February 2022 - Issue 17

Policy Brief

Réseau d'analyse stratégique
Network for Strategic Analysis

The Space Occupied by International Law in the Dynamics of Sino-American Competition

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Law proves to be omnipresent in international relations today, notably acting as a regulator of interstate activities or as a vector of legitimization. Although it has a universal vocation, the approach of states towards international law is neither homogeneous nor systematic. In this regard, the major powers have repeatedly demonstrated that the pursuit of political interests is sufficient to limit, or even ignore, certain principles of international law. Paradoxically, the law is recurrently used by states when they consider that it can serve the pursuit of their strategic objectives. Ultimately, it is established that politics and law are intrinsically linked; this is further demonstrated at the level of the international system, where it is primarily the same actors who act as legislators, interpreting and enforcing it. As a result, the opportunities for the instrumentalization of international law in the pursuit of political objectives have multiplied in parallel with the development of the legal network. Finally, the Sino-American rivalry is not unrelated to this phenomenon.

The purpose of this policy brief is to assess the space that international law occupies in the competitive dynamic between Washington and Beijing. It begins with an analysis of the relationship accorded to international law by each of the two state governments. It then touches on the semantic debate surrounding the conceptualization of the phenomenon of "lawfare," recognized as a type of instrumentalization, which is perceptible within the present dynamic. Subsequently, cleavages bearing legal ramifications are addressed, namely, Chinese revisionism of the international law of the sea, the legalization of autonomous lethal weapons and, finally, the grey zone of cyberspace. Lastly, the brief concludes with recommendations for the Canadian government.

The Respective Relationship of the United States and China Towards International Law

The United States is recognized as the instigator of the international system. Notwithstanding the recent "Trumpist" anomaly, U.S. presidencies have generally positively influenced the development and maintenance of international organizations, in addition to acting as leaders within them. However, the commitment to the establishment of these institutions has proven to be preeminent to the respect of the rules that have emerged from them. Theoretically dualist, the various interpretations of international law in the United States converge to varying degrees on the notion of exceptionalism; granting Washington a special status and, thereby, justifying it a singular margin of autonomy on the international scene. Although this view, when combined with its history of instrumentalization of international law, undermines the coherence of U.S. discourse, it does not prevent the United States from repeatedly appealing to the importance of the rule of law in international affairs. This rhetoric is illustrated on several occasions, as was the case during President Barack Obama's (2009-2017) trip to Australia in 2011 or, more recently, by President Joe Biden's statement on the role of the United States in the world. While

this exceptionalist sentiment is legally questionable, Washington still seeks to defend the liberal international order it has actively constructed and, consequently, the rule of law that applies to it.

China's relationship with international law does not share this history. Indeed, it is recognized that law serves a different function within Chinese culture. For many senior Chinese officials, the liberal international order is the object of conflict and unfair competition. This rhetoric is rooted in the so-called "century of humiliation." During this era, Chinese authority claims to have been subjugated by Western powers. Effectively, several "unfair treaties" were imposed on China, impacting its territorial integrity and sovereignty. As a result of this history, China has developed some resentment towards the West and international law, the latter having become identified as an instrument of domination. Consequently, the imprint of Chinese leadership in international organizations has long been marginal. The liberal international order, as well as the norms and values that have been developed and that are conveyed by it today, do not have the same resonance with the Asian state. Although China has developed in parallel with this systemic evolution, international law is nonetheless important to the Chinese government, both as a vehicle of international legitimacy and as a strategic instrument. The Chinese government has long been on the sidelines and is now seeking to play an active role in the legal environment. Nevertheless, Beijing remains limited in the scope of its normative legitimacy because of the ideological gap between its paradigmatic positioning and that of the liberal international order. Today, Beijing perceives its rise as a "rejuvenation," which, interrupted by the West, tends to restore it to its former glory. In part, this perception comes from the re-emergence of the ancient Chinese belief of *Tianxia*. The latter, which trades the equality between nations of the UN model for a Sinocentric hierarchical structure, is diametrically opposed to the liberal international order.

Beyond the competition in which each seeks to promote a narrative frame and direct normative proliferation, both states perceive a strategic utility in international law. However, they do not conceive it in the same way. While Washington defers considering an alternative of a more offensive use of international law, Beijing explicitly identifies the law as a "military" instrument that can be used to defend its interests. Recognized by the expression "*Falu zhan*," and better translated by the English term "lawfare," this conceptualization of law as an instrument of war was codified in 2003 by the Chinese Communist Party (CCP) in a document entitled "Political Work Regulations of the Chinese People's Liberation Army." For Beijing, the law is a tool that allows it to maintain a strategic advantage over its adversary either before, during or after a conflict.

Semantic Complexity

Law and politics cannot be separated and interact on a multitude of levels. One possible interpretation of law is that it can be defined as a goal, a means, or an obstacle in its relationship to politics. In this respect, the activities of instrumentalization and "lawfare" are consistent with this conception. The conceptualization of a legal operation as a war operation became relevant again following the War on Terror in 2001. Popularized by U.S. Major General Charles J. Dunlap Jr., the term "lawfare" originally referred as "a method of warfare where law is used as a means of realizing a military objective." Although some consider the term to be pejorative, Dunlap conceptualizes it as neutral and identifies it as an indispensable dimension of modern conflict. While retaining this notion of use in the pursuit of strategic interests, the term has gradually expanded to include areas of activity outside the traditional battlefield. Nevertheless, limitations persist, whether in relation to the applicability of the term to activities outside the military or to the sometimes complex dissociation of "lawfare" from current legal practices. This ambiguity supports the idea that the concept will continue to evolve and that not all of its ideals will reach a consensus. Furthermore, it is relevant to note that this form of instrumentalization of international law

has developed almost in tandem with the concept of hybrid warfare, resulting in a mutual reinforcement of the two concepts. Although there is a semantic blurring of the conceptualization of "lawfare," there is every reason to believe that the avenues for instrumentalizing international law and "lawfare" will only increase. Given the volatility of its definition, this brief will use "lawfare" in its broadest sense, as the use of law in pursuit of strategic objectives, without confining the phenomenon to the military framework.

South China Sea: Chinese Revisionism of the International Law of the Sea

Since the beginning of the 20th century, the South China Sea has been the site of multiple claims. The most notorious of these claims relates to Beijing's drawing of the "nine-dash line," which was originally mapped in 1947. The legal debate on this controversial issue gained momentum in 2009, following a statement by Beijing that it has "unquestionable" sovereignty over the islands and adjacent waters in the region. The delineation, which was the subject of arbitration proceedings by a tribunal of the Permanent Court of Arbitration following a 2013 initiative by the Philippines, was declared to have no legal basis under international law. Although the decision was in favour of the Philippines, China rejected it, arguing that the ruling will have no effect on "territorial sovereignty and marine rights" in the region. And it continues to act as if it were *de facto*. As such, Beijing seeks to consolidate its extensive territorial claim in the region through political, economic and military factors, rather than through direct confrontation.

To this end, the law is identified as a central component of the CCP's strategy for achieving this objective. For example, a recent law passed by the Chinese government, the China Coast Guard (CCG) Law, grants Chinese authority a coercive power in the South China Sea that systematically violates several articles of the United Nations Convention on the Law of the Sea (UNCLOS). This legislation, which is intended to regulate the activities of the Chinese Coast Guard, extends to the entirety of "waters under the jurisdiction of China." The drafting of this law, as well as recent Chinese enforcement activities within the Philippines's exclusive economic zone (EEZ), tend to substantiate the fears of many that Beijing is seeking to expand its legislative activities in the disputed maritime area in order to consolidate its sovereignty claims. Firmly arguing that it is not in the wrong, China is seeking to modulate the acceptability of its actions in the region. Having significantly disrupted the regional geopolitical environment, Beijing aims to institute a legal order to crystallize its gains; relying on a reconception of the perceived "illegality" surrounding its behaviour. By perpetuating maritime activities on the basis of a decidedly erroneous interpretation of UNCLOS' provisions, Beijing is attempting to manipulate customary international law. Through repetition and tacit acceptance, or in this case, through the existence of an implicit deterrent to opposition, China seeks to reshape the legal environment in the South China Sea with the aim of increasing its control.

For Washington, this region is of particular importance. In addition to sharing many interests with its allies in the South China Sea periphery, the latter also have a long-standing commitment to the liberal international order established by the United States. Nevertheless, although the previous U.S. administration firmly asserted that China's actions violated international law and declared its support for the arbitration tribunal's verdict in 2016, the scope of Washington's rhetoric remains limited. Essentially, the U.S.'s call to respect the international law of the sea is significantly undermined by its failure to ratify UNCLOS. In this regard, the history of U.S. policies toward the applicability of the international law of the sea exemplifies Washington's ambivalent attitude toward the use of the rule of law in its management of international affairs. The U.S.'s failure to ratify the treaty also adds to China's argument, as well as expanding its range of possible actions. Furthermore, Secretary of State Anthony Blinken's reassertion of U.S. support for the 2016 verdict earlier this year is also expected to have a modest impact. Given that the U.S. treatment of various international courts is clearly ambiguous, this diplomatic posture is easily

underscored by Beijing in its defence. For the United States, which shares economic and security interests in addition to counterbalancing Chinese influence, future actions in the South China Sea are of key strategic importance to Washington.

Autonomous Lethal Weapons and International Law

The development of new military technologies, such as lethal autonomous weapons systems (LAWS), is accompanied by significant legal concerns. In this regard, U.S. ambivalence about possible LAWS legislation creates a window of opportunity for Beijing. Although both the United States and China participated in expert group meetings addressing the topic between 2014 and 2019 under the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, the two rivals are adopting a nuanced, but oppositional, discourse. In 2019, while Washington considered the drafting of a binding legal instrument on the subject to be premature and deemed that it was necessary to avoid stigmatizing the use of this type of military equipment, Beijing positioned itself in favour of a ban. Indeed, China has openly stated the importance of legislating these new technologies in order to act complementarily with existing international humanitarian law. However, the definition proposed by its diplomatic team is deliberately flawed. Moreover, the lack of further clarification of its conceptualization of future legislation is telling. This stance is identified as an instrumentalization of the legal discourse on the subject in order to delegitimize the position maintained by the United States.

China is taking advantage of U.S. ambivalence to portray itself as the actor advocating for the creation of a binding instrument, while at the same time pursuing research and development activities in the field. The U.S.'s position, based on the logic of avoiding granting a strategic advantage to an adversary by denying it to oneself, if maintained, will perpetuate the CCP's strategic advantage. Recent developments in this regard have only confirmed that the Americans prefer the adoption of a code of conduct rather than binding legal principles. Beijing's continued doublespeak must lead to a strategic review in Washington. From the outset, the United States must stop using rhetoric aimed at reducing the risks associated with the use of this type of military equipment in order to consolidate its position on the development of non-binding principles. In the absence of such principles, Washington's discourse does more harm than good to U.S. strategic interests, as China can maintain this doublespeak without real fear of repercussions.

Cyberspace: A Grey Zone

Cyberspace is also of particular importance in the Sino-American rivalry. The fact that states are not positioned in the same way in cyberspace has an impact on their enthusiasm for normative development. In a report by the group of governmental experts tasked with examining developments in information and telecommunications in the context of international security in 2013, participating states – including China and the United States – had agreed on the applicability of the United Nations Charter in cyberspace. Two years later, China rejected the new expert report in which the importance of international humanitarian law principles within cyberspace was recognized. However, in the summer of 2021, China accepted the applicability of international humanitarian law to cyberspace in the case of armed conflict. For the Americans, the use of declaratory principles is in line with their cyber strategy. However, the latter is strongly criticized for its focus on deterrence, which has proven to be progressively ineffective. Indeed, while the United States is committed to respecting international humanitarian law across the entire spectrum of its military activities, China's engagement in this regard is more symbolic than sincere. Although China has demonstrated its support for the rule of law on global security issues, its stance on the application of international law, particularly on international humanitarian law in

cyberspace, remains wavering. It is, in turn, reasonable to question whether China truly intends to formally commit to this support, either through binding treaty or customary law development. Moreover, the stigmatization of Chinese behaviour in cyberspace, which is explicitly described as malicious by Washington and its allies, reinforces this doubt.

Finally, even if states seem to agree on the applicability of international law in cyberspace, a problem persists. The principles elaborated by the UN Charter, as well as those emanating from customary international law, are strongly colored by the environment in which they have evolved. As a result, these principles were conceived within a logic where states could alter international stability through coercion or brute force; a logic that is more nuanced in cyberspace. Prior to the creation of binding rules, it is useful to compare the position of states vis-à-vis the maintenance of the status quo. For the CCP, cyberspace is the intersection of three major concerns: maintaining regime legitimacy, national security and technological-economic dependence. In their view, existing norms are not intended to regulate activities in cyberspace and it is for this reason that China is attempting to play a role in normative proliferation. In this sense, although it has participated in the discussions on the subject, China can hope to continue its cyber activities, known as offensive, as these are orchestrated under the qualitative criteria of an "armed conflict."

As for Washington, its continued passive stance puts it at a disadvantage in the face of the *status quo*, a consequence of its inadequate deterrence strategy. Although the United States has recently supported France's move to encourage dialogue on norms in cyberspace, it is refraining from leading the effort to move beyond declaratory principles. Paradoxically, history has shown that the creation of binding international instruments regulating activities in an area prone to an arms race is one of the best ways to restore dialogue and reduce tensions. While President Biden has reiterated the importance of norms and institutions in his cyber strategy, much remains to be done.

What Can Canada Do?

Canada is not entirely unfamiliar with the phenomenon of instrumentalization of international law. Although it is not known for diligently engaging in this activity, it has resorted to this strategy in the past. However, the dynamics of great power competition in the international system must lead Canada to reconsider the strategic use of international law. The idea that a state can advance its strategic interests or harm another state by using international law is no longer in question. While this is not new, it is necessary for Canada to reassess this threat. Today, we must consider "lawfare" as a type of activity whose existence is integrated with that of hybrid conflicts. In this regard, a state adhering to the rule of law, such as Canada, cannot hope to engage in the same tactics as authoritarian states that view international law almost exclusively as a strategic tool. Nevertheless, Ottawa can hope to play a significant role in the American response to Beijing's manoeuvres. Despite its unquestionably selective behaviour, the American approach to international law, if it were to become homogenized, could significantly undermine Chinese activities.

1. The Canadian Government Must Encourage the U.S. Congress to Change its Approach to UNCLOS.

As a member of UNCLOS, Canada should seek to persuade the U.S. Congress to join the treaty. As mentioned earlier, Washington is a key player in the development of new standards. While the U.S. Congress is undecided on the scope of UNCLOS ratification, Canada should seek to reorient the U.S. discussion to the symbolic significance of ratification, rather than its short-term strategic use. By demonstrating its unconditional support for international law, the United States would enhance the

legitimacy of its call for compliance with the rule of law. Moreover, Canada should encourage the U.S. government to be more supportive of other states in the region that wish to undertake legal initiatives with respect to Chinese activities in the South China Sea, in addition to reiterating its own support for such efforts.

2. Canada Must Focus on Adopting a Definition of LAWS that is Consistent with its Interests and those of its Allies.

The lack of a universal definition of such equipment could present an opportunity for Ottawa and Washington, as well as a thorn in Beijing's side. While the United States may not be called upon to condemn its current strategic direction entirely, a more precise definition of LAWS would force the Chinese leadership to re-evaluate its commitment to the legalization of this type of weapon. Given its highly anachronistic conceptualization of LAWS, one can bet that Beijing would refuse to recognize such a definition, undermining the credibility of its legal push. As the instigator of the Anti-Personnel Mine Ban Convention, Canada could replicate this approach which has previously proven effective in ensuring that the legal framework for these weapons is consistent with its strategic interests and those of its allies. Moreover, this type of initiative would be all the more beneficial for Ottawa, since it could be carried out without direct support from Washington, as was the case in 1997. This type of initiative could help break the current impasse and revitalize Canada's image on the international scene.

3. Canada Must Diversify its Approach to the Development of Best Practices in Cyberspace.

Strategic competition in cyberspace is characterized by exploitation rather than coercion. Canada, being already relatively active on the subject of cybersecurity at the national level through the adoption of its National Strategy on Cybersecurity, could take the lead in normative development by furthering its desire to put in place standards for best practice in cyberspace. Although Canada stated in 2020 that it considers international law and the standards developed by the previous work of the working group on the subject to be sufficient, it would benefit from nuancing its discourse. For example, Ottawa could learn from the U.S.' strategic orientation of "initiative persistence." The latter comprises a defensive and offensive facet based on the exploitation of vulnerabilities and is part of a continuum of activities. Through "tacit bargaining" approaches, Canada could hope to pursue its national interests while participating in the development of best practices in cyberspace.