

University of Chicago Law School

Chicago Unbound

Public Law and Legal Theory Working Papers

Working Papers

2006

International Law and the Rise of China

Eric A. Posner

John C. Yoo

Follow this and additional works at: https://chicagounbound.uchicago.edu/public_law_and_legal_theory



Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

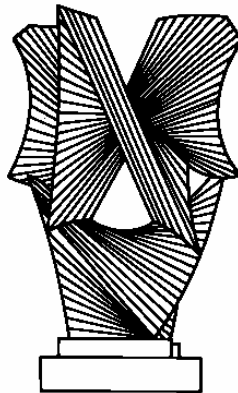
Recommended Citation

Eric Posner & John C. Yoo, "International Law and the Rise of China" (University of Chicago Public Law & Legal Theory Working Paper No. 127, 2006).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 127



INTERNATIONAL LAW AND THE RISE OF CHINA

Eric A. Posner and John Yoo

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

May 2006

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper
Series: <http://www.law.uchicago.edu/academics/publiclaw/index.html> and
The Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract_id=901997

International Law and The Rise of China

Eric A. Posner and John Yoo*

I. INTRODUCTION

The future of relations between the United States and China is murky. Many people hope that the US and China will remain friendly,¹ and there is no reason to reject this possibility outright. The US and China are bound together by an economic and financial relationship that is mutually beneficial, and an outbreak of hostility would certainly harm the populations of both countries. But the relationship between the two nations is rivalrous as well as cooperative, and there are several reasons for taking a less optimistic view about its future prospects.

First, the bare fact of economic cooperation has not, in the past, prevented tensions or even war. Prior to World War I, the European countries enjoyed economic interdependence that would not be matched until the end of the twentieth century; yet the mutually beneficial economic relationships did not prevent the outbreak of a devastating war, despite predictions to the contrary.²

Second, the relationship between the US and China is of a type that is particularly difficult to manage, and prone to breakdown. A strand of thinking in political science holds that war is least likely when the balance of power is static, and most likely when a status quo power (the US) is challenged by a rising power (China).³ The standard example is that of Germany, whose economic and military might increased rapidly after unification in 1871, resulting in expansionist tendencies that were resisted by the status quo powers—France,

* Eric A. Posner is the Kirkland and Ellis Professor of Law, University of Chicago, and John Yoo is Professor of Law, University of California at Berkeley School of Law (Boalt Hall). Posner thanks the Lynde and Harry Bradley Foundation and the John M. Olin Foundation for financial support. Yoo thanks the Boalt Hall Fund for financial support and Peter Brachman for research assistance.

¹ See, for example, Zheng Bijian, *China's "Peaceful Rise" to Great-Power Status*, 84 *Foreign Aff* 18 (Sept/Oct 2005).

² See John Mearsheimer, *The Tragedy of Great Power Politics* 370–72 (Norton 2001).

³ See, for example, id; Hans Morgenthau, *Politics Among Nations* (Knopf 4th ed 1967); Inis Claude, *Power and International Relations* (Random House 1962).

Great Britain, and the Soviet Union.⁴ The basic strategic problem for the US is that it must yield to China as China's power increases, but it should not yield too much. Conversely, China will assert its power with increasing self-confidence, but it must not assert its power too much. If either power miscalculates, war may result.

Third, the evidence already suggests that China's rise will be fraught with tension. Relatively minor incidents—America's accidental bombing of the Chinese Embassy in Belgrade in 1999 and China's capture of an American spy plane in 2001—provoked extreme public reactions in China.⁵ China's leaders have shown themselves willing to incite crowds to frenzies of nationalism in response to foreign policy challenges from Japan as well as those from the US.⁶ China has adopted an increasingly aggressive foreign policy among developing nations, where it has challenged the US in various ways. For example, China has forged links with the anti-American government in Venezuela⁷ and does business with the Sudan's genocidal government, which the US has been trying to isolate.⁸ And, finally, the status of Taiwan remains an explosive issue.

The upshot is that the US's future relationship with China could just as likely be one of rivalry as one of partnership. But what sort of rivalry? We can imagine two types. First, the US–China rivalry could resemble the Cold War between the US and the Soviet Union.⁹ The US and China would be the two superpowers, the rest of the world would be forced to take sides, and the conflict would be ideologically charged. Second, the US–China rivalry could resemble the conflicts between the great powers during the nineteenth century. The US and China would be just two of several great powers—including Russia, India, a united Europe, and Japan—and their conflict would be over resources and security, not ideological supremacy.¹⁰

⁴ See Mearsheimer, *Great Power Politics* at 293–97 (cited in note 2).

⁵ See, for example, *Students Protest NATO's Bombing of Chinese Embassy in Yugoslavia*, People's Daily (Sept 5, 1999); Wang Wei, *Guardian of Territorial Airspace and Waters*, People's Daily (Apr 25, 2001); see also Edward Friedman, *Chinese Nationalism: Challenge to US Interests*, in Stephen J. Flanagan and Michael E. Marti, eds, *The People's Liberation Army and China in Transition* (Nat'l Defense University 2003).

⁶ See Joseph Kahn, *China Pushing and Scripting Japan Protests*, NY Times A1 (Apr 15, 2005); Joseph Kahn, *In Rare Protests, Chinese Seek Boycotts of Japanese Goods*, NY Times A14 (Apr 9, 2005).

⁷ See R. Evan Ellis, *US National Security Implications of Chinese Involvement in Latin America* 5–8 (Strategic Studies Institute 2005).

⁸ See David Zweig and Bi Jianhai, *China's Global Hunt for Energy*, 84 Foreign Aff 32 (Sept/Oct 2005).

⁹ See Robert S. Ross, *The Geography of the Peace: East Asia in the Twenty-First Century*, 23 Intl Security 96–97 (Spring 1999).

¹⁰ See generally Aaron L. Friedberg, *The Future of US–China Relations: Is Conflict Inevitable?*, 30 Intl Security 7 (2005).

The geopolitics of the future US–China relationship has received a great deal of attention. Less attention has been directed to another topic—the role of international law in any future US–China confrontation. One might worry that America’s often dismissive attitude toward international law today will come back to haunt it when, in the future, American power is no longer unchallengeable. On this view, America should bind itself and the world to strict adherence to international law and international institutions such as the United Nations and the World Court. When America is no longer so mighty, it will be grateful for the protection that these institutions offer to the weak against the strong.

One useful way of evaluating this argument is to imagine how existing international laws and institutions might be applied to conflicts between the US and China in the foreseeable future.

II. SECURITY

Perhaps the most pressing concern about China’s rise involves security in East Asia. That region already has witnessed one direct military conflict between the US and the People’s Republic of China: the 1950–53 Korean War. During the Cold War, the US carefully constructed a system of alliances and military bases in East Asia. It also intervened in Vietnam, in order to contain the spread of Soviet and Chinese power. Some believe that the rise of China’s economic standing might eventually produce another conflict, either because China will seek a realignment of power in the region or because it will use military force to prevent Taiwanese independence.¹¹

International relations scholars have attributed many wars to significant shifts in the distribution of power. Some scholars attribute the outbreak of the Peloponnesian War to Sparta’s fear of the rise of Athens.¹² Others argue that World Wars I and II occurred because of the failure of European powers to adapt to the unification of Germany, while some others argue that World War I occurred because Germany feared the rising power of Russia.¹³ But changes in the balance of power need not result in war. America’s economic rise did not spark a war with Great Britain in the late nineteenth century, and the US successfully contained the growth of Soviet power during the Cold War.

¹¹ See Mearsheimer, *Great Power Politics* at 374–77 (cited in note 2).

¹² This was a view first espoused by Thucydides: “The real though unavowed cause [was] . . . the growth of the Athenian power, which terrified the [Spartans] and forced them into war.” Thucydides, *The Peloponnesian War*, Book 1, ¶ 23, line 433 (Prometheus 1998) (Benjamin Jowett, trans); see also Donald Kagan, *The Outbreak of the Peloponnesian War* (Cornell 1989).

¹³ See, for example, Paul Kennedy, *The Rise of the Anglo-German Antagonism 1860–1914* 470 (Aleen & Unwin 1980); Paul Kennedy, *The Rise and Fall of the Great Powers* (Random House 1987).

China has experienced remarkable economic growth over the last quarter century. Since 1978, China's gross domestic product has grown 9.4 percent per year; in a good year, the US economy might grow 4 percent. In 1978, China's GDP was less than 1 percent of the world's; today it accounts for 4 percent. In 1978, foreign trade with China amounted to \$20.6 billion; today that figure has risen to \$851 billion. Yet, because of its population of approximately 1.3 billion, China today still ranks about 100th in the world in per capita GDP.¹⁴

The relative growth of China's economy in comparison to the US causes the most concern. While in 1978 China's GDP was far behind that of the US, today it ranks sixth in the world.¹⁵ Only the US, Japan, Germany, the United Kingdom, and France rank higher.¹⁶ While China's GDP is still only one-tenth that of the US, once purchasing power parity is taken into account, China actually rises to second in the world, with a GDP approximately 60 percent that of the US.¹⁷ If current growth rates continue, by 2025 China's nominal GDP will pass Japan's and rank second only to the US.¹⁸ By 2050, China's economy is expected to surpass the size of the US's economy.¹⁹

Increases in military spending have paralleled China's economic rise. While reliable figures are elusive, the Department of Defense ("DoD") estimates that current Chinese military expenditures amount to roughly \$90 billion—the third largest in the world after the US and Russia.²⁰ According to the DoD, China has increased its defense budget by double digits every year for the past fifteen years.²¹ If the proportion of defense spending as a ratio of GDP stays constant, defense analysts predict that China's defense budget will triple over the next 20

¹⁴ Zheng, 84 Foreign Aff at 18–19 (cited in note 1).

¹⁵ CIA World Factbook, *Field Listing—GDP (official exchange rate)*, available online at <<http://www.cia.gov/cia/publications/factbook/fields/2195.html>> (visited Apr 22, 2006).

¹⁶ As we write, economists are adjusting their evaluation of China's economy and now rank it as number four. See *Economy in China Is No. 4 in World*, NY Times C1 (Jan 25, 2006).

¹⁷ CIA World Factbook, *Rank Order—GDP (purchasing power parity)*, available online at <<http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html>> (visited Apr 22, 2006).

¹⁸ Goldman Sachs, *Dreaming With BRICs: The Path to 2050*, Global Economics Paper No 99 (Oct 2003), available online at <<http://www.gs.com/insight/research/reports/99.pdf>> (visited Apr 22, 2006).

¹⁹ See id at 20.

²⁰ Office of the Secretary of Defense, *Annual Report to Congress: The Military Power of the People's Republic of China* 22 (2005), available online at <<http://www.dod.mil/news/Jul2005/d20050719china.pdf>> (visited Apr 22, 2006) (hereinafter *The Military Power of the People's Republic of China*).

²¹ Id at 21.

years.²² In comparison, the current US defense budget is approximately \$500 billion.²³

American officials worry that this growth in economic power could translate not just into a modern and effective Chinese military, but also into a resurgent Chinese foreign policy that would seek to alter the status quo in the region. Defense analysts identify Chinese goals in the near term as preventing Taiwanese independence and preventing intervention by third parties, such as the US, in any dispute between the China and Taiwan.²⁴ They also fear that in the long term China will seek to project power beyond its territory and home waters and into the Pacific and nearby lands. Defense Department analysts argue that China's recent military buildup has already begun to change the balance of power in East Asia:

China does not now face a direct threat from another nation. Yet, it continues to invest heavily in its military, particularly in programs designed to improve power projection. The pace and scope of China's military buildup are, already, such as to put regional military balances at risk. Current trends in China's military modernization could provide China with a force capable of prosecuting a range of military operations in Asia—well beyond Taiwan—potentially posing a credible threat to modern militaries operating in the region.²⁵

American military analysts fear that as China's economy booms, it will be able to spend more on defense. As its military becomes stronger, China will be able to assert itself as a regional and perhaps global superpower. It may threaten or invade Taiwan, which the US has suggested in the past could trigger a military response. Since the end of World War II, after all, Communist China has engaged in military conflicts not just against the US and South Korea, but against the Soviet Union, India, and Vietnam. As China uses its economic gains to modernize its armed forces, the US can no longer be sure that its current military advantage in the region will continue.

Can international law play any role in preventing such tensions? The United Nations Charter forbids states to use military force except in self-defense or with the approval of the Security Council.²⁶ The Security Council has fifteen members, of which ten are rotating. The other five members are permanent—the US, Britain, Russia, France, and China—and these permanent members alone hold a veto. The Security Council can issue a resolution if nine of the

²² Id at 22.

²³ Congressional Budget Office, *Historical Budget Data* 8 (2006), available online at <<http://www.cbo.gov/budget/historical.pdf>> (visited Apr 22, 2006).

²⁴ *The Military Power of the People's Republic of China* at 12 (cited in note 20).

²⁵ Id at 13.

²⁶ United Nations Charter, arts 51, 39, 42.

fifteen members approve, and none of the permanent members exercise their veto. Non-defensive uses of military force can legally occur, under the formal terms of the UN Charter, only with the consent of these five states.

The overall purpose of the UN Charter is to prevent the use of force except in self-defense, and to offer in exchange for the voluntary cessation of offensive war a guarantee of collective security. During the Cold War, it quite clearly failed at this purpose. Although there was no world war comparable to World War I or World War II, there were numerous regional wars, and the Soviet Union and the US played a role in almost all of them.²⁷

There were several reasons why the UN Charter failed to keep the peace. First, many states simply ignored the rules in the UN Charter. The Soviet Union invaded Afghanistan; the US invaded Grenada; Argentina invaded the Falkland Islands; Britain, France, and Israel invaded Egypt during the Suez crisis; Israel invaded Lebanon; and so forth. As a practical matter, the invading power could often claim that it was coming to the assistance of one or the other faction in civil war.²⁸

Second, the Security Council was paralyzed by the veto. After the Korean War—when UN intervention was made possible only because the Soviet Union boycotted the Security Council vote in connection with another issue—the Security Council was never able to authorize the use of force to counter Cold War-era military aggression. If the aggression served Soviet interests, the USSR would veto any proposed resolution; if the aggression served American interests, the US would veto any proposed resolution.

The most important military confrontation between the US and the USSR was the Cuban missile crisis. Adlai Stevenson's famous presentation in the UN notwithstanding, international law and international institutions played no role in this crisis.²⁹ The Soviet Union's actions—sending nuclear missiles and other military forces to Cuba—did not violate international law. Yet, the US responded with a blockade, which is a use of force that usually amounts to an act of war. The US could not claim self-defense before an imminent attack; instead, its real objection was that the stationing of Soviet missiles only 90 miles from the US radically altered the balance of power. Even though America's blockade of Cuba certainly violated the UN Charter, there were no legal consequences. The conflict was purely a matter of geopolitics.

In the 1990s, the Security Council obtained a new lease on life, thanks to the end of the Cold War rivalry. Its most impressive accomplishment was

²⁷ Michael J. Glennon, *Limits of Law, Prerogatives of Power* (Palgrave 2001).

²⁸ See John Yoo, *Using Force*, 71 U Chi L Rev 729, 783–84 (2004); see also Thomas Franck, *Recourse to Force* (Cambridge 2003).

²⁹ See Yoo, 71 U Chi L Rev at 762–64 (cited in note 28).

authorization of the first Gulf War against Iraq; it also authorized a series of peacekeeping missions. However, already in the 1990s clouds were appearing on the horizon. China and Russia refused to agree to Security Council authorization of the 1999 intervention in Kosovo, and as a result the NATO intervention was, technically, an illegal use of force under the UN Charter.³⁰ China apparently feared that such a humanitarian intervention would set a precedent contrary to China's interest—as China fears that a similar humanitarian rationale could be used to interfere in its internal affairs, especially the treatment of Tibet.

Thus, it is already clear that the Security Council can play no role in any future cold war between China and the US. China has a veto, so any effort by the US to use the Security Council to contain China is bound to fail. Indeed, China's sensitivity about this issue was shown just recently, when government supported crowds protested a proposal for reforming the Security Council, under which Japan would be given a permanent seat.³¹ Chinese citizens remember Japanese atrocities against the Chinese during World War II; the Chinese government is more worried about Japanese political and economic power.

Further, if history is any guide, China will not feel itself bound by the UN Charter when considering the use of force. International law did not prevent China from intervening in 1950 in order to prevent the unification of the Korean peninsula. In fact, China attacked American and Allied forces operating under the authority of the United Nations. Nor did international law prevent China from resorting to the use of force against its neighbors in the 1960s or 1970s. And the UN Charter has not prevented the US from using force, as we noted above.

Although there have been some recent efforts to reform the UN, no one imagines that the US or China will yield its veto power. Reform or no, we should expect the Security Council to be as powerless and irrelevant during any conflict between the US and China as it was during the Cold War with the Soviet Union. With or without reform, the US and China will use their vetoes to prevent the Security Council from either taking sides in any struggle between the two nations or pursuing any mission that advances one of their interests against the other's. As the logic of the first Cold War showed, in every war the US and China will take different sides, in the hope of obtaining a new ally for containing its

³⁰ Glennon, *Limits of Law* at 19–35 (cited in note 27).

³¹ Joseph Kahn, *Chinese Government Permits Rare Protests Against Japan*, NY Times A10 (Apr 17, 2005) (Chinese demonstrators protested “that Japan was seeking a seat on the United Nations Security Council, which they said was intolerable unless Japan apologized more forthrightly for atrocities committed in China more than 60 years ago.”).

superpower rival. Having done so, each state will use its veto to protect the interests of its ally.

The irrelevance of the UN Charter's restrictions on the use of force, however, does not end the matter. We should explore whether there might be some role for international law or institutions to at least help mediate any potential clash between China and the US. This requires a more complete understanding of the nature of conflict between a status quo power and a rising power.

Although there are many different theories about this relationship, as we discussed earlier,³² the best argument, in our view, is that the probability of war depends not on the nature of distribution of power, but on the quality of information that states have about each other's interests and capacities.³³ Imagine a hypothetical world that consists of two states that divide the benefits of cooperation in proportion to their relative power. So if one state has 80 percent of the power, and the other state has 20 percent, they will divide the surplus from international cooperation 80/20. For example, law governing exploitation of ocean resources will favor the more powerful state. Now suppose that the distribution of power shifts, so the larger state has 60 percent and the smaller state has 40 percent. The smaller state will demand more control over the seas than under the status quo, and the larger state will either yield or go to war. If information is perfect, the larger state will realize that it must eventually yield after the war, so instead it will yield peacefully in order to avoid the costs and risks of war. However, if information is not perfect, bargaining may break down, and war could result.

If this view is right, an important function of international law and institutions would be to enhance transparency—the better each state understands the other, the less likely there will be war. Each state has an incentive to agree to institutions as long as it can be assured that such institutions will be unbiased and effective. Whether this can be done depends on a lot of factors, which we will address momentarily.

For now, it is important to observe another lesson of this analysis, which is that a state that rigidly insists on the distribution of rights and obligations under international law may hasten war rather than avoid it. In our example, the larger state might insist that the smaller state comply with the international law governing ocean resources even though the law reflects the old balance of power, not the new balance of power. But this will just lead to a bargaining breakdown. Both states need to treat international law flexibly and consistent

³² See discussion around note 3.

³³ See, for example, Robert Powell, *In the Shadow of Power* (Princeton 1998); James Fearon, *Rationalist Explanations for War*, 49 *Intl Org* 379 (Summer 1995).

with the existing balance of power, not yesterday's balance of power. This suggests that as China becomes more powerful, the US needs to be prepared to renegotiate a host of important multilateral treaties that a powerful China will not be willing to obey—including, perhaps, human rights treaties.

III. THE INTERNATIONAL COURT OF JUSTICE

We argued earlier that international institutions may help enhance cooperation and avert war by providing transparency, and a natural such institution would be a court. This might lead some to argue that the ICJ could play an important role in the future relationship between the US and China.

The ICJ is the judicial organ of the United Nations, and the preeminent international court. Its founders hoped that it would resolve disputes between states that would otherwise resort to war.

The ICJ can obtain jurisdiction over disputes in three main ways. First, states may unilaterally agree to “compulsory jurisdiction,” which means that they are bound to appear before the court if any other state that has filed a similar unilateral declaration brings proceedings against them. Second, states may agree in any particular treaty that disputes arising under that treaty will be resolved by the ICJ. Third, states that have a dispute may by “special agreement” jointly consent to grant the ICJ jurisdiction over their case.³⁴

If history is any guide, the ICJ will play no role in a future US–China cold war. The ICJ has been a marginal institution from the beginning. The Soviet Union never agreed to any of the bases of jurisdiction, and never appeared before the court. Thus, the ICJ did not resolve a single conflict between the US and the Soviet Union. Most of its business has involved disputes between relatively friendly states, or, in a few cases, disputes between hostile states which then refused to comply with its decisions.

The only major case touching on the East-West rivalry was a proceeding brought by Nicaragua against the US for mining Nicaragua's harbors in 1981.³⁵ The US lodged a number of objections to Nicaragua's suit, which the ICJ rejected. Then the US refused to appear before the court for the arguments on the merits, refused to comply with the adverse judgment against it, and withdrew from compulsory jurisdiction. In short, the ICJ proceeding was a fiasco and contributed nothing to the resolution of conflicts related to the Cold War.

³⁴ See International Court of Justice, *General Information—The Court at a Glance*, available online at <<http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>> (visited Apr 22, 2006).

³⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar v US)*, 1986 ICJ 14, 94 (June 27, 1986).

China, like the Soviet Union, has refused to submit to the ICJ's jurisdiction and has refused to appear before it. China, like the US in the last three decades, has also refused to agree by treaty to jurisdiction. Neither state takes the ICJ seriously even today, when global rivalries are at an historic low. It is hard to believe they will take it seriously when these rivalries become more significant.

The ICJ is unattractive for two reasons. First, its judges can only enforce international law, and international law favors the status quo. China, like all rising powers, will most likely seek to change the status quo, and this, as a practical matter, means breaking international law and asserting new international norms. Second, thirteen of the fifteen judges are from states other than the US and China.³⁶ Thus, to the extent that the ICJ has discretion to modify or advance international law along the margin, the resolution of any dispute between China and the US will turn on the identity of the thirteen non-party judges. But these judges will be from countries that have an interest in supporting China or the US. If a majority are from countries that support one superpower, then the other superpower will not trust them. There is historical precedent for this prediction. When the ICJ was established, the judges were mainly from Western countries; that is why the Soviet Union would have nothing to do with it.³⁷ By the 1980s, more of the judges were from newly independent states that were hostile to the US, or at least not as friendly as Western states. When this happened, the US withdrew. Superpower rivals cannot afford to delegate important disputes to an international institution that is dominated by nationals of other states.³⁸

IV. THE HUMAN RIGHTS TREATY REGIME

Another likely casualty of the cold war with China will be the international human rights treaty regime. This regime consists of several treaties that ban various human rights abuses such as genocide, war crimes, apartheid, slavery, and miscellaneous crimes against humanity. Other treaties establish conventional political and civil rights such as the rights to a trial, freedom of speech, freedom

³⁶ See International Court of Justice, *General Information—The Court at a Glance*, available online at <<http://www.icj-cij.org/icjwww/igeneralinformation/icignnot.html>> (visited Apr 22, 2006).

³⁷ See Eric A. Posner, *The Decline of the International Court of Justice*, in Stefan Voigt, Max Albert, and Dieter Schmidtchen, eds, *International Conflict Resolution* 111, 129 (Tubingen 2006).

³⁸ See id; Eric A. Posner and Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 *J Legal Studies* 599 (June 2005).

of association, and due process. The origin of this treaty regime is the Universal Declaration of Human Rights, although precedents date back centuries.³⁹

The Universal Declaration of Human Rights, and the treaties that followed it, were a reaction to the Nazis' atrocities. Their purpose—to force states not to abuse their own citizens—was almost immediately defeated by the Cold War rivalry. The US found that if it demanded that developing nations respect human rights, it merely forced them into the embrace of the Soviet Union, which had no such scruples. As a result, the US put little pressure on other states to improve their human rights records. Nor did any other major state. The human rights treaties had no measurable effect on the behavior of states during the Cold War.

They did have some value, however—as a tool of propaganda. The ideological conflict between the US and the Soviet Union played out as a battle over treaties. The US endorsed and ratified a treaty that guaranteed political rights; the USSR promoted a treaty that guaranteed social and economic rights. The Soviet Union and its satellites refused to have anything to do with human rights treaties until they signed the Helsinki Accord in 1975. In this controversial agreement, the West recognized the Soviet Union's sphere of influence in return for the Soviet Union's promise to respect human rights. Some people believe that this promise gave comfort to dissidents in the Eastern bloc, and thereby hastened the demise of the communism.

The 1990s should have been a good decade for human rights. With the Cold War over, Western states should have been able to enforce the human rights treaties without fearing that by doing so they would enhance the power of their enemies. But geopolitics again intervened. The West reacted slowly and hesitantly to ethnic cleansing in the Balkans, massacres in Indonesia, and genocide in Rwanda—not to mention continued oppression in China. Large states are too powerful to be offended; small states are not important enough for military intervention.

But if any progress has been made with human rights law over the last fifteen years, it will likely end if a cold war with China begins. If the logic of the first Cold War repeats itself, then the US will not be able to threaten or cajole human rights abusers without taking the risk that states abusing human rights will align themselves with China. And although China has signed the treaty that guarantees political and civil rights, it probably will not ratify it, if it is true that the Helsinki Accord injured the USSR by giving comfort to dissidents. Right now China does not seem concerned about ideological conflict with the West.

³⁹ Universal Declaration of Human Rights, art 3, General Assembly Res No 217A (III), UN Doc A/810 (1948), available online at <<http://www.un.org/Overview/rights.html>> (visited Apr 22, 2006).

But if it becomes an issue, then China will most likely advance a version of the Asian values argument of a few years back, according to which Asians (or certain Asians) prefer a society in which order trumps human rights.⁴⁰ Indeed, in an effort to universalize the appeal of its system, China will no doubt argue that political and civil rights lead to crime, corruption, and decadence. There is not yet any philosophy that extols capitalism and rejects democracy, but perhaps one will be supplied when China needs an ideology that will mobilize international support among the enemies of the US.

V. THE INTERNATIONAL CRIMINAL COURT AND THE LAWS OF WAR

The Nuremberg and Tokyo trials after World War II gave the world hope that authors of crimes against humanity would no longer be immune to punishment. However, during the Cold War there were no international war crimes trials comparable to the trials of Nazi and Japanese criminals. They were made impossible by the Cold War rivalry, which ensured that one state's criminals were the other state's allies. All this ended in the 1990s, when the Security Council, with Russian (and Chinese) acquiescence, established tribunals to try people who committed international crimes in Rwanda and the former Yugoslavia.

These tribunals were expensive, slow, and cumbersome, but experience with them led to the realization of a long-deferred dream, the creation of a permanent International Criminal Court ("ICC"). The ICC currently has about one hundred members; significantly, neither the US nor China are members.⁴¹

The ICC has jurisdiction over international crimes committed in the territory of signatories or committed by the nationals of signatories. Thus, it has no power over Chinese or American soldiers unless they take part in a war on a signatory's territory. The US government has convinced dozens of governments to promise not to turn over Americans to the ICC,⁴² despite these governments' treaty obligations under the Rome Statute.⁴³ For this reason, the prospect of criminal sanctions has little power to influence Americans.

China has not followed suit, but today China does not have the power or desire to project force onto foreign territories—with the exception of Taiwan,

⁴⁰ For a discussion of this argument, see Walter Russell Mead, *The Real Asian Miracle: Asia Devalued*, NY Times, Sunday, Late Edition 38 (May 31, 1998).

⁴¹ See International Criminal Court, *The State Parties to the Rome Statute*, available online at <<http://www.icc-cpi.int/asp/statesparties.html>> (visited Apr 22, 2006).

⁴² See Juan Forero, *Bush's Aid Cuts on Court Issue Roil Neighbors*, NY Times A1 (Aug 19, 2005).

⁴³ Rome Statute of the International Criminal Court, 37 ILM 1002 (1998).

which it considers its own territory and which is not (and cannot be, because it is not formally an independent state) a party to the Rome Statute. If China begins sending troops overseas, we can expect it to follow the pattern set by the Americans and insist that the states to which the troops are sent enter similar bilateral immunity agreements with China.

The US and China will thus be undeterred by the ICC; but what about their allies in any future proxy wars? It is certainly possible that a signatory of the Rome Statute may fear that if it commits war crimes or crimes against humanity during a proxy war, eventually leaders or troops may be detained and forced to appear before the ICC. But it is unlikely that the ICC will have any deterrence effect. The main problem is that the ICC is, and in the foreseeable future will be, too weak and poor to handle a nontrivial fraction of international criminal cases, and the people who commit international crimes usually do so during war or civil war, when the immediate struggle for power will overwhelm long-term considerations. In addition, states are free to withdraw from or just ignore the ICC, and may do so if the ICC turns out to have teeth.

International criminal law, and the use of international tribunals to enforce it, are likely to lose the salience and symbolic resonance that they enjoy today. International criminal law presupposes a level of interstate cooperation that rarely can be achieved, and certainly cannot be sustained during a cold war rivalry.

VI. THE WORLD TRADE ORGANIZATION

The most effective and important international institution today is the World Trade Organization (“WTO”), of which both China and the US are members. Although the WTO has no power to resolve geopolitical disputes, it does have the power to manage and resolve conflicts over international trade. Might the WTO prevent, or at least soften, any future superpower rivalry?

International trade itself may reduce the attractiveness of a superpower rivalry. If China and the US currently gain a great deal from international trade, then they have a lot to lose if international trade ends. To the extent that the WTO contributes to the resolution of trade disputes, then this institution may reduce the incentives of China and the US to engage in geopolitical confrontations.

However, there is reason for thinking that the role of the WTO in any future superpower confrontation is likely to be minimal. We already know that international trade itself cannot prevent major wars between states that participate in the trading system: this was the lesson of World War I. Although nothing like the WTO existed on the eve of World War I, it is hard to believe that earlier geopolitical rivalries would have been softened if such an institution had existed.

The problem with the WTO is that its effectiveness depends on a political consensus among major states that symmetric reduction in trade barriers is desirable. Right now, the WTO mediates trade conflicts between the EU, Japan, and the US. As Chinese economic power increases, the triangle will become a square. If these four powers can continue to cooperate over trade, then the WTO will be able to avoid disruptions on the margin. If they do not, then the WTO will be rendered irrelevant.

A possible future is one in which China and the US seek to use trade as a means for strengthening their own spheres of influence and undermining those of the other. The US, for example, has already strengthened the economic bases of its power through the North American Free Trade Agreement with Canada and Mexico, and it is engaged in an effort to expand its economic leadership through a Free Trade of the Americas Agreement (“FTAA”)⁴⁴ that would include the entire hemisphere. The FTAA has the virtue of both enhancing the economic strength of the US and furthering its hegemonic role in the Americas. The US also has strong economic ties to nations in East Asia, such as Japan, South Korea, and Taiwan. China may seek to undermine American power by pushing the region into a trade bloc that would exclude the US. The outcome of such an effort will reflect the relative balance of power between the US and China in the region.

In this future, trade relations might be a weapon for expanding influence or containing the influence of rivals. China will open its market to political friends and close it to allies of the US. The US will respond in kind. Over time, the world may split into separate trading blocs. The US will be the center of a western constellation including Canada and Latin America; China will dominate the east. A big question is whether states with major economies such as the EU and Japan will side with the US or China. Most likely, the EU will try to maintain trade relationships with both blocs, and neither bloc will be strong enough to demand allegiance. Japan will side with the US as long as the US can credibly promise to protect it from Chinese dominance.

VII. CONCLUSION

Much could happen that would undermine these predictions. China has significant demographic and social problems, and if it collapsed into anarchy, or

⁴⁴ See United States Trade Representative, *Free Trade Area of the Americas*, available online at <http://www.ustr.gov/Trade_Agreements/Regional/FTAA/Section_Index.html> (visited Apr 22, 2006).

broke into pieces, then of course there will be no future cold war or great power rivalry with China. Instead, 1990s style US unipolarity would extend into the foreseeable future, or else the US would find itself in confrontations with other powers.

Another alternative future is one in which several dominant states vie for primacy: the US, China, a revived Russia, a unified Europe, and perhaps an economically powerful India. This future would recall not the Cold War but the great power rivalry of the nineteenth century. Then, too, weak international institutions such as the Concert of Europe played a small role in maintaining peace, but they were ad hoc and flimsy, and collapsed as relative power changed. Nonetheless, it might be the case that modern international institutions would be more effective in a multipolar world than in a bipolar world, just as international law mattered more in the nineteenth century than during the Cold War.

But the future that both seems most likely and so far has received least attention is the future in which the US and China engage in a cold war. The history of the first Cold War, the current American and Chinese attitudes toward international law, and the current state of international institutions all point to one outcome: the weakness of these institutions for managing a superpower conflict. For this reason, we reject the popular argument that the US should support international institutions today so that it can seek shelter in them tomorrow.

What, then, should the US do? What it is already doing. The US has been strengthening its military, economic, and political relationships with the states surrounding China—South Korea, Vietnam, India, Australia, and Japan, among others. In doing so, it is creating the rudiments of a NATO-like alliance. NATO, unlike the Cold War-era international institutions, was a success and should be the model for future cold war containment of China, should that rising nation seek to disrupt the status quo.

Readers with comments may address them to:

Professor Eric Posner
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
eposner@uchicago.edu

The University of Chicago Law School
Public Law and Legal Theory Working Paper Series

1. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (November 1999; *Ethics*, v.110, no. 1)
2. Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process (November 1999; forthcoming *Yale Law and Policy Review* v.18 #1).
3. Cass R. Sunstein, Is the Clean Air Act Unconstitutional? (August 1999; *Michigan Law Review* #3).
4. Elizabeth Garrett, The Law and Economics of “Informed Voter” Ballot Notations (November 1999, *University of Virginia Law Review*, v. 85).
5. David A. Strauss, Do Constitutional Amendments Matter? (November 1999)
6. Cass R. Sunstein, Standing for Animals (November 1999)
7. Cass R. Sunstein, Culture and Government Money: A Guide for the Perplexed (April 2000).
8. Emily Buss, Without Peers? The Blind Spot in the Debate over How to Allocate Educational Control between Parent and State (April 2000).
9. David A. Strauss, Common Law, Common Ground, and Jefferson’s Principle (June 2000).
10. Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent (May 2000; *Pennsylvania Law Review* v. 149).
11. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses? (May 2001, *Supreme Court Review*, 2000)
12. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May, 2000).
13. Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations (June 2001)
14. Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election (May 2001).
15. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001).
16. Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches (October 2001).
17. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? (October 2001).
18. Cass R. Sunstein, Of Artificial Intelligence and Legal Reasoning (November 2001).
19. Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, The William J. Brennan Lecture in Constitutional Law (December 2001).
20. Julie Roin, Taxation without Coordination (March 2002).
21. Geoffrey R. Stone, Above the Law: Research Methods, Ethics, and the Law of Privilege (March 2002; forthcoming *J. Sociological Methodology* 2002).
22. Cass R. Sunstein, Is There a Constitutional Right to Clone? (March 2002).
23. Emily Buss, Parental Rights (May 2002, forthcoming *Virginia Law Review*).
24. David A. Strauss, Must Like Cases Be Treated Alike? (May 2002).
25. David A. Strauss, The Common Law Genius of the Warren Court (May 2002).
26. Jack Goldsmith and Ryan Goodman, U.S. Civil Litigation and International Terrorism (June 2002).
27. Jack Goldsmith and Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes (June 2002).
28. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002).
29. Elizabeth Garrett, Is the Party Over? The Court and the Political Process (August 2002).
30. Cass R. Sunstein, The Rights of Animals: A Very Short Primer (August 2002).
31. Joseph Isenbergh, Activists Vote Twice (November 2002).
32. Julie Roin, Truth in Government: Beyond the Tax Expenditure Budget (November 2002).
33. Cass R. Sunstein, Hazardous Heuristics (November 2002).

34. Cass R. Sunstein, Conformity and Dissent (November 2002).
35. Jill Elaine Hasday, The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education (December 2002).
36. Cass R. Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees? (January 2003).
37. Adrian Vermeule, *Mead in the Trenches* (January 2003).
38. Cass R. Sunstein, Beyond the Precautionary Principle (January 2003).
39. Adrian Vermeule, The Constitutional Law of Congressional Procedure (February 2003).
40. Eric A. Posner and Adrian Vermeule, Transitional Justice as Ordinary Justice (March 2003).
41. Emily Buss, Children's Associational Rights? Why Less Is More (March 2003)
42. Emily Buss, The Speech Enhancing Effect of Internet Regulation (March 2003)
43. Cass R. Sunstein and Richard H. Thaler, Libertarian Paternalism Is Not an Oxymoron (May 2003)
44. Elizabeth Garrett, Legislating *Chevron* (April 2003)
45. Eric A. Posner, Transfer Regulations and Cost-Effectiveness Analysis (April 2003)
46. Mary Ann Case, Developing a Taste for Not Being Discriminated Against (May 2003)
47. Saul Levmore and Kyle Logue, Insuring against Terrorism—and Crime (June 2003)
48. Eric Posner and Adrian Vermeule, Accommodating Emergencies (September 2003)
49. Adrian Vermeule, The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory (September 2003)
50. Cass R. Sunstein, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation (September 2003)
51. Bernard E. Harcourt, Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally (November 2003)
52. Jenia Iontcheva, Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court (January 2004)
53. Lior Jacob Strahilevitz, The Right to Destroy (January 2004)
54. Adrian Vermeule, Submajority Rules (in Legislatures and Elsewhere) (January 2004)
55. Jide Nzelibe, The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism (January 2004)
56. Catharine A. MacKinnon, Directions in Sexual Harassment Law: Afterword (January 2004)
57. Cass R. Sunstein, Black on Brown (February 2004)
58. Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence (February 2004)
59. Bernard E. Harcourt, You Are Entering a Gay- and Lesbian-Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers (February 2004)
60. Adrian Vermeule, Selection Effects in Constitutional Law (March 2004)
61. Derek Jinks and David Sloss, Is the President Bound by the Geneva Conventions? (July 2004)
62. Derek Jinks and Ryan Goodman, How to Influence States: Socialization and International Human Rights Law (March 2004)
63. Eric A. Posner and Alan O. Sykes, Optimal War and *Jus Ad Bellum* (April 2004)
64. Derek Jinks, Protective Parity and the Law of War (April 2004)
65. Derek Jinks, The Declining Significance of POW Status (April 2004)
66. Bernard E. Harcourt, Unconstitutional Police Searches and Collective Responsibility (June 2004)
67. Bernard E. Harcourt, On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars {A Call to Historians} (June 2004)

68. Jide Nzelibe, *The Uniqueness of Foreign Affairs* (July 2004)
69. Derek Jinks, *Disaggregating "War"* (July 2004)
70. Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act* (August 2004)
71. Eric A. Posner and Cass R. Sunstein, *Dollars and Death* (August 2004)
72. Cass R. Sunstein, *Group Judgments: Deliberation, Statistical Means, and Information Markets* (August 2004)
73. Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* (September 2004)
74. Elizabeth Emens, *The Sympathetic Discriminator: Mental Illness and the ADA* (September 2004)
75. Adrian Vermeule, *Three Strategies of Interpretation* (October 2004)
76. Cass R. Sunstein, *The Right to Marry* (October 2004)
77. Jill Elaine Hasday, *The Canon of Family Law* (October 2004)
78. Adam M. Samaha, *Litigant Sensitivity in First Amendment Law* (November 2004)
79. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy* (December 2004)
80. Cass R. Sunstein, *Minimalism at War* (December 2004)
81. Eric A. Posner, *The Decline of the International Court of Justice* (December 2004)
82. Tim Wu, *The Breach Theory of Treaty Enforcement* (February 2005, revised March 2005)
83. Adrian Vermeule, *Libertarian Panics* (February 2005)
84. Eric A. Posner and Adrian Vermeule, *Should Coercive Interrogation Be Legal?* (March 2005)
85. Cass R. Sunstein and Adrian Vermeule, *Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs* (March 2005)
86. Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting* (April 2005)
87. Eric A. Posner, *Political Trials in Domestic and International Law* (April 2005)
88. Cass R. Sunstein, *Irreversible and Catastrophic* (April 2005)
89. Adam B. Cox, *Partisan Fairness and Redistricting Politics* (April 2005, *NYU L. Rev.* 70, #3)
90. Cass R. Sunstein, *Administrative Law Goes to War* (May 2005, *Harvard L. Rev.*, *forthcoming*)
91. Cass R. Sunstein, *Chevron Step Zero* (May 2005)
92. Bernard E. Harcourt, *Policing L.A.'s Skid Row: Crime and Real Estate Development in Downtown Los Angeles [An Experiment in Real Time]* (May 2005)
93. Bernard E. Harcourt and Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment* (May 2005)
94. Bernard E. Harcourt, *Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age* (May 2005)
95. Philip Hamburger, *The New Censorship: Institutional Review Boards* (May 2005)
96. Eugene Kontorovich, *Disrespecting the "Opinions of Mankind"* (June 2005)
97. Tim Wu, *Intellectual Property, Innovation, and Decision Architectures* (June 2005)
98. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Commons* (July 2005)
99. Cass R. Sunstein, *Ranking Law Schools: A Market Test?* (July 2005)
100. Mary Anne Case, *Pets or Meat* (August 2005)
101. Adam Samaha, *Executive Exposure: Government Secrets, Constitutional Law, and Platforms for Judicial Intervention* (August 2005, revised November 2005)
102. Jason J. Czarnezki and William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation* (August 2005)
103. Adrian Vermeule, *Absolute Voting Rules* (August 2005)
104. Eric A. Posner and Adrian Vermeule, *Emergencies and Democratic Failure* (August 2005)
105. Adrian Vermeule, *Reparations as Rough Justice* (September 2005)

106. Arthur J. Jacobson and John P. McCormick, *The Business of Business Is Democracy* (September 2005)
107. Tracey Meares and Kelsi Brown Corkran, *When 2 or 3 Come Together* (October 2005)
108. Adrian Vermeule, *Political Constraints on Supreme Court Reform* (October 2005)
109. Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude* (November 2005)
110. Cass R. Sunstein, *Fast, Frugal and (Sometimes) Wrong* (November 2005)
111. Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism* (November 2005)
112. Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles* (November 2005)
113. Adam M. Samaha, *Undue Process: Congressional Referral and Judicial Resistance in the Schiavo Controversy* (November 2005)
114. Bernard E. Harcourt, *Should We Aggregate Mental Hospitalization and Prison Population Rates in Empirical Research on the Relationship between Incarceration and Crime, Unemployment, Poverty, and Other Social Indicators? On the Continuity of Spatial Exclusion and Confinement in Twentieth Century United States* (January 2006)
115. Elizabeth Garrett and Adrian Vermeule, *Transparency in the Budget Process* (January 2006)
116. Cass R. Sunstein, *Burkean Minimalism* (January 2006)
117. Stephanos Bibas, *Transparency and Participation in Criminal Procedure* (February 2006)
118. Douglas G. Lichtman, *Captive Audiences and the First Amendment* (February 2006)
119. Eric A. Posner and Cass R. Sunstein, *The Law of Other States* (March 2006)
120. Jeff Leslie and Cass R. Sunstein, *Animal Rights without Controversy* (March 2006)
121. Adrian Vermeule, *The Delegation Lottery* (March 2006)
122. Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers* (March 2006)
123. Bernard E. Harcourt, *Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does It Violate the Right to Be Free from Discrimination?* (March 2006)
124. Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias* (April 2006)
125. Lior Strahilevitz, *"How's My Driving?" for Everyone (and Everything?)* (April 2006)
126. Jack Goldsmith and Eric A. Posner, *The New International Law Scholarship* (May 2006)
127. Eric A. Posner and John Yoo, *International Law and the Rise of China* (May 2006)
128. Eric A. Posner and Cass R. Sunstein, *Chebronizing Foreign Relations Law* (May 2006)