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THE CHINESE BALLOON INCIDENT AND PARTISANISM IN  
INTERNATIONAL LAW

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ABSTRACT

*This Article discusses the implications of the February 2023 Chinese balloon incident for understanding Chinese foreign policy elites' approaches to international law. It argues that the Chinese balloon incident fits the perception of a globally ambitious and activist China. At the same time, the ethically ambiguous context of foreign surveillance flights problematizes the stark dichotomies between authoritarian and liberal approaches to international law. Chinese legal arguments in the Chinese balloon incident followed the Cold War-era playbook of diplomatic exchanges on unauthorized flights in foreign airspace. Moreover, the Chinese commentary on U.S. conduct in the Chinese balloon incident in some ways resembled American Cold War-era perceptions about the Soviet Union. Chinese commentary on the Chinese balloon incident can even be seen as comparable to contemporary liberal narratives about authoritarian governments. These narratives delegitimize foreign adversaries by presuming them incapable of partaking in the international rule-based order in a non-partisan manner. These analogies are not perfect, however. The Chinese foreign policy elites have not articulated a theory of international law that denies the United States and other liberal democracies an equal standing on the international plane.*

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## I. INTRODUCTION

On February 4, 2023, a U.S. fighter jet shot down a Chinese high-altitude balloon off the coast of South Carolina in U.S. territorial waters (“the Chinese balloon” and “the Chinese balloon incident”).<sup>1</sup> The Chinese balloon had traveled over the continental United States for five days in a widely televised balloon chase.<sup>2</sup> This was the first time the U.S. government had fired at foreign objects in U.S. air space since the Second World War.<sup>3</sup> Between February 10 and February 12, 2023, U.S. fighter jets fired missiles at three other flying objects in the U.S. and Canadian airspaces.<sup>4</sup>

Though the U.S. government refrained from characterizing the nature of the three flying objects shot down between February 10 and 12, 2023, it quickly identified the first balloon as a Chinese espionage platform and deemed its entry into the U.S. airspace a violation of

<sup>1</sup> Randall Hill, Phil Stewart & Jeff Mason, *U.S. Fighter Jet Shoots Down Suspected Chinese Spy Balloon*, REUTERS, <https://www.reuters.com/world/us/biden-says-us-is-going-to-take-care-of-chinese-balloon-2023-02-04/> [https://perma.cc/B3AT-67BC] (Feb. 6, 2023, 12:09 AM); *Remarks by President Biden in Press Gaggle*, THE WHITE HOUSE (Feb. 4, 2023, 3:15 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/04/remarks-by-president-biden-in-press-gaggle-11/> [https://perma.cc/P8MT-C649].

<sup>2</sup> Helene Cooper & Edward Wong, *Downing of Chinese Spy Balloon Ends Chapter in a Diplomatic Crisis*, N.Y. TIMES (Feb. 4, 2023), <https://www.nytimes.com/2023/02/04/us/politics/chinese-spy-balloon-shot-down.html> [https://perma.cc/6BQT-ULQZ].

<sup>3</sup> Michael P. Ferguson, *Spy Balloons and the Next Great Game*, THE HILL (Feb. 9, 2023, 9:30 AM) <https://thehill.com/opinion/national-security/3850900-spy-balloons-and-the-next-great-game/> [https://perma.cc/CL5N-XX23].

<sup>4</sup> On February 10, 2023, a U.S. fighter jet fired a missile at an unidentified flying object over U.S. territory in Alaska. On the following day, February 11, 2023, an American fighter jet fired a missile at another unidentified flying object in Canadian airspace at the request of the Canadian government. Finally, on February 12, 2023, a U.S. fighter fired a missile at a third unidentified flying object over U.S. territory in Michigan. See Derrick Bryson Taylor, *A Timeline of the U.F.O.s That Were Shot Down*, N.Y. TIMES (Feb. 21, 2023), <https://www.nytimes.com/article/ufo-object-shot-down-when.html> [https://perma.cc/R86A-U2BR].

international law.<sup>5</sup> Two days before the Chinese balloon was shot down, the U.S. Department of Defense described it as a “high altitude surveillance balloon.”<sup>6</sup> In its press release on February 2, 2023, the Department of Defense stated that “[i]nstances of this kind of balloon activity [had] been observed previously over the past several years.”<sup>7</sup> The Department of Defense also announced that “the balloon [did] not present a military or physical threat to people on the ground.”<sup>8</sup> On the following day, the White House Press Secretary described “the presence of this balloon in [the U.S. airspace as] a clear violation of our sovereignty as well as international law.”<sup>9</sup> On February 6, 2023, two days after the Chinese balloon was shot down, President Biden described the Chinese balloon incident as an attempt “to spy on the United States.”<sup>10</sup> On February 16, 2023, President Biden addressed the three other flying objects brought down by U.S. fighter jets between February 10 and February 12, 2023.<sup>11</sup> These objects “were most likely balloons tied to private companies, recreation, or research institutions studying weather or conducting other scientific research.”<sup>12</sup> The President had issued “the order to take down these three objects due to hazards to civilian commercial air traffic and because [the U.S. government] could not rule out the surveillance risk of sensitive

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<sup>5</sup> Humeyra Pamuk, Idrees Ali & Michael Martina, *Blinken Postpones China Trip Over ‘Unacceptable’ Chinese Spy Balloon*, REUTERS (Feb. 4, 2023, 2:53 PM), <https://www.reuters.com/world/china-expresses-regret-that-civilian-airship-strays-over-us-2023-02-03/> [<https://perma.cc/ZM79-XLS3>].

<sup>6</sup> Press Release, Patrick S. Ryder, Press Secretary, Department of Defense, DoD Statement on High-Altitude Surveillance Balloon (Feb. 2, 2023), <https://www.defense.gov/News/Releases/Release/Article/3287173/dod-statement-on-high-altitude-surveillance-balloon/> [<https://perma.cc/63CY-8D5T>].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Press Gaggle by Press Secretary Karine Jean-Pierre En Route Philadelphia, PA*, THE WHITE HOUSE (Feb. 3, 2023, 1:49 PM) [hereinafter *Press Gaggle by Press Secretary Karine Jean-Pierre*], <https://www.whitehouse.gov/briefing-room/press-briefings/2023/02/03/press-gaggle-by-press-secretary-karine-jean-pierre-en-route-philadelphia-pa-2/> [<https://perma.cc/R593-UTU7>].

<sup>10</sup> *Remarks by President Biden After Marine One Arrival*, THE WHITE HOUSE (Feb. 6, 2023, 4:08 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/06/remarks-by-president-biden-after-marine-one-arrival-17/> [<https://perma.cc/JRA3-D4FG>].

<sup>11</sup> *Remarks by President Biden on the United States’ Response to Recent Aerial Objects*, THE WHITE HOUSE (Feb. 16, 2023, 2:11 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/16/remarks-by-president-biden-on-the-united-states-response-to-recent-aerial-objects/> [<https://perma.cc/L7LV-VQ7F>].

<sup>12</sup> *Id.*

facilities.”<sup>13</sup> Going forward, President Biden said that the United States would take down “any object [that] presents a threat to the safety and security of the American people.”<sup>14</sup> On the same occasion, President Biden stated that he would “make no apologies” for ordering the U.S. military to shoot down the Chinese balloon.<sup>15</sup>

On February 3, 2023, the People’s Republic of China (“the P.R.C.” or “China”) acknowledged that the Chinese balloon was indeed an “airship from China” and regretted “the unintended entry of the airship into US airspace due to *force majeure*.”<sup>16</sup> The Chinese government harshened its tone after the Chinese balloon was brought down. On February 5, 2023, a day after the Chinese balloon was shot down, the Chinese government presented legal arguments against the United States’ conduct in the Chinese balloon incident.<sup>17</sup> These arguments—discussed in more detail in Part II(C) below—made no show of regret about the incident, instead restating the force majeure defense and accusing the United States of “a serious violation of international practice” for bringing down a “civilian unmanned airship.”<sup>18</sup> In a press conference on February 6, 2023, a P.R.C. Ministry of Foreign Affairs spokesperson clarified the Chinese position. The Chinese balloon was an “unmanned . . . civilian airship used for meteorological and other research purposes.”<sup>19</sup> The “airship” was “[a]ffected by the Westerlies and with limited self-steering capability, [it had] deviated far from its planned course . . . [in] an unexpected, isolated incident caused by force majeure.”<sup>20</sup> The spokesperson cited the U.S. Department of

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Foreign Ministry Spokesperson’s Remarks on the Unintended Entry of a Chinese Unmanned Airship into US Airspace Due to Force Majeure*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 3, 2023, 9:32 PM), [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/202302/t20230203\\_11019484.html](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202302/t20230203_11019484.html) [<https://perma.cc/326D-WFUN>].

<sup>17</sup> *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 5, 2023, 8:58 AM), [https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/202302/t20230205\\_11019871.html](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202302/t20230205_11019871.html) [<https://perma.cc/G3WQ-6J28>].

<sup>18</sup> *Id.*

<sup>19</sup> *Foreign Ministry Spokesperson Mao Ning’s Regular Press Conference on February 6, 2023*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 6, 2023, 9:44 PM) [hereinafter *Foreign Ministry Spokesperson Mao Ning’s Press Conference*], [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/202302/t20230206\\_11020388.html](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202302/t20230206_11020388.html) [<https://perma.cc/X2BN-D79C>].

<sup>20</sup> *Id.* (emphasis added).

Defense's assessment from February 2, 2023, according to which "the balloon [did] not present a military or physical threat to people on the ground."<sup>21</sup> The spokesperson reiterated China's objection to the United States' decision to shoot down the balloon, stating that the "use of force [undertaken by the U.S. government was] unacceptable and irresponsible."<sup>22</sup>

The Chinese balloon incident caused immediate ripples in U.S.-China relations.<sup>23</sup> On February 3, 2023, U.S. Secretary of State Antony Blinken postponed a scheduled trip to Beijing (but did not, according to U.S. diplomatic language, "cancel" the visit).<sup>24</sup> The U.S. State Department also sanctioned Chinese technology companies that were deemed to have supported the Chinese balloon program.<sup>25</sup> The Chinese government responded to these actions by alleging that the U.S. government had conducted more than ten high-altitude balloon flights over Chinese airspace in 2022,<sup>26</sup> a claim that the U.S.

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<sup>21</sup> *Id.* (quoting DoD Statement on High-Altitude Surveillance Balloon, *supra* note 6).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Howard W. French, *The U.S. Overreacted to the Chinese Spy Balloon. That Scares Me.*, FOREIGN POL'Y (Feb. 13, 2023, 6:30 AM), <https://foreign-policy.com/2023/02/13/china-spy-balloon-us-response-biden-cold-war/> [<https://perma.cc/J3AY-F5NY>]; Michael Schuman, *Red Zeppelin*, THE ATLANTIC (Feb. 10, 2023), <https://www.theatlantic.com/international/archive/2023/02/chinese-spy-balloon-incident-china-west-divide/673011/> [<https://perma.cc/DH2J-AEJ7>].

<sup>24</sup> Jennifer Hansler, Kevin Liptak, Jeremy Herb, Kylie Atwood, Jim Sciutto & Oren Liebermann, *Blinken Postpones Trip to Beijing After Chinese Spy Balloon Spotted over US*, CNN (Feb. 3, 2023, 11:43 AM), <https://edition.cnn.com/2023/02/03/politics/china-us-balloon-intl/index.html> [<https://perma.cc/AVF9-7426>]; Michael Martina, Humeyra Pamuk & David Brunnstrom, *Top U.S., China Diplomats Weigh First Meeting Since Balloon Drama*, REUTERS (Feb. 14, 2023, 5:47 PM), <https://www.reuters.com/world/us/top-us-china-diplomats-weigh-first-meeting-since-balloon-drama-bloomberg-news-2023-02-13/> [<https://perma.cc/G2F5-BPMN>].

<sup>25</sup> Chelsey Cox & Christina Wilkie, *U.S. Sanctions Six Chinese Tech Companies for Supporting Spy Balloon Programs*, CNBC, <https://www.cnbc.com/2023/02/10/us-sanctions-six-chinese-tech-companies-for-supporting-spy-balloon-programs.html> [<https://perma.cc/KSC3-6HJF>] (Feb. 10, 2023, 5:44 PM).

<sup>26</sup> *US Balloons Flew over China More than 10 Times Since 2022: Foreign Ministry*, PEOPLE'S DAILY (Feb. 13, 2023, 8:55 AM), <https://peoplesdaily.pdnews.cn/trending/us-balloons-flew-over-china-more-than-10-times-since-2022-foreign-ministry-294699.html> [<https://perma.cc/G8MB-TL8J>]. The companies were placed on a list of entities that are subject to specific license requirements under the U.S. Export Administration Regulations. See *Entity List*, U.S. DEPT OF COMMERCE: BUREAU OF INDUS. & SEC.,

government denied.<sup>27</sup> A Chinese defense spokesperson hinted at the use of force against U.S. aircraft in the future, declaring that “China reserve[d] the right to take necessary measures to deal with similar situations.”<sup>28</sup> The political tensions caused by the Chinese balloon incident eased in May 2023, when President Biden described the balloon flight as “silly,”<sup>29</sup> and U.S.-China high-level meetings resumed.<sup>30</sup>

The legal arguments advanced by the United States and the P.R.C. will likely never be adjudicated by an international tribunal. Neither the United States nor the P.R.C. accepts the compulsory jurisdiction of the International Court of Justice (“ICJ”) and, absent mutual consent, it is not foreseeable that any other international tribunal could assert jurisdiction to adjudicate the case.<sup>31</sup> As of September 2023, neither the United States nor the P.R.C. has pursued legal action regarding the Chinese balloon incident.

The Chinese balloon incident may have some tangential bearing on emerging rules of customary international law. In particular, the incident is relevant to the proposed international legal rules regarding “near space.” Near space is the area between the maximum altitude

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<https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list> [<https://perma.cc/K7DZ-45P8>] (last visited Jan. 5, 2023).

<sup>27</sup> Martin Quin Pollard & Trevor Hunnicutt, *White House Rejects Beijing Claims of U.S. Balloons over China*, REUTERS (Feb. 13, 2023, 6:15 PM), <https://www.reuters.com/world/china/china-says-us-flew-more-than-10-high-altitude-balloons-over-chinese-airspace-2023-02-13/> [<https://perma.cc/83TP-37J7>].

<sup>28</sup> *Chinese Military Spokesperson’s Statement on U.S. Saying of China Declining U.S. Phone Call Proposal over Airship Incident*, XINHUA (Feb. 9, 2023, 9:41 PM), <https://english.news.cn/20230209/b9b821497532497696d9b595e9e55e06/c.html> [<https://perma.cc/56SR-F4EG>].

<sup>29</sup> *Remarks by President Biden in a Press Conference*, THE WHITE HOUSE (May 21, 2023, 6:57 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/21/remarks-by-president-biden-in-a-press-conference/> [<https://perma.cc/6KZE-7B8K>].

<sup>30</sup> Press Release, U.S. Dep’t of State, Secretary Blinken’s Visit to the People’s Republic of China (PRC) (June 19, 2023), <https://www.state.gov/secretary-blinkens-visit-to-the-peoples-republic-of-china-prc/> [<https://perma.cc/295U-U6BR>].

<sup>31</sup> *See Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT’L CT. OF JUST., <https://www.icj-cij.org/declarations> [<https://perma.cc/FGV7-T97V>] (last visited Sept. 29, 2023). As members of the International Civil Aviation Organization (“ICAO”), the United States and the P.R.C. could bring the matter jointly or separately to the ICAO for a dispute resolution process. *See text accompanying infra* notes 100-103; Jon Bae, *Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication*, 4 J. INT’L DISP. SETTLEMENT 65, 70 (2012); MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO: ESSENTIAL AIR AND SPACE LAW 198-99 (3d ed. 2016).

of commercial flights—18 kilometers—and the lowest feasible orbit for satellites, which is around one-hundred kilometers from earth.<sup>32</sup> Private individuals and organizations interested in utilizing this space have proposed that states should not be allowed to prevent peaceful overflight of aircraft in near space.<sup>33</sup> However, as discussed more fully in Part II(C) below, the Chinese balloon incident does not support the establishment of specific rights in near space. The P.R.C. did not argue that it could lawfully send aircraft into the near space above the United States, nor did it contest a state's right to use force to bring down an unmanned flying object at that altitude when the state suspects the object is engaged in espionage.<sup>34</sup> The dispute between the two countries was ultimately about facts: Was the Chinese balloon an espionage platform or a provocation? Or was it a civilian aircraft that ended up in U.S. airspace through an unforeseen and uncontrollable weather event? At the time of this writing the answers to these questions remain unclear.<sup>35</sup>

Nevertheless, the Chinese balloon incident opens insights into the Chinese foreign policy elites' understanding of international law and into Western descriptions of Chinese international law.<sup>36</sup> In particular, the balloon incident sheds light on the attempts to establish a dichotomy between authoritarian and liberal approaches to

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<sup>32</sup> Hao Liu & Fabio Tronchetti, *The Exclusive Utilization Space: A New Approach to the Management and Utilization of the Near Space*, 40 U. PA. J. INT'L L. 537, 540, 551 (2019); Dean N. Reinhardt, *The Vertical Limit of State Sovereignty*, 72 J. AIR L. & COM. 65, 67-68 (2007).

<sup>33</sup> Reinhardt, *supra* note 32.

<sup>34</sup> Press Gaggle by Press Secretary Karine Jean-Pierre, *supra* note 9 (regarding the U.S. position); Foreign Ministry Spokesperson Mao Ning's Press Conference, *supra* note 19 (regarding the Chinese position).

<sup>35</sup> A U.S. official was quoted in American media stating that it was "a high-confidence assessment" of the U.S. intelligence community "that there was no intelligence collection by that balloon." David Martin, *The Bizarre Secret Behind China's Spy Balloon*, CBS NEWS (Sept. 17, 2023, 9:26 AM), <https://www.cbsnews.com/news/the-bizarre-secret-behind-chinas-spy-balloon/> [<https://perma.cc/7VEL-P4E4>].

<sup>36</sup> In this Article, the term "Chinese foreign policy elites" describes the Chinese leadership and Chinese academics writing on international law and international relations. For recent scholarship on Chinese approaches to international law, see, for example, Yu-Jie Chen, *China's Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT'L L. & POL'Y 1179 (2019); Jerome A. Cohen, *Law and Power in China's International Relations*, 52 N.Y.U. J. INT'L L. & POL'Y 123 (2019); Camilla T. N. Sørensen, *That Is Not Intervention; That Is Interference with Chinese Characteristics: New Concepts, Distinctions and Approaches Developing in the Chinese Debate and Foreign and Security Policy Practice*, 239 CHINA Q. 594 (2019).

international law.<sup>37</sup> Tom Ginsburg, perhaps the most prominent theorist of authoritarian international law, has defined “authoritarian international law” as “legal rhetoric, practices, and rules specifically designed to extend the survival and reach of authoritarian rule across space and/or time.”<sup>38</sup> Ginsburg has further argued that authoritarian international law generally seeks to strengthen the traditional principles of sovereignty and non-interference.<sup>39</sup>

The concept of authoritarian international law presupposes that the absence of democratic controls and individual rights distinguishes authoritarian regimes’ conduct on the international plane.<sup>40</sup> Yet the Chinese balloon incident highlights similarities, rather than differences, in contestation between different regimes. The legal arguments presented in the Chinese balloon incident followed the Cold War era playbook of diplomatic exchanges on unauthorized flights in foreign airspace, the main distinction being that the United States was not the perpetrator of such violations, as was typically the case during the Cold War.

The Chinese commentary on the Chinese balloon incident revealed a sense of frustration with the dysfunctional nature of American democracy and its consequences for U.S.-China relations. The P.R.C. leadership and Chinese legal scholars portrayed China as a responsible rule-observer and rule-maker, while depicting the United States as an increasingly unreliable and erratic actor on the international stage.<sup>41</sup> Such viewpoints are comparable to U.S. Cold War-era perceptions about the Soviet Union.<sup>42</sup> In the early decades of the Cold War,

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<sup>37</sup> The distinction between authoritarian and democratic approaches to international law focuses on the existence of democratic controls, whereas the distinction between authoritarian or illiberal and liberal international law draws the focus to self-consciously “liberal” political theory. For the former usage, see Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT’L L. 221, 227-28 (2020) [hereinafter Ginsburg, *Authoritarian International Law?*]; Tom Ginsburg, *How Authoritarians Use International Law*, 31 J. DEMOCRACY 44, 44 (2020) [hereinafter Ginsburg, *How Authoritarians Use International Law*]. For the latter usage, see, for example, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 507-09 (1995). Both approaches to authoritarian law can be described as “liberal.” See *infra* text accompanying note 292.

<sup>38</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 228.

<sup>39</sup> *Id.* at 241, 244.

<sup>40</sup> *Id.* at 229.

<sup>41</sup> *US Hegemony and Its Perils*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 20, 2023, 4:28 PM), [https://www.fmprc.gov.cn/mfa\\_eng/wjbxw/202302/t20230220\\_11027664.html](https://www.fmprc.gov.cn/mfa_eng/wjbxw/202302/t20230220_11027664.html) [https://perma.cc/3N26-34MS].

<sup>42</sup> See *infra* text accompanying notes 53, 68-70.



American political leadership described the Soviet Union as an inherently irresponsible actor on the international plane.<sup>43</sup> The attempts to delegitimize socialist countries were particularly obvious in the context of U.S. espionage flights over Eastern bloc countries, which were justified as a necessary response to the secretive nature of communist regimes.<sup>44</sup>

To be sure, the ethically ambiguous context of surveillance and espionage may not be seen as the best field for examining the differences between various approaches to international law. Theorists of authoritarian international law have discussed idiosyncratically authoritarian uses of international law in fields such as extradition, internet governance, and human rights promotion.<sup>45</sup> Nevertheless, extending the analysis to the field of surveillance and espionage can be a helpful exercise. In particular, the Chinese balloon incident suggests an (imperfect) analogy between the Chinese and liberal narratives about international law. As Part IV below demonstrates, both approaches delegitimize foreign adversaries by presuming them incapable of partaking in the international rule-based order in a non-partisan manner.

For the state of contemporary U.S.-China relations—which may of course rapidly change—it is fortunate that these analogies between the two eras are not perfect. During the Cold War, the U.S. government was explicit about the need to violate Soviet airspace. Present-day Chinese commentators have not argued that China’s surveillance needs in the United States justify violations of international law. Moreover, while Chinese international lawyers are critical of the dysfunctional nature of contemporary U.S. politics, in some respects their approach to international law is less partisan (for now at least) than the approach of Cold War-era Chinese and U.S. politicians and the more recent advocates of liberal international law. Contemporary Chinese international lawyers do not deny the United States the equal protection of international law. In this respect, contemporary Chinese international law also differs from Chinese Marxist lawyers’

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<sup>43</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 413 (2001).

<sup>44</sup> *State Department Press Release # 249 Concerning U-2 Incident, May 5, 1960*, NAT’L ARCHIVES: EISENHOWER PRESIDENTIAL LIBR., <https://www.eisenhowerlibrary.gov/sites/default/files/research/online-documents/u2-incident/5-9-60-no254.pdf> [<https://perma.cc/N6UX-29DR>].

<sup>45</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 253-56.

view on international relations in the 1950s and 1960s, who argued that it was impossible to coexist peacefully with capitalist countries.<sup>46</sup>

The rest of this Article proceeds as follows. Part II describes the existing international legal discourse on unauthorized flights in foreign airspace. The aim of this Part is not to assess the strength of the legal arguments in the Chinese balloon incident, but to demonstrate a predictable pattern of legal argumentation for dealing with the unauthorized entry of aircraft into the airspace of foreign states. The U.S. and P.R.C. governments' legal positions in the Chinese balloon incident fell into this well-established pattern of legal argumentation. Part III analyzes China's domestic uses of international law with a focus on sovereignty and territorial integrity and discusses the contemporary narrative on China's constructive global role. Part IV describes the implications of the Chinese balloon incident for the understanding of Chinese foreign policy elites' approaches to international law. This Part concludes by elaborating on the analogies between Chinese foreign policy elites and the foreign advocates of liberal international law.

## II. INTERNATIONAL LEGAL DISCOURSE ON UNAUTHORIZED FLIGHTS

### *A. Unauthorized Flights in Historical Context*

For most of the Cold War, the United States found itself as the accused violator of territorial integrity of foreign countries.<sup>47</sup> The United States set up a large-scale aerial surveillance program in the early 1950s, sending thousands of high-altitude balloons to foreign airspace.<sup>48</sup> The United States had obtained permissions for these balloon flights from some of its Western allies, but not all of them, including Norway and Sweden.<sup>49</sup> The United States also sent balloons over socialist countries in Europe and Asia without prior authorization.<sup>50</sup> The United States responded to protests from the Soviet Union

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<sup>46</sup> JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY*, VOLUME 1, 590-98 (1974); *see supra* text accompanying notes 239-40.

<sup>47</sup> COHEN & CHIU, *supra* note 46.

<sup>48</sup> Bin Cheng, *International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites*, 6 INT'L & COMPAR. L. Q. 487, 487 (1957). By 1956 the United States had released 4,000 balloons. *Id.*

<sup>49</sup> *Id.* at 487-88.

<sup>50</sup> *Id.*

and other Eastern bloc countries by insisting that the aircraft were weather balloons sent by private entities.<sup>51</sup>

The United States ultimately suspended the high-altitude balloon flights over Eastern bloc countries in 1956.<sup>52</sup> When announcing the suspension of the balloon flights, U.S. Secretary of State John Foster Dulles explained that the United States was not acting in order to comply with the rules of international law, which, in Dulles's view, were unclear.<sup>53</sup> Instead, the suspension of the balloon flights was "a matter of decent, friendly relations."<sup>54</sup> Dulles's legal position was deemed marginal even at its time. Bin Cheng, the British legal scholar, noted in an article published in 1957 that no serious dispute existed in the 1950s about the principle that "no flight craft may fly in, into or through a State's national flight space without its permission, acquiescence or tolerance, at no matter what altitude."<sup>55</sup> Other scholars pointed out that the adoption of the Chicago Convention in 1944 had made airspace sovereignty settled law.<sup>56</sup> The widely adopted 1944 Chicago Convention explicitly provided that "[n]o aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State."<sup>57</sup>

In addition to sending unmanned surveillance balloons over foreign countries, the United States flew spy planes over often-hostile socialist countries. Between July 16 and August 29, 1946, Yugoslavia accused the United States of conducting 278 unauthorized flights over Yugoslavian territory.<sup>58</sup> In a diplomatic note to the Yugoslavian government, the U.S. government admitted that it had operated forty-three military flights in the vicinity of the Yugoslavian border during the

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; COHEN & CHIU, *supra* note 46, at 592.

<sup>53</sup> Cheng, *supra* note 48, at 487-88.

<sup>54</sup> *Id.* at 488.

<sup>55</sup> *Id.* at 494.

<sup>56</sup> Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559, 567 (1953); Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. The United States and the P.R.C. are parties to this convention. See *Convention on International Civil Aviation: Status*, INT'L CIV. AVIATION ORG., [https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago\\_EN.pdf](https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf) [<https://perma.cc/B8SK-X2DM>].

<sup>57</sup> Chicago Convention, *supra* note 56, art 8. It should be noted that the Soviet Union was not party to the convention until 1969. See MILDE, *supra* note 31, at 22.

<sup>58</sup> Lissitzyn, *supra* note 56, at 570.

alleged dates.<sup>59</sup> However, the U.S. government denied that its aircraft had committed territorial violations.<sup>60</sup>

The Soviet Union and other socialist countries accused the United States of territorial violations on dozens of other occasions, which the United States typically denied.<sup>61</sup> Nonetheless, during the Cold War, the Soviet Union and other socialist countries were able to shoot down over forty U.S. spy planes over their territories.<sup>62</sup> One such prominent incident occurred when the Soviet Union shot down an American U-2 spy plane deep within the Soviet airspace.<sup>63</sup> The plane in question had taken off from a U.S. airbase in Pakistan and was shot down hundreds of miles within the Soviet borders.<sup>64</sup> The United States initially sought to frame the U-2 flight as a “weather mission.”<sup>65</sup> A few days after the Soviet Union announced that it had shot down a “foreign aircraft” over its territory, the U.S. Embassy in Moscow delivered a note to the Soviet Ministry of Foreign Affairs, stating that the U.S. National Aeronautical Space Agency (“NASA”) had lost an “unarmed weather research plane,” which was “piloted by a civilian American.”<sup>66</sup> The U.S. note requested that the Soviet Union provide information about the foreign aircraft it had brought down and about the fate of its pilot.<sup>67</sup> After the U.S. government learned that the Soviet Union had detained the plane’s American pilot, it announced that the downed plane had indeed been on an intelligence-gathering mission in Soviet airspace.<sup>68</sup> The U.S. Secretary of State revealed in a press conference that such missions had been conducted for years and that they were necessary “to protect the United States and the Free World against surprise attack.”<sup>69</sup> President Eisenhower repeated the same

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 573-79.

<sup>62</sup> LOCH K. JOHNSON, NATIONAL SECURITY INTELLIGENCE 127 (2d ed. 2017).

<sup>63</sup> *Id.* at 228.

<sup>64</sup> Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT’L L. 836, 836 (1960).

<sup>65</sup> *Cover Plan to Be Used For Downed U-2 Flight (the U.S. Did Not Know that the Soviets Had the Captured U.S. Pilot)*, May 2, 1960, NAT’L ARCHIVES: EISENHOWER PRESIDENTIAL LIBR., <https://www.eisenhowerlibrary.gov/sites/default/files/research/online-documents/u2-incident/5-2-60-cover-plan.pdf> [https://perma.cc/X34L-P252].

<sup>66</sup> *State Department Press Release # 249 Concerning U-2 Incident*, May 6, 1960, *supra* note 44.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

points in a press conference on May 11, 1960, stating that the spy flights were necessary in order to prevent a “massive [Soviet] surprise attack” of Pearl Harbor’s scale.<sup>70</sup>

The United Nations (“U.N.”) Security Council held a meeting on the U-2 incident on May 18, 1960.<sup>71</sup> In the meeting the U.N. Security Council member states, including the United States, agreed that the U-2 flight had violated the territorial integrity of the Soviet Union.<sup>72</sup> The member states differed, however, in their assessments about whether the U-2 flight should be classified as “an act of aggression” under international law, which, according to the Soviet view, would have justified defensive military strikes against U.S. bases in Turkey, Pakistan, and Norway.<sup>73</sup> At the same time, no member state, including the United States, argued that the use of force by the Soviet Union against the American plane had been unlawful.<sup>74</sup>

The P.R.C. also shot down U-2 spy planes in the 1960s.<sup>75</sup> For instance, on September 9, 1962, the P.R.C. government announced that it had shot down a U.S.-made U-2 airplane, which had been operated by the government of the Republic of China (Taiwan) in the P.R.C. airspace.<sup>76</sup> While the U.S. denied direct involvement in the matter, the P.R.C. government called the event “a crime of flagrant aggression by U.S. imperialism against China.”<sup>77</sup> In total, the P.R.C. shot down four Taiwanese U-2 planes over its airspace between 1962 and 1965.<sup>78</sup>

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<sup>70</sup> *Statement by the President Regarding U-2 Incident, May 11, 1960*, NAT’L ARCHIVES: EISENHOWER PRESIDENTIAL LIBR., <https://www.eisenhowerlibrary.gov/sites/default/files/research/online-documents/u2-incident/5-11-60-statement-by-president.pdf> [<https://perma.cc/73RL-F9NF>].

<sup>71</sup> Security Council Official Records, 856th Mtg., U.N. Doc. S/PV. 856, 157 (Apr. 1, 1960), [https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/en/sc/repertoire/59-63/Chapter%208/59-63\\_08-5-Complaint%20by%20the%20USSR%20\(U-2%20incident\).pdf](https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/en/sc/repertoire/59-63/Chapter%208/59-63_08-5-Complaint%20by%20the%20USSR%20(U-2%20incident).pdf) [<https://perma.cc/M3NG-397M>].

<sup>72</sup> Wright, *supra* note 64, at 842.

<sup>73</sup> *Id.* at 847. Only Poland agreed with the Soviet argument. *Id.* at 842.

<sup>74</sup> Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 174 (2014).

<sup>75</sup> COHEN & CHIU, *supra* note 46, at 590-91.

<sup>76</sup> *Id.* at 590.

<sup>77</sup> *Id.*

<sup>78</sup> *Dragon Ladies Down*, AIR FORCE MAG., May 2016, at 148 <https://www.airandspaceforces.com/PDF/MagazineArchive/Magazine%20Documents/2016/May%202016/0516flashback.pdf> [<https://perma.cc/8VDZ-MEGK>].

The United States' need to send spy planes and surveillance balloons over foreign territory decreased in the 1970s and 1980s along with improvements in satellite imaging.<sup>79</sup> Since then, some of the most prominent violations of airspace have concerned civilian aircraft.<sup>80</sup> For instance, on September 1, 1983, a Soviet fighter jet shot down a commercial Korean Air Lines flight from New York City to Seoul that was flying in Soviet airspace, killing all 269 passengers and crew members.<sup>81</sup> The Soviet Union did not dispute the legal requirement to give warnings to an aircraft before using force against it, nor did it contest the duty not to harm a civilian vessel. Instead, the Soviet Union insisted in a U.N. Security Council meeting that its pilots had given appropriate warnings to the aircraft and that the incident had been an American "provocation . . . aimed at increasing international tension and at justifying its saber-rattling."<sup>82</sup>

Since the end of the Cold War, Chinese territorial claims in the South China Sea have been a source of ongoing tensions and diplomatic exchanges between the P.R.C. and the United States regarding the right of overflight. One incident stands out. On April 1, 2001, a U.S. Navy aircraft encountered two Chinese fighter jets in the Chinese Exclusive Economic Zone ("EEZ"), collided with one of them, and made an emergency landing on the Chinese Hainan Island.<sup>83</sup> The Chinese fighter jet crashed into the ocean, killing its pilot.<sup>84</sup>

The United States and the P.R.C. presented different interpretations about the causes and legal implications of the incident. The P.R.C. Ministry of Foreign Affairs maintained that the U.S. plane rammed into the Chinese fighter jet, suggesting that the United States

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<sup>79</sup> Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1074 (2006); *Legal Aspects of Reconnaissance in Airspace and Outer Space*, 61 COLUM. L. REV. 1074, 1078 (1961); John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 301 (1985).

<sup>80</sup> Phelps, *supra* note 79, at 255.

<sup>81</sup> Security Council Official Records, 2476th Mtg. U.N. Doc S/PV. 2476, 6-7 (Sept. 12, 1983).

<sup>82</sup> *Id.* at 8. The Korean Airline incident became a symbol of Russian paranoia over their airspace and "the evils of the Soviet form of government" in U.S. media. Farrel Corcoran, *KAL 007 and the Evil Empire: Mediated Disaster and Forms of Rationalization*, 3 CRITICAL STUD. MASS COMM'N 297, 300, 302 (1986).

<sup>83</sup> Sean D. Murphy, *Aerial Incident Off the Coast of China*, 95 AM. J. INT'L L. 630, 630 (2001).

<sup>84</sup> *Id.*

was liable for the crash.<sup>85</sup> A spokesperson for the P.R.C. Ministry of Foreign Affairs argued that the “surveillance flight conducted by the U.S. aircraft [had] overran the scope of ‘free over-flight’ according to international law [and] violated the United Nations Convention on the Law of the Sea.”<sup>86</sup> The plane had “intrude[d] China’s airspace and landed at a Chinese airport without permission from the Chinese side,” which, according to the spokesperson, constituted “a gross encroachment upon China’s sovereignty and territorial airspace.”<sup>87</sup> The spokesperson further argued that the “U.S. plane’s actions posed a serious threat to the national security of China.”<sup>88</sup> The P.R.C. held the twenty-four crew members of the American plane in China for nearly two weeks after the incident and kept the EP-3E airplane for inspection.<sup>89</sup> A P.R.C. Ministry of Foreign Affairs spokesperson explained that under international law and relevant Chinese law, “the Chinese side ha[d] every right to conduct a comprehensive investigation of such an incident in which a foreign military reconnaissance plane that rammed into and destroyed a Chinese plane, illegally intruded into China’s airspace and landed at a Chinese airfield.”<sup>90</sup>

Donald Rumsfeld, the U.S. Secretary of State, maintained that the incident was not the U.S. plane’s fault.<sup>91</sup> The United States further argued that the “reconnaissance and surveillance mission” conducted by the U.S. plane had occurred in international airspace and was, therefore, lawful.<sup>92</sup> The U.S. plane’s emergency landing in Chinese

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<sup>85</sup> *Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes*, EMBASSY OF CHINA IN THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA (Apr. 4, 2001, 4:40 PM), [http://lk.china-embassy.gov.cn/eng/zgxw/200104/t20010404\\_1376951.htm](http://lk.china-embassy.gov.cn/eng/zgxw/200104/t20010404_1376951.htm) [<https://perma.cc/LG56-Q8KN>].

<sup>86</sup> *Id.*; see also United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLoS].

<sup>87</sup> *Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes*, *supra* note 85.

<sup>88</sup> *Id.*

<sup>89</sup> Murphy, *supra* note 83, at 631.

<sup>90</sup> *Spokesperson on the Letter from the US Government Saying “Very Sorry” to the Chinese People*, MINISTRY OF FOREIGN AFFS. OF CHINA (Apr. 11, 2001, 12:00 AM), [https://www.fmprc.gov.cn/mfa\\_eng/gjhdq\\_665435/3376\\_665447/3432\\_664920/3436\\_664928/3439\\_664934/200104/t20010411\\_591099.html](https://www.fmprc.gov.cn/mfa_eng/gjhdq_665435/3376_665447/3432_664920/3436_664928/3439_664934/200104/t20010411_591099.html) [<https://perma.cc/RHW9-LYM9>].

<sup>91</sup> *News Briefing: Secretary of Defense Donald Rumsfeld*, CNN TRANSCRIPTS (Apr. 13, 2001), <https://transcripts.cnn.com/show/se/date/2001-04-13/segment/02> [<https://perma.cc/3WP2-7BHM>].

<sup>92</sup> *Id.*

territory had also been permissible according to international law relating to aircraft in distress.<sup>93</sup> Finally, the United States maintained that, as a state vessel, the U.S. airplane was entitled to “sovereign immunity,” which meant that it should not have been boarded or inspected and its crew should have been allowed to return to the United States without delay.<sup>94</sup> The United States ultimately agreed to issue a note to the Chinese government stating that it was “very sorry” about the incident.<sup>95</sup> The Chinese government subsequently released the U.S. crew and, three months later, handed the dismantled aircraft to the U.S. government.<sup>96</sup>

### *B. Patterns of Legal Argumentation*

While the above-described conflicts about the violations of airspace were structured through legal terminology, arbitration and adjudication about such violations has been rare.<sup>97</sup> International ad hoc arbitration is based on state consent; obtaining consent to arbitration from a state, which is accused of espionage or of using unlawful force against a foreign aircraft, is understandably difficult.<sup>98</sup> There is no record of ad hoc arbitration of disputes arising from unauthorized flights over foreign territory.<sup>99</sup> The Chicago Convention, which only applies to civil aircraft, establishes a compulsory dispute resolution process at the ICAO.<sup>100</sup> The complaints initiated under the Chicago Convention are heard by the ICAO Council, which is composed of the political representatives of ICAO member states.<sup>101</sup> So far, the member states of the Chicago Convention have brought only seven cases before the

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<sup>93</sup> *Id.*

<sup>94</sup> Eric Donnelly, *The United States–China EP-3 Incident: Legality and Realpolitik*, 9 J. CONFLICT & SEC. L. 25, 38 (2004). Donnelly notes that the ability of military aircraft to enjoy sovereign immunity is a contested matter in international law. This question is not covered by the Chicago Convention or UNCLOS and state practice on this question is inclusive. *Id.* at 39-40.

<sup>95</sup> Murphy, *supra* note 83, at 631.

<sup>96</sup> *Id.* at 632.

<sup>97</sup> Paul Stephen Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT'L & COMPAR. L. 231, 234 (2004).

<sup>98</sup> *Id.* at 300-01.

<sup>99</sup> *Id.* at 234-35; LUPING ZHANG, *THE RESOLUTION OF INTER-STATE DISPUTES IN CIVIL AVIATION* 116-25 (2022). For the applicability of the Chicago Convention, see Chicago Convention, *supra* note 56, art 3.

<sup>100</sup> Bae, *supra* note 31, at 69-70.

<sup>101</sup> Dempsey, *supra* note 97, at 302.



ICAO council.<sup>102</sup> None of these cases concerned unauthorized flights over foreign territory.<sup>103</sup>

The ICJ has considered twelve complaints relating to aerial incidents.<sup>104</sup> Nine of these complaints involved unauthorized flights over foreign territory. The United States initiated six proceedings against the Soviet Union and other Eastern bloc countries between 1951 and 1959.<sup>105</sup> In addition to these six cases, the United States, United Kingdom, and Israel initiated separate proceedings against Bulgaria for shooting down an Israeli passenger jet that, in 1955, flew into Bulgarian airspace and had British and U.S. nationals among its passengers.<sup>106</sup> All nine of these cases were dismissed after the Soviet Union and its allies refused to accept ICJ jurisdiction.<sup>107</sup> In addition to

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<sup>102</sup> ZHANG, *supra* note 99, at 82.

<sup>103</sup> *Id.* at 98-105.

<sup>104</sup> Dempsey, *supra* note 97, at 235-36.

<sup>105</sup> See (i) Treatment in Hungary of Aircraft and Crew of United States of America (U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. 103; (ii) Treatment in Hungary of Aircraft and Crew of United States of America (U.S. v. Hungarian People's Republic), 1954 I.C.J. 99; (iii) Aerial Incident of 7 October 1952 (U.S. v. Union of Soviet Socialist Republics), 1956 I.C.J. 9; (iv) Aerial Incident of 10 March 1953 (U.S. v. Czechoslovakia), 1956 I.C.J. 6; (v) Aerial Incident of 4 September 1954 (U.S. v. Union of Soviet Socialist Republics), 1958 I.C.J. 158; (vi) Aerial Incident of 7 November 1954 (U.S. v. Union of Soviet Socialist Republics), 1959 I.C.J. 276. See the I.C.J. docket at *List of All Cases*, INT'L CT. OF JUST., <https://www.icj-cij.org/list-of-all-cases> [<https://perma.cc/E8ZA-35HB>] (last visited Jan. 6, 2024).

<sup>106</sup> (vii) Aerial Incident of 27 July 1955 (U.S. v. Bulg.), 1957 I.C.J. 186. The United Kingdom and Israel initiated separate proceedings against Bulgaria with regards to the last case. See (viii) Aerial Incident of 27 July 1955 (U.K. v. Bulg.), 1957 I.C.J. 190; (ix) Aerial Incident of 27 July 1955 (Isr. v. Bulg.), 1957 I.C.J. 182.

<sup>107</sup> See Treatment in Hungary of Aircraft and Crew of United States of America (U.S. v. Union of Soviet Socialist Republics) 1954 I.C.J. 103, 104-05 (Order of July 12). The Soviet Union did not accept the compulsory jurisdiction of the ICJ under Article 36, paragraph 2, of the ICJ Statute, nor did the United States identify any alternative basis for ICJ jurisdiction in the matter. Application Instituting Proceedings Against the Union of Soviet Socialist Republics, Treatment in Hungary of Aircraft Crew of United States of America (U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. Pleadings 8, ¶ 2 (Feb. 16, 1954). The U.S. case against Hungary was removed from the docket for the same reason. Treatment in Hungary of Aircraft and Crew of United States of America (U.S. v. Hungarian People's Republic), 1954 I.C.J. 99, 101 (Order of July 12). For findings of lack of jurisdiction, see also Aerial Incident of 7 October 1952 (U.S. v. Union of Soviet Socialist Republics), 1956 I.C.J. 9, 11 (Order of Mar. 14); Aerial Incident of 10 March 1953 (U.S. v. Czechoslovakia), 1956 I.C.J. 6, 8 (Order of Mar. 14); Aerial Incident of 4 September 1954 (U.S. v. Union of Soviet Socialist Republics), 1958 I.C.J. 158, 161 (Order of Sept. 9); Aerial Incident of 7 November 1954 (U.S. v. Union of Soviet Socialist Republics), 1959 I.C.J. 276, 277 (Order of Oct. 7); Aerial Incident of 27 July 1955 (U.S. v. Bulg.), 1960 I.C.J. 146, 147 (Order of May 30).

these nine cases, the ICJ has dealt with aerial incidents in three other cases, but none concerned unauthorized flights over foreign territory.<sup>108</sup> The ICJ oversaw a settlement in a case between Iran and the United States after U.S.S. Vincennes shot down an Iranian Airbus A-300B passenger aircraft flying over Iranian waters, killing all 290 passengers and two crew members.<sup>109</sup> The ICJ discontinued a case between Pakistan and India, relating to a Pakistani fighter jet shot down over Pakistani territory, for lack of jurisdiction.<sup>110</sup> Finally, Libya initiated proceedings in the ICJ against the United Kingdom and the United States in a dispute relating to the bombing of Pan Am Flight 103 over Lockerbie in Scotland.<sup>111</sup> The United Kingdom and the United States charged two Libyan nationals for the bombing.<sup>112</sup> Libya disputed these charges and argued that the dispute ought to have been handled within the framework of the Convention for the Suppression

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<sup>108</sup> For a comprehensive overview of I.C.J. cases relating to aerial incidents, see Kay Hailbronner & Daniel Heilmann, *Aerial Incident Cases Before International Courts and Tribunals*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2009); see also Dempsey, *supra* note 97, at 236.

<sup>109</sup> Aerial Incident of 3 July 1988 (Iran v. U.S.), 1989 I.C.J. 132 (Order of Dec. 13); Settlement Agreement on the Case Concerning the Aerial Incident of 3 July 1988 Before the International Court of Justice (Feb. 9, 1996), <https://www.icj-cij.org/sites/default/files/case-related/79/11131.pdf> [<https://perma.cc/3JLD-554L>].

<sup>110</sup> Aerial Incident of 10 August 1999 (Pak. v. India), Judgment, 2000 I.C.J. 12 (June 21).

<sup>111</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.) (Order of Sept. 10, 2003), <https://www.icj-cij.org/sites/default/files/case-related/88/088-20030910-ORD-01-00-EN.pdf> [<https://perma.cc/78UR-GMXD>]; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.) (Order of Sept. 10, 2003), <https://www.icj-cij.org/sites/default/files/case-related/89/089-20030910-ORD-01-00-EN.pdf> [<https://perma.cc/5YZ7-W6TC>].

<sup>112</sup> Application Instituting Proceedings against the United Kingdom, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.) (Mar. 3, 1992), <https://www.icj-cij.org/sites/default/files/case-related/88/7207.pdf> [<https://perma.cc/3LCP-3PH5>]; Application Instituting Proceedings against the United States, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.) (Mar. 3, 1992), <https://www.icj-cij.org/sites/default/files/case-related/89/7209.pdf> [<https://perma.cc/K69W-QRDV>]. For the Libyan suspects, see Adam Goldman & Katie Benner, *U.S. Unseals Charges Against New Suspect in 1988 Lockerbie Bombing*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/21/us/politics/lockerbie-bombing-suspect.html> [<https://perma.cc/2ABB-HMRS>].

of Unlawful Acts Against the Safety of Civil Aviation.<sup>113</sup> The ICJ removed cases from its docket after Libya, the United Kingdom, and the United States reached a settlement.<sup>114</sup>

In the absence of more recent arbitrations and legal proceedings, the nine Cold War-era ICJ proceedings initiated by the United States and its allies remain the most relevant international cases for illustrating the argumentative patterns in litigation regarding unauthorized flights in foreign territory.<sup>115</sup> This is the case even though the ICJ proceedings were most likely U.S. public relations exercises.<sup>116</sup> After several failed attempts, the United States must have been aware of the futility of bringing cases before the ICJ without the consent of the respondent state.<sup>117</sup>

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<sup>113</sup> Application Instituting Proceedings against the United Kingdom, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.) (Mar. 3, 1992), <https://www.icj-cij.org/sites/default/files/case-related/88/7207.pdf>

[<https://perma.cc/K48S-6G3C>]; Application Instituting Proceedings against the United States, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.) (Mar. 3, 1992), <https://www.icj-cij.org/sites/default/files/case-related/89/7209.pdf> [<https://perma.cc/5D6Y-VUY4>]. Among other things, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation provides for international arbitration for disputes relating to violence against persons on board a civil aircraft. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177, arts. 1(1), 4, 14(1).

<sup>114</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.) (Order of Sept. 10, 2003), <https://www.icj-cij.org/sites/default/files/case-related/88/088-20030910-ORD-01-00-EN.pdf> [<https://perma.cc/78UR-GMXD>]; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.) (Order of Sept. 10, 2003), <https://www.icj-cij.org/sites/default/files/case-related/89/089-20030910-ORD-01-00-EN.pdf> [<https://perma.cc/5YZ7-W6TC>].

<sup>115</sup> The arguments of the United States and its allies can be perused from the memorials initiating the ICJ proceedings. These memorials refer to the diplomatic correspondence from the Soviet Union and other socialist states. The proceedings are available on the ICJ website. *Contentious Cases*, INT'L CT. OF JUST., <https://www.icj-cij.org/index.php/contentious-cases> [<https://perma.cc/Z57S-E9KU>] (last visited Jan. 6, 2024).

<sup>116</sup> See Dempsey, *supra* note 97, at 287. These cases demonstrate that “law is . . . the continuation of war by other means.” DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 259 (2018).

<sup>117</sup> For the argument that the ICJ ought to have accepted jurisdiction in these cases, see *Aerial Incident of July 27, 1955: Israel v. Bulgaria*, 1960 DUKE L.J. 240, 248 (1960). To be sure, memorials in ICJ proceedings can be evidence of both state practice and opinio juris in the emergence of customary rules of international law. See

The following paragraphs provide a taxonomy of the legal arguments used by parties to disputes surrounding incidents in which foreign aircraft have been shot down or forced to land by hostile states. This taxonomy elicits arguments from both parties to such incidents, and orders such arguments in romanettes (i) through (xi).

(i) The nine ICJ proceedings demonstrate that the state alleging a violation of its airspace by foreign aircraft (“the violated state”) will support its legal claim by appealing to sovereignty, territorial integrity, and the principle of non-intervention.<sup>118</sup> These principles are enshrined in the U.N. Charter and possess considerable rhetorical power on the international stage.<sup>119</sup> The violated state may also cite more specific normative sources to support its claims, such as the above-mentioned provision in the Chicago Convention, which provides that “every state has complete and exclusive sovereignty over the airspace above its territory.”<sup>120</sup> The Chicago Convention further requires that aircraft receive authorization before flying over the territory of another state.<sup>121</sup>

(ii)(a) The state that allegedly committed a violation of foreign airspace (“the violating state”) may respond to the arguments about sovereignty, territorial integrity, and non-intervention by denying that the aircraft in question was in the violated state’s airspace.<sup>122</sup> In *Aerial Incident of 4 September 1954*, the United States maintained that its

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OPPENHEIM’S INTERNATIONAL LAW: VOLUME 1: PEACE 28-31 (Robert Jennings & Arthur Watts eds., 9th ed. 2008).

<sup>118</sup> *Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes*, *supra* note 85; *Press Gaggle by Press Secretary Karine Jean-Pierre*, *supra* note 9. In public international law doctrine, territorial integrity is an aspect of a state’s sovereignty. See Samuel K. N. Blay, *Territorial Integrity and Political Independence*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1116>. According to the ICJ’s decision in the Nicaragua case, the principle of non-intervention prohibits “all States or groups of States to intervene directly or indirectly in internal or external affairs of other State . . . Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.” *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 205 (June 27). For analysis, see Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT’L L. 345, 346-49 (2009).

<sup>119</sup> U.N. Charter art. 2(1), 2(4).

<sup>120</sup> Chicago Convention, *supra* note 56, art 1; see also *id.*, art. 8 (regarding “aircraft capable of being flown without a pilot”).

<sup>121</sup> *Id.* art. 3(c).

<sup>122</sup> See, e.g., Application Instituting Proceedings, *Aerial Incident of 7 November 1954 (U.S. v. Union of Soviet Socialist Republics)*, 1959 I.C.J. Pleadings 8, 10 (July 8, 1957).

patrol plane had remained over the Sea of Japan “approximately 33 to 40 nautical miles” from Soviet airspace, when two Soviet MIG fighter jets attacked it and shot it down.<sup>123</sup> As mentioned above, the Soviet Union did not participate in the ICJ proceedings initiated by the United States. However, it stated in a U.N. Security Council Meeting on September 10, 1954, that the U.S. patrol plane had violated “Soviet frontiers” before it had been shot down.<sup>124</sup> The same argumentative pattern occurred a few months later when a Soviet Union fighter jet shot down another U.S. military aircraft. This prompted the United States to file a new complaint against the Soviet Union in the ICJ (*Aerial Incident of 7 November 1954*).<sup>125</sup> The United States argued again that the downed airplane had flown exclusively in international airspace.<sup>126</sup> The Soviet Union again maintained that the U.S. plane “violated the state boundary of the Soviet Union and continued to penetrate into the air space of the U.S.S.R.”<sup>127</sup>

(ii)(b) The violating state may agree with the violated state as to its aircraft’s location, but deny the violated state’s title to that territory.<sup>128</sup> In *Aerial Incident of 7 October 1952*, a U.S. plane was shot down over territory that was claimed by both Japan—an ally of the United States—and the Soviet Union.<sup>129</sup> The United States denied that its plane had flown over Soviet territory since it did not accept that the Soviet government could “lawfully have a state frontier” in the area in question.<sup>130</sup>

(iii) The violating state may also present an argument about force majeure, as the P.R.C. did in the Chinese balloon incident.<sup>131</sup> Force majeure applies where, for instance, unforeseen weather

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<sup>123</sup> *Id.* at 8, 14.

<sup>124</sup> 1954 U.N.Y.B. 48, U.N. Sales No. 1955.I.25, <https://www.un-ilibrary.org/content/books/9789210602150/read> [<https://perma.cc/YT5S-N3J6>].

<sup>125</sup> Application Instituting Proceedings, *Aerial Incident of 7 November 1954* (U.S. v. Union of Soviet Socialist Republics), 1959 I.C.J. Pleadings 8, 8 (July 8, 1957).

<sup>126</sup> *Id.* at 10.

<sup>127</sup> *Id.* at 13.

<sup>128</sup> *See, e.g.*, Application Instituting Proceedings, *Aerial Incident of 7 October 1952* (U.S. v. Union of Soviet Socialist Republics), 1956 I.C.J. Pleadings 9, 17 (June 2, 1955).

<sup>129</sup> *Id.*

<sup>130</sup> Application Instituting Proceedings, *Aerial Incident of 7 November 1954* (U.S. v. Union of Soviet Socialist Republics), 1959 I.C.J. Pleadings 8, 15 (July 8, 1957).

<sup>131</sup> *See Foreign Ministry Spokesperson Mao Ning’s Press Conference, supra* note 19.

conditions have moved the aircraft without the pilot's intention.<sup>132</sup> The United States presented arguments about force majeure in *Treatment in Hungary of Aircraft and Crew of United States of America*.<sup>133</sup> This case concerned a U.S. air force plane that had been flying deep in the Hungarian airspace when Soviet fighter jets forced it to land in a Soviet-operated airbase in Hungary.<sup>134</sup> According to the United States' application against the Soviet Union, the U.S. plane was "blown by winds the existence and directions of which the pilots did not . . . know."<sup>135</sup> Though the U.S. pilots believed that the plane was flying from Germany towards Belgrade, Yugoslavia, "it was actually blown by winds [which] accelerated the speed of the plane considerably beyond the speed at which the pilots believed the plane was flying."<sup>136</sup> The United States' memorial explained that "[i]n consequence of the effect of these unknown winds," the plane had not ended up in Belgrade, but instead flew hundreds of miles past it, towards the northeast, reaching Hungarian air space, where the Soviet military forced the aircraft to land in the Soviet airbase and detained its U.S. crew.<sup>137</sup> The United States argued that the plane's crew did not intend to enter Hungary and, consequently, force majeure precluded any argument that they had acted unlawfully.<sup>138</sup>

(iv) The violated state may counter the argument about force majeure by insisting that the violation of its airspace was not an unforeseen event beyond the control of the violating state.<sup>139</sup> In *Treatment in Hungary of Aircraft and Crew of United States of America*,

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<sup>132</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 76, U.N. Doc. A/56/10. For an argument about force majeure, see Application Instituting Proceedings Against the Hungarian People's Republic, *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. Hungarian People's Republic), 1954 I.C.J. Pleadings 8, 29 (Mar. 3, 1954).

<sup>133</sup> Application Instituting Proceedings Against the Hungarian People's Republic, *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. Hungarian People's Republic), 1954 I.C.J. Pleadings 8, 29 (Mar. 3, 1954).

<sup>134</sup> *Id.* at 61.

<sup>135</sup> *Id.* at 47-48.

<sup>136</sup> *Id.* at 48-49.

<sup>137</sup> *Id.* at 61.

<sup>138</sup> Application Instituting Proceedings Against the Hungarian People's Republic, *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. Hungarian People's Republic), 1954 I.C.J. Pleadings 8, 29 (Mar. 3, 1954).

<sup>139</sup> COHEN & CHIU, *supra* note 46, at 592-93 (regarding the P.R.C. objections to U.S. justification for balloon flights). For analysis of case law regarding the unforeseen nature of events, see *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 132, at 77.

the Soviet Union pointed out that, instead of having been carried by the winds over the Hungarian border, the U.S. plane had greatly diverted from its planned course.<sup>140</sup> The Soviet Union also noted the United States' acknowledgement that U.S. ground personnel had followed the plane's flight path and communicated with the aircraft crew during its flight.<sup>141</sup>

(v) Instead of, or in addition to, relying on force majeure, the violating state may present an argument about distress. This argument applies to a situation where there is a possibility of pilot intervention, but such an intervention is not reasonably possible due to a "situation of peril," such as a life-threatening emergency, which is not caused by the violating state.<sup>142</sup> In *Treatment in Hungary of Aircraft and Crew of United States of America*, the United States argued that the air force plane had been in distress, as its fuel supply had been running dangerously low, and it was seeking a safe landing place.<sup>143</sup> According to the U.S. memorial, the Soviet authorities must have known that the U.S. plane "was lost [and] in distress."<sup>144</sup> Instead of coming "to the aid of the plane or the crew," the Soviet authorities "knowingly permitted the plane to . . . cross into and over Hungary without warning."<sup>145</sup> The Soviet authorities insisted that the U.S. plane had had fuel left for several hours when they inspected it.<sup>146</sup>

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<sup>140</sup> Application Instituting Proceedings Against the Union of Soviet Socialist Republics, *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. Pleadings 42, 62 (Feb. 16, 1954).

<sup>141</sup> *Id.*

<sup>142</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 132, at 78. According to the International Law Commission commentaries on the Draft Articles on State Responsibility, "cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure." *Id.* For an argument about distress, see, for example, Application Instituting Proceedings Against the Union of Soviet Socialist Republics, *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. Pleadings 42, 50 (Feb. 16, 1954).

<sup>143</sup> Application Instituting Proceedings Against the Union of Soviet Socialist Republics, *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. Pleadings 42, 48 (Feb. 16, 1954).

<sup>144</sup> *Id.*

<sup>145</sup> Application Instituting Proceedings Against the Hungarian People's Republic, *Treatment in Hungary of Aircraft Crew of United States of America* (U.S. v. Hungarian People's Republic), 1954 I.C.J. Pleadings 8, 29 (Feb. 16, 1954).

<sup>146</sup> Application Instituting Proceedings Against the Union of Soviet Socialist Republics, *Treatment in Hungary of Aircraft and Crew of United States of America*

(vi) The violated state may counter the argument about distress by insisting that the situation of peril was caused by the violating state. This argument appeared in a case concerning the shooting down of El Al Israel Airlines' commercial flight (*Aerial Incident of 27 July 1955*).<sup>147</sup> The El Al flight was on its way from Vienna, Austria, to Lod, Israel, on July 27, 1955, when it entered the Bulgarian airspace without authorization.<sup>148</sup> The plane was shot down by Bulgarian fighter jets.<sup>149</sup> The entire seven-person crew and all fifty-one passengers died in the incident, including passengers from the United Kingdom and the United States.<sup>150</sup> In its complaint against Bulgaria, the United States maintained that the Israeli aircraft had "been driven slightly off its course . . . by unpredicted strong local winds at high altitude in sudden turbulent weather and poor visibility."<sup>151</sup> The plane was fired upon "as it was about to leave Bulgaria."<sup>152</sup> The Bulgarian government maintained that its fighter jets had been under the orders to force the Israeli plane to land at a Bulgarian airport and that the plane had been shot down only after it had "continued to fly . . . in an attempt to escape across the Bulgarian-Greek frontier."<sup>153</sup>

Violated states may force foreign aircraft to land or destroy them. The violated state may also detain the crew of the foreign aircraft and examine the aircraft. (vii) To justify such actions, the violated state will insist (vii)(a) that it has a sovereign right to force an aircraft to land for an investigation and, if necessary, use sufficient force to do so after reasonable warning has been given.<sup>154</sup> (vii)(b) Where relevant,

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(U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. Pleadings 42, 48 (Feb. 16, 1954).

<sup>147</sup> *Aerial Incident of 27 July 1955 (Isr. v. Bulg.)*, Judgment, 1959 I.C.J. 127 (May 26); Application Instituting Proceedings, *Aerial Incident of 27 July 1955 (U.S. v. Bulg.)*, 1957 I.C.J. Pleadings 22, 23 (Oct. 24, 1957).

<sup>148</sup> *Isr. v. Bulg.*, 1959 I.C.J. at 134.

<sup>149</sup> Memorial Submitted by the Government of the United States of America, *Aerial Incident of 27 July 1955 (U.S. v. Bulg.)*, 1958 I.C.J. Pleadings 167, 175 (Dec. 2, 1958).

<sup>150</sup> *Isr. v. Bulg.*, 1959 I.C.J. at 135.

<sup>151</sup> Application Instituting Proceedings, *Aerial Incident of 27 July, 1955 (U.S. v. Bulg.)*, 1957 I.C.J. Pleadings 22, 23 (Oct. 24, 1957).

<sup>152</sup> *Id.*

<sup>153</sup> Memorial Submitted by the Government of the United States of America, *Aerial Incident of 27 July 1955 (U.S. v. Bulg.)*, 1958 I.C.J. Pleadings 167, 181 (Dec. 2, 1958).

<sup>154</sup> See also Wright, *supra* note 64, at 850. For such arguments in the Chinese balloon incident, see *Spokesperson on the Letter from the US Government Saying "Very Sorry" to the Chinese People*, *supra* note 90; *Remarks by President Biden on the United States' Response to Recent Aerial Objects*, *supra* note 11.



the violated state will also insist that it has the sovereign right to enforce its criminal laws against anyone who has violated them, for instance, by unlawfully piloting an aircraft in its airspace.<sup>155</sup> (vii)(c) The violated state may also seek to justify its actions through the right of self-defense as a proportionate response to a security threat.<sup>156</sup>

(viii) The violating state may respond to these arguments by contending that the violated state used excessive and unnecessary force against the aircraft and, where relevant, failed to give reasonable warning to the airplane pilots. The United States' pleadings in *Aerial Incident of 27 July 1955*, regarding the downed El Al passenger airliner, help contextualize these arguments. The United States protested against Bulgaria's shooting down of the El Al "civil airliner without opportunity adequate to give [the pilot] a safe alternative and without opportunity adequate to keep his passengers and crew from being brutally killed."<sup>157</sup> The U.S. Memorial to the I.C.J. explained that "ancient laws of the sea" relating to "*force majeure* driving a ship off its proper course" were applicable to the matter.<sup>158</sup> In such instances, "law and practice have long been established at sea that a ship in such a plight should be aided, not ensnared or held for piratical aims."<sup>159</sup> The United States further argued that, "should there have been a security necessity to bring the [El Al flight] down to the ground, only reasonable methods for doing so could be used."<sup>160</sup> Both Bulgaria and the United States accepted that there was a right to use necessary force to bring down a foreign aircraft (even a foreign passenger aircraft) for a "security necessity"<sup>161</sup>—the question was whether sufficient

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<sup>155</sup> See, e.g., Application Instituting Proceedings Against the Union of Soviet Socialist Republics, Treatment in Hungary of Aircraft and Crew of United States of America (U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. Pleadings 42, 63-64 (Feb. 16, 1954) (regarding the right of Hungary to try American pilots under international law); see also *Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes*, supra note 86 (regarding China's right to enforce its domestic law in the Hainan Island incident).

<sup>156</sup> See, e.g., *Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes*, supra note 86; *Remarks by President Biden on the United States' Response to Recent Aerial Objects*, supra note 11.

<sup>157</sup> Memorial Submitted by the Government of the United States of America, *Aerial Incident of 27 July 1955* (U.S. v. Bulg.), 1958 I.C.J. Pleadings 167, 210 (Dec. 2, 1958).

<sup>158</sup> *Id.* at 217.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 210-11.

<sup>161</sup> *Id.* at 210.

warning had been given to the pilot of the aircraft about the impending use of force.<sup>162</sup>

The United States referred to the same limitation on the use of force in a proceeding regarding an aerial battle between U.S. and Czechoslovakian fighter jets (*Aerial Incident of 10 March 1953*).<sup>163</sup> The United States argued that the Czechoslovakian fighter jets had unlawfully entered the U.S.-administered zone of Germany.<sup>164</sup> The Czechoslovakian fighter jets ought to have submitted to identification by the U.S. fighter jets policing the border between Germany and Czechoslovakia.<sup>165</sup> The United States argued that, instead of identifying themselves, the Czechoslovakian fighter jets fired at the U.S. aircraft.<sup>166</sup> In an interview fifty years later the Czechoslovakian pilot of one of the MIGs maintained that the U.S. aircraft “were clearly encroaching on our airspace” when they were spotted.<sup>167</sup> On the same occasion, the Czech pilot admitted that his first “warning shot” had downed the U.S. fighter jet.<sup>168</sup>

(ix) It may be in the interest of the violating state to characterize its aircraft as civilian. On the one hand, this approach can refute the argument that the violating state was engaged in espionage or other forms of illegal intervention. On the other hand, this allows the violating state to rely on the aforementioned (and almost universally ratified) Article 3 *bis* (a) of the Chicago Convention, adopted in response to the aforementioned Korean Airline incident, which requires that states “refrain from resorting to the use of weapons against civil aircraft in flight.”<sup>169</sup> The civilian nature of the aircraft may also allow the violating state to avoid charges of state responsibility, although the

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<sup>162</sup> For a similar statement of the law, see Frank Fedele, *Overflight by Military Aircraft in Time of Peace*, 9 U.S.A.F. JAG L. Rev. 8, 18 (1967); Wright, *supra* note 64, at 850.

<sup>163</sup> See Application Instituting Proceedings, *Aerial Incident of 10 March 1953* (U.S. v. Czechoslovakia), 1956 I.C.J. Pleadings 8, 24 (Mar. 22, 1955).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 20-21.

<sup>167</sup> Coilin O'Connor, *Czech Fighter Pilot Recalls Cold War Dogfight*, RADIO PRAGUE INT'L (Oct. 4, 2004), <https://english.radio.cz/czech-fighter-pilot-recalls-cold-war-dogfight-8091378> [<https://perma.cc/5QN7-MXB2>].

<sup>168</sup> *Id.*

<sup>169</sup> Chicago Convention, *supra* note 56, art. 3 *bis*(a). All U.N. member states, except Liechtenstein, are parties to the Chicago Convention. See *Convention on International Civil Aviation: Status*, *supra* note 56, at 3; ZHANG, *supra* note 99, at 132.

violated state may still argue that the violating state is legally responsible for preventing non-state actors from violating foreign airspace.<sup>170</sup>

(x) Even when it is obvious that the aircraft in question was not civilian, the violating state will typically deny that its aircraft was engaged in espionage.<sup>171</sup> The circumstances of the above-described case on the *Treatment in Hungary of Aircraft and Crew of United States of America* did not allow the United States to argue that the U.S. air force plane was a civilian aircraft. Nevertheless, the United States assured the ICJ that “[a]t no time during the flight did any person aboard the plane entertain any intention or make any attempt to engage in any act of sabotage, espionage or other illegal activity.”<sup>172</sup> According to the United States’ memorial, the detailed maps showing portions of Romania and Hungary found in the airplane could have been used “in any innocent flight.”<sup>173</sup>

(xi) Where the violating state insists that the aircraft was privately owned and operated, it may also argue that damages inflicted to this plane constituted a violation of the international obligation to respect and protect the property of foreign nationals.<sup>174</sup>

(xii) In case the violating state acknowledges that the aircraft in question was a state vessel, it may argue that the inspection of the aircraft violated state immunity.<sup>175</sup> Such an argument extends the principles of law of the sea to international aviation, but it has no basis in the Chicago Convention.<sup>176</sup> Where relevant, the violating state will argue that the detention of the crew constituted a denial of justice under

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<sup>170</sup> Cheng, *supra* note 48, at 498, 501.

<sup>171</sup> However, as discussed in Part II(A) above, the United States acknowledged in 1960 that it had conducted espionage flights in the Soviet airspace. *Statement by the President Regarding U-2 Incident, May 11, 1960, supra* note 70; *see supra* text accompanying notes 68-70.

<sup>172</sup> Application Instituting Proceedings Against the Union of Soviet Socialist Republics, *Treatment in Hungary of Aircraft Crew of United States of America* (U.S. v. Union of Soviet Socialist Republics), 1954 I.C.J. Pleadings 42, 49 (Feb. 16, 1954).

<sup>173</sup> *Id.* at 53.

<sup>174</sup> *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship, supra* note 17. For this obligation, see *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, supra* note 132, at 58.

<sup>175</sup> Donnelly, *supra* note 94, at 39-40; Fedele, *supra* note 162, at 15.

<sup>176</sup> Lissitzyn, *supra* note 56, at 567.

international law, as the United States did in *Treatment in Hungary of Aircraft and Crew of United States of America*.<sup>177</sup>

### C. Legal Arguments in the Chinese Balloon Incident

The arguments in the Chinese balloon incident fit the above-described patterns of legal argumentation, despite the obvious differences between unmanned balloons and manned military and civilian aircraft. In the terms of the taxonomy of legal arguments developed in the previous section, the United States argued: (i) that the Chinese balloon incident constituted a violation of U.S. sovereignty;<sup>178</sup> (vii)(a) that the United States had the right to use force to bring down the Chinese balloon and to investigate it;<sup>179</sup> and (vii)(c) that the actions of the United States constituted a legal response to a security threat posed by the Chinese balloon.<sup>180</sup> While the White House characterized the Chinese balloon incident as “spying,” it did not make its objections through the technical terms of non-intervention or non-interference.<sup>181</sup> The P.R.C. government’s legal arguments in the Chinese balloon incident are best illustrated by quoting the statement made by the P.R.C. Ministry of Foreign Affairs on February 5, 2023, in its entirety:

China strongly disapproves of and protests against the U.S. attack on a civilian unmanned airship by force. The Chinese side has, after verification, repeatedly informed the U.S. side of the civilian nature of the airship and conveyed that its entry into the U.S. due to *force majeure* was totally unexpected. The Chinese side has clearly asked the U.S. side to properly handle the matter in a calm, professional and restrained manner. The spokesperson of the U.S. Department of Defense also noted that the balloon does not present a military or physical threat to people on the ground. Under such circumstances, the U.S. use of force is a clear overreaction and a serious violation of international practice. China will resolutely safeguard the legitimate rights and interests of the

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<sup>177</sup> See Application Instituting Proceedings Against the Hungarian People’s Republic, *Treatment in Hungary of Aircraft Crew of the United States of America* (U.S. v. Hungarian People’s Republic), 1954 I.C.J. Pleadings 8, 35 (Feb. 16, 1954).

<sup>178</sup> *Press Gaggle by Press Secretary Karine Jean-Pierre*, *supra* note 9.

<sup>179</sup> *Remarks by President Biden on the United States’ Response to Recent Aerial Objects*, *supra* note 11.

<sup>180</sup> *Id.*

<sup>181</sup> *Remarks by President Biden After Marine One Arrival*, *supra* note 10.

company concerned, and reserves the right to make further responses if necessary.<sup>182</sup>

This statement advanced three main legal arguments. First, the statement provided a force majeure justification for the Chinese balloon's entry into the U.S. airspace (item (iii) in the taxonomy developed in Part II(B) above). At the time of this writing, it is not possible to determine conclusively whether this argument was sincere. According to the U.S. Department of Defense, the P.R.C. did not inform the United States about the force majeure before the United States detected the Chinese balloon in its territory, suggesting that the overflight was intentional rather than accidental.<sup>183</sup> At the same time, U.S. officials have indicated that, in their assessment, the Chinese balloon was not engaged in intelligence gathering, confusing the matter further.<sup>184</sup> Whatever the case may be, the legal argument itself is conventional. Force majeure is a widely recognized "general principle" of international law, and it potentially applies to precisely such "accidents of nature" as described by the P.R.C. Ministry of Foreign Affairs in its statement.<sup>185</sup> Article 23(1) of the authoritative Draft Articles on State Responsibility defines force majeure as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."<sup>186</sup> As discussed above, the United States has used this principle to excuse the unauthorized entry of its aircraft into foreign airspace on several occasions.<sup>187</sup>

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<sup>182</sup> *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship*, *supra* note 17.

<sup>183</sup> *Senior Defense Official Holds a Background Briefing on High-Altitude Surveillance Balloon*, U.S. DEP'T OF DEF. (Feb. 2, 2023), <https://www.defense.gov/News/Transcripts/Transcript/Article/3287204/senior-defense-official-holds-a-background-briefing-on-high-altitude-surveillance/> [<https://perma.cc/Z3RE-JJXF>].

<sup>184</sup> Martin, *supra* note 35.

<sup>185</sup> See Federica I. Paddeu, *A Genealogy of Force Majeure in International Law*, 82 BRITISH Y.B. INT'L L. 381, 384, 422 (2012); *Foreign Ministry Spokesperson Mao Ning's Press Conference*, *supra* note 19.

<sup>186</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 132, at 76.

<sup>187</sup> See, e.g., *Application Instituting Proceedings Against the Hungarian People's Republic, Treatment in Hungary of Aircraft Crew of the United States of America (U.S. v. Hungarian People's Republic)*, 1954 I.C.J. Pleadings 8, 29 (Feb. 16, 1954).

Second, the statement by the P.R.C. Ministry of Foreign Affairs described the Chinese balloon as a “civilian airship.”<sup>188</sup> As discussed in item (ix) in Part II(B) above, the legal significance of this description was twofold. On the one hand, the emphasis on the civilian nature of the Chinese balloon sought to refute the allegation that the balloon was engaged in espionage, which likely constituted a violation of the doctrines of territorial sovereignty and non-intervention.<sup>189</sup> The statement’s reference to the “company concerned” (in original Chinese, 有关企业, *youguan qiye*) underlined the civilian nature of the airship.<sup>190</sup> On the other hand, the characterization of the Chinese balloon as a civilian airship invoked the protections afforded to civilian aircraft in international aviation law, including the Chicago Convention.<sup>191</sup>

The Chinese balloon was not an airplane, but, as a “machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth’s surface,” it potentially fell within the scope of the Chicago Convention’s definition of an aircraft.<sup>192</sup> Article 3(c) of the Chicago Convention provides that “[n]o state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.”<sup>193</sup> As mentioned above, Article 3 *bis*(a) of the Chicago Convention requires that states “refrain from resorting to the use of weapons against civil

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<sup>188</sup> *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship*, *supra* note 17.

<sup>189</sup> Iñaki Navarrete & Russell Buchan, *Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions*, 51 CORNELL INT’L L.J. 897, 907 (2019).

<sup>190</sup> *Waijiao bu jiu Meifang xuancheng jiluo Zhongguo wu ren feiting fabiao shengming* (外交部就美方宣称击落中国无人飞艇发表声明) [The Ministry of Foreign Affairs Issues a Statement on the U.S. Claim That It Shot Down an Unmanned Chinese Airship], MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 5, 2023, 7:47 AM), [https://www.mfa.gov.cn/zyxw/202302/t20230205\\_11019861.shtml](https://www.mfa.gov.cn/zyxw/202302/t20230205_11019861.shtml) [https://perma.cc/6QVZ-TS26].

<sup>191</sup> See generally Chicago Convention, *supra* note 56. As mentioned above, the United States and the P.R.C. are parties to this convention. See *Convention on International Civil Aviation: Status*, *supra* note 56, at 1, 4.

<sup>192</sup> Convention on International Civil Aviation, annex 7, Aircraft Nationality and Registration Marks, Int’l Civil Aviation Org. 1 (Nov. 27, 2003), [https://aviation-is.better-than.tv/icaodocs/Annex%207%20-%20Aircraft%20Nationality%20and%20Registration%20Marks/an07\\_5ed.pdf](https://aviation-is.better-than.tv/icaodocs/Annex%207%20-%20Aircraft%20Nationality%20and%20Registration%20Marks/an07_5ed.pdf) [https://perma.cc/XW7X-7SEN].

<sup>193</sup> Chicago Convention, *supra* note 56, art 3(c).

aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.”<sup>194</sup> Taking the P.R.C. government’s description of the Chinese balloon at face value and assuming that Article 3 *bis* (a) applies to an unmanned civilian aircraft, which has no persons on board, the P.R.C. government had a non-frivolous argument that the Chinese balloon should not have been destroyed.<sup>195</sup> The Chicago Convention also provides rules on unmanned free balloons, allowing light unmanned weather balloons to enter foreign airspace without advance notice.<sup>196</sup> The argument that the large Chinese balloon fit this description borders on the frivolous, however.<sup>197</sup>

Third, the statement of the P.R.C. Ministry of Foreign Affairs accusing the United States of “a serious violation of international practice” alluded to customary rules on the use of force.<sup>198</sup> As discussed in item (viii) of Part II(B) above, the right to use force against a foreign aircraft is not unconstrained in international law even when the aircraft is in the territory of a state using force against it. The ICJ has held that the use of force under international law must be necessary and proportional.<sup>199</sup> This is also the case when force is exercised as self-defense in response to “an armed attack” under Article 51 of the U.N. Charter.<sup>200</sup> The ICJ has limited a state’s right to use of force in its territorial

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<sup>194</sup> *Id.* art. 3 *bis*(a).

<sup>195</sup> Charlie Dunlop, *Guest Post: “The Chinese Balloon Shoot-Down Incident and the Law: Some Observations”*, LAWFIRE (Feb. 5, 2023), <https://sites.duke.edu/lawfire/2023/02/05/guest-post-the-chinese-balloon-shoot-down-incident-and-the-law-some-observations/> [https://perma.cc/Z7YV-6NXX].

<sup>196</sup> *Id.*; Convention on International Civil Aviation, annex 2, Rules of the Air, Int’l Civil Aviation Org. APP 4-1 (Nov. 11, 2005), [https://www.icao.int/Meetings/anconf12/Document%20Archive/an02\\_cons%5B1%5D.pdf](https://www.icao.int/Meetings/anconf12/Document%20Archive/an02_cons%5B1%5D.pdf) [https://perma.cc/CKP8-WCZ7]. It should be noted that these rules prohibit the unauthorized overflight over foreign territory of medium-sized and heavy balloons, defined in Article 1 of Appendix 4. *Id.* According to Article 2.2 of Appendix 4, an “unmanned free balloon, other than a light balloon used exclusively for meteorological purposes and operated in the manner prescribed by the appropriate authority, shall not be operated across the territory of another State without appropriate authorization from the other State concerned.” *Id.*

<sup>197</sup> Dunlop, *supra* note 195.

<sup>198</sup> *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship*, *supra* note 17.

<sup>199</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 194 (June 27); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8).

<sup>200</sup> *Nicar. v. U.S.*, 1986 I.C.J., ¶¶ 176, 237.

waters through “elementary considerations of humanity.”<sup>201</sup> Some scholars have argued that it is unlikely that the ICJ “would consider a peacetime submarine intrusion for purposes of espionage as tantamount to an ‘armed attack.’”<sup>202</sup> It is not a stretch to extend the same argument to the Chinese balloon incident, even if—or especially if—the Chinese balloon was a Chinese state vessel used for espionage.<sup>203</sup> The P.R.C. government did not attempt to justify the Chinese balloon incident through novel legal arguments, but instead sought to reaffirm the existing principles of territorial integrity and the use of force.<sup>204</sup> Specifically, the P.R.C. government did not seek to establish a right to operate aircraft in so-called near space, where the Chinese balloon flew.<sup>205</sup> Most scholars have assumed that territorial airspace continues until the beginning of outer space at around 100 kilometers from earth, which is approximately the lowest feasible orbit height for satellites.<sup>206</sup> At the same time, no international treaty delimits the boundary between territorial airspace and outer space.<sup>207</sup> In lieu of a treaty delimiting territorial airspace and outer space, the argument remains that a state’s territorial airspace does not, in fact, extend beyond

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<sup>201</sup> *Corfu Channel (U.K. v. Alb.)*, Judgment on the Merits, 1949 I.C.J. 4, 22 (Apr. 9).

<sup>202</sup> James Kraska, *Putting Your Head in the Tiger’s Mouth: Submarine Espionage in Territorial Waters*, 54 COLUM. J. TRANSNAT’L L. 164, 235 (2015); cf. Dale G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT’L L.J. 283, 298 (1999).

<sup>203</sup> Dunlop, *supra* note 195.

<sup>204</sup> *Foreign Ministry Spokesperson’s Remarks on the Unintended Entry of a Chinese Unmanned Airship into US Airspace Due to Force Majeure*, *supra* note 16; *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship*, *supra* note 17.

<sup>205</sup> *Foreign Ministry Spokesperson’s Remarks on the Unintended Entry of a Chinese Unmanned Airship into US Airspace Due to Force Majeure*, *supra* note 16; *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship*, *supra* note 17. For the altitude of the Chinese balloon, see Jim Garamore, *F-22 Safely Shoots Down Chinese Spy Balloon Off South Carolina Coast*, U.S. DEP’T OF DEF. (Feb. 4, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3288543/f-22-safely-shoots-down-chinese-spy-balloon-off-south-carolina-coast/> [<https://perma.cc/8T37-D5QG>]; *Press Briefing by Press Secretary Karine Jean-Pierre and National Security Council Coordinator for Strategic Communications John Kirby, February 13, 2023*, THE WHITE HOUSE (Feb. 13, 2023, 1:17 PM), <https://www.whitehouse.gov/briefing-room/press-briefings/2023/02/13/press-briefing-by-press-secretary-karine-jean-pierre-and-national-security-council-coordinator-for-strategic-communications-john-kirby-february-13-2023/> [<https://perma.cc/928U-E2K7>].

<sup>206</sup> Frans von der Dunk, *International Space Law*, in HANDBOOK OF SPACE LAW 29, 68-69 (Frans G. von der Dunk & Fabio Tronchetti eds., 2015).

<sup>207</sup> *Id.* at 71-72.



the maximum altitude at which states can ordinarily operate aircraft (about eighteen kilometers).<sup>208</sup> Neither the P.R.C. nor the United States argued in the Chinese balloon incident that states possess a right to conduct unauthorized balloon surveillance flights in foreign countries past some particular altitude.<sup>209</sup> In this way as well, the Chinese balloon incident strengthened the conventional legal arguments about alleged violations of airspace.

### III. EVOLVING APPROACHES TO INTERNATIONAL LAW IN THE P.R.C.

This Article now turns to analyze the Chinese balloon incident in the context of evolving Chinese approaches to international law. Arguments made by the P.R.C. government and Chinese legal scholars concerning the Chinese balloon incident followed China's increasingly activist approach to international law.<sup>210</sup> Such activism has coincided with the Chinese efforts to depict the United States as an increasingly illegitimate global actor.<sup>211</sup>

#### *A. Legal Arguments for a Globally Ambitious China*

The concepts of sovereignty and territorial integrity have been central to China's nation-building since the late-nineteenth century.<sup>212</sup> At the time, Western colonial powers had usurped elements of Chinese sovereignty and were exercising extraterritorial legislative and law enforcement powers in various foreign enclaves in China.<sup>213</sup> Contemporaneous Western international law held that extraterritorial (or "consular") powers were necessary because "Europeans or Americans . . . would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection to the unfamiliar interests

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<sup>208</sup> Liu & Tronchetti, *supra* note 32, at 540, 551.

<sup>209</sup> See *Press Gaggle by Press Secretary Karine Jean-Pierre*, *supra* note 9 (regarding the U.S. position); see also *Foreign Ministry Spokesperson Mao Ning's Press Conference*, *supra* note 19 (regarding the Chinese position).

<sup>210</sup> Chen, *supra* note 36, at 1213; Cohen, *supra* note 36, at 161-62.

<sup>211</sup> Chen, *supra* note 36, at 1201.

<sup>212</sup> MARIA ADELE CARRAI, SOVEREIGNTY IN CHINA: A GENEALOGY OF A CONCEPT SINCE 1840, at 88-89 (2019); see also Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267, 271 (2000).

<sup>213</sup> CARRAI, *supra* note 212, at 85.

arising out of a foreign civilisation.”<sup>214</sup> Similar rights did not exist for Chinese and Japanese people living in Europe or the United States, since international law was “law of the European peoples.”<sup>215</sup> Chinese government officials sought to resist the establishment and expansion of European powers through arguments about sovereignty and territorial integrity, although, as Ryan Mitchell points out, this was not always a priority for the Chinese government.<sup>216</sup>

Sovereignty and territorial integrity remained the cornerstones of Chinese foreign policy after the expulsion of foreign powers from China and the establishment of the P.R.C. in 1949.<sup>217</sup> China’s foreign policy principles, called “the Five Principles of Peaceful Coexistence” and originally declared in 1954, include (i) mutual respect for territorial integrity and sovereignty, (ii) mutual nonaggression, (iii) mutual noninterference in internal affairs, (iv) equality and mutual benefit, and (v) peaceful coexistence.<sup>218</sup> The Chinese emphasis on sovereignty and territorial integrity was not based on a willingness to maintain the status quo against Western interventionism. Chinese international lawyers argued that Chinese sovereignty encompassed Taiwan, which was not under the de facto control of the Beijing government.<sup>219</sup> According to Chinese international lawyers, the United States’ refusal to withdraw its support from Taiwan was a violation of the P.R.C.’s territorial integrity.<sup>220</sup> The insistence on the principles of sovereignty and territorial integrity also did not prevent Chinese political leaders from condoning and supporting socialist interventions into foreign countries.<sup>221</sup> For instance, Chinese international jurists maintained that the Soviet military invasion of Hungary in 1956 did not violate Hungary’s sovereignty and territorial integrity.<sup>222</sup> The Soviet troops were in Hungary “at the request of the Hungarian government to assist in restoring order,” which supposedly “coincide[d] with the genuine desires of the

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<sup>214</sup> JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 102 (1894).

<sup>215</sup> *Id.* at 103.

<sup>216</sup> CARRAI, *supra* note 212, at 89-90; RYAN MARTÍNEZ MITCHELL, RECENTERING THE WORLD: CHINA AND THE TRANSFORMATION OF INTERNATIONAL LAW 21 (2022).

<sup>217</sup> COHEN & CHIU, *supra* note 46, at 156.

<sup>218</sup> *Id.* at 119-20.

<sup>219</sup> *Id.* at 130.

<sup>220</sup> *Id.* at 129.

<sup>221</sup> *Id.* at 156.

<sup>222</sup> *Id.* at 174.

Hungarian people.”<sup>223</sup> These comments ignored the fact that the Hungarian government and its prime minister, Imre Nagy, had appealed to the United Nations to help it expel the Soviet Union from the country.<sup>224</sup> Soviet troops eventually quelled the Hungarian uprising and installed a new government, which tried and executed Nagy.<sup>225</sup>

Whereas Western international law adopted an increasingly critical discourse on sovereignty and territorial integrity over the course of the twentieth century, Chinese international lawyers kept insisting on a self-consciously state-centric approach to sovereignty.<sup>226</sup> To be sure, the Chinese conception of sovereignty was not the “absolutist” strawman that Western legal scholars attacked in the latter part of the twentieth century.<sup>227</sup> Even during the height of the Cold War, Chinese international lawyers acknowledged that sovereignty was not unconstrained, but limited in a number of ways through international law.<sup>228</sup> Some Chinese scholars explicitly rejected “the theory of absolute sovereignty,” which in their view suited “the policy of unrestrained aggression and expansion of imperialism.”<sup>229</sup> Yet the Chinese discourse on sovereignty sought to base international cooperation and, in particular, human rights obligations, on state consent.<sup>230</sup> This discourse viewed territorial integrity as the concrete manifestation of sovereignty.<sup>231</sup>

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<sup>223</sup> COHEN & CHIU, *supra* note 46, at 174.

<sup>224</sup> Eliav Lieblich, *At Least Something: The UN Special Committee on the Problem of Hungary, 1957–1958*, 30 EUR. J. INT’L. L. 843, 847 (2019).

<sup>225</sup> *Id.* at 847-48.

<sup>226</sup> See Xue Hanqin, *Chinese Observations on International Law*, 6 CHINESE J. INT’L L. 83, 85-87 (2007). Louis Henkin argued that the concept of sovereignty was “illegitimate” and “confused” and that some of its uses were “unworthy, some even destructive of human values.” Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 1 (1999). For the Chinese perspective, see XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW 69-71 (2012).

<sup>227</sup> For the absolutist strawman, see David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT’L. L. 385, 388 (1996); Jan Klabbbers, *Clinching the Concept of Sovereignty: Wimbledon Redux*, 3 AUSTRIAN REV. INT’L & EUR. L. ONLINE 345, 357 (1998).

<sup>228</sup> See WANG TIEYA (王铁崖), GUOJIFA (国际法) [INTERNATIONAL LAW] 76-78 (2004). For an example of the critique of sovereignty, see Louis Henkin, *The Mythology of Sovereignty*, in ESSAYS IN HONOUR OF WANG TIEYA 351 (Ronald St. John Macdonald ed., 1994).

<sup>229</sup> COHEN & CHIU, *supra* note 46, at 111-12.

<sup>230</sup> Henkin, *supra* note 228, at 355.

<sup>231</sup> COHEN & CHIU, *supra* note 46, at 335.

Frequent foreign intrusions into the P.R.C. and other socialist territory undoubtedly intensified the Chinese insistence on sovereignty and territorial integrity. A Chinese international lawyer, writing in 1962, described the U.S. Secretary of State Dulles's above-described comments about the unclear nature of international law regarding title to airspace as "nonsense."<sup>232</sup> According to the lawyer, "aerial boundaries of a country [were] as inviolable as its boundaries on land and sea."<sup>233</sup> Another Chinese international lawyer noted that a state, which caused the violation of territorial integrity through the release of a balloon, "must bear legal responsibility for any damages to another country arising from its violation of international obligations or abuse of its rights."<sup>234</sup> Other Chinese international lawyers observed that "[t]he US claim of launching balloons for the sake of scientific research [was] only intended to undertake, under similar pretext, the type of reconnaissance activities they . . . previously failed by means of aircraft over peaceful and democratic countries."<sup>235</sup> Chinese international lawyers further maintained that the United States attempted to "evade its responsibility for the practice . . . of sending propaganda balloons over the people's democracies in Eastern Europe" that were flown under the guise of private organizations.<sup>236</sup>

China's role as the target of territorial violations, rather than a violator of other states' territorial integrity, helped create a reasonably coherent narrative on sovereignty and territorial integrity during the Cold War. As long as one ignored China's support for foreign socialist movements and Soviet interventions, it seemed plausible to maintain that the Chinese government took sovereignty, non-intervention, and territorial integrity as key "principles governing the establishment and development of mutual relations among the nations of the world."<sup>237</sup> In this narrative, violations of territorial integrity were committed by the United States and other Western powers, instead of socialist countries and, in particular, the P.R.C.<sup>238</sup> This narrative was supported by the Marxist view that capitalist countries were engaged in imperialist

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<sup>232</sup> *Id.* at 591-93. For Dulles's comments, see *supra* text accompanying notes 53-54.

<sup>233</sup> COHEN & CHIU, *supra* note 46, at 593.

<sup>234</sup> *Id.* at 592.

<sup>235</sup> *Id.* at 594.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 136.

<sup>238</sup> *Id.* at 133.

policies of war and aggression.<sup>239</sup> Chinese international lawyers argued in the 1950s and 1960s that it was impossible to coexist peacefully with “American imperialism . . . the most flagrant violator of modern principles of international law.”<sup>240</sup>

The P.R.C. government’s efforts to justify a *prima facie* violation of territorial integrity in the Chinese balloon incident contrasted with China’s Cold War era appeals to sovereignty and territorial integrity. In contrast to the arguments in the 1960s and 1970s, the P.R.C. government could not present the Chinese balloon incident as an encroachment on China’s sovereignty and territorial integrity. Instead, it had to explain its conduct through the above-described legal defenses—such as *force majeure*—and exceptions to main international rules.<sup>241</sup>

In February 2023, the P.R.C. Ministry of Foreign Affairs—in addition to providing a legal defense for the balloon that flew over the United States—had to defend another Chinese balloon that was spotted over Costa Rica on February 2, 2023, and over Colombia and Venezuela on February 3, 2023.<sup>242</sup> According to a P.R.C. Ministry of Foreign Affairs spokesperson, this “unmanned airship” was also from China and “of civilian nature.”<sup>243</sup> Affected by the weather, this balloon had also “deviated far from its planned course and entered into the airspace of Latin America and the Caribbean.”<sup>244</sup> In contrast to the Chinese balloon that had travelled across the United States, the spokesman explained that the balloon in Latin America was used for a (presumably failed) “flight test.”<sup>245</sup>

While these arguments may have been novel in the context of the Chinese discourse on territorial violations, they were by no means

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<sup>239</sup> COHEN & CHIU, *supra* note 46, at 33-34.

<sup>240</sup> Hungdah Chiu, *Communist China’s Attitude Toward International Law*, 60 AM. J. INT’L L. 245, 245 (1966).

<sup>241</sup> As discussed above, the P.R.C. government responded indignantly to the downing of the Chinese balloon, arguing that it constituted a violation of China’s legitimate rights. *Foreign Ministry Spokesperson Mao Ning’s Press Conference*, *supra* note 19.

<sup>242</sup> Shannon Tiezzi, *China Admits There’s a 2nd Chinese Balloon over Latin America*, THE DIPLOMAT (Feb. 7, 2023), <https://thediplomat.com/2023/02/china-admits-theres-a-2nd-chinese-balloon-over-latin-america/> [https://perma.cc/FAZ3-NYDS].

<sup>243</sup> *Foreign Ministry Spokesperson Mao Ning’s Press Conference*, *supra* note 19.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

unexpected within the overall framework of Chinese foreign policy.<sup>246</sup> Instead of the single-minded project to safeguard China's territorial integrity against foreign interventions, contemporary Chinese foreign policy is motivated by a project to remodel global international relations in China's image.<sup>247</sup> In the past few years, the P.R.C. government has sought to influence the development of international law in various ways. For instance, the P.R.C. government has sought to extend the principle of non-intervention into the provision of information and communications technology.<sup>248</sup> In 2023, China took the first steps towards establishing a legal framework for extraterritorial sanctions.<sup>249</sup> As mentioned above, the P.R.C. government has also advanced idiosyncratic interpretations of maritime titles in the South China Sea.<sup>250</sup>

Sovereignty and territorial integrity remain prominent talking points in Chinese foreign policy.<sup>251</sup> These concepts are mentioned in China's most recent foreign policy framework, Xi Jinping Thought on Diplomacy (习近平外交思想, *Xi Jinping waijiao sixiang*), which is

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<sup>246</sup> To be sure, a pragmatic approach to international law was not new for Chinese international lawyers. See, e.g., *supra* text accompanying note 223; Samuel S. Kim, *The Development of International Law in Post-Mao China: Change and Continuity*, 1 J. CHINESE L. 117, 127 (1987).

<sup>247</sup> Sørensen, *supra* note 36, at 602.

<sup>248</sup> See William Ossoff, *Hacking the Domaine Réservé: The Rule of Non-Intervention and Political Interference in Cyberspace*, 62 HARV. INT'L. L.J. 295, 315-16 (2021).

<sup>249</sup> Zhonghua Renmin Gongheguo Duiwai Guanxi Fa (中华人民共和国对外关系法) [FOREIGN RELATIONS LAW OF THE PEOPLE'S REPUBLIC OF CHINA] (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 2023, effective July 1, 2023), art. 35 (China).

<sup>250</sup> In the Matter of the S. China Sea Arb. (Phil. v. China), Award, ¶ 200 (Perm. Ct. Arb. 2016), <https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf> [<https://perma.cc/7SKQ-ZB3V>] (last visited Oct. 27, 2023); see also Cohen, *supra* note 36, at 161. For instance, the P.R.C. government has argued that the law of the sea precludes American surveillance flights from the Chinese EEZ. Art. 58(1) of the U.N. Convention on the Law of the Sea ("UNCLOS") provides that all states "enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight . . . and other internationally lawful uses of the sea related to these freedoms" in EEZ. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994); see also Donnelly, *supra* note 94, at 32 (explaining that the "phrase 'other internationally lawful uses', and the incorporation of High Seas 'rights' contained in Articles 88-115, were considered by the major maritime powers, including the US, to safeguard 'pre-existing rights' on the High Seas with regard to military operations involving ships and aircraft within the EEZ.>").

<sup>251</sup> See Chen, *supra* note 36, at 1213.

part of the gradually evolving “Xi Jinping Thought.”<sup>252</sup> As the foreign-facing element of Xi Jinping Thought, Xi Jinping Thought on Diplomacy is meant to provide “fundamental guidance for China’s foreign policy in the new era.”<sup>253</sup> Among other things, Xi Jinping Thought on Diplomacy lays out “red lines on major issues involving sovereignty and territorial integrity.”<sup>254</sup> Nevertheless, texts on Xi Jinping Thought on Diplomacy mention territorial integrity primarily in the context of China’s own territorial disputes, rather than presenting it as the constituting principle of the entire Chinese foreign policy.<sup>255</sup>

### *B. Redefining the Self – and the Other*

Chinese international lawyers have had to conform the Chinese balloon incident to the P.R.C. government’s narrative on China’s new global role. Whereas the Cold War-era Chinese strategists described international law as a tool for furthering the socialist revolution, contemporary China portrays itself as a responsible rule-follower and rule-maker that regards compliance with international law as an

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<sup>252</sup> For an explanation of Xi Jinping Thought on Diplomacy by the P.R.C. Ministry for Foreign Affairs, see *Study and Implement Xi Jinping Thought on Diplomacy Conscientiously and Break New Ground in Major-Country Diplomacy with Chinese Characteristics*, MINISTRY FOR FOREIGN AFFS. OF CHINA (July 20, 2020, 2:01 PM) [hereinafter *Study and Implement Xi Jinping Thought*], [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zyjh\\_665391/202007/t20200721\\_678873.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/202007/t20200721_678873.html) [<https://perma.cc/P282-S4VD>]. For the development of various aspects of Xi Jinping Thought, see John Garrick & Yan Chang Bennett, “*Xi Jinping Thought*”: Realisation of the Chinese Dream of National Rejuvenation?, 113 CHINA PERSPS. 99 (2018). CCP ideologues have been developing various elements of “Xi Jinping Thought” in specific fields of policy since the beginning of the Xi Jinping administration. In addition to Xi Jinping Thought on Diplomacy, CCP ideologues have launched, among other things, “Xi Jinping Thought on Literature and Art” (习近平文艺思想), “Xi Jinping Thought on Strengthening the Military” (习近平强军思想), “Xi Jinping Thought on Education” (习近平教育思想), “Xi Jinping Thought on Ecological Civilization” (习近平生态文明思想), “Xi Jinping Thought on Party Construction” (习近平党建思想), “Xi Jinping Thought on Rule of Law” (习近平法治思想). See China Media Project, *Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*, THE CMP DICTIONARY (Mar. 27, 2021), [https://chinamediaproject.org/the\\_ccp\\_dictionary/xi-jinping-thought-on-socialism-with-chinese-characteristics-for-a-new-era/](https://chinamediaproject.org/the_ccp_dictionary/xi-jinping-thought-on-socialism-with-chinese-characteristics-for-a-new-era/) [<https://perma.cc/MQ7S-58GR>].

<sup>253</sup> *Study and Implement Xi Jinping Thought*, *supra* note 252.

<sup>254</sup> *Id.*

<sup>255</sup> Denny Roy, ‘*Xi Jinping Thought on Diplomacy*’ Fails to Impress – or Reassure, THE DIPLOMAT (Apr. 2, 2020), <https://thediplomat.com/2020/04/xi-jinping-thought-on-diplomacy-fails-to-impress-or-reassure/> [<https://perma.cc/72U5-AEGN>].

important value in its own right.<sup>256</sup> The Chinese government promotes this narrative both in international and domestic settings. On the international plane, Chinese diplomacy portrays China as the guarantor of the post-War international order, which the United States is recklessly jeopardizing. According to the P.R.C. Ministry for Foreign Affairs, China is “a responsible major country, [which] is committed to carrying forward international rule of law, firmly upholding the authority and sanctity of international law and the international order.”<sup>257</sup> China “always observes the purposes and principles of the UN Charter, especially the principles of respect for national sovereignty, non-interference in each other’s internal affairs, and peaceful settlement of international disputes, and opposes hegemony and power politics.”<sup>258</sup> China “will actively participate in reforming and developing the global governance system, help shape the international order toward greater justice and equality and advance the building of a community with a shared future for mankind.”<sup>259</sup> In contrast with China’s constructive approach to international relations, “[s]ome countries cherry-pick [rules of] international law, clamor [for a] ‘rule-based international order’, [and] impose their own rules on others, which is nothing but hegemony in essence under the disguise of rules.”<sup>260</sup> Some countries even “willfully withdraw from international treaties and organizations, seriously undermine international cooperation and hinder multilateral governance.”<sup>261</sup> These statements are thinly veiled criticisms of the United States, which, among other things, withdrew from the Kyoto Protocol on Climate Change on November 4, 2020, and announced its intention to withdraw from the World Health Organization on July 6, 2020.<sup>262</sup>

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<sup>256</sup> For the Cold War-era approach, see COHEN & CHIU, *supra* note 46, at 32. For the contemporary approach, see XI JINPING FAZHI SIXIANG GAILUN (习近平法治思想概论) [INTRODUCTION TO XI JINPING THOUGHT ON THE RULE OF LAW] 72 (2021) [hereinafter INTRODUCTION TO XI JINPING THOUGHT ON THE RULE OF LAW].

<sup>257</sup> *Carry Forward International Rule of Law and Improve Economic and Trade Rules for Securing High-Quality Belt and Road Development*, MINISTRY OF FOREIGN AFFS. OF CHINA (Nov. 12, 2021, 4:15 PM) [hereinafter *Carry Forward International Rule of Law*], [https://www.fmprc.gov.cn/mfa\\_eng/wjbxw/202111/t20211113\\_10447812.html](https://www.fmprc.gov.cn/mfa_eng/wjbxw/202111/t20211113_10447812.html) [https://perma.cc/H5QR-EDEV].

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC (Nov. 4, 2020, 3:39 AM), <https://www.bbc.com/news/science->



While the above-described language may seem disingenuous considering China's own conduct in the South China Sea—and, indeed, the Chinese balloon incident—it nevertheless reflects the Chinese leadership's domestic narrative about China's new global role. In the past few years, Chinese domestic ideological texts have begun to emphasize the global importance of China's socialist governance ideology.<sup>263</sup> This narrative is visible in Chinese Communist Party (“CCP”) descriptions of Xi Jinping Thought on the Rule of Law.<sup>264</sup> According to CCP ideologues, Xi Jinping Thought on the Rule of Law provides to the world “a new form of international relations” and “a solution for global governance.”<sup>265</sup> Xi Jinping Thought on the Rule of Law teaches the world that “[i]n the international community, the spirit of law should be the commonly applied yardstick. There is no law that only applies to others but not one self.”<sup>266</sup> Xi Jinping Thought on the Rule of Law further provides that “[a]ll countries have the responsibility to maintain the authority of the international rule of law, exercise their rights in accordance with the law, and perform their obligations in good faith.”<sup>267</sup>

Recent CCP ideology describes the Chinese approach to international law as being superior to Western, self-interested, hegemonic uses of international law.<sup>268</sup> According to Party ideologues, Xi Jinping Thought on Diplomacy “improves on and transcends traditional theories of international relations.”<sup>269</sup> It resists “notions such as ‘might makes right’ and ‘zero-sum game,’” which mark Western approaches

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environment-54797743 [https://perma.cc/T6WH-K5TC]; Lawrence O. Gostin Harold Hongju Koh, Michelle Williams, Margaret A. Hamburg, Georges Benjamin, William H. Foege, Patricia Davidson, Elizabeth H. Bradley, Michele Barry, Jeffrey P. Koplan, Mirta Flia Roses Periago, Wafaa El Sadr, Ann Kurth, Sten H. Vermund, & Matthew M. Kavanagh, *US Withdrawal from WHO Is Unlawful and Threatens Global and US Health and Security*, 396 LANCET 293, 293 (2020).

<sup>263</sup> I have described the transition from the older Hu Jintao era legal ideology to Xi Jinping era legal ideology elsewhere. See generally Samuli Seppänen, *A Global Turn in Chinese Legal Ideology?*, 55 VERFASSUNG UND RECHT IN ÜBERSEE | WORLD COMPAR. L. 287, 290-300 (2022).

<sup>264</sup> For a full definition of Xi Jinping Thought on the Rule of Law, see INTRODUCTION TO XI JINPING THOUGHT ON THE RULE OF LAW, *supra* note 256, at 123.

<sup>265</sup> *Id.* at 66, 69.

<sup>266</sup> *Id.* at 72.

<sup>267</sup> *Id.*

<sup>268</sup> *Study and Implement Xi Jinping Thought*, *supra* note 252.

<sup>269</sup> *Id.*

to international relations.<sup>270</sup> A few weeks after the Chinese balloon incident, the CCP and Chinese government directed Chinese universities to establish more programs in public international law in order to “cultivate a new generation of legal professionals who have both a global outlook and expertise in international and national law, filling the critical shortage of experts in this field.”<sup>271</sup>

The P.R.C. government’s legal arguments in the Chinese balloon incident demonstrated this global outlook. Instead of relying on the Cold War-era narrative on territorial integrity, the Chinese balloon incident called for nuanced legal arguments that made use of legal defenses and exceptions to main rules. Predictably, Chinese diplomats and international lawyers did not describe the Chinese balloon incident as a morally ambivalent instance of great power politics. Instead, the Chinese commentary on the balloon incident highlighted the moral responsibility of the Chinese government and the recklessness of the U.S. government. The attempt to seek the moral high ground was evident, for instance, in the teleconference between Wang Yi, the Chinese foreign minister, and U.S. Secretary of State Antony Blinken. According to Wang, “China, as a responsible country, [had] always strictly abided by international law, and [would] not accept any groundless conjecture or hype.”<sup>272</sup> Two days after the Chinese balloon was brought down, a P.R.C. Ministry of Foreign Affairs spokesperson

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<sup>270</sup> *Id.* For a comment on foreign reactions to Xi Jinping Thought on Diplomacy, see Roy, *supra* note 255.

<sup>271</sup> Sylvie Zhuang, *China Raises Status of International Law Studies in Push for Home-grown Global Expertise*, S. CHINA MORNING POST (Feb. 28, 2003, 11:30 AM), <https://www.scmp.com/news/china/politics/article/3211736/china-raises-status-international-law-studies-push-home-grown-global-expertise> [<https://perma.cc/SA9P-9C38>]. This directive was part of an effort to “ensure that legal education and legal theory research always advance along the correct political direction.” Xinhua (新华社), *Zhonggong zhongyang bangongting Guowuyuan bangongting yinfa “Guanyu jiaqiang xin shidai faxue jiaoyu he faxue lilun yanjiu de yijian”* (中共中央办公厅 国务院办公厅印发《关于加强新时代法学教育和法学理论研究的意见》) [*General Office of the CPC Central Committee General Office of the State Council Issued the “Opinions on Strengthening Legal Education and Legal Theory Research in the New Era”*], *Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu* (中华人民共和国中央人民政府) [THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA] (Feb. 26, 2023, 6:30 PM), [http://www.gov.cn/zhengce/2023-02/26/content\\_5743383.htm](http://www.gov.cn/zhengce/2023-02/26/content_5743383.htm) [<https://perma.cc/T4G7-KAFJ>].

<sup>272</sup> *Wang Yi Has a Phone Call with US Secretary of State Antony Blinken at Request*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 4, 2023, 11:14 AM), [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/wshd\\_665389/202302/t20230204\\_11019716.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/wshd_665389/202302/t20230204_11019716.html) [<https://perma.cc/5YZX-Y24J>].

similarly opined that the “U.S. side’s deliberate hyping up of the matter and even use of force [was] unacceptable and irresponsible.”<sup>273</sup>

Similar viewpoints appeared within Chinese academia, which, it should be noted, is subject to close political control and censorship.<sup>274</sup> Shen Yi, a professor in the Department of International Politics in Shanghai’s Fudan University, argued in a blog posting that the entry of the Chinese balloon into the U.S. airspace was “neither intentional intrusion nor harmful.”<sup>275</sup> Shen saw no legitimate security concerns for the United States in the Chinese balloon incident and maintained that it was “ridiculous” to suggest that the Chinese balloon could have been a spying platform.<sup>276</sup> In Shen’s understanding, countries generally chose to deal with such matters “in a low-key manner.”<sup>277</sup> Shen explained the U.S. reaction to the Chinese balloon incident as a result of “increasingly polarized American politics, increasingly divided political parties, and a government struggling to prepare for the 2024 presidential election, which has limited ability to deal with such emergencies.”<sup>278</sup> Jin Canrong, a professor of international relations at Beijing’s Renming University, explained the American reaction to the Chinese balloon incident in similar terms, also through the pathologies of U.S. democracy.<sup>279</sup> In Jin’s view, U.S. politicians from both political parties saw the Chinese balloon incident as an opportunity to exaggerate China’s threat to an American public, which, in Jin’s view, only “care[d] about daily necessities.”<sup>280</sup>

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<sup>273</sup> *Foreign Ministry Spokesperson Mao Ning’s Press Conference, supra* note 19.

<sup>274</sup> For the political control of publications in China, see David Shambaugh, *China’s Propaganda System: Institutions, Processes and Efficacy*, 57 CHINA J. 25, 29 (2007). At the time of the writing, a search in the comprehensive CNKI Database ([www.cnki.net](http://www.cnki.net)) for the Chinese language term for balloon (“气球”) in the title produces no law review articles on the Chinese balloon incident.

<sup>275</sup> Shen Yi (沈逸), *Yi zhi kuangbiao de “liulang qiqiu”* (一只狂飙的“流浪气球”) [*A “Wandering Balloon” that Is like a Hurricane*], Fudan Fazhan Yanjiuyuan (复旦发展研究院) [FUDAN DEV. INST.] (Feb. 8, 2023), <https://fddi.fudan.edu.cn/59/2f/c18965a481583/page.htm>.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Jin Canrong (金灿荣), “*Liulang qiqiu*” *shijian jiang chixu faxiao, women yao zai xing dong shang zuo hao zhunbei* (“流浪气球”事件将持续发酵, 我们要在行动上做好准备) [*The “Wandering Balloon” Incident Will Continue to Ferment, and We Must Be Prepared for Action*], GUANCHAZHE (观察者) (Feb. 8, 2023, 8:23 AM), [https://www.guancha.cn/JinCanRong/2023\\_02\\_08\\_678981\\_s.shtml](https://www.guancha.cn/JinCanRong/2023_02_08_678981_s.shtml) [<https://perma.cc/GR35-ZKCF>].

<sup>280</sup> *Id.*

## IV. PARTISANISM IN INTERNATIONAL LAW

This Article finally examines whether the Chinese uses of, and commentary on, public international law in the Chinese balloon incident reflect certain Western understandings of “authoritarian” international law. As mentioned in the Introduction, Tom Ginsburg has defined “authoritarian international law” as “legal rhetoric, practices, and rules specifically designed to extend the survival and reach of authoritarian rule across space and/or time.”<sup>281</sup> Virtually any appeal to international law by the P.R.C. government—including its arguments in the Chinese balloon incident—may be seen as an attempt to extend the survival and reach of the Chinese government and, therefore, be considered “authoritarian.” In more substantive terms, Ginsburg has argued that authoritarian international law seeks to strengthen “the traditional principles of noninterference, sovereignty, and independence.”<sup>282</sup> Prominent Chinese international lawyers have characterized China’s approach to international law in terms similar to Ginsburg’s. Xue Hanqin, the P.R.C. judge at the ICJ, has described Chinese international law as the adherence to doctrines of sovereignty and non-interference, which vest each state with “the autonomy to freely choose the development model it deems suitable for its own country.”<sup>283</sup> The Chinese commentary on the Chinese balloon incident reflected this narrative. Shortly after the United States announced that it had detected the Chinese balloon in U.S. airspace, a P.R.C. Ministry of Foreign Affairs spokesperson assured that China respected “the sovereignty and territorial integrity of other countries.”<sup>284</sup>

As discussed in Parts II.C and III.A above, the Chinese balloon incident required China to adopt a more qualified narrative on territorial integrity.<sup>285</sup> This more qualified narrative also conforms to descriptions of authoritarian international law. Ginsburg observes that

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<sup>281</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 228 (emphasis removed).

<sup>282</sup> *Id.* at 244. Here, “Westphalian neutrality” refers to the emphasis on sovereignty and noninterference. *Id.* at 228.

<sup>283</sup> XUE, *supra* note 226, at 95.

<sup>284</sup> *Foreign Ministry Spokesperson Mao Ning’s Press Conference*, *supra* note 19.

<sup>285</sup> *The Foreign Ministry Issues Statement on the US Claim of Downing a Chinese Unmanned Airship*, *supra* note 17; *Foreign Ministry Spokesperson Wang Wenbin’s Regular Press Conference on February 15, 2023*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 15, 2023, 9:33 PM), [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/202302/t20230215\\_11025476.html](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202302/t20230215_11025476.html) [<https://perma.cc/5QSY-9DK6>].

authoritarian regimes are no longer satisfied with “Westphalian neutrality”—that is, with an emphasis on sovereignty and noninterference.<sup>286</sup> Instead, authoritarian regimes have softened their views on sovereignty, noninterference, and territorial integrity in order to facilitate “‘rabble-rousing’ inside other countries.”<sup>287</sup> Ginsburg further argues that legal initiatives through which authoritarian regimes extend their reach can limit the principles of sovereignty and noninterference.<sup>288</sup> The Chinese balloons over North and South America and the legal defenses employed to justify them signal China’s determination to increase its global presence.

Descriptions of authoritarian international law do not ultimately turn on the nature of substantive rules that authoritarian regimes advance. As discussed in Part II(C) above, the P.R.C. and the U.S. governments’ arguments in the Chinese balloon incident did not break new legal ground but fell into familiar diplomatic exchanges on intelligence gathering. Many liberal-democratic and authoritarian states spy on foreign countries, while simultaneously seeking to prohibit unauthorized intelligence gathering by other states in their own territory.<sup>289</sup> States mostly handle disputes about espionage behind closed doors.<sup>290</sup> When allegations of foreign espionage become public knowledge—as was the case with the Chinese balloon incident—states present legal arguments in a predictable pattern. The analysis in Part II(B) above demonstrates that the form of these arguments does not depend on the type of regime making them.

Instead of being based on substantive rules of international law, theories of authoritarian international law presuppose that regime types and, more specifically, the absence or presence of liberal democratic institutions, influence a regime’s conduct on the international plane.<sup>291</sup> Such theories are “liberal” in the sense that they establish a causal connection between individual political rights, the creation of international order, and the various benefits that emerge from such an

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<sup>286</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 228.

<sup>287</sup> *Id.* at 250.

<sup>288</sup> *Id.* at 253. This would be the effect of a bilateral extradition treaty, which does not include a political offense exemption and which therefore requires the extradition of persons accused of committing ideological crimes.

<sup>289</sup> Chesterman, *supra* note 79, at 1072.

<sup>290</sup> *Id.*

<sup>291</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 229.

order.<sup>292</sup> According to Ginsburg, for instance, governments in liberal democracies are more invested in stable international institutions because transferring domestic power to the international level reduces the impact of an electoral loss.<sup>293</sup> Ginsburg argues that authoritarian regimes relate to international law in terms of their survival. This leads authoritarian regimes to focus on internal security in international cooperation and to abhor the transparency of international organizations and dispute resolution processes.<sup>294</sup> The Chinese balloon incident may conform to these theoretical observations. If one rejects the P.R.C. government's force majeure argument, the Chinese balloon incident may be seen as a textbook example of partisan provocation in international affairs.<sup>295</sup> While the United States does not hesitate to spy on other liberal democracies, it typically does not seek to provoke them.<sup>296</sup>

Nevertheless, the Chinese balloon incident also allows another, more counterintuitive, reading on Chinese foreign policy elites' approach to international law. The balloon incident suggests a symmetry between Chinese foreign policy elites' views about international law and self-consciously liberal theories on international law. Both approaches to international law explain the dysfunctions of international relations through the shortcomings of other regime types. Both approaches also delegitimize adversaries by presuming them incapable of partaking in the international rule-based order in a constructive, non-partisan manner.

As discussed in Part III(B) above, the Chinese commentators explained the fallout from the Chinese balloon incident through the deficiencies in the American political system, whose divisions had incentivized political attacks on China.<sup>297</sup> In the Chinese foreign policy elites' view, U.S. reactions to the Chinese balloon incident were part of the "new Cold War against China planned and advanced by the

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<sup>292</sup> *Id.* at 259-60; Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 PROC. ANNUAL MEETING (AM. SOC'Y INT'L L.) 240, 246-47 (2000).

<sup>293</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 229.

<sup>294</sup> *Id.* at 230.

<sup>295</sup> CARL SCHMITT, *THEORY OF THE PARTISAN: INTERMEDIATE COMMENTARY ON THE CONCEPT OF THE POLITICAL* 14 (G. L. Ulmen trans., 2007).

<sup>296</sup> Navarrete & Buchan, *supra* note 189, at 918. The conduct of the United States on the international stage during the Trump era presents an anomaly for this view. See, e.g., José E. Alvarez, *The WHO in the Age of the Coronavirus*, 114 AM. J. INT'L L. 578, 580 (2020) (discussing the plans of the Trump administration to withdraw from the World Health Organization).

<sup>297</sup> Jin, *supra* note 279; Shen, *supra* note 275.

United States,” where the United States was seeking to curb China’s technological progress.<sup>298</sup> Whereas the P.R.C. handled the incident “in a calm and professional manner,” the United States “overreacted,” “smearing and attacking China.”<sup>299</sup> A few weeks after the Chinese balloon incident, the P.R.C. Ministry of Foreign Affairs published a position paper on “US Hegemony and Its Perils,” which listed several ways through which the United States was “bringing harm to the international community.”<sup>300</sup> Among other things, the paper argued that the United States had “taken a selective approach to international law and rules, utilizing or discarding them as it sees fit, and has sought to impose rules that serve its own interests in the name of upholding a ‘rules-based international order.’”<sup>301</sup> The position paper suggested that the United States’ failure to observe international law was due to its history, which was “characterized by violence and expansion.”<sup>302</sup> The United States had “fought or been militarily involved with almost all the 190-odd countries recognized by the United Nations with only three exceptions.”<sup>303</sup> The United States also “willfully suppress[ed] its opponents with economic coercion,” using its “economic and financial hegemony [as] a geopolitical weapon.”<sup>304</sup> It abused “its cultural hegemony to instigate ‘peaceful evolution’ in socialist countries,” pouring “staggering amounts of public funds into radio and TV networks [which] bombard socialist countries in dozens of languages with inflammatory propaganda day and night.”<sup>305</sup>

The Chinese commentary on the United States in some ways resembles American descriptions of the Soviet Union during the Cold War. U.S. leadership dismissed Soviet objections to the U.S. violations of Soviet airspace as “propaganda,” effectively denying the

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<sup>298</sup> Jin, *supra* note 279; *see also* Helen Davidson, *China Foreign Minister Warns of Potential for Conflict with US and Hails Russia Ties*, THE GUARDIAN (Mar. 6, 2023, 11:25 PM), <https://www.theguardian.com/world/2023/mar/07/china-foreign-minister-warns-of-potential-for-conflict-with-us-and-hails-russia-ties> [<https://perma.cc/Q854-AGE7>].

<sup>299</sup> *Foreign Ministry Spokesperson Wang Wenbin’s Regular Press Conference on February 15, 2023*, *supra* note 285.

<sup>300</sup> *US Hegemony and Its Perils*, *supra* note 41.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* According to the P.R.C. Ministry of Foreign Affairs, “the three countries” not invaded by the United States “were ‘spared’ because the United States did not find them on the map.” *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

Soviet Union the protections of international law afforded to liberal democracies.<sup>306</sup> Perhaps ironically, the category of authoritarian international law also establishes a stark partisan opposition between authoritarian and liberal-democratic states.<sup>307</sup> As discussed above, the category of authoritarian international law relies on the argument that the P.R.C. government's nature renders its approach to international cooperation less constructive and more partisan than the approaches of liberal democracies.<sup>308</sup> Chinese foreign policy elites and ideologically invested advocates of liberalism, therefore, assert arguments that are similar in their legal form (at least as regards unauthorized flights) and allegations of partisanship.<sup>309</sup>

To be sure, these similarities only go so far. The P.R.C. government has not sought to establish a right for conducting spy flights over American territory, nor has it argued—as the U.S. government did vis-à-vis the Soviet Union—that the United States does not deserve the protections of international law ordinarily afforded to the members of the international community.<sup>310</sup> While the Chinese foreign policy elites use moralistic and hyperbolic language to criticize the United States, even suggesting that the Chinese approach to international law is superior to “Western” approaches, they have yet to design a comprehensive theory that denies the United States equal respect under international law.<sup>311</sup> Contemporary Chinese foreign policy elites differ in this respect not only from their Marxist predecessors, who saw themselves in an existential conflict with capitalist states, but also from those advocates of liberal approaches to international law who categorically deny “nonliberal peoples . . . a due measure of respect.”<sup>312</sup>

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<sup>306</sup> *State Department Press Release # 249 Concerning U-2 Incident, May 5, 1960*, *supra* note 44; *see also Statement by the President Regarding U-2 Incident, May 11, 1960*, *supra* note 70.

<sup>307</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 225. This definition of liberal international law can be contrasted with the view that liberal international law is consent-based international law. *See Slaughter*, *supra* note 292, at 240; MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 74, 93 (2005).

<sup>308</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 37, at 229.

<sup>309</sup> For a discussion of partisanism in international law, *see SCHMITT*, *supra* note 295, at 59.

<sup>310</sup> *Id.*

<sup>311</sup> *Carry Forward International Rule of Law*, *supra* note 257.

<sup>312</sup> JOHN RAWLS, *THE LAW OF PEOPLES* 61 (1993). For Marxism in Cold War-era Chinese international law, *see COHEN & CHIU*, *supra* note 46, at 33-34. For the liberal view denying non-liberal states or peoples equal respect under international law,



In conclusion, the Chinese balloon incident fits the perception of a globally ambitious and activist China, but it does not lend support to the stark dichotomies between authoritarian and liberal-democratic approaches to international law. In fact, the most striking aspects of the Chinese balloon incident do not concern the differences between various U.S. and the P.R.C. positions on international law, but instead concern their similarities. These similarities extend from formal legal arguments to the characterization of one's adversary as a political entity that is unable to cooperate internationally in non-partisan terms.

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see JOHN RAWLS, THE LAW OF PEOPLES 61 (1993); Slaughter, *supra* note 37, at 504. In concrete terms, the promoters of liberal approaches to international law have advocated interventions into illiberal states through international human rights law, humanitarian interventions, universal jurisdiction, and the overall weakening of the doctrine of state sovereignty. See Slaughter, *supra* note 292, at 246-47.