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BOOK REVIEW / RECENSIONS DE LIVRE

**China's Law of the Sea: The New Rules of Maritime Order**. By Isaac B. Kardon. New Haven, CT: Yale University Press, 2023. 416 pages.

On 16 October 2023, Chinese fighter jets aggressively intercepted a Royal Canadian Air Force CP-140 Aurora patrol aircraft, which was operating in the East China Sea as part of Operation NEON.[1] The Canadian Armed Forces (CAF) has deployed assets to the Indo-Pacific since 2018 in support of Operation NEON, through which the CAF enforces United Nations Security Council sanctions on North Korea.[2] This is not the first time that the Chinese military has intercepted a CAF vessel or plane.[3] Yet this incident was a serious one for it might have resulted in a collision and loss of life. The Chinese jets manoeuvred within five metres of the Aurora and released flares near the front of the aircraft.[4] The intercepts drew a rare rebuke from senior Canadian officials, who have tended to downplay the significance of CAF operations in the Indo-Pacific.[5] Notably, Minister of National Defence Bill Blair characterized the intercepts as "dangerous and reckless."[6]

In recent years, the Chinese government has more robustly enforced its sweeping territorial and maritime claims in its surrounding seas. Although the exact location of the intercepts is not entirely clear, a senior Canadian officer noted that the incident occurred in "international waters."[7] The Aurora almost certainly flew over waters that China claims as part of its exclusive economic zone (EEZ), an ocean zone wherein the coastal state enjoys only certain sovereign rights—namely, relating to resources located therein. A coastal state does not enjoy unlimited sovereignty in its EEZ. Under Article 58(1) of the United Nations Convention on the Law of the Sea (UNCLOS), all

[1]Neetu Garcha, "Chinese Military Jet Intercepts Canadian Forces Plane in 'Aggressive Manner,'" *Global News* (16 October 2023), online: <globalnews.ca/news/10027324/chinese-military-aircraft-intercept-canadian-forces/>.

[2]Department of National Defence, "Operation NEON," online: *Government of Canada* <www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-neon.html>.

[3]See e.g. Will LeRoy, "Canadian Military Plane Intercepted by Chinese Jets 'Numerous' Times in Recent Weeks," *CTV News* (30 November 2022), online: <www.nationalnewswatch.com/2022/11/30/canadian-military-plane-intercepted-by-chinese-jets-numerous-times-in-recent-weeks/>.

[4]Garcha, *supra* note 1.

[5]Steven Chase, "For Second Time in Three Months, Canadian Warship Transits Taiwan Strait," *Globe and Mail* (10 September 2019), online: <www.theglobeandmail.com/politics/article-for-second-time-in-three-months-canadian-warship-transits-taiwan/>.

[6]"Canada Says Chinese Fighter Jets 'Dangerously' Intercepted Aircraft," *Radio Free Asia* (17 October 2023), <www.rfa.org/english/news/china/canada-china-intercept-10172023021603.html>.

[7]Garcha, *supra* note 1.



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states enjoy the freedom of navigation and overflight in the EEZ.[8] If the aerial intercept of the Aurora — which was exercising the freedom of overflight — occurred within China's claimed EEZ, then Chinese actions violated the convention. But as Isaac B. Kardon notes in his recent book *China's Law of the Sea*, the Chinese government has sought to adapt and, in certain cases, revise key rules of the law of the sea. For example, with respect to EEZ rights, China takes the view that it is permitted to "regulate foreign military activities in its EEZ under the law of the sea."[9] This view runs counter to the convention.

As CAF assets continue to deploy to the Indo-Pacific in support not only of Operation NEON but also of Canada's Indo-Pacific strategy, Canadian politicians and officials will need to pay close attention to China's shifting views on the law of the sea. As the Aurora incident makes clear, Chinese views on the law of the sea can have real and alarming consequences for Canadian service personnel. Kardon's book offers unique insights into China's complicated relationship with the law of the sea and should be required reading in Canadian governmental circles. Kardon addresses the central question of "whether and how China is succeeding in its struggle to change the rules of the international law of the sea."[10] In answering this question, Kardon demonstrates that China takes an idiosyncratic and sovereigntist approach towards this body of law. Rather than hew closely to the treaty text of UNCLOS, China has characterized the convention as full of ambiguity and has sought to generate new, alternative norms of customary international law.[11] In other words, China regularly sidesteps UNCLOS while paying lip service to the universal applicability of the international law of the sea.

Kardon focuses on four sub-domains of the law of the sea: he asks whether China's preferred rules on geography, resources, navigation, and dispute resolution can evolve into rules of customary international law, either at the regional or global level. His answer is two-fold. First, since China has failed to implement many of its desired rules in a coherent way, it is unlikely that they will become new norms of customary international law.[12] For example, although China has claimed hydrocarbon resources within the area marked by the infamous nine-dash line — a sweeping maritime demarcation that the Permanent Court of Arbitration held to be inconsistent with UNCLOS[13] — it has only pursued hydrocarbon production "in de facto undisputed zones."[14] In addition, certain of China's neighbours continue to develop hydrocarbon resources within the nine-dash line.[15] Thus, China has not consistently enforced its articulated right to exclusive hydrocarbon resource management within waters that it treats as coming under its jurisdiction.

[8] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, art 58(1) (entered into force 16 November 1994).

[9] Isaac B Kardon, *China's Law of the Sea: The New Rules of Maritime Order* (New Haven, CT: Yale University Press, 2023), at 197.

[10] *Ibid* at 9.

[11] *Ibid* at 11.

[12] *Ibid* at 262.

[13] PCA, *Philippines v China*, PCA Case No 2013-19 (2016) at para 261 (Arbitrators: Judge Thomas A Mensah, Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred HA Soons, and Judge Rüdiger Wolfrum).

[14] Kardon, *supra* note 9 at 158.

[15] *Ibid* at 163.

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Second, even if many of China's preferred rules are unlikely to evolve into norms of customary international law, China's approach is nonetheless placing immense strain on the international maritime order. In implementing a sovereigntist vision of the law of the sea, according to which China has the right to craft its own rules outside of the UNCLOS framework and enforce those rules on its weaker neighbours, China is calling into question the global nature and applicability of the law of the sea.[16] In the waters of, and airspace above, the South and East China Seas as well as the Yellow Sea, China has effectively narrowed and, in some cases, disregarded the applicability of UNCLOS.

Given China's great power status, Kardon is far from the first author to examine Chinese viewpoints on the law of the sea.[17] Even close students of the topic, however, will find fresh insights in Kardon's study. Perhaps most impressively, Kardon provides a multi-layered depiction of China's domestic reception of international law. Due to Kardon's long-standing relationships with officials and academics, both in China and in the wider region, he is uniquely poised to detail how the party-state system "channels and transforms norms from international law into domestic institutions."[18] Kardon rightly observes that the Chinese Communist Party maintains a Leninist vision of law, according to which legal institutions are "refined instruments for" the transmittal and implementation of orders.[19] Accordingly, state institutions — from local governments to the courts — as well as associated institutions, such as think tanks and universities, have mobilized to advocate for, disseminate, or enforce China's preferred rules. While it would be a mistake to view the party-state's influence as absolute, Kardon successfully makes the case that China is able to coordinate its practices and positions on the law of the sea in a much more unified way than most other countries.

Kardon includes most of his discussion on Chinese domestic incorporation of international law in his second chapter. At certain points of the book, Kardon might have supplemented his presentation of preferred Chinese law of the sea rules with additional discussion of domestic Chinese discussions and debates. As one example, Kardon notes that Chinese views on the rights that obtain in the EEZ may be shifting.[20] As the Chinese navy increases its capabilities and footprint, it is far likelier to navigate the EEZs of foreign states. Kardon notes that Chinese legal commentators have begun to adapt their rhetoric on EEZ rights; rather than emphasize the coastal state's right to place legal restrictions on foreign military activities in its EEZ, these voices have chosen instead to criticize the frequency and intensity of foreign military activities in China's EEZ.[21] Chinese officials evidently hope to exercise freedom of navigation and overflight in foreign EEZs, even as they seek to deny these same freedoms to other states in China's own EEZ. Kardon might have buttressed his prescient observation on this rhetorical shift with direct reference to quotes by Chinese officials or articles by Chinese professors. When discussing primary source material in this context, Kardon might also have highlighted disagreements within the Chinese legal community.

[16]*Ibid* at 269.

[17]See e.g. Gregory B Poling, *On Dangerous Ground: America's Century in the South China Sea* (New York: Oxford University Press, 2022).

[18]Kardon, *supra* note 9 at 42.

[19]*Ibid* at 58.

[20]*Ibid* at 198.

[21]*Ibid.*

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However, this quibble should not take away from the enormity of Kardon's accomplishment: in thoroughly describing the different actors who implement China's law of the sea, Kardon reminds us of the uniqueness of the party-state system as well as of the rich insights that can result from focusing on Chinese viewpoints.

Furthermore, despite or perhaps because of his close study of four specific law-of-the-sea rule sets, Kardon succeeds in deriving several insights into China's overall relationship with the international legal system. China's interactions with the global maritime order generate reflections on China's place within the international legal order writ large. For example, in discussing China's approach towards the resolution of the law of the sea disputes, Kardon argues that China insists on "foregoing all third-party dispute resolution" on matters in which sovereignty is at issue.[22] Not content to focus solely on the maritime context, Kardon examines China's overall approach to dispute settlement and seeks to explain why China failed to show up before the Permanent Court of Arbitration during the *South China Sea* arbitration, even though it has proven willing to participate in dispute settlement mechanisms at the World Trade Organization.

Kardon suggests that sovereignty is the key: China is far likelier to participate in dispute resolution mechanisms when the dispute concerns merely private or commercial questions. If the dispute concerns a matter that China perceives as entangled with sovereignty, then it will eschew compulsory dispute resolution and instead seek to resolve the dispute through bilateral or multilateral mechanisms. This exception of sovereignty-related issues from compulsory third-party adjudication — if adopted as a norm of customary international law — would radically circumscribe the scope and power of international tribunals. Kardon also connects Chinese viewpoints on dispute resolution to a discussion of regional practices, contending that the states that make up the Association of Southeast Asian Nations likewise take a "circumspect attitude toward compulsory" dispute resolution mechanisms.[23] In short, China is far from the only country that has targeted the concept of compulsory dispute resolution.

If there is a gap in Kardon's excellent study, it is that he avoids engaging in a discussion of whether any of China's preferred rules have attained the status of customary international law. For a norm to constitute customary international law, it must be (1) supported by sufficient state practice and (2) viewed by states as a binding rule (that is, *opinio juris*). In addition, the International Court of Justice has held that state practice that supports the emergence of a customary law must include the practice of states "whose interests are specially affected."[24] While it can be difficult to determine whether a norm has attained the status of customary international law, Kardon goes a bit far in suggesting that such pronouncements are perhaps "never possible."[25] Admittedly, in most of the contexts that Kardon discusses, it is quite easy to dismiss the potential for a new rule of customary international law since China's maritime neighbours—which constitute "specially affected" states—have not acquiesced to China's preferred rule. Without supporting state practice by China's "specially affected" neighbours, a new norm cannot emerge.

In a minority of situations, however, Kardon notes that China's neighbours share China's preferred rule. For example, Article 17 of UNCLOS grants all states the right

[22] *Ibid* at 233.

[23] *Ibid* at 244.

[24] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at 43.

[25] Kardon, *supra* note 9 at 262.

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of innocent passage in a coastal state's territorial sea, an ocean zone that is twelve nautical miles wide and immediately adjacent to the coast. Foreign military vessels cannot engage in certain activities that are deemed prejudicial to the peace, good order, and security of the coastal state but are otherwise afforded the right to transit continuously and expeditiously through the territorial sea.[26] China views the innocent passage of foreign warships in its territorial sea as an infringement of its sovereignty. Kardon demonstrates that China and many of its neighbours — as well as some forty states worldwide — have sought to regulate the innocent passage rights of foreign warships.[27]

Implicitly, then, Kardon makes a good case that there is sufficient state practice to support a potential new rule of customary international law on the restriction of innocent passage within the territorial sea.[28] What Kardon does not do is conduct an analysis of the second requirement of customary international law — that is, he does not determine whether the involved states view the relevant norm as binding. In the absence of a regionally or globally focused discussion of *opinio juris*, Kardon cannot make the case that the coastal state's right to regulate innocent passage rights of foreign military vessels constitutes a norm of customary international law. Of course, these are questions that Kardon places beyond the scope of his study. But Kardon comes quite close at times to identifying potential new rules of customary international law, and it would have been valuable — if painstaking — for him to sail the extra mile and subject those potential rules to the familiar two-part test. In identifying those of China's preferred rules that may eventually develop into norms of customary international law, Kardon has laid down the gauntlet for future scholars to comprehensively examine the exact status of those rules.

Ultimately, Kardon's book represents a treasure trove not simply because of his insightful conclusions but also because of the empirical method that he applies across the four examined rule sets. By carefully examining Chinese rhetoric and practice surrounding a particular rule, and then by evaluating the corresponding practice of specially affected states, Kardon brings some much-needed precision to extant discussions of China's approach to the law of the sea. Rather than making vague references to China's supposed assault on the international legal order, Kardon details how China is both failing at, and succeeding in, translating its chosen rules into reality. As Canada increases its defence presence in the Indo-Pacific, Canadian officials and military officers would do well to adopt Kardon's empirical rigour, determine the precise status under international law of China's preferred rules, and assess whether those rules pose a threat to Canadian interests.

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[26]See "Law of the Sea: A Policy Primer" (2017) at 20, online: *Fletcher School of Law and Diplomacy at Tufts University* <sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf>.

[27]Kardon, *supra* note 9 at 260.

[28]*Ibid* at 261.