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# AFJAGS Podcast: Episode 60

## Lawcraft: Deciphering China's Approach Toward International Law with Captain Matt Ormsbee – Part 1

**Host:** Captain Charlton Hedden

**Guest:** Captain Matt Ormsbee

Part one of a two-part interview with Captain Ormsbee about his recently published article that deals with China and its approach to international law.

[Music: Band playing a section of the Air Force Song]

### Introduction

#### **Captain Charlton Hedden:**

Welcome to episode 60 of The Air Force Judge Advocate General's School Podcast. Today's show is another installment in our Great Power Competition series, this time focused on China.

We're talking with Captain Matt Ormsbee, who is currently the Area Defense Counsel at Misawa Air Base, Japan. Captain Ormsbee is a three-time winner of the National Security Law writing competition, as well as the recently announced winner of the Thomas P. Keenan, Jr. Award, which is given to one Air Force JAG per year for their notable contributions to the development of international law or military operations.

We're talking to Captain Ormsbee about his recently **published article** that deals with China and its approach to international law. Outright military conflict with China can never be ruled out, but right now, skirmishes are being won and lost on the legal, social and political battlefields that lie somewhere in the gray zone between peaceful cooperation and outright war. One of those legal battlefields involves international law and the systems that seek to enforce that law among participating states.

We hope you enjoy this episode where we'll spend some time looking at a seminal case in that realm that involves the dispute between China and the Philippines from 2013. But first, I ask Captain Ormsbee to provide some setup to give us a sense of what has happened over the last few decades that led us to where we are now.

## Background

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### **Captain Matt Ormsbee:**

Absolutely. My paper starts with the premise of the *Pax Americana* [Latin for "American Peace"]. So, the historical term for that period of long, sustained peace and prosperity following World War Two, end of the Cold War years, and eventually the great power competition with Russia and China following the fall of the wall in late 1989.

And what I say in the paper is that we're likely in those, the twilight years of that peace when American power and might was at its pinnacle and American influence, military power, they all appear by some accounts, at least to be waning in recent years and that we may be conceding ground to China following several years of major economic growth from them. And the Chinese Communist Party pumping resources nonstop into the Chinese military. And so that should come as no surprise, I think that China has been growing by leaps and bounds for several years now. That's been the case. But if that is the case and things, and things can always change, obviously. But if that is the case, if that's the trajectory that we're currently on, then we need a very multifaceted national defense strategy.

So, not just to counter China militarily, but also a sturdy international law, kind of infrastructure and architecture to uphold legal rights and humanitarian norms. Because if China continues to expand, and expand its regional influence over neighbors in the South China Sea, there will there will obviously be disputes, hopefully non-military disputes, but diplomatic and economic and legal disputes involving American allies. So, Japan, where I'm based out of, but also Taiwan, the Philippines, Korea, the list goes on.

And when those disputes arise, we hope that rather than armed conflicts, we hope that legal arguments will be the weapon of choice in tandem with diplomatic and economic options, of course, as well. But if that's the case, we need to be focusing on our legal arsenal alongside the traditional war fighting mission.

## Gross Domestic Product

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### **Capt Hedden:**

Yeah, that makes sense. And certainly echoes what we're hearing from our leaders and in the news these days about China's rapidly growing influence over, especially that part of the world, and then, and America's, I guess, fight to remain in power in some sense. So you kind of talked about China's growth over the last few years or at least the last few decades. And I want to say somewhere in your paper, maybe you talk about their GDP growing, you know, exponentially greater than ours, certainly, and than most other countries in a similar timeframe.

What have been some of the drivers of that growth that's taken China from where it was, say, in the fifties and sixties to where it is now?

### **Capt Ormsbee:**

Yeah, they've had an incredible economic engine. I mean, for decades, China's economy has been expanding with almost 10% gross domestic product. So, GDP growth every year since the mid-seventies, since 1978. So you maybe heard the phrase "it's the economy, stupid". And that's exactly the case with China here. The economy is really driving everything else for the country.

So, in terms of GDP, you know, China has been the second largest global economy behind only the U.S. There have been several estimates that China will surpass the U.S. as the largest global economy in the near future, which is a scary thought. You know, one of the drivers has been global trade. China is the largest merchandise trading partner of 64 countries. So basically, one out of three countries in the world China is the largest merchandizing trading partner, and that includes Germany. So major trading nations like Germany. The U.S. counts only 38 countries, for its part.

And more recently, I think experts are they're still unraveling the numbers on what the COVID era has done to both Chinese and American markets beyond just its immediate conclusions. But at least early signs were that overall, China's economy rebounded nicely in

late 2020 and 2021. And so, with that economic growth, you get other forms of national power going as well. For military power, for example, by at least one estimate, I know China's military capabilities could be on par with American military capabilities by 2035. Scary estimates, obviously. And again, a lot can happen in the near future.

But these educated predictions are starting to show a clear picture that China is sizing up, and that's a direct challenge to the U.S. I think that's probably why the most recent U.S. national security strategy from 2017 calls China a quote "revisionist state". In other words, China is a state that wants to create a new order, a new post West Global Order that doesn't feature America first, that they want to bring Chinese interests to the front of the line and minimize U.S. interests, and also make a statement—about authoritarian rule making sense in the 21st century.

I think the U.S. was for many years the undisputed world leader, right? You had a unipolar world that centered, and with many interests, but certainly American wants and needs, because America could call the shots. And China is now saying, "Wait", you know:

What about a multipolar world? What about other leading powers? What about other states like us that can rival the U.S. by many measures? We want that opportunity. We want to call the shots now as well.

And so I know we're expecting the Pentagon's 2022 National Defense Strategy shortly. It may even be released by the time this podcast is published. And I expect it is still going to be focusing on integrated deterrence and keeping us keeping a very close eye on China. Because part of that means China is flexing more than ever in the South China Sea against its neighbors. They've been intimidating. They've been harassing others, out of offshore resources, and seizing land, even creating islands from nothing—well essentially acting like the neighborhood bully.

## International Law

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### **Capt Hedden:**

So that's kind of generally and economically really some of the background in the Chinese rise and then maybe the U.S. kind of, I guess, decline, at least in global influence. Like you said, the interests of our countries, it's not nearly as easy now for us to just kind of impose or protect our interests in all corners like it may have been for 50 or 60 years following World War Two but more specifically now, moving to kind of the how China is operating in international spaces. And right now, I'm kind of talking figuratively at first and then later we'll look kind of where literally and physically they are trying to occupy international spaces. But how is that looking as far as what sorts of things they're now willing to, or apparently willing to, kind of participate in terms of international law?

### **Capt Ormsbee:**

Yeah, and I'll start with a little bit from part two of my paper where I'm basically talking about while China continues to build up its military, I think it would be foolish for them to outright challenge the U.S. in any sort of military confrontation—and never say never, of course, but I think it would be unlikely at this point.

So, what I think we'll continue to see is more of a contest, a tug of war for allegiance, not only regionally but globally, rather than outright survival like you'd see in a conventional war. But while that plays out, I think China is going to strengthen its approach to international law and dispute settlement.

And that's notable because for many, many, many years, China was very critical of the international legal order that was led by the West. The People's Republic of China was founded in 1949. And basically, from that time through the next phases from reforming and opening up policy in the seventies and late seventies, China was really skeptical of the Western legal system. It had basically very little to do with the international legal order until that time.

But as China's gradually opening up to the outside world, starting that time and since the late seventies, you see a lot of changes going on and that was great for its economy. We already talked about that and was part of the impetus for the economy beginning its boom years. But it also made China a big concern for international lawyers. And what you see is China joining more and more international organizations, meaning it's accepting more legal constraints from the outside. Many of those constraints just come with club membership to various organizations.

But I think at the same time, China is basically quietly resigning itself to constraints in the international legal system, because if it didn't accept certain terms of membership, international law could become a very real impediment to the country's steady rise. So, China was very insular up until the seventies, and then it stepped kind of grudgingly into the Western system. And that meant that meant change for the Chinese, obviously, but also a level of uncertainty from the West about how China would interpret international law as the newcomer.

So, in the beginning, China's approach to international law, the use of dispute resolution for international disputes, it was very unclear—to this day, a little bit unclear, but especially back then. And the bottom line is China was probably anxious and fearful of international adjudication.

The Chinese up until that time had traditionally favored private negotiation and consultation over public hearings. And this is partly why parties even today can opt for private mediation or arbitration proceedings. Because it gives it basically excludes outside observers, obviously unlike a public trial, and it keeps China's legal interpretations private, which is, I think, how they preferred it.

So, China didn't initially want to submit to voluntary jurisdiction over any sort of arbitration tribunal, especially one that could hand down a binding award or

hold these transparent proceedings, all of which could very much publicly embarrass the Chinese and publicly harm their interests.

## **Milestones**

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### **Capt Hedden:**

And that all of that has a lot to do with their, that's going to come into play for sure when we get into the details of that Philippines arbitration. But just before we do, can you spend a few minutes walking us through some of the key moments, key other moments in that evolution from barely, you know, barely dealing with the international order back pre 1970s to now where we are and some of those I guess landmark moments or decisions along the way?

### **Capt Ormsbee:**

One moment in particular was China's admission to the World Trade Organization the WTO in 2001. And the WTO is the international organization for really overseeing and regulating international trade between nations. And in plain English it's basically the world largest international economic body and member states to the WTO is virtually every state in the world. They make up about 98% of global trade.

So, you very much need to belong to the WTO if you want a piece of the pie. So, entry to this organization and sort of all the benefits that come with it were, I think, very important to China as it helped to grow its economy further. And regulate economic ties with other nations. So, China was able to join in 2001 and a lot changed in that year.

China signaled kind of an evolving approach to international dispute resolution, and that's largely because admission to the WTO with all of its benefits requires a dispute settlement authority with mandatory jurisdiction over all WTO members. You can't opt out of it. And so basically what that is, is an internal body that says, look, if two or more states are having disputes about tariffs, taxes, what have you, you submit to this body, you can't opt out of it. It will be a proceeding

overseen by the WTO that will hand down a binding award potentially to one of those parties.

And so China is effectively saying, look, if we want to be part of this club, we have to agree to it. And so since that time, China has come before the WTO dispute settlement body several times, numerous times, both as complainants and respondent. And that's offered a very clear sign that China will grudgingly accept international constraints if it means access to a larger market and greater reliability with other nations.

There have been a few notable decisions with the International Monetary Fund and the World Bank as well. But one other, I guess, point during the evolution, one point of interest is in carbon emissions reductions as well. A key milestone was China breaking ground in the Paris Agreement by finally acknowledging that it will need to reduce emissions, but only eventually. So it was a key player in advocating for keeping pledges to reduce carbon emissions, voluntary only. In other words, no binding part of it. And to be fair, the U.S. did the same, right? But you know, according to some sources, like the Climate Action Tracker, China's contribution to date, in this respect, has been highly insufficient. It is basically not on target for global carbon reduction.

So all of these moments and historic glimpses into China's evolution, I think they all hit basically a nickname that China has gotten over several years, which is it is the "reluctant player". China wants the benefits of membership, but without all the obligations, if it can manage that. It wants to hang with the rich countries, but at the same time wants to label itself as a developing country. It wants to have its cake and eat it, too, basically.

And so I think the Chinese Communist Party secretly wants nothing more than to overtake the U.S. in every category, but it's biding its time. And it's difficult to overtake the U.S. when there are these Western led organizations—whether it's economic, environmental or legal, that are holding it back.

So this is a huge and very complicated topic. But hopefully some of those points in the evolution help to highlight how China has kind of changed from the seventies to present.

## Arbitration, Philippines versus China

### **Capt Hedden:**

Yeah, absolutely. And especially your comments about their action on climate change, and kind of where they're at versus where they were, you know, hoped to be or expected to be, or kind of maybe where they promised to start heading is pretty analogous to the case we're going to look at now in a little more detail. And that's this arbitration that had to do with China's actions in the South China Sea and how those impacted some of their regional neighbor states, and basically how they how they entered into that, or whether they really entered into that, and then and then how they reacted to the decision that was handed down. So now for the rest of our time, if you can kind of just talk through how that came about and the main thrust of those claims, and then where it went, and where we are now based on that proceeding.

### **Capt Ormsbee:**

Absolutely. In my paper, I focus on the landmark arbitration, the Philippines versus China, and that was an arbitration proceeding that was filed in January 2013. And it was a high stakes dispute over territorial access—effectively to the Spratly Islands in the South China Sea, among other claims.

And I focused on this arbitration in particular because it renewed questions over China's approach to international law and how it may be shifting. I think it made clear that China would not always take a reliable approach to international law and international adjudications where China was contesting jurisdiction and access to land and water futures and saying it owes nothing to aggrieved neighbors, and effectively flouting awards from a tribunal that were held against it.

So this 2013 arbitration proceeding was all about entitlements in the South China Sea, which many listeners probably know is this massive body of water and land features that's incredibly important for defense reasons, for natural resources, fishing, energy, trade routes, the list goes on. And for these reasons, the sea is a real focal point for disputes over territory and maritime rights between China and members of the Association of Southeast Asian Nations. And that includes Philippines, Vietnam and Malaysia.

And even before the arbitration, this all begins with China claiming sovereignty over virtually all South China Sea islands in their adjacent waters. And China effectively says, "Look, our sovereignty is historically established, it's historically uncontested", but the Philippines certainly contested these absolute claims. So even before the arbitration—China and the Philippines held rounds of negotiations, and they had an unwritten arrangement to resolve this dispute between themselves, and that'll be important later.

Now, one of the main Chinese complaints was that the Philippines later initiated this arbitration proceeding in 2013 before the Permanent Court of Arbitration, with 15 claims against China, seeking a decision basically entitling the Philippines to maritime entitlements in and around the Spratly Islands. And for its part, China argued the UN Convention on the Law of the Sea, which will come up again later.

That Convention mandates that if there are disputing parties to the convention and they've agreed to settle disputes by any means, quote unquote, "of their own choice", then the dispute settlement proceeding under the Law of Sea Convention only applies if there's been no settlement reached by such means.

So Manila, so the Philippines said in their filings with the Court of Arbitration that they were more than justified, because there had been these talks, but certainly no settlement had in fact been reached between the two states, and nor were the bilateral talks binding.

But China clung to that unspoken agreement not to turn to a third party for dispute resolution. I don't think they were right in that case. Effectively, it was saying the settlement talks were still ongoing. Though, I mean, by that argument, they could say that in perpetuity and say, "Look, we're going to stay in these talks until we think that it's done. Until we say that they're done." That's kind of an excuse for them to say that in perpetuity.

And China said it would neither accept nor participate in the arbitration proceeding. Effectively, "we're not going to have anything to do with it, because we don't think it was right to bring in the first place." Even though it's dubious whether they have a legal leg to stand on there.

And so the first shocking move was Beijing basically said, "We're not even going to participate. And if there's an award years from now, we're not going to enforce it. And so we're not participating, period. So do whatever you want."

So it came as a shock, obviously, to many, because it effectively said we can't take for granted that China is on board with the constraints of binding international law. We can't take for granted that they're going to agree to a dispute resolution if it doesn't happen to suit their preferences, particularly when a tribunal is threatening to hand down a decision that China doesn't like, that really may impact their economy and their trade routes, and their defense posture. And that's really worrisome, because it's probably the boldest example of China completely refusing to even consider dispute resolution, especially when transnational disputes are routinely settled by tribunals who want to enforce international law. So, if China is genuinely wants greater involvement in the fabric of these international organizations, international trade, you got to pay to play. You take the sweet with the sour. And so for international organizations, that's worrisome—China is such a big player. It has a lot of sway. It has a lot of clout. And with that, you potentially get the ability to alter the rules or at least bend the rules.

So, the arbitration was started in the January 2013 and it took a few years of filings and going back and forth. But in October of 2015 a five-judge tribunal in The Hague, again this is the Permanent Court of Arbitration. They found that they did have jurisdiction over dispute in and over the parties and they accepted seven out of the 15 submissions from the Philippines, and the Philippines did not explicitly ask for the tribunal to rule on whether China or the Philippines or any other state, you know holds or should hold sovereignty over any of the geological features in the South China Sea. At least they didn't explicitly ask for that. They're filing under the Law of Sea Convention that UN Convention, and that Convention has no authority to make those kind of judgments. Its purpose is to provide a legal order identifying the characteristics of the marine environment and any sort of rights in response abilities of states to use that environment.

And so, it's important to note that even for some of the eight submissions that were not initially granted jurisdiction by the court, the court did later grant jurisdiction, at least in part or in whole at the merits stage of the hearing. It's you know, this is, this whole hearing could be the subject of several hours. So, this is kind of a very much on the surface.

But again, China said, "Look, we don't care in no way about this proceeding. The tribunal's award will be null and void." And that was their messaging from very early on. Well, the tribunal was unfazed by China's nonparticipation and eventually they did render a final award in favor of the Philippines in July of 2016. And it was virtually an across-the-board win for the Philippines.

The broadest claim for the Philippines was a direct challenge to China's nine-dash line. So that territorial line that covers most of South China Sea. China has never really clarified whether the line is supposed to be a claim to the islands within the line and their nearby waters, or a boundary of national sovereignty just over the waters, or a quote unquote "historic claim of sovereignty" or

other historic rights. It's been kind of vague about that. And partly for that reason, the Philippines wanted a declaration. They wanted an award saying, you know, addressing the country's respective rights and obligations for the waters, for the seabed, for maritime features of the sea that are governed by that Convention of the Law of the Sea. And the panel held that the Sea Convention comprehensively governs the parties' respective rights to the maritime areas in the South China Sea. And so the bottom line is China's nine-dash line claim, these quote unquote, "historic rights" is legally invalid. Basically, any historic rights China had were extinguished when the Sea Convention was earlier adopted.

There was also a claim to have certain land features in the Spratly Islands characterized as, you know, either islands, rocks, low tide elevation, submerged banks, you know it really gets in the weeds here. It sounds uninteresting, maybe, but based on how these geographical features are labeled and categorized, that would then give rights to an exclusive economic zone of up to 200 nautical miles. So basically, a space for a state to use it for, you know, mining or other resources. And there too, the panel basically found that none of the land features there generated an exclusive economic zone. And therefore, they said certain areas are within the Philippines greater exclusive economic zone and not overlapped by any Chinese entitlements.

So again, a win for the Philippines in terms of being able to use that area for all the various means. And China again said, "We don't care." Right? "We're still treating this award as meaningless." And maybe that was their posturing from the very beginning, because when they saw these claims and what the Philippines had to back them up, they may have been thinking for the long game that look if this does go to the findings portion of the court hearing we're very likely going to lose—like they did. And so, the surest bet may be to fight the jurisdiction in the first place and say we're not submitting to the court. So, anything that they determine later on is not going to be binding on us.

So that's kind of a little bit about the arbitration. Politically around this time, President Rodrigo Duterte, he won the Filipino election for president May 2016. So basically, a couple of months before that final tribunal award court and pretty soon thereafter, the Philippines just happened to issue a joint statement with China. And they're taking a very—much softer approach to their dispute. They're jointly promising new negotiations. Philippines is not opting to leverage the tribunal award.

So, this in itself raises doubts about whether President Duterte's administration would discredit any international tribunals, right? Whether they actually wanted to rely on the Permanent Court of Arbitration, or maybe they had fears that, "Great, we got this award, but how do you enforce it? You know, if it's an unenforceable award, what good is it to us at the end of the day." Or, you know, another option is maybe the award was just pursued as a kind of leverage all along to bring China to the table for more serious negotiations, because earlier talks were not fruitful.

But in any event, I mean, the tribunal award was shocking. It was a huge win for the Philippines. It was unprecedented. And I think it revealed how China was going to approach certain hearings like this, certain claims when it could foresee that the outcome may not be great for our national interests, for our defense posture, but it definitely meant reputational harm to China. It definitely meant lost credibility I think, at that point.

So, it's pretty clear that China acted poorly in the entire arbitration proceeding. It tried to make an argument to avoid jurisdiction, which many scholars, many pundits viewed as a very flimsy justification without a lot to back it up. China insulted the tribunal without much explanation, and ultimately said that the award was meaningless and they were not going to honor it.

## Conclusions

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### **Capt Hedden:**

So, as we kind of close this part of the conversation, I'm looking at that one case. What kind of conclusions do you think it's safe to draw, or at least, I guess, hypothesize about China's approach writ large to international law and norms and arbitration agreements in the future?

### **Capt Ormsbee:**

Yeah, I'll draw back to the nickname that I cited earlier for China, which is the "reluctant player". And I think this really highlights that China will use international law and adjudication to its benefit when it's only to the benefit of China—at least so far. And I mean, it's been a few years since this arbitration but I think it lays bare that China will go to great lengths to discredit the Permanent Court of Arbitration. So, a very renowned body that hears routinely hears international disputes between parties, including the U.S., China, Germany, the list goes on. That they will go so far as to say, "We're not going to play. We're not going to participate. This is an outcome that we don't want to see." Very likely because the final award is not going to be to their benefit, but they will go so far as to say, "We're not even going to participate."

So, you see them on the one hand wanting to integrate themselves into the fabric of these international organizations economic, environmental, legal and other diplomatic organizations. You see them wanting to reap the benefits. But when it comes to a situation where they stand to lose a lot, because they may be in the wrong, and they may have to concede ground on these long-held claims about historic rights to the South China Sea, you see them effectively acting, acting like a child, throwing a temper tantrum and saying the whole-time, "You guys don't have the authority to decide the dispute. We were still speaking with the Philippines one-on-one. We were", according to them, "still making progress", even though the record doesn't seem to show that progress is being



made at this point and that the Philippines did file a good faith complaint against China and the Permanent Court of Arbitration. But it just really calls to question what lengths China will go to avoid a bad outcome, especially when it goes to the core beliefs and the core tenets of the Chinese Communist Party.

**Capt Hedden:**

Excellent. Well, thank you for that informative explanation of what's kind of going on with regards to China and its approach to international law. It does sound like it's, I don't know, it almost sounds like they would like for the rest of the world to accept them as willing parties to these agreements up until that might harm their preferred outcome or their national interests, which certainly—I think you used the word worrisome—certainly a little worrisome for how to conduct ourselves as an international order going forward, especially with the economic influence that China currently wields. So that was certainly enlightening, very interesting to see how this is going on and how this kind of dispute is on news feeds pretty regularly, and how some of the background of it informs what we're seeing now. So, thank you for lending your expertise. We enjoyed reading your article on this, and we look forward to talking to you again soon about another part of it. A little more specifics, especially with regards to the to the legal field that we all occupy.

So, Captain Ormsbee, I really appreciate it. Thanks for joining us. And we'll talk to you again soon.

**Capt Ormsbee:**

All right. Thank you very much.

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## Wrap Up

**Capt Hedden:**

Thank you for listening to another episode of The Air Force Judge Advocate General's School Podcast. You can find this and all our available episodes, transcriptions and show notes at [www.jagreporter.af.mil/podcasts](http://www.jagreporter.af.mil/podcasts). You can also find us on Apple, Spotify, Stitcher, or wherever you like to listen. Please give us a like, a rating, a follow, or a subscription.

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[Music: Band playing ending of the Air Force Song]

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## Glossary

- **AFJAGS:** Air Force Judge Advocate General's School
- **GDP:** gross domestic product
- **JAG:** judge advocate general
- **UN:** United Nations
- **WTO:** World Trade Organization