AFJAGS Podcast: Episode 61

Lawcraft: Deciphering China's Approach Toward International Law with Captain Matt Ormsbee – Part 2

Host: Captain Charlton Hedden
Guest: Captain Matt Ormsbee

Part two of the 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]

Part Two

Captain Charlie Hedden:
This is part two of our conversation with Captain Matt Ormsbee about China. If you haven't listened to the previous episode yet, I encourage you to give it a listen first to put the rest of this conversation into context.

Okay, Capt Ormsbee, finally, now we get to talk about the actual title of your paper, which you called "Lawcraft: China's Evolving Approach to International Law and the Implications for National Security". Last time we spoke, we fleshed out that first part China's evolving approach, and specifically looked at that landmark 2016 decision where the Philippines took China to arbitration before the Permanent Court of Arbitration or PCA. So, thanks for joining us again to really dig into that second part you mentioned in the title, specifically the implications for our national security.

So first off, let's dive into that term, "lawcraft". Talk to us about the word itself, which is kind of a new word that hadn't really been used before in this conversation. So, what does it mean? Where does it come from and why did you choose it?

Lawcraft

Capt Ormsbee:
So, this word is a mash-up of law and witchcraft. And at the time I was writing this paper, I was looking for a term that would capture what I was talking about, what I meant, and I couldn't find anything on point. So, I viewed lawcraft as related to Lawfare, which is now, I know a

term that's been popularized years ago by Air Force Major General Dunlap. So, meaning just any use of law as a weapon of war.

I viewed lawcraft as more *threatening* in a certain way. And what I argue in the paper, is that lawcraft is characterized by sort of conjured interpretations of the law. And in that way, they are more like witchcraft than statecraft. So that's kind of the mash-up of the words and I'm using here. And it's, again, supposed to mean the use of law as a tool of subterfuge, as a means to mislead another, or to gaslight, or to coerce adversaries—most notably in disputes over territorial rights or maritime claims, anti-access denial abilities. It can be applied really anywhere. But for the context of my paper, obviously relating to territorial rights and maritime entitlements.

Capt Hedden:
Right. So, we're now kind of talking about this phenomenon of China expanding its reach and its capabilities and its influence beyond just militarily. You mentioned in the last conversation about how probably at this moment China doesn't think it's a great idea to be involved in a *direct* armed conflict with the United States. So, it's sort of feeling out these other areas in society and the law in economics where it can sort of push boundaries and expand its reach over the globe.

So that's kind of where this lawcraft comes in. So, when you use it, what kind of actions specifically are you referring to? And then what are some examples that you can point to of what you think would quell or what you would say would qualify as lawcraft rather than statecraft?

Capt Ormsbee:
Well, the main question I posed in my paper is basically if China continues to rise—and by many accounts equal or even outpace the U.S. by some measures, whether it's economic, political, military—then what can national security law do to slow China's pace, and give the U.S. some breathing room? And that comes from the 2018 National Defense Strategy, where we're talking about long term strategic measures as adversaries and their capabilities gradually match or exceed our capabilities.

So again, in part one, we kind of phrase this as a "tug of war with China", that China is our primary facing challenge. This is all also in line with the Biden Administration's pivot to Asia and focusing on that area, the Indo-Pacific more generally as the primary focus in many cases for national security. So rather than looking at strategic competition through the lens of military maneuvers, I wanted to take this angle in the paper about looking at it through the lens of legal maneuvers, in that the Chinese Communist Party will continue to use lawfare in novel ways against adversaries. And I was hoping to take it a step further. And as I said, lawcraft as a more, I guess, threatening offshoot of lawfare, because rather than the sort of up-front, black and white use of law as a means of war, I think it's a little more insidious because it's misleading. Lawcraft is not always black and white. It can oftentimes be misleading and coercive.

And so, my paper is really about China exercising lawcraft in order to outpace the U.S. And all without declaring war. One of the one of the key phrases these days is "gray zone tactics", "gray zone competition", these to describe sort of this realm of adversarial maneuvers that fall well below the threshold of war, right? They're not military, they're not armed, but they are nevertheless aggressive and adversarial. And they take the form of diplomatic maneuvers, economic sanctions, and legal disputes. And so, what I wanted to focus on as part of sort of what we now view as gray zone warfare is China's ability to wield law as a sword and in a cunning ways.

So, what I focus on in the paper is the concrete example of the Philippines versus China arbitration, which we discussed in part one, and then offers some proposals for how to analyze this, how to counteract this, how to neutralize this in the future, should China try this again? And in the process of trying to pose and answer some bigger questions about global authority as it ebbs and flows, global authority, whether it's held by the U.S. or China or some other state in the future, and at the end

of the day, kind of pose the more, I guess, the larger question of whether the international system for these peaceful dispute resolution is resilient and in particular resilient enough to contain any sort of Chinese abuses and preserve American national security. Because make no mistake, I believe the U.S. currently has the resources and strategy to maintain superiority over all of its adversaries. Even if you do take the view that our authority or superiority is potentially waning relative to other states. At the end of the day, I think we're still in a in a solid situation where we do have the air superiority, for example, that we need.

But you always have to plan for contingencies. So, if China is able to flex in the South China Sea and if its economy continues to rev year after year, after year, will the U.S. have sufficient nonviolent options to keep China in check?

International Systems

Capt Hedden:

I think sort of one of the gists of your paper is that we don't necessarily have to do this unilaterally as the United States anymore, thanks to these international systems in the international law that is currently respected and practiced by such a large majority of states. We've got help on this front. So, it sounds like, kind of like, even if there's some sort of a diminishment of the United States' absolute ability to impose its will on things, our will is fairly well represented and aligned with that liberal Western led rules-based order that these international systems sort of seek to impose. And you kind of use a term in your paper that "the system's easy to join and hard to overturn". What are you getting at there when you talk about that vis-a-vis China and its participation?

Capt Ormsbee:

What I'm addressing is that China has been rising for several years. We talked about in part one how China gradually opened up in the 1970s, began to embrace outside organizations in part because it was beneficial for the Communist Party because it offered a new avenue to grow its economy—to rise up from poverty, to develop the entire country.

And so it was rising, but it was rising as a non-Western power. And what you have to remember is that this rules-based international order, this system, largely came about right after World War Two. So late forties, early fifties, including the United Nations. And it is this very robust international legal system that came about decades before China was ready to enter, before China was a big player, before China had the authority and the clout to influence those *rules* that were going into the international organizations. So, the Communist Party's agenda is not just at odds with the U.S. agenda, whether it's political or military, but also, oftentimes at odds with the entire system. So, I think on a macro level, you have this Western oriented system that was for many decades, led by the U.S., led by Western European nations, that was open, and it was integrated, and it was rule-based. And it's a sturdy foundation that provides for, in many cases the status quo. And if there is a dispute, that it will be an open, public, fair, rules-based resolution that goes into it.

And so that's why I love the thought that you just said, which is "that today's international order, it is easy to join in, hard to overturn", because just like in part one where we were talking about China joining the World Trade Organization, the WTO, or being a bigger player in the World Bank or the IMF or in reducing carbon emissions, we want countries to be able to sign on the dotted line and to group together and to organize themselves, and what they want to do. We don't want rogue actors. We don't want necessarily states that come in as "revisionist states"—term we used in part one, where you want to shake things up, or China has said we've had a unipolar world for so many years led by the U.S. de facto, what about a multipolar world?

Instead, we want countries to be able to join and with the benefits of closer ties and of preferential treatment with other states. And that's no accident. So, I think a lot of this, fortunately, can withstand efforts of lawcraft from China or any other state. And that's important, because I think disputes in the South China Sea, or at the time that we're recording this, on the border between Ukraine and Russia, for example. Those are hot topics, and they will

be hot topics for years to come. It's nothing unique to our times. I don't think. And I know members of our JAG Corps are certainly aware of this, and hopefully we're able to integrate some of this into our mission and training so we can sort of maximize our effectiveness in the real world. I know it's part of our core mission to be relevant for commanders and the mission worldwide.

One of our three domains is dedicated just to operations, international law, as it should be. So, I think there's a very clear connection between this mission skill set and General Rockwell's priorities for the Corps, and many of the ideas that I try to flesh out in my paper. And even those outside the JAG Corps hopefully can appreciate that all this aligns with the greater national security strategy. At the end of the day, whether you're in the JAG Corps or not, you care that America can protect itself and its allies. You can barely read an article these days on security without a mention of China's latest actions and tactics in the South China Sea, right? It's just kind of a fixture every day. Same for Russia and the Ukraine border.

So, we need to understand what's happening there, but also how our laws can affect outcomes there and hopefully neutralize other states trying to contort international law to their benefit.

Proposals

Capt Hedden:
Yeah, well said. It sounds like the part that we're going to turn to now, which is your specific proposals that you wrote, kind of the meat and potatoes of your article there, has to do with making the system that's in place that much harder to overturn, making it attractive to join for those who maybe haven't yet and would benefit from it. And making it makes sense to stay a part of it, because it is resilient and mutually beneficial for everybody. So, with that, let's talk about the proposals that you did include specifically in your in your paper.

Capt Ormsbee:
What I wanted to put forth in the proposal section are ways to influence state's behavior. Ultimately, with an eye of benefiting the U.S. and stifling any objectives from adversaries. So, I wanted to put forth ways that we could influence decision making, again, looking at sort of long-term strategy, and in kind of bolstering, again, this international order that we talked about that is "easy to join in, hard to overturn", because that lays the groundwork for a legal battlefield that is ultimately going to favor U.S. interests.

So, the first proposal I had was to the maximum extent we should be trying to make disputes multilateral. So, what we'll see, I think more and more are micro-skirmishes around the world over tangible things like territorial access, maritime rights, but also intangibles, like reputation credibility. And I don't think that any single dispute is going to be decisive, but they will all move the needle a little bit. So, the U.S. and our allies, we need to master and leverage these rules that are applicable to disputes before the Permanent Court of Arbitration, which we talked about, part one. But any other adjudicated bodies, like the one that we mentioned for the WTO, which is mandatory for membership there. And in front of the Permanent Court of Arbitration, the PCA, for example, there's this key rule of joinder that permits the addition of other interested or other affected parties to dispute.

So in the arbitration we talked about last episode between Philippines and China, for example, other nations in the area such as Vietnam, or Malaysia and Taiwan, they might have joined, they could have joined the arbitration and bolstered the stance taken by the Philippines. I think that's important for signaling that what we talk about in "gray zone warfare", like we said, is not always outright aggressive acts, but it can be also signaling diplomatically or legally that you have other allies, that you are not the only one going toe to toe with China or Russia, for example.

So in the arbitration, clearly the Philippines won almost hands down and all the claims that they had even absent joinder. But I'm also looking at future disputes. So, I hope there's not another arbitration case like this with China.

But if there is, or if there is or if there's something similar to it, this could make the difference in a future dispute.

Short of joinder, interested parties can always file amicus briefs, much the same way that parties with an interest can file briefs in U.S. Supreme Court cases, and in some state court cases. And this all goes to the bigger picture of community over individual. So that non-parties to the arbitration can still have and demonstrate a community interest in the outcome, that in the future outcome it will not be just Taiwan against China. It will not be just Vietnam trying to protect its rights vis-a-vis China. It will be a group of nations in the region that are teaming together and would potentially have better odds of success. I mean, even the foreign affairs secretary for the Philippines at the time, Secretary Rosario, kind of addressed this even back during the original arbitration, and said that he wanted the arbitration in the spirit of a class action lawsuit, that this affects all the coastal states that border the South China Sea, that it doesn't interest just the Philippines, but there are other similarly situated states that would also want to push back.

Now, China did push back against this, but eventually, against this stance and the statement from the foreign affairs secretary, but they did eventually concede that the South China Sea is clearly an enormous geographical feature. It directly impacts countless states. So, it eventually acknowledged that there were inherent community interests in the South China Sea, certainly as an enormous geographic feature.

So, at the heart of it, I think China stance was lawcraft. In this arbitration, it cited a technicality and distracted from the main points, kind of to shirk responsibility, to say that, look, negotiations were still ongoing, even though they had been going on for many, many years, and had not been fruitful in the least. And even though clearly the Permanent Court of Arbitration had jurisdiction over it and over these claims, but nevertheless, I think the argument would be much harder to make with a straight face if you have several complaining states banding together. I do think that community-based interests can tip the scales in favor of U.S. allies in the future. And it's not just hypothetical. Vietnam is currently considering legal action against China for very much the same claims that the Philippines brought. And if that's the case, and it goes forward, then being able to add complainants and show that this is not just one state against China, that can certainly bolster the claims.

A second proposal I had was distinguishing political fights from legal arguments. So, Secretary Rosario had said over and over that the Philippines just wants to enforce the Law of the Sea Convention, just enforce its legal rights, and that they were just trying to clarify the country's maritime entitlements. They just wanted a legal judgment, rather than a political victory. But China countered and they basically said the arbitration is motivated purely by politics. It's a political maneuver, and so for that reason, it's illegitimate.

Now, there's little or no support for this claim from China. The Law and Sea Convention clearly supports the Philippines position. If anything, China's "historic claims" argument goes back a long way and seems to be basically a political argument itself. Somewhat ironic, in which the PCA later found legally invalid.

One claim that may be valid, is China said the tribunal was inherently biased because the U.S. and Japan were able to have some say in the appointment of arbitrators to the tribunal. So, their claim being that this was potentially stacking the odds in favor of a positive Philippines outcome. This claim was never substantiated, but I certainly agree that even the appearance of partiality can be poisonous. Can undermine the legitimacy of the PCA. And obviously the legitimacy of the final award.

The only surefire way to take the wind out of China's sails is basically to say, look, in future arbitrations, legal hearings of any kind, we won't even go near the appearance of unfairness. We don't even want to risk that at this point. Because, you know, if the outcome is going to be positive for the U.S. or allies, we want to be able to enforce that and say that it was fairly done, fairly

considered, and that there was nothing unfair about the proceeding. So, we need "clean" panels, and we need "spotless" processes that are guaranteed to be fair at the end of the day.

And with that, states can directly address any sort of lawcraft arguments that come from China, like the historical territory, which I think itself holds no weight. There's absolutely no basis in international law to justify that argument about having historic rights to the territory. That's in line with what the PCA, the five panel, five-member panel held was that China had no historic rights to these territories. But also, the complete and utter refusal to participate in the arbitration.

China could have participated, all while maintaining its objection to the forum. So, it didn't have to be all or nothing. It could have said:

> We object. We don't think that you have proper jurisdiction and we may not honor a future award, but at the same time if it's going to move forward anyway, we can at least file some claims and counterclaims, and participate to a limited extent in the findings portion.

Which they did not do.

They objected, China objected so often. After all that, it basically *was* participating in the arbitration. I think it honestly, it should have participated, but at the end of the day, like we mentioned earlier, what they were probably scared of is an outcome that would not be in their favor and so if they put all their weight into contesting it, and still lost, that would be a huge blow to the Communist Party.

A third proposal, I'll briefly touch on a few other proposals, but one was with China especially. I think complaining states have to be especially careful to phrase any sort of complaints in terms of entitlements to land and water, not sovereignty. So, this is obviously especially relevant for the South China Sea, but really focusing on rights and entitlements to *use* the land of water, and not necessarily sovereignty and *ownership* of the land and water. And that's a fine line to walk, because China will otherwise have ammunition to argue, at least before the PCA, that the panel does not have the authority to pass down decisions that are squarely relating to sovereignty. And I think this was reflected a little bit in the panel's early reluctance to take some of the Philippines claims until the findings portion of the hearing and not early on when they district when they determine the jurisdiction.

So states have to be careful. They need to separate questions of sovereignty from land feature entitlement questions, because if you're going in front of a body, like the PCA, and you're waving around the convention on the Law of the Sea, you need to make sure that you're not asking them to make certain determinations that they're not able to make, but also giving China ammunition to say that you are trying to cross a line, that you are trying to undermine rule of law and take certain islands wrongfully from them.

Because at the end of the day, if you win on entitlement questions, in the PCA or otherwise, that's ultimately the win that I think most states are going to care about. That's what they honestly care about is being able to use certain land features, mine, minerals, and use natural resources, to be able to fish, things of that nature.

And one final proposal I'll mention briefly, is I call for a gentler approach to enforcing international law with China. In part because we don't want China to reflexively recoil at legal proceedings. We don't want them to say, "Look, we're not even to participate at all." I think if a state comes out too hard against China, comes out swinging, China may harden their resistance and could even potentially escalate the conflict, especially if that's a red flag for China, or if they think early on that this is going to be a knockdown, drag out fight. They may recoil from that, especially if they think that the evidence is somewhat stacked against them. So, in practice again, I think claims should be no more than what is necessary to enforce certain discrete rights. That's going to fall

on each particular state to be very careful about what they're pleading and what they're asking the PCA or any other body to decide, and what they really want at the end of the day. And I hope that this will welcome China to participate more and more in the PCA and other forums that are favorable to large states, but also small states alike.

Capt Hedden:
How do you think that adopting those proposals impacts China's ability to practice its lawcraft or at least impacts the effectiveness of those lawcraft sort of efforts, whenever China does employ those?

Capt Ormsbee:
So the good news at the end is that China is trending toward greater acceptance of outside dispute resolution. And that tribunals have been able, on the whole they've been able to ease many of China's fears. And this is heartening to hear because the number of international tribunals with compulsory jurisdiction and ability to handle these binding awards, they have increased significantly. So the role of the judiciary, in an international context, is more important than ever for international law, and for U.S. national security law.

As I mentioned before, in the past, China greatly prefer to settle any sort of international disputes through private negotiation. They wanted to be able to keep their tactics and their legal maneuvers internal and private, but they started opening up in the seventies. And since the nineties, China has began to really embrace international regimes. And with that comes the dispute settlement mechanisms with implied jurisdiction, compulsory jurisdiction, like the Law and Sea Convention and the WTO agreement. And so as a result, China is getting more and more involved in international adjudication, which is a good thing, I think, for China, but also for the U.S. I mentioned in my paper that, and this just kind of drive the point home, that in 2007, a total of 13 disputes were filed in the WTO for their dispute settlement body and of those 13, five of them involved China. A year later, in 2008, China was involved in a third of disputes among WTO members. And then in 2009 and just another year later, China was involved in half of all WTO disputes. And the trend continues.

And if it's not as a complainant or as the respondent, then China, is appearing as a third party, oftentimes in front of the WTO dispute settlement body or in front of the International Court of Justice or the International Tribunal for the Law of Sea. So, I think ultimately the Philippines versus China arbitration is a historic decision because it shows that smaller states are more and more willing to exert their rights in a legal forum against China, even as China becomes bigger and bigger. And even if China largely avoided accountability in the 2013 arbitration with the Philippines, it showed the dark side of how to manipulate the law through lawcraft for ultimately an outcome that I think it favored because at the end of the day, even though the Philippines got the decision it wanted, I think you have even further lawcraft thereafter potentially in these joint releases and maybe in China flexing its muscle with President Duterte: maybe holding off and not forcing just yet. And you know what, maybe we can consider further negotiations at this point. We wouldn't want to rush to judgment anything like that.

But I think China will have a harder and harder time with these kind of slippery maneuvers in future hearings before the PCA, before the International Court of Justice, things of that nature. I think these arbitration proceedings stand out, hopefully as an anomaly for China. And obviously, I hope that the U.S. can bolster a dispute resolution system that will be more immuned to lawcraft and any other lawfare tactics coming from China or anywhere else. We need a system that's conducive to third party claims. It's kind of what I mentioned at the very beginning is if we were going to settle a number of disputes more and more, not in the military context per se, not with arms involved, but rather in a diplomatic or economic or legal forum, we need to make sure that the battlefield is optimal for outcomes that are going to benefit U.S. national security. And this is just one of the ways to do it.

Capt Hedden:
And a follow up question on one of the things that you mentioned. You talked about the trend of China's involvement in those WTO negotiations or dispute resolutions and how that keeps rising. And wondered, in your opinion or if you know, is that because they are such a high volume, just a huge player in the, in world trade, or does it say something about, I guess, a rocky relationship between them and their trade partners that they end up being in court, as it were, so often and apparently in growing numbers every year?

Capt Ormsbee:
It's a little bit of both. It is partly always going to be inherent that China will be involved in an inordinate number of these disputes because the level of its trade with countries all around the world. We mentioned that before, it can't take a step back. I mean, it is just at this point, it is so interwoven with the economies of virtually every other national economy in the world, that inevitably you will be involved in these disputes.

But I think it's a little bit of the second point that you raise as well, because you can look at the number of disputes that the U.S. has been in and is in currently. I don't have that number at my fingertips but it is less than China at the end of the day. That maybe because the U.S. has been involved in the international rules-based system longer, so it is sort of found its rhythm, and is not necessarily in disputes with other states that often. But I think it's poignant the fact that the U.S. is involved in less disputes than China is. I think oftentimes what you see is these disputes will arise because smaller states have no other recourse except through economic measures to try to get an even playing field with China. And that may be a long shot, especially when you look at the economic might, the size of the economy that China has.

It's, it's a David and Goliath situation for many states. But I think many of them will use the WTO dispute settlement body as their fairest shot at leveling the playing field with China, because it can be no holds barred at times if you're disputing with them diplomatically or militarily, right? I mean militarily, you'll lose all day long as a small state against China. But at least in the dispute settlement body and the WTO, you're guaranteed to have a fair hearing with due process, and perhaps a better likelihood of a favorable decision against China. So, I think small states all day long will say:

> Yeah, I mean, if we think there's unfairness or if China perceives unfairness from us, and we haven't done anything. Absolutely. We will submit to the WTO. We will let them hear the dispute and hopefully come down on our side.

Capt Hedden:
That makes sense. It also seems to make it that much more important to ensure that those dispute resolving bodies are as immune to China's attempts to use lawcraft to wriggle free as possible so that not just U.S. interests can be advanced, but so that this system can protect smaller states when those asymmetries exist.

Capt Ormsbee:
Absolutely.

Final Thoughts

Capt Hedden:
Look Capt Ormsbee, I can't tell you just how much I learned reading your paper and some of the other ancillary materials about international law and China and getting to talk to you about this and how grateful we are here at The JAG School for you submitting this for the National Security Law competition last year and then agreeing to talk with us and educate the field about these important and growing important issues for our particular career field, but also just for our country as well.

So, anything else you want to leave us with before we hang it up, call it a night?

Capt Ormsbee:
I guess the only thing I'll mention is the buzzword of the day right now is "gray zone warfare", and that is the

umbrella term for any non-armed conflicts that can involve, whether it's diplomatic efforts or economic or legal, and I think more and more, rather than seeing armed conflict, you're going to see posturing, you're going to see tactics in these fields of national power.

I think for the JAG Corps and for attorneys more generally, obviously, we're most interested in the legal field and on an international level, what the big players like China and Russia are trying to do to use law to their benefit, to either further their interests or evade liability to other states. We need to just keep a close eye on this as it develops.

Certainly, the topic of today is Russia and Ukraine, and monitoring sort of where does national security law fit into that situation? They'll be, there'll always be a topic du jour. I chose this arbitration because I think China and Asia is still the biggest concern for the DoD currently, but I hope that some of the takeaways from the paper can be adapted to other situations, whether it is Russia, North Korea, Iran, whatever the competitor may be. We need to be able to have takeaways that can be molded to different situations like that.

Capt Hedden:
Awesome. Thanks again, Captain Ormsbee, for your time and lending your knowledge and expertise and being willing to talk to us about this.

Capt Ormsbee:
Thank you so much. It was a real pleasure.

Capt Hedden:
Thank you for listening to another episode of The Air Force Judge Advocate General's School Podcast. One of the best ways you can support this publication is by following or subscribing the show and leaving us a rating. You can find this episode transcription and show notes at **www.jagreporter.af.mil/podcasts**. We welcome your feedback.

Disclaimer:
Nothing from this show should be construed as legal advice. Please consult an attorney for any legal issues Nothing in this show is endorsed by the Federal Government, the Air Force, or any of its components. All content and opinions are those of its guests and hosts.

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

Glossary

- **AFJAGS:** Air Force Judge Advocate General's School
- **IMF:** International Monetary Fund
- **JAG:** judge advocate general
- **PCA:** Permanent Court of Arbitration
- **WTO:** World Trade Organization

Layout by Thomasa Huffstutler