

How China's Views on the Law of *Jus ad Bellum* Will Shape Its Legal Approach to Cyberwarfare

JULIAN KU

Aegis Series Paper No. 1707

The US government has long sought to pressure China to publicly state its positions on how and whether the international law governing the use of force between states applies to cyberwarfare. China thus far has resisted this pressure, but its reticence does not mean that China has no views on these legal questions or that its positions will be based on purely political or strategic considerations. Rather, China's legal views on cyberwarfare will almost certainly be shaped by its general approach to the international law governing the use of force. For this reason, investigating its legal views on the use of force will illuminate China's eventual legal approach to cyberwarfare.

Traditionally, the Chinese government has adopted a strict positivist reading of the UN Charter's limitations on the use of force that brooks no exceptions for humanitarian interventions and with a narrowly construed exception for self-defense. Although China is hardly the only country that takes this positivist and restrictivist legal approach, its strict reading of this law is at odds with legal positions taken by the US government. Whereas the United States has sometimes endorsed a relatively capacious definition of "self-defense" under international law and might do so again in the cyber context, China's restrictivist position would classify many "self-defensive" US cyberwarfare actions as violations of the UN Charter.

Since China has not shown any willingness to abandon this legal approach to the law of *jus ad bellum* codified in the charter, it is unlikely that China will embrace the US legal approach to cyberwarfare. Rather, China will probably use its restrictive reading of the UN Charter to garner political support among other countries to criticize and deter offensive US cyberwarfare. This sharp divide between the American and Chinese legal positions calls into question the efficacy of long-standing US government efforts to convince China to accept and apply international law to cyberwarfare.



To flesh out the likely contours of China's views on the legality of cyberwarfare, it is useful to start with the Chinese government's public statements on the applicability of the law of *jus ad bellum* to cyberwarfare. We can then take a step back to review China's overall approach to the law of *jus ad bellum* by considering its approach to doctrinal questions such as the definition of "use of force" and "armed attack" and "self-defense" in the UN Charter in situations outside of the cyberwarfare context. We can also look at recent Chinese legal academic scholarship on the law of *jus ad bellum* and cyberwarfare. Having done all this, we can then assess how China's restrictivist views on the law of *jus ad bellum* in cyberwarfare could affect US cyberstrategy and policy.

China, Cyberwarfare, and the Law of *Jus ad Bellum*

Conflict over cyber activity has become an increasingly serious area of bilateral friction between China and the United States. Citing "the increasing prevalence and severity of [foreign] malicious cyber-enabled activities," then US president Barack Obama announced in 2015 that he would authorize economic sanctions on any foreign individuals or organizations found to be engaged in such activities.¹ These steps were made in the context of news reports detailing significant cyber breaches of US government facilities by Chinese hackers and previous US indictments of Chinese military personnel for hacking in the United States.² A few months later, China and the United States reached their first bilateral cyber-related agreement where both countries pledged to "refrain from conducting or knowingly supporting cyber-enabled theft of intellectual property."³ Perhaps as importantly, both countries agreed to "pursue efforts to further identify and promote appropriate norms of state behavior in cyberspace within the international community."⁴

But while the Chinese government has made efforts to "identify and promote appropriate norms of state behavior in cyberspace," it has generally shied away from openly discussing its views on how the international law governing the use of force between states (*jus ad bellum*) should apply to cyber conduct. For instance, when the Chinese government released its first official national cyberstrategy document in March 2017, it barely addressed questions of *jus ad bellum*.⁵ Its only reference merely called on all states to avoid militarization of cyberspace and to adhere to the UN Charter's principles of "non-use or threat of force" and "peaceful settlement of disputes."⁶ Similar formulations also appeared in the government's 2017 Asia-Pacific Security Cooperation policy statement where China (along with other states) affirmed that principles in the UN Charter such as the "non-use of force" should also apply to cyberspace.⁷

However small these references are, US analysts were probably gratified that the Chinese government has begun referring to the UN Charter in cyberspace at all. It was only in 2013 that China officially agreed that the UN Charter and existing international law apply to cyberspace.⁸ Prior to this time, Chinese government statements had emphasized the difficulty of adapting international rules to cyberspace and had focused on promoting an “international code of conduct” for cyberspace instead. The Chinese government’s 2013 acknowledgment of the “applicability of international law to cyberspace” was therefore warmly welcomed by the United States.⁹

In contrast, the US government has publicly and repeatedly declared that “cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law.”¹⁰ While the United States has increased the transparency of its legal views on these issues, US analysts have complained that China has refused to offer more specifics on how it would apply the law of *jus ad bellum* to cyber activities. As a 2014 report to the China Economic and Security Review Commission stated, “The Chinese government has not definitively stated what types of [cyber] actions it considers to be an act of war which may reflect nothing more than a desire to hold this information close to preserve strategic flexibility in a crisis.”¹¹ In the past, China has “taken the position in diplomatic groupings that cyberattacks should not trigger the right to self-defense under the UN Charter but called for new international legal regulations in regard to cyberspace.”¹²

Along with Russia, Tajikistan, and Uzbekistan, China submitted a Draft International Code of Conduct for Information Security to the United Nations secretary-general in 2011 and a revised version in 2015.¹³ The Draft Code of Conduct remains an important statement of China’s worldview on the proper international regulation of cyber activities. The initial draft of the Code asks members to pledge “not to use information and communications technologies, including networks, to carry out hostile activities or acts of aggression [or] pose threats to international peace and security.”¹⁴ The 2015 amended version borrows more directly from the UN Charter, but still offers little or no guidance on how those prohibitions on the use of force would apply in the cyber context.

As of 2017, China still advocates new international legislation for cyberspace. But it has also acknowledged the applicability of existing rules such as the regulation of the use of force in the UN Charter. On this latter point, the United States has sought, and will likely continue to seek, further clarity from China and other cyber powers.¹⁵



China and the Law of *Jus ad Bellum*

If and when China develops a detailed legal position on the law of *jus ad bellum* in cyberspace, it will almost certainly take into account its existing views on this body of law in other contexts. Outside of the cyberspace context, China's government has a substantial record of state practice and officially stated legal positions on the law of *jus ad bellum* in general and in the context of particular cases. Such positions offer a rich source of information needed to evaluate and predict China's emerging legal approach to cyberwarfare.

The Law of Jus ad Bellum

Jus ad bellum refers to the conditions under which nation-states may resort to war or to the use of armed force in general. While historically *jus ad bellum* (Latin for "right to war") was understood to be comprised of philosophical principles for moral conduct, the enactment of the UN Charter in 1945 distilled these principles into binding international legal rules. Article 2(4) prohibits "the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." This broad prohibition is tempered by two explicit exceptions. First, the Security Council may use force if it determines it is necessary to "maintain international peace and security." Second, Article 51 preserves the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."

Under the UN Charter regime, therefore, states seem to be restricted from using force against other states unless such force is used under the authority of the UN Security Council or it is used in "individual or collective self-defense" against an "armed attack." Legal justifications for a state's use of force often depend on analysis of these two exceptions or upon interpretive claims about the scope of the UN Charter's restrictions on the use of force. Broadly speaking, interpretations of these provisions of the UN Charter can be divided into two camps: *extensivists* and *restrictivists*.

The "extensivist" camp favors interpretations that result in more possibilities for the use of force than those two textual exceptions identified above. Doctrinally, such interpretations usually favor "broad definition of self-defense, a rejection of a UN monopoly to authorize military actions, and the admissibility of humanitarian or pro-democratic interventions."¹⁶ On the other side, we find interpretations that adopt a *positivist* approach by focusing on the text of the UN Charter and sometimes on

relevant General Assembly resolutions or applicable decisions of the International Court of Justice. This positivist interpretive methodology leads to “restrictivist” interpretations that limit self-defense to a narrow set of circumstances and recognize few, if any, other exceptions to the general prohibition on the use of force by states.¹⁷

China’s Views on the Law of Jus ad Bellum

The People’s Republic of China did not take its seat in the United Nations until 1971, but it has become a devoted adherent to the United Nations and the principles of the charter. In particular, the Chinese government’s public statements repeatedly emphasize the importance of Article 2(4)’s prohibition on the threat or use of force. In general, China has hewed consistently to the “positivist” methodology and restrictivist interpretation. This section will first offer an overview of China’s general views on this area of law. It will then examine three areas of doctrine that have particular salience in the cyber context: the definition of “force” in Article 2, the necessity of UN Security Council authorization for the use of force, and the right of self-defense.

Overview For decades, Chinese leaders have promoted the Five Principles of Peaceful Co-existence (FPPC) as a basic framework guiding China’s foreign relations. First stated in 1953, the FPPC have been described in the preamble to China’s Constitution as mutual respect for sovereignty and territorial integrity, mutual nonaggression, noninterference 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. The FPPC’s emphasis on sovereignty, territorial integrity, and noninterference all echo language in the UN Charter and help to explain the Chinese government’s ease and comfort in citing the UN Charter as the basis for Chinese foreign policy when it finally took its seat there in 1971.

Indeed, the Chinese government’s 2005 position paper on United Nations reform lauded that body’s “indispensable role in international affairs” and the “best venue to practice multilateralism.”¹⁸ The paper supported some minor reforms, but its main message was that the United Nations’ role in world affairs should remain central and that none of its institutions required radical reform. This includes the UN Charter’s framework for regulating the use of force by states. Its statement on those particular provisions is a useful summary of China’s overall views on this subject.

The position paper emphasizes that “China consistently stands for settlement of international disputes by peaceful means and opposes the threat or use of force in



international relations.”¹⁹ It then goes on to reject suggestions that changes to the charter to enlarge exceptions to Article 2’s prohibition on the use of force are needed.

We are of the view that Article 51 of the Charter should neither be amended nor reinterpreted. The Charter lays down explicit provisions on the use of force, i.e., use of force shall not be resorted to without the authorization of the Security Council with the exception of self-defense under armed attack.²⁰

The centrality of Security Council control over the use of force (except for self-defense) is a common theme of China’s approach to the UN Charter. As the position paper states flatly, “The Security Council is the only body that can decide the use of force.”²¹ It specifically rejects any role for regional organizations in making this decision. Reliance on the Security Council’s case-by-case judgment is necessary “given the varying causes and nature of crises . . .”²² Thus, the position paper concludes “it is both unrealistic and hugely controversial to formulate a ‘one- fits-all’ rule or criterion on the use of force.”²³

China’s stated views on the proper role of the Security Council do not make it an outlier, but it does place China squarely in the “positivist/restrictivist” approach to the law of *jus ad bellum*. With the exception of self-defense, China believes any decision about the use of force by states should be left solely to the discretion of the Security Council’s judgment on a case-by-case basis.

There is only one slight variation to this strict positivist/restrictivist approach. Leading Chinese textbooks on international law continue to identify one other exception to the Security Council’s monopoly on force: armed resistance by peoples rightfully exercising their rights of self-determination.²⁴ These texts all reference a 1970 General Assembly Declaration on Principles of International Law²⁵ and the statements by various countries (historically associated with the communist bloc) that the use of force is permissible in these contexts.²⁶ But while this nonbinding General Assembly declaration highlights the duty of states to refrain from “forcible action” that deprives “peoples” of self-determination, it does not explicitly endorse the right of those “peoples” to use force. While this position seems to be an artifact of China’s historical association with decolonization movements and the communist bloc, Chinese texts continue to cite this as a possible exemption to the UN Charter. As one text explains, “Under international law, aggressive wars and colonial wars are unjust wars, wars to resist aggression and colonization are just wars . . . Unjust wars are a violation of international law.”²⁷

With this one caveat, however, China's general approach to the UN Charter's provisions can be described as a straightforward example of positivism and restrictivism. In this view, the use of force by states is prohibited absent Security Council authorization with the sole exception of self-defense. No serious consideration is given to extensivist approaches, for instance, that allow for humanitarian interventions without Security Council approval such as that adopted by NATO in the 1999 Kosovo conflict.

The Definition of "Use of Force" The clarity and simplicity of this approach does not mean the Chinese government and Chinese scholars can avoid all of the difficult interpretive issues raised by the text of the charter's use-of-force provisions. For instance, states have sometimes struggled to define the term "use of force" in Article 2. Various interpretive disputes have arisen.

First, Article 2's prohibition on the use of force could be interpreted to encompass both military and nonmilitary uses of coercion.²⁸ Thus, in this reading, coercive economic or political pressure could fall under Article 2's prohibition on the use of force.²⁹ Though often critical of coercive economic sanctions, the Chinese government has not embraced this more expansive definition of the use of force. Instead, China has consistently supported General Assembly resolutions defining unilateral coercive economic sanctions as an impermissible interference in the domestic affairs of another state.³⁰ This view accords better with the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, which specifically condemned such economic actions as interventionist while not defining it as a use of force.³¹ This document is often cited in Chinese international law texts as an authoritative interpretation of the UN Charter.

Authoritative Chinese government statements on the exact scope of the use of force are rare, but recent Chinese scholarship has suggested that China's views are likely to be conventional and uncontroversial. Eschewing the broad definition of "force" that would include economic sanctions, Chinese scholars commenting on the meaning of "force" have made several interpretive points. First, such scholarship has emphasized that Article 2's usage of the phrase "force" as opposed to war or aggression should not be construed to allow "war" or "aggression."³² Rather, the proper reading of Article 2 is that the "force" language is intended to be broader than the League of Nations Covenant's reference to war and that it also prohibits acts of war or aggression.³³ Indeed, some



scholars have gone out of their way to emphasize that the language of the charter is intended to “prohibit actions by those states engaging in military invasions who don’t declare war or who engage in excuses that their actions are not war, and who try to avoid international responsibility or sanctions.”³⁴

Second, Chinese scholars have maintained that the scope of Article 2’s prohibition extends beyond merely force against “territorial integrity and political independence.” Rather, Article 2’s language prohibiting force for any reason inconsistent with the UN Charter should be conceptualized as a broad protection of a state’s sovereignty beyond territory and independence.³⁵ This approach follows the International Court of Justice (ICJ) 1986 decision in the *Nicaragua* case.

Third, Chinese scholars have noted disagreements among scholars on the definition of “threat” under Article 2. While a threat must be coercive in nature to trigger Article 2, scholars suggest a threat requires a clear statement of intent to use force.³⁶ This accords, for instance, with the Chinese government’s recent criticism of the Philippines for “threatening to use force” by sending its navy to occupy the disputed Scarborough Shoal, thus triggering China’s necessary response.³⁷ Given China’s status as a nuclear power, it is not surprising that Chinese scholars have endorsed the view, promulgated by the ICJ in the Nuclear Weapons Advisory Opinion, that mere possession of nuclear weapons is not enough to constitute a threat within the meaning of Article 2.³⁸ The same analysis would apply to the legality of large-scale military exercises, an activity in which China’s growing military is increasingly engaged.

Fourth, as mentioned, Chinese scholars have resisted efforts to apply Article 2’s prohibition on the use of force to domestic civil wars. While China has long supported the right of groups to resist colonization and to exercise self-determination, China’s long-standing goal of reunifying with Taiwan probably shapes its views on this question. In 2005, for instance, China enacted an “anti-secession” law that directs the Chinese government to “employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity”³⁹ in event of a Taiwanese effort to “secede” from China. If Article 2 applied to large-scale civil wars as some Western scholars have argued,⁴⁰ then military action to reunify Taiwan with China would be legally suspect. The legal argument here is that Article 2 applies only to the use of force by states against other states. There is no reason in this view to apply such a prohibition to a state’s domestic affairs since that would also threaten a state’s sovereignty.

In sum, the Chinese government has not specified its detailed interpretation of “force” or “threat” in the context of Article 2. This is hardly a criticism, as few other countries have done so either. Based on a review of Chinese scholarship, however, China’s views on the definition of force seem broadly compatible with American and Western understandings. “Force” does not include economic or political coercion and the “threat” of force is not triggered merely by possessing dangerous and threatening military weapons like nuclear missiles.

The Necessity of Security Council Authorization As discussed above, China has voiced its adherence to a restrictivist Security Council monopoly on the use of force with a sole exception for self-defense. This approach thus would reject the legal argument for allowing states to use force in “humanitarian interventions,” even without Security Council authorization. The legal case for humanitarian intervention typically relies on a reading of Article 2(4) to prohibit “use of force” only against a state’s territorial integrity or political independence. Because humanitarian intervention does not threaten a state’s territorial integrity or political independence, and taking into account its long history in state practice,⁴¹ some scholars and states have argued for its legality under the charter.⁴² This debate among Western scholars has left the legality of such interventions unsettled.⁴³ But the legal case for humanitarian intervention has found no support in Chinese scholarship. As a leading Chinese scholar on the issue writes,

There was no express prohibition against humanitarian intervention in modern international law. However, after 1945 when the Charter of United Nations was formulated, the so-called “humanitarian intervention” has actually been prohibited by international law, and the corresponding theory has been denied and discarded by international law because the Charter expressly stipulates the principle of non-interference of internal affairs and the principle of prohibition of use of military force.⁴⁴

This view does not mean that China opposes all interventions for humanitarian reasons. In its role as a permanent member of the Security Council, China has not opposed—and has even supported—several post-Cold War interventions that were made on humanitarian grounds. Most notably, China supported the Security Council’s approval of a mission to Somalia in 1992⁴⁵ and abstained from votes on several other UN humanitarian-motivated interventions in places such as Haiti and Bosnia.⁴⁶ But it has consistently insisted that the Security Council, and not individual states, determine whether force should be used for a humanitarian intervention.



Consistent with this view, the Chinese government was a strong and consistent critic of NATO's 1999 military intervention in the Serbia-Kosovo conflict. Even before China's Belgrade embassy was bombed by NATO forces, Chinese officials indicated their opposition to any military intervention absent Security Council authorization (and agreed with Russia that no such authorization should be given). After NATO launched an attack on Serbia to avert what NATO believed would be a humanitarian crisis in Kosovo, China denounced the NATO intervention. The action, China's UN ambassador declared, "violated the purposes, principles and relevant provisions of the United Nations Charter, as well as international law and widely acknowledged norms governing relations between States."⁴⁷ While China's opposition was no doubt strategic and political, its opposition to the idea of humanitarian intervention without Security Council approval also fit with its restrictivist legal view of Article 2.

This restrictivist legal view also helps to explain China's approach to the 2005 effort in the United Nations to adopt a principle of "responsibility to protect" (R2P) that would respond to Rwanda or Kosovo types of humanitarian crises. China did not back down from its opposition to humanitarian intervention and only reluctantly endorsed the idea that the humanitarian atrocities within a state could trigger any sort of duty or responsibility among other states. Thus, while the Chinese government accepted the principle of R2P, its acceptance was made with reluctance as a way to respond to the "abuse" of the concept of humanitarian intervention by Western powers.⁴⁸ Hence, the Chinese acceptance of R2P required several important preconditions.

First, R2P can be triggered only by the four most serious international crimes: "genocide, war crimes, ethnic cleansing, and crimes against humanity." No foreign intervention, military or otherwise, is justified absent these extraordinary circumstances. Indeed, any action is first and foremost the responsibility of the host state. But even in these circumstances, the use of force still requires authorization from the Security Council or consent from the host state.

These preconditions made Chinese acceptance of R2P much easier and a recent study has found wide support for the concept among Chinese officials and scholars. Some scholars have become more cautious about R2P in the aftermath of the 2011 Libya intervention because it was widely seen within China as a mistake to vote to allow NATO intervention.⁴⁹ But other scholars have pointed out that China's growing overseas interests, especially the growing number of Chinese nationals abroad, might necessitate Chinese protection overseas.⁵⁰

The acceptance of R2P thus does not suggest any weakening of China's traditional insistence on a Security Council monopoly on the use of force. To the contrary, there is reason to think China's government saw the UN R2P process as an opportunity to limit further Western claims about a right to humanitarian intervention. By demanding Security Council control over any R2P-inspired use of force, China reaffirmed its commitment to its restrictivist reading of Article 2 giving the Security Council a monopoly on the use of force by states except in self-defense.

Self-defense The final and most legally contentious doctrinal area of modern *jus ad bellum* law turns on the meaning of Article 51's "inherent right" of self-defense. As the only textual exception to Article 2's prohibition on the use of force, the scope and meaning of this right is raised by almost all states who have sought to legally justify their military actions after 1945.

In parallel with views on the scope of Article 2's prohibition on the use of force, views on the meaning of Article 51's right to self-defense fall into two categories: restrictivist interpretations of the right to collective and individual self-defense versus extensivist interpretations that allow force against threats such as terrorism, weapons of mass destruction, and cyberattacks.⁵¹

Like its legal approach to Article 2, the Chinese government's approach to Article 51 tends to fall on the restrictivist side. Indeed, Chinese scholars typically claim all of China's military actions since 1945 have been lawful exercises of self-defense. But while China has expressed skepticism of US claims of a broad right of "preemptive" self-defense and has advocated a narrow definition of "armed attack" that would justify self-defense, the Chinese government has been willing to recognize a right of states to invoke the right of self-defense against transnational terrorist organizations.

China's Practice The importance of invoking self-defense as a right and justification for military action has a long pedigree in modern China. Before the establishment of the People's Republic of China, then Chinese Communist Party leader Mao Tse-tung was quoted as setting forth self-defense as a basic principle for the CCP: "If you don't attack me, I won't attack you. If you attack me, I will definitely attack you."⁵² Mao went on to instruct party members to strictly abide by the principle of self-defense. Although Mao was referring to his political rival and civil war enemy, the Nationalist Party, the quotation has been adopted by the People's Liberation Army as a slogan and guiding principle more generally.



Thus, the Chinese government has generally characterized all four of its major military clashes with foreign states since 1945 as exercises of self-defense. In its first post-1945 action, the Chinese government sent a People's Volunteer Force to support North Korea during the Korean War. Although China was not a member of the United Nations at the time due to US support at that time for its rival government on Taiwan, it was careful to characterize its intervention as either unofficial or an exercise of self-defense due to US threats against Chinese territory.⁵³ While there are reasons to doubt the authenticity of the self-defense rationale since US forces never directly attacked Chinese territory,⁵⁴ the existence of a large United States-led military force near the Chinese border with North Korea did pose a serious challenge to the then new People's Republic of China.

China more persuasively invoked the right of self-defense in response to a series of armed clashes with India over their disputed border. Many historians blame the Indian government for initiating the hostilities, although it was China who launched the first large-scale offensive attack.⁵⁵ Still, after each offensive, China's good-faith claim of self-defense was bolstered by its willingness to unilaterally withdraw from the disputed border even after it had successfully defeated Indian army units. Unlike the Korean War example where US forces threatened but never attacked Chinese forces or entered into Chinese territory, China's use of force in the Indian conflict generally occurred after it had already suffered an armed attack on territory over which it claimed sovereignty.

China also cited self-defense to justify its short 1969 border conflict with the Soviet Union. Here, the Chinese case is murkier because Chinese forces initiated hostilities by attacking Soviet border guards on the disputed Damanskii (Zhenbao) Island located in the Ussuri River.⁵⁶ The Soviets responded by bombarding Chinese troops on the Chinese side of the river and sending tanks onto the islands to attack Chinese troops. Border clashes also took place along other parts of the China-USSR border, leading to fears of an all-out war. Though China initiated the armed conflict, Chinese scholars have typically characterized the Zhenbao conflict as an example of Soviet aggression necessitating Chinese self-defense.

Chinese scholars have also invoked self-defense to justify China's 1978 invasion of Vietnam. This factual case is even more difficult to make here because Chinese leaders publicly admitted that the goal of the war was to "teach Vietnam a lesson" and support China's ally in Cambodia.⁵⁷ Nevertheless, Chinese scholars have also pointed

to Vietnamese raids across the Chinese border as “self-defense” justification for the invasion.

Whether or not they are supported by the facts, Chinese scholars have often tried to justify China’s own military actions by invoking the “inherent right” of self-defense in Article 51. As one Chinese textbook explains,

China has consistently supported the principle of self-defense, and has never used force illegally. China’s constant position is to use peaceful means of international dispute settlement. But it has never submitted to any foreign country’s armed aggression. After the establishment of New China, it has encountered four situations [Korea, India, USSR, and Vietnam] where it has been compelled to use force, and it has used its rights under the rules of the self-defense in the UN Charter each time.

Outside of its own military actions, the Chinese government has also publicly committed itself to a narrower definition of self-defense than many of its nuclear-armed peers. Before India joined the nuclear club in the 1990s, China was the sole declared nuclear power that had committed itself to a “no-first-use” nuclear weapons policy. This means that China has pledged it will never use nuclear weapons in response to a nonnuclear attack. It has repeatedly reaffirmed this policy in “white papers” and it has presented its fellow nuclear powers with a draft treaty to the same effect. While such restraint in the use of nuclear weapons in response to a nonnuclear armed attack is not legally required by Article 51, China’s long-standing public commitment to no-first-use is a tangible sign of its willingness to limit its ability to use certain types of armed force in its self-defense. Indeed, China has shown a willingness to limit its use of other new military technology beyond what might be required by the law of self-defense. For instance, China is believed to have the capability to use drones for lethal strikes against hostile targets, but it appears to have restrained itself from using this power.⁵⁸ Similarly, China has repeatedly warned against the militarization of outer space and has warned in particular against the abuse of self-defense in this context.⁵⁹

It is too simple, however, to characterize China as either consistently hostile or consistently supportive of a robust right of self-defense. In many cases, China is unwilling to accept other states’ (especially the United States’) claims of self-defense. China was one of the few countries to publicly question the propriety of the 1993 US missile strike on Baghdad responding to Iraqi assassination plans against former



US president George H. W. Bush. Invoking the UN Charter, China stated its opposition “to any action that can contravene the Charter of the United Nations and norms of international relations.”⁶⁰ China was also clear in its opposition to US claims to a right of “preemptive” self-defense in Iraq or in other regions of the world.

Yet China did not condemn or oppose US military actions in response to the al-Qaeda terrorist attacks on 9/11. In fact, China supported US invocations of its right to self-defense against terrorist attacks under Article 51. In addition to voting in support of UN Security Council resolutions supporting US actions, China has refrained from criticizing the legality of American post-9/11 action in Afghanistan.⁶¹ China’s silence on the US response to 9/11 versus its robust criticism of the US war on Iraq shows that it (like many countries) saw important policy and legal distinctions between the two US military actions.

Chinese Scholarship Chinese scholarship on the law of self-defense supports this general approach. One of China’s leading scholars on self-defense, Professor Xu Mincai, has set forth a conventional legal framework for analyzing the right of self-defense.⁶² Recognizing the pre-charter origins of the right of self-defense, Xu accepts that the contours of the right are drawn from customary international law rather than purely from the text of the charter. He also recognizes that the right of self-defense is not limited to attacks by other states, but can also occur in response to attacks by transnational non-state actors like al-Qaeda. Other Chinese scholars have supported this view and have also offered a legal defense of the US attack on Afghanistan on self-defense grounds.⁶³

On the other hand, Xu and other Chinese scholars have argued for strict preconditions before the right of self-defense can be exercised. For instance, following the ICJ’s decision in *Nicaragua*, Xu argues that any “armed attack” justifying self-defense must rise to a certain level of “gravity and seriousness.”⁶⁴ This suggests that an armed attack which causes only minor damage to property or life would not justify an act of self-defense.

Like most scholars in the restrictivist school, Chinese scholars are uniformly skeptical of any right to self-defense before an actual armed attack has occurred. While they follow the “imminence” requirement stated in the famous *Caroline* case, neither are they willing to accept any loose or broad definition of this requirement. For this reason, Xu argues that merely planning an armed attack is not itself an armed attack

triggering the right of self-defense.⁶⁵ Chinese scholars have uniformly rejected the United States' statement of "preemptive" self-defense in its National Security Strategy and in relation to the Iraq War of 2003.⁶⁶

A scholar from one of China's military universities has distilled China's approach to self-defense to six elements:

- Respect a "time requirement" and reject "preemptive" self-defense.
- Respect a "targeting" requirement and do not allow states to use self-defense against one state on third-party states.
- Respect every state's own determination of self-defense and do not allow other states to determine.
- Follow the spirit of the definition of self-defense in responding to new types of aggression. New military technology does not change the definition of "use of force." China has authority to act in self-defense to these new types of attacks.
- Firmly support the proportionality principle and prevent excessive uses of self-defense.
- Support transparency and notice and seek support of the international community for any action in self-defense.⁶⁷

With the addition of its willingness to recognize self-defense actions against non-state actors, the Chinese government's approach to self-defense can be fairly summarized by these six principles. To be sure, there remains uncertainty about how China might apply these principles in practice. For instance, a PLA scholar also suggested China has the right to act in self-defense against nonconventional attacks such as public relations, psychological, legal, and cyberwarfare.⁶⁸ Yet it is unclear whether the author thinks the same restrictivist approach China applies in other contexts should apply to these new types of attacks.

Conclusion

China's views and practice on the law of *jus ad bellum* can be safely characterized as falling on the positivist and restrictivist side of approaches to this area of law. The next



section explores how this approach might shape its thinking about this law applied to cyberwarfare.

Combining Chinese Views on *Jus ad Bellum* and Cyberspace

China's general views on the law of *jus ad bellum* will shape China's approach to the legal implications of cyberwarfare. Because China will likely use law to justify its cyberwarfare activities or criticize others' cyber actions, elucidating China's likely views is even more important. To date, however, the Chinese government has been circumspect in making public statements on cyber policy, much less the application of international law to cyber policy. This section will review emerging Chinese academic legal scholarship discussing cyberwarfare and the law of *jus ad bellum* in hopes of gleaned insights into the Chinese government's likely positions on these issues.

Chinese Reactions to the Tallinn Manual

The Tallinn Manual is an ambitious effort by legal experts to study and propose ways that international law would apply to transnational cyber activity and cyberwarfare. Convened by a North Atlantic Treaty Organization cyber institute, the experts published the "Tallinn Manual on the International Law Applicable to Cyber Warfare" in 2013. Although many of the experts, including chief editor Michael Schmitt, have affiliations with the United States or other NATO country armed forces, the Tallinn Manual represents the independent views of the expert authors rather than the views of their employers or home governments. A second publication by the same group, dubbed "Tallinn 2.0," examined how international law treats cyber operations that do not rise to the level of "armed attack" under the law of *jus ad bellum*.

Although no Chinese experts served as coauthors of the first Tallinn Manual and only began participating during the second Tallinn Manual process, Chinese academics have paid keen attention to the work product of the Tallinn Manual process. Their reactions and critiques help to illuminate likely Chinese government positions on the legal issues addressed by the first Tallinn Manual.

Skepticism about Motives and Process

Initial reactions to the Tallinn Manual in Chinese media were muted. Chinese media commentators had already expressed suspicion that activities like the Tallinn Manual were simply tools for US manipulation of the international legal process. As one Chinese media commentator put it, the United States is attempting to "spur the

international community into drawing up rules for cyberwarfare in order to put a cloak of legality on its ‘preemptive strike’ strategy in cyberwarfare.”⁶⁹ Other semi-authoritative media reactions, including one published by commentator Li Ying in the *People’s Liberation Army Daily*, characterized the Tallinn Manual as simply an effort to find a legal basis to justify NATO’s control over cyberspace.⁷⁰

The *PLA Daily* critique noted that while the Tallinn Manual insisted that cyberspace must be governed by law, especially international law, the manual also approved as legal many cyber activities. Such legal activities included creating “puppet” computer systems to give a false impression of military strength, sending false or misleading orders to enemy forces, surveillance, and other activities. The commentary wryly noted that these legalized activities “left the United States plenty of legal space to conduct its most commonly used methods of cyberattacks.” Ultimately, the commentary concluded that the Tallinn Manual represents another effort by the United States to protect its interests and maintain its dominance in the information warfare age.⁷¹

This general attitude can also be seen in an essay published by foreign affairs commentator Wu Chu in the *Global Times* responding to the release of Tallinn 2.0 (TM2) in 2017. While noting TM2 had become a “must read,” it warned that “the international law of cyberspace involves the interests and concerns of the entire international society, and it is inappropriate for it to be subject to the manipulation of ideas peddled by a small circle of Western think tanks.”⁷² It also criticized the West’s enthusiasm for the Tallinn Manual process and its refusal to submit these issues to the United Nations for negotiation as China and most developing nations wanted. It noted the irony of the West, which previously enjoyed bragging about its “carrying of the flag” for international law, becoming the main obstacle to international legislation in this area. It concluded by calling for the governance of cyberspace to be developed with equal participation of all states through the administration of the United Nations.

The same commentator published a short essay in February 2017 striking similar notes about Tallinn 2.0 on the official WeChat account of the Ministry of Foreign Affairs’ Department of Treaty and Law. Wu again highlighted the prominence of Western scholars with governmental backgrounds in the Tallinn 2.0 drafting. It also suggested that the intent of Western states to use the Tallinn manuals to create legal norms through “shadow” lawmaking was becoming even clearer with the release of Tallinn 2.0. Yet, in the view of the author, the norms offered in both manuals exceeded existing understandings of international law.⁷³



Independent Chinese scholars have also offered similar critiques of the motives and goals of the Tallinn Manual's drafters. Professor Zhu Lixin of Xi'an Jiaotong University's Information Security Center has become a frequent observer of the Tallinn Manual's work product. But in a 2015 paper, she also complained that the Tallinn Manual is not limited to just "international law" and that it has too much political intention and military theory running through its contents. "In reality," she warns, "[Tallinn] is a legal tool in the US government's execution of its cyberspace strategy."⁷⁴

Substantive Critiques Some Chinese scholarship has also offered substantive critiques of the first Tallinn Manual. While conceding that international law applies to cyberspace, Chinese scholar Chen Qi noted that even the commentary within each provision of the Tallinn Manual reveals disagreement among the manual's author-experts. Disagreement, Chen noted, seems to exist on such thorny questions as a cyberattack's subject, form, and consequences in different armed attack circumstances.⁷⁵

These disagreements and uncertainties, Chen argued, show that the norms of cyberwarfare identified in the Tallinn Manual are not drawn from formal sources of international law. In reality, Chen charged, the Tallinn Manual is creating "new cyber law norms."⁷⁶ For instance, six of the eleven factors recommended by the manual for use in determining whether a cyber action is a use of force were developed by Tallinn Manual chief author Michael Schmitt in his earlier writings. The origin of these factors in the writing of a US Navy-affiliated academic suggests, in Chen's view, that they have achieved little general recognition and acceptance in international law.⁷⁷

Chen specifically criticized the Tallinn Manual's Rule 13 for expanding a state's right of self-defense under international law by suggesting that serious damage to critical cyber network facilities alone could be sufficient to justify an act of self-defense in some circumstances. Similarly, Chen critiqued the manual's expansion of the right of self-defense to a third state that was not the target of a cyberattack, but which had suffered the consequences of the cyberattack on another state.⁷⁸ Such an approach, Chen warned, could lead to dangerous effects such as an incident in 2013 when South Korea attributed a cyberattack to North Korea and China but ended up discovering the attack had originated from within South Korea itself.⁷⁹

Chen leveled further critiques on the Tallinn Manual's treatment of the right of a state to invoke self-defense against individuals or non-state organizations, a concept

the author noted is almost certainly drawn from US doctrines developed in the war on terrorism. Similarly, the manual suggests a preemptive strike against an imminent cyberattack could be legal. Chen wondered how a state facing such an attack could establish the requisite level of damage or harm caused by an imminent (as opposed to actual) cyberattack.

Overall, Chen is concerned that the expansive notion of self-defense in the Tallinn Manual could lead to the abuse of this right by the United States and its allies. In expressing this concern, Chen echoed traditional Chinese concerns about US “abuse” of this right with respect to the use of new technologies such as in outer space and about the US concept of preemption as applied to cases like the Iraq War.

Other Chinese scholars have focused on the technical difficulties in attributing cyberattacks to states. Professor Huang Zhixiong, a scholar at Wuhan University who participated in the second Tallinn Manual process, has expressed detailed concerns about the challenges of attribution. In a 2014 article, he identified two distinct characteristics of cyberattacks: 1) they are usually conducted by individual or small groups of hackers whose relationship with particular states is hard to confirm; and, 2) the secretive nature of hacking attacks makes attributing the sources of such attacks extremely difficult.⁸⁰ He then argued that some Western scholars had sought to overcome these difficulties by loosening or even abolishing attribution standards for state responsibility in cyberattacks by developing new concepts for cyber attribution such as “imputed responsibility.”

Huang argued that this idea, analogized from the idea of a state’s duty to prevent terrorist attacks from its territory, remains hotly disputed as a matter of international law and has not achieved any level of consensus. It would enlarge the scope of state responsibility for cyberattacks and actually create a higher likelihood of state-to-state conflict. Moreover, this rule might also end up drawing third-party states who unknowingly host an attack into a conflict.

This and other proposed innovations in the law by scholars or by certain states like the United States, Huang argued, will only contribute to confusion and disagreement among states about the proper rules for determining state responsibility. Instead, Huang recommended a return to the framework for state responsibility set out by the UN International Law Commission in 2001 as a common basis for resolving issues of state attribution for cyber activities.



Conclusion and Assessment

This paper has reviewed China's general approach to the law of *jus ad bellum* in hopes of gleaning insights into its application of that law to cyberwarfare. China's treatment of this area of law has been consistent and largely coherent for much of its recent history. For the Chinese government, the UN Charter's prohibition on the use of force should be interpreted using standard positivist tools of text, drafting history, and judicial interpretation. These positivist tools have led China to consistently endorse a "restrictivist" understanding of Article 2 that prohibits any use of military force by one state against another absent authorization from the UN Security Council or a situation involving self-defense. Interpretive claims to preexisting rights to use force for "humanitarian intervention" have found no support from the government or from academics.

To be sure, China's government has on occasion departed from a purely restrictivist position. It has long endorsed a right of "peoples" (as opposed to recognized states) to use military force in self-defense and it has accepted that the right of self-defense can be invoked to use force against non-state terrorist organizations. Its own claims of self-defense in wars against Vietnam, India, and the Soviet Union are factually weak. But as a doctrinal matter, China's legal positions on the law of *jus ad bellum* can safely be classified as restrictivist on almost all questions and in every area of its own practice.

Although China's government has expressed strong support for the "inherent" right of self-defense contained in Article 51 and has typically tried to frame its own military actions in this rubric, China has long been concerned that states might abuse this right. This concern will likely animate Chinese critiques of emerging US positions on the application of this right in the context of cyberwarfare. Such critiques, as I have discussed, have already been expressed in Chinese academic scholarship on these issues.

Seen in this light, the possibility for a consensus between the United States and China on how the law of *jus ad bellum* applies to cyberwarfare seems remote. This should not be surprising since the United States and China are usually divided on applications of the law of *jus ad bellum*. Such divisions are not, as this paper tries to show, merely due to political or strategic considerations. Rather, the Chinese government's prior legal positions on the law of *jus ad bellum* will also influence its future views on cyberwarfare.

These differences also call into question the long-standing US goal of winning China's commitment to applying international law to cyberspace. If, as this paper observes, the United States and China maintain different understandings of self-defense and actions outside of the scope of the UN Charter, then China's willingness to obey the law of *jus ad bellum* to cyberspace may not advance American policy significantly. Moreover, the fact that the United States has a less restrictivist conception of the law of *jus ad bellum* than China may explain China's historic reluctance to wholeheartedly embrace the *jus-ad-bellum-in-cyberspace* framework. China may not see much benefit in signing onto a regime which it believes strictly limits its rights of self-defense and third-party intervention, but where its main competitor, the United States, is not so limited. For these reasons, America is unlikely to win China's public adherence to the law of *jus ad bellum* in cyberspace. But even if it did, it is uncertain that such adherence would benefit the United States in any meaningful way.

NOTES

- 1 Executive Order No. 13694 of April 1, 2015, Fed. Reg. 80, no. 63: 18077.
- 2 Department of Justice, "U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage," news release, May 19, 2014, accessed August 5, 2017, <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor>.
- 3 See John W. Rollins, "U.S.-China Cyber Agreement," *CRS Insight*, October 16, 2015, accessed August 5, 2017, <https://fas.org/sgp/crs/row/IN10376.pdf>.
- 4 Ibid.
- 5 See "International Strategy of Cooperation on Cyberspace," *Xinhua*, March 1, 2017, accessed August 5, 2017, http://news.xinhuanet.com/english/china/2017-03/01/c_136094371_3.htm.
- 6 Ibid.
- 7 Ministry of Foreign Affairs of the People's Republic of China, "China's Policies on Asia-Pacific Security Cooperation," January 11, 2017, accessed August 5, 2017, www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1429771.shtml.
- 8 "Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security," para. 19 (2013), UN Doc. A/68/98, June 24, 2013, accessed August 5, 2017, <http://undocs.org/A/68/98>.
- 9 US Department of State, "Statement on Consensus Achieved by the UN Group of Governmental Experts on Cyber Issues," news release, June 7, 2013, accessed August 5, 2017, <https://2009-2017.state.gov/r/pa/prs/ps/2013/06/210418.htm> (noting that the United States "is pleased to join consensus to affirm the applicability of international law to cyberspace").
- 10 Harold Hongju Koh, "International Law in Cyberspace," *Harvard International Law Journal* 54 (December 2012); see also Department of Defense, "Law of War Manual," December 2016 edition, 994; paper submitted by the United States to the 2014–15 UN Group of Governmental Experts, October 2014.



- 11 “Capability of the People’s Republic of China to Conduct Cyber Warfare and Computer Network Exploitation,” prepared for the US-China Economic and Security Review Commission, October 9, 2009, accessed August 5, 2017, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB424/docs/Cyber-030.pdf>.
- 12 Boris Kondoch, “Jus ad Bellum and Cyber Warfare in Northeast Asia,” *Journal of East Asia and International Law* 6, no. 2 (2013): 459, 463, citing Matthew C. Waxman, “Self-defensive Force against Cyber Attacks: Legal, Strategic and Political Dimensions,” *International Law Studies* 89 (2013): 109–122.
- 13 Annex to “Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, International Code of Conduct for Information Security,” UN Doc. A/69/723.
- 14 Annex to “Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General,” UN Doc. A/66/359.
- 15 See Michele G. Markoff, “Explanation of Position at the Conclusion of the 2016–2017 UN Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security,” US Department of State, June 23, 2017 (sharply criticizing other countries, including China, that refused to commit to the applicability of the law of *jus ad bellum* to cyberspace), accessed August 5, 2017, <https://www.state.gov/s/cyberissues/releasesandremarks/272175.htm>.
- 16 Olivier Corten, “Use of Force in International Law,” *International Law*, March 2012, accessed August 5, 2017, doi: 10.1093/OBO/9780199796953-0005, citing as examples of this extensivist approach: Anthony C. Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993) and Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, UK: Cambridge University Press, 2002), among others.
- 17 Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010); and Christine Gray, *International Law and the Use of Force* (New York: Oxford University Press, 2008).
- 18 Permanent Mission of the People’s Republic of China to the UN, “Position Paper of the People’s Republic of China on the United Nations Reforms,” June 7, 2005, accessed August 6, 2017, www.china-un.org/eng/chinaandun/jzhgg/t199101.htm.
- 19 Ibid.
- 20 Ibid.
- 21 Ibid.
- 22 Ibid.
- 23 Ibid.
- 24 See, e.g., Wang Tieya 王铁崖, *International Law* 国际法 (Beijing: Law Press 法律出版社, 2010), 451–52; Liang Xi 梁西, ed., *International Law* 国际法, 3rd ed. (Wuhan, China: Wuhan University Press, 2011), 418; Wang Huhua 王虎华 ed., *Public International Law* 国际公法, 3rd ed. (Beijing: Peking University Press, 2008), 441.
- 25 UN General Assembly, “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,” October 24, 1970, UN doc. A/res/25/2625.
- 26 See discussion in Rupert Emerson, “The New Higher Law of Anti-Colonialism,” in *The Relevance of International Law*, eds. Karl W. Deutsch and Stanley Hoffmann (Cambridge, MA: Schenkman Publishing, 1968), 159, cited in Julius Stone, “Force and the Charter in the Seventies,” *Syracuse Journal of International Law and Commerce* 2, no. 1 (1974).

27 Liang Xi, *International Law*, 418.

28 A strong majority of scholars seems to have rejected this view. See, e.g., Sarah H. Cleveland, “Norm Internalization and U.S. Economic Sanctions,” *Yale Journal of International Law* 26, no. 1 (2001): 50–52, concluding that Article 2(4) is expressly limited to threat or use of military force, Article 2(7) is limited to action by the UN, and “no international consensus has emerged to support the contrary position.” But the argument still persists. See, e.g., Cassandra LaRae-Perez, “Economic Sanctions as a Use of Force: Re-evaluating the Legality of Sanctions from an Effects-Based Perspective,” *Boston University International Law Journal* 20 (2002): 161, 188: “Parties that impose unilateral sanctions should be as answerable for their actions as they would be if they had attacked a sovereign nation with arms.”

29 For a useful review of this debate, see Hartmut Brosche, “The Arab Oil Embargo and United States Pressure against Chile: Economic and Political Coercion and the Charter of the United Nations,” *Case Western Reserve Journal of International Law* 7, no. 1 (1974): 3, 34, emphasizing a trend toward a broader interpretation of the prohibition of the threat or use of force as formulated in Article 2(4) that includes measures of an economic and political character.

30 See, e.g., China’s support of the following General Assembly resolutions condemning coercive economic sanctions by member states: G.A. Res. 44/215, U.N. Doc. A/RES/44/215 (December 22, 1989); G.A. Res. 46/210, U.N. Doc. A/RES/46/210 (December 20, 1991); G.A. Res. 48/168, U.N. Doc. A/RES/48/168 (December 21, 1993); G.A. Res. 50/96, U.N. Doc. A/RES/50/96 (December 20, 1995); G.A. Res. 52/181, U.N. Doc. A/RES/52/181 (December 18, 1997); G.A. Res. 54/200, U.N. Doc. A/RES/54/200 (December 22, 1999); G.A. Res. 56/179, U.N. Doc. A/RES/56/179 (December 21, 2001); G.A. Res. 58/198, U.N. Doc. A/RES/58/198 (December 23, 2003); G.A. Res. 60/185, U.N. Doc. A/RES/60/185 (December 22, 2005); G.A. Res. 62/183, U.N. Doc. A/RES/62/183 (December 19, 2007); G.A. Res. 64/189, U.N. Doc. A/RES/64/189 (December 21, 2009); G.A. Res. 66/186, U.N. Doc. A/RES/66/186 (December 22, 2011); G.A. Res. 68/200, U.N. Doc. A/RES/68/200 (December 20, 2013). The resolutions repeat the almost identical statement urging “the international community to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system.” Compiled in Mergen Doraev, “The ‘Memory Effect’ of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again,” *University of Pennsylvania Journal of International Law* 37, no. 1 (2015): 375n80.

31 UN General Assembly, “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,” October 24, 1970, accessed August 6, 2017, www.un-documents.net/a25r2625.htm: “No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”

32 See, e.g., Ma Xinmin 马新民, “The Law of Use of Force: Development and Challenges,” *China International Law Yearbook* 1, 中国国际法年刊 (2013), 93.

33 See Wang Tieya, *International Law*, 451–52.

34 See Liang Xi, *International Law*, 419.

35 See, e.g., Wang Tieya, *International Law*, 451–52; Liang Xi, *International Law*, 418; Wang Huhua, *Public International Law*, 441.

36 See, e.g., Ma Xinmin, “Law of Use of Force,” 93.

37 Ministry of Foreign Affairs of the People’s Republic of China, “Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines,” paragraph 51: “But the fact is that, regarding the situation at Huangyan Dao, it was the Philippines



that first resorted to the threat of force by dispatching on 10 April 2012 a naval vessel to detain and arrest Chinese fishing boats and fishermen in the waters of Huangyan Dao.” Accessed August 6, 2017, www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

38 See, e.g., Ma Xinmin, “Law of Use of Force.”

39 Embassy of the People’s Republic of China in the United States, “Anti-Secession Law,” March 15, 2005, accessed August 6, 2017, www.china-embassy.org/eng/zt/999999999/t187406.htm.

40 Mary Ellen O’Connell, “Energized by War Fatigue,” *European Society of International Law* 3, no. 2 (2014), accessed August 5, 2017, www.esil-sedi.eu/node/522.

41 Antoine Rougier, “La théorie de l’intervention d’humanité,” *Revue générale de Droit International Public* 17, no. 1 (1910): 468–526.

42 See Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge, UK: Cambridge University Press, 2008), 1157, quoting legal defense of humanitarian intervention by UK Minister of Foreign Affairs; Fernando Tesón. *Humanitarian Intervention: An Inquiry into Law and Morality*, 2d ed. (New York: Transnational Publishers, 1997).

43 See generally Ryan Goodman, “Humanitarian Intervention and Pretexts for War,” *American Journal of International Law* 100, no. 107 (2006), addressing the issue of whether international law should permit states to intervene to stop or ameliorate dire humanitarian crises without UN approval.

44 Wang Huhua, *Public International Law*, 441.

45 See UN Security Council Official Records, 47th Sess., UN Doc. S/PV.3145, December 3, 1992, statement by Chinese delegation: “Taking into account the long-term chaotic situation resulting from the present lack of a Government in Somalia, and in view of our deep sympathy with the Somali people in their anguish, we endorse the requests of most African countries and the recommendations of the Secretary-General, that is, that the United Nations should take prompt, strong and exceptional measures for the settlement of the Somali crisis.”

46 See Jonathan E. Davis, “From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era,” *Vanderbilt Journal of Transnational Law* 44, no. 2 (2011): 217, 232–33.

47 UN Security Council Official Records, 53rd Sess., 3937th mtg., 14.

48 *China News*, Waijiaobu Guanyuan: Yao Jianjue Fangzhi, “Baohude Zeren Bei Lanyong.” 外交部官员：要坚决防止“保护的责任”被滥用, January 13, 2012, accessed August 6, 2017, www.chinanews.com/gn/2012/01-13/3603886.shtml.

49 See Andrew Garwood-Gowers, “China and the ‘Responsibility to Protect’: The Implications of the Libyan Intervention,” *Asian Journal of International Law* 2, no. 2 (July 2012): 375–393, accessed August 6, 2017, <https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/div-classtitlechina-and-the-responsibility-to-protect-the-implications-of-the-libyan-interventiondiv/A224DA6CBDF91D7A1A2423A43CCBFC23>.

50 Tiewa Liu and Haibin Zhang, “Debates in China about the Responsibility to Protect as a Developing International Norm: A General Assessment,” *Conflict, Security & Development* 14, no. 4 (July 11, 2014): 403–427.

51 Mary Ellen O’Connell, “Self-Defense,” *International Law*, March 2012, accessed August 6, 2017, doi: 10.1093/obo/9780199796953-0028.

52 This quotation is dated from September 9, 1939, during the war against Japan but referred to the CCP’s posture against a possible attack by its rival Chinese party, the Kuomintang. For Chinese language article, see <http://cpc.people.com.cn/GB/64162/64170/4467378.html>, accessed August 6, 2017.

53 See Andrew Scobell, *China’s Use of Military Force: Beyond the Great Wall and the Long March* (New York: Cambridge University Press, 2003), 32, 80–81.

- 54 Jamieson L. Greer, "China and the Laws of War: Patterns of Compliance and Disregard," *Virginia Journal of International Law* 46, no. 4 (2006): 717, 724.
- 55 See M. Taylor Fravel, "Power Shifts and Escalation: Explaining China's Use of Force in Territorial Disputes," *International Security* 32, no. 3 (Winter 2007/08): 44, 70.
- 56 *Ibid.*, 76–77.
- 57 Robert S. Ross, *The Indochina Tangle: China's Vietnam Policy, 1975–1979* (New York: Columbia University Press, 1988); and Zhang Xiaoming, "China's 1979 War with Vietnam: A Reassessment," *China Quarterly* 184 (December 2005): 851–874.
- 58 Tobias Burgers and Scott N. Romaniuk, "Will China Adhere to Its Own Norm Prohibiting Lethal Drone Strikes?" *The Diplomat*, October 6, 2016, accessed August 6, 2017, <http://thediplomat.com/2016/10/will-china-adhere-to-its-own-norm-prohibiting-lethal-drone-strikes>.
- 59 Zhongguo Daibiaotuantuanzhang Fucong Dashi Zai Rineiwa Waikonganquan Yuantaohui Shang Fayan 中国代表团团长傅聪大使在日内瓦外空安全研讨会上的发言 [Remarks of Ambassador Fu Cong, China's chief representative to Vienna outer space security conference], August 24, 2015, accessed August 6, 2017, www.mfa.gov.cn/mfa_chn/ziliao_611306/zyjh_611308/t1336216.shtml.
- 60 UN Security Council, UN Doc. S/PV 3245, June 27, 1993, 21.
- 61 Denny Roy, 2006, "Lukewarm Partner: Chinese Support for U.S. Counterterrorism in Southeast Asia," Asia-Pacific Center for Security Studies, March 2006, accessed August 6, 2017, <http://apcss.org/Publications/APSSS/LukewarmPartnerChinaandCTinSEA.pdf>.
- 62 Xu Mincai, "The Legal Issues in the Application of the Right of Self-Defense," *Faxuejia* 3 (2003): 145.
- 63 See also Li Weiwei 李薇薇, Guoji Kongbuzhuyi yu Guojifa Shang De Shiyong Wuli 国际恐怖主义与国际法上的使用武力 [The use of force in international terrorism and international law], *Huadong Zhengfa Daxue Xuebao* 《华东政法大学学报》44 页 2003 年.
- 64 Xu Mincai, "The Legal Issues in the Application of the Right of Self-Defense," *Faxuejia* 法学家 3 (2003): 145.
- 65 Xu Mincai, "The Legal Issues in the Application of the Right of Self-Defense," *Faxuejia* 3 (2003):145.
- 66 Zhao Zhenhua 赵振华, Lun Guojifa Shangde Guojia Ziwei quan 论国际法上的国家自卫权 [A state's self-defense right under international law], *Lilunjie* 理论界, November 2006: 194; Wang Puqu 王献枢 Yilake Zhanzheng de Feifaxing 伊拉克战争的非法性 [The illegality of the Iraq war], *Faxue Pinglun* 法学评论 (2004): 10.
- 67 Hu Shihong 胡世洪, Zhongguo Zizhu Xingshi Ziwei quan De Liuxiang Yuanze 中国自主行使自卫权的六项原则, [Six principles for China's own implementation of its self-defense right]; *Zhongguo Shehui Kexuebao* 中国社会科学报, March 20, 2013.
- 68 *Ibid.*
- 69 Kimberly Hsu with Craig Murray, "China and International Law in Cyberspace," U.S.-China Economic and Security Review Commission staff report, May 6, 2014: 6 (quoting Zhong Sheng, *People's Daily*).
- 70 Beiyue Wangluozhan Shouce: Wei Caozong Wangluo Kongjian Xunzhao Zhao Fali Yiju 北约网络战手册：为操纵网络空间寻找法理依据 [NATO cyberwar handbook: using law to manipulate cyberspace], *People's Liberation Army Daily*, October 24, 2014.
- 71 *Ibid.*
- 72 Wu Chu 吴楚 Wangluo Kongjian Guojifa Ying You Lianheguo Lai 网络空间国际法应由联合国来 [The UN should be used to create international law in cyberspace], Huanqiu Wang 环球网, February 11, 2017; Wangluo kongjian Guojifa Benshi Sheji Guojishehui Gongtong Liyi Deshe, Que You Xifang Zhiku XiaoQuanzi Caozuo Bing Xiang Guoji Shehui Doushou, Zheshe Fou Nuodang "网络空间国际法本是涉及国际社会共同利益的事，却由西方智库小圈子操作并向



国际社会兜售，这是否妥当？” [The international law of cyberspace is part of the international society’s interests, and not something that should be manipulated by Western think tanks to peddle to international society, is that appropriate?] (author’s translation).

73 Wu Chu 吴楚, Wangluo Kongjian Guojifa “Talin Shouce 2.0” Jianjie He Chubu Kanfa 网络空间国际法《塔林手册 2.0》简介和初步看法 [Cyberspace, international law, “Tallinn 2.0”: simple and initial opinions], May 2, 2017; Zhongguo Guojifa Yantai 中国国际法前沿 [China and the frontiers of international law.]

74 Zhu Lixin 朱莉欣, Jujiao “Talin Shouce” Xiushi Wangluo Zhan Guice 聚焦《塔林手册》透视网络战规则 [Focus on the Tallinn Manual’s perspective on cyber warfare rules], November 30, 2015 (“事实上，它是美国进行网络空间战略布局的重要法律工具”).

75 Chen Qi 陈颀, Wangluo Anquan, Wangluo Zhanzheng Yu Guojifa 网络安全、网络战争与国际法 [Network security, network warfare and international law], *Zhengzhi Yu Falv* 7 《政治与法律》(2014): 147.

76 Ibid.

77 Ibid.

78 Ibid. (“规则 13 的评注 13 认为，如果 A 国对 B 国的网络攻击对 C 国造成严重损害，C 国也有自卫权。规则 13 的评注 16 认为，国家有权对来自于个人或组织的网络攻击（战争）进行自卫反击。针对网络攻击的自卫权，无疑与美国的反恐战争实践是联系在一起的.”)

79 Ibid. (“一个实例是：2013 年 3 月 20 日，韩国至少有三家电视台和两家金融机构的计算机网络受到攻击，几乎同时陷入瘫痪。韩国起初认为是朝鲜所为，而后又认为是中国所为，最后发现发起攻击的主机就在韩国本土，其幕后指使仍未确定。如果按照“国际冲突的特征”条款所规定，韩国与朝鲜和中国将进入敌对状态，这势必会引起不必要的国际局势紧张和混乱.”)

80 Ibid.



The publisher has made this work available under a Creative Commons Attribution-NoDerivs license 3.0. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nd/3.0>.

Hoover Institution Press assumes no responsibility for the persistence or accuracy of URLs for external or third-party Internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Copyright © 2017 by the Board of Trustees of the Leland Stanford Junior University

The preferred citation for this publication:

Julian Ku, **How China's Views On the Law of *Jus ad Bellum* Will Shape Its Legal Approach to Cyberwarfare**, Hoover Working Group on National Security, Technology, and Law, Aegis Series Paper No. 1707 (August 17, 2017), available at <https://lawfareblog.com/how-chinas-views-law-jus-ad-bellum-will-shape-its-legal-approach-cyber-warfare>.



About the Author



JULIAN KU

Julian Ku is the Maurice A. Deane Professor of Constitutional Law at Hofstra University in Hempstead, New York.

Synopsis

This paper conducts such an investigation and concludes that the Chinese government has adopted a strict positivist reading of the UN Charter's limitations on the use of force that brooks no exceptions for humanitarian interventions and with a narrowly construed exception for self defense. Since China has not shown any willingness to abandon this legal approach to the law of *jus ad bellum* codified in the Charter, it is unlikely that China will embrace the US legal approach to cyberwarfare. Rather, China will probably use its restrictive reading of the UN Charter to garner political support among other countries to criticize and deter offensive US cyberwarfare. This sharp divide between the United States and Chinese legal positions calls into question the efficacy of long-standing US government efforts to convince China to accept and apply international law to cyberwarfare.