Rewriting the New "Great Game": China, the United States, and their International Public Lawyers[1]

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The June 2013 United States-China Summit signals a watershed moment for postmodern international law and global policy, implicitly conveying China's bid to shift from the United States' unipolar hegemony, to one of shared 'Great Power' responsibility. This dialogue revives the 1800s Great Game themes on the appropriate spaces of sovereignty and internationalism, and in the contemporary spheres of US-China relations, is critically being translated in both countries' day-to-day engagement of international economic law, jus ad bellum (the law governing the use of force) and jus in bello (the law governing the conduct of hostilities). The peaceful outcome of this century's new Great Game will be decided mostly through the crucial role of each country's corps of international public lawyers. This lecture identifies the urgent areas of expertise, experience, education, and engagement necessary for Chinese law students and future leaders.

I Introduction: An International Lawyer's Lens

I am not a historical analyst, political economist, or diplomatic specialist in United States-China relations; neither am I a scholar of American foreign policy or Chinese foreign policy. I am neither American nor am I Chinese. While I have lived, studied, and worked at various points in my career as an international law scholar in the United States and China, I have also lived, studied, and worked in various countries

[1] Public Lecture delivered at the Peking University School of Transnational Law, Shenzhen, China, on 18 June 2013. The author extends her deep gratitude to PKUSTL Dean Stephen Yandle for the opportunity to deliver these remarks before her faculty peers and students, and to the Editors of the PKUSTL Law Review for featuring this lecture in their 2013 issue.

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throughout Asia and Europe.[2] I have had training in both common law and civil law traditions, before I moved on to specialize in international law. One could rightly say (and I concede in advance) that my thoughts on the lecture topic today would be rather different from what most enthusiasts and/or critics of US-China relations would expect.[3]

I do, however, claim the viewpoint of an international public lawyer[4]—and one who has had the great privilege of teaching international law this past year in China's premier law school, and who, in the coming months, would be tasked with the responsibility of succeeding to the void

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[3] US-China relations constitute an entire analytical discipline occupying a prominent place in international academic scholarship from both sides of the Pacific. Some influential works include Michael Oksenberg and Robert B. Oxnam (Eds.), Dragon and Eagle: United States-China Relations: Past and Future (New York, 1978); Gordon H. Chang, Friends and Enemies: The United States, China, and the Soviet Union, 1948–1972 (Stanford Univ. Press, 1990); Yang Zhong and Che-huan Shen, Reading China: How Do America's China Scholars View US-China Relations and China's Future?, 41 PS: Political Science and Politics 2 (Apr. 2008), 359–365; Roderick MacFarquhar, Jerome Cohen, Jonathan Spence and Tu Weiming, Whither China: Strategic Competitor, Global Trader, or Antiterrorist Partner?, 55 Bulletin of the American Academy of Arts and Sciences 3 (Spring 2002) 69–90; Steve Chan, Looking for Balance: China, the United States, and Power Balancing in East Asia (Stanford University Press, 2012); Immanuel C.Y. Hsu, China without Mao: The Search for a New Order (Oxford Univ. Press, 1990); Jerome Cohen and H.D. Chiu, People's China and International Law (Princeton Univ. Press, 1974).

[4] International public lawyers are an inherently heterogenous group. I purposely include government lawyers working for the public interest within "invisible college of international lawyers". See Oscar Schachter, The Invisible College of International Lawyers, 72 NW. U. L. REV. 217 (1977); Allan C. Hutchinson, *'In the Public Interest':* The Responsibilities and Rights of Government Lawyers, 46 OSGOODE HALL L.J. 105 (2008) (where the author argues that legal ethics and professional responsibility are "part of a larger democratic understanding of law and justice," at 106). On the various dimensions and functions discharged by international public lawyers, see Shirley V. Scott, The Political Life of Public International Lawyers: Granting the Imprimatur, 21 INT'L REL. 411 (2007); Gillian Triggs, The Public International Lawyer and the Practice of International Law, 24 AUSTL. Y.B. INT'L L. 201 (2005).

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left by the eminent international lawyer Professor Jon van Dyke,[5] in order to help shape the international law program of a United States law school that also has a distinct focus in Asia-Pacific legal studies. To the extent that I am called upon to speak truths to power as an international public lawyer, today's lecture is my tribute both to this (our) academic home that I am grateful to have assisted in building this past year, as well as to the future academic home where the international public lawyer's duty to contribute must continue. I see no hard disjunction between the work of an international public lawyer in either institution. In this, I hearken to Hersch Lauterpacht's view that there are no fixed demarcations between the legal and the political (or the "justiciable and non-justiciable") in international law, and that it is the "duty incumbent upon the lawyer to adopt a critical attitude in regard to that doctrine in the interest not only of the dignity of the science of international law, but also of an effective peaceful organization of the international community which it is the legitimate business of international lawyers to promote."[6] International public lawyers have a fundamental duty to be advocates of international peace – "peace is not only a moral idea… [it] is pre-eminently a legal postulate."[7] This duty – one to which I deem myself personally bound – knows no geographic or institutional compass.

I will return to what I mean by "speaking truths to power as an international public lawyer"[8] in the last part of this lecture. Suffice it to say that these disclosures of my background are made merely to convey that my approach to this topic is necessarily informed by a plurality of social science disciplines, educational pedagogies, cultural experiences, and historical narratives to which I have been exposed. My lecture today, therefore, proceeds from the lens of an international public lawyer that always seeks to situate, understand, and navigate international law in diverse legal systems and traditions.[9] From where I stand as an observer,

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[5] His contributions to international law scholarship on the law of the sea, human rights, and dispute settlement are vast and cannot be enumerated here. For a brief synthesis skimming the surface of his legacy of contributions to international legal academia, see Jon Markham Van Dyke (1943–2011), In Memoriam, in 27 OCEAN YEARBOOK, xv (Aldo Chircop et al. eds., 2013).

[6] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 310 (The Lawbook Exchange, Ltd., reprt. 2000).

[7] Id. at 438.

[8] By this, I purposely do not intend to convey a deconstructionist approach or methodology to the sources of international law. See Antony Carty, Critical International Law: Recent Trends in the Theory of International Law, 2 EUR. J. INT'L L 1, 1 (1991).

[9] See W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT Ch. 14 (2013) ("The Penumbra of Professionalism: The Citizenship Role of the International Lawyer").

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what is taking place in both the United States and China in regard to each country's treatment of, and engagement with, international law,[10] is the most fascinating phenomenon that, I anticipate, will likely shape the course of the post-Westphalian[11] and post-"Eastphalian"[12] international legal order and global power politics. I view this phenomenon as this century's rewriting of the "New Great Game".

II "Great Game" Configurations: Classic "Great Game" to "New Great Game"

Arthur Connolly, a British-Irish intelligence officer, first coined the term "The Great Game" in the 1800s to describe the decades of conflict and strategic rivalry between the Victorian British Empire and Tsarist Russian Imperial Empire to seize control of, and dominate, the fledgling states and territorial entities of Central Asia.[13] This classical version of "The Great Game" ended with the 1907 Anglo-Russian Convention that delineated the boundaries of control set for each imperial side.[14] What was then Persia was split into a Russian northern zone, a British south-eastern zone, and a buffer neutral zone in between. Afghanistan became a

[10] Much has been written on each country's respective engagement with, and enforcement of international law within their judicial and public law traditions. See among others Oona A. Hathaway, Sabria McElroy, and Sara Aronchick Solow, International Law at Home: Enforcing Treaties in U.S. Courts, 37 YALE J. INT'L L. 52 (2012); Hungdah Chiu, *Communist China's Attitude Toward I*nternational Law, 60 AM. J. INT'L L. 245 (1966). Eric Posner and John Yoo argued in 2006 that the United States should "bind itself and the world to strict adherence to international law and international institutions such as the United Nations and the World Court", as a way of managing US-China geopolitics in view of China's rise as a world power. See Eric A. Posner and John Yoo, International Law and the Rise of China, 7 CHI. J. INT'L L. 1 (2006–2007).

[11] The post-Westphalian legal order is not necessarily synonymous with hard conceptions of nation-State sovereignty. For the key work on this subject, see STEPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTEL AND THE MYTH OF WESTPHALIA Part III (2004) ("The Social Power of the Myth of Westphalia").

[12] Tom Ginsburg coined "Eastphalia" to describe the ironic return of rising power Asian countries to strong conceptions of nation-state sovereignty associated with the classic Westphalian period. See TOM GINSBURG, EASTPHALIA AS THE PERFECTION OF WESTPHALIA 27 (2010).

[13] See PETER HOPKIRK, THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA 270 (1994).

[14] See IRA KLEIN, THE ANGLO-RUSSIAN CONVENTION AND THE PROBLEM OF CENTRAL ASIA, 1907–1914, 126–47 (1971); see also Rose Louise Greaves, Some Aspects of the Anglo-Russian Convention and Its Working in Persia, 1907–14, 31 BULL. SCH. ORIENTAL & AFR. STUD. 69 (1968).

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British protectorate. Britain bound itself not to seek concessions beyond a line delimited from the Persian, Russian, and Afghan frontiers.[15]

Scholars dub the Cold War between the United States and the Soviet Union as the second iteration of the Great Game ("Great Game II").[16] While there was no overt or direct military confrontation between both countries in this era, it was a period infamously marked by the threat of mutually assured destruction from each side's possession of nuclear weapon.[17] The "Great Game II" was also sharply more ideologically-based than its predecessor – this was the era of the political gulf between democracy and communism, and contrasting economic theories between the capitalism and neoliberalism of a free market and enterprise system, and the socialism of micromanaged and centrally planned economies.[18] The end of the Cold War saw the dismantling of the Soviet Union and the rise of the United States as the world's sole postwar superpower. It is the United States' role as unipolar realist hegemon[19] that has mainly shaped the contours and institutions of the postmodern international system that we know today.[20]

Today, other scholars have coined the phrase the "New Great Game" to describe the geopolitical rivalry between the United States, the United Kingdom, and other countries of the North Atlantic Treaty Organization (NATO) against Russia and China over the vast petroleum reserves in the Central Asia and Transcaucasia region.[21] The academic

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[15] Full text of the Agreement Concerning Persia (1907) available at http://avalon.law.yale.edu/20th_century/angrusen.asp (last accessed June 10, 2013), Articles I to V. See also David Fromkin, The Great Game in Asia, 58 FOREIGN AFF. 936 (1980).

[16] ERIC WALBERG, POSTMODERN IMPERIALISM: GEOPOLITICS AND THE GREAT GAMES 50–98 (2011) (describing the finance, military, political, and ideological strategies during the 'Great Game II', or the Cold War between the United States and the Soviet Union). See generally Mark Kramer, Ideology and the Cold War, 25 REV. INT'L STUD. 539 (1999).

[17] MARK BEYER, NUCLEAR WEAPONS AND THE COLD WAR 25 (2005).

[18] WALBERG, supra note 16, at 53. See also Richard Ned Lebow, The Rise and Fall of the Cold War in Comparative Perspective, 25 Rev. Int'l Stud. 21 (1999). For interesting perspectives on the role of hard American and Soviet national security policies in shaping the Cold War, see MELVYN P. LEFFLER & DAVID S. PAINTER, ORIGINS OF THE COLD WAR – AN INTERNATIONAL HISTORY Ch. 1 & 2 (2005).

[19] See Alastair Buchan, The United States as a Global Power, 24 INT'L J. 205 (1969); BARRY BUZAN, THE UNITED STATES AND THE GREAT POWERS: WORLD POLITICS IN THE TWENTY-FIRST CENTURY 165–72 (2004).

[20] David A. Kay, United States National Security Policy and International Organizations: A Critical View of the Literature, 23 INT'L ORG. 755 (1969); Ian Clark, Bringing hegemony back in: the United States and international order, 85 INT'L AFF. 23, 34–35 (2009) (regarding the United States as more of a "coalitional hegemon" based on a post-1945 strategy of institution and alliance building).

[21] Ariel Cohen, The New Great Game: Oil Politics in the Caucasus and Central Asia, THE HERITAGE FOUND. (Jan. 25, 1996), http://www.heritage.org/research/reports/

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literature in international relations and comparative politics on this "New Great Game" is vast – but all are in agreement that this is a game no longer about traditional imperial expansionism and sovereign control, but rather, a petroleum resource race where multibillion dollar pipeline projects, strategic tanker routes, international consortia operations, shareholder values and international financing and leveraging sources, investment contracts and trade interests – and ultimately, global market share and production, transnational corporate power, as well as world oil and fuel prices are at stake.[22]

I am of the view that the respective authoritative decision-makers of the United States and China are now in the process of rewriting this "New Great Game" based on their own strategic relationship. I refer to "authoritative decision-makers,"[23] and not United States or China alone, because as a self-identifying member of the New Haven School of International Law,[24] I am ideologically predisposed to look at multiple processes of decision-making in States and the modes of attribution of different lines of conduct to a State, rather than assuming that States are

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1996/01/bg1065nbsp-the-new-great-game; Ian Cuthberson, The *New 'Great Game'* (Central Asia and the Transcaucasus), 11 WORLD POL'Y J. 4 (1994); Arif Ahmadov, Great Power Rivalry in the Caucasus and the Greater Caspian Region: 1991–2011, unpublished thesis (May 2011) submitted to Washington University, http://openscholarship.wustl.edu/cgi/viewconten t.cgi?article=1435&context=etd&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dthe%2Bnew%2Bgreat%2Bgame%2Btranscaucsus%26source%3Dweb%26cd%3D8%26ved%3D0CFQQFjAH%26url%3Dhttp%253A%252F%252Fopenscholarship.wustl.edu%252Fcgi%252Fviewcotent.cgi%253Farticle%253D1435%2526context%253Detd%26ei%3D-mTnUfrsAeaviQfCjHAw%26usg%3DAFQjCNGRQVWDRFuNlVsV44HDQ93MDmS2DA%26sig2%3DlYwPDjem7-p9azVP996ESg%26bvm%3Dbv.49478099%2Cd.aGc#search=%22new%20great%20game%20transcaucasus%22.

[22] Id. at note 22; Cuthberson at 41–43; Rajan Menon, In the Shadow of the Bear: Security in Post-Soviet Central Asia, 20 Int'l Sec. 149 (1995); R.G. Gidadhubli, Oil Politics in Central Asia, 34 ECON. & POL. WKLY. 5 (Jan. 30 – Feb. 5, 1999), 260–263; Dianne L. Smith, Central Asia: A New Great Game?, 23 ASIAN AFF. 147 (1996).

[23] See ; W. Michael Reisman, The View From the New Haven School of International Law, 86 AM.SOC'Y INT'L L.PROC. 118 (1992).

[24] See Myres S. McDougal and W. Michael Reisman, The Prescribing Function in the World Constitutive Process: How International Law is Made, in INTERNATIONAL LAW ESSAYS 355 (Myres S. McDougal & W. Michael Reisman eds., 1981); Tai-heng Cheng, Positivism, New Haven Jurisprudence, and the Fragmentation of International Law, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 411 (Todd Weiler & Freya Baetens eds., Brill 2011); Siegfried Wiessner and Andrew R. Willard, Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity, in 36 THE METHODS OF INTERNATIONAL LAW 47 (Steven R. Rainer & Anne-Marie Slaughter eds., ASIL 2004). For a recently attempted third-party summary of the New Haven School of International Law's conceptual positions and methodology, see JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES 105–10 (Oxford Univ. Press 2011).

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monolithic entities issuing linear decisions or acting in universally attributable or identifiable ways. What an international relations or comparative politics scholar would easily characterize as "American foreign policy" or "Chinese foreign policy," a New Haven international legal scholar would rather disaggregate and disambiguate down to the essential lines of authority that have produced particular policies in a prevailing social context. It is through this narrow prism that I now turn to examine some implications for international law in the June 2013 Summit between United States President Barack Obama and Chinese Chaireman Xi Jinping.[25] It is my view that the Summit – the first historic meeting between Heads of State of both countries since US President Richard Nixon's 1972 meeting with Chairman Mao Zedong in China[26] – signals another watershed moment between both countries' authoritative decision-makers, at a particularly crucial time of altered strengths between the unipolar hegemon riven by economic crises,[27] and the rising power currently the world's second-largest economy and projected by world economists and financial analysts to overtake as the world's first or largest economy by the year 2027.[28]

The 2013 Summit is geopolitically significant for having initiated a bilateral dialogue on policies between the established hegemon and the rising power, their respective relationships with the Asia-Pacific region, as well as the broader themes of global order and the postmodern interna-

[25] Getting to Know You, N.Y. TIMES (June 4, 2013), http://www.nytimes.com/2013/06/05/opinion/president-obama-meets-president-xi-jinping.html?_r=0; Chinese Leader Xi Jinping Joins Obama for Summit, B.B.C. NEWS (June 8, 2013), http://www.bbc.co.uk/news/world-asia-china-22798572;

See also Oriana Skylar Mastro, The Obama-Xi Summit: A New Era in Bilateral Relations?, THE NAT'L BUREAU ASIAN RES. (June 12, 2013), http://www.nbr.org/research/activity.aspx?id=345#.Ued9AOCvkb4.

[26] For the famous biographical account of the 1972 Nixon-Mao meetings, see generally MARGARET MACMILLAN, NIXON AND MAO: THE WEEK THAT CHANGED THE WORLD (2007).

[27] See Anne-Marie Slaughter, No More Superpower?, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/interactive/2011/06/24/opinion/global/20110624_SUPERPOWER.html (declaring that "America's ability to direct or control global or even regional events is declining, but so too is the ability of every other nation", and that "[t]he best the United States can hope for is 'credible influence,' the ability to guide other nations through the appeal of our values, the power of our example, and the strength of our economy and political system.").

[28] China *"Will Be the World's* Biggest Economy by 2027," LONDON EVENING STANDARD (Nov. 17 2009), http://www.standard.co.uk/business/china-will-be-the-worlds-biggest-economy-by-2027-6745259.html; Kamal Ahmed, *Jim O'Neill: China* could overtake US economy by 2027, THE TELEGRAPH (Nov. 19, 2011), http://www.telegraph.co.uk/finance/economics/8901828/Jim-ONeill-China-could-overtake-US-economy-by-2027.html.

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tional system.[29] It is a dialogue, I submit, that will be quietly underwritten – and thus crucially shaped – by each country's corps of international public lawyers. It is for this reason that I am particularly interested in how each country's legal system views and treats international law, because this affects the realpolitik translation of international law into foreign policy-making, and ultimately what options or courses of action authoritative decision-makers consider available for them. I will illustrate a brief doctrinal and conceptual nutshell of the complexities of the reception of international law in both the United States and China – and how there are some rather quaint parallels and divergences in each country's treatment of the spaces of sovereignty and internationalism in their respective legal discourses.

My central argument is that the terms of the new Great Game is in the hands of each side's corps of international public lawyers – and there might be more areas for agreement than one might ordinarily expect between two diametrically different legal traditions and political systems. Both legal traditions in the United States and China demonstrate pragmatist and/or realist readings of international law that protect their core sovereign interests,[30] but it is their respective authoritative decision-makers that have spelled the difference in how they have chosen to engage with the international legal system, particularly in the spheres of international economic law, jus ad bellum (the law governing the use of force) and jus in bello (the law governing the conduct of hostilities).

Where we do we see this difference? On the one hand, while Bush-era United States is frequently dubbed as neoconservative and ex-

[29] See *Obama's Pow*-Wow with Xi Jinping, FIN. TIMES (June 10, 2013), http://www.ft.com/intl/cms/s/0/65d95e44-d1d6-11e2-9336-00144feab7de.html#axzz2ZND2NQ8D.

[30] XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE, AND INTERNATIONAL 18–40 (2012). See generally Yong Deng, The Chinese Conception of National Interests in International Relations, 154 THE CHINA Q. 308 (1998); Jacques deLisle, *China's Approach to Intern*ational Law: A Historical Perspective, 94 AM. SOC'Y INT'L L. PROC. 267 (2000); SHIRLEY V. SCOTT, INTERNATIONAL LAW, US POWER: THE UNITED STATES' QUEST FOR LEGAL SECURITY 228 (2012) ("Like the United States, China has approached international law from a pragmatic perspective, the nature of its engagement continuing to be driven by foreign-policy goals.").

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ceptionalist when it comes to international law compliance,[31] the United States under the Obama administration policies reflects strategic uses of international law,[32] marshaling both "mainstream" institutions and procedures (such as the aggressive and repeatedly triumphant use of the US Trade Representative of dispute settlement in the World Trade Organization),[33] as well as claiming progressive interpretation in what are deemed to be "gray areas" in international law (such as on the legality of drone warfare,[34] government surveillance for national security purposes and defending against cyber-attacks,[35] the parameters of lawful or unlawful intervention or direct military assistance after discovery of chemical weapons use in Syria,[36] among others).

On the other hand, while Chinese scholars and international jurists have frequently characterized China's international law compliance as strictly sovereignty-based or gravitating around a hard core of inter-State

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[31] NOËLLE CROSSLEY, MULTILATERALISM VERSUS UNILATERALISM: THE RELEVANCE OF THE UNITED NATIONS IN A UNIPOLAR WORLD 61–62 (2008) ("The Bush administration, especially after the September 11 attacks, ideologically opposed the development of international law, disregarding both treaties and international institutions…The second Bush administration has been influenced strongly by neoconservative thinking."); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW Part I, Ch. 3 (2008).

[32] See Harold Hongju Koh, The Obama Administration and International Law, AM. SOC'Y INT'L L. (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

[33] See Chad P. Bown, US-China Trade Conflicts and the Future of the WTO, 33 Fletcher F. World Aff. 1, 45–6 (2009); United States Trade Representative, 2012 Report *to Congress on China's WTO Compliance*, 26–7, http://www.ustr.gov/webfm_send/3620 (last visited July 1, 2013).

[34] Barack Obama Defends *"Just War"Using* Drones, B.B.C. NEWS (May 24, 2013), http://www.bbc.co.uk/news/world-us-canada-22638533; *Obama's Speech on Drone* Policy, N.Y. TIMES (May 23, 2013), http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all.

[35] Tom McCarthy, Obama Defends Secret NSA Surveillance Programs – As It Happened," THE GUARDIAN (June 7, 2013), http://www.guardian.co.uk/world/2013/jun/07/obama-administration-nsa-prism-revelations-live; Geoff Dyer & Anna Fifield, Obama Defends Surveillance Tactics, FIN. TIMES (June 7, 2013), http://www.ft.com/intl/cms/s/0/0b62853a-cf65-11e2-a050-00144feab7de.html#axzz2ZND2NQ8D.

[36] James Legge, Barack Obama Says Syria Chemical Weapon Use Would Change US *"Calculus" over* Intervention, THE INDEPENDENT (Apr. 27, 2013), http://www.independent.co.uk/news/world/americas/barack-obama-says-syria-chemical-weapon-use-would-change-us-calculus-over-intervention-8590961.html; Mark Mazetti et al. U.S. is Said to Plan to Send Weapons to Syrian Rebels, N.Y. TIMES (June 13, 2013), http://www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html?pagewanted=all.

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"consensualism,"[37] recent actions demonstrate a softening or finessing of its positions on what used to be inflexible interpretations on international doctrine (such as its formerly restrictive positions at the Security Council on the resort to force for humanitarian interventions),[38] as well as more frequent articulation of new or novel interpretations or progressive theories in the mainstream institutions or procedures within international law (such as the non-UNCLOS bases for Chinese claims in the South China Sea dispute,[39] defenses raised against currency manipulation alleged to be in breach of the IMF Articles of Agreement,[40] interpretations of GATT obligations and exceptions in the landmark Rare Earths and Audiovisual Publications cases at the WTO,[41] and now the pending solar

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[37] JUNWU PAN, TOWARDS A NEW FRAMEWORK FOR PEACEFUL SETTLEMENT OF CHINA'S TERRITORIAL AND BOUNDARY DISPUTES 80 (2009) ("China believes that, because states create international law when they exercise their sovereignty, the validity and effectiveness of international law cannot forego the continuing consent and support of nation-states. State sovereignty is the very foundation upon which international law rests. State sovereignty implies at least the following corollaries: (1) sovereign equality; (2) political independence; (3) territorial integrity; (4) exclusive jurisdiction over a territory and the permanent population therein; (5) freedom from external intervention and the corresponding duty of non-intervention in areas of exclusive jurisdiction of other States; (6) freedom to choose political, economic, social and cultural systems; and (7) dependence of obligations arising from international law and treaties on the consent of States."). See also BYRON N. TZOU, CHINA AND INTERNATIONAL LAW: THE BOUNDARY DISPUTES 7–22 (1990) (summarizing various positions on consent-based international law taken by Chinese scholars and jurists such as Ho Wu-shuang and Ma Chun, Professor Chiu Jih-ch'ing, Lin Hsin, Chu Li-lu, Chu Ch'i-wu, among others).

[38] See Allen Carlson, *Helping to Keep the Peace (Albeit Reluctantly): China's* Recent Stance on Sovereignty and Multilateral Intervention, 77 PAC. AFF. 9, 10 (2004) (arguing "although Beijing promoted a relatively static interpretation of sovereignty and in principle opposed the idea of intervention, Chinese leaders also committed to a series of multilateral endeavours that gradually modified China's stance on intervention and, by extension, sovereignty's role in international politics.").

[39] For an unofficial (scholarly) discussion of the historical bases and evidence of China's claims to the disputed areas, see Li Jinming & Li Dixia, The Dotted Line on the Chinese Map of the South China Sea: A Note, 34 OCEAN DEV. & INT'L L. 287 (2003), http://cat.middlebury.edu/~scs/docs/Li%20and%20Li-The%20Dotted%20Line%20on%20the%20Map.pdf; Su Hao, *China's Pos*itions and Interests in the South China Sea: A Rational Choices in its Cooperative Policies, unpublished paper, Center for Strategic and International Studies, 1–12, http://csis.org/files/publication/110912_Hao_South_China_Sea.pdf (last visited July 1, 2013).

[40] See Bryan Mercurio & Celine Sze Ning Leung, *Is China a 'Currency* Manipula*tor?': The Legitimacy of China's* Exchange Regime under the Current International Legal Framework, 43 INT'L L.1257 (2009).

[41] See Elisa Baroncini, The China-Rare Earths WTO Dispute: A Precious Chance to Revise the China-Raw Materials Conclusions on the Applicability of GATT Article XX *to China's WTO Accession Protocol*, 4 CUADERNOS DE DERECHO TRANSNACIONAL 49 (2012); China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, Report of the Appellate Body, (21 Dec. 21, 2009), http://www.worldtradelaw.net/reports/wtoa

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panels dispute with the European Union). From my vantage point as an international law scholar and observer, the authoritative decision-makers in the United States and China both reveal functionalist asymmetries between their "myth systems" of international law and the actual "operational codes" of their international law compliance.[42] Let me turn now to exposing some of these asymmetries.

III Between Myth System and Operational Code: International Law in the United States and China

International law has never had an easy place for reception in either the legal system of the United States or the legal system of China. Indeed, I have grown accustomed to patiently engaging with the usual skepticism, disbelief, or resistance to international law from communities of domestic lawyers, or domestic legal scholars,[43] that I accept it to be entirely par for the course for any international public lawyer entering any legal system to confront that system's legal architecture on issues of normativity, binding effect, and implementation.[44] In this respect, I find it very interesting that both legal traditions in the United States and China reflect similar tensions and concerns on the perceived potential intrusion and overreaching of international law in their systems, and the constitutional controls that are respectively maintained to govern the interaction between international law and domestic law.

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b/china-publications(ab).pdf; Joshua Chaffin, *China's* Premier Li Keqiang Warns Europe over Trade War, FIN. TIMES (May 26, 2013), http://www.ft.com/intl/cms/s/0/7f9f608e-c5f2-11e2-99d1-00144feab7de.html#axzz2ZND2NQ8D; Joshua Chaffin, EU-China Solar Anti-dumping Talks Face Fresh Flare-up, FIN. TIMES (July 12, 2013), http://www.ft.com/intl/cms/s/0/9b09120c-eb0e-11e2-bfdb-00144feabdc0.html#axzz2ZND2NQ8D.

[42] See W. Michael Reisman, International Incidents: Introduction to a New Genre in the Study of International Law, 10 YALE J. INT'L L. 1, 9 (1984) ("People who seek legal advice plainly require it with regard to both the myth system and the operational code: myth system because it is applied in part by some control institutions, operational code because it is applied by others. Myth system is readily retrievable through conventional research in the formal repositories of law. Operational code, in contrast, must be sought in elite behavior.")

[43] Among my earliest works as a new Philippine law professor in 2007 was to scrutinize in detail how international law was received within the postcolonial and post-dictatorship Philippine constitutional system. See generally DIANE A. DESIERTO, FREEDOM AND CONSTRAINT: UNIVERSALISM IN THE PHILIPPINE CONSTITUTIONAL SYSTEM AND THE LIMITS TO EXECUTIVE PARTICULARIST POWER (2007).

[44] For authoritative essays on the theoretical interfaces between international law and domestic public law, see generally GERRY SIMPSON, THE NATURE OF INTERNATIONAL LAW (2001).

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Paul Dubinsky describes the status of international law in the US legal system as a "moving picture" where "so much of importance is so fluid. The law is unsettled because so many of the legal questions currently being revisited are of fundamental rather than marginal importance."[45] Harold Koh made the case for transnationalist jurisprudence nearly ten years ago, arguing that the famous Paquete Habana pronouncement of the US Supreme Court (e.g. "International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination") meant that "particular provisions of [the United States] Constitution should be construed with decent respect for international and foreign comparative law. When phrases like 'due process of law', 'equal protection' and 'cruel and unusual punishments' are illuminated by parallel rules, empirical evidence, or community standards found in other mature legal systems, that evidence cannot simply be ignored."[46] But this is not a universally held view by either United States courts or legal academics.

While there are various provisions of the United States Constitution that directly refer to international law sources (such as the Article II Section 2 Presidential power to "make treaties;" the Article I Section 8 Congressional powers to define and punish "Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," to "regulate commerce with foreign nations" and to "make rules concerning captures on Land and Water," "to make rules for the Government and Regulation of land and naval Forces;" the Article III Section 2 judicial power over "all cases affecting ambassadors, other public ministers and consuls;" or the Article VI Supremacy clause indicating that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land…"),[47] the rest of American constitutional canon on international law has been, by and large, a product of judicial development and common-law reasoning.[48] The Charming Betsy canon, for example, remains the famous precedent for accepting a later-in-time (lex posterior) rule between federal statute

[45] DINAH SHELTON, INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION 631 (2011).

[46] Harold Hongju Koh, International Law as Part of Our Law, 98 AM. J. INT'L L. 43, 56 (2004).

[47] CONST. (U.S.) Art. II, Sec. 2; Art. I, Sec. 8; Art. III, Sec. 2; Art. VI.

[48] See Gerald L. Neuman, The Uses of International Law in Constitutional Interpretation, 98 AM. J. INT'L L. 82 (2004); Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 YALE L. J. 8 (1991); Louis Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555 (1983–1984).

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and treaty, as well as to construe US statutes and international law as consistent with one another.[49] Despite the lack of uniformity among its precedents, US jurisprudence carved out self-executing treaties and international agreements, from those that require implementing legislation before they can function as rules of decision binding upon US courts.[50] Likewise comity with customary international law, as articulated in Paquete Habana,[51] and brought to the forefront in modern jurisprudence under the Alien Tort Statute (including Sosa v. Alvarez-Machain,[52] and most recently in Kiobel[53]), is just as much contested through judicial gloss. The US Supreme Court's dismissal in Medellin[54] of the binding legal effect of a judgment of the International Court of Justice upon US courts certainly suggests its preference for a policy of mere respectful consideration for international adjudication without conferring legal quality to such decisions.[55] International law within the United States

[49] See generally Murray v. The Charming Betsy, 6 U.S. 64 (1804); Curtis A. Bradley, The "Charming Betsy" Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 GEO. L. J. 479 (1998).

[50] CURTIS BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 31–96 (2013); Alona Evans, Self-Executing Treaties in the United States of America, 30 BRIT. Y.B. INT'L L. 178 (1953); David Sloss, Non-Self-Executing Treaties: Exposing a Constitutional Fallacy, 36 U.C. Davis L. Rev. 1 (2002).

[51] The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law out to be, but for trustworthy evidence of what the law really is.") See generally Beth Stephens, The Law of Our Land: Customary International Law as Federal Law after Erie, 66 Fordham L. Rev. 393 (1997).

[52] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[53] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. (2013) ("[t]he presumption against extraterritoriality applies to claims under the ATS [Alien Tort Statute], and that nothing in the statute rebuts that presumption.")

[54] Medellin v. Texas, 522 U.S. 491 (2008).

[55] Id. at 509 ("In sum, Medellin's view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94 [UN Charter]. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment – again, always regarded as an option by the political branches – any more than courts may consider whether to comply with any other species of domestic law. This result would be particularly anomalous in light of the principle that 'the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – the political – Departments.")

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legal system is clearly a matter of varying engagement and disengagement – with over two centuries of jurisprudence on foreign sources, internationalism, and how the Executive, Legislative, and Judicial Branches functionally develop the evolving conceptions of American sovereignty alongside the international commitments and obligations assumed by the United States.[56]

China mirrors some of these fundamental uncertainties with the status of international law in its own legal system. The Chinese Constitution is silent on the domestic status of treaties, customary international law, or other international rules, although its preamble contains its famous Five Principles of Coexistence governing its foreign policy: "China consistently carries out an independent foreign policy and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries."[57] While legal scholars such as Jerry Z. Li and Sanzhuan Guo write that "[t]he concept of fundamental principles of international law is widely used and accepted in China. Instead of treating general principles of international law as a separate source of international law, fundamental principles of international law are regarded as higher law and constitute parts of jus cogens in most cases,"[58] they are less clear about the actual operational effects and implementation of international law within the Chinese legal system. At best, they conclude:

> [t]reaties to which China is a party are generally regarded as a part of Chinese law. Chinese domestic legislation may be passed to implement treaties, and Chinese courts may directly apply treaties in some areas such as civil and commercial areas. However, not all treaties are directly applied by Chinese courts without transformation. International human rights treaties are good examples of this. International treaties should have a lower legal status than the Constitution and the basic laws, but may have the same legal force as laws passed by the National People's Congress Standing Committee, ad-

[56] BRADLEY 2013, supra note 50, at 329–32; DAVID L. SLOSS ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 589–606 (2011).

[57] 宪法(2004 修正)[Constitution (2004 Amendment)], prbl., CLI.1.51974 CHINALAWINFO.

[58] Jerry Z. Li & Sanzhuan Guo, China, pp. 160–195, at 159, in, INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS:INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., Oxford Univ. Press 2011).

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> ministrative regulations, or ministerial rules, depending on their concerned making procedures.
>
> Legislative and administrative state organs may interpret treaties through their involvement in the treaty-making process, and courts interpret treaties in order to apply them, as allowed by provisions of the legislative acts. Ministerial departments, particularly the Ministry of Foreign Affairs, who are in charge of concluding treaties, may issue departmental regulations or opinions to interpret treaties. China generally does not give international customary law binding force in its domestic legal system. No matter which definition of 'international usage' is adopted, it usually applies only when there are neither Chinese laws nor treaties to govern in certain areas. In addition, Chinese courts have discretion to decide whether to apply international usage or not...[59]

Having had numerous conversations with my PKUSTL students and in particular, Professor Jin Zining here at the PKUSTL faculty on the matter of international law reception in the Chinese constitutional and legal system,[60] I am convinced that the shifting sands between international law and domestic law are no less contested here than they are in the United States. In both countries, the "myth system" arising from the normative environment of the legal system and its drivers appears to be one of caution, restraint, and control against the undue or illegitimate entry of international law norms into the domestic legal system and institutions of governance. But I submit that the "operational code" as to the uses of international law for each country is markedly different. The United States' authoritative decision-makers have made deft use of their corps of international public lawyers to publicly claim compliance with international law obligations as a fundamental "rule of law" priority to establish the legitimacy of its decisions with the other authoritative decision-makers in States and international institutions.[61] Of course, the veracity and soundness of each claim of international law compliance re-

[59] Id. at 193–95.

[60] I am particularly indebted to PKUSTL's Professor of Chinese Constitutional Law and Chinese Administrative Law, Professor Jin Zining, for many illuminating exchanges on the nature of constitutional interpretation, the function of judicial and administrative review, and treaty implementation under Chinese law.

[61] Certainly the "compliance debate" among US State Department Legal Advisers remains very much a living one. For an interesting recent tome on the roles, functions, and duties of the US State Department Legal Advisers, see MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 1–14 (2010).

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mains very much a polemical case-to-case evaluation even for us international lawyers – United States policies on the use of force and intervention,[62] humanitarian law and the rules governing the conduct of hostilities in a post 9/11 context,[63] the enforcement of multilateral trading rules,[64] and providing recourse for US investors against recalcitrant non-paying host States[65] are all complex questions that would take much longer to discuss and evaluate carefully on an individual basis than in this brief lecture.

What is crucial, for purposes of advancing my central argument in this lecture, is that, even if it has a "myth system" of contested reception of international law, one cannot deny that the United States' "operational code" involves a well-entrenched process of international law justification as part and parcel of its authoritative decision-makers' strategic policy-making as the unipolar hegemon in the postmodern international system.[66] This is where the corps of international public lawyers in the United States have spelled the difference in the trajectories of their rich

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[62] See CHRISTIAN HENDERSON, THE PERSISTENT ADVOCATE AND THE USE OF FORCE: THE IMPACT OF THE UNITED STATES UPON THE JUS AD BELLUM IN THE POST-COLD WAR ERA 205 (2010) ("...whilst Obama has made overtures to multilateralism and the standards governing the use of force, not only did he not mention the collective security system in his speeches but appeared to intentionally avoid mentioning it in the context of humanitarian interventions by stating that these actions would take place either 'individually or in concert'....Obama has never claimed to be a pacifist and his belief that the use of force will sometimes be 'necessary' has been made clear...However, of concern here is the President's refusal so far to expand upon what was meant by his use of the term 'necessary.' Was this to be taken to be understood as it is in traditional legal parlance of the jus ad bellum? If not, what conditions have to pertain to make the use of force 'necessary'? What is worrying about this doctrine is not the assertion of wide rights but the complete lack of clarity as to what is permissible under it....").

[63] See generally STEPHEN L. CARTER, THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA (2011) (discussing at length various policies on targeting, the use of drone warfare, among others).

[64] CHRISTINA L. DAVIS, WHY ADJUDICATE?: ENFORCING TRADE RULES IN THE WTO 102–84 (2012) (providing a useful description of recent US trade and litigation policies).

[65] On the protection of US investors, see *The US President's 2013 Trade Policy* Agenda 13–18, http://www.ustr.gov/sites/default/files/Chapter%20I%20-%20The%20 President's%20Trade%20Policy%20Agenda.pdf (last visited July 1, 2013).

[66] Of course, this is not the first time that the pivotal role of American international lawyers has been observed in US foreign policy-making. See generally Guglielmo Verdirame, *'he Divided West': International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553 (2007); Laura A. Dickinson, Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance, 104 AM. J. INT'L L. 1 (2010); HATSUE SHINOHARA, US INTERNATIONAL LAWYERS IN THE INTERWAR YEARS: A FORGOTTEN CRUSADE 12–63 (2012); Michael K. Young, The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives, 61 LAW & CONTEMP. PROBS. 133 (1998) (containing a useful synthesis of the professional line functions and advisory duties of counsels at the US State Department in the generation of legal opinions and impact on the foreign policy process).

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judicial and legal discourses on international law, and where I believe the corps of international public lawyers in China will be vital to how the path of the 'new Great Game' will be rewritten between the United States and China.

China's "myth system" of contested reception of international law does not yet have a counterpart "operational code" deliberately embracing an open policy of international law justification. But this is not to say that its actions ipso facto are non-compliant – rather, what would be more accurate to say is that its authoritative decision-makers' engagement with the international legal community have not been as readily or positionally identifiable from the standpoint of international law assessment.[67] As Professor Jacques deLisle interestingly narrated in his article on the history of China's approach towards international law,[68] the orthodox narrative has been one that is strictly sovereigntist and deeply consensualist, owing in large part to institutional memories of historical injustices and grievances experienced at the hands of imperial expansionism from other States before the establishment of the postmodern international system. It was not coincidental that China's Five Principles of Coexistence was built into the Bandung Principles written at the 1955 Asian-African Conference, and which eventually paved the way for the Non-Aligned Movement of about 120 Member States within the United Nations.[69] Both these Five Principles of Coexistence, as well as the doctrine of un-

[67] Literature in English on the specific role of Chinese international lawyers remains quite scarce. See among others Timothy A. Gelatt, Lawyers in China: The Past Decade and Beyond, 23 N.Y.U. J. INT'L L. & POL. 751 (1991); RICHARD KOMAIKO AND BEIBEI QUE, LAWYERS IN MODERN CHINA 7–90 (2009); RONALD ST. JOHN MACDONALD, ESSAYS IN HONOUR OF WANG TIEYA 243–50, 359–66 (1994). Certainly very little has been documented in English about the functions and impact of Chinese international lawyers in historical narratives on the evolution of Chinese foreign policy. For some authoritative studies on the formation of Chinese foreign policies alongside debated issues of international law applicability and compliance, see MICHAEL H. HUNT, THE GENESIS OF CHINESE COMMUNIST FOREIGN POLICY (1998); DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005).

[68] See generally Jacques deLisle, supra note 30.

[69] POBZENG VANG, FIVE PRINCIPLES OF CHINESE FOREIGN POLICIES 166 (2008) (narrating the adoption of the Five Principles of Peaceful Coexistence by the Bandung Conference, spearheaded by Indian Prime Minister Jawaharlal Nehru and Chinese Premier Zhou Enlai).

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equal treaties in international law, are significantly attributed to Chinese legal scholars and jurists.[70]

A scholar on China relations, Pittman Potter, recently observed that Deng Xiaoping's strategy of taoguang yanghui, or to "hide brightness and nourish obscurity," resulted in China's heavy normative engagement with international law (signing and ratifying numerous international agreements on the environment, trade, investment, finance, security, the Covenant on economic, social and cultural rights, among others), but at the same time adopting a "paradigm of selective adaptation" – where local implementation of international rules depends on the extent to which their underlying norms are received by local interpretive communities.[71] Interpretive communities then "selectively adapt non-local standards for local application in light of their own normative perspectives."[72] Assuming the accuracy of Potter's theory, one could see an explanation for why China's actions have been alternatively characterized by various scholars as "exceptionalist" or "non-conforming" with international law.[73] A Hans Morgenthau-resonant assertion of sovereignty,[74] given today's more complex interrelationships of States, does little to inspire confidence or trust in the lawfulness or legitimacy of State conduct or governmental acts.

Neither would a strict reliance on the orthodox narratives of sovereignty and consensualism be fully consistent with the actual spheres of influence occupied and economic strengths wielded by, China, within the postmodern international system. Another scholar, Justin Hempson-Jones,

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[70] For various narratives on Chinese contributions to international law, see generally Xue Hanqin, *China's Open Policy and Intern*ational Law, 4 C.J.I.L. 133 (2005); Christopher Holland, Chinese Attitudes to International Law: China, the Security Council, Sovereignty, and Intervention, N.Y.U. J. INT'L L. & POL. ONLINE FORUM (July 2012), http://nyujilp.org/wp-content/uploads/2012/07/Christopher-Holland-China-the-Security-Council-and-Intervention.pdf; Zhaojie Li, Teaching, Research, and the Dissemination of International Law in China: the Contribution of Wang Tieya, 31 CAN. Y.B. I'L L. 189 (1993); KEYUAN ZOU, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 227 (2006).

[71] See generally Pitman B. Potter, China and the International Legal System: Challenges of Participation, 191 THE CHINA Q. 699 (2007).

[72] Id. at 700–1.

[73] On Chinese "exceptionalism" in international law, see Anu Bradford & Eric A. Posner, Universal Exceptionalism in International Law, 52 HARV. INT'L L. J. 3, 25–34 (2011); Benjamin Ho Tze Ern, The Rising Chorus of Chinese Exceptionalism, RSIS WORKING PAPER No. 256, (Apr. 15, 2013), http://www.rsis.edu.sg/publications/WorkingPapers/WP256.pdf.

[74] See generally Hans J. Morgenthau, The Problem of Sovereignty Reconsidered, 48 COLUM. L. REV. 341 (1948); Hans J. Morgenthau, To Intervene or Not to Intervene, 45 FOREIGN AFF. 425 (1967).

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argues that one must use a neo-liberal institutionalist perspective, rather than a hard realist perspective, in characterizing China's international acts, maintaining that China's deep engagement with international governmental organizations in the last decade actually does reflect patterns of liberal foreign policy-making, where "the level of its liberal action has increased hand-in-hand with the increase in the number of intergovernmental organizations [that the PRC] participates in."[75] Allen Carlson has written about the emerging trends in China's strategic abstentions at the Security Council that have enabled more humanitarian interventions and peacekeeping missions to proceed in the last decade (such as in Kosovo and East Timor), instead of vetoing such operations outright on the basis of the Chinese Constitution's Five Principles of Coexistence and the narrow guidelines on intervention previously articulated by Chinese representatives.[76] (Shortly after I delivered this lecture at PKUSTL, it was certainly historic to witness China's first public and open foreign policy shift favoring humanitarian intervention, declaring that it would, for the first time, send security and peacekeeping troops outside of Chinese borders to contribute to the ongoing UN-sanctioned humanitarian and peacekeeping intervention forces in Mali.[77]) Bryan Mercurio has recently written that China's currency peg and capital controls, for all that they contain badges of potential currency manipulation, would not necessarily rise to the level of a breach of the IMF Articles of Agreement.[78] What might thus appear evident from the "operational code" emerging from these recent trends is that China's authoritative decision-makers could well be shifting to softer and more cooperative versions of consensualism and sovereignty in international law, without openly subscribing to a hard and obsolete Schmittian[79] notion of the exception as the unremitting perpetual prerogative of a State.

This is where I do think that the 2013 June Summit between United States President Barack Obama and Chinese President Xi Jinping represents a watershed moment for narrowing the gap between myth system

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[75] Justin S. Hempson-Jones, The Evolution of *China's Engagement with* International Government Organizations: Toward a Liberal Foreign Policy?, 45 ASIAN SURV. 702, 704 (2005).

[76] Allen Carlson, *Helping to Keep the Peace (Albeit Reluctantly): China's* Recent Stance on Sovereignty and Multilateral Intervention, 77 PAC. AFF. 1, 9–27 (2004).

[77] See Monish Gulati, Chinese Troops in Mali: Strategic Change in Foreign Policy?, SOUTH ASIA MONITOR, (July 5, 2013), http://southasiamonitor.org/detail.php?type=sl&nid=5312; Kathrin Hille, China Commits Combat Troops in Mali, FIN. TIMES, (June 27, 2013), http://www.ft.com/intl/cms/s/0/e46f3e42-defe-11e2-881f-00144feab7de.html #axzz2ZND2NQ8D.

[78] Id. at 41.

[79] See genenrally CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (1985).

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and operational code. As historic as these initial exploratory talks are between these Heads of State and the initial discussions on cyber-security, maritime and territorial disputes, trade and investment cooperation, I am more interested in the long-term potentials for international law evaluation, assessment, and compliance, that could ensue from the dynamics of the complex relationship between the United States (the unipolar hegemon that incorporates international law justification as part of its operational code in international relations), and China (the rising power whose operational code in international relations remains facially deeply sovereigntist but latently appears to be shifting towards some instrumental internationalism – quite consistent with the ideological hybridity bred by "socialist modernization" or what Ronald Coase recently wrote on as "Chinese capitalism"[80]). Whatever will be placed on the menu of what are "lawful" and "legitimate" options for each country's authoritative decision-makers will depend on the ethos, expertise, education, and experience of their corps of international public lawyers. In this light, let me now turn to the last part of this lecture, or what I mean by "speaking truth to power" as an international public lawyer.

IV "Rule By Law" or "Rule of Law"? Lord Shawcross' Dilemma and the Role of International Public Lawyers in this Century's New Great Game

Lawyers have a crucial, if not usually decisive, impact on the policies eventually taken by a State's authoritative decision-makers. I was just about to start clerking at the International Court of Justice when I had the opportunity to attend the Yale Law School Conference on Government Lawyering and International Law,[81] where various academics and legal advisers debated the roles of the government lawyer in shaping a State's compliance with international law, the comparative functional mandates of legal advisers across different States, and their particular duties in representing sovereigns in international arbitration and litigation. This was in the aftermath of the inquiries on the role of government lawyers in issuing the infamous "Torture Memoranda" during the Bush Administration,[82] and the parallel transatlantic inquiries on the role of government lawyers with respect to the decision taken by the States forming

[80] RONALD COASE & NING WANG, HOW CHINA BECAME CAPITALIST 104–203 (2012).

[81] Details on the 35th anniversary conference of the Yale Journal of International Law, see http://www.yjil.org/docs/pdf/conference_poster.pdf (last visited July 1, 2013).

[82] See Terry Frieden, Report Clears Bush Officials of Misconduct over *"Torture"* Memos, CNN NEWS, (Feb. 20, 2010), http://edition.cnn.com/2010/POLITICS/02/19/bush.administration.memos/index.html.

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the "Coalition of the Willing" to launch the Iraq War on the basis of alleged weapons of mass destruction.[83]

The themes of these inquiries and conferences ultimately all still revolved around the perennial international law question I have dealt with since my first law degree all the way to my doctoral degree and postgraduate work: "what would you do if you were advising a sovereign government on this legal question?" Hard as that question was when I was first studying international law, I fully concede it is a thousand times harder now that I engage in international law teaching, writing, and occasional practice. The difficulty is not so much about defining one's functional role in these situations, but rather, about the fundamental duties we deem inherent for any international public lawyer. Above and beyond a local code of professional responsibility owed to bar membership, do we, as international public lawyers, have a greater responsibility to resist the pull of "my country, right or wrong, my country"[84] when international law—and by practical extension, the gainful stability of the international system under an international rule of law—is at stake?

This reminds me of Lord Shawcross' dilemma, and one of the first conversations I had with Professor W. Michael Reisman, Myres S. McDougal Professor of International Law at Yale Law School – when I was a Philippine law professor and law partner, using my postgraduate studies to carve out the semblance of a teaching and practice sabbatical. Professor Reisman was the Faculty Advisor assigned to me, where out of about 20 Master of Laws students, I was the one focusing on international law and comparative public and private law studies that year. When I came to his office for our initial meeting, I discovered we had a shared enthusiasm for Joseph Conrad's Heart of Darkness,[85] and its compelling themes on witnessing conquest, colonialism, inequality and injustice, slavery, and institutionalized exploitation. Before ending our session, Professor Reisman asked me the same question I put forward to you today: "what, in your view, is the work of an international lawyer?" While I was ruminating this, he told me briefly about Lord Hartley Shawcross[86] – the United Kingdom's famous legal adviser who led the British legal prosecution team at the Nuremberg Trials, and who argued for the UK in

[83] For various documents on the UK Chilcot Inquiry, see http://www.iraqinquiry.org.uk/transcripts.aspx (last visited July 1. 2013). On the US Senate Intelligence Committee inquiry, see How the US Has Investigated the Iraq War, BBC NEWS, (Nov. 24, 2009), http://news.bbc.co.uk/2/hi/middle_east/8376977.stm.

[84] REISMAN , supra note 10, 459.

[85] See generally JOSEPH CONRAD, HEART OF DARKNESS (1990).

[86] For a brief biography, see Hartley Shawcross, ECONOMIST (July 17, 2003), http://www.economist.com/node/19228.

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the International Court of Justice on the landmark Corfu Channel case between the United Kingdom and the Republic of Albania. As you will recall, Corfu Channel involved, among others, the UK's claim that its navy's passage through the Corfu Channel Straits was innocent passage, and that Albania had acted in bad faith for laying mines on the Channel without notifying incoming ships.[87]

As Professor Reisman recounted in more detail in his Hague Academy lectures,[88] while proceedings were pending, the International Court of Justice requested the production of a certain document (titled XCU document). The British government decided not to produce or disclose the document because it was feared that it would cast doubt on British motives in undertaking passage. Lord Shawcross was incensed with the decision not to disclose the document, and said that he would have objected to the filing of the case had the document been disclosed to him and the UK legal team. Lord Shawcross proceeded to argue the case without producing XCU document. After the UK won the case, Lord Shawcross sent a memorandum to British Prime Minister Clement Atlee, stating in no uncertain terms that:

> It is a fundamental principle of the practice of the Courts of our country and of the conduct of our legal profession that parties to litigation are not entitled to use merely those documents which they think will assist their case and to suppress others which are inimical to it. I must make it clear that neither the Solicitor General, nor myself, nor, I am sure, any of the other members of the Bar who are assisting us in this matter, would for a moment contemplate being parties to the course of conduct now forced upon us by the Admiralty's failure to procure and produce these documents earlier had *our country's international position not been so gravely involved….*[89]

The above memorandum—Lord Shawcross' attempt to "speak truth to power"—was only released fifty years later.

Lord Shawcross' dilemma – deciding whether as an international lawyer one had obligations to truth and justice in the international community that transcended State lines and national obligations – is a recurring dilemma for any international public lawyer who has to work at the

[87] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).
[88] CONRAD, supra note 85, at 458–62.
[89] Id. at 457–58.

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intersection of national and international legal systems, and who has to know both systems well enough to be able to identify and prescribe what is indeed, possible, lawful, and legitimate to authoritative decision-makers of States. Beyond, for example, the traditional ethics of the legal profession, there is an added dimension of complexity that makes the international public lawyer's internal struggles more difficult: States are not monolithic entities, and authoritative decision-makers in each State are a product of their times, felt experiences, and socio-historical contexts – they bear different lines of accountability and apply different degrees of public transparency to the decisions they eventually take on behalf of their respective States. It is for this reason that the International Bar Association's 2011 International Principles on Conduct for the Legal Profession[90] expansively cover independence, honesty, integrity and fairness, conflicts of interest, confidentiality and professional secrecy, lawyers' undertakings, among others. But this barely scratches the surface of Lord Shawcross' dilemma, and the inimitable challenges that the corps of international public lawyers around the world face anonymously every day as States' authoritative decision-makers issue policies of international consequence and impact.

The new Great Game between the United States and China in this century could very easily swerve between forcible confrontation and pragmatic cooperation. Both the unipolar hegemon and the rising power exhibit gaps between myth systems and operational codes on their reception of, and uses for, international law, and both have stood accusations, at times, of "exceptionalist" or "non-conforming" realist behavior driven by thick conceptions of sovereignty that tend to exclude and reject broader international or global interests. Both States reach for redefinitions of the spaces of sovereignty and internationalism in their legal and political discourses, and both inimitably and understandably look towards protecting their sovereign interests.

The main difference lies with how each State has been conducting this conversation with everyone else in the international community, and to what extent the "Others" have been welcomed in the decisions that also end up affecting them. The United States' corps of international public lawyers has professionalized the practice (even art form) of international law justification in public decision-making within its federal government system – these positions may be debated, vetted, and contested by other States and institutions and constituencies, but they are, for the

[90] See International Bar Association Principles on Conduct for the Legal Profession and Commentary, IBA (May 28, 2011), http://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C.

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most part, readily identifiable and openly disclosed under international lines of accountability and voice that have some suasion and impact (whether now or in the next political administration seeking to differentiate itself from its predecessor). China's corps of international public lawyers, on the other hand, is spreading out and diffusing across administrative agencies, ministries, and institutions – pedestrian governmental decision-making that may touch upon or yield international legal consequences is a labyrinthine bureaucratic exercise despite the central government's exclusive competence on foreign policy-making. China's myth system abides by an absolute nationalist-sovereigntist core, but its operational code might appear to some to be quietly leaning towards more cooperative expressions of sovereignty in some areas that seem to trench only upon economic interests.

It is in this sense that the evolution of Chinese legal education towards the international, transnational, and global – as PKUSTL well embodies and represents in its pedagogic mission – is crucial for developing and professionalizing China's future corps of international public lawyers. Whether such a gap between myth system and operational code – between the fictive differences of "rule by law" and "rule of law"[91] – could persist and endure given the dialogue initiated this June 2013, will, I submit, eventually decide the outcome of this century's new Great Game.

[91] See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 55–125, 343–93 (2002).

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