

# INTERNATIONAL LAW WITH CHINESE CHARACTERISTICS: BEIJING AND THE “RULES-BASED” GLOBAL ORDER

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## EXECUTIVE SUMMARY

China's degree of compliance with and influence over international law are complex and contested subjects. The meaning of international legal rules can be vague, illusory, and open to dispute. Like other powerful nations, China may refuse to comply with the law when doing so suits its perceived interests. Nonetheless, international law matters to China. It can be a tool for accomplishing objectives, a source of legitimation or delegitimation, and a constitutive element of China's interests. China is actively pushing to shape legal norms across a range of issues, and U.S. policymakers should take note.

This paper briefly reviews China's recent history of engagement with international law and its mixed record in several contemporary issue areas: trade, maritime and territorial disputes, Hong Kong, human rights, climate change, and the emerging spheres of cybersecurity and autonomous weapons. I offer three tentative conclusions.

First, China exhibits a flexible and functional approach to international law that enables it to benefit from and exploit the international order without the need to advocate fundamental changes to the letter of the law in most areas. Second, China is increasingly seeking to shape legal norms across various domains of international relations. Third, despite its malleability and limitations, international law can also shape the context for the choices of Chinese leaders and their perceptions of their interests.

These conclusions highlight the need to strengthen systems of international rules in order to better manage increasing competition and multipolarity among nations. In response to the China challenge, the United States, in concert with allies and partners, should reengage clear-eyed with international law in an effort to shape rules that are more robust and more effectively enforced in the coming era — however difficult that may be.

## INTRODUCTION

Studies of China's current and future role in the international system are sometimes pursued by investigating the extent to which China complies with or violates international law — the body of rules consisting primarily of international treaties and customary norms.<sup>1</sup> Other lines of inquiry consider whether China seeks to transform the international order in its image, perhaps by displacing the United States as the preeminent global power.<sup>2</sup> China's recent enactment of national security legislation for Hong Kong has once again brought to the fore questions about China's good-faith adherence to its international commitments.<sup>3</sup>

China presents a paradigmatic case of the limits and value of international law in shaping and constraining the behavior of powerful nation-states. To the extent international law reflects the global distribution of power, this may frustrate attempts to analyze it as an independent causal influence on state behavior.<sup>4</sup> Because international law is often vague and contested, discourse about China's “compliance” with international law can be misleading insofar as compliance is often in the eye of the beholder.<sup>5</sup>

On some questions that generate international conflict, international law simply does not provide norms or institutions to effectively govern those conflicts. Even where norms exist, many countries — China and the United States included — display selectively “revisionist” ambitions to adjust the system of international law and make it more compatible with their own preferences.<sup>6</sup> Finally, major powers are occasionally willing to defy international law when it conflicts with their fundamental interests.<sup>7</sup>

China, like other nations, seeks to advance interpretations of international law and the development of new international norms that reflect China’s values and advance its interests, neither of which are necessarily fixed.<sup>8</sup> At the core of its approach, China continues to emphasize the concept of sovereignty.<sup>9</sup> Yet China exhibits a pragmatic and flexible attitude toward international law that enables it to benefit from and exploit the international legal order without the need to advocate fundamental changes to the letter of the law in most areas.<sup>10</sup> If one views international law as the product of overlapping consensus among major powers, these attributes of Chinese “exceptionalism” are fairly unexceptional.<sup>11</sup>



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Even as China exerts increasing influence over international law, policymakers should consider the extent to which international law also influences China. Law creates legitimation incentives and can help to shape the context in which Chinese leaders make decisions.<sup>12</sup> Thus, a central question for U.S. strategists is not simply how to preserve a “rules-based” international order as such, but instead how to reinforce and reshape international law in ways that account for the complex challenges that China presents.

## BACKGROUND ON CHINA’S ENGAGEMENT WITH INTERNATIONAL LAW

In the two decades following the founding of the People’s Republic of China (PRC) in 1949, China’s limited engagement with international law was heavily influenced by Soviet practice and Marxist theories of proletarian internationalism.<sup>13</sup> Although generally accepting of international law and institutions in principle,<sup>14</sup> Chinese officials criticized international law for “primarily protect[ing] the interests of the colonial and imperialist powers to the detriment of most undeveloped nations and peoples.”<sup>15</sup> At times, Chinese officials explicitly rejected the idea of a single public international law that binds all states — going so far as to advocate the establishment of a parallel international organization to rival the United Nations, from which the PRC was excluded until 1971.<sup>16</sup>

During the “opening and reform” period after 1978, as China emerged from the devastation of the Cultural Revolution, Beijing gradually joined more than 300 multilateral treaties and 130 international organizations.<sup>17</sup> China incorporated a variety of international commercial legal regimes into its domestic legal system. This enabled Chinese domestic courts to begin applying international legal rules governing relations between private parties, which in turn supported China’s economic development and gradually increased foreign confidence in trade and investment with China.<sup>18</sup> Beijing also enacted a range of domestic legal reforms in the lead-up to its accession to the World Trade Organization (WTO) in 2001.<sup>19</sup>

Under the Chinese system, like many other jurisdictions, substantive treaty obligations generally become applicable in domestic law only through specific provisions of national legislation.<sup>20</sup> During the post-1978 period, China ratified a number of international human rights treaties that, unlike the commercial treaties noted above, were not incorporated into its domestic legal system in a way that could be applied by Chinese courts to constrain state power.<sup>21</sup> Thus, China’s functional approach has tended to incorporate international law into its domestic legal system when doing so supports economic growth or other interests

without posing a direct threat to the authority of the ruling Chinese Communist Party (CCP).<sup>22</sup>

China, today, is an active participant in the major international institutions — the United Nations (where it holds a permanent, veto-wielding seat on the Security Council), the WTO, the International Monetary Fund, and various specialized bodies. China is a signatory to hundreds of multilateral treaties and thousands of bilateral treaties, covering everything from arms control to human rights to environmental protection to trade and commerce.<sup>23</sup> Chinese representatives now lead four of the U.N.’s 15 specialized agencies, while no other nation has its citizens heading more than one.<sup>24</sup> Chinese officials regularly invoke the importance of international law and seek to portray China as a “staunch defender and builder” of international rule of law.<sup>25</sup>

To be sure, Chinese leaders retain a degree of skepticism — partly rooted in China’s own history with “unequal treaties” — about the prospect that international law will be manipulated to undermine China’s sovereign interests.<sup>26</sup> Chinese President Xi Jinping’s recent speeches routinely endorse the universality of international law while cautioning that all countries should “reject double standards” and selective application of international norms.<sup>27</sup> Other official statements have argued against a “one-size-fits-all” approach to protection of international human rights.<sup>28</sup> But China’s desire to influence the trajectory of international law is hardly a new phenomenon. Former CCP general secretary Jiang Zemin’s 1996 admonishment that Chinese cadres should “be adept at using international law as a ‘weapon’ to defend the interests of our state and maintain national pride”<sup>29</sup> finds echoes in the 2014 Decision of the Fourth Plenum of the 18th National Party Congress exhorting CCP leaders to strengthen China’s “discourse power and influence” in international legal affairs.<sup>30</sup>

## CURRENT AND FUTURE ISSUES

China’s record regarding its international legal obligations is decidedly mixed. This is not to suggest that Beijing is dismissive of international law. On the contrary, Chinese officials generally have taken pains to argue that China’s conduct complies with international law or is progressing toward compliance.<sup>31</sup> Beijing also

increasingly seeks to garner acceptance of its legal positions and to influence international discourse involving non-legally-binding norms.

### Trade

The area of trade aptly illustrates the extent to which China has benefited from existing international rules and institutions, including the ambiguity and gaps that allow China to exploit those rules, while also being shaped by those rules and seeking to adapt and shape them in turn.

China’s engagement at the WTO presents a complicated picture. As noted above, China undertook a broad range of liberalizing reforms to bring its economy in line with its 2001 WTO accession protocol. Many of those reforms, however, have stalled in recent years.<sup>32</sup> Moreover, there is increasing consensus among the United States, the European Union, and Japan that existing WTO rules are simply outdated and inadequate to address concerns regarding certain Chinese practices including market-distortive industrial subsidies.<sup>33</sup> This conclusion has been bolstered by analyses indicating that existing WTO disciplines and dispute resolution mechanisms, although effective in addressing a range of trade disputes, do not adequately account for complex features of China’s economic model that blur the lines between state and private sectors.<sup>34</sup>

China has grown increasingly comfortable with the WTO’s dispute resolution system and generally complies with adverse rulings of the WTO’s Dispute Settlement Body (DSB).<sup>35</sup> To a considerable extent, the DSB has provided an effective legal forum for channeling trade tensions.<sup>36</sup> Some analysts point out, however, that China’s “compliance” with DSB decisions is often carried out through superficial reforms that enable circumvention of the spirit of WTO rules.<sup>37</sup> Others note that even when it faithfully implements adverse WTO judgments, Beijing sometimes gets a “free pass” for trade violations because the DSB’s rulings do not afford retrospective remedies and its judgments are issued after long processes during which economic lock-in effects may render the distortions caused by Chinese trade practices irreversible.<sup>38</sup>

More broadly, the United States and other countries complain about persistent gaps in China’s implementation of WTO disciplines on market access,

intellectual property protection, technology transfer, subsidies, local content provisions, cross-border data restrictions, regulatory transparency, enforcement of competition law, and other non-tariff barriers.<sup>39</sup> As noted above, these complaints are compounded by concerns that existing WTO rules are simply inadequate to address unfair Chinese practices given the blurred lines and subtle linkages between governmental and private entities in China’s economic system.<sup>40</sup> In response, China argues that the United States and other countries have not sufficiently acknowledged China’s continuing progress on trade liberalization.<sup>41</sup> China is sensitive to its reputation on WTO compliance. For example, Chinese officials recently withdrew their WTO complaint challenging the EU’s refusal to grant Beijing “market economy” status, reportedly due in part to fear of facing an impending DSB decision that would have criticized China’s failure to live up to its WTO commitments.<sup>42</sup>



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At the rhetorical level, China has consistently reaffirmed the country’s commitment to the multilateral rules-based trading system with the WTO at its core.<sup>43</sup> Xi Jinping has even sought to position China as the leading protector of globalization and open trade.<sup>44</sup> This rhetoric reveals the importance of international trade law in defining China’s perception of its interests. As the United States and other countries seek major updates in global trade rules to counter Chinese mercantilism,<sup>45</sup> China retains an enormous stake in the status quo as defined by international law.<sup>46</sup> Its recent advocacy for relatively narrow WTO reforms has focused on defending the institution against steps by other countries to weaken it — for example, the United States’ blocking of new appointments to the DSB’s

appellate body, or its invocation of national security to justify tariffs on various imports.<sup>47</sup> Meanwhile, Beijing has largely refrained from committing itself to structural reform of its economic model or to reconciling the contradictions in its self-serving claim of “developing country” status to retain certain trading advantages. China’s proposed reforms are explicitly aimed at “increasing [the] WTO’s relevance in global economic governance” because doing so is centrally in China’s interests.<sup>48</sup>

### ***Maritime and territorial disputes***

China maintains longstanding disputes with neighboring Asian countries regarding sovereignty over various land features in the East and South China Seas, as well as related disputes concerning rights and jurisdiction over the surrounding waters. As in the case of trade policy, these regional conflicts are partly defined by law. The disputes involve manipulation and argumentation to promote self-interested interpretations of legal norms, but law also creates incentives that influence China’s actions and those of other regional players.

China ratified the United Nations Convention on the Law of the Sea (UNCLOS) and has submitted to its compulsory dispute settlement mechanisms.<sup>49</sup> In 2013, the Philippines brought a landmark arbitration proceeding against China in response to increasing Chinese artificial-island construction and occupation of disputed features within China’s so-called “nine-dash line” that covers most of the South China Sea.<sup>50</sup> China launched an all-out campaign to discredit the arbitration panel, refused to participate in the proceedings — even during the initial jurisdictional phase — and rejected the final award issued in July 2016 that resolved nearly every claim in the Philippines’ favor.<sup>51</sup> China’s refusal to recognize the outcome directly contravenes UNCLOS, which stipulates that even non-participating parties are bound by the decisions of UNCLOS dispute resolution bodies.<sup>52</sup>

Some commentators seized on Beijing’s rejection of the Philippines arbitration as evidence that China, like other major powers, will simply disregard international law when doing so suits its interests.<sup>53</sup> The reality is a bit more complicated. Even as China refused to participate in the proceedings, it demonstrated

a desire not to be seen as a scofflaw, issuing white papers and launching a public relations campaign to persuade other countries to support its legal position — however disingenuous it may have been — that UNCLOS was not applicable to the Philippines dispute and that the international tribunal had no jurisdiction over the matter.<sup>54</sup>



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Some have characterized China’s approach in the South China Sea as part of a strategy of legal warfare or “lawfare,” defined as the “use and misuse of international law to achieve strategic gains.”<sup>55</sup> An example of this approach is China’s drawing of “straight baselines” in 1996 enclosing the Paracel Islands, which are claimed by both China and Vietnam.<sup>56</sup> The practice of drawing such baselines to claim sovereignty over the waters within and around an offshore island group contravenes UNCLOS.<sup>57</sup> Because China is not an archipelagic state that is “constituted wholly by one or more archipelagos,”<sup>58</sup> it is not legally entitled to draw straight baselines around offshore island groupings such as the Paracel Islands.<sup>59</sup> There was arguably ambiguity around this practice prior to the 2016 tribunal decision in *Philippines v. China* because UNCLOS does not expressly preclude drawing straight baselines in a manner other than those it specifically authorizes. That theory — an attempt to exploit a loophole in international law — was rejected by the 2016 arbitral tribunal. Although the tribunal’s decision does not directly apply to China’s dispute with Vietnam, its legal reasoning further delegitimizes China’s legal position regarding the Paracels.<sup>60</sup>

Whether motivated by an attempt to capitalize on indeterminacy in the law or a desire to limit the reputational costs of noncompliance, Beijing often behaves in ways that implicitly recognize the legitimating function of international law. Even China’s continuing failure to clarify its nine-dash line can be seen as tacit recognition of the fact that to countries such as the Philippines, Vietnam, and the United States, the line is incoherent and illegitimate insofar as it purports to assert claims that are inconsistent with international law.<sup>61</sup> Law creates the strategic context that renders the disputed features of the South China Sea meaningful in the first place.<sup>62</sup>

To illustrate further, consider that the law of the sea gives nations control over an “exclusive economic zone” (EEZ) of up to 200 nautical miles of ocean and seabed resources surrounding island features — as compared with mere “rocks” that do not generate such rights.<sup>63</sup> The South China Sea is rich in fish and petroleum resources.<sup>64</sup> International law thus creates an incentive structure that defines the stakes of competition over the outcroppings in that region.

Moreover, China has advanced a particular legal interpretation asserting that coastal states have the right to regulate the activities of foreign military vessels in the coastal state’s EEZ.<sup>65</sup> This position is contrary to that of the United States and the overwhelming majority of other countries.<sup>66</sup> China views the South China Sea as a strategic waterway and its anti-access/area-denial strategy calls for the capability to exclude hostile naval powers from the waters in China’s near abroad.<sup>67</sup> Standing alone, Chinese placement of military assets on reefs may not be sufficient to deny adversaries access in a legal context that recognizes broad rights of navigational freedom for military vessels. But if China could gain greater acceptance and support for its position, then its occupation of features throughout the Paracel and Spratly Islands (and attendant EEZ claims) would afford China a patina of legitimacy for its efforts to control the strategic waters in its near abroad.

China’s EEZ legal position also potentially allows Beijing to have its cake and eat it too. The theory is that China can require prior notification and approval to allow other countries’ warships to transit China’s EEZ, but China is free to operate its own military vessels in

the EEZs of other states that do not restrict military activities in the EEZ. Recent history suggests that as China builds out a blue-water navy, it is increasingly doing exactly this.<sup>68</sup>

In sum, although law has its limits — for example, the law of the sea cannot resolve sovereignty disputes<sup>69</sup> — it is also a constitutive element of China’s interests in the maritime domain. As Lynn Kuok has documented, China is undermining the strength of U.S.-backed legal norms in the South China Sea by advancing legal interpretations that diverge from those of its Southeast Asian neighbors and the United States.<sup>70</sup> It seeks to entrench those positions with actions that interfere with coastal states’ claimed EEZs, deny navigational freedoms, and advance the militarization of land features it occupies.<sup>71</sup> But China also recognizes the legitimating function of law, seeking to couch its actions in legal arguments and influence other countries to support (or at least not oppose) its positions, with mixed success.<sup>72</sup>

### **Hong Kong**

On June 30, 2020, the Standing Committee of China’s National People’s Congress passed a sweeping law to “safeguard national security” in the Hong Kong Special Administrative Region. The new law institutionalizes broad powers for PRC authorities to enforce vaguely defined political crimes in and beyond the territory.<sup>73</sup> China regained the exercise of sovereignty over Hong Kong in a 1997 handover from the United Kingdom pursuant to a treaty known as the Sino-British Joint Declaration.<sup>74</sup> That bilateral treaty underpins the “one country, two systems” governing framework codified in the Basic Law of the Hong Kong Special Administrative Region, according to which Hong Kong was granted a “high degree of autonomy” for 50 years following the handover.<sup>75</sup>

Foreign observers immediately pronounced the new national security law an effective “takeover” of Hong Kong, which is renowned for its dynamic economy underpinned by rule of law, freedom of expression, and an independent judiciary.<sup>76</sup> That critique was borne out in the immediate implementation of the security law through arrests of protestors and activists and the promulgation of broadly permissive regulations codifying special police powers, including

with respect to online expression.<sup>77</sup> The new law is only the latest and most egregious manifestation of steady encroachment by mainland Chinese authorities on Hong Kong’s autonomy in recent years.<sup>78</sup> At the time of writing, at least 25 people, including prominent pro-democracy advocates, reportedly had been arrested under the law’s broad prohibitions on subversion, secession, terrorism, and foreign collusion.<sup>79</sup>

On June 17, 2020, the European Parliament voted overwhelmingly in favor of a resolution calling on the European Union and its member states to consider filing a case before the International Court of Justice alleging that China’s Hong Kong national security legislation violates the Sino-British Joint Declaration and the International Covenant on Civil and Political Rights (ICCPR), which the Joint Declaration and Basic Law specify shall remain in force in Hong Kong (despite the fact that the PRC has not ratified that human rights treaty).<sup>80</sup> U.S. President Donald Trump and Secretary of State Mike Pompeo accused Beijing of violating the Joint Declaration and the rights of Hong Kong citizens.<sup>81</sup> On September 1, a group of U.N. human rights experts issued a scathing communique expressing concern that the law and its implementation violate China’s obligations to abide by the ICCPR.<sup>82</sup>

In recent years, China has argued that the Joint Declaration expired in 1997 with the handover and the adoption of the Basic Law, a proposition that finds no basis in the international law applicable to treaties.<sup>83</sup> On the other hand, both the Joint Declaration and Basic Law explicitly provide that Hong Kong’s autonomy does not extend to foreign affairs and defense.<sup>84</sup> There is a colorable argument that this carve-out, combined with Hong Kong’s failure thus far to “enact laws on its own” regarding treason and subversion in accordance with the Basic Law, renders Beijing’s decision to enact national security legislation consistent with the letter (if not the spirit) of international law and the Basic Law.<sup>85</sup>

The abuses that are beginning to flow from implementation of the Hong Kong security law conflict with the spirit of the rights to association, expression, and liberty and security of the person as enunciated in the ICCPR, which remains applicable in Hong Kong.<sup>86</sup> As a textual matter, however, one could argue that these actions fall within the ICCPR’s general

allowance for derogation and limits on the protection of civil rights where required by the interests of “national security” and “public order.”<sup>87</sup> The Chinese government notoriously interprets and applies these concepts expansively to suit the objectives of the party-state.<sup>88</sup> The U.N. Human Rights Committee has issued interpretive comments attempting to clarify that governments cannot invoke “national security” to justify suppression of democracy or rights advocacy.<sup>89</sup> However, such statements, persuasive as they may be, are not legally binding on treaty parties.<sup>90</sup>



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Thus, despite China’s brazen rejection of rights-centric norms in Hong Kong, international law appears to offer little that would compel Beijing to pursue a different course. Far from ignoring law, Chinese officials and PRC state media have gone to great lengths to paint Beijing’s moves in Hong Kong as consistent with China’s treaty obligations and the protection of human rights.<sup>91</sup> Indeed, part of the tragedy of Hong Kong is the perverse manner in which Beijing’s actions, however awful, can be self-servingly construed as lawful.

### *Human rights*

China’s approach to multilateral human rights regimes follows a similar pattern: Beijing rhetorically endorses many human rights norms while advocating self-serving interpretations of their meaning and future development.<sup>92</sup> China has joined a number of major human rights conventions including the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the International Covenant on Economic, Social, and Cultural Rights. The PRC has also signed but not ratified the ICCPR.<sup>93</sup> Where China has adopted legislation to implement these human rights protections in its domestic legal system, those rules “frequently prove difficult to enforce and are sometimes even illusory in practice.”<sup>94</sup> More

broadly, law and legal institutions have little power to protect human rights in areas that are “politically sensitive” for the Chinese party-state.<sup>95</sup>

Against this backdrop, China’s government has perpetrated massive human rights abuses even as its legal and policy reforms have smoothed the path for hundreds of millions of Chinese citizens to rise out of poverty and stimulated improvements in the transparency, responsiveness, and professionalism of Chinese governance across a range of issues.<sup>96</sup> Among the most egregious of China’s human rights violations is the ongoing campaign against Uyghurs and Turkic Muslims in its Xinjiang Uygur Autonomous Region — reportedly ranging from arbitrary detention of hundreds of thousands of Chinese citizens in indoctrination camps<sup>97</sup> to population-reduction measures such as forced sterilization, forced abortion, and coercive family planning policies.<sup>98</sup> Such practices meet the definition of genocide under the U.N. Convention on the Prevention and Punishment of the Crime of Genocide, which China has ratified.<sup>99</sup> Beijing has denied the reports of forced birth control as “baseless” and, amid growing international criticism, released a white paper in September 2020 seeking to defend the Xinjiang internment camps as “vocational training centers.”<sup>100</sup> Because China has not accepted the compulsory jurisdiction of international judicial mechanisms for individual complaints over human rights abuses, international legal oversight is limited to “periodic reviews” by treaty bodies and other means of public pressure — work which can be made difficult by Beijing’s lack of transparency and retaliation against critics.<sup>101</sup>

Other human rights violations in China span a wide range: repression of Tibetans and other indigenous peoples; curbs on free expression, association, and religion; crackdowns on dissidents, human rights lawyers, and other reform advocates; strict limits on labor rights; and an intrusive surveillance state with few if any reliable legal constraints.<sup>102</sup> Analysts are now exploring the extent to which certain of these practices are being exported — intentionally or otherwise — to countries that receive Chinese investment through the Belt and Road global infrastructure initiative.<sup>103</sup>

Of course, Beijing does not admit to being a serial human rights violator. Instead, as Jerome Cohen has explained, in their public statements Chinese officials emphasize “the sovereign independence of each country; the differing economic circumstances, values, traditions, and priorities of different countries; and the relativity of various human rights, as though the PRC had not adhered to any binding multilateral arrangements calling for compliance with prescribed universal standards.”<sup>104</sup> In the realm of civil and political rights, this does not necessarily require rewriting international human rights law, but instead promoting interpretations that render those norms hollow.<sup>105</sup>



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At the U.N. Security Council, General Assembly, Human Rights Council, and elsewhere, Chinese diplomats have found various ways to insulate China against criticism for its human rights record and to promote its “statist, development-as-top-priority view” of human rights — in some cases through “distorting procedures, undercutting institutional strength, and diluting conventional human rights norms.”<sup>106</sup> Variations on this theme may include pressuring other countries to submit positive reviews of China’s human rights record at the U.N.<sup>107</sup> and running political training programs for African officials to “share lessons” from China’s domestic governance in an effort to bolster the legitimacy of Beijing’s human rights perspective.<sup>108</sup> At the Human Rights Council, China has advocated for a hierarchy of human rights values that gives priority to an amorphous “right to development.”<sup>109</sup> It has also emphasized that there is “no universal road for the development of human rights in the world.”<sup>110</sup>

These developments are fueling growing concerns that under Beijing’s vision of international human rights governance, “sovereignty, non-interference, ‘dialogue

and cooperation,’ ‘mutual respect,’ and multilateralism would be prioritized as fundamental, non-negotiable principles, and the promotion and protection of human rights of individuals rendered an afterthought.”<sup>111</sup>

### ***Climate change***

China increasingly seeks to advance its interests — including reputational interests — across other domains of international law. On climate change, as the United States has pulled back from a leadership role, other countries have begun looking to China to set the terms of global debate.<sup>112</sup>

As the world’s largest carbon emitter, China has adopted a variety of domestic policies aimed at improving the energy and carbon intensity of its economy, though implementation has been uneven.<sup>113</sup> In the international sphere, China has long advocated that developed countries such as the United States should face more onerous obligations in addressing climate change than developing countries, including China.<sup>114</sup> Against this backdrop, China played an important role in the negotiations leading to the 2016 Paris Agreement on climate change.<sup>115</sup>

The Paris treaty introduces the concept of “nationally determined contributions” for emissions targets to be set voluntarily by each country.<sup>116</sup> Some analysts have argued, however, that China’s core Paris commitments — to reach peak carbon emissions by 2030 and to increase the proportion of renewables in its energy mix to about 20% by then — are simply a reflection of what China’s energy policies were already on track to deliver due to domestic imperatives.<sup>117</sup> Xi Jinping has attempted to cast China as a “torchbearer” in global climate change efforts,<sup>118</sup> and even announced in a recent speech that China would go beyond its Paris targets to achieve “carbon neutrality before 2060.”<sup>119</sup> It remains to be seen, however, whether China will live up to its open-ended pledges.<sup>120</sup> Meanwhile, China is financing a host of low-efficiency, coal-fired power plants under its Belt and Road Initiative, setting a path toward increased global emissions that could undercut broader climate change efforts.<sup>121</sup>

The main point for present purposes is that the pliability of the Paris regime highlights the limits of existing international law in shaping China’s (and other states’) behavior. Prior to the COVID-19 pandemic,



many countries in the Paris accord were not living up to their nationally determined contributions. Even if fulfilled, those commitments — including China’s — are insufficient to accomplish the agreement’s explicit goal of reducing global greenhouse gas emissions by 50% by 2030.<sup>122</sup> Moreover, even though many elements of the Paris Agreement are “binding” under international law, countries’ respective emissions reduction pledges are entirely voluntary.<sup>123</sup> In this context, the U.S. withdrawal from the Paris accord has left the door open for China to claim the rhetorical mantle of climate leadership under a regime that affords China enormous flexibility in whether and how to adhere to its voluntary commitments.<sup>124</sup>

### ***Emerging issues: Cybersecurity and new weapons technology***

China has begun to play an increasingly active role in areas where the applicability of international law is unclear, including legal and quasi-legal negotiations regarding information and communications technology. Three norm-setting forums of note are the U.N. Group of Governmental Experts on Advancing Responsible State Behavior in Cyberspace in the Context of International Security (Cyber GGE),<sup>125</sup> the Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security (OEWG),<sup>126</sup> and the U.N. Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (LAWS GGE).<sup>127</sup> These institutions aim to create “soft law” norms in areas where there is no consensus on how existing law applies to nations’ use of technologies or whether new binding legal instruments are needed.

China’s approach in these discussions has been characterized by qualified endorsement of the applicability of international law to cyberspace and emerging technologies, but resistance to specification of law’s applicability beyond general terms that leave open large questions of interpretation and flexibility for state action.<sup>128</sup> The Cyber GGE made slow progress for several years, including consensus in 2015 around several norms such as non-intervention, state responsibility for wrongful acts, and abstention from cyberattacks on critical infrastructure in peacetime.<sup>129</sup> However, efforts to produce further GGE consensus reportedly were stymied in June 2017 when a small

group of countries, including China, rejected three legal principles in the proposed text — states’ right of self-defense under the U.N. Charter, the applicability of international humanitarian law (IHL) to cyberspace, and the right of states to take countermeasures in response to internationally wrongful acts.<sup>130</sup>

China’s reasons for resisting agreement on such principles could be largely defensive, reflecting wariness at what China views as U.S. hegemony and “militarization” of cyberspace.<sup>131</sup> But as Beijing’s global hacking campaign continues to expand — notwithstanding commitments such as the 2015 U.S.-China agreement to abstain from state-sponsored cybertheft of intellectual property for commercial advantage<sup>132</sup> — China’s reluctance to sign on to basic legal norms leaves gaping questions about its reasons for strategic ambiguity on the applicability of international law in cyberspace.<sup>133</sup>

Such questions are further underscored by China’s participation in regional frameworks such as the Shanghai Cooperation Organisation’s 2015 proposed code of conduct in cyberspace. That proposal emphasizes state sovereignty and opposition to the multi-stakeholder model of global internet governance, while sidestepping questions about the limits China is willing to place on its own freedom of action.<sup>134</sup>

China’s statements in the recently established OEWG — which parallels the Cyber GGE but is open to all U.N. member states — point to a similar conclusion. In its first OEWG submission, China emphasized the importance of state sovereignty and suggested that further study is needed regarding “which international laws are applicable to cyberspace and how they can apply.”<sup>135</sup> China’s April 2020 submission to the OEWG expressed a desire to “reach universally-accepted consensus on application of international law” and a vague concern that conflict could result from “indiscriminate” application of IHL to cyberspace.<sup>136</sup> Given China’s apparent reluctance to specify the applicability of international law in cyberspace, it remains to be seen whether the OEWG can make progress where the Cyber GGE failed.

It is too early to tell whether a similar dynamic will prevail in the LAWS GGE dealing with emerging legal and strategic questions around the governance of

lethal autonomous weapons systems. In April 2018, Chinese representatives to the LAWS GGE stated their “desire to negotiate and conclude” a new protocol for the Convention on Certain Conventional Weapons “to ban the use of fully autonomous lethal weapons systems.”<sup>137</sup> On the surface, this would seem to be a constructive contribution to the development of legal norms regarding technologies with enormous strategic implications. At the same time, however, China issued a position paper that defined “fully autonomous” weapons systems so narrowly as to render any ban on such weapons essentially meaningless.<sup>138</sup> Again, such a position leaves open myriad questions about the limits China is prepared to place on its international conduct relating to emerging technologies.

## CONCLUSION

The examples sketched above are partial illustrations of China’s approach toward international law. A more comprehensive treatment would need to cover, among other issues, the current and future status of Taiwan; China’s engagement with non-proliferation regimes; its emerging approach to Arctic policy; its compliance with consular agreements; its use of exit bans; its record in the U.N. Security Council; and its participation in the provision of global public goods such as U.N. peacekeeping missions and public health efforts, including its engagement with the World Health Organization during the COVID-19 global pandemic.<sup>139</sup>

Nonetheless, a few tentative conclusions can be drawn.

First, China exhibits a flexible and functional approach to international law that enables it to benefit from and exploit the international order without the need to advocate fundamental changes to the letter of the law in most areas. The meaning of international legal rules can be vague, illusory, and open to dispute. In critiquing China’s “compliance” with international law, we should be careful not to romanticize the clarity and moral force of existing rules or the necessarily “liberal” nature of international law. Legal regimes are limited: human rights treaties did not prevent China’s actions in Xinjiang or Hong Kong, for example. International law can be used to advance a wide range of normative objectives. As Ian Hurd has written, it is “the language that states use to understand and explain their acts,

goals, and desires” and a domain “within which the normal conduct of politics and contestation takes place.”<sup>140</sup> China’s approach generally bears this out.

Second, China is increasingly active in seeking to shape legal norms in ways that advance its interests. In some areas, such as trade, Chinese leaders seem to perceive an interest in preserving the status quo. In other areas, such as the law of the sea and human rights, China is pressing the limits of credible legal interpretation and seeking to build coalitional support for positions that could erode the strength of U.S.-preferred norms. In other areas, including climate change and the governance of cyberspace, Beijing for now seems content with legal ambiguity that preserves its freedom of maneuver.

Third, despite its malleability and limitations, international law can also shape the context for the choices of Chinese leaders and their perceptions of their interests. International law can be a source of legitimation or delegitimation. It is a constitutive element of China’s interests on important issues such as trade and the South China Sea, where law defines the stakes of competition. In general, Beijing wishes to be seen by the international community as being supportive of international law.

Thus, a central question for U.S. strategists is not simply how to preserve a “rules-based” international order as such, but instead how to reshape and reinforce various international legal rules to account for the complex challenges outlined above. Under President Donald Trump, the United States has pulled back from international law and institutions – from impeding the WTO to withdrawing from the Paris Agreement and the U.N. Human Rights Council.<sup>141</sup> Despite Trump’s damaging actions, his presidency offers a reminder to shed illusions about the inevitability of an ever-deepening liberal international order built on law. Law is no panacea; there are important limits to its role in constraining state power.<sup>142</sup> Amid concerns about the rise of “authoritarian” approaches to international law, policymakers should bear in mind that “in the long view, international law has always been amenable and even facilitative of authoritarian governance.”<sup>143</sup>



**U.S. policymakers would do well to revisit the instrumental values of international law: facilitating the peaceful settlement of disputes, promoting positive-sum economic relations, providing a framework for international cooperation, and (hopefully, but not inevitably) promoting human dignity.**

A revitalized system of international rules and institutions could help to better manage increasing competition and multipolarity among nations. In response to the China challenge, the United States, in concert with allies and partners, should reengage clear-eyed with international law in an effort to shape rules that are more robust and more effectively enforced in the coming era — however difficult that may be.

But realism about international law need not collapse into fatalism. U.S. policymakers would do well to revisit the instrumental values of international law: facilitating the peaceful settlement of disputes, promoting positive-sum economic relations, providing a framework for international cooperation, and (hopefully, but not inevitably) promoting human dignity. The United States must also acknowledge that many of its European and Asian allies — without whose cooperation any American strategy regarding China is unlikely to be effective — generally place a high value on international law and institutions.<sup>144</sup>

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