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The Dissociation of Chinese International Law Scholars from TWAIL

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Abstract

Despite historical affinity and instrumental utility for criticizing Eurocentrism and structural bias, Chinese international law scholars gradually lost interest in Third World Approaches to International Law (TWAIL) in substantiating arguments in the Chinese approach to international law. This article first delineates what TWAIL entails and its importance to international law. More specifically, by delineating the relationship between TWAIL and Chinese scholars from the 1950s to the current period, I explain this dissociation in light of China's rapid economic growth, the dissolution of the Soviet Union, the rise of China, and associated implications for international law. On this basis, I then explain why the absence of TWAIL scholarship is more conspicuous in China based on two reasons: the close identification between Chinese scholars with the government's position and the lack of inter-disciplinary studies. Finally, I argue that dissociation between Chinese scholars and TWAIL is a sign that Chinese scholars in international law are paving towards developing a sui generis Chinese site of agency in international legal theory.

Key words

Chinese scholars; dissociation; instrumental utility; international legal theory; interdisciplinary; academia

1 Introduction

Why did Chinese international law scholars gradually lose interest in engaging with TWAIL literature to substantiate the Chinese approach to international law, especially in the past decade? With Communist China benefiting from its retrieval of a UN Seat in the 1970s with the Non-aligned Movement (NAM), it has long espoused the Third World wave in the international arena. The first generation of Chinese international law scholars, those precursors as Wang Tieya, Zhou Gengsheng, Li Haopei, Chen

Tiqiang, and many others, were unyielding fighters who spoke for the vulnerable and newly independent countries in international legal scholarship.[1] These influential Chinese scholars made extensive contributions to the 'non-western, third world, socialist, or otherwise marginalized approaches to international law.'[2] As the earliest Chinese scholars using international law and the UN Charter to condemn imperialist approaches after WWII, they manifested the proposition, 'excluded actors endorse foundational norms.'[3]

In sticking to the formal legal validity of these foundational norms, socialist and Third World critiques constructively imbue "epistemic determinacy and meaningfully counter-hegemonic character" into the interpretation of international law.[4] Most prominently in 1983, the eminent Chinese international lawyer Wang Tieya – also a former judge of the International Criminal Tribunal for the Former Yugoslavia – wrote an important piece entitled 'The Third World and International Law' encouraging Chinese international lawyers to heed Third World studies in international law against the backdrop of Third World countries' enlarging impact in international relations.[5] Wang vigorously argued that Third World countries find themselves in identical quagmires – 'one of undergoing bitter struggles to rid themselves of colonial

[1] These authors are representative because they had assumed important positions either in China's ministry of foreign affairs or in international institutions. Wang Tieya was the legal advisor to the PRC delegation to the UN in 1950. Zhou Gengsheng was the director of the Committee of International Treaties of the Ministry of Foreign Affairs. Li Haopei was a member of the Permanent Court of Arbitration and a judge at the Appeals Chamber at the International Criminal Tribunal for the Former Yugoslavia. Chen Tiqiang was the head of the first international law division at the Institute of International Relations of the Chinese Academy of Science. As for their work relating to the third world, Zhou Gengsheng's masterpiece on International Law and ten lectures on unequal treaties addressed important viewpoints on the subaltern states. Zhou Gengsheng, *Bu Pingdeng Tiaoyue Shijiang* (Ten Lectures on Unequal Treaties) (Shanghai Taipingyang Bookshop Print, 1929). Zhou Gengsheng, *International Law* (The Commercial Press, 1976). Li Haopei's paper on Jus Cogens probed into the need to reconsider whether unanimously or almost unanimously adopted General Assembly Declarative resolutions can be considered as a formal source of international law, as important scholarly support for the increasing third world influence in the General Assembly. This article was first published in Chinese in the Chinese Yearbook of International Law (1982). The English translation appeared in Selected Articles from the Chinese Yearbook of International Law (1983). Chen Tiqiang's doctoral thesis completed in Oxford on the issue of recognition also critiqued the thesis that protection offered by the rule of recognition of new states was imperialist and erroneous: Chen Tichiang, 'Recognition in International Law: With Special Reference to Practice in Great Britain and the United States', DPhil, University of Oxford, 1949.

[2] Ryan Mitchell, 'The Korean War and the Ontology of Intervention: Chen Tiqiang's "Who Is Undermining International Law?" (1950) — A Translation by Ryan Mitchell' (March 2019). https://legalform.blog/2019/03/05/the-korean-war-and-the-ontology-of-intervention-chen-tiqiangs-who-is-undermining-international-law-1950-ryan-mitchell/ (Accessed 4 July 2022).

[3] Chen Tiqiang, 'Who Is Undermining International Law?' (1950) 8 *World Knowledge [Shijie Zhishi 世界知识]*, at 7.

[4] Mitchell (2019).

[5] This collection of papers has gathered the most important scholars in international law in its time to provide opinions in international law. And interestingly, only Wang Tieya chose the topic of 'The Third World and International Law' while R.P. Anand wrote on another topic: 'The Influence of History on the Literature of International Law'. See Wang Tieya, 'The Third World and International Law' in Ronald St. J. Macdonald and D.M. Johnston (eds.), *The Structure and Process of International law: essays in legal philosophy, doctrine, and theory* (Martinus Nijhoff, 1983) 957.

rule in order to gain independence and freedom'– which made it possible to lump together such a complicated and diverse hodgepodge of nations under a single heading of the Third World, acting as an important "new force."[6]

However, in recent years, Chinese scholars seem to distance themselves from the Third World approach. It is a vexing question why Chinese scholars adopted this alienating attitude in considering TWAIL's powerful legal weapons as 'serviceable' to China's advocacy for group rights (e.g., the 'right to food' and 'right to development').[7] It is well noted that TWAIL has over the years constructed a solid alternative legal edifice that narrates socioeconomic and political disparities in the South-North dichotomy and promotes the eradication of underdevelopment conditions in the Third World.[8] Indeed, Lone proposes that 'TWAIL can explain President Xi Jinping's adoption of a new slogan of "Socialist rule of law with Chinese characteristics"'.[9] More specifically, by looking at Indigenous legal systems and practices, TWAIL can not only expose the violence of colonial encounters, but unearth knowledge and perspectives of law to challenge historical exclusions.[10]

Despite seeming serviceable, what deepens the alienation between Chinese scholarship and TWAIL may be the surge of scrutinizing interest in Third World studies towards the rise of China. This suspicion looms large with increasing Chinese investments in South Asia and Africa, and even more so since the Belt and Road Initiative (BRI).[11] B.S. Chimni perceives that 'China no longer talks the language of

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[6] Ibid, 959.

[7] See China's advocacy for group rights at the Human Rights Council, Ma Zhaoxu's speech: Ministry of Foreign Affairs, the People's Republic of China, 'China Is Firmly Committed to a Path of Human Rights Development That Suits Its National Conditions' (September 2021) https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzgy_663314/gyhd_663338/202109/t20210926_9580076.html (Accessed 4 July 2022); Xinhua, 'China on Behalf of 139 Countries Calls for Full Realization of Right to Development at UN' (September 2019) http://www.china.org.cn/world/2019-09/14/content_75205353.htm (Accessed 5 July 2022); Katrin Kinzelbach, 'An Analysis of China's Statements on Human Rights at the United Nations (2000–2010)' (2012) 30:3 *Netherlands Quarterly of Human Rights* 299.

[8] See for instance, Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31; B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3, at 3-4.

[9] Fozia Nazir Lone, 'Cross-Fertilization of Westphalian Approaches to International Law: Third World Studies and a New Era of International Law Scholarship' (2020) 34:4 *Emory International Law Review* 955, at 980.

[10] Lone (2020).

[11] Okafor argues that countries like China and Singapore should not be lumped in the same political category as Bhutan and Jamaica – 'There is a 'Third World' within the "First World," and vice versa.' See Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43:1,2 *Osgoode Hall Law Journal* 171, at 174. Moreover, many articles in *Third World Quarterly* deal with Chinese ambitions in less developed countries, which impelled 'those countries into partnerships that look unequal rather than equal.' See Jonathan Holslag, 'Unequal Partnerships and Open Doors: Probing China's Economic Ambitions in Asia' (2015) 36:11 *Third World Quarterly* 2112, at 2112; China is said to employ 'imperialist tactics to its pursuit of a regionally based order.' See Jeffrey Reeves, 'Imperialism and the Middle Kingdom: The Xi Jinping Administration's Peripheral Diplomacy with Developing States' (2018) 39:5 *Third World Quarterly* 976, at 976; See also Goldie Osuri, 'Imperialism, Colonialism and Sovereignty in the (Post)Colony: India and Kashmir' (2017) 38 *Third World Quarterly* 2428. Furthermore, Anand argues that China and India as "postcolonial informal empires" critically appropriated

Third Worldism,' and 'seeks to claim political power commensurate with their growing economic profile', rather than form political alignment to oppose capitalism and advanced capitalist countries.[12] The creation of the Asian Infrastructure Investment Bank (AIIB) is thus a different form of political alignment which features the participation of many developed states as well as developing states.

Chimni further explains the approach practiced by emerging powers like China and India, which involves the convergence of interests between the transnational capitalist class in the Global South and the Global North.[13] In this sense, China's standing seems to shift from an alliance with the Third World, to an accomplice of neoliberalism, which tries to mediate converging interests between the North and elites in the South in order to claim more political power.

Despite the dilemma of China's position, the insurgent voice of China in the field of human rights remains trenchant *vis-à-vis* its Western counterparts. A number of authors raise serious critiques of human rights as 'not just defences against power, but themselves significant forms of power.'[14] They argue that the rise of human rights in the 1970s was tied with a 'neoliberal version of "private" capitalism,' which has now degenerated into a 'familiar policy prescription of privatization, deregulation and state retreat from social provision.'[15] More specifically, tying the neoliberalist agenda with emphasis on individual civil and political rights privileges 'private rights over collective social and economic rights.'[16] Dianne Otto illustrates that the rights 'given prominence are those that assist free market economic globalization, in short, certain civil and

Western ideas like sovereignty and the free market to build a multinational state and combined it with stories of pre-Westernized civilizational-national cultures. These postcolonial empires had reduced diverse inhabiting peoples to culturally different but politically subservient subjects. See Dibyesh Anand, 'China and India: Postcolonial Informal Empires in the Emerging Global Order' (2012) 24:1 *Rethinking Marxism* 68. More pertinently, Azeem questions whether China as a non-western country can separate its economic success from 'the structurally-entrenched global capital often considered western.' See Muhammad Azeem, 'Theoretical Challenges to TWAIL with the Rise of China: Labor Conditions Under Chinese Investment in Pakistan' 20:2 *Oregon Review of International Law* 395, at 396.

[12] B.S. Chimni, 'Anti-Imperialism: Then and Now' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP, 2017) 35, at 38.

[13] Ibid.

[14] For Wendy Brown, '[The vindication of human rights] is a politics, and it organizes political space, often with the aim of monopolizing it.' Therefore, 'rather than offering analytically substantive accounts of the forces of injustice or injury,' human rights are just moralistic discourses that 'condemn the manifestation of these forces in particular events,' which leads to a 'politics of rhetoric and gesture.' See Wendy Brown, *Politics Out of History* (PUP, 2001) 35-37, 461. Samuel Moyn also cautioned risks of activism that dilute the human rights movement's strength with an uncritical spirit against the politics of human rights themselves. See Samuel Moyn, *The Last Utopia: Human Rights in History* (HUP, 2010) Prologue.

[15] Susan Marks, 'Four Human Rights Myths' in David Kinley, Wojciech Sadurski, & Kevin Walton (eds.), *Human Rights: Old Problems, New Possibilities* (Edward Elgar, 2013) 217, at 226. See also Naomi Klein, *The Shock Doctrine* (Penguin, 2007) 118; Susan Marks, 'Human Rights and Root Causes' (2011) 74:1 *Modern Law Review* 57, at 58.

[16] B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15:1 *European Journal of International Law* 1, at 11.

political rights: freedom of speech and information, minimal forms of representative democracy, the rule of law, and the strengthening of civil society.'[17]

However, the critical theoretical approach against tying neoliberal capitalism with an over-investment in civil and political rights did not receive enough attention in Chinese academia. Even if China attempts to defend a distinctive approach to human rights that plays down the emphasis on individual rights as civil and political rights, and uplifts the importance of collective rights as social and economic rights, Chinese scholars seem to display an uninterested sentiment towards this vigorous intellectual wave.

Given TWAIL's instrumental potency for China in defence of collective human rights, I aim to investigate the reasons for Chinese disenchantment with TWAIL. By so doing, I wish to shed light on how the current Chinese approach to international law steps on a different avenue from TWAIL. I organize my reasons in the following order: first, I explain how and why China moved away from Third Worldist language. Second, I stress the close identification between Chinese international legal academia and government positions, which intensified this detachment from TWAIL by Chinese scholars. Third, I elaborate on the orthodox international legal education in China which venerates positive law while marginalizing other disciplines, thereby distinguishing Chinese academia from the inter-disciplinary tide of TWAIL that draws inspiration from history, culture, gender, race, politics, critical approaches, and theories. Fourth, I will address the new narrative of the Chinese Rule of International Law, and its vision of the common future for mankind, to understand how the Chinese version of universalism plays out in its agenda. With these explained, this article argues that dissociation between Chinese scholars and TWAIL is a sign that Chinese scholars in international law are paving towards developing a uniquely Chinese site of agency in international law theory.

2 The Gradual Detachment from Third Worldist Language

I explain China's detachment through three layers: (1) the nature and conception of the Third World and TWAIL; (2) the Chinese relationship with the Third World and its involvement in the NAM; and (3) China's detachment from the Third World in relation to dissolution of the Soviet Union and China's rapid economic growth.

I first want to make clear that Third World countries should not be conflated with TWAIL. The notion of the Third World is 'ill-conceived'- the Third World may

[17] Dianne Otto, 'Defending Women's Economic and Social Rights: Some Thoughts on Indivisibility and a New Standard of Equality' in Isfahan Merali & Valerie Oosterveld (eds.), *Giving Meaning to Economic, Social, and Cultural Rights* (University of Pennsylvania Press, 2001) 52, at 52.

be characterized as a geographical space or geopolitical entity.[18] Further, many would still view the concept as 'anachronistic or terribly imprecise' for its admixture with other notions as 'developing countries', 'the Global South', or the 'periphery of the world'. In other words, the periphery is also 'often found "within" the developed North, where increasing fringes of the population live on the margins of society [in poverty]'.[19]

This territorial imprecision may extend to the definition of TWAIL scholars. TWAIL scholars were frequently assaulted for lacking a coherent and distinctive Third World approach, since 'these disparate strands do not weave together into any sort of pattern' to be called the Third World.[20] The heterogenous nature of TWAIL scholars was predetermined at the first TWAIL conference in 1997 at Harvard, with a group of participants from Third World and Western countries.[21] Therefore, unlike the first generation of public international law scholars from the Third World (a generation James Thuo Gathii calls the 'contributionist generation'), nationalities and backgrounds do not define this Harvard group of TWAIL scholars.

Still further, as opposed to the first generation, the new generation of TWAIL scholars hold a more radical critique of international law and its creation (i.e., conceptions of sovereignty and self-determination), which carried forward the legacy of imperialism and colonial conquest.[22] They share concerns about issues of knowledge and power in the creation and operation of international law.[23] They believe that advocacy for the Third World should be united in resistance, struggle and insurgence against colonialism and neocolonialism.[24] Therefore, under this banner, what matters is not nationality, but self-identification in a contingent and historically situated way.[25]

To self-identify is to align with the vision provided by TWAIL scholars in the discursive language of critiquing power and knowledge production, unpacking ideology, and speaking for subaltern states. Fighting against subordination is the

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[18] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP, 2016) 205.

[19] Ibid.

[20] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16:2 *Wisconsin International Law Journal* 353, at 353.

[21] James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3:1 *Trade, Law & Development* 26, at 28–29.

[22] Ibid, 30–31.

[23] Karin Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10 *International Community Law Review* 355, at 357.

[24] Chimni (2017) 6.

[25] Okafor (2005) 174. See also Flora IP, 'On Food and TWAIL: An Interview with Dr Michael Fakhri' (August 2018) https://www.floraip.com/2018/08/20/on-food-and-twail-an-interview-with-dr-michael-fakhri/ (Accessed 5 July 2022).

common legacy of TWAIL scholars, regardless of physical or geographic boundaries. That common legacy constitutes a 'unifying and self-identifying factor for TWAIL scholars, regardless of whether the chorus of their voices blends harmoniously.'[26] Self-identification, hence, is the distinctive method for TWAIL scholars who were not necessarily born or educated in a Third World country, but spoke the language of TWAIL to diverge and resist. The uncoupling between a Third World nationality and the cognition of Third World sensibilities enriches TWAIL discourses. Under this consciousness, inspecting China as a Third World country and studying Chinese scholars' views on TWAIL intermingle.

The question of whether China belongs to the Third World category should not prevent contemporary Chinese scholars from promoting TWAIL scholarship. Undeniably, China historically self-identified as a Third World country. This was first raised in 1974 by Mao Tse-tung in his conversation with the Zambian President Kenneth David Kaunda regarding the organization of countries into three worlds.[27] On this conception, China and other Asian countries (except for Japan), Africa, and Latin America all belong to the Third World.[28]

Early in the Bandung Conference, China was an important co-initiator with India.[29] NAM then inherited the spirit of the Bandung Conference, presenting itself as a constellation for resistance and unification against colonialism, racism, apartheid and neocolonialism in the pursuit of greater economic and political independence against Western power.[30] China's membership in NAM was mostly rendered in support from non-aligned countries for Communist China to regain UN status. China actively engaged in NAM as an observer in the 1970s and 1980s, and later in the activities of G77, which put forward a wide range of Third Worldist legal arguments.[31]

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[26] Mickelson (1998) 360; Bianchi (2016) 207.

[27] The First World was composed of the United States and the Soviet Union, the Second World of European countries, Japan, Australia and Canada. See Zedong Mao, *Mao Zedong on Diplomacy* (Foreign Languages Press, 1998).

[28] According to the Western theory, China belonged to the Second World as co-led by the Soviet Union and their allies, yet China has self-identified itself as a Third World country in order to unite the peoples in subaltern states. See Jiang An, 'Mao Zedong's "Three Worlds" Theory: Political Considerations and Value for the Times' (2013) 34 *Social Sciences in China* 35, at 40. As noted by Chou En-lai before a meeting of the 1975 National People's Congress of China: 'The Third World is the main force in combating colonialism, imperialism, and hegemonism. China is a developing socialist country belonging to the Third World.' See George T. Yu, 'China and the Third World' (1977) 17:11 *Asian Survey* 1036, at 1036.

[29] Chen Yifeng's paper in the same collection on the Bandung conference and China also presented in detail how Chinese leaders were actively promoting the convening of the Bandung conference. See Chen Yifeng, 'Bandung, China, and the Making of World Order in East Asia' in Luis Eslava, Michael Fakhri & Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP, 2017) 180.

[30] Bandung contributed to the creation of NAM and there was ideational continuity between the two. Luis Eslava, Michael Fakhri & Vasuki Nesiah, 'The Spirit of Bandung', in Luis Eslava, Michael Fakhri & Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP, 2017) 3, at 13.

[31] A.D. Hassan, 'China and Non-Alignment' (1976) 3:3 *India International Centre Quarterly* 65, at 65-66; P.K.S Namboodiri, 'China and the Nonaligned' (1979) 3:6 *Strategic Analysis* 221, at 221.

The historical intimacy of alliances and companionships between China and Third World countries manifested an indispensable affinity by Chinese scholars and lawyers to capacitate themselves with TWAIL sensibilities for criticizing and resisting the unfair imposition of Western domination in international norm-making and ordering. The first generation of Chinese international lawyers deplored how international law imposed a system of hierarchized civilizations and classified humanities used to authorize and legitimatize the plundering, exploitation and oppression of colonized peoples.[32] Chinese scholars strongly condemned unequal treaties as part of Western-imposed international law, which legitimize Western domination and exploitation in China.[33]

It is against the legitimized imposition of unequal treaties that this generation of Chinese international legal scholars highly advocated for the concept of sovereignty. Attachment to sovereignty by newly established States was mainly due to a sense of vulnerability to infringement.[34] In particular, China put emphasis on sovereignty as 'the hard-worn prize of their long struggles for their lost sovereignty' and 'a legal barrier protecting against foreign domination and aggression.'[35] China's emphasis on sovereignty allowed it to break the suzerain relation with its Soviet counterpart to produce a new model of independence.[36]

However, the praxis of Third World vocabulary from the 1960s to 1980s gradually lost its charm when the dissolution of the Soviet Union meant the collapse of the Second World,[37] and the expiration of this ideological wedge or lever.[38] The decline of the concept of 'Third World,' as Geeta Kapur observes, was inevitable - this concept came in handy for primarily ideological reasons and denied historical sense in

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[32] Chen Tiqiang, 'The People's Republic of China and Public International Law' (1984) 8:1 *The Dalhousie Law Journal* 3, at 7-9. Citing Oppenheim's five classes which hierarchized states according to level of civilization, and James Lorimer's classification of humanities, Chen expressly unveiled how 'Humiliation suffered by China was due principally to the imperialist policy of the Great Powers and the incompetence, the corruption and the anti-people policy of the reactionary ruling cliques in China' and how international law could do nothing to change the semi-colonial degradation of China which served hegemonic ambitions through absurd hierarchies coined by distinguished international legal scholars.

[33] For these Western countries, Wang states, "the main role of international law was to guarantee and supplement the execution of unequal treaties." Tieya Wang, *International Law in China: Historical and Contemporary Perspectives (Volume 221)* (Collected Courses of the Hague Academy of International Law, 1990) 258. See also Zhou Gengsheng, *Bu Pingdeng Tiaoyue Shijiang (Ten Lectures on Unequal Treaties)* (Shanghai Taipingyang Bookshop, 1929).

[34] Wang (1990) 290.

[35] Ibid.

[36] Hui Wang, *China's New Order: Society, Politics, and Economy in Transition* (edited & translated by Theodore Huters) (HUP, 2003) xx.

[37] Here I refer to the Chinese classification of 'three worlds' with the Soviet Union and communist states in Eastern Europe as the Second World.

[38] M Sornarajah, 'On Fighting for Global Justice: The Role of a Third World International Lawyer' (2016) 37:11 *Third World Quarterly* 1972, at 1974.

order to be polemically effective.[39] The Third World, by definition, was only possible when wedged in the global bind established between First and Second worlds.[40] Once used not as a simple lever, but as a concept, issues became confounded.[41] The hope embraced by the first generation of Third World international lawyers, as agents striving to achieve "universality and the possibility of a plurality of laws for the whole of mankind based on justice and equality", collapsed in paradoxically solidifying Western power.[42] The Third World as a concept collapsed when 'Third World cohesion and Soviet communism collapsed around the same time, ensuring the predominance of the USA as the sole hegemonic power.'[43] It collapsed because aspired 'universalism' actually provided legal permission for the powerful to ensure their status as leaders of the world.[44]

Drastic changes took place after the end of the Cultural Revolution: 'After 1978, the Chinese Government gradually came to abandon its policy thrust of uniting with the Third World and the nonaligned movement and made relations with the United States, Japan, and other advanced capitalist countries its principal focus.'[45] In this period, China started to carry forward a process of marketization reform. The progress of reforms after 1978 can be broadly divided into two main stages: the agricultural reforms (1978-1984) and the urban reforms (1984-1989).[46]

At the beginning of urban reforms in 1984, the 'Decision on the Economic System Reform' by China's leadership was an important step towards a marketized economy.[47] In the following years, Chinese leadership and economists engaged in long debates regarding how to avoid a shock from price liberation and marketization.[48] Despite long discussions, China experienced a huge shock from price liberation in 1988, resulting in hyperinflation and unprecedented backlash against market reform. However, with the insistence of Chinese statesmen (in particular Deng Xiaoping and Zhao Ziyang), price reform was pushed forward.[49]

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[39] Geeta Kapur, 'Contemporary Cultural Practice: Some Polemical Categories' (1990) 4:11 *Third Text* 109, at 114.

[40] Ibid.

[41] Ibid.

[42] Sornarajah (2016) 1974.

[43] Ibid.

[44] Ibid.

[45] Wang (2003) 74.

[46] Ibid, 48.

[47] Isabella M. Weber, *How China Escaped Shock Therapy: The Market Reform Debate* (Routledge, 2021) 184.

[48] Ibid, 7.

[49] Ibid, 226. Deng Xiaoping was Chairman of the Central Military Commission. Zhao Ziyang was General Secretary to the Chinese Communist Party during this period.

During 1992-1993, China made a significant decision: a shift from planned economy to market economy, tremendously accelerating implementation of the Reform and Opening Up policy.[50] Deng Xiaoping's Southern Tour Speech is a critical juncture marking China's full embrace of the market economy.[51] This critical move effaced systemic obstacles regarding whether to adhere to capitalism or socialism, and helped China reap tremendous benefits in economic growth and technological development. Rapid economic growth following the adoption of market economy provided China with greater chances to connect with advanced capitalist countries.

The dissolution of the Soviet Union, China's change of economic path to market economy, and success in the 1994 Uruguay Round in establishing the WTO, constituted the background on which China decided to engage more actively with international trade and development.[52] During this period, Chinese legal scholars increased engagement with formalist technicalities of international law in their criticisms against Western domination of international economic law. At the same time, Chinese legal education 'aimed at nurturing specialized talents who know law, economics and foreign languages, [and] to propel the development of the market economy and the legal construction of the rule of law.'[53] Chinese international lawyers were dedicated to familiarising themselves with the rules of trade laws in not only being third-parties to numerous WTO dispute settlement resolution cases, but also in proactively waging claims.[54]

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[50] The Reform and Opening Up policy were initiated in 1978 by Deng Xiaoping. In 1993, the Chinese Communist Party passed a decision to establish Socialist Market Economy, as the primary goal of reform for Chinese economic structures.

[51] For a background discussion of Deng's Southern Tour Speech, see John Wong & Yongnian Zheng, 'The Political Economy of China's Post-Nanxun Development' in John Wong and Yongnian Zheng (eds.), *The Nanxun Legacy and China's Development in the Post-Deng Era* (NUS Press & World Scientific, 2001) 3, at 18.

[52] Victor Carneiro Corrêa Vieira, 'From Third World Theory to Belt and Road Initiative: International Aid as a Chinese Foreign Policy Tool' (2019) 41:3 *Contexto Internacional* 529. This paper provides a trajectory of China's transformation from closed economy to international cooperation.

[53] Zou Keyuan, 'Professionalising Legal Education in the People's Republic of China' (2003) 7 *Singapore Journal of International & Comparative Law* 159, at 163-164. Zou observes that legal education differed in this period than described from Deng Xiaoping's trip to South China in 1992, due to less ideological education. Before 1992, the mission of legal education was 'to train students through higher legal education to become people who possess basic knowledge of the Marxist-Leninist theory of law; are familiar with the Party's political and legal work, policies and guiding principles; are endowed with socialist political consciousness; have mastered the professional knowledge of law; and are capable of undertaking research, teaching and practical legal work…after Deng Xiaoping's trip to South China in 1992, China has been heading towards the market economy, thus diminishing the influence of communist ideology. Consequently, the mission of legal education has become more pragmatic in the sense of serving the development of the market economy. For example, the recent mission statement of the Peking University Law School does not contain such communist ideological jargons, such as 'Marxist-Leninist', 'socialist', and 'Party' any longer.': at 168; Han Dayuan (Dean of Law School of Renming University) similarly observes that Deng's South Tour Speech had important implications for professionalization of legal education in China, as China needed more legal talent for developing its market economy. See also Weixing Shen, Jin Huang, Dayuan Han, Xianming Xu, 'Dialogue- Gaige Kaifang Sishinian de Zhongguo Faxue Jiaoyu (Chinese Legal Education – 40 years after the Reform and Opening up)' (2018) 3 *Zhongguo Falv Pinglun (China Law Review)* 2, at 8.

[54]Yang Guohua, 'China in the WTO Dispute Settlement: A Memoir' (2015) 49:1 *Journal of World Trade* 1, at 9.

Chinese scholars continue to criticize structural bias in trade rules. For instance, they argue that WTO cases like *China-Raw Materials* lay bare how developing countries use 'export restraints on minerals' to 'upgrade their economic conditions against a broader backdrop of international economic transition in a mineral-hungry world'. Despite accusations of being inconsistent with WTO agreements, developing countries cite 'environmental protection' reasons and the 'conservation of exhaustible natural resource[s]',[55] to prevent environmental harm from lack of capacity in certain cases to regulate domestic markets.[56] Chinese scholars suggest that 'trade measures [like export control] may be a "second-best" alternative', stressing 'developing countries [greater need] for recourse to sustainable development-related exceptions than industrialized countries'. [57] As a 'pro-North institution' which fails to accommodate emerging demands of the Global South,[58] the WTO mechanism is criticised in 'leav[ing] very little policy space for Member States applying export quotas for sustainable development purposes.'[59]

The economic rise and expansion of legal professionals in China has allowed it to gradually shift from a passive rule-taker to an active rule-maker in the international legal order.[60] An important manifestation of this role shift in the economic law sector, is a repositioning from a host State to a home State for investors. By pinpointing the fact that China receives as much foreign direct investment inflow as outflow, Chinese scholarship suggests that China strikes a balance between protecting its national industry against foreign investors at home and safeguarding increasing foreign investment in other countries.[61] Many scholars note such balance should be carefully drawn in investment agreement designs and domestic legislation of foreign investment.[62]

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[55] Bin Gu, 'Mineral Export Restraints and Sustainable Development--Are Rare Earths Testing the WTO's Loopholes?' (2011) 14:4 *Journal of International Economic Law* 765, at 765.

[56] Han-Wei Liu and John Maughan, 'China's Rare Earths Export Quotas: Out of the China-Raw Materials Gate, But Past the WTO's Finish Line?' (2012) 15:4 *Journal of International Economic Law* 971, at 1003.

[57] Ibid.

[58] Gu (2011) 797.

[59] Liu and Maughan (2012) 1002.

[60] Heng Wang, 'Selective Reshaping: China's Paradigm Shift in International Economic Governance' (2020) 23 *Journal of International Economic Law* 583, at 591–593.

[61] See Yanzhi Wang, 'Zhongguo Zai Guoji Touzifa Shang de Shenfen Zhuanhuan yu Lichang Dingwei (The Change of Identity and Positioning of China in International Investment Law)' (2013) 4 *Dangdai Faxue (Contemporary Law Review)* 131, at 136; Yongjie Li, 'Factors to be Considered for China's Future Investment Treaties' in Shan Wenhua and Jinyuan Su (ed), *China and International Investment Law* (Brill 2015) 173, at 176.

[62] Sun Liu, 'Guoji Touzi yu Huanjing Baohu de Falv Chongtu yu Xietiao (The Legal Conflicts and Coordination of International Investment and Environmental Protection)' (2006) 28:6 *Xiandai Faxue (Modern Law Science)* 34, at 40-41; Xiuli Han, 'Zhongguo Haiwai Touzi zhong de Huanjing Baohu Wenti (The Environmental Protection Issues in Chinese Overseas Investment)' (2013) 5 *Guoji Wenti Yanjiu (International Issues Studies)* 103, at 111.

In this connection, academic interest in the Chinese international legal discipline shifted from an indictment of Western domination to a systemic design of balancing Chinese national interest as both a home State and a host State. This shift of China's position, from a recipient of foreign investment to an investor-donor, accounts for the major reasons behind China's gradual disenchantment with Third Worldist language of subjugation and resistance.

Consistent with furthering alliance to neoliberal modes of governance, some Chinese lawyers suggested changing the original approach of absolute sovereignty after participation in international economic institutions.[63] This required China to make a compromise on sovereignty as a principle.[64] Underlying this compromise was a perception that first generation Third Worldist language emphasizing sovereignty and non-intervention was more diplomatic than professional. Professionalism became an important requirement for the new generation of Chinese international lawyers in distinguishing themselves from diplomats. By choosing professionalism, Chinese scholars moved away from a more 'systematic process of resistance to the negative aspects of international law' espoused by the second generation of TWAIL.[65] In any case, the related debates on capitalist vs. socialist ideology were no longer important since 1993, when the socialist market economy was put in place. Disenchantment toward resisting neoliberalism had already started at this critical juncture.

3 The Close Identification between Legal Academia and the Official Stance

In the course of examining Chinese international legal literature, it is notable that Chinese scholars 'saw their tasks [as] supporting the nation-building project by projecting national interests.'[66] Many Western scholars meticulously recorded and identified Chinese academics' profound entanglement with official Chinese discourses.[67] The close identification between legal academia and the government's official stance led to marginalization of Third World studies and critical studies in

[63] Guiguo Wang, 'Sovereignty in Global Economic Integration: a Chinese Perspective' in Haopei Li, Sienho Yee & Tieya Wang (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, 2001) 357, at 371.'

[64] Ibid.

[65] Luis Eslava & Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45:2 *Journal of Law and Politics in Africa, Asia and Latin America* 195, at 209. Some scholars coined the second TWAIL generation and beyond in relation to the first ('contributionist') generation. See Antony Anghie & B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2:1 *Chinese Journal of International Law* 77, at 82.

[66] B.S. Chimni, 'International Law Scholarship in Post-Colonial India: Coping with Dualism' (2010) 23:1 *Leiden Journal of International Law* 23, at 25.

[67] Anthea Roberts, *Is International Law International?* (OUP, 2017) 52.

Chinese legal academia through China's gradual detachment from Third Worldist language.

Anthea Roberts presents how the Chinese government seeks to promote international legal research regarding "issues of pressing national import" through the strategic use of funding.[68] The project lists identified by Roberts in the National Natural Science Foundation of China showcased her proposition that project aims are invariably intended to promote China's interests.[69] Roberts also examines the role of the Chinese Society of International Law as a national academic group with a Secretariat located in the China University of Foreign Affairs, and which is governed by the Ministry of Foreign Affairs.[70] The Chinese Society of International Law – and close collaboration with the Ministry of Foreign Affairs – ensures that 'research on international law faithfully serves diplomatic practice in China.'[71]

Other studies also compile the topics of annual plenary conferences of the Chinese Society of International Law and China Society for the Law of the Sea, in which most topics have a strong Chinese interest orientation: 'the Changing Era and Development of International Law: Contributions of China' (2017), 'Application and Development of International Law: Opportunities and Challenges for China' (2016), 'The Maritime Silk Road and the Law of the Sea' (2017), and 'Safeguarding the Oceanic Interests of China and Opposing the South China Sea Arbitration Award' (2016).[72]

Roberts delineates the South China Sea arbitration, asserting that the Chinese Journal of International Law (CJIL) only publishes papers questioning the tribunal's jurisdiction. She argues that CJIL's book project titled, *The South China Sea Arbitration: A Chinese Perspective*, clearly supports China's position on jurisdiction, despite endeavoring to present an 'amicus curiae brief of interested academics acting in their capacity as independent experts of international law'.[73] Similarly, Matthew Erie pinpoints this close relationship between Chinese legal scholarship and the government position in the sense that 'scholarship must be "useful" to the Party-State to garner state patronage, which is a prerequisite for funding, publishing, and policy impact.'[74] The stringent censorship system in the Chinese context and self-censorship

[68] Ibid, 229.

[69] Ibid.

[70] Ibid, 241.

[71] Lin Zhang & Lingsheng Zhang, 'Research and Teaching of International Law in Contemporary China: A Landscape Sketch' (2017) 10:2 *Journal of East Asia and International Law* 427, at 448.

[72] Ibid, 445.

[73] Roberts (2017) 252.

[74] Matthew S. Erie, 'China and Comparative International Law: Between Social Science and Critique' (2021) 22:1 *Chicago Journal of International Law* 59, at 64.

in avoiding controversial issues illustrates difficulties for Chinese scholars to 'denationalize' themselves.[75]

In addition to institutional difficulties for denationalization, Chinese scholars encounter sentimental difficulties to denationalizing their research, endogenous to the entanglement of scholarly research and government position. Unlike many countries that implement multi-party systems, China operates the one-party rule, meaning the Beijing government as a government is equivalent to China as a country. The unification of government and country in the Chinese context has made it psychologically difficult for Chinese scholars to denationalize, or in other words, to uncouple the government from the nation-state. Using international law to defend the national position and state interest becomes a natural decision, without pondering the underlying reason or mentality.[76]

The American Policy-Oriented approach in international law, which lent itself to instrumental use for foreign policy purposes, provides legitimacy for a close alliance with the national position and interest.[77] Chinese international legal scholars were deeply influenced by this approach, in particular those who studied law in the US during the 1990s.[78] This approach allows many Chinese scholars to find a comfortable position to reflect Chinese foreign policies and propound the values of international law. During China's gradual detachment from Third Worldist language, particularly in the economic law sector, Chinese legal academia was unavoidably affected and led by this detachment. Some Chinese scholars argue that TWAIL or feminism are value-loaded perspectives, which do not reflect a comprehensive overview of international law.[79] Furthermore, some scholars suggest that Chinese scholarship 'should get rid of the traditional struggling perspective when dealing with the relation between the North

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[75] Roberts (2017) 161.

[76] For a more elaborate account of the relation between state interest and international law, see Zhiyun Liu, 'Guojia Liyi de Cengci Fenxi yu Guojia zai Guojifa shang de Xingdong Xuanze (The Layer Analysis of National Interest and the Choice of Actions by States in International Law)' (2015) 37:1 *Xiandai Faxue (Modern Law Science)* 139, at 139-141.

[77] For a critique of the New Haven School, see Bianchi (2016) ch 5.

[78] For Chinese scholars' view of law as a means to defend foreign policies: Li Ming, 'Gaige Kaifang Sichou Zhilu Guojifa – Cong Zhengzhi Jiaodu Kandai Falv (Reform and Opening Up, the Silk Road, and International Law – Law from a Political Perspective)' (2014) 28:6 *Journal of Shihezi University* 1. Many important Chinese scholars wrote about the Policy-Oriented Approach: Bai Guimei, 'Zhengce Dingxiang Xueshuo de Guojifa Lilun (The Policy-Oriented Theories of International Law)' in *Zhongguo Guojifa Niankan (Chinese Yearbook of International Law)* (China Law Press 1990) 201; Bai Guimei, 'Myres McDougal and Policy-Oriented School', in *Zhongguo Guojifa Niankan (Chinese Yearbook of International Law)* (China Law Press 1996) 361; Guiguo Wang, 'The New Haven School of Legal Theory from the Perspective of Traditional Chinese Culture' (2012) 20:2 *Asia Pacific Law Review* 211, at 213; Zhiyun Liu, 'Niu Heiwen Xuepai: Lengzhan Shiqi Guoji Faxue de Yici Lilun Chuangxin (The New Haven School: A Theoretical Innovation in International Law During the Cold War)' (2007) 5 *Gansu Zhengfa Xueyuan Xuebao (Journal of Gansu University of Political Science and Law)* 134.

[79] Zhipeng He & Yue Gao, 'Zuowei Guojifa Yanjiu Fangfa de Pipan Xianshi Zhuyi (Critical Realism as a Methodology of International Law)' (2014) 3 *Fazhi yu Shehui Fazhan (Law & Social Development)* 148, at 149.

and the South and attempt to design operational mechanisms to harmonize them under the strategy of "One Belt, One Road".'[80] Scholars believe that the continuing ascension of China in the global community requires China and Chinese international legal academia to contribute more to the building of international rule of law.[81] This scholarly aspiration is in line with Beijing's position and plan.

However, a few scholars in China criticize the instrumentalism of the Chinese legal academic approach in the sense that theoretical research should only work for diplomatic practices.[82] Some scholars argue that such 'academic' work blurs the line between policy papers and academic research, which impoverishes work on international legal theories in China.[83] Some Chinese scholars also argue that concentration on national interest with a narrow understanding renders a short-sighted policy vision.[84] Samuli Sappänen provides an eloquent account of how some Chinese scholars subvert state-sanctioned ideology and advocate for a more liberal narrative respecting rule of law and individual liberty.[85] In this sense, some Chinese scholars are far more internationalist and closer to political liberalism than the State.[86] Yet such critical voices are scant compared to the general trend in China's legal academia, where the close identification between the official stance and legal academia is entrenched.

4 The Deficiency of Inter-disciplinary Studies in China's Legal Education

As mentioned above, starting from 1992, China's legal education developed towards professionalism. Professional legal education also means a focus on the legal discipline, and mainly a positivist approach to law. The plan to focus on the legal discipline was to help Chinese lawyers 'assimilate international law into practical knowledge.'[87] The eagerness to grapple with practical knowledge is described by Georges Abi-Saab when sharing his experiences in the WTO dispute settlement body: 'When I started the worst thing was the hermetic character of the products. If anyone takes the trouble of reading

[80] Lin Zhang & Lingsheng Zhang (2017) 448–449.

[81] Ibid.

[82] See Xu Chongli, 'The Mentality of the System Outsider and the Poverty of Chinese International Law Theories' (2006) 5 *Journal of China University of Political Science and Law* 33, at 35; Li Ming, 'Guojifa de Xingzhi ji Zuoyong: Pipan Guoji Faxue de Fansi (On the Nature and Function of International Law: Insights from Critical International Law)' (2020) 3 *Peking University Law Journal* 801, at 816-817.

[83] Xu (2006) 35.

[84] Ibid.

[85] Samuli Seppanen, *Ideological Conflict and the Rule of Law in Contemporary China: Useful Paradoxes* (CUP 2016) 105. A prominent example of advocacy for the liberal narrative was Ji Weidong, based in Shanghai Jiaotong University.

[86] See Wenkai Sun & Weidong Li, 'Zhongzu Pipan Faxue de Hou Xiandai Fenxi (A Post-modernist Analysis of Race Critical Theories)' (2004) 4 *Neimengu Daxue Xuebao (Journal of Neimenggu University)* 98, at 99; Hui Wang, 'Is a New Internationalism Possible?' (2012) 20:1 *positions* 385.

[87] Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (CUP, 2014) 61.

a report of the Appellate body, particularly an older one, it's really like reading Chinese for a non-Chinese speaker. Everything is almost in cipher.'[88] Therefore, in order to train more qualified international lawyers to understand international rules, law schools in Third World countries tended to only focus on technicalities of international law with a formalist pedagogical approach.[89]

Chimni characterizes increasing interest in professionalism in international law as a 'formalist dualism' that critiques colonial international law but embraces the narrative of progress in the present.[90] More precisely, this formalist dualism manifests in both 'an opposition to the policies of imperialism' and 'an attempt to use existing international legal and institutional structures to bring about change in the international system to the advantage of Third World peoples."[91]

Chinese scholarship embodies this formalist dualism through critical heed paid to how pre-set trade and investment rules devised by advanced Western states generate a prejudiced global market favouring the Global North.[92] In this critical wave, Chinese scholars utilize a formalist approach in appealing for a levelled economic playing field for developing states.[93] As Abi-Saab states, they 'operate behind the enemy lines,' to 'expose high and loud what went wrong and the legal failings and defects' in order to 'undermine its credibility and legitimacy.'[94] Third Worldist scholars' 'strategic use of international legal arguments' have shifted from a pure reliance on the principle of sovereignty to a more astutely instrumentalized international law through technicalities

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[88] Georges Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines?' (2016) 37:11 *Third World Quarterly* 1957, at 1968.

[89] As argued by Arnulf Becker Lorca, "Semi-peripheral lawyers were formalists when supporting a variety of legal propositions or doctrines – from non-intervention, to the illegality of the use of force to recover public debt, to the abrogation of consular jurisdiction – by way of presenting them as deductions from the principle of sovereignty.": Lorca (2014) 60.

[90] Chimni (2010) 23.

[91] Ibid, 25.

[92] Julia Ya Qin analyzes the WTO-plus protocols regarding China's accession protocol to the WTO. She argues these practices are a legacy of GATT, which was inherently inconsistent with WTO rule of law, suggesting that WTO law is still a power-based regime which would impede the effective functioning of the WTO system: Julia Ya Qin, '"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System' (2003) 37:3 *Journal of World Trade* 483, at 521–522. In the same journal, Haochen Sun discusses how the TRIPs Agreement creates difficulties for developing countries with insufficient capacities for manufacturing essential pharmaceuticals, and appeals for greater discussions and mutual understanding in the Doha Round: Haochen Sun, 'Reshaping the TRIPs Agreement Concerning Public Health: Two Critical Issues' (2003) 37:1 *Journal of World Trade* 163.

[93] To list a few examples: Bin Gu (2011) 767; Bin Gu, 'Applicability of GATT Article XX in China-Raw Materials: A Clash within the WTO Agreement' (2012) 15:4 *Journal of International Economic Law* 1007, at 1029; Wu Jiangong, 'WTO Zhengduan Jiejue Jizhi zhong de Bugongzheng Xing: Yi Fazhanzhong Guojia Chengyuan Wei Shijiao (Analysis About the Unjust Character of WTO Disputes-Solving System)' (2010) 1 *Faxue Zazhi* 142, at 142; Chen Huiping, 'Investor-State Dispute Settlement Mechanism: Where to Go in the 21st Century?' (2008) 9:6 *The Journal of World Investment & Trade* 467, at 470.

[94] Abi-Saab (2016) 1964.

embedded in the convoluted rules and jurisprudence of international dispute settlement.

Indeed, Chimni criticizes formalist dualism for being an instrumental use of international law as a historical result of Eurocentrism, where developed states intentionally failed to inscribe sufficient concessionary norms in international legal rules.[95] However, Chimni believes that such 'light' criticisms are not sufficient because 'a liberal order with a dose of reforms in favour of Asian and other third world nations' may not work well for its peoples.[96] For Chimni, what is more important are criticisms against mainstream international legal scholarship regarding class, gender and race fractures that mark contemporary international law.[97] In the end, those who view a critical approach to international law as only a means to criticize its Eurocentric roots and unfavourable attitude toward developing states, only teach international law to essentially familiarize students with existing doctrines and practices in order to foster skillful Asian international lawyers in competition with Western counterparts for the purpose of realizing national and regional interests.[98]

In being predicated on the impossibility of the universal domesticating the particular, Third World scholars advocate for going beyond self-representation and 'traditional sites of enactment and performance such as "diplomacy and mainstream international law"', as a 'heroic agent of progress, security, order, human rights and democracy'. [99] Critical TWAIL scholars focus on histories, theories and inter-disciplinary studies in order to challenge the established centeredness of international law in disciplinary studies and to discern how international law plays out in the 'continuous formation and re-formation of the composition of social forces.'[100]
Intense exchanges with critical approaches and gender studies enabled TWAIL to embrace more profoundly a sociological perspective on law, power and domination. In a similar vein, Marxism was reinvigorated to criticize the neoliberal imposition of notions of sovereignty and property rights.[101] There was increasing interest among TWAILers in sociology regarding how international law constitutes and reconstitutes

[95] Chimni argues that 'in this view radical critiques of international law are either irrelevant or misplaced.' B.S.Chimni, 'Teaching and Research of International Law in Asia: Some Reflections on the Way Forward (Draft)' (May 23) https://cil.nus.edu.sg/wp-content/uploads/2018/07/CHIMNI-TEACHING-AND-RESEARCH-OF-INTERNATIONAL-LAW-IN-ASIA-23-MAY-2018.pdf (Accessed 7 July 2022) 3.

[96] Ibid.

[97] Ibid.

[98] Ibid, 4.

[99] James Thuo Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' in Jeffrey L. Dunoff & Mark A. Pollack (eds.), *International Legal Theory: Foundations and Frontiers* (CUP, 2022) 153, at 162.

[100] Michael Hardt & Antonio Negri, *Empire* (HUP, 2000) xiv.

[101] ibid.

through routines, spaces and objects. More notably, the current TWAIL studies demonstrate a spirited turn to history in international law. The interplay with theories, sociology, culture, history and other disciplines was not socialized in legal education in most Third World countries.[102]

Very few Chinese law schools have opened inter-disciplinary courses.[103] This has directly weakened Chinese law students' capacities to take on an inter-disciplinary reading of international law. Setting aside the language barriers (considering that Chinese is a non-Latin language), the cultural education in China is inherently oriental and mainstreamed by the Chinese government. Unlike the first generation of international law scholars in China who had a good command of international relations, diplomacy and international law,[104] the current generation is more specialist than generalist in international law, let alone other disciplines. Similar to places in the world where 'most of the [academic] programs…showed a tendency to reproduce knowledge rather than comprehend its origins and question its consequences,' Chinese international legal education is dedicated to training lawyers by providing them 'with knowledge of the rules of the game,' but 'do not pay close attention to the context in which law is produced and applied, the objectives it pursues, and its political implications.'[105]

It is observed that '[t]he legal education teaching method in China is very traditional, i.e., the most common pedagogical technique is lecturing, which is now criticized as being too conservative since it does not promote healthy skepticism, intellectual curiosity and creativity.'[106] The international legal textbooks used by Chinese universities are seriously lagging behind the theories and practices of international laws and relations; recent publications of international legal textbooks are

[102] Chinese jurists share a consensus that there was a deficiency of inter-disciplinary education in China's legal education: Shen et al. (2018) 3.

[103] This deficiency was mentioned in Shen et al. (2018) 3.

[104] This remark was given by the jurists to Qian Duansheng, an eminent legal scholar in China's history: Shen et al. (2018) 6.

[105] The same experience is happening to many other countries. The REDIAL (a project on *Rethinking International Legal Education in Latin America*), a platform that facilitates dialogue among scholars on the 'periphery', has provided many insights in this regard which have similar echoes in Chinese legal teaching and education. See Paola Andrea Acosta Alvarado, Amaya Álvez Marín, Laura Betancur-Restrepo, Fabia Veçoso & Daniel Rivas-Ramírez, 'Rethinking International Legal Education in Latin America: Reflections toward a Global Dialogue' (30 August 2019) https://twailr.com/rethinking-international-legal-education-in-latin-america-reflections-toward-a-global-dialogue/ (Accessed 7 July 2022).

[106] Zou (2003) 170.

the same as those published decades ago, which poses a serious issue of repetitive work.[107]

Over the years, paucity in furnishing different ways of thinking about international law among Chinese legal scholars and teachers has impoverished TWAIL studies in China.[108] Against this background, even 'the histories of international law produced by Chinese jurists and historians seem marginal within the historiographical turn and within Western academic circles specifically.'[109] A primary reason for this marginalization of Chinese voices in the historiographical turn in international law is the lack of socialization and education of inter-disciplinary studies, including the history of international law and globalization.

The homogeneity in positivist legal education in international law is not a single phenomenon in China, but in the world at large.[110] This domination by positivism may be even more complete in China for various reasons.[111] One of the major reasons is the uprooting of the Soviet legacy and correcting the extreme-leftist politics in its legal education. Zhu Suli, an eminent jurist based at Peking University, explains that throughout the 1980s a major mission of China's legal education was to criticize the Soviet legacy and to establish law as a discipline and profession, independent of politics. That was because before the 1980s, China's legal scholarship was a type of political legal scholarship rather than doctrinal or social-scienced, due to the influence of the Soviets which considered international law (and law in general) as an instrument to articulate political propaganda.[112] Starting in the 1980s, the determination to uproot politics and rediscover the autonomy of the legal discipline directly led to an emphasis on formalistic education.[113] As such, a 'leapfrogging' situation changed 'the former soviet legal tradition to the practice of rule of law in China, as endorsed by the law and development movement and the Washington Consensus in the 20th century.'[114]

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[107] Cai Congyan, 'Dangqian Xifang Guojifa Jiaoyu Mianlin de Tiaozhan jiqi dui Zhongguo de Qishi (Challenges of International Law Education facing the West and its Implications for China)' (2007) *3 Fujian Guangbo Dianshi Daxue Xuebao (Journal of Fujian Radio and TV University)* 8, at 10.

[108] Li (2020) 804.

[109] Maria Adele Carrai, 'Historiographies of International Law from a Chinese Perspective' (2020) 18 *Clio@Themis* 1, at 2.

[110] Bianchi (2016) 21 -22.

[111] Li (2020) 805.

[112] Suli Zhu, 'Yexu Zhengzai Fasheng – Zhongguo Daidai Faxue Fazhan de Yige Gailan (Maybe it's happening – An overview of the development of legal studies in contemporary China)' (2001) 3 *Bijiaofa Yanjiu (Comparative Law Research)* 1, at 3.

[113] Ibid.

[114] Yingmao Tang and John Zhuang Liu, 'Computational Legal Studies in China: Progress, Challenges, and Future' in Ryan Whalen (ed.), *Computational Legal Studies: The Promise and Challenge of Data-Driven Research* (Edward Elgar Publishing, 2020) 124, at 134.

Some scholars even suggest that promotion of power politics will further marginalize international law and boost legal nihilism in China, a dangerous phenomenon that should be avoided.[115] Apparently, there is a mixture of 'politics as a discipline' and 'everything can be politicized' in the mindset of Chinese legal academia since legal realism was not properly socialized either in textbooks or readings.[116] The centralization of orthodox positivist legal education results in such a contrast with the marginalization of other non-legal disciplines in China, which also sheds some light on the less-popular current wave of TWAIL studies for Chinese academics.

5 Beijing's New Narrative on the Rule of International Law

The fourth and probably most important reason for China's detachment from TWAIL is that Beijing strives to narrate a Chinese version of the rule of international law that the world can understand, empathize with, and even propagate. To build a rule of international law is not new talk in the history of international law. Many great classic writers in the 20th century (especially early and mid-20th century) were dedicated to building the rule of international law, when the international legal system was in the process of being shaped.[117] Since the start of the BRI, put forward by President Xi Jinping in 2015, Chinese legal academia increasingly places interest on elaborating and completing the legal construction of the BRI, in line with the rule of international law project.

Along with the BRI initiative, an important legal invention was submission of the notion of the shared future of mankind by President Xi in 2015 at the UN 70th anniversary General Debates.[118] Under the auspices of the shared future of mankind, propositions for legal design of the rule of international law (国际法治构建) preempted a multitude of funded projects at the Chinese Academy of Social Science

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[115] Zhipeng He, 'Zhongguo Guojifa Jiaoxue Tisheng de Dao yu Su (The Art and Techniques for Improving Chinese International Legal Education' (August 2017) www.sohu.com/a/167652759_618422 (Accessed 7 July 2022).

[116] Li (2020) 817.

[117] Hirsch Lauterpacht, *Règles Générales Du Droit de La Paix (Volume 62)* (Collected Courses of the Hague Academy of International Law, 1937); James-Leslie Brierly, *Règles Générales Du Droit de La Paix (Volume 58)*' (Collected Courses of the Hague Academy of International Law, 1936); Gerald Fitzmaurice, *The General Principles Of International Law Considered from the Standpoint Of the Rule of Law (Volume 92)* (Collected Courses of the Hague Academy of International Law, 1957).

[118] 'China | General Assembly of the United Nations' (September 2015) https://gadebate.un.org/en/70/china (Accessed 7 July 2022). The idea of constructing the shared future of mankind was also included in the Chinese constitution after its revision in 2018:

'Constitution of the People's Republic of China' (November 2019) http://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html (Accessed 7 July 2022).

and the annual conference topics at the Chinese Society of International Law.[119] To strengthen international law-making capacity, China established a number of institutions facilitating the project of the rule of international law. These institutions include establishment of the China International Commercial Court under the Supreme Court in 2018 and the sanctioning of many investment arbitration committees to establish investment arbitration rules for adjudicating investment disputes (e.g. Shenzhen International Arbitration Committee Rules 2019).[120]

Under the ideal of a new version of the rule of international law, China tries to systematize its rule of law notion through a set of institutional and formal arrangements. Zhang and Ginsburg registered a series of legal changes in Chinese institutions towards the rule of law and the direction of legality in the past decade.[121] They explain that an important reason for this 'turn to law' was to enhance sociopolitical control and economic development.[122]

Legal reform towards the rule of law simultaneously influences China's international vision. Beijing demonstrates a more proactive attitude towards the building of the rule of international law and the shared future of mankind, which aims to imbue some of its perspective on universal values into the substance of international law.[123] A number of Chinese scholars elaborate on the legal construction of the BRI, and in particular how it contributes to the building of the rule of international law, by characterizing the 'BRI as an international public good.'[124] In these initiatives – the BRI, the shared future of mankind, and the rule of international law project - many scholars identify and conceptualize a Chinese approach to international law.[125]

Obviously, the Chinese approach to international law is identified as a *sui generis* approach, reminiscent of the 'American exceptionalism' of the Bush administration.

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[119] See for instance, the 2019 conference on 'Building a Community with a Shared Future for Mankind and the International Rule of Law' hosted by the Chinese Academy of Social Sciences: CASS, 'Exploring the road to the rule of law in building a community with a shared future for mankind (**探索构建人类命运共同体法治道路**)' (November 2019) http://cass.cssn.cn/gjgdzk/201912/t20191231_5068169.shtml (Accessed 7 July 2022).

[120] Sheng Zhang, 'China's International Commercial Court: Background, Obstacles and the Road Ahead' (2020) 11 *Journal of International Dispute Settlement* 150, at 156.

[121] Taisu Zhang & Tom Ginsburg, 'China's Turn Toward Law' (2019) 59:2 *Virginia Journal of International Law* 308, at 308-314.

[122] Ibid, 367.

[123] Xinhua, 'China Issues Plan on Building Rule of Law' (January 2021) http://www.xinhuanet.com/english/2021-01/10/c_139656578.htm (Accessed 7 July 2022.

[124] Jingxia Shi, 'The Belt and Road Initiative and International Law' in Yun Zhao (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (CUP, 2018) 9, at 12.

[125] See Jiangyu Wang & Huaer Cheng, 'China's Approach to International Law: From Traditional Westphalianism to Aggressive Instrumentalism in the Xi Jinping Era' (2022) 10:1 *The Chinese Journal of Comparative Law* 140; Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (OUP, 2019); Tom Ginsburg, 'THE BRI, Non-Interference and Democracy' (2021) 62 *Harvard International Law Journal* 40, at 42-43.

American exceptionalism eventually rendered the US sweeping and undisciplined privileges in international law.[126] Cai Congyan's book *Taking Chinese Exceptionalism Seriously* precisely discusses how Chinese exceptionalism differs from American exceptionalism, mainly on the rejection of 'double standards.'[127] Even though Cai concludes that China will not impose double standards like the US, Chinese exceptionalism is unequivocally existent and probably daunting.[128]

The *sui generis* Chinese approach to international law develops in juxtaposition with the Chinese school in international relations (IR) theory and against the backdrop of a rising China and its proactive international claims.[129] This Chinese school in IR theory is dedicated to unearthing non-Western sources in histories about intra-state relations, such as the concepts of Tianxia (all under heaven) and Wangdao (humane authority).[130] Some scholars thus contend that the enterprise of the Chinese school is important as a judicious use of strategic essentialism, whereby a 'local group in a wider effort [may] contest diffused and decentred forms of Western domination through linking various struggles to form a unified "counter-hegemonic bloc" of post-Western IR in the discipline.'[131]

To echo the strategic essentialism of the Chinese school in IR theories, the Chinese approach to international law has its specificities, making it different and useful in contesting the Eurocentric approach. Yet much like criticisms raised toward ancient Chinese concepts, these concepts risk the danger of being romanticised and potentially hegemonic as well.[132]

Therefore, on this winding path in which China strives to mainstream its approach to international law, and not be portrayed as a hegemon, it has learned strenuously to speak the language of international rule of law and to furnish its

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126 Cai (2019) 322.

127 Ibid.

128 Cai argues that taking Chinese exceptionalism seriously does not mean China is outlawed. Rather, the Chinese approach (e.g., non-engagement with international adjudication) emphasizes its emergence from culture and tradition, or special political environment: Ibid, 165. Such a non-mainstream approach to international law is unfamiliar for mainstream lawyers, and boundaries between outlawry and legitimacy are politically open-textured: Ibid.

129 Yih-Jye Hwang, 'The Births of International Studies in China' (2021) 47:5 *Review of International Studies* 580, at 581.

130 Yih-Jye Hwang, 'Reappraising the Chinese School of International Relations: A Postcolonial Perspective' (2021) 47:3 Review of International Studies 311, at 312-314. The Tianxia system was an idealized version of governance in the Zhou Dynasty, which includes principles of global governance in the Chinese tradition premised on the holistic entity of humanity. On the other hand, humane authority is a style of leadership regarded in Xunzi's thought and other Confucian philosophy. The core of humane authority is 'benevolence', 'righteousness', and 'rite'.

131 Ibid, 311.

132 Yuan-kang Wang, 'Managing Regional Hegemony in Historical Asia: The Case of Early Ming China' (2012) 5 *The Chinese Journal of International Politics* 129, at 152.

domestic legal infrastructure with assimilated procedures for international adjudication. Paradoxically, the same academics have to tackle realism in international law, which imposes an academic orientation to speak for the national interest. The difficulty lies in the dilemma of denationalizing themselves for a disguise of internationalism while astutely safeguarding their national interest and academic funding. The most persuasive way to denationalize may be to speak the formal positivist language as everyone else. At very least, the language of formalist international law is the "common language" understood by the club of the international community.[133]

As suggested by He Zhipeng, an international legal theorist in China who contributed to a number of projects on China's rule of international law building, 'international law is a decent and appropriate language for modern civilized countries to express their own positions. Mastering this language can protect self-interest in a more effective and less costly manner. On the contrary, an ambiguous usage of international law with shifting positions might pose an image of unreliability, which is disadvantageous for a big country to enlarge its international influence.'[134] He Zhipeng argues that international law can only be used by strong countries, and China should take this opportunity to build itself as a trust-worthy country in order to leverage its use in the international community and lead the tide of international development and global governance.[135]

Ultimately, the narrative offered by Beijing is a more grandiose one that concerns itself with coexistence for solidarity and co-progressiveness, rather than resistance.[136] This narrative also hinders the Chinese approach from a full alliance with the concerns of TWAIL. Adherence to the Chinese *sui generis* approach to international law also inculcates Chinese scholars' dissociation from TWAIL studies, where many Chinese scholars probably see this acronym as unfitting and unnecessary in a scenario where China becomes a stronger country.

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[133] To portray international law as the common language, Russia and China issued a joint declaration emphasizing the role of 'principles of international law' and 'Five Principles of Peaceful Coexistence of 1954.' They also highlighted the non-interference principle and concept of sovereignty, criticizing the 'double standards' imposed by the West. Thus, 'the Russian-Chinese Joint Declaration has been conceived of as part of a struggle for ideational power and moral high ground regarding international law as the common language of the international community.' See Lauri Mälksoo, 'Russia and China Challenge the Western Hegemony in the Interpretation of International Law' (July 2016) https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/ (Accessed 7 July 2022).

[134] Zhipeng He (2017). For an elaboration on this point, see Zhipeng He, *Guojia Liyi Weihu: Guojifa de Liliang (The protection of National Interest: The Strength of International Law)* (China Legal Press, 2018) 72-76.

[135] Zhipeng He (2017).

[136] Sienho Yee, 'Towards an international law of co-progressiveness' in Haopei Li, Sienho Yee & Tieya Wang (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, 2001) 18, at 37-38.

6 Conclusion

The Chinese approach to international law has gone through many different phases, which is obviously very difficult to conceptualize in this short article. This article only aims at offering an overview of the relationship between TWAIL and Chinese international legal scholarship. Throughout this journey, one may legitimately claim that Chinese legal scholarship tremendously fostered the development of TWAIL in its infancy, but waved away a post-colonial critique with China's rise. China's key concerns gradually became inconsistent with the resistant voice advocated by the critical strand of TWAIL, particularly those who held a post-colonial critique of states, progress and developmentalism. As argued by this article, alongside a gradual detachment from TWAIL studies, China continued to develop an approach that to some extent shared certain concerns with TWAIL in terms of Eurocentric international law and structural bias in international economic rules. Yet at the same time, a number of Chinese scholars in international law dedicated writings to articulating the Chinese approach to international law, in line with Beijing's position, the BRI project, and a neoliberal multilateralism favouring China's economic development. The dissociation between Chinese scholars and TWAIL signifies that a *sui generis* Chinese site of agency in international law theory is in its formation.

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