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## Can International Law Survive a Rising China?

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# Can International Law Survive a Rising China?

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Simon Chesterman\*

*The founding myth of international law is the sovereign equality of its member states. How, then, can and should it accommodate the rise of one potential hegemon and the decline of another? This review essay discusses an important new book by Cai Congyan, of Xiamen University, that tries to reconcile an international rule of law with rising powers in general and the rise of China in particular. The larger theoretical project is less successful than a more immediate one, which is describing and explaining China's instrumentalist approach to the rule of law at the domestic and international levels. Though the tone of the book is assured and reassuring, Cai's diplomacy at times leaves some interesting questions unanswered — and a few crucial ones unasked. It is, nonetheless, essential reading for anyone seeking to understand how China sees and uses international norms and institutions.*

Can international law survive a rising China? That is the central question in a provocative new book by Professor Cai Congyan.<sup>1</sup> *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford University Press, 2019) now sits alongside Judge Xue

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<sup>1</sup> Chinese surnames — such as 'Cai' — precede given names, but this order is sometimes reversed in English. This essay will follow the Chinese practice in the text. References will reflect the name as published; where the first listed name of an author is the surname, it will be in all capitals.

Hanqin's Hague Lectures as essential reading for anyone seeking to understand how China sees and uses international norms and institutions.<sup>2</sup>

The ascent of the Middle Kingdom has been a source of anxiety for Western international relations theorists for decades.<sup>3</sup> When President George W. Bush entered the White House in 2001, the United States moved from referring to China as a 'strategic partner' to using the language of 'strategic competitor', with serious talk of a new containment strategy.<sup>4</sup> The September 11 attacks pushed this off the table, as the United States focused its attention on counterterrorism and a controversial war in Iraq. That suited China perfectly. Having been exhorted by Deng Xiaoping in the 1990s to 'hide brightness and nourish obscurity' (韬光养晦), it developed its economy and embraced globalization, before presenting itself as open to the world in the 2008 Olympics. A month later, *taikonauts* on the Shenzhou 7 made China only the third country to complete a spacewalk. Days after that, Premier Wen Jiabao celebrated both events as evidence of 'the great rejuvenation of the Chinese nation.'<sup>5</sup> All of this took place in the shadow of a global financial crisis that shook the certainties underpinning the dominance of Western economies and economic thinking.

By the time China was back on the US radar, towards the end of the Obama presidency, opinions were divided on whether China could 'peacefully rise' within the existing multilateral framework. Obama's campaign platform had included language that 'rising powers like China hold the potential to be either partners or adversaries'.<sup>6</sup> Once in office, however, the focus remained on the partnership side. The 2015 National Security Strategy stressed that the

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<sup>2</sup> XUE Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture, and International Law* (2012).

<sup>3</sup> See, e.g., Michel Oksenberg and Robert B. Oxnam (eds) *Dragon and Eagle: United States-China Relations* (1978); Harry Harding, *A Fragile Relationship: The United States and China Since 1972* (1992); Rosemary Foot, *The Practice of Power: US Relations with China Since 1949* (1995); Daniel Burstein and Arne J. De Keijzer, *Big Dragon: China's Future and What It Means for Business, the Economy, and the Global Order* (1998); Bill Gertz, *The China Threat: How the People's Republic Targets America* (2000); John Mearsheimer, *The Tragedy of Great Power Politics* (2001).

<sup>4</sup> See, e.g., Richard Baum, 'From "Strategic Partners" to "Strategic Competitors": George W. Bush and the Politics of U.S. China Policy', 1(2) *Journal of East Asian Studies* (2001) 191.

<sup>5</sup> 'Premier Wen: China to Stick to Reform, Opening-Up', *People's Daily*, 30 September 2008.

<sup>6</sup> Barack Obama and Joe Biden on Defense Issues (Obama for America, Chicago, 2008). See generally Scott Brown, *Power, Perception, and Foreign Policymaking: US and EU Responses to the Rise of China* (2017).

‘scope of our cooperation with China is unprecedented’ and that the United States ‘welcomes the rise of a stable, peaceful, and prosperous China.’<sup>7</sup>

The election of Donald J. Trump put a stop to all that nonsense. Having campaigned on a stridently anti-China platform, his own National Security Strategy labelled China a ‘revisionist power’ bent on eroding America’s security and prosperity, in favour of a world ‘antithetical to US values and interests.’<sup>8</sup>

International law is not — or, perhaps, most international lawyers are not — comfortable talking about matters of power. The creation myth of international law is the sovereign equality of states, enshrined in article 2(1) of the UN Charter as a founding principle of the Organization. (Twenty-five articles later, five of its notionally equal members are given a veto over decisions by its most powerful organ. In international law, as in life, some are more equal than others.) The discomfort is curious because the history of international law is scarred by power, from its legitimation of imperialism and colonialism<sup>9</sup> to the through line connecting the *mission civilisatrice* with modern human rights.<sup>10</sup> Unease may be due to implicit analogies with domestic legal systems, the Western traditions of which regard power-based arguments as anathema to the rule of law.

Chinese lawyers, by contrast, have always been clear-eyed about the role of power. In part this reflects a view of law as something that should serve the state rather than constrain it. Domestically, the Supreme People’s Court sits at the apex of the legal system but below the Chinese Communist Party (CCP).<sup>11</sup> Yet it also reflects China’s experience of international law. ‘Unequal treaties’ imposed on China during the nineteenth century and the failure to recognize the People’s Republic of China for much of the twentieth encouraged a view of

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<sup>7</sup> National Security Strategy (President of the United States, Washington, DC, February 2015), at i, 24. The also noted that the United States would ‘remain alert to China’s military modernization and reject any role for intimidation in resolving territorial disputes’.

<sup>8</sup> National Security Strategy of the United States of America (President of the United States, Washington, DC, December 2017), at 2, 25.

<sup>9</sup> See, e.g., Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005).

<sup>10</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001), at 11-97.

<sup>11</sup> Randall Peerenboom, *China’s Long March Toward Rule of Law* (2002), at 280-330.

international law as an instrument that the powerful use against the weak.<sup>12</sup> The period is sometimes referred to as the ‘century of humiliation’ (百年耻辱).<sup>13</sup>

Speaking in 1996, President Jiang Zemin warned a CCP seminar on international law that China’s lack of knowledge of the discipline put it at a strategic disadvantage. He urged party members to enhance their skills and become ‘adept at using international law as “a weapon” to defend the interests of our state and maintain national pride’.<sup>14</sup> This was five years before Charles Dunlap popularized the term ‘lawfare’ in English.<sup>15</sup> Two years after that, the equivalent Chinese term (法律战) was explicitly included as part of China’s strategic doctrine.<sup>16</sup>

Cai deflects to ‘statesmen, diplomats and international relations scholars’ whether China actually has the power to challenge the United States and whether it would want to do so (at 3). The clear implication of his book, however, is that the proper form of both questions is not whether but when — and with what consequences.

## 1 Translating China

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The book’s genesis can in fact be traced back to *EJIL* and an article Cai published in these pages some seven years ago.<sup>17</sup> That work was completed when he was a Fulbright Scholar in New York. Substantial parts of the longer treatment were written in Berlin under the auspices of a

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<sup>12</sup> See Simon Chesterman, ‘Asia’s Ambivalence About International Law and Institutions: Past, Present and Futures’, 27 *EJIL* (2016) 945, at 951-53.

<sup>13</sup> Alison Adcock Kaufman, ‘The ‘Century of Humiliation’, Then and Now: Chinese Perceptions of the International Order’, 25(1) *Pacific Focus* (2010) 1.

<sup>14</sup> Quoted in Dong Wang, *China’s Unequal Treaties: Narrating National History* (2005), at 128.

<sup>15</sup> Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts (Carr Center for Human Rights Policy, Cambridge, MA, 29 November 2001).

<sup>16</sup> See Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (2016), at 161-96.

<sup>17</sup> Congyan Cai, ‘New Great Powers and International Law in the 21st Century’, 24 *EJIL* (2013) 755.

research group led by Professors Georg Nolte and Heike Krieger,<sup>18</sup> while others were first floated in the *American Journal of International Law*.<sup>19</sup>

The itinerary of the author and his text is significant because Cai is more effective than most in communicating the Chinese view to a non-specialist reader. Though he is on the faculty of the School of Law at Xiamen University, where he completed all three of his degrees, he clearly writes to a Western audience. There are deft nods to the Western canon, from Tom Bingham on the rule of law to David Kennedy on the turn to institutions. Not a single Chinese character appears in the book, nor a tone on the limited use of Romanization. (This can be confusing as, for example, a term like *fazhi* can mean rule of law (法治), legal system (法制/法律制度), or ‘made in France’ (法制/法国制造).)

And yet it is striking that, throughout the book, ‘China’ is invoked as a unitary actor and almost in the first person: ‘China is of the view...’, ‘China tries...’, ‘China seeks...’, ‘For China’s part...’ (at 4, 89, 150, 324). This articulation of China’s position is largely drawn from official statements. Indeed, most of the last two pages of the book is taken up by long excerpts from a speech by President Xi Jinping. There are occasional gestures at criticism — the opacity of China’s treaty negotiations, the use of ‘progressive compliance’ to distract from non-compliance,<sup>20</sup> the lack of domestic laws to prosecute torture despite widespread reports of its practice — but, for the most part, this is a party line book.

The limits that puts on scholarship have recently been on display in some of the academic writing on the South China Sea. In 2018, for example, the *Chinese Journal of International Law* — which, like *EJIL*, is published by Oxford University Press — devoted an entire issue to a 500-page rebuttal of the arbitral award that had ruled against China.<sup>21</sup> The ‘critical study’ acknowledges 39 drafters and 21 reviewers (including Cai), and is attributed to the Chinese Society of International Law. It concludes that the tribunal’s findings ‘impaired the integrity and authority of the Convention, threaten to undermine the international maritime legal

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<sup>18</sup> See, e.g., Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds) *The International Rule of Law: Rise or Decline?* (2019).

<sup>19</sup> Congyan Cai, ‘International Law in Chinese Courts During the Rise of China’, 110 *AJIL* (2016) 269.

<sup>20</sup> Cf. Timothy Webster, ‘Paper Compliance: How China Implements WTO Decisions’, 35 *Michigan Journal of International Law* (2014) 525. Cai embraces Webster’s conception of ‘paper compliance’, noting that ‘[t]here has long existed a big gap between the law in books and law in action in China. Many Chinese laws are poorly respected and enforced in practice’ (at 104-105).

<sup>21</sup> *In re Arbitration Between the Republic of the Philippines and the People’s Republic of China* (PCA Case No. 2013-19, 12 July 2016) (2016)

order, run counter to the basic requirements of the international rule of law, and also imperilled the interests of the whole international community.’<sup>22</sup> (The article has its own index and is one of very few pieces in the *Chinese JIL* to be made open access, though no source of funding for this seems to have been disclosed.) The unanimity was consistent with a pattern of behaviour in which Chinese international law academics have either voiced support for the Chinese position on this issue or remained silent.<sup>23</sup> It is entirely possible that the position articulated is sincerely held by all of them. Anecdotal evidence of internal debates over whether refusing to appear before the tribunal was the correct decision suggests, however, that the reality might be more complex.<sup>24</sup>

Here and elsewhere, a strength and a weakness of the book is Cai’s admirable candour in acknowledging — if only indirectly — the conflicted position of the Chinese scholar. In a discussion of China’s growing role as norm entrepreneur, one factor he lists is the government’s capacity-building efforts: these include educating its officials, encouraging law firms to develop international practices, and ‘encouraging international lawyers to defend Chinese international legal policies and practices’ (at 112). Here he cites Anthea Roberts’ work documenting the Chinese government’s strategic use of research grants to advance favourable scholarly agendas, with a heavy emphasis on international economic law and law of the sea.<sup>25</sup> Cai himself thanks the National Social Science Planning Office for supporting his own project (at xiv). Such carrots are supplemented by widely reported examples of sticks that discourage dissent.<sup>26</sup>

Those caveats having been lodged, Cai’s book nevertheless remains useful as an insight into how the most populous and economically dynamic country in the world sees the normative regime that it may one day lead.

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<sup>22</sup> Chinese Society of International Law, ‘The South China Sea Arbitration Awards: A Critical Study’, 17 *Chinese Journal of International Law* (2018) 207, at 218.

<sup>23</sup> Cf. Jerome A. Cohen, ‘Forecasting the Aftermath of a Ruling on China’s Nine-Dash Line’, *Foreign Policy*, 20 April 2016.

<sup>24</sup> Julian Ku, ‘China’s Legal Scholars Are Less Credible After South China Sea Ruling’, *Foreign Policy*, 14 July 2016; Isaac B. Kardon, ‘China Can Say “No”: Analyzing China’s Rejection of the South China Sea Arbitration’, 13(2) *University of Pennsylvania Asian Law Review* (2018) 1.

<sup>25</sup> Anthea Roberts, *Is International Law International?* (2017), at 226-29.

<sup>26</sup> See, e.g., Jennifer Ruth and Yu Xiao, ‘Academic Freedom and China’, 105(4) *Academe* (2019) 1; Karin Fischer, ‘China’s Ambitions Are at Odds With Its Grip on Academic Freedom’, 66(5) *Chronicle of Higher Education* (2019) A17.

He begins by examining the evolution of international law as it applies to great powers in general and to China in particular. The expansion of the community of nations from its European origins to the platitudes of article 2(1) of the Charter highlights the ambiguous position of those newly welcomed to the global legal order. Some, like Japan at the start of the twentieth century, overstretched — believing itself equal until it tried, and failed, to include a reference to racial equality in the Covenant of the League of Nations.<sup>27</sup> Some, like decolonized Latin American and African states, made the best of a bad situation — accepting borders imposed by administering powers under the doctrine of *uti possidetis*.<sup>28</sup> It was only socialist states, Cai argues, that ‘fiercely assaulted the conception of the univers[al]ity of international law’ (at 19). The collapse of the Soviet Union meant that that battle was lost by default.

China, meanwhile, bided its time and studied the international system.

The relative decline of the United States since the end of the Cold War has ushered in a curious period in which the fragmentation and decentralization of the international order has made it easier for lesser powers to make their voices heard.<sup>29</sup> At the same time, Cai writes that the regime within which China is rising is less tractable than the one dominated by colonial powers, the Concert of Europe, or the *Pax Americana*.

But what sort of great power will China be? Cai argues that the ‘ostensibly stupid’ question of China’s identity is essential to understanding China’s attitude towards international law (at 9). Externally, perceptions of China’s rise and potential threat date back to the observation attributed to Napoleon that China was a sleeping giant. ‘Let her lie and sleep,’ he is said to have warned, ‘for when she awakens, she will shake the world.’<sup>30</sup> Internally, China’s preferred

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<sup>27</sup> SHIMAZU Naoko, ‘The Japanese Attempt to Secure Racial Equality in 1919’, 1 *Japan Forum* (1989) 93; MOGAMI Toshiki, ‘Japan’, in Simon Chesterman, Hisashi Owada, and Ben Saul eds, *The Oxford Handbook of International Law in Asia and the Pacific* (2019) 320.

<sup>28</sup> See, e.g., Makau Mutua, ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’, 16 *Michigan Journal of International Law* (1995) 1113; Luis Eslava, ‘The Developmental State: Independence, Dependency, and the History of the South’, in Jochen von Bernstorff and Philipp Dann eds, *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019) 71.

<sup>29</sup> See, e.g., Fareed Zakaria, *The Post-American World* (2008); Simon S.C. Tay, *Asia Alone: The Dangerous Post-Crisis Divide from America* (2010).

<sup>30</sup> The provenance of the quote is disputed, but Xi Jinping himself has invoked it in the context of China’s rise. Teddy Ng and Andrea Chen, ‘Xi Jinping Says World Has Nothing to Fear from Awakening of “Peaceful Lion”’, *South China Morning Post*, 28 March 2014.



language has been that of a ‘responsible great power’ (负责任的大国) or ‘rising power’ (崛起的大国).

A brief excursus into sociology, social theory, and constructivism concludes, unhelpfully, that a state’s identity is ‘complicated’ (at 45). Cai is on stronger ground when discussing China itself, which he characterizes as being in movement at four levels: from an orthodox socialist state to a ‘revisionist’ socialist state, from a special developing state to a special rising power, from a rule-of-man state to a rule-of-law state, and from a falling civilized state to a reviving civilized state.

There is, however, a disjunction in the consideration of China’s identity that is never fully addressed. Internally, China continues to identify as socialist — albeit a socialism ‘with Chinese characteristics’ (中国特色社会主义). Externally, however, China’s foreign policy and approach to international law and institutions bears almost no resemblance to that ideology.<sup>31</sup> It would be hard, for example, to reconcile socialist legal philosophy with China’s embrace of investment treaties to satisfy what Cai calls its ‘hunger for capital’ (at 133). He wisely does not attempt to do so, merely noting its status as one of the largest targets and sources of foreign direct investment, then moving on.

Though it might be argued that support for national resistance movements in the 1960s and 1970s was at least partly driven by ‘proletarian internationalism’ (at 78), China largely stood apart in pursuit of its national interests. It remained outside the Warsaw Pact and COMECON, as well as the G-77 and the Non-Aligned Movement. Those organizations that it did join or create — the Shanghai Cooperation Organization, the BRICS grouping — were forums to discuss overlapping interests rather than institutions pursuing a shared agenda.<sup>32</sup>

In particular, it is not clear how China’s conception of socialist legal philosophy might ‘reshape the Western conception of the rule of law’ (at 61). At the international level, at least, China’s approach to sovereignty reflects a very traditional Westphalian view of law.<sup>33</sup> This was always

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<sup>31</sup> Even when Mao Zedong pronounced his ‘Three Worlds Theory’ in 1974, China was placed in the Third World; Deng Xiaoping in turn classed China as a socialist country but also a developing one.

<sup>32</sup> See generally John W. Garver, *China’s Quest: The History of the Foreign Relations of the People’s Republic of China* (2016). One aspect of that national interest was regarding Southeast Asia as part of China’s traditional sphere of influence: *ibid.* at 198-199.

<sup>33</sup> See, e.g., Five Principles of Peaceful Coexistence (Agreement Between the Republic of India and the People’s Republic of China on Trade and Intercourse Between Tibet Region of China and India), done at Peking, 29 April

instrumental in nature and Cai is candid in acknowledging that ‘the sovereignty argument’ is a convenient justification for measures taken to deal with ‘domestic challenges’ such as Tibet, Xinjiang, Taiwan, and Hong Kong (at 88). On matters like human rights and responsibility to protect, that interpretation will likely slow down developments that accelerated during the exuberant post-Cold War period in which history was presumed to have ended. But it is not clear that a coherent alternative vision is being offered.

China’s approach to the rule of law is, arguably, more consistent. As Cai makes clear, China’s leadership ultimately views law as an instrument in the service of the state rather than a check on its power: rule *by* law rather than rule *of* law.<sup>34</sup> This is not to say that power is exercised arbitrarily — an interesting excursus from Cai’s thesis discusses the shift from rule of man to rule by law — but he approvingly quotes a 2014 decision that ‘unequivocally states that socialist rule of law “must adhere to the CCP’s leadership”’ (at 60).<sup>35</sup> Domestically, this much is explicit in China’s constitution;<sup>36</sup> internationally, it helps to make sense of China’s approach to treaties and institutions.

## 2 Power and Law

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The heart of Cai’s thesis is that international law is the product of great powers ‘favoring themselves while disadvantaging less powerful States’ (at 9). This raises the question of what attitude an emerging great power should take towards the rules and institution that it inherited prior to becoming great. Here Cai is at pains to present China as an evolutionary rather than revolutionary great power, a norm entrepreneur rather than a ‘revisionist’.

Yet the evidence of entrepreneurialism is thin. Cai argues that China advocates principles over rules, though the examples given — negotiations at UNCITRAL, China’s involvement in the International Law Commission — suggest that the impact thus far has been negligible. Even the much-vaunted Belt and Road initiative (BRI) is an economic strategy rather than a

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1954 (in force 3 June 1954), 299 UNTS 57. See generally Phil C.W. Chan, *China, State Sovereignty, and International Legal Order* (2015).

<sup>34</sup> Mark Tushnet, ‘Rule by Law or Rule of Law?’, 22(2) *Asia Pacific Law Review* (2014) 79, at 80.

<sup>35</sup> Cf. Hiroko Naito, ‘“Rule of Law” Under the Chinese Communist Party’s Leadership: The Case of the Professionalization of Judges and the CCP’s Governance of the People’s Court’, in Hiroko Naito and Vida Macikenaite eds, *State Capacity Building in Contemporary China* (2020) 69.

<sup>36</sup> Constitution of the People’s Republic of China (1982), art. 128.

normative one.<sup>37</sup> China's brief leadership on climate change, helped by the vacuum left by the United States, remains symbolically important but has translated into little concrete action.<sup>38</sup> As Cai concedes, for the time being China 'largely remains a norm taker' (at 119).

In terms of institutions, by contrast, China's influence is more apparent. From Mao Zedong's early dismissal of the United Nations as a 'cesspool',<sup>39</sup> China has become one of its more active member states. In March 2020, China was the tenth largest contributor to UN peacekeeping operations by personnel deployed, sending more than the other four permanent members of the Security Council combined.<sup>40</sup> In the same month, China's bid to have Wang Binying appointed Director General of the World Intellectual Property Organization (WIPO) was derailed — due in part to concerns about Chinese respect for IP rights, but also due to the fact that Chinese citizens already headed four of the UN's fifteen specialized agencies.<sup>41</sup>

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<sup>37</sup> Cf. Roza Nurgozhayeva, 'The Belt and Road Initiative: Rule-making, Rule-Taking, or Rule-Rejecting. Central Asian Perspective', forthcoming *Chinese Journal of Comparative Law* (2020).

<sup>38</sup> See María del Pilar Bueno Rubial and Linda Siegele (eds) *Negotiating Climate Change Adaptation: The Common Position of the Group of 77 and China* (2020); Leslie Hook, 'Climate Change: How China Moved from Leader to Laggard', *Financial Times*, 25 November 2019.

<sup>39</sup> Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (1974), vol 2, at 1295.

<sup>40</sup> UN Peacekeeping Troop and Police Contributors, available at <https://peacekeeping.un.org/en/troop-and-police-contributors> (China: 2,538; France: 697; United Kingdom: 246; Russian Federation: 73; United States: 29). While two decades ago, China began by sending civilian police to selected operations, today its contributions are predominantly military personnel.

<sup>41</sup> Chinese citizens at the time headed the Food and Agriculture Organization (FAO), the International Telecommunication Union (ITU), the United Nations Industrial Development Organization (UNIDP), and the International Civil Aviation Organization (ICAO).



*Chinese peacekeeping forces. Photo: Xinhua.*

On the UN Security Council, China was long a silent partner. In the 1990s, China cast sixty percent of the abstentions by permanent members; for the 2000s and 2010s, that dropped to about one-third. In the period to 2000, China used its veto power a total of three times — the least of any of the P5. China cast three vetoes in 2019 alone, and for the past decade is second only to Russia in its usage.<sup>42</sup>

It is the WTO regime, however, that Cai proposes as the best example of how ‘an international regime enhances a rise of a great power, how a rising great power survives an international regime, and how an international regime is challenged by a rising great power’ (at 126). There seems to be no question that the WTO helped China become the largest trader in the world, surpassing the United States in dollar terms in 2013.<sup>43</sup> Cai describes China’s compliance with the attendant obligations as ‘highly demanding’ and requiring ‘extraordinary effort’ (at 128). The challenge is whether China will be treated as a ‘normal’ power by other WTO members. An economy as big as China’s can simply ignore the various penalties that have been imposed

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<sup>42</sup> Voting data for the UN Security Council is available at <https://digitallibrary.un.org/search?ln=en&cc=Voting+Data>.

<sup>43</sup> Angela Monaghan, ‘China Surpasses US as World’s Largest Trading Nation’, *Guardian*, 10 January 2014. See also Jiangyu Wang, ‘The Evolution of China’s International Trade Policy: Development through Protection and Liberalization’, in Y.S. Lee ed. *Economic Development through World Trade* (2007) 191.

upon it for departure from WTO disciplines.<sup>44</sup> Proposals for special regulation of state-owned enterprises (SOEs), for example, would require China's consent. For its part, China's ambassador to the WTO has made clear that the WTO is not the appropriate forum to discuss the economic models of its members.<sup>45</sup>

A more recent example of institution-building is the 2015 launch of the Asian Infrastructure Investment Bank (AIIB). Although the Chinese government (and Cai) stress that the AIIB is intended to complement, rather than rival, existing international financial institutions, the United States saw it as a threat and pressured countries not to join. In an extraordinary defeat for Washington, even allies such as Britain, Australia, South Korea, and Singapore all agreed to sign on as founding members. President Xi emphasized that China's support for the AIIB demonstrates its willingness to take on 'more international obligations' and provide 'more international public goods'<sup>46</sup> — evidence, Cai suggests, of it realizing its ambitions as a great power (at 189). Further evidence may be seen in the fact that China initially held 30 percent of the voting power, while 75 percent is the threshold for key decisions — giving China an effective veto within the AIIB on issues like appointing its President.<sup>47</sup>

### 3 Chinese Characteristics

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The area of international law in which the discourse on China has changed the most in recent decades is human rights. From the 'Asian values' debates of the early 1990s, China now submits itself to the Universal Periodic Review of its record along with all other UN member states.<sup>48</sup> Much of this is form over substance. It is now two decades since China signed the International Covenant on Civil and Political Rights. As recently as November 2018, China

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<sup>44</sup> Cf. Weihuan Zhou, *China's Implementation of the Rulings of the World Trade Organization* (2019): 'The book shows how China has utilised the limitations and flexibilities of WTO rulings to ensure that its implementation of the rulings not only delivers adequate compliance but also maintains its own interests.'

<sup>45</sup> REN Yan, 'China Is not America's Scapegoat, Says Chinese WTO Envoy', *People's Daily*, 30 July 2018.

<sup>46</sup> 'Full Text of Chinese President Xi Jinping's Address at AIIB Inauguration Ceremony', *China Daily*, 16 January 2016.

<sup>47</sup> Asian Infrastructure Investment Bank: Articles of Agreement, done at Beijing, 29 June 2015, arts 26, 28, 29. By May 2020, that had reduced to 26.6 percent, still sufficient to block any action. See AIIB, Members and Prospective Members of the Bank, available at <https://www.aiib.org/en/about-aiib/governance/members-of-bank>.

<sup>48</sup> See generally Sarah Biddulph and Joshua Rosenzweig (eds) *Handbook on Human Rights in China* (2019).

stated that ‘relevant departments of the Government are steadily continuing to advance administrative and judicial reforms in preparation for its ratification’<sup>49</sup> — just as they had been in 2013<sup>50</sup> and 2009.<sup>51</sup>

Here, as elsewhere, Cai mediates criticism of China through revealing backhanded compliments. Suggestions, for example, that China will use its power to the detriment of the global human rights regime are ‘not totally unsound’ (at 143). But he prefers to focus on the positive, such as the manner in which China may encourage reflection on the needs to balance the rights of individuals with obligations, and prioritizing economic, social, and cultural rights alongside civil and political ones. As is common in official and unofficial defences of China’s human rights regime, its economic development and the lifting of hundreds of millions out of poverty is hailed as a major human rights achievement in itself.<sup>52</sup> Cai concedes, however, that China will seek to maintain an ‘authoritative government’, prioritizing economic growth over political freedom and social justice, while rejecting compulsory dispute resolution procedures (at 142).

There are some jarring moments. In the field of cybersecurity, for example, Cai states that China’s ‘principled’ stand has put sovereignty and non-intervention ahead of the free flow of information (at 148).<sup>53</sup> There is no mention of extensive and well-documented hacking by the People’s Liberation Army and other government agencies.<sup>54</sup> Similarly, data localization requirements that have been criticized are held up as an example of norm entrepreneurship

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<sup>49</sup> National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, China, UN Doc. A/HRC/WG.6/31/CHN/1 (2018), para. 14.

<sup>50</sup> National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, China, UN Doc. A/HRC/WG.6/17/CHN/1 (2013), para. 7.

<sup>51</sup> National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1, China, UN Doc. A/HRC/WG.6/4/CHN/1 (2009), para. 11. Cf. Margaret K. Lewis, ‘Why China Should Unsign the International Covenant on Civil and Political Rights’, 53 *Vanderbilt Journal of Transnational Law* (2020) forthcoming.

<sup>52</sup> See, e.g., WANG Yi, ‘Our Country Has Made Historic Progress in its Human Rights Cause’ (Brussels, European Policy Centre, 17 December 2019).

<sup>53</sup> See, e.g., International Strategy of Cooperation on Cyberspace (Ministry of Foreign Affairs of the People’s Republic of China, Beijing, 1 March 2017).

<sup>54</sup> See, e.g., Jason R. Fritz, *China’s Cyber Warfare: The Evolution of Strategic Doctrine* (2016); Katie Benner, ‘US Charges Chinese Military Officers in 2017 Equifax Hacking’, *New York Times*, 7 May 2020.

that is attractive to non-Western states, without explaining that one of the key reasons for that attraction is the ability to monitor and suppress dissent.<sup>55</sup>

Another revealing section describes China's fraught relationship with the Association of Southeast Asian Nations (ASEAN). Cai bluntly warns that the regional organization may pose 'substantial troubles' (at 174) for China's rise due to wariness on the part of some of its members, its strategic location, and its refusal to admit China as a full member. He goes on to document ASEAN's efforts to strengthen its status as a community — and China's attempts to 'neutralize' those efforts (at 175).

The book also considers China's domestic approach to international law, including a lengthy exposition of the relevant constitutional provisions and a short explanation of how they are routinely disregarded. A particular challenge is posed by China's SOEs. Despite periodic assertions that their actions should not be attributable to China, Cai notes that the CCP appoints and disciplines all top executives. As Wang Jiangyu has observed, this situation is largely unique to China and something of a 'puzzle' to observers.<sup>56</sup> The mixed messages are exacerbated by the fact that SOEs have sometimes asserted sovereign immunity before foreign courts, implying a closer relationship to the state in practice than is officially claimed in theory.<sup>57</sup>

Another chapter examines the use of international law in China's courts. Given the status of the rule of law in China, it should be no surprise that the judiciary approaches international law 'strategically' (at 266). Again, Cai is candid in explaining that strategy as being based on the Beijing Consensus, which he defines as having two core elements: 'an emphasis on economic growth over political freedom and social justice, and the maintenance of an authoritarian regime with unfettered executive authority'. This is unusually blunt. The Beijing Consensus is more commonly invoked indirectly, opposing the neoliberal Washington Consensus and claiming to advance economic policies without any form of positive political

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<sup>55</sup> Anupam Chander and Uyên P. Lê, 'Data Nationalism', 64 *Emory Law Journal* (2015) 677; John Selby, 'Data Localization Laws: Trade Barriers or Legitimate Responses to Cybersecurity Risks, or Both?', 25 *International Journal of Law and Information Technology* (2017) 213. For a nuanced but quasi-official defence of China's position, see Jinhe Liu, 'China's Data Localization', 13(1) *Chinese Journal of Communication* (2020) 84.

<sup>56</sup> Jiangyu Wang, 'The Political Logic of Corporate Governance in China's State-owned Enterprises', 47 *Cornell International Law Journal* (2014) 631, at 636.

<sup>57</sup> See, e.g., Dahai Qi, 'State Immunity, China and Its Shifting Position', 7 *Chinese Journal of International Law* (2008) 307; Paula Kates, 'Immunity of State-Owned Enterprises: Striking a New Balance', 51 *New York University Journal of International Law and Politics* (2019) 1223.

programme at all.<sup>58</sup> Unsurprisingly, such a strategy ‘limits the role of Chinese courts in enhancing the rule of law’ at either the domestic or international level (at 266).

## 4 Hard Cases

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The true test of Cai’s thesis is whether a normative regime can discipline its great powers. The history of the rule of law at the domestic level can be measured by its application to kings and emperors.<sup>59</sup> Two ‘hard cases’ for international law that he considers are the South China Sea dispute and the ongoing trade war with the United States.

The judicialization of international law, Cai writes, is a ‘mixed blessing’.<sup>60</sup> Adjudication encourages peaceful settlement of disputes in accordance with agreed norms, but ‘great powers are more ambivalent in their feelings’ (at 29). He knowingly cites the French and US repudiation of the International Court of Justice after the *Nuclear Tests* and *Nicaragua* cases respectively.<sup>61</sup> Of the five permanent members of the UN Security Council, only Britain continues to accept the ICJ’s compulsory jurisdiction. Do such courts ‘properly interpret international law? Do they, in addition to the determination of international rights and obligation, act ultra vires as lawmakers to create international rights and obligations? Are their capability and impartiality reliable?’ (at 29) Answers to these rhetorical questions are said to be beyond the scope of the book, but they sow seeds to be reaped when attention turns to the South China Sea.

The reasons given for China’s reluctance to accept international adjudication include Confucian wariness of litigation,<sup>62</sup> the unequal treaties of the nineteenth century, a lack of expertise, as well as socialist ideology, but the operative one appears to be the ‘high

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<sup>58</sup> See generally Weitseng Chen (ed.) *The Beijing Consensus? How China Has Changed Western Ideas of Law and Economic Development* (2017).

<sup>59</sup> Simon Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* (2008) 331, at 334-36.

<sup>60</sup> Cf. Alec Stone Sweet, ‘Judicialization and the Construction of Governance’, 32(2) *Comparative Political Studies* (1999) 147.

<sup>61</sup> *Nuclear Tests (Australia v. France)* (International Court of Justice, Judgment), [1974] ICJ Rep 253 (1974); *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits), [1986] ICJ Rep 14 (1986).

<sup>62</sup> Cf. PAN Junwu, ‘Chinese Philosophy and International Law’, 1 *Asian Journal of International Law* (2011) 233.



sensitivity’ of the disputes in question (at 283-284). Three months after the South China Sea final award was handed down, Xu Hong, Director-General of the Department of Treaty and Law in the Ministry of Foreign Affairs, pointedly praised the International Court of Justice for strictly abiding by the principle of ‘consent of state’, stressing that this had laid the foundations for the ICJ to carry out its ‘high-quality judicial activities on the basis of objectivity and fairness’.<sup>63</sup> Cai quotes Xu at length — omitting to add that China does not accept the jurisdiction of the ICJ either, and has never appeared before it in a contentious case.<sup>64</sup>

Senior Chinese officials have stated that the South China Sea final award is ‘nothing more than a piece of waste paper’ that ‘has already been turned over as a page of history’. Cai dutifully quotes this pabulum, wryly observing that ‘this is only China’s viewpoint’ (at 298). Pondering whether China can successfully rebuff such infelicitous outcomes brings Cai at last to the question implicit in the book’s subtitle.

Chinese leaders have never openly referred to ‘Chinese exceptionalism’ — though, as the book makes clear, they regularly proclaim that China is in fact exceptional. Cai carefully distinguishes those claims from the exceptionalism asserted by the United States,<sup>65</sup> as well as that claimed by China during its imperial (221BCE–1911CE) and revolutionary (1949–1976) periods. Instead, he argues, modern Chinese ‘exceptionalism’ will be ‘characterized by partnership based on state sovereignty, pacifism based on common security, and inclusionism based on national diversities’ (at 326).

Cai does acknowledge, in the final lines of the book, that the ostensibly defensive nature of this ‘exceptionalism’ — which Tom Ginsburg has compared to a ‘kinder, gentler Westphalia’<sup>66</sup> — might well be undermined by the fact that China does ‘in an indirect manner’ impose its will on other countries. In any event, he cheerily concludes, it is ‘high time to take Chinese exceptionalism seriously!’ (at 326)

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<sup>63</sup> Report of the International Court of Justice, 71 GAOR, Agenda Item 70, UN Doc. A/71/PV.35, 2 (2016).

<sup>64</sup> Cai does note that China has appeared once at oral proceedings, during the *Kosovo* advisory opinion in April 2009. China has also submitted written statements in the course of other advisory opinions, most recently the *Chagos* case in March 2018. China has been far more active in tribunals associated with international economic law, most prominently the WTO’s Dispute Settlement Body. Cai describes the steep learning curve of its representatives over the course of two decades of practice — mostly as a respondent, sometimes as a complainant, and increasingly as a third party (at 288-290).

<sup>65</sup> See, e.g., Harold Hongju Koh, ‘On American Exceptionalism’, 55 *Stanford Law Review* (2003) 1479.

<sup>66</sup> Tom Ginsburg, ‘Eastphalia as the Perfection of Westphalia’, 17 *Indiana Journal of Global Legal Studies* (2010) 27, at 45.

## 5 Conclusion

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*Xi Jinping speaking at the 70th Annual General Assembly Debate. Photo: UN Photos.*

The long passage quoted in the final pages of Cai’s book is drawn from Xi Jinping’s first address to the UN General Assembly in 2015. In it, President Xi also stressed the importance of mutual respect, sovereign equality, consultation over confrontation. To frame these remarks, he quoted what was described in the official translation as an ancient Chinese adage: ‘Our greatest ideal is to create a world truly shared by all.’<sup>67</sup> The phrase he used — ‘大道之行也，天下为公’ — is drawn from the *Book of Rites* (礼记), a Confucian text describing the perfect society. In the original, however, there are two points of divergence from the UN translation. The first is that Confucius was looking backward rather than forward, reminiscing about an order that was lost rather than one yet to be created. Secondly, ‘ideal’ is misleading because it suggests a general aspiration; a closer translation would make it clear that the world is to be shared by all when *the Way* (道), or the great Way, is followed.<sup>68</sup>

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<sup>67</sup> General Assembly, Seventieth Session, 13th Plenary Meeting, UN Doc. A/70/PV.13, 19 (2015). See, e.g.,

<sup>68</sup> The original text is available online here: <https://ctext.org/liji/li-yun>. James Legge’s 1885 translation has Confucius sighing and pacing back and forth. When asked why he sighs, Confucius regrets never seeing the practice of the ‘Grand course’ (大道), a notion of universal harmony: ‘When the Grand course was pursued, a public and common spirit ruled all under the sky.’ James Legge, *Sacred Books of the East: The Texts of*

The twenty-first century is not the first time that China has risen.<sup>69</sup> Even as the nation-state's relative power has grown, so President Xi is said to wield more power than any leader since Mao Zedong. He has held Party, military, and constitutional leadership positions since 2013, and recently abolished term limits that would have required him to step down as President in 2022.<sup>70</sup> Such an accrual of titles was once seen as a potential indication of weakness — Deng Xiaoping famously controlled the Chinese government while styled only as Honorary President of the All-China Bridge Association<sup>71</sup> — but today Xi's power is largely unquestioned.

What Xi, and China, will do with that power remains to be seen. When Cai was finishing his book around May 2019, China was on the ascent: an ironic champion of globalization as the United States turned protectionist and nationalist. Much as President Xi had noticeably avoided socialist legal philosophy in his rock star appearance at the World Economic Forum in Davos, its Belt and Road Initiative was being presented as a development model that eschewed ideology completely.<sup>72</sup>

The year since the book was published has, of course, been a tumultuous one. China's response to ongoing unrest in Hong Kong and to the Covid-19 pandemic in particular echoes many of the trends that Cai touches upon: the prioritization of domestic issues (especially the authority of the CCP) over domestic or international obligations; its efforts to procure

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*Confucianism* (1885), vol. 27, at 364. Speaking in Xi'an in 1998, US President Bill Clinton cited the same proverb, rendering it as 'When the great way is followed, all under heaven will be equal.' William Jefferson Clinton, *Remarks at the Arrival Ceremony in Xi'an, China* (Washington, DC, Public Papers of the Presidents of the United States: William J. Clinton, 25 June 1998), 1060. An official elaboration on a CCP website explains that the great Way (大道) refers to peace, development, fairness, justice, democracy, freedom, and other common values of all humanity ('这里的“大道”，就是习近平总书记在第七届联合国大会上所说的“和平发展公平正义民主自由”等全人类的共同价值'): '大道之行也，天下为公 (详解版) — 习近平谈治国理政中的传统文化智慧 [Xi Jinping Talks About the Traditional Cultural Wisdom in Governing the Country]', *共产党员网* [Communist Party] [www.12371.cn](http://www.12371.cn), 10 March 2019.

<sup>69</sup> See John King Fairbank (ed.) *The Chinese World Order: Traditional China's Foreign Relations* (1968).

<sup>70</sup> Kevin Rudd, 'Xi Jinping Offers a Long-term View of China's Ambition', *Financial Times*, 22 October 2017.

<sup>71</sup> Craig Thomas, 'China After Deng Xiaoping', 24(2) *Asian Affairs* (1997) 67; David M. Lampton, *Following the Leader: Ruling China, from Deng Xiaoping to Xi Jinping* (2019), at 62.

<sup>72</sup> See Wenxian Zhang, Ilan Alon, and Christoph Lattemann (eds) *China's Belt and Road Initiative: Changing the Rules of Globalization* (2018). Early cracks were, however, beginning to appear in criticism of what has been called 'debt-trap diplomacy'. See, e.g., Deborah Brautigam, 'Is China the World's Loan Shark?', *New York Times*, 26 April 2019, 'Xi Jinping Says China's Belt and Road Initiative Is Not Saddling Poor Countries With Debt', *Time*, 26 April 2019.

goodwill through ostentatious development assistance; its perplexity when what it regards as principled behaviour is interrogated through the lens of responsibility and accountability; and its vociferous rejection of the prospect of being judged by an external tribunal — however remote that prospect might be.

Cai could not have predicted the pandemic, but his observations about the US-China trade war were becoming more pointed as President Trump headed into the November 2020 election. Though containing China is no longer a serious option, US actions have undermined the WTO and put the entire multilateral trade system ‘in peril’ (at 306). Cai is too diplomatic to put it this way, but his otherwise ebullient message seems to be that of course international law can survive a rising China — it just might not survive a declining United States.