

## LAW AND POWER IN CHINA'S INTERNATIONAL RELATIONS

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*This article offers a much-needed updated examination of China's resort to international law in its international relations—one of the most important and controversial topics facing today's world. The article analyzes a range of significant subjects concerning China's contemporary theory and practice of international law, including its WTO experience, territorial and maritime disputes, bilateral agreements concerning civil and political rights, and multilateral human rights treaties. Noting that the current rules-based order appears unable to significantly restrain the exercise of China's growing power, this article argues that Beijing's present attitude toward*

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*international law, which thus far seeks piecemeal changes issue by issue, may be in transition. Beijing seems to be inching gradually toward a more innovative, broader approach that shapes international law in ways that some observers see as resurrecting traditional China's prominence in East Asia, and that others fear reflect even grander ambitions. China's growing power, however, is not as securely based as widely assumed, and China's views are influenced by its interactions with the United States and its perception of American international law practice.*

## I. INTRODUCTION

Any consideration of the law's relationship to power in China's foreign relations encounters complexity marked by tension and struggle. Yet, in the decades since the entry of the People's Republic of China (PRC) into the United Nations in 1971—and especially since Chairman Mao's death, signaling the end of the Cultural Revolution in 1976—Beijing has not presented an overall challenge to the Western or universal values embodied in public international law. In theory, Beijing has come to generally accept public international law, including many international customs, multilateral and bilateral treaties, and other legal documents, doctrines, standards, and institutions. This is in vivid contrast to the Xi Jinping regime's frequent domestic repudiation of conventional notions of the rule of law and its enhanced emphasis on a socialist rule of law with Chinese characteristics.<sup>1</sup>

This article explores the extent to which, in practice, the PRC respects international law's restraints on the exercise of national power. It concludes by asking whether the Xi Jinping government, in its second term, has in fact begun to challenge the Western, Westphalian international law system as it had, in its first term, challenged the Western-derived, now universal, principles of the domestic rule of law.<sup>2</sup>

## II. BACKGROUND

From the founding of the PRC in 1949 until 1971, Beijing often challenged prevailing foreign views of public interna-

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1. See generally Jerome A. Cohen, *Law's Relation to Political Power in China: A Backward Transition*, 86 SOC. RES.: INT'L Q. 231 (2019) (discussing the current state of law and government in China).

2. *Id.* at 233–34.

tional law, both in theory and practice.<sup>3</sup> This was in obvious response to the world community's rejection of China's new revolutionary government. When, shortly after its establishment, the PRC sought to replace Chiang Kaishek's Republic of China (ROC) government as the representative of China at the United Nations, its application was spurned<sup>4</sup>—despite the fact that the ROC authorities had fled from mainland China to Taiwan, leaving the PRC in almost full control of the mainland. The entry of Chinese People's Volunteers into the Korean conflict on the North Korean side against the United Nations in the autumn of 1950 further alienated it from the U.S.-dominated world organization. Even after the Korean Armistice in 1953 and the PRC's adoption of "the five principles of peaceful coexistence" and a more moderate foreign policy, the United Nations continued its exclusion of Beijing.<sup>5</sup> Moreover, most major Western countries still refused to recognize and establish bilateral diplomatic relations with Beijing.

In response, the PRC not only denounced Western applications of international law as manipulative and hypocritical, but at times also rejected the concept of a single world community and a single binding public international law. At certain points, Beijing advocated for the establishment of a new international organization to rival the United Nations.<sup>6</sup> In addition, under the influence of several Soviet legal scholars, some important Chinese specialists even adopted the theory that there are really three bodies of public international law: one regulating relations within the bourgeois world, another regulating relations within the Communist world, and a third regulating relations between the bourgeois and Communist worlds.<sup>7</sup>

Such institutional and ideological nonconformity began to ebb with the end of the most violent portion of the Cultural Revolution in the autumn of 1969, when Beijing began a renewed effort to enter the United Nations and to complete its

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3. For background, see 1 JEROME A. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 1, 3–22 (1974) (providing an overview of China's view of international affairs and law).

4. *Id.* at 19.

5. *Id.*

6. *Id.* at 20.

7. See generally *id.* at 25–64 (discussing PRC efforts to develop a "socialist" theory of international law for China).

normalization of bilateral relations with the major powers. Yet, despite groundbreaking establishment of diplomatic relations with Beijing in the early 1970s and the PRC's U.N. entry in October 1971, China's leaders, still in the midst of fierce internal political struggles in the waning years of Chairman Mao's rule, revealed a continuing mistrust of U.N. institutions and international law principles.<sup>8</sup> Moreover, at least until the mid-1970s, the impact of the Cultural Revolution on China's educational, research, and bureaucratic systems had left many PRC diplomats and officials ill-equipped to cope with the legal demands of the new situation.

On June 16, 1972, this author together with Professor John Fairbank of Harvard, Harrison Salisbury of the New York Times, and others took part in a four-hour dinner discussion with Prime Minister Zhou Enlai and his main foreign policy advisors. Since the first half of this session seemed to go well in reviewing Sino-American relations and the Vietnam war, I decided to ask about the Chinese government's current attitude toward international law. I introduced the topic by suggesting that the PRC, having just become a prominent participant in the United Nations with a permanent, veto-wielding seat in the Security Council, should also consider sending an expert to serve as a judge on the International Court of Justice (ICJ) in the Hague. This suggestion provoked the loud laughter of all the Chinese officials present, who plainly thought it was a ludicrous proposal. Why, they wondered, should the PRC want to assume a seat on the fifteen-member ICJ, where they were sure most judges would be prejudiced against an Asian, Communist state, and so would disagree with its views? Moreover, the PRC has traditionally mistrusted settling international disputes through adjudication, arbitration, and other forms of third-party decision-making. Despite China's millennial practice of mediating domestic disputes, Beijing has shunned even mediation's more limited third-party participation in international dispute resolution.

However, I argued that for permanent members of the Security Council, an ICJ judgeship is one of the perquisites of being a world power and that the PRC should not pass up the opportunity. It took more than another decade before Beijing

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8. *Id.* at 22.

finally posted to the ICJ the first of what has become a succession of well-qualified Chinese judges.<sup>9</sup>

One of the reasons this process took so long was that the PRC then lacked a sufficient number of international law experts to staff the important positions that its belated acceptance by the world community required. In 1973, two years after Beijing's entry into the United Nations, it still lacked the trained personnel it needed there. At that time, the PRC's permanent representative to the United Nations, the capable Ambassador Huang Hua, told this author how embarrassing it was that, for lack of a qualified official to fill Beijing's seat on the U.N. General Assembly's Sixth Committee, which is responsible for legal affairs, he had to ask his wife, who was only trained in economics, to do so.

### III. THE SITUATION TODAY

More than forty-five years later, the situation is very different. The PRC has developed impressive expertise in the field of public international law. Its law schools and political science departments offer detailed instruction from well-trained specialists, many of whom have accomplished advanced studies in leading academic institutions around the world. Some Chinese experts have even taught at major foreign institutions. These scholars, as well as their colleagues at the PRC's various research and policy organizations, often publish sophisticated analyses in books, academic journals, and media essays—not only in the Chinese language, but also in English and other foreign languages—and are active participants in nongovernmental international law conferences and dialogues. In addition, they frequently provide advice to various departments of the Chinese government.

Contemporary PRC officials and diplomats are products of this educational system, and have developed their legal expertise in sundry areas of international responsibility. This is apparent from their activities in representing their government in many international fora, as well as at home in the Law and Treaty Division and other bureaus of the Ministry of Foreign Affairs, and in other agencies dealing with foreign eco-

9. *Around the World; Peking Judge Chosen for World Court*, N.Y. TIMES (Nov. 8, 1984), <https://www.nytimes.com/1984/11/08/world/around-the-world-peking-judge-chosen-for-world-court.html>.

conomic and business issues within the government. Some have also honed their credentials while working for the United Nations or other public and private international organizations.

Together, this impressive and increasingly large group of specialists brings to bear an important body of international legal knowledge, as well as a potential for acting as a restraining influence on the exercise of untrammelled official power. Of course, as in the United States and other countries, these experts in and out of government often disagree among themselves about the proper application of international law to complex and controversial problems. In any event, as in other countries, their views are often overridden by more powerful, official decision-makers who may not be attuned to international legal considerations, or who give greater weight to political, military, and economic factors, among others.

Because of the PRC's unusually repressive domestic political climate during the Xi Jinping years, the opportunities for Chinese international law experts to influence government policies and actions are undoubtedly not as great as those enjoyed by counterparts in foreign democracies. Certainly, discretion is the better part of valor when Chinese experts state their views in public. To be sure, there is greater scope for expression when advocating a future course than when criticizing decisions already taken. Yet, this author's Chinese colleagues say that today, whether as an official or consultant, one has to tread especially carefully when offering opinions, even within the confidential confines of government discussions, and especially after decisions have been made.

#### IV. POWER AND LAW IN CHINA'S INTERNATIONAL PRACTICE: SOME EXAMPLES

To what extent have PRC leaders accepted, in practice, the restraints imposed upon their power by the international law system, which they now endorse in principle and which their officials and specialists now well understand? This is not the place for the book-length study required to comprehensively answer the question, but what follows is an overview and an examination of several important areas of the PRC's recent participation in the world community.

### A. *Economic and Business Dispute Resolution*

Those looking for evidence that the PRC will increasingly comply with the current rules-based international order usually take heart from its participation in the World Trade Organization (WTO). That participation was preceded by both a long period of intense negotiations concerning the extraordinarily demanding terms imposed on Beijing's entry, and by Beijing's simultaneous, prodigious effort to revamp its laws, regulations, and institutions in order to comply with those evolving terms.<sup>10</sup>

Since its entry in 2001, Beijing has become an accepting and active member of the WTO system—at least with respect to dispute resolution. After a few years of learning the procedures and substance of WTO arbitration, the PRC has become a vibrant participant in the system. While it wins some cases and loses others, the Chinese government still plays the game.<sup>11</sup> To be sure, the enthusiasm of Chinese spokespersons appears to have diminished a bit of late, and PRC experts occasionally claim that Western, especially American, experts frequently outlawyer them.<sup>12</sup> Yet, ironically, it has been the U.S. government under President Donald Trump that has recently posed obstacles to WTO arbitration by opposing the appointment of new appellate arbitrators.<sup>13</sup>

It is also true, however, that the PRC has not fulfilled some of the important substantive and institutional commitments it was required to make in order to assure its WTO admission. Some commentators have actually voiced regret con-

10. See, e.g., Julia Ya Qin, *Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*, 191 CHINA Q. 720 (2007) (discussing the "legislative overhaul" that China conducted to implement the "extensive commitments" China made in its WTO accession agreement); see also Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 117–18 (2003) (arguing that China's accession is a strategic move by the Chinese government to induce domestic economic reform).

11. See generally Yang Guohua, *China in the WTO Dispute Settlement: A Memoir*, 49 J. WORLD TRADE 1 (2015) (providing a first-hand account of a Chinese official growing to trust WTO dispute resolution procedures).

12. Confidential interviews with select PRC legal officials and lawyers.

13. Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS, Aug. 27, 2018, <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC190>.



cerning the enormous economic progress that WTO membership has enabled Beijing to make, even while the PRC remains essentially a “non-market economy” and therefore still incompatible with the WTO.<sup>14</sup> The recent efforts of President Xi Jinping and his government to cast China as the world’s new champion of open markets, which has inspired the cynicism of foreign observers familiar with its continuing barriers to foreign trade and investment at home,<sup>15</sup> may stimulate the PRC to reduce those barriers in response to rising adverse political and economic pressures and accusations of hypocrisy.

The PRC has also shown signs of warily moving toward participation in the World Bank’s institution for the arbitration of disputes between foreign investors and host governments: the International Center for the Settlement of Investment Disputes (ICSID).<sup>16</sup> Yet Beijing has preferred to rely on a vast and complex network of domestic arbitration institutions for dealing with trade, investment, and other commercial legal disputes. These institutions, which badly need technical improvements, include those that directly and indirectly involve foreign business.<sup>17</sup> The PRC’s recent successful establishment of the multilateral Asian Infrastructure Investment Bank (AIIB), a welcome supplement and possible rival to the World

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14. See generally Marie-José Rinaldi-Larribe et al., *Does China Deserve the Market Economy Status?*, 2 J. CHINESE ECON. & FOREIGN TRADE STUD. 110 (2009) (discussing justifications of not granting China the market economy status).

15. See, e.g., Sarah Zheng, *Xi Jinping’s Defence of Globalisation and Open Markets: Key Takeaways from Chinese Leader’s Speech to Boao Forum*, SOUTH CHINA MORNING POST (Apr. 10, 2018), <https://www.scmp.com/news/china/economy/article/2141032/xi-jinpings-defence-globalisation-and-open-markets-key-takeaways> (reporting President Xi Jinping’s speech to the Boao Forum on his commitment to opening up the economy, and noting that this speech follows President Trump’s complaints about Chinese policies that impact trade).

16. See, e.g., Julian Ku, *The Enforcement of ICSID Awards in the People’s Republic of China*, 6 CONTEMP. ASIA ARB. J. 31, 32 (2013) (noting the PRC’s support of and apparent enthusiasm for ICSID arbitration tribunals).

17. See Weixia Gu, *Arbitration in China*, in INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 77, 77–79, 129–31 (Tom Ginsburg & Shahla Ali eds., 3rd ed. 2013) (discussing reform of legal and institutional regimes of arbitration in China and the obstacles to such reform).



Bank, should also add to Chinese sophistication and support for international dispute resolution.<sup>18</sup>

More uncertain and controversial are Beijing's many ambitious bilateral One Belt, One Road projects, also grouped under the name Belt and Road Initiative (BRI), which represent a more obviously self-serving political-economic strategy.<sup>19</sup> The PRC evidently hopes that the BRI will benefit from the services of new Chinese dispute settlement institutions, such as Beijing's recently established international commercial courts. As Susan Finder writes, this appears to be part of an effort to "move the locus of China-related dispute resolution from London and other centers in Europe (or elsewhere) to China, where Chinese parties will encounter a more familiar dispute resolution system."<sup>20</sup> It would be surprising, however, if many of the PRC's BRI partners—assuming they have significant bargaining power—accept dispute resolution in China instead of in more neutral fora, if not their own. Certainly, the PRC itself, as soon as it established a basic environment for attracting foreign direct investors, insisted that they settle foreign investment disputes in China rather than in their homeland.<sup>21</sup>

18. See generally NATALIE LICHTENSTEIN, *A COMPARATIVE GUIDE TO THE ASIAN INFRASTRUCTURE INVESTMENT BANK* (2018) (discussing the structure, development, and functions of the AIIB).

19. See, e.g., MICHAEL BALTENSPERGER & URI DADUSH, *THE BELT AND ROAD TURNS FIVE* 2–6 (Bruegel, Policy Contribution Issue No. 1, 2019) (discussing the background and context of the Belt Road Initiative); *China's Belt and Road Initiative: Why the Price Is Too High*, WHARTON SCH. U. PA.: KNOWLEDGE@WHARTON (Apr. 30, 2019) <https://knowledge.wharton.upenn.edu/article/chinas-belt-and-road-initiative-why-the-price-is-too-high> (analyzing the future of the Belt Road Initiative).

20. Susan Finder, *Update on China's International Commercial Court*, SUPREME PEOPLE'S COURT MONITOR (Mar. 11, 2018), <https://supremepeoples-courtmonitor.com/2018/03/11/update-on-chinas-international-commercial-court>.

21. See *Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa Shishi Xize* (中华人民共和国中外合作经营企业法实施细则) [Regulations for the Implementation of the Law on Sino-Foreign Equity Joint Ventures] (promulgated by the St. Council, Sept. 20, 1983, effective Sept. 20, 1983; rev'd by St. Council, July 22, 2001), MINISTRY OF COM., CHINA, Jan. 17, 2003, [english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100064563.shtml](http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100064563.shtml) (China) (stating that Sino-foreign joint ventures established in China are subject to Chinese jurisdiction).

B. *Arbitration or Adjudication of International Territorial and Maritime Disputes*

The Chinese government has thus far disappointed those who hope that its acceptance of arbitration of commercial disputes between Chinese and foreign companies and economic disputes between states at the WTO might improve prospects for its similar acceptance of arbitration or adjudication of other inter-state disputes, including those that involve issues of sovereignty. Indeed, Beijing has been at pains to reaffirm its rejection of third-party determinations of such disputes. Its long-running negotiations with the Association of Southeast Asian Nations (ASEAN) member states to develop a code of conduct governing relations in the South China Sea<sup>22</sup> and its angry response to the Philippine-initiated South China Sea arbitration case<sup>23</sup> have demonstrated attempts to distort the interpretation of Article 38 of the U.N. Charter by excluding international arbitration and adjudication from the authorized means of peacefully settling inter-state disputes listed in the Charter. The calculated ambiguity of the 2002 Declaration on a Code of Conduct signed between China and ASEAN reflects Beijing's pressures to win acceptance of this unorthodox position among its neighbors, while at the same time seeking to assert its power to control its economic and security interests in the area.<sup>24</sup>

1. *The Philippine Arbitration*

Most glaring of Beijing's rejections of third-party determinations is its refusal to take part in the arbitration that the Philippines initiated against the country in 2013, which concerned a host of issues involving application of the U.N. Convention on the Law of the Sea (UNCLOS) to the Spratly Is-

22. For an informed view of the background on China's negotiations with ASEAN, see generally Carlyle A. Thayer, *Chinese Assertiveness in the South China Sea and Southeast Asian Responses*, 30 J. CURRENT SOUTHEAST ASIAN AFF., no. 2, 2011, at 79 (2011) (reviewing China's assertive behavior in attempting to develop a code of conduct in the South China Sea).

23. For the PRC response to the Philippine arbitration, see *infra* text accompanying notes 25–29.

24. Ass'n of Southeast Asian Nations [ASEAN], *Declaration on the Conduct of Parties in the South China Sea*, art. X (Nov. 4, 2002), [https://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2](https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2).

lands in the South China Sea.<sup>25</sup> The PRC claimed that, according to UNCLOS and the terms of China's ratification of the treaty, the UNCLOS arbitration tribunal lacked jurisdiction over any of the issues in the case.<sup>26</sup> While this was a plausible, but not persuasive, legal position, the PRC went further. It also claimed that China's legal arguments were so plainly correct that they did not need to be submitted for examination and determination by an independent, impartial, expert tribunal authorized to consider them under UNCLOS.<sup>27</sup> The PRC in fact steadfastly refused to take any formal part in the proceedings, although it did attempt to get the best of both worlds by issuing an elaborate position paper to the public, which the tribunal did consider.<sup>28</sup> Moreover, the PRC rejected the tribunal's award as illegitimate and refused to implement it in any way.<sup>29</sup> This flies in the face of a UNCLOS provision clearly mandating that every party to its dispute resolution processes is legally bound to comply with the outcome, whether or not the party has chosen to participate in the proceedings.<sup>30</sup>

Understandably, the PRC's wholesale rejection of the arbitral tribunal's rulings concerning both jurisdiction and the merits of the case, and especially its refusal to present its arguments to the tribunal and abide by its award, have badly hurt its international reputation.<sup>31</sup> Although Beijing mobilized ex-

25. *In re South China Sea Arbitration (China v. Phil.)*, PCA Case Repository 2013-19, Award, ¶¶ 2, 4 (2016).

26. *Id.* ¶ 13.

27. *Id.* ¶ 11.

28. *Id.* ¶ 13.

29. *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, MINISTRY FOREIGN AFF. CHINA (July 12, 2016), [www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1379492.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm).

30. U.N. Convention on the Law of the Sea art. 296, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

31. For background on this reputational impact due to the PRC's rejection of the ruling, see, e.g., Julian Ku, *A Guide to Countering Chinese Government Spin on the Fairness of the South China Sea Arbitration Tribunal*, LAWFARE (June 20, 2016), <https://www.lawfareblog.com/guide-countering-chinese-government-spin-fairness-south-china-sea-arbitration-tribunal> (suggesting that China's rejection of the award involves costs to the international legal system, and indicating that its actions are concerning); Thomas E. Kellogg, *The South China Sea Ruling: China's International Law Dilemma*, DIPLOMAT (July 14, 2016), <https://thediplomat.com/2016/07/the-south-china-sea-ruling->

traordinary political and economic pressures in an effort to win foreign support for its bold position, that effort has not proved to be successful, even among some of the most important states that seek to cultivate beneficial relations with the PRC.<sup>32</sup>

Beijing's "soft power" prestige suffered additional damage because of its unattractive, unsuccessful, and almost unprecedented attempts to discredit the members of the arbitration tribunal itself, which was composed of some of the world's acknowledged specialists in maritime law.<sup>33</sup> The case has thus become a leading recent example of PRC unwillingness to abide by the rules of the world community in practice.

In fairness to China, this was not the first time that a country has failed to respect the UNCLOS dispute resolution system. In the lesser known *Arctic Sunrise* case, Russia had already rejected an arbitration brought against it by the Netherlands over the Russian capture of a Dutch-flag boat and crew, maintaining its position that the tribunal lacked jurisdiction and that the award was therefore not entitled to respect.<sup>34</sup> However, within a matter of months, the Russian government—without mentioning the UNCLOS award—released the crew and then the ship, as the award had required, claiming that it was taking these measures according to Russian law.<sup>35</sup>

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chinas-international-law-dilemma (noting that the dispute has caused damage to China's reputation, and questioning whether its reaction signals an ambivalent attitude toward the international system).

32. Tara Davenport, *Why the South China Sea Arbitration Case Matters (Even If China Ignores It)*, DIPLOMAT (July 8, 2016), <https://thediplomat.com/2016/07/why-the-south-china-sea-arbitration-case-matters-even-if-china-ignores-it>.

33. Ku, *supra* note 31.

34. *Foreign Ministry: Arctic Sunrise Arbitration Ruling Encourages Illegal Activity*, ARCTIC (July 20, 2017), <http://arctic.ru/international/20170720/648623.html>.

35. The vessel and its crew were arrested by the Russian Coast Guard for "hooliganism and piracy" in September 2013. The members of the crew were released after three months and the ship was released after an additional six month period pending the outcome of an internal Russian investigation. John Vidal, *Arctic 30: Russia Releases Greenpeace Ship*, GUARDIAN (June 6, 2014), <https://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship>; *see id.* (noting that the crewmembers were eventually released on bail and benefitted from an amnesty law).

Defenders of the Chinese position have not only cited Russia's rejection of *Arctic Sunrise*, but have also recalled the notorious refusal of the United States to accept the 1986 ruling of the ICJ in its dispute with Nicaragua.<sup>36</sup> That dispute, of course, did not involve the UNCLOS dispute resolution system, since the United States has not, to this day, ratified the UNCLOS treaty despite having played an important role in its negotiation.<sup>37</sup> However, as Russia did following *Arctic Sunrise*, the United States subsequently took certain steps to mitigate its ICJ default and mollify the successful party, a point that most critics tend to ignore, even while recalling the objectionable American effort to disparage the ICJ judges.<sup>38</sup> It would be unwise to underestimate the influence that the U.S. example in the Nicaragua case may have had on Beijing's disappointing response to the Philippine arbitration.

While the Philippines case was still being considered by the tribunal, in July 2014, India's then new, nationalistic leader, Prime Minister Narendra Modi, showed the world a splendid example of how a big power should behave when confronted by an embarrassing UNCLOS arbitration award in favor of a weaker power. Modi's India might have rejected the UNCLOS arbitration award in favor of Bangladesh<sup>39</sup> and mobilized popular nationalistic feelings against the tribunal, UNCLOS, and Bangladesh. Instead, Modi dealt with the adverse award in a civilized, matter-of-fact manner. His office issued a statement saying that, while it would have been better if India had won the case, now that the award had been rendered, the

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36. Paul Lewis, *World Court Supports Nicaragua After U.S. Rejected Judges' Role*, N.Y. TIMES (June 28, 1986), [www.nytimes.com/1986/06/28/world/world-court-supports-nicaragua-after-us-rejected-judges-role.html](http://www.nytimes.com/1986/06/28/world/world-court-supports-nicaragua-after-us-rejected-judges-role.html).

37. Ben Cardin, *The South China Sea Is the Reason the United States Must Ratify UNCLOS*, FOREIGN POL'Y (July 13, 2016), <https://foreignpolicy.com/2016/07/13/the-south-china-sea-is-the-reason-the-united-states-must-ratify-unclos>.

38. See *Nicaragua's Hard Road to a New Day*, N.Y. TIMES (Apr. 26, 1990), <http://www.nytimes.com/1990/04/26/world/nicaragua-s-hard-road-to-a-new-day.html> (reporting the timeline of U.S. actions in Nicaragua, including its actions after the ICJ ruling); Lewis, *supra* note 36 (recalling the accusations of bias that the U.S. made against the ICJ judges).

39. *In re Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India)*, PCA Case Repository 2010-16, Award (2014).

disputants could put their differences behind them and develop their long-delayed cooperation.<sup>40</sup>

To be sure, by the time of Modi's enlightened announcement, the PRC had already rejected the ongoing Philippine arbitration so often and so vociferously that one could not expect Beijing to lose even more face by reversing its position regarding the legitimacy of the case. One might have expected, however, that an adverse award would stimulate the PRC to quietly negotiate with the Philippines on the basis of the award, but without either side making reference to it. This author published a suggestion to that effect weeks before the award was announced.<sup>41</sup>

The award has in fact stimulated quiet, bilateral negotiations, but with a very different Philippine government from the one that initiated the arbitration.<sup>42</sup> The new and controversial administration of President Rodrigo Duterte has only occasionally made vague reference to the country's legal victory while tolerating the PRC's continuing but somewhat more muted public refusal to accept the award.<sup>43</sup> Manila apparently hopes that its patient, low-key posture will eventually win substantial new economic benefits from China, as well as some degree of tacit compliance with at least a few aspects of the award. Yet, three years after issuance of the award, no major results have been announced. The access of Philippine fishermen to the disputed and hypersensitive area of Scarborough

40. Ruma Paul, *U.N. Tribunal Rules for Bangladesh in Sea Border Dispute with India*, REUTERS, July 8, 2014, <http://uk.reuters.com/article/uk-bangladesh-india-seaborder/u-n-tribunal-rules-for-bangladesh-in-sea-border-dispute-with-india-idUKKBN0FD15N20140708>.

41. Jerome A. Cohen, *Is There a Way for Beijing to Save Face After the South China Sea Arbitration Ruling?*, SOUTH CHINA MORNING POST (June 15, 2016), <http://www.scmp.com/comment/insight-opinion/article/1975070/there-way-beijing-save-face-after-south-china-sea>.

42. Liu Zhen, *China, Philippines to Set Up Negotiation Mechanism to Resolve South China Sea Disputes*, SOUTH CHINA MORNING POST (Oct. 21, 2016), [scmp.com/news/china/diplomacy-defence/article/2038993/china-philippines-agree-set-negotiation-mechanism](http://scmp.com/news/china/diplomacy-defence/article/2038993/china-philippines-agree-set-negotiation-mechanism).

43. Xi, *Duterte Meet on Pushing Forward Ties*, XINHUA (Aug. 30, 2019), [https://www.xinhuanet.com/english/2019-08/30/c\\_138349009.htm](https://www.xinhuanet.com/english/2019-08/30/c_138349009.htm); Andreo Calonzo, *Xi, Duterte Fail to Reach Agreement on South China Sea Issues*, BLOOMBERG (Aug. 30, 2019), <https://www.bloomberg.com/news/articles/2019-08-30/xi-duterte-agreed-to-disagree-no-deal-on-exploration-sea-row>.



Shoal has, however, reportedly been renewed.<sup>44</sup> One specialist has claimed—although without adequate confirmation—that the PRC has quietly complied with most provisions of the award, a view that the Philippine public has rejected, which has put increasing pressure on Duterte.<sup>45</sup>

## 2. *Taiwan's Contrasting View of the Philippine Arbitration*

Taiwan's view of the Philippine award is worthy of comment for the light it casts upon the PRC's standpoint. Unlike the PRC, the ROC on Taiwan, although maintaining a position similar to that of the PRC on the merits of the issues in the case, was eager to take part in the arbitration. Participation would have not only allowed it to assert its genuine interests in the issues at stake, but it would have also bolstered its claim to legitimacy as a sovereign state entitled to participation in the diplomatic community.

However, because it no longer takes part in the United Nations as the representative of China or in any other capacity, and is therefore excluded from the UNCLOS system, the ROC was not permitted to enter the case as a party. Nor was it even accorded observer status in the proceedings, as were several countries that also have immediate interests in the South China Sea controversy. Moreover, the arbitration award, in referring to the ROC—which is the occupant of Taiping Island (Itu Aba), the largest of the Spratly Islands that constituted the focus of the case—did not call the ROC by its official name. Instead, the tribunal referred to the ROC as “the Taiwan Authority of China,”<sup>46</sup> a Beijing-favored characterization sure to arouse Taipei's resentment.

To add substantive insult to Taiwan's procedural and reputational injury, the arbitration tribunal, in a bold, yet thorough, interpretation of UNCLOS Article 121(3), unanimously held that Taiping Island is not entitled to an exclusive eco-

44. Ankit Panda, *South China Sea: Philippine Fishermen Gain Access to Scarborough Shoal After Duterte's China Trip*, DIPLOMAT (Oct. 29, 2016), <http://thediplomat.com/2016/10/south-china-sea-philippine-fishermen-gain-access-to-scarborough-shoal-after-dutertes-china-trip>.

45. David A. Welch & Kobi Logendrarajah, *Is China Still an Outlaw in the South China Sea?*, OPEN CAN. (July 29, 2019), <https://www.opencanada.org/features/china-still-outlaw-south-china-sea>.

46. *In re South China Sea Arbitration (China v. Phil.)*, PCA Case Repository 2013-19, Award, ¶ 89(c) (2016).



conomic zone (EEZ).<sup>47</sup> This denied the ROC exclusive control over the economic resources within a vast maritime area extending up to 200 nautical miles from the island's coastline, far beyond the more comprehensive exclusive jurisdiction that it enjoys within its 12-nautical mile territorial sea. Although the ROC had only claimed an EEZ for Taiping Island after the Philippines initiated its arbitration in 2013, the tribunal's rejection of an EEZ for the island embarrassed not only the PRC government, but also the ROC government, and further outraged Taiwan public opinion, which intensive government propaganda had prepared for a favorable outcome on that issue.<sup>48</sup>

The tribunal, although fastidious to a fault in following the PRC's persistent insistence upon formally denying the ROC any status within the U.N. system, did consider the ROC's legal analysis concerning the EEZ issue. It informally received a long, carefully reasoned *amicus curiae* type brief submitted by a prominent Taiwanese nongovernmental organization (NGO), the Chinese (Taiwan) Society of International Law, and passed it on to the Philippines for a potential response.<sup>49</sup> The tribunal also sent this unofficial Taiwan brief to the PRC, which the tribunal kept fully apprised of all relevant developments despite the fact that the PRC never formally took part in the proceedings.<sup>50</sup> Beijing thus had the significant benefit of Taiwan's skillful legal support of their common view regarding the EEZ issue without suffering any cost regarding either its traditional position that the ROC government does not represent a state deserving international recognition, or Beijing's refusal to take part in the arbitration.

Taiwan's initial response to the embarrassment of the arbitration tribunal's adverse decision was led by its then newly elected leader, President Tsai Ing-wen, who was obviously eager to demonstrate a strong defense of the ROC position first

47. *Id.* ¶ 625.

48. Shannon Tiezzi, *Taiwan: South China Sea Ruling 'Completely Unacceptable'*, DIPLOMAT (July 13, 2016), <http://thediplomat.com/2016/07/taiwan-south-china-sea-ruling-completely-unacceptable>.

49. Brief for the Chinese (Taiwan) Society of International Law as *Amicus Curiae*, *In re* South China Sea Arbitration, PCA Case Repository 2013-19; *id.*

50. *In re* South China Sea Arbitration, PCA Case Repository 2013-19, ¶ 89.

asserted by the preceding administration of President Ma Ying-jeou. President Tsai vigorously reasserted ROC sovereignty over Taiping Island and made a show of mobilizing ROC maritime forces, ostensibly to protect ROC interests.<sup>51</sup> This reaction may have played well politically at home, but, to outside observers, it may have seemed somewhat exaggerated and, indeed, almost irrelevant. The tribunal's decision did not touch upon sovereignty issues and no one was threatening the use of force against Taiwan or Taiping Island. The question was simply whether the island deserved an EEZ.

### 3. *Implications of the Award for ROC and PRC Relations with Japan*

Certainly in one respect, although never acknowledged by either the ROC or the PRC, the arbitration tribunal's decision can be seen as favorable to ROC/PRC maritime interests: Although the tribunal rejected the view that Taiping Island and the other Spratly Islands claimed by China are entitled to an EEZ, that very decision is evidently applicable to Taiwan's—and China's—ongoing dispute with Japan over whether Japan's Okinotorishima is entitled to the extensive EEZ that Tokyo has long claimed for the tiny island to the detriment of the PRC and the ROC. Unlike Taiping Island, Okinotorishima, prior to artificial construction, was merely a pile of coral not much larger than a king-size bed.<sup>52</sup> In light of the tribunal's decision on Taiping Island, Japan's attempt to endow the artificial Okinotorishima with an EEZ is not plausible.

President Tsai had inherited a recent and much-publicized dispute over Tokyo's arrest of a Taiwanese fishing boat

51. Ben Blanchard & Martin Petty, *China Vows to Protect South China Sea Sovereignty, Manila Upbeat*, REUTERS, July 11, 2016, <https://www.reuters.com/article/us-southchinasea-ruling-stakes-idUSKCN0ZS02U> (quoting President Tsai: "This patrol mission is to show the determination of the Taiwan people to defend our national interest . . ."); Lawrence Chung, *Tsai Ing-wen Tells Warship Crew to Defend Taiwan's Interests as They Set Off for Island in South China Sea*, SOUTH CHINA MORNING POST (July 13, 2016), <https://www.scmp.com/news/china/diplomacy-defence/article/1989282/tsai-ing-wen-tells-warship-crew-defend-taiwans>.

52. Ralph Jennings, *Japan is Quietly Building a Tiny Tropical Islet, but an Angry China Has Noticed*, FORBES (July 17, 2016), <https://www.forbes.com/sites/ralphjennings/2016/07/17/japan-is-quietly-building-a-tiny-tropical-islet-but-an-angry-china-has-noticed/#7e636dde705b>.

and crew within the EEZ that Japan asserted for Okinotorishima.<sup>53</sup> One might have expected Tsai, an able law specialist and sometime law professor, to immediately invoke the Philippine tribunal's EEZ decision as proof that her predecessor, President Ma, had been right in ostentatiously protesting against Japan's exercise of EEZ jurisdiction over Taiwan fishermen.

However, the Tsai administration, which stoked the fires of nationalism against the Philippine tribunal's treatment of Taiwan, has remained largely silent about the favorable implications for Taiwan—and China—of the tribunal's EEZ ruling in relation to the Okinotorishima dispute. Perhaps this is because Tsai feels the need for Japanese political support for her administration's efforts to resist Beijing's enhanced cross-strait pressures against the Tsai government. Perhaps this is also because she does not want to be seen relying on an arbitration award that she has rejected. A third factor may be that Tsai does not want to prejudice continuing implementation of the innovative fisheries agreement that the Ma administration had concluded with Japan regarding the Senkaku/Diaoyu Islands area in the East China Sea.<sup>54</sup> It may also be that Beijing, which shares Taiwan's interest in these political-legal maritime matters but has been seeking to moderate its bitter relations with Japan, might prefer Taiwan's public silence to crowing on this issue and appearing to rely on the arbitration award it too has condemned.

In addition, both Taipei and Beijing have to decide how to deal with their even larger disputes with Japan over the Sino-Japanese maritime boundary and the related Diaoyu/Senkaku territorial dispute in the East China Sea.<sup>55</sup> In these

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53. *Taiwanese and Japanese Vessels Arrive in Okinotori for a Show of Strength*, SOUTH CHINA MORNING POST (May 6, 2016), <https://www.scmp.com/news/china/diplomacy-defence/article/1941964/taiwanese-and-japanese-vessels-arrive-okinotori-show>; Tetsuo Kotani, *Taipei's Risky Agreement with Beijing on Okinotorishima*, ASIA MAR. TRANSPARENCY INITIATIVE (May 10, 2016), <https://amti.csis.org/taipeis-risky-agreement-beijing-okinotorishima>.

54. Press Release, Ministry of Foreign Affairs of China (Taiwan), China (Taiwan) Signs Fisheries Agreement with Japan, (Apr. 15, 2013), [https://www.mofa.gov.tw/en/News\\_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB](https://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB).

55. For an excellent legal analysis, see generally Peter Dutton, *Carving Up the East China Sea*, 60 NAVAL WAR C. REV. 44, 49–68 (2007) (positing three options for peaceful delimitation of the East China Sea between China and

disputes, Beijing rather than Taipei has played the dominant role in pursuing the interests of “China,” and, through a broad range of military, diplomatic, and political measures, Beijing has insistently pressed Tokyo for solutions. The implications of the Philippine award for the Diaoyu/Senkaku dispute are unclear, since these East China Sea islands, although difficult to inhabit, are considerably larger than Taiping Island and might therefore be deemed more deserving of an EEZ. If, however, the disputing parties could agree that the islands do not warrant an EEZ, they would be reducing the magnitude of their dispute over ownership of the Senkaku/Diaoyu Islands, and thus presumably enhancing possibilities for its peaceful resolution.

However, Japan does not even formally recognize the existence of a territorial “dispute” with China in the East China Sea because of its supposed indisputable sovereignty over the islands.<sup>56</sup> In the fall of 2012, just before the current government of Prime Minister Shinzo Abe assumed power, it seemed that Japan might finally be ready to acknowledge the obvious existence of the dispute. Japan’s Foreign Minister, Koichiro Genba, about to leave office, published an essay in the *International Herald Tribune* (later absorbed by *The New York Times*) challenging the PRC to take Japan to the ICJ if it felt confident about its claim to sovereignty over the Diaoyu/Senkaku Islands.<sup>57</sup> This seemed to constitute implicit recognition of the existence of a “dispute.” Indeed, Foreign Minister Genba criticized China for not supporting international law to the extent that Japan does, since, unlike Tokyo, Beijing has not yet agreed to submit to the compulsory jurisdiction of the ICJ in

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Japan); see also generally Hui-Yi Katherine Tseng, *The Taiwan Dilemma in the Diaoyu/Diaoyutai/Senkaku Islands Sovereignty Dispute*, 21 AM. J. CHINESE STUD. 111, 111–26 (2014) (reassessing Taiwan’s difficult position in the territorial dispute).

56. See, e.g., *About the Senkaku Islands*, MINISTRY FOREIGN AFF. JAPAN, <https://www.mofa.go.jp/region/asia-paci/senkaku/index.html> (last visited Sep. 19, 2019) (“There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.”); Zachary Keck, *Japan Has Not Recognized Senkaku Island Dispute*, DIPLOMAT (Nov. 11, 2014), <https://thediplomat.com/2014/11/japan-has-not-recognized-senkaku-island-dispute> (reporting that Japan continues to see no territorial dispute).

57. Koichiro Genba, *Japan-China Relations at a Crossroads*, N.Y. TIMES (Nov. 20, 2012), <http://www.nytimes.com/2012/11/21/opinion/koichiro-genba-japan-china-relations-at-a-crossroads.html?mcubz=1>.

any dispute brought to the World Court by another state that has accepted the court's compulsory jurisdiction.<sup>58</sup> Occasionally, Japanese diplomats have informally said that Genba's essay should be understood as a change in Japan's formal position.<sup>59</sup> The Abe government, however, has never confirmed this. Furthermore, Japan's adherence to the ICJ's compulsory jurisdiction was accompanied by two restrictions that might limit ICJ jurisdiction in the unlikely event that China seeks to invoke it.<sup>60</sup>

4. *A Few Further Thoughts About the PRC and the Law of the Sea*

Although the PRC has often rejected Japan's claim that the Diaoyu/Senkaku Islands are "indisputably" Japanese, the PRC itself has adopted a similar position in response to Vietnam's challenge to China's sovereignty over the Paracel Islands, another contested area of the South China Sea additional to the Spratly Islands.

Several years ago, this author asked Vietnam's government legal experts why they do not seek to negotiate a solution to the Paracel dispute, since the PRC frequently proclaims its willingness to peacefully settle South China Sea disputes through bilateral negotiations rather than arbitration or adjudication, and since Vietnam and China have settled both a land boundary dispute and a maritime dispute in the Gulf of Tonkin through negotiations. The Vietnamese responded that they have tried to do so, but they were met with the argument that there was nothing to negotiate in this case since the Paracels "indisputably" belonged to China.<sup>61</sup> Plainly, island sovereignty disputes are unlikely to ever be resolved if the occupying country adopts the view that there is no "dispute." Japan itself has encountered this obstacle in its effort to take South Korea to the ICJ in order to resolve their intense, na-

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58. *Id.*

59. Confidential conversations with senior Japanese diplomats.

60. *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Japan*, INT'L CT. JUST. (Oct. 6, 2015), <https://www.icj-cij.org/en/declarations/jp>.

61. Confidential interview with Vietnamese government officials, January 2013.

tionalistic dispute over ownership of Dokdo/Takeshima Island, some tiny but strategic rocks that Seoul occupies.<sup>62</sup>

Perhaps enough has been said about the PRC and the law of the sea to demonstrate that it does not regard UNCLOS as a significant restraint upon its power. This conclusion is bolstered by Beijing's recent, massive effort to quietly change the facts of the South China Sea by constructing airfields and other military facilities on at least seven maritime features without apparent regard for the niceties of international law.<sup>63</sup> The PRC built some of these new bases on artificial islands that it had constructed from low-tide elevations over which no country may legally claim sovereignty since, under UNCLOS, they are treated as part of the seabed.<sup>64</sup> The PRC, for example, has built a significant military base on the appropriately named Mischief Reef, a low-tide elevation that lies in the EEZ of the Philippines and therefore, as the arbitration tribunal confirmed, forms part of the continental shelf belonging to the Philippines.<sup>65</sup> Accordingly, the PRC cannot legitimately claim Mischief Reef as its territory.

There are additional UNCLOS issues that reveal Beijing's willingness to assert its power in defiance of the majority interpretations of the UNCLOS treaty. The PRC continues to challenge and risk military combat over U.S. air and naval reconnaissance activities within China's EEZ that, in the majority view, UNCLOS plainly authorizes.<sup>66</sup> Some modification of

62. *South Korea Rejects Japan's ICJ Proposal*, JAPAN TIMES (Aug. 31, 2012), <https://www.japantimes.co.jp/news/2012/08/31/national/south-korea-rejects-japans-icj-proposal/#.WcaKYoyPI2w>.

63. *See China Has Built Seven New Military Bases in South China Sea, US Navy Commander Says*, SOUTH CHINA MORNING POST (Feb. 15, 2018), <https://www.scmp.com/news/china/diplomacy-defence/article/2133483/china-has-built-seven-new-military-bases-south-china> (discussing China's recent unilateral activity in the East and China seas).

64. UNCLOS, *supra* note 30, arts. 13, 21.

65. *In re South China Sea Arbitration (China v. Phil.)*, PCA Case Repository 2013-19, Award, ¶ 1025 (2016).

66. Jeff M. Smith & Joshua Eisenman, *China and America Clash on the High Seas: The EEZ Challenge*, NAT'L INT. (May 22, 2014), <http://nationalinterest.org/feature/china-america-clash-the-high-seas-the-eez-challenge-10513>; see also Margaret K. Lewis, Note, *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U. L. REV. 1404, 1407 & 1414 (2002) (stating that although the United States is not a party to UNCLOS, the provisions are "nonetheless applicable to the United States as customary international law," though U.S. actions in the Chinese-American air crash



Beijing's position may be gradually, if invisibly, under way in light of the PRC's similar reconnaissance activities in the EEZs of other states, including those claimed by the United States in the vicinity of Guam, Hawaii, and the Aleutian Islands.<sup>67</sup>

More difficult to deal with may be Beijing's adoption of the exceptional method of drawing straight baselines in charting its territorial sea in circumstances where UNCLOS cannot justify straight baselines.<sup>68</sup> Also, Beijing has thus far vainly sought to win acceptance for a restricted UNCLOS definition of warships' right of "innocent passage" in the territorial sea of other states.<sup>69</sup> It also shows no sign of abandoning its vague

incident of 2001 did not "give rise to any legal responsibility" under UNCLOS in this case).

67. See generally 2018 OFFICE OF THE SEC'Y OF DEF. ANN. REP. TO CONG.: MIL. & SECURITY DEV. INVOLVING CHINA 2018 (discussing China's military progress, including its activity around U.S. territory).

68. Hyunsoo Kim, *China's Basepoints and Baselines Under the United Nations Convention on the Law of the Sea: A Critical Analysis*, 6 J. E. ASIA & INT'L L. 135, 153 (2013); J. Ashley Roach, *China's Straight Baseline Claim: Senkaku (Diaoyu) Islands*, 17 AM. SOC'Y INT'L L. INSIGHTS 7 (2013), <https://www.asil.org/in-sights/volume/17/issue/7/china's-straight-baseline-claim-senkaku-diaoyu-islands>.

69. U.N. Treaty Collection, Status of Treaties: United Nations Convention on the Law of the Sea, [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (last updated Apr. 10, 2019) ("The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state."). In addition, Article 6 of the PRC's Law on the Territorial Sea and the Contiguous Zone provides, "Foreign ships for non-military purposes shall enjoy the right of innocent passage through the territorial sea of the People's Republic of China in accordance with the law. Foreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China." *Zhonghua Renmin Gongheguo Linghai Ji Pilian Qu Fa* (中华人民共和国领海及毗连区法) [Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 1992, effective Feb. 25, 1992), art. 6, 1992 ST. COUNCIL GAZ. 69, translated at NAT'L PEOPLE'S CONG. CHINA, [http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383846.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383846.htm); see also Sébastien Colin, *China, the US, and the Law of the Sea*, 106 CHINA PERSPECTIVES 57, 59 (2016) (describing unsuccessful Chinese attempts to limit "innocent passage" to civilian ships); JAMES KRASKA & RAUL PEDROZO, *THE FREE SEA: THE AMERICAN FIGHT FOR*



claim to control most of the South China Sea through its assertion of a “nine-dash line” inherited from the pre-1949 ROC government, despite the Philippine arbitration tribunal’s rejection of that claim.<sup>70</sup>

In addition, neither the procedures nor the substance of the Air Defense Identification Zone (ADIZ) that Beijing has established in the East China Sea have been accepted by other governments affected,<sup>71</sup> although commercial airlines appear to have complied for business reasons. Nevertheless, Beijing has long hinted that it may soon establish a similar ADIZ in the currently more sensitive South China Sea.

### C. *Bilateral Agreements*

Does the PRC experience with other treaty obligations offer a firmer basis for optimism about effective international legal restraints on Beijing’s conduct? Its adherence to bilateral agreements often receives too little attention.

In some cases where bilateral agreements have been informal or non-transparent, it is not possible to confirm either the details of the alleged commitment or the basis for the claim that the PRC has failed to honor it. One example of the former is the charge by the U.S. government that, in 2015, Xi Jinping promised not to militarize contested islands in the South China Sea, yet nevertheless proceeded to quietly do so.<sup>72</sup> An example of the latter is the American charge that, also in 2015, despite the agreement between the two governments to refrain from cyber-hacking commercial enterprises in their respective countries, Beijing, after briefly suspending such at-

FREEDOM OF NAVIGATION 224 (2018) (discussing the right of innocent passage).

70. *In re South China Sea Arbitration* (China v. Phil.), PCA Case Repository 2013-19, Award, ¶ 278 (2016).

71. See generally Jae Woon Lee, *Tension on the Air: The Air Defense Identification Zones on the East China Sea*, 7 J. OF E. ASIA & INT’L L. 274 (2014) (noting that China’s declaration of an ADIZ was procedurally deficient due to its failure to consult with affected nations, and the boundaries are disputed by such affected nations); see also generally Peter Dutton, *Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AM. J. INT’L L. 691, 691–92, 703–07 (2009) (discussing the use of ADIZs and China’s assertion of an ADIZ).

72. Jeremy Page et al., *China’s President Pledges No Militarization in Disputed Islands*, WALL STREET J. (Sept. 25, 2015), <https://www.wsj.com/articles/china-completes-runway-on-artificial-island-in-south-china-sea-1443184818>.

tacks, subsequently resumed them.<sup>73</sup> More recently, each side has accused the other of violating informal commitments allegedly made in the course of their seemingly endless bilateral trade negotiations.<sup>74</sup>

In some cases where China has formally committed to bilateral agreements, its implementation has been questionable. China's 2017 unilateral announcement that the 1984 Sino-British Joint Declaration (Joint Declaration), supposedly guaranteeing the "one country, two systems" ideal under which China governs Hong Kong, "no longer has any realistic meaning" understandably aroused great concern in the diplomatic community.<sup>75</sup> The United Kingdom and the PRC had originally endowed this detailed document, which has no termination provision, with binding legal effect, even registering it as a treaty with the United Nations. Beijing's sudden statement that the Joint Declaration has lost its binding effect, made in an effort to deny the United Kingdom the right to protest against Beijing's alleged failure to honor its electoral commitments in the Joint Declaration,<sup>76</sup> caused many observers to question the value of concluding any human rights-related agreements with the PRC.

To be sure, controversies over the proper interpretation of the Joint Declaration have existed from its inception. They seem to have multiplied in recent days, as disputes have arisen, for example, over the right of the PRC's Hong Kong citizens to advocate for the Special Administrative Region's indepen-

73. Lily Hay Newman, *China Escalates Hacks Against the US as Trade Tensions Rise*, WIRED (June 22, 2018), <https://www.wired.com/story/china-hacks-against-united-states>; Kim Zetter, *US and China Reach Historic Agreement on Economic Espionage*, WIRED (Sept. 25, 2015), <https://www.wired.com/2015/09/us-china-reach-historic-agreement-economic-espionage>.

74. Chris Buckley & Keith Bradsher, *How Xi's Last-Minute Switch on U.S.-China Trade Deal Upended It*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/world/asia/trade-xi-jinping-trump-china-united-states.html>.

75. Joyce Ng, *Sino-British Joint Declaration on Hong Kong 'No Longer Has Any Realistic Meaning'*, CHINESE FOREIGN MINISTRY SAYS, SOUTH CHINA MORNING POST (June 30, 2017), <https://www.scmp.com/news/hong-kong/politics/article/2100779/sino-british-joint-declaration-hong-kong-no-longer-has-any>.

76. See Yasmeen Serhan, *What Is Britain's Responsibility to Hong Kong?*, ATLANTIC (July 17, 2019), (noting that there are experts in the United Kingdom who urge U.K. intervention in Hong Kong in response to China's apparent breach of the Joint Declaration).

dence from China,<sup>77</sup> and the right of PRC authorities to openly exercise jurisdiction in a portion of Kowloon's major railway station.<sup>78</sup> Yet neither party has challenged the view that the Joint Declaration prohibits the secret operation in Hong Kong of PRC police. Nevertheless, allegedly mainland secret police, or thugs in their employ, have kidnapped and illegally transported to the mainland foreign nationals residing in Hong Kong whom the PRC deemed to be engaged in undesirable politically sensitive activities. The highly publicized "disappearances" in 2015 of Hong Kong publisher Lee Bo, a U.K. national, and in 2017 of Xiao Jianhua, a Canadian billionaire residing in Hong Kong, offered vivid illustrations, despite Beijing's highly implausible explanations.<sup>79</sup> The foreigners who have suffered these unlawful actions are usually ethnic Chinese who have legally abandoned PRC nationality. A cynical observer might well conclude that, at least in those instances, the PRC has accorded foreign and Chinese nationals equal treatment.

Although neither side has regarded the 2009 cross-strait judicial assistance agreement between PRC and ROC proxy organizations as an "international" agreement,<sup>80</sup> Beijing's refusal to apply the agreement to the 2017 secret police detention of Taiwanese human rights activist, Lee Ming-cheh, further eroded confidence in its pledged word, both in Taiwan and

77. See generally Carole J. Petersen, *Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?*, 48 H.K. L.J. 789 (2018) (discussing the Hong Kong National Party's political challenges due to actions by Beijing and the Hong Kong Secretary for Security).

78. See, e.g., Kanis Leung et al., *Chinese Court Officers Did Not Have to Tell Hong Kong Government About Arrest at High-Speed Rail Station, Chief Secretary Matthew Cheung Says*, SOUTH CHINA MORNING POST (Jan. 5, 2019), <https://www.scmp.com/news/hong-kong/politics/article/2180855/chinese-court-officers-did-not-have-tell-hong-kong> (reporting that Hong Kong's chief secretary said that "Chinese court officers did not have to notify the Hong Kong government" about arrests at the West Kowloon rail station).

79. Thomas E. Kellogg, *News of a Kidnapping: The Gui Minhai Case and China's Approach to International Law*, 41 FORDHAM INT'L L.J., 1215, 1215, 1221, 1236–38 (2018).

80. Yu-Jie Chen & Jerome A. Cohen, *China-Taiwan Relations Re-Examined: The '1992 Consensus' and Cross-Strait Agreements*, 14 U. PA. ASIAN L. REV. 1, 38 (2019).

abroad.<sup>81</sup> So too did its cessation of repatriating to Taipei Taiwanese criminal suspects detained in China, which the agreement anticipated in a provision to which China had previously adhered.<sup>82</sup> Both of these departures from the terms of the innovative judicial assistance agreement were part of an ongoing campaign to pressure Tsai Ing-wen's government to accept the principle of "one China," which would preclude Taiwan from opting for formal independence from the mainland.<sup>83</sup>

To be sure, failure to honor bilateral commitments is not a new issue in the PRC's relations with the world, even if we limit our survey to the period after the end of the Cultural Revolution in 1976. The fact that other countries, including the United States, have similarly marred their record—in consular agreements, for example—does not permit us to ignore Beijing's experience. Implementation of consular agreements is especially important given their implications for civil liberties.

One consular case worth recalling involved a 2010 PRC criminal prosecution of a naturalized Australian national named Stern Hu, formerly from China, and three of his PRC colleagues employed in Shanghai by the Australian mining

81. Jerome A. Cohen & Yu-Jie Chen, *A Taiwanese Man's Detention in Guangdong Threatens a Key Pillar of Cross-Straits Relations*, CHINAFILE (Apr. 20, 2017), <http://www.chinafile.com/reporting-opinion/viewpoint/taiwanese-mans-detention-guangdong-threatens-key-pillar-of-cross-straits#comment-4761>.

82. Yu-Jie Chen & Jerome A. Cohen, *Beijing and Taipei Should End Their Tug of War over Repatriation of Criminal Suspects*, SOUTH CHINA MORNING POST (Sept. 28, 2016), <https://www.scmp.com/comment/insight-opinion/article/2023276/beijing-and-taipei-should-end-their-tug-war-over>; see also generally Yu-Jie Chen & Jerome A. Cohen, *China-Taiwan Repatriation of Criminal Suspects: Room for Human Rights?*, 48 H.K. L.J. 1029 (2018) (discussing the regulatory vacuum for repatriating nationals in China and Taiwan).

83. See Lawrence Chung, *New Taiwanese President Tsai Ing-wen Won't Be Able to Ignore Beijing, Analysts Say*, SOUTH CHINA MORNING POST (May 19, 2016), <https://www.scmp.com/news/china/policies-politics/article/1947283/new-taiwanese-president-tsai-ing-wen-wont-be-able> (reporting that China has "demanded" that President Tsai Ing-wen formally accept the "one China" principle); Chen & Cohen, *supra* note 80, at 28–29 (examining how departure from the agreement seeks to pressure Tsai's government to accept that Taiwan is part of China).

company Rio Tinto.<sup>84</sup> The PRC court refused to allow any Australian diplomats to observe the part of the trial that the PRC deemed to involve state secrets.<sup>85</sup> The Sino-Australian consular treaty provided for diplomats of each country to attend all trials of their nationals by the other side, but it did not deal specifically with the special situation wherein a trial is said to involve state secrets.<sup>86</sup> Although the PRC might have mustered a respectable legal interpretation of the agreement to support its exclusion of Australian consular observers from court in these circumstances, Australia's contrary, all-inclusive interpretation was probably the better view. Indeed, Dr. Yu-Jie Chen, a Taiwan legal scholar, discovered a PRC regulation dealing with the precise issue that called for the admission of foreign consular officials to such state-secret trials if the two states have a consular agreement.<sup>87</sup> This regulation was apparently unknown to the Australian Government and not revealed by the PRC, raising a further question of the roles of good faith and deceit in international relations.

Even more disturbing was the fact that the PRC Ministry of Foreign Affairs spokesman, in justifying the PRC's refusal to allow consular attendance at the secret part of the Stern Hu trial, did not even mention the anticipated issue of the proper interpretation of the consular agreement. Instead, he simply swept away the significance of the agreement, grandly proclaiming that "nobody has the right to speak ill of China's judicial sovereignty"—apparently, not even in the face of a treaty commitment made by China in the exercise of *its sovereignty*.<sup>88</sup>

Of late, PRC spokesmen have spouted this unpersuasive and dangerous nationalistic logic with increasing frequency, as also illustrated by the PRC's airy attempt to dismiss the Joint

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84. David Barboza, *Chinese Court Hands Down Stiff Sentences to Four Mining Company Employees*, N.Y. TIMES (Mar. 29, 2010), <https://www.nytimes.com/2010/03/30/world/asia/30riotinto.html>.

85. Jerome Cohen & Yu-Jie Chen, *China Rips Up Rule Book*, SYDNEY MORNING HERALD (Apr. 1, 2010), <http://www.smh.com.au/federal-politics/political-opinion/china-rips-up-rule-book-20100331-reqj.html>.

86. Agreement on Consular Relations Between Australia and the People's Republic of China, China-Austl., art. 11, Sept. 8, 1999, 2169 U.N.T.S. 494; *id.*

87. Cohen & Chen, *supra* note 85.

88. *Id.*

Declaration concerning Hong Kong.<sup>89</sup> In Beijing's view, at least in some instances, international law, and ostensibly binding bilateral commitments, must yield to claims of untrammelled Chinese sovereignty.

The previously mentioned Hong Kong kidnappings of Lee Bo and Xiao Jianhua<sup>90</sup> illustrate not only PRC violations of the Joint Declaration with the United Kingdom, but also Beijing's subsequent failures to honor some of the commitments made in its respective bilateral consular agreements with the United Kingdom and Canada.<sup>91</sup>

An even more recent example of Beijing's highhandedness in a bilateral consular dispute occurred in late 2018, when it famously detained two Canadian nationals in apparent retaliation for Canada's cooperation with an American request to extradite a major Chinese business executive.<sup>92</sup> The hapless detainees, seemingly held as hostages more than as legitimately suspected criminals, were not given the full protections prescribed in the Sino-Canadian consular agreement.<sup>93</sup> To this date, although both detainees have received belated, minimal consular access, they continue to be kept incommunicado and denied legal assistance of their own choosing, ostensibly on the basis of suspicion that they represent threats to national security. At least one is also reportedly subjected to all-night lighting in his detention cell.<sup>94</sup>

#### D. *Multilateral Human Rights Commitments*

While the preceding section examined China's adherence to bilateral agreements, including some related to civil and po-

89. Ng, *supra* note 75.

90. Kellogg, *supra* note 79, at 1221, 1237.

91. For an analysis of the respective consular efforts of the United Kingdom and Canada to gain access to their nationals, see *id.* at 1236–38.

92. *Ottawa Confirms China Has Detained Second Canadian*, STRAIT TIMES (Dec. 13, 2018), <https://www.straitstimes.com/world/americas/ottawa-says-second-canadian-questioned-in-china-now-missing>.

93. Consular Agreement Between the Government of Canada and the Government of the People's Republic of China, Can.-China, art. 8, Nov. 28, 1997, 1999 Can. T.S. No. 9.

94. Anna Fifield, *Canadian Analyst Held in China Is Kept in a Cell with Lights Always On*, WASH. POST (Dec. 21, 2018), [https://www.washingtonpost.com/world/asia\\_pacific/detained-canadian-analyst-kept-in-chinese-cell-with-lights-always-on/2018/12/21/451b2d72-0506-11e9-9122-82e98f91ee6f\\_story.html?noredirect=on&utm\\_term=.c960f4dad8db](https://www.washingtonpost.com/world/asia_pacific/detained-canadian-analyst-kept-in-chinese-cell-with-lights-always-on/2018/12/21/451b2d72-0506-11e9-9122-82e98f91ee6f_story.html?noredirect=on&utm_term=.c960f4dad8db).

litical rights, this section considers China's compliance with the world's foremost multilateral consular treaty, and with multilateral treaties explicitly concerned with human rights.

Although the PRC has concluded some forty bilateral consular agreements such as those mentioned above, it has yet to conclude such agreements with most states.<sup>95</sup> Thus, China's consular relations with most states are exclusively governed by the multilateral Vienna Convention on Consular Relations (VCCR), which by now has achieved the status of customary international law, and to which the PRC acceded in 1979.<sup>96</sup>

Those who have carefully studied Beijing's compliance with the VCCR have concluded that, after a poor record in the first two decades after its accession, in most cases where the PRC has detained foreign nationals, it has generally complied with the VCCR's requirements that it notify the detained person's government "without delay," and that it grant the foreign government's consuls timely access to visit the detainee.<sup>97</sup> To be sure, issues have sometimes arisen concerning what constitutes "delay," whether consular conversations with the detainee may be confidential, and whether the host government can restrict the topics to be discussed. That is why many countries have negotiated more specific bilateral agreements with the PRC in an attempt to remedy the inadequacies of the VCCR's text, including the failure to assure the detainee's access to legal counsel.

Recently, in a small number of highly publicized and politically sensitive cases, the PRC has blatantly refused to honor even its VCCR notification and access commitments. Indeed, two detained persons, who were formerly Chinese nationals before respectively acquiring Swedish and U.K. nationality, stated from the blatantly coercive environment of their PRC captivity that, not only did they not wish the protection of their governments, but they also wanted to renounce their foreign passports.<sup>98</sup> Thus, as Thomas E. Kellogg has pointed out, the PRC has now developed a "new and innovative way" of at-

95. Kellogg, *supra* note 79, at 1234.

96. *Id.*

97. *Id.* at 1231, 1235.

98. *Id.* at 1236.



tempting to evade its VCCR obligations and nullify the rights of the detainees and their countries under the VCCR.<sup>99</sup>

When we turn to Beijing's compliance with those multilateral treaties explicitly concerned with human rights, we see that, to its credit, Beijing has joined a surprising number of human rights conventions, including six of the core documents.<sup>100</sup> Foremost among the six are the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although in 1998 the PRC signed the other major human rights treaty associated with the ICESCR, the International Covenant on Civil and Political Rights (ICCPR), it has not yet ratified that demanding document.<sup>101</sup> However, as recently as 2018, China repeated its intention to do so. Its report of Beijing's human rights record to the latest U.N. Universal Periodic Review stated that "the relevant departments of the Government are steadily continuing to advance administrative and judicial reforms in preparation for its ratification."<sup>102</sup> Yet, absent an unanticipated liberalization of China's party-state government, Beijing's ICCPR ratification is a very long way off.

To what extent have Beijing's multilateral human rights treaty obligations restricted its power in practice? Usually, China's present leaders do not openly reject the values, norms, institutions, and procedures of the international human rights system in the same way that they have often rejected similar "Western" or "universal" principles and practices in their domestic legal system.<sup>103</sup> Perhaps the current leaders may regret

99. *Id.* at 1238.

100. The conventions are the Convention on the Elimination of All Forms of Discrimination Against Women; International Convention on the Elimination of All Forms of Racial Discrimination; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Covenant on Economic, Social, and Cultural Rights; and Convention on the Rights of Persons with Disabilities. SONYA SCEATS & SHAUN BRESLIN, *CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 33–34 (2012).

101. *Id.* at 5.

102. Human Rights Council, Working Group on the Universal Periodic Review, Nat'l Rep. Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21—China, ¶ 14, U.N. Doc. A/HRC/WG.6/31/CHN/1 (Aug. 20, 2018).

103. Cohen, *supra* note 1, at 233–34.

their predecessors' decisions to participate in certain human rights treaties, particularly the CAT and the Refugee Convention, which the PRC has often violated with its forced repatriation of North Korean refugees.<sup>104</sup> However, they do not openly denounce or disparage these treaties.

Instead, in their public statements, especially when defending against foreign condemnation of their failure to conform Chinese government conduct to their international human rights commitments, Chinese officials have rejected the application of relevant standards to PRC actions as infringements on PRC sovereignty. Frequently, they simply choose to ignore those commitments, and speak as though they are taking part in a world that lacks the impressive human rights system that has developed since the end of World War II. In such statements, they 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>105</sup>

In addition to often denying the facts upon which foreign protests are based, they also oppose such protests against the PRC's alleged human rights failures as impermissible interference in China's domestic affairs, and the hypocritical and unfair manipulation of human rights concepts for partisan international political purposes.<sup>106</sup> In recent years, PRC representatives at the United Nations have skillfully maneuvered to enhance acceptance of these views, especially among develop-

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104. See, e.g., *China's Repatriation of North Korean Refugees: Hearing Before the Cong.-Exec. Comm'n on China*, 112th Cong. 1 (2012) (noting on record that the PRC has violated human rights treaties due to forcible repatriation of North Korean refugees).

105. For an assessment of Beijing's rhetoric and practice in the international human rights system, see, e.g., Yu-Jie Chen, *China's Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT'L L. & POL. 1179, 1182-83 (2019) (arguing that the PRC is attempting to provide an alternative international human rights regime in place of the current Western regime).

106. *Id.* at 1186.

ing nations,<sup>107</sup> as the most recent Universal Periodic Review of China's conduct demonstrates.<sup>108</sup>

In principle, the PRC complies, if sometimes belatedly and incompletely, with reporting and other requirements of the various human rights treaties of which it is a member. Its reporting to the Committee on the Elimination of Racial Discrimination has been notoriously late: Its January 2017 report was submitted four years after the deadline,<sup>109</sup> probably because Beijing has difficulty rationalizing and concealing its abusive treatment of Tibetans, Muslims, and other minorities. In fact, China's submission of periodic reports to various treaty bodies, as is often the case with other states, is sometimes very late.<sup>110</sup> Moreover, the appearances of its representatives before the treaty bodies responsible for scrutinizing the behavior of national governments are often regarded by disinterested observers as unsatisfactory for a number of reasons, including the country's disappointing relevant achievements, the Chinese

107. See, e.g., Andrea Worden, *China Pushes 'Human Rights with Chinese Characteristics' at the UN*, CHINA CHANGE (Oct. 9, 2017), <https://chinachange.org/2017/10/09/china-pushes-human-rights-with-chinese-characteristics-at-the-un> (noting that the PRC has "overstate[d] the significance of the inclusion of its 'community of shared future' slogan in [recent Human Rights Council] resolutions"); Andrea Worden, *With Its Latest Human Rights Council Resolution, China Continues Its Assault on the UN Human Rights Framework*, CHINA CHANGE (Apr. 9, 2018), <https://chinachange.org/2018/04/09/with-its-latest-human-rights-council-resolution-china-continues-its-assault-on-the-un-human-rights-framework> (stating that the Human Rights Council adopted another resolution that included a PRC slogan in 2018); *id.* at 1190, 1194, 1198 (citing several examples of PRC strategies to advance its views and rally support from developing nations).

108. See, e.g., Andrea Worden, *China Deals Another Blow to the International Human Rights Framework at Its UN Universal Periodic Review*, CHINA CHANGE (Nov. 25, 2018), <https://chinachange.org/2018/11/25/china-deals-another-blow-to-the-international-human-rights-framework-at-its-un-universal-periodic-review> ("In a press conference following the review, Assistant Foreign Minister Zhang Jun claimed that more than 120 countries supported China's path during the review, and that China's formulation was 'completely correct.'").

109. Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined fourteenth to seventeenth periodic reports of China, ¶ 2, U.N. Doc. CERD/C/CHN/CO/14-17 (Sept. 19, 2018).

110. SCEATS & BRESLIN, *supra* note 100, at 35.

delegation's lack of candor, and the PRC's omissions and misleading reporting.<sup>111</sup>

China's relationship with two specific U.N. committees is particularly telling: the Committee Against Torture and the Committee on Economic, Social and Cultural Rights. Its responses to the latter committee have been generally less combative than its posture before other treaty body review committees. This is to be expected, since the PRC's official conception of human rights emphasizes economic and social rights over political and civil rights,<sup>112</sup> and therefore its goals align more naturally with those of this committee. Nevertheless, Beijing has rejected committee recommendations that do not align with its other goals. For example, it has repeatedly rejected committee recommendations to withdraw its reservation to Article 8 of the ICESCR, which mandates allowing free labor unions,<sup>113</sup> just as it has frequently refused to commit itself to permitting genuine collective bargaining.<sup>114</sup> These actions reflect the overall PRC policy of carefully choosing to adopt only those multilateral labor treaties that do not significantly curb its discretion.<sup>115</sup>

111. For an overview of China's human rights treaty reporting on which this paragraph is based, see SCEATS & BRESLIN, *supra* note 100, at 33–36 (finding that China has complied procedurally with a number of international human rights treaties, but has serious substantive compliance issues). For another example, see generally Felice Gaer, *International Human Rights Scrutiny of China's Treatment of Human Rights Lawyers and Defenders: The Committee Against Torture*, 41 *FORDHAM INT'L L.J.* 1165 (2018) (finding that China has been unwilling to facilitate the Committee Against Torture's examination of human rights in China).

112. SCEATS & BRESLIN, *supra* note 100, at 2.

113. Carole J. Petersen, *Preserving Traditions or Breaking the Mold? Transnational Human Rights Processes in the People's Republic of China and Hong Kong*, in *TRANSNATIONAL LEGAL PROCESSES AND HUMAN RIGHTS* 127, 146–47 (Kyriaki Topidi & Lauren Fielder eds., 2013).

114. See, e.g., Cynthia Estlund & Aaron Halegua, *What Is Socialist About Labour Law in China?*, in *SOCIALIST LAW IN SOCIALIST EAST ASIA* 257, 263–67 (Fu Hualing et al. eds., 2018) (describing the PRC union landscape, wherein one organization has a monopoly on collective worker representation).

115. For instance, while China has ratified International Labor Organization (ILO) conventions on child labor, discrimination, and occupational safety and health, it has not signed either the ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). See *Ratifications for China*, INT'L LAB. ORG. [ILO]: NORMLEX, <https://www.ilo.org/dyn/normlex/en/F?p=>

Beijing routinely continues to cast China as a developing country that needs to focus on vindicating economic and social rights—which it usually refers to as lifting many hundreds of millions of people out of poverty—before it can emphasize political and civil rights. As New York University Law School Professor Philip Alston has noted, however, this distinction is artificial, since political and civil rights are necessarily instrumental in assuring government accountability for the delivery of economic, social, and cultural rights.<sup>116</sup>

The PRC's engagement with the Committee Against Torture has been particularly troubled, often full of bluster and angry rhetoric from Chinese spokespersons who at times have even accused the committee of bias and defamation. Beijing has sought to have certain NGO attendees blacklisted from committee hearings, has used coercive measures to prevent would-be Chinese NGO representatives from traveling to Geneva, and has resorted to petty maneuvers such as last-minute delivery of reports that were only written in Chinese, despite the fact that the committee lacked the Chinese language competence to understand them.<sup>117</sup> Although PRC reports to the committee are sometimes extensive, as the committee noted in its 2016 concluding observations, the PRC continues to ignore many of the committee's recommendations.<sup>118</sup> Beijing's formal abolition of the police-administered punishment of "reeducation through labor," after a long process, stands as an important exception.<sup>119</sup> Yet, as previously mentioned, to a considera-

1000:11200:0::NO:11200:P11200\_COUNTRY\_ID:103404 (last visited Oct. 4, 2019) (listing the ILO conventions that China has ratified).

116. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Hum. Rights on His Mission to China*, ¶¶ 16–17, U.N. Doc. A/HRC/35/26/Add.2 (Mar. 28, 2017).

117. While providing reports that are only written in Chinese is technically not a violation of China's obligations as rules allow submission in the U.N. languages, such practice is considered bad faith. I thank Sharon Hom for this point.

118. Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of China, ¶ 6, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016).

119. Yu-Jie Chen & Jerome A. Cohen, *Freedom from Arbitrary Detention in Asia: Lessons from China, Taiwan and Hong Kong*, in OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA (David Law et al. eds., forthcoming 2019) (manuscript at 11), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3275169](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3275169).

ble extent, other forms of similar police-imposed punishments have continued to fill the newly-created gap, even while two other types of administrative punishment have also been formally abolished.<sup>120</sup>

Of course, within all U.N. institutions—such as the Security Council, the General Assembly, the Human Rights Council, and other fora—PRC diplomats do their best to fend off accusations against their government and to protect other dictatorial regimes against charges launched by the broader international community.<sup>121</sup> Such efforts are largely successful, although there are a few minor U.N. institutions that regularly pummel the PRC for its violations, especially the Working Group on Arbitrary Detention, which in dozens of cases has found the PRC guilty of violations of due process.<sup>122</sup> PRC delegates often dismiss even constructive human rights criticisms by U.N. bodies as politically motivated, beyond their mandates, or infringements of state sovereignty.<sup>123</sup>

120. *Id.*

121. See generally TED PICCONE, BROOKINGS INST., CHINA'S LONG GAME ON HUMAN RIGHTS AT THE UNITED NATIONS 2 (2018) (discussing "China's growing involvement in the U.N. human rights system"); Andrew J. Nathan, *China and International Human Rights: Tiananmen's Paradoxical Impact*, in THE IMPACT OF CHINA'S 1989 TIANANMEN MASSACRE 206, 206 (Jean-Philippe Béja ed., 1st ed. 2010) (exploring that "China's post-Tiananmen re-entry into world diplomacy and its economic rise" have helped Beijing find "ways to blunt the impact of international human rights advocacy efforts on its internal politics and to shape the international human rights system to its own advantage"); Gaer, *supra* note 111 (finding that China feigns ignorance towards human rights criticism); SCEATS & BRESLIN, *supra* note 100 (offering examples of China's tendency to downplay criticism against itself).

122. See generally U.N. Office of the High Comm'r of Human Rights, Opinions Adopted by the Working Group on Arbitrary Detention, <http://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx> (last visited Oct. 7, 2019) (listing opinions of the Working Group on Arbitrary Detentions); see also JARED GENSER, THE UN WORKING GROUP ON ARBITRARY DETENTION: COMMENTARY AND GUIDE TO PRACTICE (forthcoming Sept. 2019) (discussing the Working Group on Arbitrary Detention).

123. See, e.g., *China at the UN: Shouting Down the Critics*, HUMAN RIGHTS IN CHINA (Mar. 15, 2016), <http://www.hrichina.org/en/press-work/press-release/china-un-shouting-down-critics> (reporting that the Chinese Ambassador to the U.N. fended off accusations of human rights abuses by framing the accusations as "new interventionism . . . under the banner of human rights and humanitarianism" that would "openly politicize human rights issues").



Beijing usually resists the efforts of U.N. special rapporteurs to visit and report on in-country human rights conditions. Those few who have managed to wrangle invitations after years of delay, while recognizing the extent of PRC progress in implementing certain human rights, have nevertheless complained about the lengths to which the regime has gone to limit their freedom to make observations and contacts during their visits.

Two classic instances of Beijing's resort to obstruction and obfuscation during the visits of special rapporteurs come to mind. The first is the 2005 visit of Professor Manfred Nowak of the University of Vienna, then Special Rapporteur on Torture, which took place nearly ten years after the initial request. Despite the many difficulties presented, Nowak, interpreting his torture mandate broadly, gave the PRC an impressive critique of its overall criminal justice system.<sup>124</sup> Consequently, Beijing has consistently rejected all subsequent requests for a visit by his successors. The second instance is the 2016 visit by Professor Philip Alston, as Special Rapporteur on Extreme Poverty and Human Rights, who noted that his official hosts consistently thwarted his attempts to meet with NGOs and other civil actors.<sup>125</sup>

However, as previously noted, implementation of some of the PRC's international human rights obligations is slowly progressing. It often takes the form of improved legislation and regulatory decrees. However, these new domestic rules frequently prove difficult to enforce and are sometimes even illusory in practice.<sup>126</sup> Moreover, Chinese courts are not allowed to apply international human rights norms, or even domestic constitutional norms.<sup>127</sup>

For example, the new constitutional amendment and legislation establishing "supervision commissions," which are authorized to detain incommunicado and investigate for up to six months non-Party government officials as well as Party

124. For the text of this critique, see generally Manfred Nowak (Special Rapporteur on Torture), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mission to China*, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006).

125. Alston, *supra* note 116, ¶ 4.

126. Cohen, *supra* note 1, at 237.

127. Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. Pa. E. Asia L. Rev. 51, 84–87 (2011).



members, seem designed more to provide an official fig leaf of legality for arbitrary incarcerations, rather than norms to protect internationally guaranteed freedoms of the person.<sup>128</sup> In the case of PRC compliance with the CAT, torture violations remain rampant nationwide, and even the PRC's legislative improvements have failed to meet the standards that its adherence to the CAT requires.<sup>129</sup>

Despite China's extraordinary achievement in lifting as many as 800 million of its citizens out of poverty and creating a middle class of perhaps 400 million,<sup>130</sup> much remains to be accomplished even regarding implementation of the ICESCR. The regime justifiably faced criticism for its failure to adopt the fundamental premise that the treaty creates individual rights to the economic, social, and cultural benefits prescribed therein.<sup>131</sup>

Of course, the PRC's shockingly repulsive suppression of the Muslim residents of the Xinjiang "autonomous" region has given rise to massive continuing violations of the ICESCR, as well as most of the other human rights treaties to which the PRC has committed itself. The arbitrary detention—in what can only be described as concentration camps—of perhaps one to two million Uyghur and Kazakh people<sup>132</sup> may have exceeded even the scale of the 1957–58 "anti-rightist" campaign that launched "re-education through labor" (RETL) throughout the country.

While the Communist Party continues to boast that it abolished RETL in 2013, "custody and repatriation" in 2003,

128. Jamie P. Horsley, *What's So Controversial About China's New Anti-Corruption Body?*, DIPLOMAT (May 30, 2018), <https://thediplomat.com/2018/05/whats-so-controversial-about-chinas-new-anti-corruption-body>.

129. Chen & Cohen, *supra* note 120 (manuscript at 7–8); Nowak, *supra* note 124, at 2.

130. Javier C. Hernández & Quoc Trung Bui, *The American Dream Is Alive. In China.*, N.Y. Times (Nov. 18, 2018), <https://www.nytimes.com/interactive/2018/11/18/world/asia/china-social-mobility.html>.

131. See generally Alston, *supra* note 116 (finding that China has serious problems related to equality and poverty, among others).

132. Lucas Niewenhuis, *Re-Education Camps in China's 'No-Rights Zone' for Muslims: What Everyone Needs to Know*, SUPCHINA (Aug. 22, 2018), <https://supchina.com/2018/08/22/xinjiang-explainer-chinas-reeducation-camps-for-a-million-muslims>.

and very recently “custody and education,”<sup>133</sup> a variety of similar police-administered punishments have continued under other names for alleged drug, prostitution, political, and other offenses. Now, in Xinjiang, the Party has even dared to return to “re-education” language that almost literally revives RETL in name as well as reality.<sup>134</sup> Moreover, in Xinjiang, the labor aspect of this punishment has increasingly been reemphasized as reliable reports have recently surfaced about forced factory labor, to which many detained persons are now subjected in exploitative conditions as a key component of their “education” and “transformation.”<sup>135</sup>

The detention of the overwhelming majority of these persons in Xinjiang is completely lawless in domestic terms, as national legislation has not authorized it, as required by the PRC’s Law on Legislation.<sup>136</sup> Only a relatively small percentage of Muslim detainees has been detained in accordance with the nation’s criminal justice legislation. Even those Xinjiang minority residents who have not been detained suffer from suffocating technological and personal surveillance and constant, mind-numbing “education,” as well as the forced requirement that they accommodate in their homes the over one million Party and government officials who are posted there to “educate” and report on them.<sup>137</sup> These measures in Xinjiang, some of which were first honed in the PRC’s suppression of its Tibetan minority, appear to have gone beyond even those that have largely silenced Tibetans.

133. *Recording & Review Pt. 4: The Last Days of “Custody & Education”*, NPC OBSERVER (Dec. 25, 2018), <https://npcobserver.com/2018/12/25/recording-review-pt-4-the-last-days-of-custody-education>.

134. See Niewenhuis, *supra* note 132 (reporting that, while the Chinese government does not label these programs “re-education” camps, they did not deny their existence or purpose).

135. Dake Kang et al., *US Sportswear Traced to Factory in China’s Internment Camps*, ASSOCIATED PRESS, Dec. 19, 2018, <https://www.apnews.com/99016849cddb4b99a048b863b52c28cb>; *id.*

136. See Donald Clarke, *No, New Xinjiang Legislation Does Not Legalize Detention Centers*, LAWFARE (Oct. 11, 2018), <https://www.lawfareblog.com/no-new-xinjiang-legislation-does-not-legalize-detention-centers> (arguing that national legislation does not legalize detention centers).

137. Darren Byler, *China’s Government Has Ordered a Million Citizens to Occupy Uighur Homes. Here’s What They Think They’re Doing*, CHINAFILE (Oct. 24, 2018), [www.chinafile.com/reporting-opinion/postcard/million-citizens-occupy-uighur-homes-xinjiang](http://www.chinafile.com/reporting-opinion/postcard/million-citizens-occupy-uighur-homes-xinjiang).

## V. CONCLUSION

To what extent does this review of some aspects of the PRC's theory and practice of international law suggest that the current rules-based world order significantly restrains the exercise of China's growing power? It is comforting that the PRC no longer openly disdains the institutions and norms of the world community, as it did during its earliest years in response to its rejection by the United Nations and many major Western powers. In the almost half a century since its entry into the United Nations, the PRC's attitudes toward international law, at least at a high level of abstraction, do not appear to vary significantly from those of other major powers. This is true despite Beijing's recent domestic rejection of Western or universal rule of law principles, and its often lawless repression of its own citizens in practice.<sup>138</sup> The PRC, like other players, now expresses belief in the existence and importance of international law at the wholesale level, and that is a notably encouraging sign. It obviously has come to recognize the utility of this posture for donning the mantle of contemporary legitimacy.

Although in every specific context, the PRC presses for an interpretation of international law that it believes most favorable to its national interests, that, of course, is how all states usually participate in international relations. However, it is also clear that in its interpretations of the law of the sea, human rights, and bilateral and multilateral treaty relationships, Beijing, more often than the other important players, places itself in a minority position, advocating for either distinctive readings of the dominant rules or their formal revision. Spurred by the PRC's recent detention of two Canadians as apparent hostages in response to Canada's cooperation with the American extradition request mentioned above, a former Canadian ambassador to China, David Mulrone, recently stated: "China is an increasingly irresponsible power and partner, one that feigns compliance with international norms only when it is convenient to do so."<sup>139</sup>

The PRC's attitude toward international law appears to be in transition, inching gradually toward a different and broader

138. Cohen, *supra* note 1, at 233–34, 238–45.

139. David Mulrone, *We Must Finally See China for What It Truly Is*, GLOBE & MAIL (Dec. 27, 2018), <https://www.theglobeandmail.com/opinion/article-we-must-finally-see-china-for-what-it-truly-is>.

approach. Some observers believe that China has already become a revisionist power that intends to reshape relations and relevant rules, at least within East Asia. One respected analyst, who has generally been sympathetic to China's ambitions, recently wrote that: "[China's] assertive behaviour in the South and East China Seas seems to confirm Southeast Asian perceptions that China is trying to reinvent the regional order on its own terms."<sup>140</sup>

Analysts sensitive to the pull of history even anticipate some form of contemporary revival of East Asia's traditional Sinocentric system. In view of the extent to which the PRC leadership has been stoking the fires of Chinese nationalism by recurrent emphasis on the country's impressive historic accomplishments and dominance of East Asia until the nineteenth century interference of Western imperialism, they believe that Beijing hopes to create an expanded version of its millennial "*tianxia*" (all under heaven) governance.<sup>141</sup> Under that system, neighboring governments were expected to pay tribute to the Emperor in Beijing in return for being blessed with his legitimation and munificence.<sup>142</sup> Yet some historians debate the durability and nature of "*tianxia*" in different eras, and question the current official Chinese version of Beijing's past preeminence in East Asia, as well as the "century of humiliation" that China is said to have suffered beginning with the First Opium War in 1839.<sup>143</sup>

Other experts, spurred by Xi Jinping's frequently-expressed aspirations for Chinese leadership in dealing with universal problems such as world trade, economic development, climate change, and environmental pollution; by his ambitious but vague references to achieving "the Chinese Dream of national rejuvenation"; and by his attractive international advocacy of enlightened and generous Chinese leadership towards a "community of shared future for mankind," see an emerging PRC effort to replace or alter contemporary international law

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140. Huang Jing, *Here Is What China Wants to See Happen in Asia (and America May Not Like It)*, NAT'L INT. (Aug. 28, 2017), <http://nationalinterest.org/blog/the-buzz/here-what-china-wants-see-happen-asia-america-may-not-it-22082>.

141. Ji-Young Lee, *CHINA'S HEGEMONY: FOUR HUNDRED YEARS OF EAST ASIAN DOMINATION* 2–3 (2016).

142. *Id.* at 13–14.

143. *Id.* at 35–39.

and governance on a global scale.<sup>144</sup> Certainly, before experiencing the difficulties (or opportunities) presented by President Trump, Xi urged the United States to join China in creating “a new model of major-country relations.”<sup>145</sup>

In 2014, under Xi's direction, the fourth plenary session of the eighteenth Communist Party Congress endorsed international law as part of its emphatic support for “advancing the law-based governance of China.”<sup>146</sup> More recently, however, Xi's many speeches, though prominently concerned with international relations and the frequently invoked “community of shared future for mankind,” have made little mention of international law itself. This author tends to be skeptical, if not cynical, about prospects for international law to significantly restrain PRC power. Yet Xi's future rhetoric is unlikely to sponsor a serious substitute for contemporary international law and its institutions.

Moreover, China's growing power is not as securely based as widely assumed,<sup>147</sup> both because of a host of increasingly formidable domestic problems and because regional and other foreign powers, not only a post-Trump United States, are likely to respond to the challenge of a rising China and balance the PRC's quest for expansion. The PRC's influence is also likely to be limited by the disastrous impact of its political and civil rights violations—especially its massive Xinjiang atrocities—on its quest for “soft power,” and by embarrassing disappointment in its foreign policies, as its highly touted Belt and Road Initiative may turn out to be.

In these circumstances, the PRC will probably persist in its present efforts to shape international law to its interests issue

144. Liza Tobin, *Xi's Vision for Transforming Global Governance: A Strategic Challenge for Washington and Its Allies*, 2 TEX. NAT'L SECURITY REV. 155, 155 (2018). For an especially thoughtful recent analysis, see generally *supra*.

145. *Xi Offers Ways to Build New Model of Major-Country Relationship with US*, CHINA DAILY (Sept. 23, 2015), [www.chinadaily.com.cn/world/2015xivisit/2015-09/23/content\\_21963566.htm](http://www.chinadaily.com.cn/world/2015xivisit/2015-09/23/content_21963566.htm).

146. *Communique of the 4th Plenary Session of the 18th Central Committee of CPC*, CHINA INTERNET INFO. CTR. (Dec. 2, 2014), [http://www.china.org.cn/china/fourth\\_plenary\\_session/2014-12/02/content\\_34208801.htm](http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm).

147. Cohen, *supra* note 1, at 246; see Jerome A. Cohen, *The Insecurity Underpinning Xi Jinping's Repression*, WASH. POST (Sept. 23, 2015), [https://www.washingtonpost.com/opinions/the-insecure-underpinning-of-chinese-repression/2015/09/23/f8f33720-6092-11e5-9757-e49273f05f65\\_story.html?utm\\_term=.5c2f3a0e0988](https://www.washingtonpost.com/opinions/the-insecure-underpinning-of-chinese-repression/2015/09/23/f8f33720-6092-11e5-9757-e49273f05f65_story.html?utm_term=.5c2f3a0e0988) (claiming that Xi's recent actions indicate instability).

by issue. It can be expected to try to narrow the existing gap between it and the majority, in part by accepting majority rules in instances wherein they suit China's evolving power position, as in WTO dispute resolution; in part by occasionally convincing the majority to accommodate PRC positions and innovations, as it recently did in establishing the AIIB; and in part by continuing, in various ways, to undermine those norms to which it is unalterably opposed, as in the case of many aspects of the law of the sea and human rights.

A great immediate opportunity for the PRC to shape international law now exists in the bilateral and multilateral negotiations required to deal with the many new and important challenges that cry out for world regulation. Attempts to cope with issues such as climate change and the environment have only just started. Discussions with China relating to arms control, cyber security, the Arctic, and outer space are at an even earlier stage. It is unclear to what extent and how rapidly the PRC will be prepared to undertake serious negotiations on these topics.

Change must inevitably continue in the development of international law, and such change will be affected by and reflected in world power relations. If China's rise persists, its voice will be—and should be—increasingly heard. The crucial issue is not whether change will occur, but by what means it will take place. One can only hope that the major powers, especially China and the United States, will make greater use of existing international and regional institutions, including the United Nations, the ICJ, and UNCLOS agencies; foster the creation of new organizations such as the AIIB; and establish much needed East Asian institutions for the settlement of territorial and maritime disputes and for the protection of human rights.

This will require much greater effort and commitment to international law on the part of the United States as well as China, starting with the long-delayed U.S. ratification of UNCLOS, and then both countries' acceptance of the International Criminal Court's jurisdiction. Progress in international law is interactive. The United States cannot remain on the sidelines, preaching "do as I say, not as I do" and seeking to reap the benefits of the international system without subjecting itself to its burdens and discipline. A new, more positive American endorsement of international law, in both theory

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and practice, will give the PRC an incentive to increasingly submit its own conduct to an evolving “rules-based order.”