

## Book Review

### Review of THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY

Congyan Cai, *THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY* (Oxford Univ. Press 2019).

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Generally speaking, it would be true to say that no one believes that war pays and nearly every one believes that policies which lead inevitably to war do pay. Every nation sincerely desires peace; and all nations pursue courses which if persisted in, must make peace impossible.

All nations are quite ready to condemn “in the abstract,” armaments, economic nationalism, international suspicion and mistrust, while each one individually clings to his armament, adds to his tariff, invents new modes of economic nationalism, and insists upon an absolute national sovereignty which must make international order impossible, and the prolongation of anarchy and chaos inevitable.<sup>1</sup>

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1. NORMAN ANGELL, *THE GREAT ILLUSION* 1933, at 4–5 (1933) (Angell was the 1933 winner of the Nobel Peace Prize).

## INTRODUCTION

Historically, the emergence of a new great political power has destabilized the existing international system, resulting in conflict, and even war. Thucydides observed this dynamic in the rise of Sparta as early as the fifth century BCE.<sup>2</sup> Writing between the two world wars of the twentieth century, Sir Norman Angell presciently observed that all nations claim to desire peace, but too often fail to make the concessions necessary to achieve it.<sup>3</sup> This historical pattern has inevitably raised high-stakes questions in the context of a modern, powerful, and ascendant People's Republic of China (PRC). Will China's sense of exceptionalism cause the international rules-based order to bend or to break? Will the United States help manage a peaceful rise, or will it resist China's ascent and wage war to fend off the emergence of a peer competitor? Could a resurgent China help lead the international community into a more harmonious and equitable era in which transnational legal regimes provide meaningful constraints and structures for overcoming national differences? To address these critical questions, Professor Congyan Cai recently published a thoughtful and well-researched monograph describing and explaining modern China's relationship to international law and discussing its implications for the world order.

Quoting extensively from President Xi Jinping's 2015 maiden address to the U.N. General Assembly, Cai argues in his new book, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (2019), that a brave, new China—magnanimous, cosmopolitan, and unafraid—is improved by the rule of law and will in turn contribute its own enhancements to the international order, thereby spreading the benefits of peace and prosperity. As if to reassure readers with this new book, Cai endeavors to claim, clarify, and reify China's peaceful intentions. In his effort, Cai extensively documents China's work over the past four decades to adopt international documents and adapt it to suit China's evolving needs. He tries to reassure Western readers that China's embrace of international law will hold if the United States and other legacy powers make reasonable accommodations in recognition of the unique status of the PRC. This review essay addresses Cai's claims, with significant trepidation. Mindful of Norman Angell's observations quoted above, I fear that the PRC's sincere desire for peace will be overwhelmed by its relentless pursuit of a course that may ultimately "make peace impossible."

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2. See *infra* note 9 and accompanying text.

3. ANGELL, *supra* note 1, at 4–5.

Cai makes repeated reference to China's unique status and purportedly peaceful rise. In the final sentence of the book, Cai proclaims "that it is high time to take Chinese exceptionalism seriously!"<sup>4</sup> By that point, regrettably, the reader already may have arrived at the conclusion that there is nothing particularly exceptional about Chinese exceptionalism, and that, like Ancient Sparta or Hohenzollern Germany, an ambitious and powerful newcomer makes great power conflict all but inevitable. As a nascent superpower, China claims to promote an international order of peace and prosperity. But like the tragic situation Norman Angell described in the passage quoted above, China's leaders seem incapable or unwilling to bear the costs necessary to avoid conflict. Little in Cai's work convinces the reader that China's aspirations differ significantly from those that overturned previous hegemonic eras of relative peace and prosperity. But history is not destiny. Maybe this time will prove different, and the system will peacefully adjust to the rise of a new superpower.

*The Rise of China and International Law* constitutes the first English-language monograph to systematically address the connections between international law and China's rise. It examines how international law conditioned China's reemergence after its long "century of national humiliation" under foreign domination (1839–1949) and the revolutionary era (1949–1976). Ambitiously, this work also surveys how the PRC is shaping the doctrine, institutions, and effectiveness of international law. To attempt all this, the book not only employs traditional methods of legal interpretation, but it also applies international relations models. While not entirely successful, this ambitious undertaking is tremendously important and laudably performed.

#### THE AUTHOR'S BACKGROUND AND INTENTIONS

Congyan Cai has earned impressive credentials, positioning him to write this much-needed book. Having earned his B.A. in history and his LL.M. and PhD in International Law at Xiamen University, he rose to serve as a Professor of International Law at that same highly respected institution. He has published extensively in Chinese and foreign law reviews of the highest caliber.<sup>5</sup> He has served as a

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4. CONGYAN CAI, *THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY* 326 (2019).

5. See, e.g., Congyan Cai, *Chinese Foreign Relations Law*, 111 *AJIL UNBOUND* 336 (2017); Congyan Cai, *Enforcing a New National Security? China's National Security Law and International Law*, 10 *J. E. ASIA & INT'L L.* 65 (2017); Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 *EUR. J. INT'L L.* 755 (2013).

Fulbright Scholar and Global Research Fellow at New York University School of Law, a Visiting Professor at Columbia Law School and at Kobe University School of Law, as well as a Senior Research Fellow at Humboldt University School of Law. The book's acknowledgements section thanks several of the leading lights of international law scholarship who have helped him along the way.<sup>6</sup> And upon the successful publication of this book, he finds himself a Professor of International Law at Fudan University, a faculty revered as among the very best in China.

With the apparent goal of influencing Western policy in the near term, Cai appears to be addressing foreign (non-Chinese) scholars or others with an abiding interest and some background in the sub-fields of Chinese or comparative international law. The writing is dense and assumes extensive background knowledge. The fragmented structure of the argument and the heavy scholarly apparatus may deter non-specialists.<sup>7</sup> And, as much of the most interesting material constitutes a first draft of the history of the Xi era, the book seems unlikely to be widely consulted in the future. As of now, the text has only been published in English, and it is hard to imagine a fair translation into Chinese. On account of some of Cai's bolder claims on politically sensitive issues, the prospect of widespread distribution in China seems even more remote.<sup>8</sup> Although unstated, the ultimate audience appears to be people who can shape U.S.-China policy over the next few years.

Cai argues that China's rise is characterized by the unique circumstances of the historical moment and by the distinctive character of the PRC. The book implies that China's rise will remain peaceful if the United States responds appropriately—that is, by conceding as much deference to China's regime as it has historically granted itself. In large part, this book is a response to those policy analysts who argue that the United States and China are doomed to fall into the so-called "Thucydides Trap." Harvard Professor Graham Allison laid out this theory, distilled from the eponymous Athenian general and historian, who explained the origins of the Peloponnesian War (431–404 BCE):

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6. CAI, *supra* note 4, at xiii–xiv.

7. Distracting typographical errors also appear throughout the book with discouraging frequency.

8. See, e.g., CAI, *supra* note 4, at 105 ("Many Chinese laws are poorly respected and enforced in practice" (referring to China's common experience of "paper compliance" in contrast to the legally required "progressive compliance" of international law)); see also *id.* at 142 (noting that China "fully takes advantage of discretion or loopholes in human rights treaties[,] thus preventing "Chinese courts from invoking human rights treaties to challenge executive organs that are major human rights abusers"). These critiques might appear mild to Western readers, but they are fairly bold criticisms in the current Chinese context.

“What made war inevitable was the growth of Athenian power and the fear which this caused in Sparta.”<sup>9</sup> Thucydides implies that avoiding the inevitable war requires trust. And trust between China and the West is quickly diminishing.<sup>10</sup>

Cai takes an important first step in bridging this gap by clearly and repeatedly pronouncing China’s longstanding desire for peace. For the most part, he adopts the language of a peaceful rise to argue that China would be content with its status as a peer and to reassure American readers that they need not fear China. For example, he quotes approvingly the Ministry of Foreign Affairs’ 1999 statement: “China steadily stands out its image as a peaceful, cooperative and responsible power.”<sup>11</sup> He also repeats the 2003 claim of a confidant of President Hu Jintao that China “strives for rise while pursuing peace and not seeking hegemony.”<sup>12</sup> And he notes more than once Premier Wen Jiabao’s speech at Harvard University that same year, in which Wen proclaimed that his country was “a rising power dedicated to peace.”<sup>13</sup> Cai further suggests that the terms of any realignment to accommodate a powerful China would not be onerous. He quotes Deng Xiaoping, who asserted as “a socialist country, China shall always belong to the Third World and shall never seek hegemony.”<sup>14</sup> Cai states repeatedly that China’s rise will be peaceful because the PRC desires peace.

This assertion pervades the book. The brief concluding chapter is focused on it and includes a page-long quote from Xi Jinping’s

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9. THUCYDIDES, *THE PELOPONNESIAN WAR* 49 (Rex Warner trans., 1972); see also GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES’S TRAP?* 29 (2017); Graham Allison, *Thucydides’s Trap Has Been Sprung in the Pacific*, *FIN. TIMES* (Aug. 21, 2012), <https://www.ft.com/content/5d695b5a-ead3-11e1-984b-00144feab49a> [<https://perma.cc/GV3D-AAQN>]. Professor Allison and colleagues at Harvard’s Belfer Center for Science and International Affairs have created a special initiative to explore whether America and China can escape Thucydides’s Trap. See *Special Initiative: Thucydides’s Trap*, HARV. KENNEDY SCH., <https://www.belfercenter.org/thucydides-trap/book/purchasing-info-thucydides-trap> [<https://perma.cc/R4K6-YVFN>].

10. See, e.g., Steven Lee Myers & Amy Qin, *Biden Has Angered China, and Beijing Is Pushing Back*, *N.Y. TIMES* (July 20, 2021), <https://www.nytimes.com/2021/07/20/world/asia/china-biden.html> [<https://perma.cc/U3NW-4VXR>] (“Wu Qiang, an independent political analyst in Beijing, said mutual suspicion was blocking a return to more stable relations. ‘There is a lack of political trust,’ he said. ‘This is the biggest obstacle.’”).

11. CAI, *supra* note 4, at 55.

12. *Id.* at 55, and more fully developed at 73.

13. *Id.* at 55.

14. *Id.* at 71 (quoting Deng Xiaoping, at the Special Session of the U.N. General Assembly (Apr. 10, 1974)).

September 2015 speech to the U.N. General Assembly In that address, Xi asserted:

We should build partnerships in which countries treat each other as equals, engage in mutual consultation and show mutual understanding . . . . We should increase inter-civilization exchanges to promote inclusive development that benefits all. The world is simply more colorful as a result of cultural diversity. Diversity breeds exchanges, exchanges create integration, and integration makes progress possible.<sup>15</sup>

If quantity of quotes is any indication, Cai is fixated on communicating China's peaceful intentions. In addition to copiously quoting national leaders, Cai references (without explanation) China's "traditional civilization, which is characterized by pacifism, inclusiveness, harmony, and so on, to claim its identity and to justify its international legal policies."<sup>16</sup> In short, Cai contends that "China may bring about a 'kinder, gentler' Westphalia."<sup>17</sup>

#### BUT WILL THE INTERNATIONAL ORDER SURVIVE CHINA'S RISE?

Of course, asserting a desire for peace is only part of the solution. For peace to succeed, a lot must go right. China's declarations of desire for peace must be heard and trusted, but in determining credibility, the audience will weigh the evidence and reflect on the potential harm of a misperception. In the case of China's rise, the potential cost of misperception is incalculably high. China has the second largest economy and an enormously powerful and fast-growing modern military.<sup>18</sup> There are also countless potential sources

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15. *Id.* at 325–26 (quoting Xi Jinping, General Secretary, Chinese Communist Party, Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind, Statement at the U.N. General Assembly (Sept. 29, 2015)).

16. *Id.* at 99. *But see* US-Asia Institute, *The Rise of China and International Law*, YOUTUBE (Oct. 22, 2020), [https://www.youtube.com/watch?v=flBX\\_U6GulA&t=321s](https://www.youtube.com/watch?v=flBX_U6GulA&t=321s) [<https://perma.cc/D9GM-ANJJ>]. During Cai's elaboration in response to my question in his discussion with José Alvarez, Cai speculated that interests may ultimately overwhelm this tradition. *Id.*

17. CAI, *supra* note 4, at 326 (quoting Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOB. LEGAL STUD. 27, 45 (2010)).

18. OFF. OF THE U.S. SEC'Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 122 (2020), <https://media.defense.gov/2020/Sep/01/2002488689/-1/-1/2020-DOD-CHINA-MILITARY-POWER-REPORT-FINAL.PDF> [<https://perma.cc/VX4E-MX3F>].

of conflict from boundary disputes to a trade war, and from arrested citizens to cyber espionage. With so many chances to fail, a great deal rests on whether Americans believe China's claims. Failure threatens calamity, even Armageddon.<sup>19</sup>

Regrettably, recent history offers plenty of cause to question the PRC's commitment to a peaceful rise. Cai does not address the conquest of Tibet, the menacing of Taiwan, or the encroachments upon Hong Kong. He does not discuss the PRC's border clashes with Vietnam, India, Burma, and Russia. And he accepts as fact the PRC's contested claim to sovereignty over the South China Sea. In this region, China's controversial construction projects raise the specter of similar so-called "defensive" clashes with its maritime neighbors. Likewise, Chinese and Indian forces are killing and dying in the Himalayas, where China created a new village in contested territory.<sup>20</sup> While the PRC has always maintained that these conflicts were merely intended to preserve the integrity of China, their opponents see it differently. Sadly, history is replete with instances of irredentist claims based on selective interpretations of history leading to clashes and wider wars.

To support his arguments, Cai does draw on an impressive array of articles and books. The twenty-one-page, single-spaced bibliography contains approximately 400 references—almost all in English. The numerous footnotes include the occasional reference to Chinese-language materials. Cai provides no explanation for citing so few Chinese language sources: perhaps because he assumes that readers cannot or will not examine or give credence to them. Among the works Cai does credit are international law classics by Emer de Vattel,<sup>21</sup> Hersch Lauterpacht,<sup>22</sup> Wolfgang Friedmann,<sup>23</sup> Thomas Franck,<sup>24</sup> and Louis Henkin,<sup>25</sup> contemporary works of international relations based on aggressive realism, such as John Mearsheimer's

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19. For one imagined scenario, see ELIOT ACKERMAN & ADMIRAL JAMES STAVRIDIS, *2034: A NOVEL OF THE NEXT WORLD WAR I* (2021).

20. See Ethirajan Anbarasan, *China-India Clashes: No Change a Year After Ladakh Stand-Off*, BBC NEWS (June 1, 2021), <https://www.bbc.com/news/world-asia-57234024> [<https://perma.cc/UK49-FQU6>]; Archana Chaudhary, *Why Chinese and Indian Troops Clash in the Himalayas*, WASH. POST (July 2, 2021, 4:59 PM), [https://www.washingtonpost.com/business/why-chinese-and-indian-troops-clash-in-the-himalayas/2021/06/29/0cd73f20-d892-11eb-8c87-ad6f27918c78\\_story.html](https://www.washingtonpost.com/business/why-chinese-and-indian-troops-clash-in-the-himalayas/2021/06/29/0cd73f20-d892-11eb-8c87-ad6f27918c78_story.html) [<https://perma.cc/6YH2-GCLL>].

21. CAI, *supra* note 4, at 344.

22. *Id.* at 338.

23. *Id.* at 333.

24. *Id.*

25. *Id.* at 335.

gloom and doom *The Tragedy of Great Power Politics*<sup>26</sup> and Charles Dunlop's influential work on lawfare<sup>27</sup>; and international history, relying heavily on the thesis of Paul Kennedy's magisterial *The Rise and Fall of the Great Powers*.<sup>28</sup> Arguably the most influential source cited is Anthea Roberts' recent *Is International Law International?*.<sup>29</sup> Roberts' path-breaking book opens the door to the focused study of how different countries interpret, teach, and practice international law. Her investigation of the situation in China remains invaluable. Cai's contribution builds on that of Roberts but differs given its distinctly pro-PRC voice.

Couching the Party line in this interdisciplinary context, Cai distinguishes China's rise from that of previous peer competitors which have destabilized a world system. In contrast to previous eras, he observes that China's rise occurs when the global order is "hard to overturn and easy to join."<sup>30</sup> It emerges within a system that enjoys a relatively robust international rule of law—one in which all states are presumed civilized and equal—thereby increasing the legality and legitimacy of China's rise and easing its path.<sup>31</sup> Likewise, China's status as a "revisionist socialist state" with a gigantic and fast-growing economy distinguishes it from other contenders, as does its permanent seat and veto on the U.N. Security Council. These features enable the ruling Chinese Communist Party (the "CCP" or the "Party") to protect the nation's economy and security from foreign menaces, freeing it from concerns that have made previous newcomers anxious and trigger-happy. In response to the dismal projections of aggressive realists, such as John Mearsheimer, Cai contends that the current international environment is conducive to a peaceful rise.

#### WHAT THE BOOK DOES NOT—OR CANNOT—DO

While a worldly scholar, Cai presents the PRC mostly as the CCP prefers to see it: strong, stable, and united behind the CCP. He

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26. *Id.* at 339.

27. *Id.* at 332.

28. *Id.* at 337.

29. *Id.* at 342.

30. *Id.* at 109 (citing G. John Ikenberry, *The Rise of China and the Future of the West*, 87 FOREIGN AFFS. 23, 24 (2008)).

31. *Id.* at 13–39, especially 26.



treats “China” as a body, the Party leadership as its brain.<sup>32</sup> He does not discuss the unsettling boundary disputes, the serious unrest among some ethnic minorities, the glaring rural-urban divide that increasingly separates the rich and the poor, or the multitude of other environmental, health, social or economic pressures that degrade and may ultimately overwhelm the stability of the regime. He claims that, as a system transitioning from the rule of man under Mao Zedong to the rule of law (or really, the rule *by* law), China is becoming ever more just and consequently more legitimate.<sup>33</sup>

In one awkward instance, however, Cai does glance at the inconsistency of China’s “revisionist socialist” system. Referencing Deng himself, Cai observes that as “China continually liberalizes its economy, . . . the tension between the market-motivated pursuit of economic liberalism and the CCP-led control of political democracy has become more and more acute.”<sup>34</sup> What this sentence says, how it says it, and what it leaves out could fairly be the subject of its own review essay. In short, Cai is referencing the systemic challenges of maintaining centralized control over the nation’s political institutions, while resting their legitimacy on the economic growth generated by the release of powerful but chaotic entrepreneurial forces. In other words, the Party must feed the dragon—or be eaten by it. And while Cai does not confront this dilemma directly, it remains to be determined whether the Party or the dragon will prevail.<sup>35</sup>

Evidently, Cai’s toeing the Party line is most obvious on more politically sensitive issues, where he has the least space for doubt and is most likely to face intense scrutiny. Despite the obvious implications for those seeking to understand China’s attitude toward international law, Cai avoids the most politically sensitive topics, such as the “Three Ts”—Tibet, Taiwan, and Tiananmen. In the most significant tack along this cautious course, he does observe: “It is well known that, since the late 1980s (especially since the Tiananmen

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32. Simon Chesterman, *Can International Law Survive a Rising China?*, 31 *EURO. J. INT’L L.* 1507, 1510 (2020) (“‘China’ is invoked as a unitary actor . . . for the most part this is a party-line book.”).

33. CAI, *supra* note 4, at 56–61, 140. The distinction between rule *of* law and rule *by* law deservedly garners a great deal of attention in the scholarly community. Cai’s description of the difference is useful and telling, defining the latter as law “made in a scientific manner”—that is, according to a socialist legality, that which “subordinates law to the policy preferences of the Communist Party.” *Id.* at 58.

34. *Id.* at 51.

35. The metaphor is mine; the dragon is a traditional Chinese symbol of power and those who wield it. If the Party can sustain the power of the Chinese people, it may endure. If it fails to deliver prosperity, the people may no longer accept authoritarian rule. See CARL MINZNER, *END OF AN ERA: HOW CHINA’S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* (2018) for a sophisticated treatment of this argument.

Square incident in 1989), China and the West have fiercely sparred over human rights affairs, and China has been accused of systematic violations of human rights.”<sup>36</sup> But he stops there, short of inquiring into the truth or legal significance of these accusations. In light of the regime’s censorious practices, Cai’s reticence is completely understandable. Nevertheless, this silence leaves substantial gaps in the lay reader’s understanding of *The Rise of China and International Law*.

Not only does he fail to weigh China’s political statements against its often-brutal practices, but Cai also offers charitable readings of the lawfulness of these actions. For instance, Cai explains that China has signed several human rights treaties and either failed to ratify them or rejected optional protocols granting compulsory jurisdiction. In this respect, China has taken full “advantage of discretion or loopholes in human rights treaties,” going for gradual transformation, rather than incorporation, to prevent “Chinese courts from invoking human rights treaties to challenge executive organs that are major human rights abusers.”<sup>37</sup> Cai nonetheless writes that he expects China’s rise to improve human rights conditions.<sup>38</sup> Applauding China’s nominal efforts, Cai overlooks the rule that signing a treaty expresses a state’s consent to be bound by it, an obligation hardly relieved because a government decides to “place the priority on economic growth rather than political freedom and social justice.”<sup>39</sup> With equally undue charity, Cai simultaneously applauds the protections promised within the PRC’s Constitution while obscuring the non-justiciability of that particular document<sup>40</sup> by claiming that “[t]he constitution of a state is obviously the most authoritative instrument with which to ascertain its identity.”<sup>41</sup> To some, failing to provide the legal remedies to enforce obligations of a human rights treaty or a constitution might seem a cruel joke.

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36. CAI, *supra* note 4, at 260; *see also id.* at 140, 142, 260.

37. *Id.* at 105, 140, 142 (the same can be said about the United States).

38. *Id.* at 142.

39. *Id.*; *see* Vienna Convention on the Law of Treaties art. 12, May. 23, 1969, 1155 U.N.T.S. 331 (articulating that a party’s consent to be bound by a treaty is expressed by its signature).

40. Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PENN. E. ASIA L. REV. 51, 82 (2011) (“While China recognizes the Constitution as fundamental law, the lack of justiciability weakens its legal characteristics.”).

41. CAI, *supra* note 4, at 46.

If this review seems unduly harsh, consider the enormity of the stakes and the urgency of the task—indeed, time may be running out.<sup>42</sup> If we are to avoid tripping the Thucydides Trap, China and the West must develop trust and understanding. The international rules-based order can facilitate the necessary adjustments. While Cai's book increases the sum of knowledge significantly, its subjectivity does not inspire the kind of durable trust that the moment demands. Let us strive to avoid the outcome that Norman Angell forecast in 1933 as the world trod tragically back down the path to war. Congyan Cai has taken an important first step in the right direction by offering a wide-ranging description and robust justification of China's approach to international law. Heeding Angell, it remains up to the actions and attitudes of all interested parties—including the PRC, its leaders, and the West—to ensure that China pursues a course that makes peace possible.

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42. President Xi has voiced increasingly impatient and even bellicose sentiments about those who would stand in the way of China's rise. Chris Buckley & Keith Bradsher, *Marking Party's Centennial, Xi Warns That China Will Not Be Bullied*, N.Y. TIMES (July 7, 2021), <https://www.nytimes.com/2021/07/01/world/asia/xi-china-communist-party-anniversary.html> [<https://perma.cc/5MWN-T5TS>] (“‘The Chinese people will never allow foreign forces to bully, oppress or enslave us,’ [Xi] said, clad in a Mao suit. ‘Whoever nurses delusions of doing that will crack their heads and spill blood on the Great Wall of steel built from the flesh and blood of 1.4 billion Chinese people.’”).