example, the United Nations Charter clearly sets forth the fundamental importance of the principles of sovereign equality, national self-determination, the prohibition of the use or threat of force in international relations, *et cetera*. Thus, a treaty which violates one or more of these principles would be not only "unequal" but inconsistent with the Charter and thereby invalid under Article 103 of the Charter.¹¹⁰

In fact, there is no theoretical conflict between the two conceptions of unequal treaties. The disagreement can be analyzed as merely a difference in degree.¹¹¹ The West places more emphasis on the

106. See generally 2 PEOPLE'S CHINA AND INTERNATIONAL LAW 1118 (J. Cohen & H. Chiu eds. 1974) (excerpt from Wang Yao-t'ien's textbook on international treaties which discusses the Marxist analysis of unequal treaties in relation to the doctrine *pacta sunt servanda*) [hereinafter cited as 2 PEOPLE'S CHINA].

107. *Id.* at 1118-19.

108. See Chiu, *supra* note 92, at 125. This work discusses particular treaties where the PRC's position on the validity of treaties "does not seem unreasonable, even in light of Western legal principles." *Id.*

109. Chiu, *supra* note 92, at 126.

110. *Id.*

111. *Id.*; see also G. SCOTT, *supra* note 26, at 76 (providing analysis of the two concepts of unequal treaties).

binding force of treaties, while the PRC focuses on other accepted principles of international law which it considers more important than requiring strict adherence to unequal treaties.¹¹² Additionally, the Charter of the United Nations, which is the product of modern principles of international law, lends strong support to the PRC's nontraditional approach to unequal treaties.¹¹³

The result of the PRC's emphasis on the deleterious effect of unequal treaties is that the PRC's interpretation of the term "unequal" is substantially broader than the Western interpretation.¹¹⁴ Included in the PRC's definition are treaties procured through economic and political coercion.¹¹⁵ In this precept, it is aligned with other Asian and third world countries that insisted at the Vienna Convention that these forms of coercion should also be illegal.¹¹⁶

B. *Is The Treaty of Nanking Within An Exception?*

1. The Invalidation of Consent by Coercion: Article 52

Article 52 of the Vienna Convention renders void *ab initio* treaties procured by the threat or use of force.¹¹⁷ Facially, the circumstances surrounding the conclusion of the Treaty of Nanking appear to be the type of aggressive military coercion envisioned by the participants of the Convention as warranting the application of

112. See L. CHEN, *supra* note 9, at 32 ("It has been pointed out that the essential difference between Western and Eastern theorists with regard to treaty-making is that Eastern theorists hold that the elements of consent, equality and freedom of acceptance are absolute while their Western counterparts hold that such elements are relative.") (footnote omitted); see also J. TRISKA & R. SLUSSER, *THE THEORY, LAW AND POLICIES OF SOVIET TREATIES* 105 (1962) (describing Soviet approaches to these principles).

113. Chiu, *supra* note 92, at 126.

114. See *supra* notes 109-10 and accompanying text.

115. Chiu, *supra* note 92, at 120. While the PRC emphasizes the equities of their position, it is of interest to note that when writers discuss the PRC's concept of unequal treaties, some have focused on the fact that the concept is not purely legal but subject to political factors. See *id.* at 121-22; see also G. SCOTT, *supra* note 26, at 96 (recognizing Chiu's position). But see *id.* (providing the opposite view through illustrations of the PRC's sincerity). Additionally, Scott points out that because the PRC has not always sustained a "logical and consistent pattern in the abrogation of treaties under the unequal treaties principle," accusations have been made to the effect that the PRC is an "international outlaw." *Id.*

116. Varma, *supra* note 10, at 64.

117. I.L.C. Report, *supra* note 68, at 408, para. 6.

article 52.¹¹⁸ Therefore, the Treaty of Nanking would be void under the Vienna Convention.

This facile solution does not take into consideration the principle of nonretroactivity provided for in article 4 of the Vienna Convention.¹¹⁹ Article 4 states that if any article of the Convention is merely a codification of a pre-existing rule of international law, then the principle of nonretroactivity applies "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention."¹²⁰ Thus, article 4 differentiates between rules promulgated by the Convention that are a codification of existing rules of customary international law, and those that reflect the progressive development of treaty law.¹²¹ This distinction is significant because the latter rules fall within the scope of the nonretroactivity principle.

The Commission's approach to the retroactive effect of article 52 was based on its understanding of the historical development of the rule codified therein.¹²² This development has been divided into three epochs: "(i) prior to the Covenant of the League of Nations; (ii) the period of the Covenant and the Pact of Paris; (iii) the consolidation of the law in the Charter of the United Nations and the practice of the United Nations itself."¹²³ The Treaty of Nanking falls into the first epoch because it was concluded prior to the Covenant of the League of Nations.¹²⁴ Thus, the application of the principle of nonretroactivity is clearly warranted.¹²⁵

118. For a discussion of the background on the military force employed by the British to win the opium war and impose the Treaty of Nanking, see *supra* notes 18-27 and accompanying text.

119. Vienna Convention, *supra* note 35, art. 4.

120. *Id.*

121. Rosenne, *The Temporal Application of the Vienna Convention*, 4 CORNELL INT'L L.J. 2 (1970). Paragraph 7 of the preamble to the Convention states that the members of the Convention believe "that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations." Vienna Convention, *supra* note 35, preamble, para. 7. The Convention has a dual purpose, one of which is the progressive development of the law of treaties. Rosenne, *supra* at 2.

122. Rosenne, *supra* note 121, at 13. The International Law Commission did not specify whether the rule was a codification of a pre-existing rule or the progressive development of the law within most of the articles. *Id.* at 2.

123. *Id.* at 13 (footnote omitted).

124. *Id.*

125. See *infra* notes 127-31 and accompanying text.

In discussing the retroactive effect of article 52, the Commission stated that, "there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law."¹²⁶ The Commission relied on the "celebrated dictum" of Judge Huber in the *Isle of Palmas* arbitration in reaching this conclusion.¹²⁷ The intertemporal rule of law contained in *Isle of Palmas* states, in effect, that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls (sic) to be settled."¹²⁸ The Commission adopted this approach by stating: "An evolution of the law governing the conditions for the carrying out of a legal act does not operate to deprive of validity a legal act already accomplished in conformity with the law previously in force."¹²⁹ Thus, in determining whether the Treaty of Nanking may be invalidated by the rule expressed in article 52, the key issue is to determine the rule of law in effect in 1842.¹³⁰

The customary rules of international law in 1842¹³¹ permitted treaties to be imposed on states by the threat or use of force.¹³² Comments by the delegates to the Vienna Convention,¹³³ and state-

126. I.L.C. Report, *supra* note 68, at 408, para. 7 (footnote omitted). The date concerning the establishment of the new rule against imposed treaties has caused considerable disagreement. See S. MALAWER, *supra* note 38, at 18-19. The majority of nations do agree, however, that "[t]he traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force." I.L.C. Report, *supra* note 68, at 407, para. 1.

127. *Island of Palmas* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 845 (1928).

128. Rosenne, *supra* note 121, at 13. For another interpretation of the intertemporal rule of law reached in *Island of Palmas* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 845 (1928), see Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735, 740-41 (1928).

129. I.L.C. Report, *supra* note 68, at 409. The Commission made it clear that article 52 would not apply to treaties concluded prior to modern law by noting that "the present article concerns the conditions . . . for the creation of a legal relation by treaty." *Id.* at 408-09.

130. See *infra* notes 131-37 and accompanying text.

131. See *supra* notes 39-40 and accompanying text.

132. See U.N. Conference, *supra* note 43, at 90-92.

133. Mr. Escudero, the delegate from Ecuador stated:

The date of the Briand-Kellogg Pact [1928] was clearly the date from which the principles of international law now embodied in the United Nations Charter had come into force. Between 1928 and the signing of the Charter in 1945, the prohibition of the use of force had become a peremptory norm of international law.

Id. at 91.

Peremptory norms of international law, also known as *jus cogens*, are principles which are universally recognized by the international community. See J. STARKE, *supra* note 49, at

ments in the Commentary¹³⁴ suggest that article 52 may be applied retroactively only to treaties concluded after 1921.¹³⁵ A minority of states of the "older order"¹³⁶ view article 52 as a codification of a progressively developing rule of law, and therefore they do not believe it may be retroactively applied.¹³⁷

The PRC, which was not a member of the United Nations and thus did not participate in the Convention,¹³⁸ does not agree with the Convention's position on the nonretroactivity of rules invalidating treaties procured by coercion.¹³⁹ In fact, representatives of the PRC have stated that the principles expressed in the Final Act of the Convention that outlaw coercion through military, political or economic pressure¹⁴⁰ are actually "based on long accepted standards of international law and therefore are applicable to all treaties, past,

63. The fact that article 52 is now recognized as a peremptory norm of international law does not change the retroactive effect of the rule. U.N. Conference, *supra* note 43, at 91. Article 53 codifies the rule of *jus cogens*: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Vienna Convention, *supra* note 35, art. 53; see also RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 (Tent. Draft No. 1, 1980). The pertinent language concerning the retroactivity of a peremptory norm of law is the reference to the time of a treaty's conclusion. In 1842, when the Treaty of Nanking was concluded, no peremptory norm existed which prescribed the use of force. See Rosenne, *supra* note 121, at 14. Therefore, article 52 does not apply. For further analysis of *jus cogens*, see C. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES (1976).

134. The Commentary to the Draft Convention provided: "[T]he emergence of a new rule of *jus cogens* is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only as from the time of the establishment of the new rule of *jus cogens*." I.L.C. Report, *supra* note 68, at 412, para. 6.

135. See *supra* note 133.

136. The "older order" refers to the highly industrialized Western European states. Malawer, *supra* note 71, at 15.

137. *Id.*

138. The PRC became a member of the United Nations in 1971. G.A. Res. 2758, 26 U.N. GAOR (No. 29) at 2, U.N. Doc. A/8429 (1971). An analysis of the treaty relations of the PRC is provided by Lee, *Treaty Relations of the People's Republic of China: A Study in Compliance*, 116 U. PA. L. REV. 244 (1967). Lee finds that the PRC's record of compliance is high, and notes that "treaties . . . as expressions of consent, remain the logical source of international law for China." *Id.* at 245 (footnote omitted). On the other hand, Lee mentions that the PRC might justifiably feel reluctant to be bound by "Western customary law, in the making of which it did not participate." *Id.* Thus, the PRC is presented with the dilemma of standing outside of laws it had no part in promulgating, or upholding the laws of the international community which might serve the PRC advantageously in the future.

139. See C. SCOTT, *supra* note 26, at 92.

140. A Declaration in the Final Act of the Vienna Convention "[s]olemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State . . . to . . . [conclude] a treaty in violation of the

present and future."¹⁴¹ From this statement, it is clear that the PRC's position is in direct conflict with that of both the West and the compromise approach indicated by the comments of delegates to the Convention.¹⁴² Although the PRC's position on its right to invalidate the Treaty of Nanking seems irreconcilable with the principle of nonretroactivity, this is not the case because the PRC does not rely solely on this exception to *pacta sunt servanda* to justify its claim that the Treaty of Nanking should be abrogated.¹⁴³

2. A Broad Unequal Treaty Exception

A broad conception of unequal treaties implies the right to abrogate all unequal treaties, not only those imposed by military force.¹⁴⁴ It is logical that the states that are encumbered by unequal treaties left over from the nineteenth century would be those asserting this position.¹⁴⁵ As these states have achieved independence, there has been increasing acceptance in the international community of a broad exception to *pacta sunt servanda* based on unequal treaties in the context of state succession.¹⁴⁶ These successor states, former colonies, began the practice of invalidating unequal treaties by their refusal to succeed to them.¹⁴⁷ It is within this context that the PRC has framed its right to abrogate the Treaty of Nanking.¹⁴⁸

principles of the sovereign equality of States and freedom of consent." Vienna Convention, *supra* note 35, Final Act. For a discussion of the effects of the Declaration, see *supra* note 71.

141. See G. SCOTT, *supra* note 26, at 92 (footnote omitted).

142. See generally U.N. Conference, *supra* note 43, at 90-92 (delegates' comments concerning the retroactive effect of article 52).

143. In framing its claim that it is not bound by 19th century coerced treaties, such as the Treaty of Nanking, *supra* note 2, the PRC has emphasized its right to selectively accept such treaties as a new governing entity. See *infra* note 188 and accompanying text.

144. See *supra* notes 95-97 and accompanying text.

145. The new states base their right to broadly invalidate unequal treaties on the fact that such treaties not only imply inequality of obligations but inequality of relationships. O. UDOKANG, *supra* note 97, at 93.

146. See L. CHEN, *supra* note 9, at 44-46 (listing the reasons for carving a large exception into the *pacta sunt servanda* doctrine). Chen notes that including economic and political coercion in the definition of force "will not weaken the rule of *pacta sunt servanda*. In terms of justice and equality, a 'coercive' and 'predatory' treaty does not deserve the application of the rule of *pacta sunt servanda*." *Id.* at 46 (footnote omitted). He further concludes that it is regrettable that the states holding this position are divided along the lines of old and new states. *Id.* at 47.

147. See *infra* notes 165-69 and accompanying text. The practice of new successor states has not been consistent and has reflected the lack of a consensus among international scholars. See S. MALAWER, *supra* note 38, at 25.

148. See *infra* notes 188-93 and accompanying text.

a. Traditional Rule of State Succession

State succession to treaties has been a particularly controversial area of the law since World War II when the number of new states burgeoned.¹⁴⁹ State succession occurs when one state ceases to exist or govern in a specific territory and is replaced by another state.¹⁵⁰ Historically, state succession arose through annexation, cession, or the dismembering of a federal state.¹⁵¹ Since the formation of the United Nations, however, the typical form of state succession has been through the emergence of new states via the independence of colonial territories.¹⁵²

The traditional rule of state succession to treaties¹⁵³ involved the classification of treaties as either personal¹⁵⁴ or dispositive.¹⁵⁵

149. The growing number of new states since 1945 is a significant development in international law. Thus Bokor-Szego, in examining the relation of new states to international law, provides the following data:

The first Hague Peace Conference (1899) was attended by 26 States, the second (1907) by 44 States. Among the latter there were only five Asian nations, while Africa was not represented at all. The League of Nations had 45 original members, among them six Asian and two African States; subsequently five more Afro-Asian States were admitted into the League. In 1945 the United Nations Organization was originally established by 51 States, among them only four from Africa and nine from Asia. On 1 May 1968, the Organization had 124 Members, including 40 from Africa and 29 from Asia. Another characteristic figure: of the 124 States Members of the United Nations a round sixty (36 African, 20 Asian and 4 American) States have been established after 1945!

H. BOKOR-SZEGO, *NEW STATES AND INTERNATIONAL LAW* 52 (1970) (citations omitted).

150. D. O'CONNELL, *THE LAW OF STATES SUCCESSION* 1 (1956).

151. See L. CHEN, *supra* note 9, at 8-9.

152. *Id.* at 10.

153. The traditional rule here refers to a theory which was prevalent in the 19th century called Negativism. For further analysis of this approach, see *infra* notes 154-57 and accompanying text. Prior to the 19th century, the earliest theories in modern international law involved extrapolations of Roman law. L. CHEN, *supra* note 9, at 15-16; Note, *SUCCESSION OF STATES IN RESPECT OF TREATIES: THE VIENNA CONVENTION OF 1978*, 19 VA. INT'L L.J. 885, 886 (1979). Under the theory of universal succession, all rights and obligations of the "deceased" state passed *in toto* to the successor state. See H. GROTIUS, *supra* note 52, at 185-86; S. PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* 1360 (C. Oldfather & W. Oldfather trans. 1934).

154. The concept of personal treaties is analogous to the notion given to personality in modern contract law. Note, *supra* note 153, at 887-88; see *Kelley v. Thompson Land Co.*, 112 W. Va. 454, 164 S.E. 667 (1932). When a state concludes a treaty with another state, the relationship is considered personal. See D. O'CONNELL, *supra* note 150, at 16-17. Thus if one state is extinguished, its treaties terminate because of impossibility of performance. *Id.* Similarly, when a contract is based on the performance of personal services, it does not survive the death of that party. *Id.*

155. The International Law Association defined dispositive treaties as those which: "a) are in the nature of objective territorial regimes created in the interests of one nation or the

“Personal treaties were non-inheritable, dispositive treaties were inheritable, and no effort was made to distinguish the effects of state succession on unequal and equal treaties.”¹⁵⁶ Under this view, the Treaty of Nanking, as a dispositive treaty,¹⁵⁷ would still have binding force.

New successor states are particularly concerned with the doctrine of equality of states and the eradication of unequal treaty obligations.¹⁵⁸ In the interest of ensuring the “integrity of [their] sovereignty, their political independence and their status of equality in the world,”¹⁵⁹ these states have often refused to succeed to treaties that were “incompatible with the independence of . . . sovereign states.”¹⁶⁰ These successor states have developed practices of nonsuccession to unequal treaties.¹⁶¹ The PRC has implicitly analogized its position as a successor government burdened by unequal treaties to the position of successor states, and has accordingly asserted the right to repudiate its predecessor’s unequal treaties.¹⁶²

b. Current State Practice

Prior to World War II, state succession was usually accomplished gradually.¹⁶³ In contrast, during the post-World War II decolonization period, states became independent “almost in one step.”¹⁶⁴ The new successor states adopted five different succession practices: 1) total rejection,¹⁶⁵ 2) devolution agreements,¹⁶⁶ 3) tem-

community of nations; b) are applied locally in territorial application clauses; c) touch or concern a particular area of land.” *INT’L LAW ASSOC., THE EFFECT OF INDEPENDENCE ON TREATIES* 352 (1965).

156. L. CHEN, *supra* note 9, at 20 (footnote omitted).

157. The Treaty of Nanking, *supra* note 2, concerns the boundaries of China and thus falls within the category of dispositive treaties. The law concerning dispositive, or real, treaties originated out of the application of property rather than contract law. *See* L. CHEN, *supra* note 9, at 141. The emphasis is not on the termination of the predecessor state, but on the notion that title to property runs with the land. *See* E. DE VATTEL, *supra* note 53, at 169.

158. *See supra* notes 95-97 and accompanying text.

159. L. CHEN, *supra* note 9, at 235.

160. *Id.* *See also* [1962] 2 *Y.B. INT’L L. COMM’N* 114, U.N. Doc. A/CN.4/150 (1962) (memorandum on succession of states and governments) [hereinafter cited as Memorandum] (footnote omitted).

161. *See infra* notes 165-86 and accompanying text.

162. *See infra* note 193 and accompanying text.

163. O. UDOKANG, *supra* note 97, at 165-66.

164. *Id.* at 186. *See generally* Keith, *Succession to Bilateral Treaties by Seceding States*, 61 *AM. J. INT’L L.* 521 (1967) (discussing practices of new states in succeeding to treaties).

165. L. CHEN, *supra* note 9, at 21.

166. *Id.* at 21-22. *See, e.g.,* Memorandum, *supra* note 160, at 119.

porary application,¹⁶⁷ 4) selective acceptance,¹⁶⁸ and 5) deferment of decision.¹⁶⁹

Total rejection involves repudiation of all the predecessor's treaties, both equal and unequal.¹⁷⁰ An example of this approach was Israel's refusal to succeed to Palestine's treaties.¹⁷¹ The other four practices involve a determination of whether the treaties are unequal.¹⁷²

Great Britain introduced the practice of concluding devolution agreements to notify the international community that the successor state inherited all of the predecessor's treaty rights and obligations.¹⁷³ These agreements, however, have evolved into more flexible instruments whereby the successor may agree to succeed only to equal treaties and ignore unequal ones.¹⁷⁴ Ignoring a treaty as though it were void created an exception to *pacta sunt servanda*. Thus, devolution agreements that rejected unequal treaties began the practice of nonsuccession to unequal treaties.

The other three approaches are more straightforward. These practices are based on the notion that a successor state should have the opportunity to choose which treaties will continue in force.¹⁷⁵ Prime Minister Nyerere of Tanganyika, now Tanzania, devised the first framework in which states may examine their predecessor's treaties, accepting only those it deems equal.¹⁷⁶ The doctrine involves a unilateral declaration that the successor state will analyze its treaties for a period of two years to determine which are

167. L. CHEN, *supra* note 9, at 22-23.

168. *Id.* at 23-24. See Memorandum, *supra* note 160, at 115 (Letter from the Minister for Foreign Affairs for the Republic of Congo to the Secretary General of the United Nations advising the world of its policy of selective acceptance).

169. L. CHEN, *supra* note 9, at 24-25. See Memorandum, *supra* note 160, at 117 (Letter from the Madagascar government to the Secretary General of the United Nations).

170. L. CHEN, *supra* note 9, at 21.

171. *Id.* Other states that applied the clean slate theory, or *tabula rasa*, in their rejection of all of their predecessor's treaties were Algeria and Upper Volta. *Id.*

172. See *infra* notes 174-81 and accompanying text.

173. L. CHEN, *supra* note 9, at 21.

174. O'Connell, *Independence and Succession to Treaties*, 38 BRIT. Y.B. INT'L L. 122-28 (1962).

175. See *infra* notes 177, 179-80 and accompanying text.

176. Nyerere, *Problems of State Succession in Africa: Statement of the Prime Minister of Tanganyika*, 11 INT'L & COMP. L.Q. 1210 (1962).

equal.¹⁷⁷ The Nyerere Doctrine has been followed by many African states.¹⁷⁸

The other two approaches are similar, but less formal. Under the deferment approach, new states are initially noncommittal and wait until particular problems arise before deciding whether a treaty is unequal.¹⁷⁹ Selective acceptance is the practice advocated by the Soviet Union and the PRC.¹⁸⁰ It is a radical approach in that no time limit is set to notify concerned states that a particular treaty is considered invalid.¹⁸¹

c. Whether the Approaches Have Legal Effect

The legal validity of these practices is questionable.¹⁸² When the parties to a treaty mutually consent to invalidate it, however, legal effect is given to their abrogation of that treaty.¹⁸³ Although successor states have sometimes reconsidered their refusal to succeed to treaties during negotiations, they have achieved some success in freeing themselves from unequal treaties.¹⁸⁴

Current international law prohibits the creation of unequal treaties through coercion.¹⁸⁵ From a policy perspective, however, it may be a questionable practice to prohibit future coercion without allowing relief from past injustices. States that have inequitable obligations imposed upon them will not have reason to view the

177. O. UDOKANG, *supra* note 97, at 199. One of the radical aspects of the Nyerere Doctrine was the Prime Minister's refusal to conclude a devolution agreement with Great Britain. For Great Britain's position on the declaration, see U.N. Doc. A/CN.4/214/Add.2, at 4 (1969).

178. Swaziland, Kenya, Malawi, Botswana, and Lesotho followed the lead of Tanganyika in adopting this approach in one form or another. L. CHEN, *supra* note 9, at 22.

179. *Id.* at 24.

180. For an examination of the PRC's position, see *infra* notes 193-94 and accompanying text.

181. See Chiu, *supra* note 92, at 122-23.

182. See L. CHEN, *supra* note 9, at 217-18, 222-25. The question of whether devolution agreements are unequal treaties in and of themselves has been raised by the International Law Commission. H. BOKOR-SZEGO, *supra* note 149, at 111-14.

183. H. KELSEN, *supra* note 35, at 494.

184. Compare L. CHEN, *supra* note 9, at 179-85 (discussing African successor states' problems with succession to unequal boundary treaties) with Nyerere, *supra* note 176, at 1210 (Prime Minister Nyerere's refusal to succeed to the Anglo-Belgium agreements gave Belgium a perpetual lease and rights of passage in Tanganyika).

185. See *supra* note 117 and accompanying text.

obligee nations as entities that desire to end the era of colonialism.¹⁸⁶

3. The PRC's Right to Selectively Accept Treaties

Shortly after the PRC took over the government of China, it announced its position on state succession to treaties.¹⁸⁷ Article 55 of the Common Program of the Chinese People's Political Consultative Conference states: "The Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall recognize, abrogate, revise, or renegotiate them according to their respective contents."¹⁸⁸ This policy has also been applied to treaties concluded by the Imperial Chinese government.¹⁸⁹

The PRC's view of the Treaty of Nanking was clarified in a 1963 editorial.¹⁹⁰ The writer reiterated the PRC's position that it has the right to selectively accept treaties¹⁹¹ and directly referred to the Treaty of Nanking as an unequal treaty:

[M]any of these treaties concluded in the past either have lost their validity, or have been abrogated or have been replaced. . . . With regard to the outstanding issues, which are a legacy from the past, we have always held that, when conditions are ripe, they should be settled peacefully through negotiations

186. See generally Rosenne, *supra* note 121, at 8 (describing the delegate from Bolivia's concerns about the nonretroactivity of the rules of the Vienna Convention). The delegate from Bolivia believed that excluding existing treaties "from the application of the Convention . . . would be tantamount in many cases to setting the seal of approval on certain agreements which were the cause of continual controversies." *Id.*

187. 1 PEOPLE'S CHINA, *supra* note 6, at 214.

188. *Id.*

189. G. SCOTT, *supra* note 26, at 81.

190. See *supra* note 6 (discussing the significance of an editorial in *JMJP*).

191. *A Comment on the Statement of the Communist Party of the USA*, *JMJP*, Mar. 8, 1963, reprinted in 1 PEOPLE'S CHINA, *supra* note 6, at 380.

Note that the PRC reserves the right to wait until conditions are "ripe." *Id.* According to established principles of international law, the PRC would not be estopped from invalidating the Treaty of Nanking if its reasons for abrogation are valid under the Vienna Convention. "Waldock's original draft envisaged the principle [of estoppel] to apply to all causes of invalidity. Opposition, however, was expressed in the Commission to the effect that in cases of invalidity caused by *jus cogens* and coercion, principles such as estoppel . . . have no place." Elreedy, *The Main Features of the Concept of Invalidity in the Vienna Convention on Treaties*, 27 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 13, 24 (1971). In this instance,

. . . . Within this category are the questions of Hong Kong, Kowloon and Macao¹⁹²

The PRC's claim that it has the right to selectively accept treaties depends on an analogy to the rights of the successor states.¹⁹³ The PRC's approach, however, like the Soviet Union's, has been questioned on the grounds that it is not a successor state, but merely a successor government.¹⁹⁴

The traditional rule of international law concerning successor governments is that governments inherit their predecessor's treaty rights and obligations without qualification.¹⁹⁵ The internal governance of states is beyond the jurisdiction of international law, thus the means by which a government succession is accomplished falls outside the ambit of international concern.¹⁹⁶

Succession in China did not occur through either the historical¹⁹⁷ or modern route¹⁹⁸ of state succession. Instead, a civil war led to a radical change in the government.¹⁹⁹ The PRC argues that the revolutionary change in government was such a substantial permutation as to be the equivalent of forming a new state.²⁰⁰ The PRC

the principle of nonretroactivity further complicates the issue. *See supra* notes 119-37 and accompanying text.

192. 1 PEOPLE'S CHINA, *supra* note 6, at 380.

193. Both the PRC and the new successor states have renounced unequal treaties as undermining their status as equal sovereigns. *See* L. CHEN, *supra* note 9, at 13.

194. *Cf.* Jackson v. People's Rep. of China, 550 F. Supp. 869, 872 (N.D. Ala. 1982). In *Jackson*, the PRC chose not to appear and defend itself against a suit involving the PRC's refusal to pay a U.S.\$41.3 million debt on bonds issued to finance the 1911 Hukuang railroad by the Imperial Chinese government. *Id.* at 877. The court found that "[t]he People's Republic of China is the successor government to the Imperial Chinese Government and, therefore, the successor to its obligations." *Id.* at 872.

195. 1 C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 158-59 (2d rev. ed. 1945) ("After a State has come into being, its obligations in relation to the outside world are not affected in consequence of internal changes which may be undergone.").

196. *See* A. ROSS, A TEXTBOOK OF INTERNATIONAL LAW 134 (1947).

197. *See supra* note 151 and accompanying text.

198. *See supra* note 152 and accompanying text.

199. *See* Jackson v. People's Rep. of China, 550 F. Supp. 869, 872 (N.D. Ala. 1982). The court characterized the PRC's entry into power as the seizure of control. Many authors believe that changes in government do not terminate treaties and imply that revolutions are changes in government alone. *See, e.g.*, 5 C. HACKWORTH, DIGEST OF INTERNATIONAL LAW 360 (1944); 1 J. MOORE, DIGEST OF INTERNATIONAL LAW 249 (1906); A. MCNAIR, THE LAW OF TREATIES 668-76 (2d ed. 1961).

The literature on revolutions is vast. *See, e.g.*, H. AHRENDT, ON REVOLUTION (1963); C. BRINTON, THE ANATOMY OF REVOLUTION (rev. ed. 1952); E. HOBSBAUM, THE AGE OF REVOLUTION, EUROPE 1789-1848 (1962).

200. *See* 2 PEOPLE'S CHINA, *supra* note 106, which noted that: "[a]lthough [the question whether] the Soviet Union is a new state or the continuation of the old Russian state . . .

recognizes the rule of government succession but does not consider it binding.²⁰¹ In refusing to adhere to its predecessor's treaties the PRC ignores the principle of international law that a successor government is required "to perform the obligations undertaken on behalf of the state by its predecessor."²⁰²

Historically, the law of state succession has been a controversial area,²⁰³ whereas rules applicable to government succession have been undisputed until recently.²⁰⁴ Yet, because the PRC's position is analogous to successor states, it is not unreasonable for the PRC to claim the right to selectively accept its predecessor's treaties.²⁰⁵ The

created controversy among Soviet jurists, it was apparent that to some extent Soviet practice provided a precedent" which supported the PRC's position. *Id.* at 1122.

O'Connell concludes that the distinction between government and state succession is artificial:

If there is any rubric, therefore, to which one could resort as a touchstone for the solution of all problems of political change over territory it might be this: that the consequences of such change should be measured according to the degree of political, economic and social disruption which occurs.

1 D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW* vi (1967).

In discussing the complexity of determining whether a revolution is so substantial as to change the social and economic structure of a state as well as its political institutions, one writer noted: "Revolutionary change may be like hard-core pornography: one knows it when one sees it." Note, *Revolutions, Treaties, and State Succession*, 76 *YALE L.J.* 1669, 1683 (1967). *Cf.* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

201. See *Statement by the Central Committee of the Chinese Communist Party on Agreements and Negotiations between the Kuomintang and Foreign Governments*, Hsin-hua Jih-pao (New China Daily) Feb. 1, 1947, reprinted in 2 *PEOPLE'S CHINA*, *supra* note 106, at 1120-22.

202. *Id.*

203. For discussion and analysis of the different views on state succession, see E. FEILCHENFELD, *PUBLIC DEBTS AND STATE SUCCESSION* (1931); 2 D. O'CONNELL, *supra* note 200; Aufright, *State Succession under the Law and Practice of the International Monetary Fund*, 11 *INT'L & COMP. L.Q.* 154 (1962); Delson, *Comments on State Succession*, 1966 *PROC. AM. SOC'Y INT'L L.* 111; Jenks, *State Succession in Respect of Law-making Treaties*, [1952] 29 *BRIT. Y.B. INT'L L.* 105; Verbit, *State Succession in the New States*, 1966 *PROC. AM. SOC'Y INT'L L.* 119.

204. See *RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 208 (Tent. Draft No. 2, 1981). The Reporters' Notes clearly distinguish state and government succession: "International law sharply distinguished the succession of states which may create a discontinuity in statehood, from a succession of governments which leaves statehood unaffected." *Id.* at 35, n.2.

The Soviet Union was the state that originally took issue with this traditional distinction. After the Russian revolution "the new regime sought to insist that it was not merely a new government, but represented a new state, and that the U.S.S.R. was not responsible for the international obligations assumed by the previous regime." *Id.* The PRC's assertion that it may selectively accept treaties indicates its disavowal of the traditional rule of government succession. See *supra* note 201 and accompanying text.

205. See 1 D. O'CONNELL, *supra* note 200, at 6. O'Connell dismisses the distinction between state and government succession as antiquated. *Id.* However, the International Law

PRC is as much the victim of unequal treaties as successor states. In addition, the Chinese revolution produced a change of political system so radical that the status of the PRC is closer to that of a successor state than that of a successor government.²⁰⁶

CONCLUSION

The PRC claims that it is justified in abrogating the Treaty of Nanking under accepted principles of international law.²⁰⁷ For the claim to have validity, it must fall within an exception to the doctrine of *pacta sunt servanda*.²⁰⁸ Two possible exceptions to this doctrine exist.

The first exception involves article 52 of the Vienna Convention which appears to render the Treaty of Nanking void.²⁰⁹ The nonretroactivity principle in article 4 of the Vienna Convention, however, subverts this conclusion.²¹⁰ Thus the second exception, which arises in the context of state succession, is the more significant one and the one under which the PRC has framed its right to invalidate the Treaty of Nanking.²¹¹

The law regarding state succession to unequal treaties has been developing since 1945.²¹² During this period, because of the increasing number of new states and the lack of uniformity in state practice, nations involved in treaty relations with these states have recognized new approaches of succession to treaties.²¹³ The fact that these new practices are still developing and are not yet solidified into generally accepted principles of international law means that there is no settled rule governing a state's right to refuse to succeed to its predecessor's unequal treaties. Therefore, the PRC's claim that it has the right to abrogate the Treaty of Nanking may fall into the state succession exception to the rule of *pacta sunt servanda*.

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Commission supports the distinction. See [1963] 2 Y.B. INT'L L. COMM'N 262, U.N. Doc. A/CN.4/214, at 5 (1969).

206. See *supra* notes 199-201 and accompanying text.

207. See *supra* note 9 and accompanying text.

208. See *supra* note 48 and accompanying text.

209. See *supra* notes 75-84 and accompanying text.

210. See *supra* notes 119-30 and accompanying text.

211. See *supra* notes 144-48 and accompanying text.

212. See *supra* notes 95-100, 149 and accompanying text.

213. See *supra* notes 163-84 and accompanying text.